Scot A. Boyd (9503)
scot.boyd@chrisjen.com
Stephen D. Kelson (8458)
Stephen.kelson@chrisjen.com
Bryson Brown (14146)
bryson.brown@chrisjen.com
Christensen & Jensen P.C.
257 East 200 South, Suite 1100
Salt Lake City, Utah 84111
Attorneys for Petitioner
Emigration Canyon Home Owners Association

IN THE THIRD DISTRICT COURT OF THE STATE OF UTAH

EMIGRATION CANYON HOME OWNERS ASSOCIATION, a Utah Corporation; Petitioner, vs. KENT L. JONES, Division Director of the Utah State Division of Water Rights; EMIGRATION IMPROVEMENT DISTRICT, a special service district of the state of Utah, Respondents.	**MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS** **Case No. 190904621** **Judge: Laura Scott**

Plaintiff Mark Tracy dba Emigration Canyon Home Owners ("Mr. Tracy"), through counsel, hereby opposes Emigration Improvement District's (the "District") motion to dismiss,[1] stating as follows:

I. BACKGROUND AND PREFERRED DISPOSITION AND GROUNDS

[1] Docket no. 12, filed July 11, 2019 ("Opp'n Mem.").

This case seeks judicial review of the State Engineer's decision to grant the District's request for an extension of time to file proof of beneficial use. Utah law provides that a water right holder is entitled to change the point of diversion or the place or nature of use of water so long as vested rights are not impaired by the change. To do so the water rights holder must submit a change of use application to the State Engineer.

If the State Engineer approves the change of use application, the water rights holder has a limited amount of time to "perfect" the change in use by putting the water to beneficial use – *i.e.,* building the infrastructure necessary to extract water from the new point of diversion and actually extracting water from that approved water source – and then filing a proof of beneficial use with the State Engineer. A water rights holder may petition for an extension of time to file a proof of beneficial use, as permitted under Utah Code § 73-3-12.

The District had a deadline of December 31, 2018 to a submit to the State Engineer proof of beneficial use concerning a change application for water right no. 57-8865 (the "Change Application"). The District missed the deadline, and the Change Application lapsed. Via a letter dated January 18, 2019 (the "Letter"),[2] however, the State Engineer purported to reinstate the Change Application on grounds that, on January 17, 2019, the District had filed a request for an extension of time to submit a proof of beneficial use (the "Extension Request").[3] Via order dated April 23, 2019, the State Engineer granted the requested extension (the "Order").[4]

Because the State Engineer mailed the Order to the wrong address, Mr. Tracy received a copy of the Order just days before the May 13, 2019 deadline to petition for reconsideration.

[2] Compl., ex. A.
[3] Compl., ex. F.
[4] Compl., ex. B.

Mr. Tracy subsequently sent a request for reconsideration to the State Engineer. Via letter dated May 16, 2019, the State Engineer denied the request for reconsideration on grounds that it was untimely. Mr. Tracy subsequently filed this action seeking judicial review of the State Engineer's orders.

In its motion to dismiss, the District argues that the State Engineer correctly applied the applicable statutes when it granted the Extension Request and reinstated the Change Application. As discussed in sections II.A and II.B below, however, the District's arguments on these points are without merit. Because the Extension Request was untimely and otherwise failed to show that the District was holding the Change Application for the public's reasonable future water requirements, the State Engineer erred in granting the Extension Request. Additionally, because the District never made a showing of "reasonable cause" for reinstatement of the Change Application, the State Engineer erred in reinstating it.

The District also argues that the request for reconsideration was untimely, that Mr. Tracy lacks standing to bring the current suit because Mr. Tracy filed the suit under the name of his registered dba, and because the request for reconsideration is moot. As discussed in sections II.C, II.D and II.E below, these arguments also are without merit.

