
In the Utah Court of Appeals

EMIGRATION CANYON HOME
OWNERS ASSOCIATION, a dba of
Mark Christopher Tracy

Petitioner / Appellant,

v.

KENT L. JONES, Utah State Engineer
and EMIGRATION IMPROVEMENT
DISTRICT, a Utah Special Service
District

Respondents / Appellees.

PUBLIC

No. 20200295-CA

Brief of Appellant Emigration Canyon Home Owners Association

Appeal from Order Granting Motion to Dismiss Petition for *de novo* Judicial
Review of Approved Permanent Changes to Water Rights by the Utah State
Engineer Permitting Continued Groundwater Mining in Emigration Canyon,
entered in the Third Judicial District, Salt Lake County Division,
the Honorable Su Chon Presiding

No. 190901675

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No. 20200295-CA

IN THE
UTAH COURT OF APPEALS

PARTIES ON APPEAL*

EMIGRATION CANYON HOME OWNERS ASSOCIATION,

Appellant and Petitioner Below

v.

KENT L. JONES and EMIGRATION IMPROVEMENT DISTRICT,

Appellees and Respondents Below

ADDITIONAL PARTIES BELOW

None.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... iv

LIST OF ADDENDA v

INTRODUCTION 1

STATEMENT OF ISSUES 3

STATEMENT OF THE CASE..... 14

SUMMARY OF ARGUMENT 14

ARGUMENT 15

 I. AS A NON-PROFIT UNINCORPORATED ASSOCIATION OF SENIOR
 WATER RIGHT HOLDERS AND PROTESTANTS, THE ECHO-
 ASSOCIATION HAS LEGAL STANDING.....15

 II. AS A FOR-PROFIT SOLE PROPRIETORSHIP OF MR. TRACY AND
 HOLDER OF EQUITABLE AND LEGAL TITLE TO A SENIOR
 IMPAIRED WATER RIGHT, THE ECHO-ASSOCIATION HAS LEGAL
 STANDING.....17

 III. AS A DBA ENTITY OF EITHER AN UNINCORPORATED ASSOCIATION
 OR A FOR-PROFIT SOLE PROPRIETORSHIP OF MR. TRACY, THE
 ECHO-ASSOCIATION HAS LEGAL STANDING UNDER THE PUBLIC
 POLICY EXCEPTION22

 A. The Present Action Raises a Statutory and Constitutional Issue of
 Substantial Public Import.23

 B. The ECHO-Association is an Appropriate Adverse Party.27

 C. The Action is Suitable for Resolution by the Court.....29

CONCLUSION..... 29

CLAIM FOR ATTORNEY’S FEES..... 30

CERTIFICATE OF COMPLIANCE 32

CERTIFICATE OF SERVICE 33

TABLE OF AUTHORITIES

Cases

<i>Banach v. Home Gas Co.</i> , 12 App.Div.2d 373, 211 N.Y.S.2d 443 (1961).....	16
<i>Barker v. Utah Public Service Com'n</i> , 970 P.2d 702.....	30
<i>Bonham v. Morgan</i> , 788 P.2d 497 (Utah 1989).....	25
<i>Buzas Baseball v. Salt Lake Trappers</i> , 925 P. 2d 941, 954 (Utah 1996).....	29
<i>Colman v. Utah State Land Board</i> , 795 P.2d 622, 624 (Utah 1990).....	2
<i>Crane v. Crane</i> , 683 P.2d 1062, 1067 (UT 1984).....	15, 16
<i>First Southwestern Fin. Servs. v. Sessions</i> , 875 P.2d 553, 555-56 (Utah 1994).....	30
<i>Gregory v. Shurtleff</i> , 2013 UT 18.....	27
<i>Graham v. Davis County Solid Waste Mgmt. & Energy Recovery Special Serv.</i> <i>Dist.</i> , 1999 UT App. 136.....	3, 13, 17, 18
<i>Haik v. Jones</i> , 2018 UT 39.....	11, 23
<i>Harris v. Springville City</i> , P.2d 188, 190 (Utah 1986).....	20
<i>Hebertson v. Willow Creek Plaza</i> , 923, P.2d 389, 1392 (Utah 1996).....	12, 17
<i>Jenkins v. Swan</i> , 675 P.2d 1145,1150-51(Utah 1983).....	23

<i>Jones v. Niagara Frontier Transp. Auth.</i> , 722 F.2d 20, 23 (2nd Cir. 1983).....	3
<i>Kansas City Area Transportation Authority v. Ashley</i> , Mo. App., 485 S.W.2d 641, 645 (1972).....	15
<i>Mark Christopher Tracy v. Simplifi Company et al.</i> Case No. 20210227-CA (UT App.).....	9
<i>Nat. Park & Cons. Ass'n v. Bd. of St. Lands</i> , 869 P.2d 909 (UT 1993).....	23, 29
<i>Richins v. Delbert Chipman & Sons Co.</i> , 817 P.2d 382, 385 (Utah App. 1991).....	14
<i>Sandy Island Corp. v. Ragsdale</i> , 246 S.C. 414, 143 S.E.2d 803 (1965).....	16
<i>Sunset Lake Water Service District v. Remington</i> , 45 Or. App. 973, 609 P.2d 896 (1980).....	16
<i>Terracor v. Utah Bd. of State Lands</i> , 716 P.2d 796,799 (Utah 1986).....	23
<i>Washington County Water Conservancy Dist. v. Morgan</i> , 2003 UT 58.....	3, 11, 23, 24
<i>United States of America ex rel. Mark Christopher Tracy v. Emigration Improvement District et al.</i> , Case No. 21-4051 (10th Cir.).....	9, 19
<i>Utah Chapter of the Sierra Club v. Utah Air Quality Bd.</i> 2006 UT 74.....	27
 Statutes	
42 U.S.C. § 1983.....	5
Cal. Corp. Code § 18035(a).....	17
Utah Code Ann. § 42-2-5(2)(ii).....	18
Utah Code Ann. § 42-2-6.....	19

Utah Code Ann. § 48-1d-102.....	18
Utah Code Ann. § 63G-4-401.....	20
Utah Code Ann. § 63G-4-402.....	20
Utah Code Ann. § 73-1-1.....	4
Utah Code Ann. § 73-3-1.....	4
Utah Code Ann. § 73-3-3.....	5, 25
Utah Code Ann. § 73-3-5.....	4
Utah Code Ann. § 73-3-5.5.....	4, 5
Utah Code Ann. § 73-3-8.....	2, 24, 25
Utah Code Ann. § 73-3-17.....	20
Utah Code Ann. § 73-3-21.1.....	4
Utah Code Ann. § 48-1d-102.....	18

Rules

Utah R. Civ. P. 17(d).....	17
----------------------------	----

LIST OF ADDENDA

- A. PDF copy of the Emigration Improvement District (aka Emigration Canyon Improvement District, aka ECID) website administered by the Simplifi Company through Emigration Canyon Deputy Major Jennifer Hawkes and EID General Manager & EID Certified Public Records Officer at <https://www.ecid.org/price-list>, last accessed on September 12, 2021.
- B. Memorandum Decision and Order, Utah Third District Court [R751-5].
- C. Order, Utah Court of Appeals [R800-1].
- D. Findings of Fact, Conclusions of Law, and Order, Utah Third District Court [R1034-41].

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Petitioner / Appellant,

vs.

KENT L. JONES, the Utah State Engineer and EMIGRATION IMPROVEMENT DISTRICT, a Utah Special Service District

Respondents / Appellees.

PUBLIC

No. 20200295-CA

Brief of Appellant Emigration Canyon Home Owners Association

INTRODUCTION

Emigration Canyon (the “Canyon”) is arguably the most historically significant location in modern Utah and currently home to approximately 680 domestic units predominately reliant on an evaluated groundwater table maintaining artesian pressure and thereby safe drinking water to mountain springs and shallow single-family domestic wells.¹

Also dependent on and in direct communication with the Canyon’s isolated hydrogeologic units is the surface water of the Emigration Canyon stream (“Canyon Stream”) critical to Utah’s Hogle Zoo, the Wasatch Hollow Preserve, and the Mount Olivet

¹ For reasons not germane to the instant litigation, approximately 40 Canyon homes are connected to Salt Lake City Public Utilities and receive culinary drinking water from the Emigration Canyon tunnel located near Utah’s Hogle Zoo.

Cemetery (“Mt. Olivet”), the only active federal-military cemetery created by an Act of Congress and signed into law by United States President Ulysses S. Grant in 1874.²

The instant action addresses whether Kent L. Jones, Director of the Utah State Division of Water Rights (“State Engineer”), may knowingly disregard “shall reject” requirements of Utah Code Ann. § 73-3-8(1)(c) and permit a Utah special service district to continue documented depletion (and therewith contamination) of the Canyon’s ground and surface water at a rate and volume grossly exceeding the natural recharge of community aquifers by means of an improper and destructive practice known as “overdraft” or groundwater mining.^{3, 4}

The question presented to this Court is if a doing-business-as alias (“dba entity”) duly registered with the Utah Department of Commerce under the Assumed Name Statute as a for-profit sole proprietorship of Mark Christopher Tracy (“Mr. Tracy”), or even a non-

² See e.g., open letter to United States congressional leaders at the website administered by The ECHO-Association at https://echo-association.com/?page_id=6908.

