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Pro se Petitioner

**IN THE THIRD DISTRICT COURT
IN AND FOR THE STATE OF UTAH**

MARK CHRISTOPHER TRACY, dba
EMIGRATION CANYON HOME OWNERS
ASSOCIATION,

Petitioner,

vs.

SIMPLIFI COMPANY, *et al.*

Respondents.

**OPPOSITION TO RULE 12(B)(6)
MOTION TO DISMISS PETITION FOR
JUDICIAL REVIEW OF DENIED
REQUEST FOR DISCLOSURE OF
GOVERNMENTAL RECORDS**

**REF: WATER TELEMETRY OF A
PUBLIC DRINKING SYSTEM**

Case No.: 200905074

Judge: Mark S. Kouris

Hearing Requested

Pursuant to Rule 7 (d)(1) Utah Rules of Civil Procedure (“URCP”), petitioner Mark Christopher Tracy (“Mr. Tracy”) dba Emigration Canyon Home Owners Association (“The ECHO-Association”) respectfully submits this *Opposition to Rule 12 (b)(6) Motion to Dismiss Petition for Judicial Review of Denied Request for Disclosure of Governmental Records* filed by the Simplifi Company (“Simplifi”), the Deputy Mayor of Emigration Canyon Jennifer Hawkes

(“Deputy Mayor Hawkes”) and Eric Hawkes (“Mr. Hawkes”)(collectively “Simplifi Respondents”).

I. REQUESTED DISPOSITION OF MOTION AND SUPPORTING GROUNDS

Simplifi Respondents argue that a private corporation and controlling individuals are exempt from the Utah Government Records Access and Manage Act (“GRAMA”) in its entirety.¹ Moreover, Emigration Improvement District (“EID”),² the non-party governmental entity, which contracts and compensates Simplifi with public funds to create, maintain, and control access to public records, fully and accurately disclosed the requested public records to Mr. Tracy,³ or in the alternative, is not required to compile and/or prepare documents in a different format than maintained in the normal course of business⁴ (“Simplifi Motion”).

These arguments fail.

Mr. Tracy objects to evidence and arguments presented on behalf of a non-party neither named⁵ nor necessary to the present litigation⁶ and requests the Court deny the Rule 12 (b)(6)

¹ Simplifi Motion at page 6.

² The EID website maintained by Simplifi is recorded under the designation “Emigration Canyon Improvement District” and “ECID” although no such name or entity is registered with the Utah Division of Corporations and Commercial Code as per Utah Code Ann. § 42-2-5(2) and no such entity is registered with the Utah Lt. Governor’s Office as a special service district as required under Utah Code Ann. § 67-1a-15(3).

³ Simplifi Motion at page 8.

⁴ Simplifi Motion at page 9.

⁵ Because governmental functions of creating, maintaining and controlling access to public documents was transferred to Simplifi and thereby relinquished to Deputy Mayor Hawkes and Mr. Hawkes, EID was not named and is not a necessary party to the present litigation under Rule 19 (a) URCP.

⁶ To date, EID has not filed motion for permissive joinder in the present action under Rule 20(a) URCP and therefore may not be heard.

motion to dismiss the petition for *de novo* judicial review of the *de facto* denied request⁷ and *de facto* denied appeal⁸ for disclosure of governmental records.

Under Utah Code § 63G-2-103(11)(b), a for-profit Utah corporation funded entirely with public monies to perform governmental services and functions related to the operation of a public drinking-water system and therewith contracted by a governmental entity to create, maintain and control access to public records is subject to GRAMA. The officers and directors of that corporation in possession of public records maintained in the basement of their private residence are likewise subject to criminal sanctions of Utah Code Ann. § 63G-2-801 (3)(a) without limitation.

The petition for *de novo* judicial review in the instant action (“ECHO Petition”) alleges and substantiates in detail that Simplifi Respondents knowingly provided incomplete and/or incorrect electronic data files, withheld hard-copies of public records, demanded payment of **\$3,000.00** to undertake a simple, 1-click process to generate a Microsoft Excel spreadsheet with the existing telemetry software, refused to record the request for public documents with the contracting governmental entity in an open public meeting in possible violation of the Utah Open and Public Meetings Act,⁹ and thereby willfully and unlawfully prevented disclosure of governmental records required under the federal Safe Drinking Water Act of 1974 to be maintained for public view and inspection.

⁷ Utah Code Ann. § 63G-2-204(9).

⁸ Utah Code Ann. § 63G-2-401(5)(b)(i).

⁹ See e.g., Utah Code Ann. § 52-4-305.

II. STATEMENT OF FACTS

1. Mr. Tracy owns water right 57-8947 (a16143) through Mr. Tracy's dba entity The ECHO-Association, approved for surface water diversion from the Emigration Canyon Stream ("Canyon Stream") near the Freeze Creek drainage of Emigration Canyon, Utah and enjoys a senior priority date of 1910 and a change application priority of February 1, 2002 ("ECHO Water Right").¹⁰
2. On June 15, 1986, private land-developer Kem C. Gardner ("Land-Developer Gardner") through The Boyer Company LC completed construction of an underground water source identified as "Boyer Well No. 1" (aka Freeze Creek Well) and a grossly undersized reservoir ("Boyer Tank") and water distribution lines in the Freeze Creek drainage identified in the database of the Utah Division of Drinking Water ("DDW") as public drinking-water system No. 18143 ("Oaks Water System") in order to provide culinary drinking water to the luxurious Emigration Oaks Private Urban Development ("Emigration Oaks PUD").¹¹
3. After Boyer Well No. 1 pumped dry with only 3 homes connected to the water system, and having promised future drinking water service to unsuspecting buyers of over 200 vacant parcels sold as "buildable," in March 1994, Land-Developer Gardner and City Development Inc. through land-developer Walter J. Plumb III ("Land-Developer Plumb") constructed another underground water source identified as "Boyer Well No. 2" approximately 1,720 feet west of Boyer Well Nr. 1 as the bird flies despite the fact that EID hydrologist Don Barnett had testified before the Utah State Engineer that the use of large-diameter commercial wells in the Freeze Creek drainage would

¹⁰ ECHO Petition at page 3, ¶ 1.

¹¹ *Id.* at page 5, ¶ 13.

interrupt the movement of underground water supporting surface-water flow of the Canyon Stream “for decades -- twenty-five, fifty, seventy-five years”¹² and the hydrological study on file with the Utah State Engineer had expressly warned that the extraction of groundwater via large-diameter commercial wells in the Canyon would impair senior water rights “with almost certainty.”¹³

4. After Boyer Well No. 1 and Boyer Well No. 2 tested positive for lead contamination, Land Developers Gardner and Plumb transferred legal title and liability of the defunct Oaks Water System to EID allowing for the further massive expansion of the Emigration Oaks PUD thereby securing extraordinary private profit at the expense of Canyon taxpayers.¹⁴

5. Simultaneously with the acquisition of legal title from Land Developer Gardner and Plumb, the EID Board of Trustees (“EID Board”) through EID trustee chairman Fred A. Smolka (“Trustee Chairman Smolka”) and EID trustee Lynn Hales (“Trustee Hales”) awarded Trustee Chairman Smolka’s own for-profit Utah corporation Management Enterprises LLC, a lucrative no-bid contract to operate the Oaks §Water System whereby Trustee Chairman Smolka christened himself as “EID General Manager,” “EID Financial Manager,” and “EID Election Specialist” as an independent contractor.¹⁵

6. In August 2003, again at the expense of Canyon taxpayers, EID completed construction of the Brigham Fork Well and Wildflower Reservoir on property belonging to private land-developer and EID Advisory Committee Chairman R. Steve Creamer (“Land-Developer Creamer”) with

¹² *Id.* at page 5, ¶ 14. *See also* audio recording of the December 15, 1995 Utah State Engineer protest hearing and illustrative maps at the website maintained by The ECHO-Association available at https://echo-association.com/?page_id=2204.

¹³ *Id.* at page 4, ¶ 11.

¹⁴ *Id.* at page 10, ¶ 32.

¹⁵ *Id.* at page 5, ¶ 15.

federally-backed funds administered under the requirements of the Safe Drinking Water Act of 1974.¹⁶

7. The receipt of federally-backed funds was contingent upon the EID Board adopting a “Water Management and Conservation Plan.”¹⁷ See DDW correspondence entitled “Federal SRF Loan Authorization and Procedures for Committal of Funds” dated January 7, 2001 at page 7, ¶ Nr. 11, attached as **Ex. A**.

8. Adopted on November 14, 2002 by EID Trustee Chairman Hughes (“Trustee Chairman Hughes”) and Trustee Hales, the plan documented that the telemetry system installed in the year 2000 “measures and records well depths, reservoir levels and pumping volumes, rates of pumping and electrical usage” whereby [a]ll of these levels, volumes, ect. *are available for observation and print-out [sic] on-line [sic] through PC Anywhere [sic]*” and “[p]ermanent *hard copy table and graphs are created and kept in EID files* in addition to the electronic files created by the computer program in use” (emphasis added).¹⁸ See “Telemetry System” of the Water Management and Conservation Plan at page 2, ¶ 5, attached as **Ex. B**.