Accordingly, Mr. Tracy seeks an order denying the District's motion to dismiss, at least insofar as the motion seeks dismissal of the claims seeking judicial review of the State Engineer's decision to reinstate the Change Application and the State Engineer's decision to grant the Extension Request.[5]

[5] Having reviewed the District's opposition to claims for relief nos. 4 and 5, Mr. Tracy does not oppose dismissal of the same.

II. ARGUMENT

A. The State Engineer failed to follow the statutory requirements when approving the Extension Request.

The District argues that "the State Engineer's decisions to approve the Extension Request was clearly consistent with the statutory requirements."[6] This argument fails for two reasons. First, because the Extension Request was untimely, the State Engineer lacked authority to authorize it. Second, the District did not meet its burden of showing that the change application is necessary to meet the public's reasonable future water requirements.

1. The Extension Request was untimely.

Citing Utah Code § 73-3-18, both the District and the State Engineer take the position the State Engineer has authority approve a request for an extension of time to file proof of beneficial use, even if the request occurs after the original deadline has passed, if the request for an extension occurs within sixty days after expiration of the original deadline. This argument, however, contravenes the express language of Utah Code § 73-3-12(2)(c), which states, "[a]n applicant shall file a request for an extension of time with the state engineer on or before the date set for filing proof."[7]

It is axiomatic "'that when two statutory provisions conflict in their operation, the provision more specific in application governs over the more general provision.'"[8] Here, there are two statutory provisions that conflict in their operation: section 73-3-12(c), which requires

[6] Opp'n Mem., p. 7.
[7] Utah Code § 73-3-12(2)(c).
[8] *Asset Acceptance LLC v. Utah State Treasurer, Unclaimed Prop. Adm'r*, 2016 UT App 25, ¶ 10, 367 P.3d 1019 (quoting *Taghipour v. Jerez*, 2002 UT 74, ¶ 11, 52 P.3d 1252); *see also Osuala v. Aetna Life & Cas.*, 608 P.2d 242, 243 (Utah Sup.Ct. 1980) (the "basic rule" of statutory construction is that "specific provisions prevail over more general expressions").

filing for an extension before the original deadline passes; and section 73-3-18(2), which ostensibly permits an applicant to file an extension of time within sixty days after the deadline to do so has passed. The more specific of these two provisions is section 73-3-12(2)(c), which only applies to requests for an extension of time to file proof of beneficial use, while the more general of the two provisions is section 73-3-18(2), which broadly applies to any failure to comply with Utah Code, Title 73 or an order of the State Engineer.

Because section 73-3-12(2)(c) is the more specific of the two provisions, it controls. Accordingly, the Extension Request was untimely, as it occurred after the original deadline of December 31, 2018, and the State Engineer erred in treating it as timely filed.

2. The District failed to present any evidence – let alone convincing evidence – that the change application was necessary to accommodate the public's reasonable future water requirements.

Citing subsection 73-3-12(2)(h), the District argues that, because the Extension Request baldly asserts that the District needs to hold the Change Application to accommodate the public's reasonable future water requirements, the State Engineer did not err in granting the extension. This argument ignores the reality that, to qualify for an extension, an applicant must produce evidence – as opposed to bald, uncorroborated assertions – that justifies and supports the extension requested. Indeed, a person or entity seeking an extension of time to file proof of beneficial use must establish the right to an extension via a "high type of convincing evidence."[9]

Here, as mentioned above, both the District and the State Engineer justified the District's extension under subsection 73-3-12(2)(h), which generally requires the State Engineer to approve an extension request made by a "public water supplier," such as the District, if the

[9] *See Carbon Canal Co. v. Sanpete Water Users Ass'n*, 425 P.2d 405, 407 (Sup.Ct. 1967).

public water supplier shows that it is holding – but not developing infrastructure under – a change application in order to "meet the reasonable future water or electricity requirements of the public."[10]