³ For the purpose of a motion to dismiss and thus the present appeal all factual allegation of the Petition for de novo judicial review are assumed true and all inferences are to be drawn in favor of the non-moving party and appellant Emigration Canyon Home Owners Association (“The ECHO-Association”). *Colman v. Utah State Land Board*, 795 P.2d 622, 624 (Utah 1990).

⁴ Although the destructive effects of groundwater mining have been extensively researched and documented in California, Texas, Nebraska, Arizona, and Sierra de Crebillente, Spain, Emigration Canyon is only the second recorded case in Utah following the 2014 report of groundwater depletion and corresponding fissures and ground subsidence in the Cedar Valley by the Utah Geological Survey. See Utah Geological Society Special Study No. 150 available at the website administered by The ECHO-Association at https://echo-association.com/?page_id=3919; see also “Aerial and Ground Recording of Emigration Oaks PUD near Lots Nr. 199, 171, 178, 180, 182 and 184 (YouTube)” available at the website maintained by The ECHO-Association at https://echo-association.com/?page_id=3310.

profit unincorporated association of water-right protestants with equitable and legal title to senior, perfected and impaired water right(s) may petition a Utah court for de novo judicial review to prevent further depletion, contamination, and permanent damage of the Canyon's fragile aquifer system under the traditional doctrine of legal standing or the public policy exception articulated in *Washington County Water Conservancy Dist. v. Morgan*, 2003 UT 58.

As the issues presented herein are unique and of great import to all Canyon residents, the Canyon Stream and therewith Utah's Hogle Zoo, the Wasatch Hollow Preserve, and the historic Mt. Olivet, while the Appellant and dba entity Emigration Canon Home Owners Association ("The ECHO-Association") has suffered documented, clear and palpable injury as either the for-profit sole proprietorship of Mr. Tracy or a non-profit unincorporated association of senior water right holders and protestants, the Court should reverse the trial court's dismissal and remand for further proceedings.⁵

STATEMENT OF ISSUES

In the arid climate of a high desert, even a palatial multi-million dollar estate without access to clean, safe, and reliable water is worthless. However, the same high-end

⁵ If this Court adopts the district court's legal conclusion that The ECHO-Association is a dba entity of a non-profit unincorporated association of water right protestants and not a for-profit sole proprietorship of Mr. Tracy requiring appearance of legal counsel, upon remand, the district court should be ordered to set a deadline of 45 days for The ECHO-Association to either file an amended complaint substituting Mr. Tracy as petitioner or enter appearance of legal counsel as mandated in *Graham v. Davis County Solid Waste Mgmt. and Energy Recovery Special Serv. Dist.*, 1999 UT App. 136, at ¶ 15 citing *Jones v. Niagara Frontier Transp. Auth.*, 722 F.2d 20, 23 (2nd Cir. 1983).

luxurious residence and architectural masterpiece having a readily available source but lacking sufficient legal right to water is equally devoid of enjoyment and thus economic value should impairment of a senior perfected water right occur.

For example, in Utah all water is declared “property of the public” and is partitioned and controlled by the State Engineer. Utah Code Ann. §§ 73-3-1(1) and subsection 2-1. 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”). Utah Code Ann. § 73-1-1(3).

In this regard, Utah is a “first-in-right state” meaning that the first vested owner of a water right may enjoin subsequent conflicting water users (so-called “quantity” and/or “quality impairment”) until the full amount of water right is satisfied. Utah Code Ann. § 73-3-21.1(2)(a). A person may not acquire a legal right to water through adverse use or possession (*i.e.*, illegal water use over an extended period of time) (Utah Code Ann. § 73-3-1(6)) and any change to the point-of-diversion (geographic point where water is extracted) or the place-of-use (geographic area where water may be used) of a previously permitted water right requires the approval of the State Engineer in the form of either a permanent or temporary change application. Utah Code Ann. § 73-3-5(2).

Like adverse possession, temporary change applications may not vest and are therefore inferior to both permanent change applications and a perfected water right should quantity or quality impairment occur. Utah Code Ann. § 73-3-5.5(d)(i). However, unlike permanent change applications, temporary change applications automatically expire after one year and cancel according to their own terms. Utah Code Ann. § 73-3-5.5(d)(ii).

Once put to beneficial use or “perfected” the lawful right to water extraction and use is a constitutionally guaranteed property right and is therefore protected against any form of improper use to include taking under the color of state authority. *See e.g.* 42 U.S.C. § 1983. Furthermore, failure to obtain an approved change to an existing right is a criminal offense if the change to the point-of-diversion or the place-of-use is made knowingly and willingly (Utah Code Ann. § 73-3-3(7)(b)) and interference with water flow or taking water out of turn or in excess is likewise criminally sanctioned. Utah Code Ann. §§ 76-10-201 and 202.

As gateway to the Mormon pioneer’s arrival to the Salt Lake Valley in 1847, the majority of Canyon homes are serviced with safe culinary drinking water via shallow single-family domestic wells under artesian pressure⁶ operated under senior and perfected water rights while approximately 300 domestic units received water service from four (4) large-diameter commercial wells drilled into the Canyon’s Twin Creek Aquifer by Emigration Improvement District (“EID” aka Emigration Canyon Improvement District aka ECID) or its processor in interest The Boyer Company LC and operated under either unapproved [R18 at ¶¶ 64, 65 and R51 at ¶ 15] or temporarily approved points-of-diversion filed sporadically with the State Engineer [R18 at ¶ 64] (“Boyer Water System”).⁷

⁶ To date, the private operator of the Boyer Water System has only provided a duplicitous data file of the water levels of EID production and monitor wells believed to evidence extraction of groundwater below the Canyon Stream. *See Mark Christopher Tracy v. Simplifi Company et al.* Case No. 20210227-CA (UT App.)(pending).

⁷ The ECHO-Association acknowledges that if upon remand district court denies permanent change applications “a44045” (57-7796) and “a44046” (57-10711) in their entirety, EID must terminate groundwater extraction in the Canyon and therewith water service to all homes issued water letters since August 1998 when EID assumed legal title

As such, although the Boyer Water System has been operational since June 15, 1986 and over 200 homes built with water letters issued by either EID or The Boyer Company LC, prior to total depletion of the historic Canyon Stream in September 2018 for the first time on record [R23 at ¶ 95],⁸ not 1 drop of the hundreds of millions of gallons extracted from the Twin Creek Aquifer was permitted under a fully adjudicated water right or a published and fully vetted permanent change application approved by the State Engineer [R135 at ¶ 162].

Why would politically influential private land developers and a Utah special service district issue over 200 irrevocable water letters for high-end residential building, construct and operate 4 large-diameter commercial wells for over 30 years with only the unvested, sporadic and provisional approval of the State Engineer? In short, to conceal and facilitate further continued fraudulent consolidation of senior water rights in the Canyon at extraordinary private profit [R12 at ¶ 37, R22 at ¶¶ 91, 92].⁹

Specifically, in 1968, the State Engineer had expressly closed the Canyon to new water-use applications due to “full appropriation” of water sources and expressly warned

and liability of Boyer Water System from private land-developers Kem and Dan Gardner of Boyer Company LC and Walter J. Plumb III of City Development Inc.

⁸ See Salt Lake Tribune article entitled “Why is Emigration Creek — a Historic Utah Waterway — Dry?” by Brian Maffly on the website administered by The ECHO-Association at https://echo-association.com/?page_id=405.

⁹ To date, with the knowledge of EID legal counsel Jeremy R. Cook of the Salt Lake City law firm Cohn Kinghorn P.C., EID continues to misrepresent to Canyon residents that it “holds one of the most senior water rights in the Canyon.” See EID website administered by the Simplifi Company through Emigration Canyon Deputy Mayor Jennifer Hawkes and EID General Manager & EID Certified Public Records Officer Eric Hawkes under main menu “Water Costs” under heading “Water Rights” at <https://www.ecid.org/price-list> last accessed on September 13, 2021, PDF copy attached as Addendum A.

that groundwater extraction via large-diameter commercial wells would impair senior perfected water rights “with almost certainty” [R11 at ¶ 34].

However, in order to service the planned luxurious Emigration Oaks and Emigration Place Private Urban Developments (“Emigration Oaks PUD” and “Emigration Place PUD” respectively), on March 8, 1983 and June 13, 1988, by unknown means, private land developers stripped surface water rights deed by the United State Congress for exclusive use at Mt. Olivet near the Rice-Eccles Stadium of the University of Utah shifting both the point-of-diversion and place-of-use over 33,000 ft. as the crow flies (and 1,4000 ft. in elevation) to the Canyon foothills [R113 at ¶ 39].