9. In the revised Water Management and Conservation Plan adopted on March 14, 2013 by Trustee Chairman Hughes and EID Trustee David Bradford (“Trustee Bradford”) required for the construction of the Upper Freeze Creek Well with public funds in the Freeze Creek drainage on 20 acres acquired from Land-Developer Plumb, the EID Board confirmed that the original telemetry system was “updated in 2003 to include the new reservoir [*i.e.*, the Wildflower Reservoir

¹⁶ *Id.* at page 6, ¶ 17.

¹⁷ *Id.* at page 13, ¶ 43.

¹⁸ *Id.* at Ex. Y.

constructed on Land-Developer Creamer's property]" and "will also include the new well [*i.e.*, the Upper Freeze Creek Well constructed Land-Developer Plumb's property]." ¹⁹

10. Circa 15 years after assuming legal title and liability from Land-Developers Plumb and Gardner, and building approximately \$6.3 million dollars of water infrastructure on property belonging to Land-Developer Creamer, the EID Board awarded Simplifi a no-bid contract to perform governmental functions and services as "EID General Manager," "EID Financial Manager," and "EID Records Officer" and therewith oversight and control of 25 boxes of public documents previously maintained at the private residence of Trustee Chairman Smolka.

11. In a community letter, dated June 2014, the EID Board insisted that although EID is a governmental entity created by Salt Lake County in 1968, the water district was not subject to Utah State statutes prohibiting nepotism ²⁰ due to the fact that EID has no employees and operates entirely through independent contractors such as Simplifi. ²¹

12. Since 2013, most all public records of EID are created and maintained in the sole possession of Simplifi in the basement of the private residence of Deputy Mayor Hawkes and Mr. Hawkes. ²²

13. Deputy Mayor Hawkes and Mr. Hawkes are the sole directors and officers of Simplifi. ²³

14. Simplifi has no employees, owns no real property, and has no other income source other than public funds transferred by Simplifi through Mr. Hawkes from EID's accounts maintained at

¹⁹ *Id.* at Ex. Z.

²⁰ *See e.g.*, Utah Code Ann. § 17B-1-110.

²¹ ECHO Petition at Ex. N.

²² *Id.* at page 10, ¶ 28.

²³ *Id.* at ¶ 30.

Zions National Bank and Utah State Public Treasury Funds no. 1061 and no. 2200 to Simplifi accounts controlled solely by Deputy Mayor Hawkes and Mr. Hawkes.²⁴

15. The private residence of Deputy Mayor Hawkes and Mr. Hawkes is registered with the Utah State Lt. Governor’s Office as the location of EID as a Utah special service water district²⁵ and is likewise registered with the Utah Division of Corporation and Commercial Code as the place of business for Simplifi.²⁶

16. In the 2019 calendar year, Simplifi through Mr. Hawkes transferred **\$97,315.08** of public funds from EID accounts to Simplifi for “management compensation,” “office expenses,” and “internet and computer expenses.”²⁷

17. As “EID Financial Manager,” Simplifi through Mr. Hawkes is unable to maintain commensurate revenue flow through (i) the sale of culinary drinking-water to existing water users of the Oaks Water System; (ii) the collection of “standby fees” from 98 property owners promised future water service from the EID Board; and (iii) the assessment of “fire- hydrant rental fees” billed by Simplifi to 86 Canyon residents and/or property owners financially unable or unwilling to connect to the Oaks Water System and unaware of extensive lead-contamination of the Oaks Water System operated by Simplifi.²⁸

18. Mr. Hawkes was last certified as “EID records officer” with the Utah State Records Ombudsman on July 10, 2020. *See* true and correct copy of email correspondence of Rosemary

²⁴ *Id.* at ¶ 31.

²⁵ As per Utah Code Ann. § 67-1a-15(3) all Utah special service districts must register with the Utah State Lt. Governor’s Office.

²⁶ ECHO Petition at page 10, ¶ 30.

²⁷ *Id.* at page 9, ¶ 25.

²⁸ *Id.* at page 10, ¶ 27.

Cundiff, the Utah Government Records Ombudsman, to The ECHO-Association dated September 23, 2020, attached as **Ex. C**.

19. On September 26, 2014, Mr. Tracy commenced legal action against Mr. Hawkes including Trustee Chairman Smolka, Trustee Chairman Hughes, Emigration Canyon Mayor Joseph Smolka, Trustee Hales, Trustee Bradford, Land-Developer Creamer, The Boyer Company LC and City Development Inc., *et al.* for alleged violations of the Safe Drinking Water Act of 1974 including fraudulent consolidation and willful impairment of senior water rights in Emigration Canyon (“FCA Litigation”).²⁹

20. At the expense of Canyon taxpayers, Simplifi Respondents’ current legal counsel of record Jeremy R. Cook of the Salt Lake City law firm Cohen Kinghorn P.C (“Utah Attorney Cook”)³⁰ entered appearance on behalf of Mr. Hawkes in the FCA Litigation.³¹

21. On December 15, 2020, the EID Board budgeted **\$118,000.00** for the current calendar year for the operation of the Oaks Water System by Simplifi despite Mr. Hawkes having secured revenue of only **\$185,000.00** in water usage fees for the previous year as “EID Financial Manager” and independent contractor.³² See audio-video recording entitled “Payment of Public Funds to the Simplifi Company (2021 EID Budget Hearing Excerpt)” at the website administered by The ECHO-Association available at https://echo-association.com/?page_id=6054.

²⁹ *United States of America ex rel. Mark Christopher Tracy v. Emigration Improvement District et al.*, (D. Utah) Case No. 2:14-cv-701-JNP-JCB.

³⁰ See profile of Utah Attorney Cook at the website administered by The ECHO-Association available at https://echo-association.com/?page_id=5666.

³¹ See *USA ex rel. Tracy v. Emigration Improvement District*, supra footnote no. 29.

³² ECHO Petition at page 9, ¶ 26.

22. During the public portion of the 2021 EID budget hearing, Utah Attorney Cook instructed the EID Board and Mr. Hawkes not to answer questions regarding the use of public funds for the payment of Simplifi Respondents' legal fees in litigation currently pending before the Utah Court of Appeals³³ ("Lead-Contamination Lawsuit") and then ordered Mr. Tracy to "shut up."³⁴ See audio-video recordings entitled "The ECHO-Association Ordered to 'Shut Up' During Public Hearing (2021 EID Budget Hearing Excerpt)" at the website administered by The ECHO-Association available at https://echo-association.com/?page_id=5666.

23. As a special service water district, the EID Board lacks governmental authority to permit access to the private home of Deputy Mayor Hawkes and Mr. Hawkes, or to order Simplifi Respondents to disclose governmental documents, which may prove damaging in the pending FCA Litigation and Lead-Contamination Lawsuit.³⁵

24. In an extensive hydrological study completed in July 2000, EID hydrologist Don A. Barnett and the Weber State University Geology Department Chairman W. Adolph Yonkee concluded that Boyer Well No. 2 of the Oaks Water System had extracted more groundwater from the Freeze Creek drainage than was replenished in a "good water year" of 1998 and expressly warned against continued groundwater mining of the Twin Creek Aquifer (2000 Barnett-Yonkee Study").³⁶

³³ *Mark Christopher Tracy dba Emigration Canyon Home Owners Association v. Simplifi Company et al.*, (Utah Ct. App.) Case No. 20200705-CA.

³⁴ Mr. Tracy notified the appropriate professional authority as per Rule 8.3(a) Utah Rules of Professional Conduct and herewith the Court. See e.g. *In re Gopman*, 531 F.2d 262, 265 (5th Cir. 1976).

³⁵ ECHO Petition at page 10, ¶ 28.

³⁶ *Id.* at page 6, ¶ 16.

25. Despite recording the agenda item “water level reports” in the monthly EID Board meetings, Simplifi through Mr. Hawkes refused to state the water levels of the Oaks Water System’s 4 production and 6 monitor wells after discovery that Mr. Tracy had identified that all production and monitor wells were pumping at levels lower than the senior ECHO Water Right.³⁷

26. On June 10, 2020, Mr. Tracy through The ECHO-Association submitted a request for all telemetry data for EID production wells and water storage facilities since September 1, 1998 (“Water-Telemetry GRAMA”).³⁸

27. Upon non-response to the Water-Telemetry GRAMA, on June 27, 2020, Mr. Tracy filed appeal to Trustee Chairman Hughes, the chief administrative officer of EID, (“Water-Telemetry Appeal”) whereby on July 9, 2020 Simplifi through Mr. Hawkes responded that the “data requires custom software programs to access the data” and then identified the software program “LGH File Inspector” with a subsequent demand for payment of **\$3,000.00** to provide telemetry data in the form of a Microsoft Excel spreadsheet.³⁹

28. Upon inspection of the referenced software and transmitted data files, on July 15, 2020, Mr. Tracy reported that the electronic files did not match the water levels reported by Mr. Hawkes to the EID Board and all raw data could be easily produced in a Microsoft Excel spreadsheet in an 1-click process using software program’s user interface button entitled “Send to Excel.”⁴⁰ *See*

³⁷ *Id.* at page 15, ¶ 52.