However, the District presented the State Engineer with no evidence that the change application was necessary to meet the public's reasonable future water requirements, let alone the high type of convincing evidence required for a time extension. While the Extension Request baldly states that "[t]here are presently just over 300 connections on the system" and that the District historically has added "between 5-10 connections per year," it provided no evidence of this. Nor did the District provide any evidence of the amount of water needed to sustain 5-10 new connections per year, of the probable or potential locations of future connections, that future connections would continue to occur at a rate of 5-10 per year, or that production from the existing two wells would be inadequate to accommodate future connections. Without this sort of information or evidence, the State Engineer had no basis for determining what the public's reasonable future water needs are or whether the change application is necessary to accommodate those needs.

In short, the District's bald assertions concerning the public's future water needs were insufficient, and the State Engineer erred in treating those bald assertions as the "high type of convincing evidence" needed to justify an extension. Under these circumstances, it cannot be said that "the state engineer correctly performed an administrative task."[11]

[10] Utah Code § 73-3-12(2)(h).
[11] *Searle v. Milburn Irrigation Co.*, 2006 UT 16, ¶ 35, 133 P.3d 382.

B. The State Engineer failed to follow the statutory requirements when reinstating the District's lapsed application.

The District argues that "the State Engineer's decision to reinstate the Change Application was clearly consistent with the statutory requirements."[12] This argument is incorrect. The State Engineer not only failed to follow the procedures prescribed by the Administrative Procedures Act, but also failed to provide any substantive findings or analysis under the statutory standard for reinstatement.

Reinstatement of a change application only can occur if the State Engineer conducts an informal adjudication and, based upon the materials presented during the adjudication, determines that there is "reasonable cause" for reinstatement. Section 73-3-18 of the Utah Code sets forth the standard for reinstatement of a lapsed water right[13]:

> (1) If an application lapses for failure of the applicant to comply with a provision of this title or an order of the state engineer, the state engineer shall promptly give notice of the lapse to the applicant by regular mail.
> (2) Within 60 days after notice of a lapse described in Subsection (1), the state engineer may, *upon a showing of reasonable cause*, reinstate the application with the date of priority changed to the date of reinstatement.

As this provision makes clear, the State Engineer may reinstate a change application, but only if there is a showing of reasonable cause. This showing must occur as part of an informal adjudication that complies with the Administrative Procedures Act, Utah Code §§ 63G-4-101 *et al.* ("APA") and chapter R655-6 of the Utah Administrative Code ("UAC"). Indeed, any "action or proceedings" under which the State Engineer "determines the legal rights, duties, privileges, immunities, or other legal interest of one or more identifiable persons" qualifies as an

[12] Opp'n Mem., p. 6.
[13] Utah Code Ann. § 73-3-18(1) and (2).

adjudication.[14] A decision to reinstate a lapsed changed application is an action that determines the legal rights of an identifiable person. To be sure, the applicable rules expressly state that "requests for reinstatement" are "adjudicative proceedings."[15]

Under both the UAC and APA, following an adjudication concerning a request for reinstatement, the State Engineer must "make and enter a signed order in writing" that includes, among other things, "the decision" and "the reasons for the decision."[16] Here, the Letter does not invoke the "reasonable cause" standard set forth in subsections 73-3-18(1) and (2), cite any authorities for what "reasonable cause" means in this context, or explain why there was reasonable cause for reinstatement of the Change Application. Accordingly, the State Engineer failed to follow the statutory requirement to set forth in writing the reasons for his decision.