However, unable to locate a suitable water source for even half of the homes built in the Emigration Oaks PUD [R15 at ¶ 49], and having sold more parcels as “buildable” than could be serviced with a surface water right stripped from an active federal-military cemetery in violation of the conveyance deed of the United States of America without congressional consent [R13 at ¶ 41], in August 1998 Dan and Kem Gardner of The Boyer Company LC and Walter J. Plumb III of City Development Inc. “gifted” legal title and liability of a defunct 355,000 gallon tank and two (2) unapproved points-of-diversion identified as Boyer Wells Nos. 1 and 2 to EID [R96 at ¶ 1 bullet no. 3 and ¶ 2 bullet no. 3, R16 at ¶ 54] thereby facilitating further massive expansion of the Emigration Oaks PUD at extraordinary private profit [R16 at ¶ 55].¹⁰

¹⁰ To date, with the positive knowledge of EID legal counsel Jeremy R. Cook of the Salt Lake City law firm Cohne Kinghorn P.C., EID continues operation of Boyer Well No. 2 without a valid operating permit in violation of the federal Safe Drinking Water Act of 1974 [R227].

With unsuspecting buyers of exclusive vacant parcels dubbed the “Bel Aire of Salt Lake”¹¹ demanding water service on one side, and senior perfected water-right owners reporting impairment to the State Engineer on the other [R14 at ¶¶ 43, 45], in order to avoid almost certain litigation action from either, in 2003 and 2013 EID constructed two (2) additional large-diameter commercial wells in the Canyon’s Freeze Creek Aquifer via unpublished temporary change applications [R21 at ¶ 86] under the known duplicitous Emigration Dam & Ditch Water Claim no. 57-7796 germane to the present litigation (“Emigration Dam & Ditch Water Right”) [R11 at ¶¶ 29-33, R14 at ¶ 46, R17 at ¶ 60, R19 at ¶ 70, R21 at ¶ 86, R475 at bullet no. 6].

Under the “shall reject” requirement of Utah Code Ann. § 73-3-8(1)(c) and EID’s own burden of proof under Utah Code Ann. § 73-3-3(5)(a), permanent approval was extremely unlikely if it was revealed that (i) the State Engineer’s own expert for the Canyon and later EID hydrologists Jack A. Barnett had determined in 1966 that the operation of large-diameter commercial wells would impair senior water rights “with almost certainty” [R11 at ¶ 34(a)-(d)], and had testified before the State Engineer on December 15, 1995 that the exact same proposed underground points-of-diversion would impair surface water flow of the Canyon stream at Utah’s Hogle Zoo and the historic Mt. Olivet “for 25, 50 or 75 years” [R21 at ¶ 88], (ii) EID itself had capped Canyon development at 700 domestic units

¹¹ See Desert News article entitled “Emigration Canyon: Its Historical Significance, Offbeat Aura Lend the Area Plenty of Flavor” by Dennis Romboy available at <https://www.deseret.com/2006/7/25/19964952/emigration-canyon-its-historical-significance-offbeat-aura-lend-the-area-plenty-of-flavor#longtime-resident-stan-fishler-chairman-of-the-emigration-canyon-historical-society-relaxes-in-his-woodshop-at-his-home-in-emigration-canyon>.

in November 2002 under the express terms of EID's own federally-backed loan requirements [R17 at ¶ 61, R212 at no. 4, R219 at no. 4], and (iii) a July 2000 geo-hydrological study commissioned by EID expressly warned of continued groundwater mining of the Twin Creek Aquifer as documented the "good water year" of 1998 [R16 at ¶ 57].¹²

However, on September 12, 2018, immediately following media reports of the total depletion of the Canyon Stream for the first time on record less than 2 miles from Utah's Hogle Zoo [R23 at ¶ 95] and EID's final temporary change application set expire on January 16, 2019 [*id.* at ¶ 94],¹³ EID was left with no option but file permanent change applications a44045 (57-7796) and segregated water claim a44046 (57-10711) under the duplicitous Emigration Dam and Ditch Water Right seeking approval of all 4 water sources already constructed in the Canyon's Twin Creek Aquifer, 5 additional underground points-

¹² Although EID trustees, managers and legal counsel had taken extraordinary effort to both misrepresent and conceal the August 1966 and July 2000 geo-hydrological studies [R561 at footnote no. 3], the development of over 568 future homes in the Canyon [R107 at no. 4] and even the scope and existence of the permanent change applications filed with the State Engineer [R19 at ¶ 69, R21 at ¶¶ 83 and 84, R22 at ¶ 89 and R107 at subheadings I and II], on September 26, 2014, Mr. Tracy filed federal litigation action against EID trustees, managers, consultants and private land developers The Boyer Company LC and City Development Inc., *et al.* for alleged violations of the Safe Drinking Water Act of 1974 including drinking water contamination after securing a copy of the August 1966 State Engineer study on the internet platform Ebay. *See United States of America ex rel. Mark Christopher Tracy v. Emigration Improvement District et al.*, Case No. 21-4051 (10th Cir.)(pending). After several years search, Mr. Tracy secured an original copy of the July 2000 study immediately following the State Engineer hearing on December 18, 2018 from a previously unknown Canyon resident [R561 at footnote no. 3] and immediately reported its actual findings to the State Engineer [R238-41].

¹³ *See* footnote no. 5 *supra*.

of-diversion in the Thyanes and Nugget Aquifers, and future water service to **568** additional residential units above the current buildout of 677 homes including a planned Gun Range and Wedding Resort [R23 at ¶¶ 94, 95].

Following acquisition of senior perfected surface water right a16183 (57-8947) on September 27, 2018 [R568 at ¶ 8, R575 at ¶ 3], Mr. Tracy filed timely protest [R87-99] and two update addenda [R238-41, R474-6] in the name of The ECHO-Association, a registered dba and for-profit sole proprietorship of Mr. Tracy approved by the Utah Department of Commerce to transact business in the State of Utah under the Assumed Name Statute [R667].

Following the State Engineer’s approval of permanent changes to the duplicitous Emigration Dam & Ditch Water Right, Mr. Tracy through legal counsel filed petition for de novo judicial review in the name of his dba entity, after first recording the deed of conveyance of the senior impaired water right a16183 (57-8947) with Salt Lake County [R575 at ¶ 4].¹⁴

The district court however ruled that because The ECHO-Association was not the “owner” of water right a16183 (57-8947) during the protest period,¹⁵ it was not an

¹⁴ Pursuant to the parties agreement, Mr. Mather executed both Deed of Assignment and Deed of Conveyance to The ECHO-Association. Mr. Tracy recorded the later with Salt Lake County on February 21, 2019 prior to filing petition for de novo judicial review 4 days later.

¹⁵ As EID filed the original permanent change applications on September 12, the protest period ended on October 17, 2018.

“aggravated” by the decisions of the State Engineer¹⁶ pursuant to Utah Code Ann. § 63G-4-401(1) and (2) and therefore lacked individualized legal standing [Addendum B, R754 at ¶ 1].

Furthermore, in regard to the public policy exception, in similar cursory fashion, the district court ruled that The ECHO-Association “had even fewer grounds to assert the public interest exception than the parties of in *Washington County*¹⁷ and *Halk*”¹⁸ [R755].

As sole proprietor of the for-profit dba entity, Mr. Tracy appealed as a pro se litigant [R762].

Following referral by the Utah Supreme Court [R787-9] and prior to appellate briefing, this Court however remitted the case back to the district court in order to make a factual determination if The ECHO-Association was an “unincorporated association”

¹⁶ The State Engineer approved a44045 (57-7796) on January 16 [R45-54] and segregated water claim a44046 (57-10711) on January 25, 2019 [R56-64]. The ECHO-Association petition for de novo review was filed on February 25, 2019 [R1-84].

¹⁷ Unlike the present case, in *Washington* the court ruled that the petitioner failed to demonstrate direct communication between the proposed and existing water use following evidentiary hearing with conflicting testimony of expert witnesses. *Washington County Water Conservancy Dist. v. Morgan*, 2003 UT 58 at ¶ 27. As direct communication between the Canyon’s Twin Creek Aquifer and the historic Canyon stream including drinking-water contamination for all Canyon residents via EID’s operation of large-diameter commercial wells was alleged in the Petition, the district court failed to accept all factual allegations of the Petition as true as required under a Rule 12(b)(6) motion to dismiss, and expressly disregarded the expert report of Dr. Hansen attesting to the current overbuild of the Canyon and impairment of the Canyon stream via EID’s current and proposed water use [R484-93].