³⁸ *Id.* at page 15, ¶ 49.

³⁹ Simplifi Motion at Ex. 1.

⁴⁰ ECHO Petition at page 15, ¶ 51 and Ex. CC.

email correspondence from Mr. Tracy to Trustee Chairman Hughes,⁴¹ Trustee Bradford⁴² and EID Trustee Brent Tippet⁴³ and Mr. Hawkes⁴⁴ at ¶ 3, attached as **Ex. D**.

29. During the following EID Board meeting on August 6, 2020, Mr. Hawkes failed to identify or discuss the Water-Telemetry GRAMA or the Water-Telemetry Appeal and likewise refused to disclose water levels of the Oaks Water System's 4 production wells and 6 monitor wells despite the fact that "Water Level Report" and "System Water Levels and Consumption Report" was identified in the EID meeting agenda under Nr. 6, subsection A.⁴⁵

30. In September 2018, for the first time in recorded history, with the collapse of artesian pressure due to a declining water levels, the Canyon Stream suffered total depletion less than 2 miles from Utah's Hogle Zoo thereby forcing many long-time Canyon residents to abandon private wells with senior water rights and involuntarily connect to the Oaks Water System at substantial cost and possible risk to health and safety.⁴⁶

31. On June 16, 2020, The ECHO-Association recorded massive ground subsidence and a 700-foot fissure in the Freeze Creek drainage near Emigration Oaks PUD lots 171, 178, 180, 182, 184 and 199 believed to have been caused by the groundwater mining of the Canyon's Twin Creek Aquifer as documented in the 2000 Barnett-Yonkee Study.⁴⁷ *See also* aerial audio/video recording

⁴¹ See EID trustee profile at the website maintained by The ECHO-Association available at https://echo-association.com/?page_id=1661.

⁴² *Id.* at https://echo-association.com/?page_id=5945.

⁴³ *Id.* at https://echo-association.com/?page_id=5979.

⁴⁴ See Simplifi profile at the website maintained by The ECHO-Association at https://echo-association.com/?page_id=6054.

⁴⁵ ECHO Petition at page 15, ¶ 52 and Ex. DD.

⁴⁶ *Id.* at page 2, ¶ 12.

⁴⁷ *Id.* at page 7, ¶ 20.

of ground subsidence and massive fissures in Freeze Creek Drainage area at the website maintained by The ECHO-Association available at https://echo-association.com/?page_id=3310.

III. ARGUMENT

For the purpose of the present motion, the above factual allegations are considered true and all reasonable inferences are to be drawn from them in a light most favorable to Mr. Tracy. *See Colman v. Utah State Land Board*, 795 P.2d 622, 624 (Utah 1990); *Lowe v. Sorenson Research Co.*, 779 P.2d 668, 669 (Utah 1989).

A. Application of GRAMA Provisions to a Private Corporation

Simplifi Respondents argue that a private for-profit corporation is exempt from GRAMA in its entirety.

The problems of increasing privatization of governmental functions laid bare in the present case are easily resolved with statutory interpretation of legislative intent, administrative rules and standing court rules of civil procedure currently in force in the State of Utah. The clear weight of state and federal authority also support the conclusion that the Court should follow legislative intent and apply Utah Code Ann. § 63G-2-103(11)(b) directly to private for-profit corporations.

a) Application of Public Records Act to Private Corporations under Utah State Statute and Court Rules

Whether a “quasi-governmental” entity such as a Utah special water district may hinder the public’s right to access governmental records by placing documents in the custody of a private

for-profit corporation doing business at a private residence is a matter of statutory interpretation. The best evidence of legislative intent “is the plain language of the statute itself.”⁴⁸

The purpose of GRAMA is recorded in Utah Code Ann. § 63G-2-102 and provides that “the Legislature recognizes two constitutional rights: (a) the public’s right of access to information concerning the conduct of the public's business; and b) the right of privacy in relation to personal data gathered by governmental entities.”

Statutory analysis however does not stop at the plain language of the statute. The Utah Supreme Court ruled that “plain language analysis” is not so limited to inquire into individual words and subsections in isolation but rather that each part or section be “construed in connection with every other part or section so as to produce a harmonious whole.”⁴⁹

As such, Utah Code Ann. § 63G-2-201 mandates that “a person has a right to inspect a public record free of charge, and the right to take a copy of a public record during normal working hours” if the record is not confidential and exempt from disclosure.

Did the Utah legislature however intend to exempt a private for-profit corporation doing business during “normal working hours” at a private residence?

In a word, no.

Utah Code Ann. § 63G-2-103(11)(b)(i) provides that a “government entity” also includes “every office, agency, board, bureau, committee, department, advisory board, or commission of

⁴⁸ *Duke v. Graham*, 2007 UT 31, ¶ 16, 158 P.3d 540.

⁴⁹ *Anderson v. Bell*, 2010 UT 47 (quoting *Sill v. Hart*, 2007 UT 45, ¶ 7, 162 P.3d 1099).

an entity listed in Subsection (11)(a) that is funded or established by the government to carry out the public's business.”

With the designation “every office” with the additional requirement of “funded... to carry out the public’s business” it is clear that the Utah State legislature did not intend to exempt a private for-profit corporation.

With no employees and no physical presence of its own, the EID Board authorized transfer of public funds to Simplifi for “management compensation” and “office expenses” and further designated Mr. Hawkes as “EID certified records officer,” “EID general manager,” and “EID Financial Manager” whereby Mr. Hawkes is contracted and compensated entirely through Simplifi.

This is a textbook example of *de facto* and *de jure* privatization of governmental functions and services falling within the broad statutory language of Utah Code § 63G-2-102 (11)(b)(i) as an “office” of a governmental entity “funded to carry out the people’s business.”

Furthermore, the designation of the private residence of Deputy Mayor Hawkes and Mr. Hawkes as the physical location of EID with the Utah Lt. Governor’s Office has inescapable implications. Namely, the EID Board bestowed upon Simplifi the governmental function of operating the Oaks Water System. Therewith, Simplifi creates and maintains governmental records at the same location registered with the Utah Division of Corporations and Commercial Code as the business location for Simplifi.

Since assuming legal title of Oaks Water System in August 1998 and pursuant to the Utah Public and Open Meetings Act, the only discernable actions of EID as a governmental entity are recorded in the EID Board’s monthly meeting minutes convened (and frequently canceled) by

Simplifi at the Emigration Canyon Fire Station, or via the internet platform Zoom during the COVID-19 pandemic.

Lastly, the EID Board lacks governmental authority to order or allow entry into a private residence. Therefore, an order from this Court against EID alone to allow access to or to produce governmental records maintained at the private residence of Deputy Mayor Hawkes and Mr. Hawkes would be a legal impossibility and thus unenforceable.

As such, Rule 19 (a) URCP mandates that “a person who is subject to service of process ... *shall* be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties” (emphasis added).

As an “independent contractor” in sole possession and control of governmental records at its registered place of business, Simplifi is a necessary party to the present litigation and Mr. Tracy’s has pursued litigation against the only legal entity who can accord relief.

b) Application of Public Records Act to Private Corporations in Sister States.

Other states also apply public record statutes to private entities under requirements similar to Utah Code § 63G-2-102 (11)(b)(i).

In *Memphis Publishing Company*, the Supreme Court of Tennessee expressly confirmed that the Tennessee Public Records Act applies to a non-profit corporation.⁵⁰

Under similar circumstances, the private entity had contracted with the Tennessee Department of Human Services to help administer a state-subsidized day care program.

⁵⁰ *Memphis Publishing v. Cherokee Children*, 87 SW 3d 67 (Tenn. 2002).

Although the trial court had determined that the non-profit corporation was also an “independent contractor” of a governmental agency, the Tennessee Supreme Court rejected the application of agency law and affirmed the broad mandate of the public records act “to promote public awareness and knowledge of governmental actions in order to ensure that governmental officials and agencies remain accountable to the people.”⁵¹

The court distinguished when the records of private corporation are considered “governmental” and thus subject to public scrutiny while purely private organizations are exempt.

Drawing from the “functionality equivalency test” developed by the Connecticut Supreme Court,⁵² the court delineated the determining factors, which establish the public’s right to access corporate documents: (1) whether the entity performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by the government.⁵³

While no single factor is dispositive in a “case-by-case analysis,” the court reasoned that “[i]n light of the myriad of organizational arrangements that may be confronted, under the functional equivalency approach, each new arrangement must be examined anew and in its own context.”⁵⁴

⁵¹ Quoting *Cf. Forsberg v. Hous. Auth. of Miami Beach*, 455 So.2d 373, 378 (Fla.1984).

⁵² *Connecticut Humane Soc’y v. Freedom of Info. Comm’n*, 218 Conn. 757, 591 A.2d 395, 397 (1991).

⁵³ *Id.* at 397.

⁵⁴ Quoting *Washington Research Project, Inc. v. Department of Health, Educ. & Welfare*, 504 F.2d 238, 245-46 (D.C. Cir.1974).