The State Engineer also failed to require the District to make a showing of reasonable cause. The District's change application lapsed because the District failed to submit a request for an extension of time to file proof of beneficial use before the deadline to do so had passed. In this context, the question before the State Engineer was whether the District had shown reasonable cause for its failure to request an extension before the December 31, 2018 deadline. In *Green River Canal Co. v. Olds (In re Gen. Determination of Rights to the Use of Water)*, the Utah Supreme Court explained the meaning of "due cause" or "reasonable cause" under a provision of Title 73 similar to section 73-3-18: "a claimant seeking a retroactive extension must show excusable neglect or good cause excusing the late filing. Excusable neglect occurs, in this

[14] Utah Admin. Code § 655-6-3.
[15] Utah Admin. Code § 655-6-2.
[16] Utah Admin. Code § 655-6-16(A); *see also* Utah Code Ann. § 63G-4-203(i).

context, when an admittedly neglectful delay in filing is excused by special circumstances."[17] "Evidence of events occurring after the [deadline] is irrelevant to a … due cause analysis."[18]

There is no such showing in the record. The Letter makes no finding of excusable neglect or reasonable cause, nor does it explain what the special circumstances were that ostensibly justified the District's late filing. Indeed, the only justification given for the reinstatement was the District's filing of the Extension Request,[19] but the Extension Request does not explain why the District could not submit the request before the December 31, 2018 deadline or otherwise engage in any analysis under the excusable neglect or reasonable cause standard.[20] Additionally, under *Green River Canal*, the mere fact that the District filed the Extension Request is irrelevant to the reasonable cause analysis because the filing occurred after the December 31, 2018 deadline.

Because the State Engineer failed to make any findings or conclusions under the "reasonable cause" standard and because there otherwise is not a showing of reasonable cause in the record, the State Engineer failed to follow the statutory requirements. Under these circumstances, it cannot be said that the State Engineer correctly performed his administrative task.

C. The State Engineer erred in treating Mr. Tracy's motion for reconsideration as untimely.

1. The State Engineer's failure to strictly comply with statutory notice requirements prevented or tolled the triggering of the 20-day time period within which to file a motion for reconsideration.

[17] 2004 UT 106, ¶ 43, 110 P.3d 666.
[18] *Id*.
[19] Compl., ex. A.
[20] Compl., ex F.

When the State Engineer issues an order granting or denying a request of extension of time to file proof of beneficial use, "[a] copy of the [State Engineer's] order shall be promptly mailed by regular mail to each of the parties."[21] Here, the State Engineer failed to strictly comply with the statute. It mailed the Order to Mr. Tracy on May 8, 2019 – fifteen days after it issued the order. The State Engineer's failure to strictly comply with statutory notice requirements prevented or tolled the triggering of the 20-day time period within which to file a motion for reconsideration. This result is supporting by *Longley v. Leucadia Fin Corp.*, which held that that, "because the public notice given regarding [the applicant's] fifth extension request did not strictly comply with the statutory requirements … the notice was invalid and the statutory time period within which [the protestant] was required to protest was never triggered."[22]

Accordingly, because there was a 15-day delay in mailing the Order to Mr. Tracy, Mr. Tracy should have had the benefit of an additional 15 days to move for reconsideration of the order, making his motion for reconsideration due on May 23, 2019. A contrary result would open the door for the State Engineer to engage in gamesmanship on future applications, that is, wait until the time to move for reconsideration is close to expiring before mailing notice of its orders.

2. The State Engineer's decision to deny the motion for reconsideration on untimeliness grounds violates Mr. Tracy's rights to due process.

Under the facts alleged in the petition, the State Engineer's decision to deny Mr. Tracy's motion for reconsideration as untimely violated Mr. Tracy's right to due process under the Fourteenth Amendment to the United States Constitution and article I, section 7 of the Utah Constitution. Indeed, "for rights the law deems subject to formal process (in courts or other

[21] Utah Admin. Code § 655-6-16.
[22] 2000 UT 69, ¶ 26, 9 P.3d 762.

adjudicative bodies), due process requires notice reasonably calculated to inform parties that their rights are in jeopardy and a meaningful opportunity to be heard in the course of such proceedings."[23]