¹⁸ The public policy exception at issue in *Haiké* was not groundwater mining, drinking water contamination and development of 568 future homes in Little Cottonwood Canyon, but rather a broad constitutional claim that the court determined was not within the State Engineer’s purview and thus not within the trial court’s jurisdiction under de novo review. *Haiké v. Jones*, 2018 UT 39 at ¶ 32.

requiring appearance of a licensed attorney, or if The ECHO-Association was a sole proprietorship of Mr. Tracy allowing him to proceed as pro se litigant [Addendum C, R800-1].

Following evidentiary hearing, the district court entered factual findings that The EHCO-Association was an unincorporated association due to the fact that Mr. Tracy's coordination with other protestants and Canyon neighbors during administrative proceedings constituted "(i) parties transacting business, and (ii) transacting such business under a common name" under the two-factor test articulated in *Hebertson v. Willow Creek Plaza*, 923, P.2d 389, 1392 (Utah 1996)" [Addendum D, R1034-41].

The following issues are now presented to this Court for review.

Issue No. 1: Does coordination between neighbors and senior water rights holders during administrative proceedings constitute "parties transacting business" and "transacting such business under a common name" as a non-profit unincorporated association thereby invalidating Mr. Tracy's registration and authorization by the Utah Department of Commerce to conduct for-profit activities as sole proprietor of The ECHO-Association under the Utah Assumed Name Statute?

Standard of Review: Questions of law are reviewed for correctness without giving deference to the district court's interpretations. *See e.g., Richins v. Delbert Chipman & Sons Co.*, 817 P.2d 382, 385 (Utah App. 1991).

Preservation: Preserved generally in the Statement of Discovery Issues [R857] and Mr. Tracy's testimony before the district court during the evidentiary hearing on December 22, 2020 [R1037 at ¶ 19].¹⁹

Issue No. 2: May the district court accept baseless conjecture of the moving parties pursuant to a Rule 12(b)(6) Motion to Dismiss and disregard sworn affidavits of the sole contracting parties that The ECHO-Association acquired legal and equitable title to senior impaired water right a16183 (57-8947) on September 27, 2018?

Standard of Review: A legal conclusion supporting a motion to dismiss is a question of law reviewed *de novo* with no presumption of correctness accorded to the findings of the district court. *Id.*

Preservation: Preserved in The ECHO-Association's Supplemental Brief in Opposition to Respondents' Motion Dismiss [R709 at subheading II], Motion for Leave to File Motion to Submit Additional Briefing in Opposition to Respondent Emigration Improvement District's Motion to Dismiss Petition for Judicial Review [R703], Declaration of Nelson R. Mather [R568 at ¶ 8] and Declaration of Mark Christopher Tracy [R575 at ¶ 3].

Issue No. 3: Does The ECHO-Association have legal standing file *de novo* judicial review under the public policy exception of *Washington*?

¹⁹ As this Court did not order legal counsel to appear on behalf of The ECHO-Association in the Briefing Notice dated August 6, 2021, and the district court was only granted limited jurisdiction to issue factual findings and not legal conclusions and orders [Addendum C at page 2], Mr. Tracy declined to appoint a legal representative at this time, but will comply with a 45-day deadline and order issued and consistent with this Court's mandate in *Grahm*, 1999 UT App. 136 at ¶ 15.

Standard of Review: Review of questions of law are reviewed for correctness without giving deference to the district court's interpretations. *See e.g., Richins v. Delbert Chipman & Sons Co.*, 817 P.2d 382, 385 (Utah App. 1991).

Preservation: Preserved in The ECHO-Association's Opposition to Respondents' Motion to Dismiss [R558 at subheading B] and Declaration of Mark Christopher Tracy [R574-8].

STATEMENT OF THE CASE

This is an appeal of the district court's dismissal of The ECHO-Association's petition for de novo judicial review of the State Engineer's approval of the altered points-of-diversion and place-of-use of the duplicitous Emigration Dam & Ditch Water Right under permanent change applications a44045 (57-7796) and segregated water claim a44046 (57-10711) for purported lack of legal standing under both the traditional doctrine and public policy exception.

SUMMARY OF ARGUMENT

As a dba entity registered with the Utah Department of Commerce as a for-profit sole proprietorship of Mr. Tracy or even a non-profit unincorporated association of water users having equitable and legal title to senior perfected and impaired water rights in the Canyon, The ECHO-Association has legal standing to petition the court for de novo judicial review under the customary doctrine of legal standing.

Moreover, as the permanent exhaustion of Canyon aquifers is the only the second documented case of groundwater mining in the State of Utah, and EID has made

extraordinary efforts to conceal and misrepresent hydrological studies, the priority date of EID water rights, and even the scope and existence of permanent change applications filed with the State Engineer, and this case is unique and of great import to Canyon residents, Utah's Hogle Zoo, the Wasatch Hollow Preserve, and the historic Mt. Olivet, The ECHO-Association has legal standing under the public policy exception.

ARGUMENT

I. AS A NON-PROFIT UNINCORPORATED ASSOCIATION OF SENIOR WATER RIGHT HOLDERS AND PROTESTANTS, THE ECHO-ASSOCIATION HAS LEGAL STANDING

In its original ruling, the district court denied legal standing of The ECHO-Association, because it was not the "owner" of water right of a16183 (57-8947) during the protest period contrary to the sworn affidavits of the sole contracting parties [Addendum B at page 4]. Following evidentiary hearing ordered by this Court [Addendum C], the district court however entered a factual determination that multiple water right protestants were represented by The ECHO-Association during the protest hearing before the State Engineer and had therewith formed a non-profit "unincorporated association" [Addendum D at R1041].

It is uncontested that an unincorporated association cannot hold or transfer title to property in Utah. *Crane v. Crane*, 683 P.2d 1062, 1067 (UT 1984) citing 6 Am.Jur.2d Associations and Clubs § 13 (1963); Annot., 15 A.L.R.2d 1451 (1951). Property transferred to an unincorporated association will be given the effect as conveyance to the members as individuals. *Id.* citing *Kansas City Area Transportation Authority v. Ashley*,

Mo. App., 485 S.W.2d 641, 645 (1972); *Banach v. Home Gas Co.*, 12 App. Div. 2d 373, 211 N.Y.S.2d 443 (1961); *Sunset Lake Water Service District v. Remington*, 45 Or. App. 973, 609 P.2d 896 (1980); and *Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 143 S.E.2d 803 (1965).

As such, the Utah Supreme Court recognized that prescriptive use of property by individual members of an association for the purpose of the association is the basis for the acquisition of an easement in gross by all members.

The Court ruled:

Such an easement would not be acquired by the association (unless it had trustees or another capacity to hold title to property), but the activities of its members would, because of the association and within the limit of its purposes, inure to the benefit of all of the members, just like a conveyance to the association. *Crane* 683 P.2d at 1067.

In the present case, the district court determined that senior water right owners and protestants Tierra Investments, LLC, Jack Samuel Plumb, Jamie White, Karen Penske, Margot McCallum, Michael Terry, Patricia Sheya, Robert R. Reid, and Michael Martin were represented by The ECHO-Association at the protest hearing before the State Engineer [R1036 at ¶ 15] and thus had exhausted administrative remedies necessary for de novo judicial review of the permanent change applications.

As these protestants are “ascertainable members” of The ECHO-Association within the definition of *Cramer*, each with unquestionable legal standing to petition the court for judicial review as a non-profit unincorporated association, The ECHO-Association has legal standing to pursue and protect the interests of “ascertainable” individual members in the present case.

The district court's ruling that The ECHO-Association is an unincorporated association direct refutes the court's own previous determination that it lacked legal standing because it was not the "owner" of a single senior impaired water right during the 30-day protest period.²⁰

II. AS A FOR-PROFIT SOLE PROPRIETORSHIP OF MR. TRACY AND HOLDER OF EQUITABLE AND LEGAL TITLE TO A SENIOR IMPAIRED WATER RIGHT, THE ECHO-ASSOCIATION HAS LEGAL STANDING

As noted by this Court, there is no statutory definition of an unincorporated association in the State of Utah.^{21, 22} Rule 17 (d) URCP however provides that when "two or more persons associated in any business as either joint stock company, or partnership or *other association* ... transacts such business under a common name" they may sue or be sued by such common name (emphasis added)" in the State of Utah.

²⁰ As The ECHO-Association is a registered for-profit sole proprietorship of Mr. Tracy, it had never argued before the district court that it was an unincorporated association of water right protestants in its Opposition and Surreply to Respondents' Rule 12(b)(6) motion to dismiss [R551-576, R600-3, R636]. In an apparent attempt to only increase legal costs, both the State Engineer and EID now argue before this Court that The ECHO-Association has always had legal standing to protest permanent changes to the duplicitous Emigration Dam & Ditch Water Right as a non-profit unincorporated association of water right protestants.

²¹ See *Herbertson v. Willowcreek Plaza*, 895 P.2d 839, 840-41 (Utah Ct. App. 1996); see also *Graham v. Davis County Solid Waste Mgmt. & Energy Recovery Special Serv. Dist.*, 1999 UT App. 136.