Similar tests for the application of public records acts to private corporations are recognize in Maryland,⁵⁵ Florida,⁵⁶ North Carolina,⁵⁷ Oregon,⁵⁸ and Kansas.⁵⁹

In the present case, all governmental records of EID are in the sole possession of Deputy Mayor Hawkes and Mr. Hawkes at their private residence. Moreover, the EID Board has fully relinquished its public duty to preserve and control governmental records to a for-profit private corporation under the first prong “performing a governmental function” test.

Next, Simplifi has no other income source other than public funds administered by Mr. Hawkes on behalf of EID while all legal fees in pending state and federal litigation, including presumably the instant action, are paid from the public coffers of EID at the expense of Canyon taxpayers.

As Simplifi’s corporate form appears to be a mere shell intended to obscure a lucrative salary for part-time employment exceeding that of the Utah State governor, Simplifi is subject to GRAMA provisions under the second prong “public-funding” test.

Lastly, the EID Board has decided no issue related to the Water-Telemetry GRAMA and/or the Water-Telemetry Appeal in accordance with the Utah Open and Public Meetings Act. Absent recording of deliberations and/or resolution in an EID Board meeting, EID has transferred full

⁵⁵ *A.S. Abell Publ'g Co. v. Mezzanote*, 297 Md. 26, 464 A.2d 1068, 1074 (1983).

⁵⁶ *News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group*, 596 So.2d 1029, 1031 (Fla.1992).

⁵⁷ *News and Observer Publ'g Co. v. Wake County Hosp. Sys., Inc.*, 55 N.C.App. 1, 284 S.E.2d 542, 544-49 (1981).

⁵⁸ *Marks v. McKenzie High School Fact- Finding Team*, 319 Or. 451, 878 P.2d 417, 424-26 (1994).

⁵⁹ *Kan. Op. Att'y Gen.* 93-130 (1993), available at 1993 WL 467822, 1993 Kan. AG LEXIS 116.

decision-making authority to Simplifi through Mr. Hawkes as the contracted “certified records officer” under the third prong “governmental control” test.

Simplifi is irrefutably subject to public records requirements under the authority of sister state rulings.

c) Application of Federal Freedom of Information Act and Civil Rights Violations to Private Entities and Individuals.

Federal courts have also favorably discussed the application of the functional equivalency analysis in applying the Freedom of Information Act (“FOIA”) to private entities.⁶⁰

Likewise, federal courts recognize liability under 42 U.S.C. § 1983 for private companies acting “under the color of state law” when fulfilling governmental functions and responsibilities under a “public function test.”⁶¹

Under the Utah State Utah Code § 63G-2-102 (11)(b)(i) as wells as the functionality-equivalency test applied in sister states and in federal courts, Simplifi is subject to GRAMA provisions in their entirety.

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⁶⁰ *Ry. Labor Executives' Ass'n v. Consol. Rail Corp.*, 580 F.Supp. 777, 778-79 (D.D.C. 1984).

⁶¹ *Ellison v. Garbarino*, 48 F.3d 192, 195 (6th Cir.1995). “The public function test ‘requires that the private entity exercise powers which are traditionally exclusively reserved to the state.’” *Id.* (quoting *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir.1992)).

B. Application of GRAMA Provisions to Private Individuals in Possession of Governmental Records at a Private Residence.

Simplifi Respondents' additional argument that private individuals are exempt from criminal sanctions of GRAMA is further refuted by legislative intent as documented by the plain language of the statute.

Utah Code 63G-2-801 (1)(a) provides:

A public employee *or other person* who has lawful access to any private, controlled, or protected record under this chapter, and who intentionally discloses, provides a copy of, or improperly uses a private, controlled, or protected record knowing that the disclosure or use is prohibited under this chapter, is, except as provided in Subsection 53-5-708(1)(c), guilty of a class B misdemeanor (emphasis added).

In the present case, it is uncontested that both Deputy Mayor Hawkes and Mr. Hawkes have lawful control and access to governmental records under the Water Management and Conservation Plan when the EID Board transferred operation of the Oaks Water System from Management Enterprises, LLC to Simplifi sometime in 2013.

Subsection (3)(a) further provides:

A public employee who intentionally refuses to release a record, the disclosure of which the employee knows is required by law, is guilty of a class B misdemeanor.

As an elected member of the Emigration Canyon Metro Township Counsel, it is uncontested that Deputy Mayor Hawkes is a public employees within the express definition of GRAMA criminal sanctions.

Furthermore, it is irrefutable that the governmental function of public records management has been transferred to Simplifi. It is also irrefutable that the Utah for-profit corporation operates solely through its officer and directors. As such, Deputy Mayor Hawkes and Mr. Hawkes are

subject to criminal sanction for the willful and unlawful refusal to allow access to telemetry documents required by the Water Conservation Management Plan to be maintained on the premises of the water system operator for public inspection and review under the term of the federal funding requirements of the Safe Drinking Water Act of 1974.

C. Failure to Disclose Existing Governmental Documents.

As the data provided by Simplifi through Mr. Hawkes was inconsistent with the water levels reported by Mr. Hawkes to the EID Board during the May 5, 2015 trustee meeting, the data files transmitted to Mr. Tracy were either incomplete or willfully manipulated.

Simplifi Respondents' supplemental argument that telemetry records were provided to Mr. Tracy in the "format normally maintained" by the governmental entity is again refuted by EID Board's own Water Management and Conservation Plan, which provides that "[p]ermanent *hard copy tables and graphs are created and kept in EID files* in addition to the electronic files created by the computer in use. EID's manager and Aqua Services personnel monitor the system from their homes or offices thru the computer on a daily basis to ensure that the system operates properly" (emphasis added). Ex. 3 at page 3, ¶ 5.

These documents were neither identified nor transmitted to Mr. Tracy.

D. Failure to Disclose Existing Electronic Governmental Records.

Lastly, Simplifi Respondents argue that acting solely as EID's legal representative with authority to speak and enter contracts on behalf of the district, GRAMA does not require EID (and not Simplifi) to create, compile, or format governmental documents" under Utah Code § 63G-2-

201 and Mr. Hawkes' alternative demand for payment of **\$3,000.00** to format raw data files in a Microsoft Excel spreadsheet was proper.

Apart from Mr. Tracy's objection below that Simplifi Respondents may not speak for a third party in the instant action, in the email correspondence immediately following the Water-Telemetry Appeal, Mr. Tracy reported that the software program identified and utilized by Simplifi allowed for a simple 1-click process to import raw data to a Microsoft Excel spreadsheet via the user interface button "Send to Excel." *See* The ECHO-Association email correspondence dated July 17, 2020, attached as **Ex. D**.

As the electronic files created by the "computer program in use" under the Water Conservation and Management Plan allowed for conversion and formatting of existing data, in no way did the Water-Telemetry GRAMA or Water-Telemetry Appeal require "creation," "compilation" or "formatting" of electronic files not already coded into the software program currently in use by Simplifi Respondents.

In sum, Simplifi Respondents failed to transmit accurate electronic data files, failed to transmit hard copies of tables and charts as required in the Water Management and Conservation Plan and thereby unlawfully and willfully withheld governmental records required under the federal Safe Drinking Water Act of 1974 to be maintained for public view and inspection.

The reasons and motivation for demanding payment of **\$3,000.00** to format existing data files with a single mouse click requires further examination during discovery proceedings.⁶²

⁶² *See e.g.* Utah Code Ann. § 76-10-1801(1)(c).

IV. OBJECTION TO EVIDENCE

Under Rule 4 of the Utah Rules of Evidence (“Utah R. Evid.”), the relevance of evidence is determined if “(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”

As all factual allegations of the petition for *de novo* judicial review are considered true for the purpose of the present motion, references to vacated and appealed rulings and/or pending litigation⁶³ have no bearing on a motion to dismiss under Rule 12 (b)(6) URCP and are thus improper.

Moreover, as EID is not a party to the present litigation, has no physical presence, operates solely through independent contractors, does not have possession of governmental records, may not order access to public documents maintained at a private residence, has no governmental authority to order an independent contractor and/or private for-profit company and individuals to release governmental documents, and has decided no issue relevant to the present action in a properly noticed, open and public meeting under Utah Code §54-4-203 (1)-(7), any argument or evidence submitted on behalf of EID is likewise irrelevant and should be disregarded under Rule 4 Utah R. Evid.

[This Section Intentionally Left Blank]

⁶³ Simplifi Motion at page 3, ¶¶ 7-12.

V. CONCLUSION

For the foregoing reasons, Mr. Tracy requests that the Court disregard evidence and arguments submitted on behalf of EID and deny the Rule 12 (b)(6) motion to dismiss petition for *de novo* judicial review of the denied request for disclosure of governmental documents.

DATED this 11th day of January, 2021.

MARK CHRISTOPHER TRACY dba
EMIGRATION CANYON HOME OWNERS
ASSOCIATION

/s/ Mark Christopher Tracy
Mark Christopher Tracy
Pro se Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of January, 2021, a true and correct copy of the foregoing **OPPOSITION TO RULE 12(B)(6) MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW OF DENIED REQUEST FOR PUBLIC RECORDS** was sent via electronic mail to the following counsel of record:

Jeremy R. Cook
jcook@ck.law

– and –

Tim Nielsen
tnielsen@ck.law
COHNE KINGHORN, P.C.
111 E. Broadway, Suite 1100
Salt Lake City, Utah 84111

Attorneys for Simplifi Company, Eric Hawkes and Jennifer Hawkes

/s/ Mark Christopher Tracy
Mark Christopher Tracy

EXHIBIT A



State of Utah

DEPARTMENT OF ENVIRONMENTAL QUALITY DIVISION OF DRINKING WATER

Michael O. Leavitt
Governor
Hattie K. Nielsen, Ph.D.
Executive Director
Kevin W. Brown, P.E.
Division Director

150 North 1950 West
P.O. Box 144830
Salt Lake City, Utah 84114-4830
(801) 536-4300 Voice
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Drinking Water Board
Daniel McArthur
Chairman
Boyd Workman
Vice-Chairman
David Clint
Anne Erickson, Ed.D.
Donald F. Hayes, Ph.D.
Steve Jenkins
Linda Kruse
William A. Luce
Dianne R. Nielson, Ph.D.
Dale F. Pierson
Chris Webb

January 3, 2001

Fred Smolka, Chairman
Board of Trustees
Emigration Improvement District
P.O. Box 58945
Salt Lake City, Utah 84158

Dear Mr. Smolka:

Subject: Federal SRF Loan Authorization and Procedures for Committal of Funds

On October 13, 2000 the Drinking Water Board (hereinafter called the "Board") authorized a loan of \$1,256,000.00 to the Emigration Improvement District, Salt Lake City, Utah (hereinafter called the "Applicant") for the construction of drinking water system improvements (hereinafter called the "Project"). The loan from the Board will be secured by General Obligation bond(s), Non-voted Water Revenue bond(s), or a combination thereof; issued by the Applicant as incremental disbursement bond(s) (hereinafter referred to as the Bond(s) disbursed on a quarterly basis). The Board has determined the retirement period for the Bond to be no more than 15 years, with interest and a hardship grant assessment payable on the unpaid principal from the date of each advance of loan funds. The annual Interest Rate is 1.005 % and the annual Hardship Grant Assessment is 1.005 % for an annual total effective rate of 2.01 %. The Board will require annual principal payments on the Bonds, plus interest and hardship grant assessments totaling approximately \$97,820 (See enclosed proposed bond repayment schedule). If a revenue bond is used, a reserve fund equal to this annual amount must be established by no more than 10 equal annual deposits.

Special Conditions:

This financial assistance was authorized subject to the availability of funds. The assistance represented by this authorization will be funded, in whole or in part, from the proceeds of a federal SRF Capitalization Grant (Section 1452 SDWA) to the State of Utah. Under the SRF Capitalization Grant Program, federal funds are to be made available to the State by way of authorized draws on a letter of credit over the construction period of the Project. Therefore, this authorization is expressly subject to the continued availability of federal funds through the SRF Capitalization Grant and the letter of credit related thereto.

Fred Smolka

Page 2

March 3, 2001

Neither the Board nor the State of Utah shall be bound by this authorization or by any obligation to provide either loan funds to or purchase any bonds from the Applicant if the SRF Capitalization Grant funds to which this authorization relates are not awarded or if payments under the letter of credit are withheld for any reason.

As a condition of this authorization, the Board will require the Applicant to provide a schedule of estimated engineering and construction time for the Project within ninety (90) days of the date of this letter. If the Project has not progressed sufficiently for the Board to purchase the first of the incremental disbursement bond(s) within twelve months of the date of authorization, authorized funding may be withdrawn.

As a condition of this loan, the Board will require the Applicant to establish a capital facilities replacement reserve account. Deposits to that account shall be made at least annually in the amount of five percent (5%) of the Applicant's annual drinking water system budget, including depreciation, and must continue until the Bonds are redeemed. Failure to maintain the reserve account will constitute a technical default on the Bonds and may result in penalties being assessed.

The Bonds may be prepaid, in whole or in part, at any time in minimum amounts of \$1,000 or any integral multiple thereof, with the prepayments applied against the Bond principal in inverse order of maturities. In addition, if any Bond proceeds remain after the Project is completed, those remaining proceeds shall be used to redeem Bond principal in inverse order of maturities. The Bond documents must contain the following provisions:

- i] The Bonds will initially be in the form of a single, fully-registered bond with provisions for incremental advances quarterly, based on a schedule that coincides with the rate at which engineering/construction related costs are expected to be incurred for the Project.
- ii] If revenue bonds are used the Bonds must be secured by a pledge by the Applicant of 100% of the net revenue produced by the Applicant's water system, and the Applicant will be required to warrant and demonstrate that those net revenues equal or exceed 125% of the total annual debt service requirements on the Bonds and any other obligations secured by a pledge of those revenues.
- iii] If interest is payable on the Bonds, that interest must be tax-exempt, and delivery of the Bonds must be accompanied by an opinion of recognized bond counsel that the interest is not subject to state or federal income taxes.

Mr. Fred Smolka
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January 3, 2001

- iv) If a revenue bond is used, and if the Applicant has previously issued bonds or other obligations secured by a pledge of water system revenues, the Bonds to be purchased by the Board should be issued on a parity with those prior bonds or obligations with respect to the revenue. If it is not possible for the Bonds to be issued on a parity basis, the Applicant should contact Michael Georgeson immediately at 536-4197.

Based on the information presented to the Board, the following sources of funding will be available for the construction of the Project:

Cost Sharing

<u>Agency</u>	<u>Share</u>	<u>% of Total</u>
Applicant (Direct Contribution)	\$ 586,000	31.81%
Drinking Water Board (Loan)	<u>1,256,000</u>	<u>68.19%</u>
Total Project Cost	\$1,842,000	100.00%

As a condition to the purchase of the Bonds by the Board, the Applicant must make arrangements for all loan proceeds and all other Project funds to be available for deposit into the escrow account described below at the time the Board delivers its initial disbursement unless other acceptable arrangements have been previously made.

The financial assistance is conditioned upon the availability of funds at the time of closing, satisfaction of the conditions specified in this letter, and adherence to the project schedule approved at that time. If the Project does not proceed according to the project schedule, the Board may withdraw project authorization, so that projects which are ready to proceed can obtain necessary funding. Extensions to the project schedule may be considered by the Board, but any extension requested must be fully justified. After the Project's construction bids have been opened and the below listed requirements have been met, and if the project remains substantially as approved, loan closing will proceed subject to funds available at that time. But, if substantial changes in the project are required, they must be considered by the Board for committal of funds.

As the Applicant you will need to complete the following items before the Board will purchase your Bonds:

1. The State of Utah has assigned Special Assistant Attorney General William L. Prater Esq. the responsibility of reviewing all proceedings and documents relating to the sale of bonds to the Board. His address is 6925 Union Park Center, Suite 265, Midvale, Utah 84047; telephone number (801) 566-8882 or mail to P.O. Box 71368, Salt Lake City, Utah 84171. The Applicant's bond counsel should submit the following items to his office at the times indicated below:

- a. No later than one week prior to the meeting at which the Applicant intends to adopt its Resolution for the issuance of the Bonds, a complete copy of the Resolution shall be submitted for review.
 - b. No later than two weeks after the adoption of the Resolution, the following items shall be submitted:
 - i] A true and complete photocopy of the Resolution as adopted, showing signatures of the appropriate officials of the Applicant on the Resolution and on the Notice of Meeting, Acknowledgment of Notice and Consent, Certificate of Publication, Open Meeting Certificate, and other similar documents relating to the Resolution.
 - ii] A true and complete photocopy of the minutes, notices, resolutions, and other documents relating to the Bonds, showing signatures of the appropriate officials.
 - iii] A complete copy of the proposed documents to be signed at Closing, including (but not necessarily limited to) General Certificate, Signature Identification and Non-Litigation Certificate, Receipt, Arbitrage Certificate (if required), Applicant Attorney's Non-Litigation Certificate, Certificate of Clerk (or Recorder) as to contents of Bond Transcript File, Escrow Agreement, and the Bond Attorney's Opinion.
 - iv] A copy of the water rate structure described in paragraph 3 below of this letter.
 - v] A copy of the proposed opinion letter of the Applicant's attorney described in paragraph 7 of this letter. The procedures for bond approval will be substantially the same as required by the Utah Municipal Bond Act as it applies to cities and towns. The opinion of the bond attorney must accompany ~~delivery of the Bonds~~ to the Board before proceeds of the loan will be released.
-

At or after the Closing, the Applicant will be billed by the Special Assistant Attorney General, and those legal fees must be paid by the Applicant. This is an eligible project expenditure. If the Applicant fails to close the loan after this authorization, it will nonetheless be billed for the actions taken by the Special Assistant Attorney General prior to loan cancellation.