²² A meaningful definition however is perhaps articulated Cal. Corp. Code § 18035(a), which provides that an "[u]nincorporated association" means an unincorporated group of two or more persons *joined by mutual consent* for a common lawful purpose, whether organized for profit or not" (emphasis added).

In both *Herbertson* and *Grahm*, this Court however failed to offer clear criteria for “transacting business under a common name.”^{23, 24}

Regardless, of whether there exists a statutory definition or not, whatever business form an entity takes, it must be “unincorporated.” That is, once registered to conduct business in the State of Utah, the organizational form is no longer a matter subject to judicial inquiry short of involuntarily dissolution. The authorization to transact business by the Utah Department of Commerce as an “individual, association, partnership, corporation” and must be afforded deference by the court devoid of overwhelming evidence to the contrary.

Specifically, under Utah Code Ann. § 42-2-5(2)(ii) any person who carries on, conducts, or transacts business in this state under an assumed name, whether that business is carried on, conducted, or transacted as an individual, association, partnership, corporation, or otherwise, shall file with the Utah Department of Commerce “the full true name, or names, of the person owning, and the person carrying on, conducting, or transacting the business.”

²³ In *Grahm*, this Court accepted that the actions of a non-profit environmental watchdog group over a period of several years was “likely” engaged in business under a common name. *Grahm*, 979 P.2d at 368. It must be however noted that unlike *Grahm*, The ECHO-Association is registered with the Utah Department of Commerce under the Utah Assumed Name Statute as a sole proprietorship of Mr. Tracy.

²⁴ As defined under the Unincorporated Business Entity Act a business is “every trade occupation or profession” (Utah Code Ann. § 48-1d-102). As such, it may be a reasonable inference that the activity in question must be for-profit in nature.

This principal of judicial deference is further supported by Utah Code Ann. § 42-2-6, which requires that an amended certificate shall be filed within 30 days “after any change in the person or persons owning, carrying on, conducting, or transacting such business...”

In the instant action, Mr. Tracy registered The ECHO-Association with the Utah Department of Commerce and identified only himself as the sole person authorized to carry on, conduct or transact the business under that name. Moreover, as Mr. Tracy collected no membership fees from other senior property holders it is clear that no other duties and obligations of third persons were created.

As indicated to the district court, the only person owning and carrying on, or transacting the business” was Mr. Tracy. While the district court cited interactions with other Canyon residents and senior water right holders during administrative procedures, it failed to identify a single person other than Mr. Tracy who had carried on, conducted, or transacted the business in the name of The ECHO-Association, and the district court failed to cite any evidence that the ECHO-Association had accepted members.

As only Mr. Tracy has conducted business in the name of The ECHO-Association, accepted no membership fee from any third party, created no duties and obligations between members, and does not provide confidential information to other parties during the pendency of federal litigation against managers and trustees of EID *et al.*,²⁵ it is by statutory definition currently operated as a sole proprietorship.²⁶

²⁵ See *United States of America ex rel. Mark Christopher Tracy v. Emigration Improvement District et al.*, Case No. 21-4051 (10th Cir.)(pending).

²⁶ Upon accepting members or partners, Mr. Tracy will alter the corporate form of The ECHO-Association with the advice and consent of legal counsel at the appropriate time.

The district court's original determination that this Action should be dismissed with prejudice because, while The ECHO-Association did file a timely protest for the underlying administrative hearing, it was not the owner of water share 57-8947 (a16183) prior to termination of the protest period on October 17, 2018, it was not an "aggravated party" within the mean of Utah Code Ann. § 63G-4-401(1) and (2).

This argument is also inconsistent with the statutory requirements and should be disregarded by this Court.

In *Washington*, the Supreme Court of Utah only determined that the mere fact that a member of the public files a timely protest to a permanent change application, it does not alone confer legal standing to later challenge the decision of the State Engineer in court (so-called "bootstrapping"). Court specifically noted that Utah Code Section Ann. § 73-3-17(1) allows those persons who have a "genuine concern" about proposed changes in water rights "to voice those concerns before the State Engineer and as an important corollary, provide the State Engineer with all viewpoints relevant to any proposal." *Washington*, 2003 UT 58 at ¶ 11.

An "interested party" however does not automatically become an "aggravated party" within the meaning of Utah Code Ann § 63G-4-402 *by mere virtue of filing protest*, due to the fact that legal standing requires that the jurisdiction requirement must be satisfied "before a district court may even entertain the question of whether the state engineer's decision was consistent with the requirements of Utah State law" (emphasis added). *Id.* at footnote no. 2 citing *Harris v. Springville City*, P.2d 188, 190 (Utah 1986).

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

In the present case, The ECHO-Association became the sole owner of water right 57- 8947 (a16183) prior to the expiration of the protest period, prior to the Protest Hearing on December 19,2018, and prior to commencement of this Action. Specifically, on September 27, 2018, The ECHO-Association's purchase of Mr. Mather's interest in water right 57-8947(a16183) occurred several weeks before The ECHO-Association filed its initial protest to EID's Permanent Change Applications with the State Division of Water Rights.

Upon purchasing Mr. Mather's water right, The ECHO-Association acquired a constitutionally protected property right to water use in the Canyon and thereby legal standing to contest Mr. Jones's order permitting EID's current operation of large-diameter commercial wells in the Freeze Creek Aquifer and the further exploitation of groundwater in the Nugget and Thaynes Aquifers as proposed.

As agreed by the parties, Mr. Mather executed the title transfer documents and The ECHO-Association recorded the same on February 21,2019. By recording transfer of title to water right 57-8947(a16183) prior to filing this Action, The ECHO-Association secured

any remaining formal requirements of legal standing under the Utah Rules of Civil Procedure if applicable in the present case.²⁷

Unlike the parties in *Washington*, and contrary to the district court's reference to *Haik v. Jones*, (2018 UT 39), as the owner of surface water share a16183 (57-8947), The ECHO-Association has suffered total impairment of its surface water right during the summer, autumn and winter of 2018. Based upon the State Engineer's Orders, EID is permitted to continue extract groundwater via the Upper Freeze Creek and Brigham Fork Wells in the Freeze Creek Aquifer at a quantity greater than can be replenished through the natural recharge rate during spring run-off (*i.e.*, groundwater mining).²⁸ The ECHO-Association suffers not only potential but actual injury in fact through the deprivation of water use in accordance with its water right.

As a registered dba of Mr. Tracy, The ECHO-Association has suffered a palpable, and particularized injury that gives rise to a personal stake in the outcome of a dispute, it has legal standing in the instant action.

²⁷ As neither EID nor the State Engineer were parties to the conveyance of equitable and legal title to The ECHO-Association, there is no basis for the district court to have accepted factual arguments presented in a Rule 12(b)(6) motion to dismiss that the conveyance agreement was not in writing under the Statute of Frauds, nor that conveyance documents were only delivered shortly prior to recording with Salt Lake County on February 21, 2019.

²⁸ As noted by the Area Manager of Respondent Jones and EID's own hydrologist during the hearing on December 15, 1995, interference with surface water flow from the same large-diameter commercial wells in the present Action may "last decades – 25, 50, 75 years" (emphasis added) [R21 at ¶ 88]. This fact has been admitted by EID and Mr. Jones for purposes of the Motions to Dismiss and thus this appeal.

III. AS A DBA ENTITY OF EITHER A NON-PROFIT UNINCORPORATED ASSOCIATION OR A FOR-PROFIT SOLE PROPRIETORSHIP OF MR. TRACY, THE ECHO-ASSOCIATION HAS LEGAL STANDING UNDER THE PUBLIC POLICY EXCEPTION

Regardless of whether The ECHO-Association owned water right57-8947(a16182) or not, or whether it is an unincorporated association of water right protestants, the issues in the instant Action are so “unique and of such great importance that they ought to be decided in furtherance of the public interest.” *Washington*, 2003 UT 58 at ¶ 26 (citation and quotation omitted).

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

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

Nat'l Parks & Conservation Ass'n, 869 P.2d at 913 (quoting *Terracor v. Utah Bd. of State Lands*, 716 P.2d 796,799 (Utah 1986)); *see also Jenkins v. State*, 585 P.2d 442, 443 (Utah 1878); *Wash. County Water Conservancy Dist.*, 82 P.3d at 1132-33; *Haik v. Jones*, 2018 UT 39, 23-25, 27 P.3d 1155 (Utah 2018).

In order to establish standing under this alternative standard, the dispute must (1) raise a statutory or constitutional issue of substantial public import, (2) be presented by

adverse parties, and (3) otherwise be suitable for resolution by the courts. *Nat'l Parks & Conservation Ass'n*, 869 P.2d at 913.

A. The Present Action Raises a Statutory and Constitutional Issue of Substantial Public Import.

The Utah Supreme Court has left open to the possibility that some issues concerning water rights might present questions of great public importance where a large number of people would be affected by the outcome.