- 2. Consistent with requirements of the law and the covenants of applicable bond resolutions, the actual payment of funds by the Board to the Applicant will not take place until the Board has assurance the funds will be used for Project costs and the Project will actually be completed. To assure this, all monies to be expended on the project, including the Applicant's share, shall be

placed in an escrow account supervised by the Applicant and the Board. The Board will make incremental advances into the account on a quarterly basis. A copy of the proposed escrow agreement shall be submitted to the Board and the Special Assistant Attorney General for Review. It is anticipated that the Applicant will spend some of its share of funds prior to bond closing to develop an additional water source(s) as required by item 18. Money spent by the Applicant on approved work prior to bond closing will be subtracted from the amount of funds required for deposit into the escrow account.

3. At the time of the adoption of the bond resolution, the Applicant shall have passed an ordinance or resolution establishing reasonable water use rates and collection enforcement remedies, taking into account many factors including the need to have sufficient revenue income for all outstanding water system debts, operation and maintenance costs, and any reserve funds. It will then be necessary to implement effective collection procedures. A copy of the rate ordinance and collection enforcement procedures shall be submitted to the Board and the Special Assistant Attorney General for review.
4. The Applicant's contract with its engineer should include the cost of developing the plans and specifications and the construction inspection of the Project. The contract should be submitted to the Division of Drinking Water for review. (This requirement is to assure the Board that adequate and appropriate arrangements are made for completing and inspecting the project within the guidelines set by the Board.)
5. The project engineer shall submit plans and specifications, bidding documents, and general conditions to the Division of Drinking Water for review prior to soliciting bids on the Project. The engineer should contact Michael Georgeson, Manager, Engineering Section; Division of Drinking Water to arrange for the expeditious review of the plans and specifications. This loan cannot be closed until after the bid opening to assure that sufficient funds are available to complete the project.
6. Rights-of-way and easements for construction, and operation and maintenance of the Project shall be acquired. The Applicant, through its engineer, shall furnish its attorney a right-of-way map showing the location of all sources, buildings, structures, pipelines, and other pertinent facilities not only in the Project but for the entire water system. This map will be signed by the engineer and presiding officer of the Applicant and a copy provided to the Applicant's attorney as a basis for the certification described below.
7. The Applicant's attorney shall certify the following items in writing to the Board:
 - a. The Applicant is a legal entity.

- b. The Applicant has valid legal title to the rights-of-way both for the project to be constructed and the remainder of the existing water system.
- c. The Applicant has established the ownership of water rights to any and all water used in the system and such rights are summarized with associated water right numbers.
- d. The contract documents for the construction of the Project have the proper and legal format and are in compliance with the Utah Code Annotated 1953 (including, but not limited to Title 34, Chapter 30).
- e. After the completed and executed construction contract, along with the performance and payment bonds and evidence of necessary insurance, has been reviewed by the Applicant's attorney, the Applicant's attorney shall furnish to the Board his legal opinion that all of such items are legal and binding and in compliance with the Utah Code.

As indicated earlier a draft of this letter is to be submitted to the Board and Special Assistant Attorney General two weeks after the adoption of the resolution.

- 8. The Bonds must be accompanied by a legal opinion of recognized municipal bond counsel that interest on the bond obligations is exempt from federal income taxation. Unless otherwise covered, the opinion must also include a statement that the project to be constructed with the Bond proceeds is not for private activity and that the Applicant has complied with all the requirements of the Board with respect to the Utah Federal State Revolving Fund (SRF) Program (R309-705 of the Utah Administrative Code).
- 9. The Applicant must obtain and maintain continuously throughout the loan repayment period, a fidelity bond on the positions handling the Applicant's funds, in an amount at least equal to the total amount of funds that will be on hand at any one time, exclusive of loan funds. This amount should be at least \$125,000. This fidelity bond must be obtained and furnished to the Board prior to the loan closing date. The names of the insured on the position fidelity bond will be "Emigration Improvement District and the State of Utah acting through the Drinking Water Board."
- 10. As a condition of a non-voted revenue bond, either:
 - a. The Applicant must provide to the Board a legal petition signed by a majority of the users of the Applicant's service area approving the issuance of a non-voted revenue bond to the Board: or

- b. The Applicant must mail notices to each water user in the Applicant's service area informing them of a public hearing. In addition to time and location of the public hearing the notice shall inform water users of the Applicant's intent to issue a non-voted revenue bond to the Board, shall describe the face amount of the bond, the rate of interest, the repayment schedule and shall describe the impact of the project. User charge rates and connection fees should be noted in the notice. The notice shall state that water users may respond to the Applicant in writing or in the public hearing within ten days after the date of the notice. A copy of all written responses and a certified record of a public hearing shall be forwarded to the Division of Drinking Water. If the Board feels there is significant opposition to the proposed Project, it may require the Applicant to hold a bond election before the Board's funds will be made available.
11. As a condition of this loan, the Board will require the Applicant to complete the attached *Water Management and Conservation Plan* form, submit it for review by the Division of Drinking Water, and adopt the approved plan (completing the *Certification of Adoption*) prior to bond closing. If the Applicant has already adopted such a plan, that plan may be submitted in lieu of this form.
12. There are a number of Federal laws, executive orders and government-wide policies that apply to projects receiving Federal financial assistance. These "cross-cutting Federal authorities" include the following:

Environmental Authorities

- Archaeological and Historic Preservation Act of 1974, Pub. L. 86-523, as amended
- Clean Air Act, Pub. L. 84-159, as amended
- Coastal Barrier Resources Act, Pub. L. 97-348
- Coastal Zone Management Act, Pub. L. 92-583, as amended
- Endangered Species Act, Pub. L. 93-205, as amended
- ~~Environmental Justice, Executive Order 12896~~
- Flood Plain Management, Executive Order 11988 as amended by Executive Order 12148
- Protection of Wetlands, Executive Order 11990
- Farmland Protection Policy Act, Pub. L. 97-98
- Fish and Wildlife Coordination Act, Pub. L. 85-624, as amended
- National Historic Preservation Act of 1966, Pub. L. 89-665, as amended
- Safe Drinking Water Act, Pub. L. 93-523, as amended
- Wild and Scenic Rivers Act, Pub. L. 90-542, as amended

Economic and Miscellaneous Authorities

- Demonstration Cities and Metropolitan Development Act of 1966, Pub. L. 89-754, as amended, Executive Order 12372
- Procurement Prohibitions under Section 306 of the Clean Air Act and Section 508 of the Clean Water Act, including Executive Order 11738, Administration of the Clean Air Act and the Federal Water Pollution Control Act with Respect to Federal Contracts, Grant, or Loans
- Uniform Relocation and Real Property Acquisition Policies Act, Pub. L. 91-646, as amended

- Detainment and Suspension, Executive Order 12549
 - Social Policy Authorities
- Age Discrimination Act of 1975, Pub. L. 94-135
- Title VI of the Civil Rights Act of 1964, Pub. L. 88-352
- Section 13 of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500 (the Clean Water Act)
- Section 504 of the Rehabilitation Act of 1973, Pub. L. 93-112 (including Executive Orders 11914 and 11250)
- The Drug-Free Workplace Act of 1988, Pub. L. 100-690 (applies only to the capitalization grant recipient)
- Equal Employment Opportunity, Executive Order 11246
- Women's and Minority Business Enterprise, Executive Orders 11625, 12138, and 12432
- Section 129 of the Small Business Administration Reauthorization and Amendment Act of 1988, Pub. L. 100-590
- Anti-Lobbying Provisions (40 CFR Part 30) [applies only to capitalization grant recipients]

The Applicant must agree to comply with the above mentioned Federal laws, executive orders and government-wide policies that apply to the Project and do the following:

- a. Ensure, to the fullest extent possible, that Minority and Women's Business Enterprise procurement requirements are achieved in all procurements for prime contractors, subcontractors, suppliers, and others. Ensure that the six affirmative steps are taken to assure compliance with the State's "fair share goals" in all procurements. The required language and instructions will be supplied by the Division of Drinking Water (Division).
 - i) Bid solicitations shall state that this is a federally funded project requiring compliance with the State's "fair share goals" and federal EEO regulations.
 - ii) The "Special Conditions" or "Supplemental Conditions" in the bid documents shall contain the language and instructions specifying the MBE and WBE procurement requirements, provided by the Division.
 - iii) The same bid documents shall also contain the federal EEO requirements.
- b. Completion and submittal to the Division of Drinking Water of the MBE/WBE utilization form 334 before loan closing for planning design services and two weeks after the end of each quarter during construction for construction services.
- c. Completion of EPA Form 4700-4, Pre-award Compliance Review Report and submittal to the Division of Drinking Water within 45 days before loan closing.
- d. Include the following certification in the bond resolution:

"The Issuer agrees, in accepting the proceeds of the Series _____ Bonds, to comply with all applicable state and federal regulations related to the Utah State Revolving Fund administered by the Drinking Water Board. These requirements include, but are not limited to, Title XIV of the Safe Drinking Water Act of 1996, OMB Circular A-133, the Utah Federal State Revolving Fund (SRF) Program (R309-705 of the Utah Administrative Code), the Utah Municipal Bond Act, the Utah Money Management Act, the Utah Procurement Code and the State of Utah Legal Compliance Audit Guide."

13. The applicant shall submit a cash draw-down schedule prepared and certified by their consulting engineer to be a schedule which coincides with the rate at which construction related costs are expected to be incurred for the Project.
14. The applicant shall receive "firm commitments" from at least 57 (85%) of the 67 homeowners anticipated as participants under this project. This would include both the payment of the connection fee and a signed contract to pay water utility bills from each homeowner.
15. Provide acceptable evidence it owns sufficient water rights to serve at least 280 homes (213 homes and lots in EID and 67 homes outside of the District).
16. Document how it is organized, including an organizational chart and description of responsibilities.
17. Provide a water system operation plan satisfactory to the Division of Drinking Water, including operation and maintenance duties.
18. Find additional acceptable sources of drinking water. Demonstrate that together the new sources and the two existing wells will adequately serve at least 280 homes. The sources may be wells, springs, and/or extending another acceptable source of water to the service area. The District must also have Division approval of its "Preliminary Evaluation Report" (PER) for its sources.

In order to facilitate the timely completion of the financial assistance requirements outlined in this letter, the Applicant and its attorney and engineer should submit to the Division of Drinking Water all of the items listed in numbered paragraphs 2 through 18 above prior to seeking committal of funds from the Board and no later than 30 days before the bond closing, and the Applicant's bond attorney should submit to the Special Assistant Attorney General the items listed in subsection "b" of paragraph 1 on or before this date. As much as possible, this information should apply to the Project in general to allow a single review.

Mr. Fred Smolka

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January 3, 2001

These requirements must be completed on or before September 15, 2001. If the Applicant fails to reasonably comply with the Project schedule, the Authorization may be withdrawn in accordance with R409-705-2.

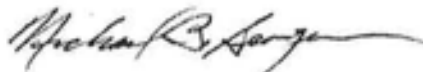
The Division of Drinking Water must be reimbursed for its expenses in preparing this loan and for those expenses administering the construction contract. The loan preparation expenses will be billed to the Applicant shortly after the loan closing. The contract administration costs will be billed to the Applicant periodically through the life of the construction contract. These costs are eligible project expenses. If the Applicant fails to close the loan after its authorization, the Applicant will also be billed for the Division's expenses.

These requirements will probably not cover all the matters pertaining to the Project. We anticipate that specific questions on matters relating to your Project will arise, and we are confident that a joint cooperative effort can resolve the issues.

If you have any questions concerning these requirements, please contact Michael Georgeson of the Division of Drinking Water.

Sincerely,

DRINKING WATER BOARD



Michael B. Georgeson
Assistant Executive Secretary

KEW:kew

Enclosures:

cc: William Prater, Esq., William L. Prater, LLC, P.O. Box 71368, S.L.C., UT 84171
Rick Wheadon, Carollo Engineers, 1935 E. Vine Street, Suite 200, Salt Lake City, UT 84121
Shirl D. Clarke, Adm., P.C.L.B. Fund, Div. Comm. Dev., 324 So. State St. Suite 500 S.L.C., UT 84111
Richard E. Walker, Adm., CDBG, Div. Comm. Dev., 324 So. State St. Suite 500 S.L.C., UT 84111
John R. Cox, USDA, Rural Development, P.O. Box 11350, Room 4431, S.L.C., UT 84147
Steven L. Wilde, Div. Water Resources, DNR, P.O. Box 146201, SLC, UT 84114

EXHIBIT B

Water Management and Conservation Plan

Emigration Improvement District - November 14, 2002

A. Background Information:

The Emigration Improvement District "EID" was established by vote of the Salt Lake County Commission in the fall of 1968 for the purpose of providing water and sewer services to Emigration Canyon residents. In June 1998, EID contracted with the Boyer Company and Freeze Creek Water Company "Boyer" to take over the water system they had built to provide water for Emigration Oaks Subdivision - Phase I - 6A "Oaks". This system has been run by EID since June 1998 and currently serves approximately 113 homes. As part of the agreement with Boyer, Boyer agreed to hold the number of lots to be developed in the future to a finite number and EID agreed to provide water services for Oaks. Build out of Oaks currently stands at 223 connections, or approximately 110 more than are currently served.

The engineers for EID determined that the Oaks system was insufficient in capacity both as to source and as to storage to provide service for the entire 223 connections. At about the same time, residents from two areas of the Canyon - Young Oaks/Little Oaks/Quads at mid canyon and Lower Burr Fork/Killyons Canyon in the upper canyon petitioned EID to expand the existing system to include their neighborhoods.

B. Existing Resources:

1. Water Rights - EID owns water rights 57-7796 (a17521, t26672) and 57- 8865 (a12710b), which combined, as modified by their respective change applications, provide for the annual diversion of approximately 740 acre-feet and allow for diversion from the three existing wells in the Oaks system. EID leases portions of its water rights to approximately 35 homeowners for use at their residences. There has been a moratorium on new water right appropriations in the canyon for approximately forty years. With the exception of the Oaks and Emigration Place, most of the existing homes in the canyon have individual water rights. Most individual water rights have been developed and are associated with existing homes with few unperfected rights remaining in the Canyon. In evaluating future impacts to the Canyon's water resources, EID considers all existing water rights whether held by the District or by individual Canyon residents.

2. Wells - Two wells are currently used to provide for the Oaks water system. Freeze Creek Well #1 (FCW#1) is 500 feet deep and is located in the Freeze Creek drainage. It is capable of providing about 60 - 70 gallons per minute continuously for several days to a week at a time. After sustained use, the level in the well drops and production rates are very limited. This well is used to supplement the production of Freeze Creek Well #2 (FCW#2). FCW#2 is approximately 800 feet deep with the pump placed at approximately 650 feet. It will normally pump approximately 200 gallons per minute for more sustained lengths of time. It will reach as high as 300 gallons per minute when the water level is high and has dropped to as low as 100 gallons per

minute when the water levels get very low. This well when assisted from time to time by FCW#1 has sufficient water to provide for the existing 111 homes in Oaks, plus a few more. However, it will not be able to provide for the entire Oaks build out of 224 homes.

A new well (BFW) has been drilled in the Brigham Fork drainage to a depth of 1,200 feet and was drilled on a 30 degree angle off vertical, to maximize the number of beds of aquifer material that it penetrates so as to maximize production and increase the aquifer storage potential. Initial pump tests indicate that EID has been successful in these goals. However, as with any bedrock well, only time will tell its true long-term pumping capacity. EID intends to equip BFW with a pump which can produce up to approximately 300 gpm, but, in order to protect water quality and insure against ground-water mining, EID intends to pump at an average rate of approximately 200 gpm. It is believed that placing BFW into production in combination with FCW#1 and FCW#2 will be sufficient to meet the needs of Oaks as well as the expansion areas.

Several years ago EID commissioned a hydrogeologic study of upper Emigration Canyon. That study catalogued surface and ground-water sources and identified potential source aquifers. The study identified that the canyon's aquifers are part of an integrated hydrologic system upon which present and future uses are dependant. All present and future water diversions impact the canyon's water resources, though the degree of direct impact to stream flows may differ depending on the source developed.

3. Storage - EID currently owns a 300,000 gallon underground concrete reservoir located within Oaks. An additional one million gallon concrete underground reservoir is anticipated as a part of the expansion project and will accommodate the two new areas and the Oaks shortfall in required facilities.

4. Distribution System - Oaks has water lines, fire hydrants, meter boxes, pressure reducing valves where appropriate and various and sundry connections and fixtures in place and is a viable operating system. The main pipeline is 8 inches in diameter. The system provides a minimum 1,000 gallon per minute flow with the exception of one spur known as Old Oak Road which has up to five homes on it that may not receive a full 1,000 gallon per minute flow. An eight inch line with 5 fire hydrants was installed in an Easterly direction from Brigham Fork Circle (the furthest East road in Oaks) by Steve Creamer in 2000 as a condition of a contract to provide water services to Creamer by EID. That pipe will become part of the distribution system and will connect the existing system to the new reservoir site and beyond to the Lower Burr Fork/Killyon homes.

5. Telemetry System - A new telemetry system was installed by EID in 2000 for the Oaks water system. This system communicates via radio transmission and measures and records well depths, reservoir levels, pumping volumes, rates of pumping and electrical use. The pumps are selectively prompted to turn on automatically when the reservoir level gets below a prescribed level and turn off automatically when the level gets up to a prescribed level. All of these levels, volumes etc are available for observation and print-out on-line through PC Anywhere. The

levels are as set by an operator on a computer in Well house #2 or on-line. Permanent hard copy tables and graphs are created and kept in EID files in addition to the electronic files created by the computer programs in use. EID's manager and Aqua Environmental Services personnel monitor the system from their homes or offices thru the computer on a daily basis to assure the system continues to operate properly. The system includes a dial up system to warn the operator in case of unusual use, break in service etc.