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* 2003 UT 58 at ¶ 27.

The Court should take judicial notice that the Canyon is one of the most historically significant areas in modern Utah history. It was the decisive obstacle of the Donner-Reed Party in 1846, as well as the last resting place of the Mormon Pioneers before entering the Salt Lake Valley on July 24, 1847. Mt. Olivet, the only active military cemetery commissioned by an Act of Congress and signed into law by United States President Ulysses S. Grant in 1874, is maintained from the Canyon's surface water sources. The Canyon is also the location of Utah's Hogle Zoo, a public retreat, which is also reliant upon the sustained flow of the same surface water source. Moreover, and equally significant, more than 415 private wells are reliant on the same isolated hydrogeologic units [R41] as Mt. Olivet and Utah's Hogle Zoo.

To date, over forty (40) Canyon residents have reported substantial impairment of private wells possessing superior water shares, including total impairment [R24 at ¶ 99].

Many public wells have and likely will suffer further impairment in stream flow and contamination with e coli bacteria if the artesian pressure in the valley floor of Canyon collapses with the deteriorating water-table caused by groundwater mining [R1-34 at ¶¶ 34(b)-(c), 43, 94, 99, 100, 111, and 156]. With substantial quality and quantity impairment and the Canyon stream suffering total impairment less than 2 miles from Utah's Hogle Zoo, there is a significant public interest in preventing further destruction of the Canyon aquifers as petitioned by The ECHO-Association.

In the present case, the State Engineer has a duty to comply with Utah statutory law to comply with Utah Code Ann. § 73-3-8(1)(b) to investigate permanent change applications and to reject them if “approval would interfere more beneficial use, public recreation, the natural stream environment, or the public welfare.” *See also Bonham v. Morgan*, 788 P.2d 497 (Utah 1989).

Utah Code Ann. §§ 73-3-3(5) and 78-3-8 establish 7 inquiries upon which the State Engineer is required to consider in order to support a "reasonable belief" that a change application can be made to grant a permanent change application. These inquiries include: (1) whether there is unappropriated water in the proposed source; (2) whether the proposed water will impair existing rights and interfere with more beneficial use of the water; (3) whether the proposed plan is physically and economically feasible; (4) whether the plan will prove to be detrimental to public health, welfare and safety; (5) whether the applicant has shown that it has the financial ability to complete the proposed work; (6) whether the applications are for the purpose of speculation or monopoly; and (7) whether the applications are filed in good faith. The burden is on the applicant to produce evidence

sufficient to support a reasonable belief that the change can be made in compliance with Utah Code Ann. §§ 73-3-3(5) and 78-3-8.

The State Engineer held a Protest Hearing. Prior to and after the Protest Hearing, The ECHO-Association provided substantial evidence to Mr. Jones to deny EID's Permanent Change Applications, pursuant to Utah Code Ann. §§ 73-3-3(5) and 78-3-8. [R1-493]. EID provided no report and only provided verbal data without supporting documentation. Mr. Jones conducted no investigation to qualify the opinions and verbal data provided by EID, particularly in light of contradictory evidence presented by The ECHO-Association, including some of EID's own documentation.²⁹ For example, EID's past and present hydrologists, in written reports and in prior presentation to the State Engineer's Office, concluded that large-diameter wells are harmful to the ecosystem of the

²⁹ For example, although the 1966 Barnett Thesis was completed by the State Engineer's own former area engineer and EID's own expert hydrologist, expressly warned against the operation of large-diameter commercial wells in the Canyon, both Mr. Jones and EID failed to investigate or collect critical data and reports regarding groundwater mining and the destruction of the Canyon's underground waters systems [R1-36 at ¶¶ 34, 35, 131, 133, 146, 171(f)]. One day after the EID Permanent Change Applications were submitted Mr. Jones, EID reported that the Brigham Fork Well had failed federal drinking water standard for sulfates and turbidity based upon iron bacterial contamination. However, during the Protest Hearing, EID testified to Mr. Jones that the Brigham Fork Well was not currently in operation due to "mechanical issues." Mr. Jones failed to investigate this issue of public health, welfare and safety. *Id.* at ¶ 158. In a 2000 Barnett Study entitled "Geologic and Hydrologic Setting of the Upper Emigration Canyon Area," EID hydrologist, Don Barnett, noted that in the year 1998 Boyer Well #2 extracted more water than was replenished by natural groundwater recharge in a "good water year," resulting in groundwater mining [R74-82]. While EID verbally referenced and relied upon the 2000 Barnett Study at the Protest Hearing in support of their applications, it did not produce a copy and Mr. Jones did not request it. When a copy of the 2000 Barnett Study was subsequently found and provided by The ECHO-Association the next day, showing evidence contrary to EID's representation, Mr. Jones made no further investigation and simply accepted EID's false representation of the study made during the Protest Hearing.

Canyon and the Canyon Stream and will cause impairment in quality and quantity of water to private wells in the Canyon [R1-39].

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

B. The ECHO-Association is an Appropriate Adverse Party.

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

The ECHO-Association is a recognized legal entity, sufficiently situated with an administrative structure, and financial resources and if necessary, legal counsel. It owns a

water right which has suffered total impairment [R562]. The ECHO-Association has collected and reviewed thousands of pages of documents related to the Canyon and its water-related issues, spanning over a period of one-hundred and forty-five (145) years, has researched the Canyon's water right issues and EID's historical water rights, has researched EID's historical applications and historic representations to the State Engineer, has reviewed hundreds of hours of meetings related to EID's alleged water rights, has interviewed numerous witnesses and subject-matter experts [R575-6].

The ECHO-Association has previously retained the supporting expertise of hydrologist Dr. David Hansen in 2015, who determined that EID failed to maintain minimum stream flow in 8 of the foregoing fifteen (15) years, demonstrating that EID has already far exceeded the hydrological limits of the Canyon's groundwater system [R484-93].

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

C. The Action is Suitable for Resolution by the Court.

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

In the present Action, the legal issues regarding the State Engineer’s Orders and underlying issues, including EID’s groundwater mining and consolidation of senior water rights are “sufficiently crystalized to be subject to judicial resolution.” *Nat’l Parks & Conservation Ass’n v. Bd. Of St. Lands*, 869 P.2d 909, 913 (UT 1993). Either EID will be permitted to continue groundwater mining to the detriment of the Canyon, its residents and the general public (via the operation of large-diameter commercial wells, thereby exceeding sustainable water supply and permanently damaging the remaining aquifer systems) or the district court will reject the approved changes to EID’s water rights upon remand.

CONCLUSION

As a for-profit dba entity of Mr. Tracy or even a non-profit unincorporated association of senior water right holders, The ECHO-Association has legal standing to commence de novo judicial of the State Engineer’s approval of permanent changes to 649 acre feet of surface water rights of the duplicitous Emigration Dam & Ditch Water Right under permanent change applications a44045 (57-7796) and segregated water claim a44046 (57-10711).

Moreover, as groundwater mining of Canyon aquifers by EID is an important public interest issue addressed in the Complaint, supported by substantial facts and evidence to support a finding that The ECHO-Association has legal standing under the public policy exception.

For the foregoing reasons, The ECHO-Association respectfully requests that this Court vacate the district court's dismissal and remand for further proceedings.

CLAIM FOR ATTORNEY'S FEES

The Utah Supreme Court has recognized that a party is entitled to reasonable attorney fees and costs on appeal under the authority of statute allowing for reasonable attorney fees at the trial court below. *Buzas Baseball v. Salt Lake Trappers*, 925 P. 2d 941, 954 (Utah 1996) citing *First Southwestern Fin. Servs. v. Sessions*, 875 P.2d 553, 555-56 (Utah 1994).

Under *Barker v. Utah Public Service Com'n*, 970 P.2d 702, the court recognized that even in the absence of a statutory or contractual authorization, a court has inherent equitable power to award reasonable attorney fees when it deems it appropriate in the interest of justice and equity a party is entitled to attorney fees.

As only recovery against the State Engineer is barred under Utah Code § 73-2-28(2), the Court should also award The ECHO-Association appellate fees and costs in the present action against EID.

The Court should hold that if The ECHO-Association is entitled to reasonable attorney fees below, it is also entitled to reasonable attorney fees in bringing this appeal.

Respectfully submitted this 15th day of September, 2021.

MARK CHRISTOPHER TRACY DBA
EMIGRATION CANYON HOME OWNERS
ASSOCIATION

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

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(g)(1), I, Mark Christopher Tracy, certify that this brief contains **8,401 words**, excluding the table of contents, table of authorities, addenda, certificates of compliance and service.

In compliance with the typeface requirements of Utah R. App. P. 27(b), I also certify that this brief has been prepared in a proportionally spaced font using Microsoft Word v.16.52 in Time New Romans font, 13-point.

I also certify that this brief contains no non-public information in compliance with the non-public information requirements of Utah R. App. P. 21(h).

MARK CHRISTOPHER TRACY DBA
EMIGRATION CANYON HOME
OWNERS ASSOCIATION

/s/ Mark Christopher Tracy

Mark Christopher Tracy

Pro se Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of September, 2021, a true and correct copy of the foregoing Brief of Appellant was sent via electronic mail as per Rule 26(b) Utah R. of App. P. to the following counsel of record. Two (2) paper copies will be provided upon request.

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/s/ Mark Christopher Tracy
Mark Christopher Tracy

**Addendum A
to Appellant's Brief**

**Emigration Canyon Home Owners Association v. Kent L. Jones *et al.*
20200295-CA**

**PDF COPY OF EMIGRATION IMPROVEMENT DISTRICT (AKA
EMIGRATION CANOYN IMPROVEMENT DISTRICT AKA ECID)
WEBSITE**

Water Rights

For specific information regarding property water rights, water right priorities, or enforcement of water right issues, contact the State Engineer's office, Division of Water Rights. The Emigration Improvement District holds one of the most senior water rights in the canyon, thanks to the Utah Road Commission (Now Department of Transportation) who, in 1976, deeded to the District a large sum of water rights. As 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. In most cases, .75 ac/ft of water right is needed for both culinary and irrigation use as established by the Utah Engineer's office. There are situations where this amount may differ, pending on usage and lot size being irrigated etc.... The current value for use of .75 ac/ft of District's senior water right is \$6000.00 (\$8000 per acft). The District does not sale water rights and they are used for those who are connected to the community water system. There is on an occasion, where the District (upon approval of the Board of Trustees) will lease a portion of water right for properties not located within the community water system, however, if the community water system is available to them in the future, the agreement is to connect to the community system at that point in time.



For more information regarding water rights click on the Utah Division of Water Rights or contact the District Manager.

Connection Costs

When connecting to the community water system, there are four main areas regarding costs to consider. First, as mentioned above, is the water right. Do you have a water right to exchange in for the District's water right, or do you need to purchase the water right? Second, what standby fees and/or water base fees have been paid and are they current? A person who has paid the standby fees and water base fees are contributing to their overall impact fee. The current impact fee for connection is \$13,750. This impact fee has been broken down into two portions. The first portion (\$7500) is wrapped into the \$25 per/mo impact fee billed out quarterly by the District. The second portion is an application fee of \$750 (paid at connection) and \$5500 which can be paid up front or financed by the District over a 14 year term. The interest rate is variable and is based upon the Utah Public Treasury Investment fund. The current rate is .005% and has been for the past few years. The Third expense is the cost of the meter and installation. A 3/4" meter installed is \$750 and a 1" meter is \$900. Any other sizes are priced out on an individual basis. The fourth area of costs is one the property or homeowner will have to consider and that is the cost to run the water line from the meter box to the home and make the necessary connections. For more information contact the District Manager who will be able to walk you through the process and provide detailed costs for specific properties.

**Addendum B
to Appellant's Brief**

**Emigration Canyon Home Owners Association v. Kent L. Jones *et al.*
Trail Case No. 190901675**

Memorandum Decision and Order

**Judge Su Chon
Third District Court**

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 and 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.

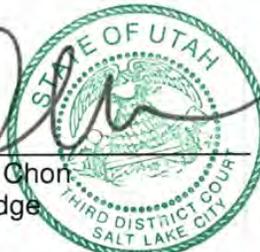
Lastly, ECHO claims it has standing under the public interest exception. But the issues here are not “so unique and of such great importance to Utah that they ought to be decided in furtherance of public interest.” Utah Code Ann. § 63G-4- 402. “A party can acquire standing to litigate an important public 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



**Addendum C
to Appellant's Brief**

**Emigration Canyon Home Owners Association v. Kent L. Jones *et al.*
20200295-CA**

Order

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

<p>EMIGRATION CANYON HOME OWNERS ASSOCIATION, Appellant, <i>v.</i> KENT L. JONES AND EMIGRATION IMPROVEMENT DISTRICT, Appellees.</p>	<p>ORDER Case No. 20200295-CA</p>
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Before Judges Mortensen, Pohlman, and Harris.

This case is before the court on Appellee Emigration Improvement District's (EID) Motion to Dismiss for Unauthorized Practice of Law. In the alternative, EID requests an order requiring Emigration Canyon Home Owners Association (ECHO) to be represented by legal counsel licensed in the State of Utah.

ECHO was a party in the district court, so it can appeal the standing ruling. Accordingly, we deny the motion to dismiss the appeal based upon alleged unauthorized practice of law but must consider whether ECHO must be represented by licensed legal counsel or can proceed as a pro se appellant through Mark Christopher Tracy. ECHO was represented by licensed attorneys in the district court, so the district court was not presented with the issue that is now before this court.

In *Graham v. Davis County Solid Waste Management*, 1999 UT App 136, ¶ 13, 979 P.2d 363, this court held that rule 17(d) of the Utah Rules of Civil Procedure allowed an unincorporated association to sue, but the association was required "to register as an association conducting business in Utah under an assumed name." Furthermore, the Davis County Clean Air Committee's filing of the original complaint in that case through one of its members "also violated the well-established rule that an unincorporated association, like a corporate entity, may not be represented by a nonlawyer." *Id.* ¶ 14. This court held that the Committee could have cured the deficiencies in the complaint by filing under the Assumed Name Statute and by entering an appearance of counsel on its behalf. *Id.* ¶ 15. Because it did neither, this court dismissed the appeal.

Utah Code section 42-2-5(2) requires “[A] person who carries on, conducts, or transacts business in this state under an assumed name, whether that business is carried on, conducted, or transacted as an individual, association, partnership, corporation or otherwise” to file the required certification with the Division of Corporations and Commercial Code. Tracy filed such a certificate, which initially contained a misspelling. The district court’s ruling on standing accepted that “Emigration Canyon Homeowners Association” is a DBA for Mark Christopher Tracy. The first requirement identified in *Graham* is satisfied. However, the present record is not sufficient to allow this court to make a factual determination whether *Graham* would require ECHO to obtain legal counsel because it is an “unincorporated association,” or whether ECHO being a DBA for Tracy allows him to proceed as an appellant pro se. The language of *Graham* is conjunctive throughout, demonstrating that compliance with the Assumed Name Statute is one requirement and obtaining legal counsel for an unincorporated association is a separate and additional requirement. *See id.* ¶ 14 (stating that the filing of the original complaint by Graham on behalf of the Committee “violated the well-established rule that an unincorporated association, like a corporate entity,” may not be represented by a nonlawyer.”).

IT IS HEREBY ORDERED that the motion to dismiss the appeal based upon the authorized practice of law is denied.

IT IS FURTHER ORDERED that this case is temporarily remanded to the district court for the limited purpose of making the factual findings necessary to determine whether the Emigration Canyon Home Owners Association is an unincorporated association that must be represented by legal counsel licensed in Utah in this appeal. The district court may hold such proceedings as that court deems necessary to make the factual determination.

Dated this 16 day of July, 2020.

FOR THE COURT:

Ryan M. Harris, Judge

**Addendum D
to Appellant's Brief**

**Emigration Canyon Home Owners Association v. Kent L. Jones *et al.*
20200295-CA**

Memorandum Decision, Findings of Fact and Conclusions of Law and Order

**Judge Su Chon
Third District Court**

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, FINDINGS
OF FACTS AND CONCLUSIONS OF
LAW AND ORDER**

Case No. 190901675

Judge Su Chon

This matter is before the Court on the Utah Court of Appeals' July 16, 2020 Order of remand for this Court to determine whether Petitioner Emigration Canyon Home Owners Association ("ECHO") is an "unincorporated association" which must obtain counsel, or whether ECHO is simply a DBA of Mark Christopher Tracy who may represent ECHO pro se. See *Graham v. Davis Cty. Solid Waste Mgmt. & Energy Recovery Special Serv. Dist.*, 1999 UT App 136, ¶ 14, 979 P.2d 363 (noting the "well-established rule that an unincorporated association, like a corporate entity, may not be represented by a nonlawyer."). The Court enters the following Memorandum Decision, Findings of Fact and Conclusions of Law based on the evidence heard before the Court.¹

¹ The Court was notified on June 11, 2021 that this decision was not uploaded to the docket. The Court recalls that it had given this ruling to a staff member that is no longer with the courts. The Court does not know what happened and reissues this ruling today. We apologize for the delay.