C. Current Water Use and Determination of Future Requirements - Water Management Issues and Goals:

- 1. Use and Delivery** - Both Oaks and Emigration Place Subdivisions have community water delivery systems. The Oaks and Emigration Place systems have water meters, while any other meters are voluntary and are read and monitored only by the owners. EID does have a program wherein they lease water rights to approximately 35 residences in the canyon. EID leases .75 acre feet per household, .45 acre feet for indoor use and .30 acre feet for outdoor use. Such leases and amounts apply to residents both within and outside of the water system.
- 2. System Additions** - Since the existing source and storage are inadequate to meet the build-out of 300 in the expanded water service area, plans are being implemented to add storage and source to the system.
- 3. Meter Use** - Meters are required by EID for all connections served by EID.
- 4. Limited Resource** - For a number of years EID has been concerned about protecting the Canyon's limited water resources. More than ten years ago EID drilled 5 monitor wells in the Canyon and regularly measures water levels in these wells to determine whether there are changes in the aquifers upon which Canyon residents are dependant for their culinary water supply. Further, a continuing EID goal is to manage existing water resources in the canyon in such a way as to keep water flow in the creek the large majority of the time. While it is understood that in some drought years the stream may go dry, as it has historically, in most years it should be possible to maintain a flow. Many residents currently have wells (some quite shallow) along the stream that depend on the stream for recharging of the aquifer from which they derive their domestic and irrigation water. If the stream is allowed to dry up, then these wells along the creek suffer and many also dry up leaving the residents without a water supply. Recognizing that existing and future water depletions will impact the flows of Emigration Creek, EID adopted a creek protection policy to maintain our stream flow in all but the worst drought years. After substantial investigation, it was determined that the Canyon hydrology could not support more than approximately 700 homes without meaningful impacts to the flows in Emigration Creek. Since there are already roughly 450 homes in the canyon and 100 more lots approved for which water has been provided for, there remain about 150 future water services

EID will continue to promote water conservation throughout the Canyon. Not only must attempts be made to manage the number of homes in the canyon, the canyon must also promote

conservation by all homes. As an educational guide aimed at reducing water usage, EID hired Gayle Weyher Landscape Design to do a study and published a pamphlet entitled "A Guide to Landscaping with Available Water in Emigration Canyon". This booklet identifies low water use plants and gives ideas on how to landscape so that minimal water is used. This pamphlet has been distributed to all canyon residents.

5. Conservation Campaign - During the late summer and early fall of 2000, an intensive campaign to reduce water use in the Oaks was undertaken by EID, because of declining water levels in its wells. The campaign was successful in reducing water use to about 2/3 of its prior use. The conservation awareness level of the residents is good and lower consumption levels have been maintained.

6. Rate Structure - A "progressive" water rate structure was adopted in late 1999 for the Oaks water system that is owned by EID. The rate for the first 1,000 gallons is \$ 2.15. The second 1,000 gallons in at a rate of \$ 2.20 per thousand. The rates continue to increase by \$.05 per 1,000 gallons for each 1,000 gallons used. If water is used conservatively, then the use fee is very moderate, however, the more water that is used, the higher the use fee becomes per gallon. Excessive use can result in very high cost to the user thus penalizing excessive use. EID intended to continue with this rate structure as the new expansion is completed, but may adjust and fine tune it in the future.

D. Identification of Alternatives to Meet Future Water Needs:

EID does not have plans to expand beyond the current expansion project described herein. Any water system improvement in the Canyon should be built in such a way that they do not have to be re-done if additional expansion is undertaken.

E. Evaluation and Selection of Alternatives:

Future demands for source, storage or distribution lines for areas served in the expanded water system should be minimal or non-existent. However, if additional source or storage is required it may dictate additional pipe lines to hook-up with the existing system. Research would be done to determine various alternatives that might be used to meet the need. Public hearings and careful assessment would be conducted by EID if such an expansion is required. Trustees are sympathetic to the Canyon environment and would strive to have as little impact as possible on animals, flora, fauna and visual appearance of our canyon.

F. Periodic Evaluation:

EID will review this Water Management and Conservation Plan periodically to determine if updating is appropriate. Trustees are on alert for new ideas, trends and policy that would help us better manage our precious resource - water. This is a major duty of the Trustees. EID will continue to monitor both the monitor wells owned by EID, stream flows, and use by customers to determine if there is deterioration in our conservation program.

G. Associated Plans - Emergency Response Plan:

Each year EID adopts an "Emergency Response Plan" as a part of its application for a land disposal waste permit. This Plan of the EID Board of Trustees is attached and hereby made a part of this Water Management and Conservation Plan.

H. List of Utility Administrators and Officers:

Board of Trustees:

Michael Hughes, Chairman

Lynn B. Hales, Clerk

William Bowen

Manager:

Fred A. Smolka, Treasurer

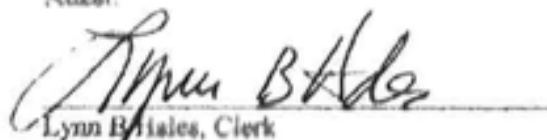
I. Certification of Adoption:

We, Trustees and officers of the Emigration Improvement District, hereby certify that the attached Water Management and Conservation Plan has been established and adopted by the Board on November 14, 2002.


Michael Hughes, Chairman

11-14-02
Date

Attest:


Lynn B. Hales, Clerk

11-14-02
Date

EXHIBIT C

From: Rosemary Cundiff <rcundiff@utah.gov>
Subject: Re: Records Manger and Chief Administrative Officer for Emigration Improvement District
Date: September 23, 2020 at 9:43:13 AM PDT
To: The ECHO-Association <m.tracy@echo-association.com>

Hi Mark,

The records officer (ARO) and chief administrative officer (CAO) are as follows:
ARO is Eric Hawkes 801-243-5741 eric@ecid.org
CAO is Mike Hughes 801-243-5741 mike@ecid.org
Have an awesome day.

Rosemary Cundiff
Government Records Ombudsman
Utah State Archives
(801) 531-3858

On Wed, Sep 23, 2020 at 9:58 AM The ECHO-Association <m.tracy@echo-association.com> wrote:

Dear M. Cundiff,

Can you please verify the identity of the Records Manager and Chief Administrative Officer for Emigration Improvement District (aka Emigration Canyon Improvement District)?

Kind Regards,

Mark Christopher Tracy
Tel. 929-208-6010

EXHIBIT D

From: The ECHO-Association <m.tracy@echo-association.com>

Date: July 17, 2020 at 11:55:17 AM PDT

To: mike@ecid.org

Cc: Eric Hawkes <eric@ecid.org>, brent@ecid.org, david@ecid.org

Subject: De Facto Denial of GRAMA Request & Final Deadline for Judicial Review Filing - Utah Third District Court (Telemetry Data)

Dear Michael Scott Hughes, Chief Administrative Officer of Emigration Improvement District,

Attached herewith is a screen shot of a data query utilizing the software program "LGH File Inspector for Wonderware InTouch" as identified and provided by Emigration Improvement District ("**EID**" aka ECID) General Manager Eric Hawkes of the Simplifi Company in response our GRAMA request of June 10, 2020 and our subsequent GRAMA appeal dated June 27, 2020 for telemetry data (*i.e.*, water level reports) for all EID water sources and storage facilities (*see* attachment below).

We note that EID through the Simplifi Company demanded payment of **\$3,000.00** in order to provide an Excel spreadsheet of the requested telemetry data although a simple click of the programming button "Send to Exel" is readily available in the software program (*see id.* and email correspondence dated July 9, 2020 attached below).

Furthermore, it appears that the water levels reported by the Simplifi Company in the EID Trustee meeting of **May 5, 2016** in no way reflect the data provided by EID in response to our GRAMA request (*see* audio excerpt of EID Trustee meeting below) nor does the data appear to reflect the static water level the Upper Freeze Creek Well as first recorded in the Driller's Report on file with the Utah State Division of water Rights (*see* driller report below).

Before commencing further legal action, and publishing the attached information on Emigration Canyon Home Owners Association website as stated in our GRAMA request for expedited response under Utah Code section 63G-2-204 (5), we wanted to give you an opportunity to clarify these discrepancies as well as your demand of payment in the amount of \$3,000.00 in order for EID to comply with our request for public records.

Once again, we hereby request Excel spreadsheets of the requested telemetry data based on the following simple 5 step process:

1) Under the rubric "STEP 1: Set Query Time"

set "Calendar" to "September 17, 2017;

set "Query Duration" to 999;

set "Query Interval" to 1 days.

2) Under the rubric "STEP 2: Select Tags to Query"

Select the following tags:

- "TANK1LEVEL", "TANK2LEVEL", "BFWELL_LEVEL", "WELL1WELL_LEVEL", "WELL2WELL_LEVEL" and "UFCWELLWELL_LEVEL".

3) Click the area identified as "STEP 3 Click Run Query".

4) Click the area identified as "Send to Excel" to create an Excel file.

5) Complete the previous 4 steps for the calendar dates December 23, 2014, March 12, 2012, June 17, 2009, and September 22, 2006 thereby creating five (5) Excel spreadsheets for each of the aforementioned data query.

We do not believe that this process will require more than 15 minutes as stipulated in Utah Code section 63G-2-203 (2)(c).

Please note that we intend to file judicial review under Utah Code section 63G-2-404 with the Utah Third District Court for the *de facto* denial of our GRAMA request on **July 31, 2020** should EID fail to comply with our request for public records and clarify the discrepancies as outlined above.

Kind Regards,

Mark Christopher Tray
dba Emigration Canyon Home Owners Association
Tel. 929-208-6010