FINDINGS OF FACTS:

1. Mark Christopher Tracy is currently a resident of Salt Lake County, Utah.
2. He used to own real property in Emigration Canyon, and now owns a separate water right located therein.
3. Mr. Tracy is currently the owner of a DBA called Emigration Canyon Homeowners Association ("ECHO"). He registered this DBA with the Division of Corporations and Commercial Code on May 23, 2018. See Exhibit 4.
4. Mr. Tracy initially started ECHO in January 2014 while he was an owner of real property in Emigration Canyon.
5. He noticed issues involving Emigration Improvement District (EID) and notices that were sent out as well as the Minutes of the Trustees' meetings. Mr. Tracy thought that there was something wrong going on and he created ECHO at that time.
6. Mr. Tracy began communicating with other residents about EID.
7. He started receiving documents from Jack Plumb and Sam Plumb regarding EID's meetings. Sam Plumb provided copies of documents and transcribed his own minutes of the EID meetings.
8. Mr. Tracy also obtained documents from Joanne Edwards and other people in the community.
9. Mr. Tracy and Trevor Irons were both residents of Emigration Canyon. Mr. Irons helped Mr. Tracy to create the ECHO website. Mr. Irons was not paid for his services. Mr. Irons also did research for Mr. Tracy, reviewed hydrological reports and provided him with additional information. Mr. Irons has since sold his property and is no longer a resident.

10. Mr. Tracy also filed seven (7) informational complaints with the State Auditor's Office with respect to EID.

11. In 2014, ECHO and Mr. Tracy sent out a letter with a postcard asking people to communicate with them and join the association. Mr. Tracy claimed that the association was never formed.

12. However, the exhibits provided to the Court indicate otherwise. The association appear to have been formed sometime in 2014. And there were email correspondences to various persons within the Emigration Canyon community informing them of the association. See Exhibit 2 and Exhibit 6.

13. Exhibit 6 is an email dated October 18, 2018, that ECHO Association sent to the attorney representing them in the federal case as well as to certain reporters. The email letter indicated that there was open enrollment into the association and it provided membership guides as well an application to complete to join the association. ECHO through Mr. Tracy held a meeting to discuss joining the association for any persons who had issue with the EID. Mr. Tracy testified that no one joined. Mr. Tracy stated that people were afraid of the EID and that they did not want to come forward.

14. In Exhibit 5, there is an email from Patrick Hogle to Ms. Wilhelmsen, the Water Rights Engineer for the State of Utah, and informed her that ECHO Association was representing Tierra Investments, LLC. Mr. Hogle indicated that he was the managing member of this entity.

15. Also, in Exhibit 5 is an email to Ms. Wilhelmsen from ECHO Association indicating that ECHO Association was going to speak for Tierra Investments, LLC, Jack Samuel Plum, Jamie White, Karen Penske, Margot McCallum, Michael Terry, Patricia

Sheya, Robert J. Reed, IV, and Michael Martin. Mr. Tracy testified that he was only trying to consolidate the time that the parties each had to allow them more time to speak. However, looking at the plain language of that email, it appears that these persons' intended for ECHO Association to represent them to protest the Water Right at issue.

16. There is an email in Exhibit 7 between Michael Terry and ECHO Association where ECHO Association removed Mr. Terry from their membership lists. They seemed to have a disagreement. However, Exhibit 5 indicates that ECHO Association was representing Michael Terry as referenced in both Exhibit 5 and Exhibit 7.

17. Mr. Tracy also created a bank account through Bank of America in which he listed himself as Mark Christopher Tracy, sole prop DBA Emigration Canyon Homeowners Association. On April 5, 2019, ECHO and Mr. Tracy received a check for \$25,000 paid by Patrick Hogle. On April 12, 2019, those funds were transferred to Christensen & Jensen for payment of legal fees. See Exhibit 11.

18. Mr. Tracy also received donations from people indicating that it was for ECHO Association. See Exhibits 13 and 14.

19. Mr. Tracy now claims that he is the sole person involved in ECHO. He states that he is only arguing his Water Right that he owns.

20. Exhibit 2 shows a letter that was sent to a Doctor Gilbert. The letter dated June 12, 2015, stated the following: "As previously announced, the above association has been formed to protect the interest of property owners within Emigration Canyon." The letter notified the property owner that the organization had changed their name to

ECHO. The letter also stated and provided information regarding the Qui Tam action against EID for improper assessments of property taxes, fire hydrant rental fees, improper inducement of water connection and standby contracts, incorrect billing, improper use of property tax revenue, failure to report iron, bacterial contamination in drinking water supply by EID.

21. As noted in Exhibit 6, the letter to Emigration Canyon property owners stated that they were holding a membership meeting and would welcome questions regarding actions being taken against EID. The guide to ECHO Association membership benefits is two-pages long, and it talks about litigating against EID, some of these issues regarding water depletion and the permit change application. Also contained in Exhibit 6 is the ECHO Association membership fees. It lists that current ECHO Association members for \$1 and then gives other amounts in the thousands for membership, depending on the type of property. Mr. Tracy stated that no one had paid these fees. However, he was unable to explain the \$25,000 payment that he received from Patrick Hogle, and he admitted that he had used that money to pay the attorney fees.

CONCLUSIONS OF LAW:

The Court has jurisdiction over this matter and the parties and incorporates its legal analysis below.

ANALYSIS:

Graham cites Rule 17(d), Utah Rules of Civil Procedure, defining what makes an unincorporated association: "When two or more persons associated in any business either as a joint-stock company, a partnership or *other association, not a corporation,*

transact such business under a common name, whether it comprises the names of such associates or not, *they may sue* or be sued by such common name." *Id.* at ¶ 12.

Graham also states:

In this case, the Committee, as an unincorporated, voluntary environmental watch-dog association, falls within the purview of the "other association" language of Rule 17(d). Although Utah courts have not articulated a test to determine when a party is transacting business for purposes of Rule 17(d), we note that the Committee, apparently acting under a common name for several years in monitoring and working to improve air quality in Davis County, was likely engaged in transacting business.

Id. (citations omitted). *Graham* cites to other cases regarding incorporated associations, one of which noted that Rule 17(d) contemplates two factors: "(i) parties transacting business, and (ii) transacting such business *under a common name.*" *Hebertson v. Willowcreek Plaza*, 923 P.2d 1389, 1392 (Utah 1996) (emphasis in original). The Utah Court of Appeals has noted,

In fact, no Utah statutes or cases have defined what constitutes transacting business under a common name pursuant to Rule 17(d). However, for jurisdictional purposes, non resident corporations are considered to be doing business in Utah if they negotiate and enter into contracts within the state. Other factors in determining whether an entity is doing business in the state and thus is subject to its jurisdiction include: (1) whether there are local offices in the state; (2) the presence of employees in the state; (3) how the business holds itself out to the public; (4) the presence of real or personal property in the state. Thus, if two or more entities together negotiate and enter into contracts, have offices, hire employees, or own property in this state, they are within the jurisdiction of Utah courts. If they also transact such business under a *common name*, then, pursuant to Rule 17(d), those entities could be subject to suit under that name.

Hebertson v. Willowcreek Plaza, 895 P.2d 839, 840–41 (Utah Ct. App. 1995) (citations omitted). Another court cited in *Graham* had found an unincorporated association

based on the following: the membership was too large to feasibly join all defendants, there were officers and an organization, accumulation of funds, it had chosen a name under which to do business, it held itself out as capable of contracting in that name, and it was engaged in business under that name. *Askew v. Joachim Mem'l Home*, 234 N.W.2d 226, 236 (N.D. 1975).

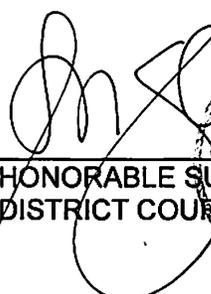
Mr. Tracy argues that he is a DBA as evidenced by the DBA registration and the bank account and therefore able to represent himself. However, the Court must consider whether the parties were transacting business under a common name and transacting business under a common name. The Court finds that both factors are met that ECHO was an unincorporated association. ECHO recruited people to join the association and to help with their efforts. The Plumbs provided minutes, transcripts and other information to ECHO to further the cause. Mr. Irons did research, created a website for ECHO and reviewed reports to aid Mr. Tracy. He was also engaged in the work that ECHO was involved in.

Mr. Tracy admits that ECHO did try to recruit other property owners to join their group, but he denies that anyone joined ECHO. ECHO held informational meetings, and perhaps from those meetings, Mr. Tracy may have received no response. However, there are third party emails to the state that demonstrate that ECHO was representing individual property owners at the State Engineer's hearing. The plain language of those emails indicate that the parties understood that Mr. Tracy and ECHO were appearing on their behalf. Mr. Tracy on behalf of ECHO used the allotted time to address all of the interested parties' concerns regarding the change application. Additionally, the bank statements show that other property owners were donating money ECHO and those

funds were deposited into the ECHO bank account. Mr. Tracy applied those donations to the payment of the incurred attorney's fees with his prior counsel. For all of those reasons, it appears that ECHO is an unincorporated association under the caselaw. The Court orders that ECHO is required to have an attorney represent ECHO in these matters. No further order is needed.

DATED this 21st day of January, 2021.

REISSUED this 11th June, 2021.


HONORABLE SUSAN J. CHON
DISTRICT COURT JUDGE