The UAC and the APA contemplate that informal adjudicative proceedings before the State Engineer are subject to formal process. This process includes a protestant's right to move for reconsideration of the State Engineer's decision to grant a request for extension of time to prove beneficial use.[24] It also includes the protestant's right to prompt notice of any such decision: "[a] copy of the [State Engineer's] order shall be promptly mailed by regular mail to each of the parties."[25]

Here, as alleged in the complaint, the State Engineer mailed its decision granting the District's request for an extension of time to the wrong address.[26] The State Engineer eventually recognized the mistake when its correspondence was returned as undeliverable and subsequently resent the notice to the correct address, but Mr. Tracy did not receive the resent notice until just

[23] *Bolden v. Doe (In re J.S.)*, 2014 UT 51, ¶ 20, 358 P.3d 1009; *see also Bailey v. Bayles*, 2002 UT 58, ¶ 11 n.2, 52 P.3d 1158 ("Utah's constitutional guarantee of due process is substantially the same as the due process guarantees contained in the Fifth and Fourteenth amendments to the United States Constitution").

[24] Utah Admin. Code § 655-6-17.

[25] Utah Admin. Code § 655-6-16.

[26] On this point, the District argues that the mailing error was Mr. Tracy's fault because State Engineer had the wrong address in its files and Mr. Tracy and/or Mr. Tracy's legal representative Christensen & Jensen P.C. otherwise did not provide an address in its protest letter for either Mr. Tracy or Christensen & Jensen P.C. (Opp'n Mem., p. 11.) The Court should ignore this argument for two reasons. First, the notion that the State Engineer had the wrong address in its files is unsupported by any evidence and, even if it were supported, the Court cannot consider evidence outside the complaint on a motion to dismiss. *Biedermann v. Wasatch Cty.*, 2015 UT App 274, ¶ 7, 362 P.3d 287 (courts cannot consider outside evidence on a motion to dismiss). Second, incorrect address used suggests a scrivener's error. Indeed, the incorrect address used was 257 East 200 South, *Suite 500*, Salt Lake City, when the correct address was 257 East 200 South, *Suite 1100*, Salt Lake City. (Compl., ex. M.)

days before the deadline to file a motion for reconsideration was set to expire. Were the State Engineer's decision to deny the motion for reconsideration on grounds of untimeliness to stand, Mr. Tracy would be deprived of notice reasonably calculated to inform him that his rights were in jeopardy and a meaningful opportunity to be heard in the course of proceedings. Indeed, a notice delivered on the cusp of a deadline to respond is not notice reasonably calculated to afford a meaningful response, especially where the applicable regulations required the State Engineer to provide prompt notice. Accordingly, the State Engineer erred in treating Mr. Tracy's request for reconsideration as untimely.

D. The fact that Mr. Tracy's water right is registered under the name of Mr. Tracy's dba does not undermine Mr. Tracy's standing.

The District next argues that the named plaintiff, Emigration Canyon Homeowners Association, is not a natural person and therefore cannot own a water right.[27] This argument misunderstands the nature of a dba. When a person or entity transacts business under a dba, the person or entity is transacting business on its own behalf. The complaint alleges that the Emigration Canyon Homeowners Association is a dba of Mr. Tracy. When the complaint alleges that Emigration Canyon Homeowners Association owns the water right at issue, it is alleging that Mr. Tracy owns the water right at issue. Certainly, there is no dispute that Mr. Tracy is a natural person capable of owning a water rights. Accordingly, the District's argument that the plaintiff in this litigation – i.e., Mr. Tracy dba Emigration Canyon Homeowners Association – lacks standing is without merit.

[27] Opp'n Mem., pp. 7-8.

E. The request for reconsideration is not moot.

Finally, the District argues that Mr. Tracy's "request that the Court find that [Mr. Tracy's] Request for Reconsideration was timely is moot because the State Engineer does not have to rule on the Request for Reconsideration."[28] This is the case, the District argues, because a request for reconsideration is deemed denied after twenty days.[29] This argument is without merit. The State Engineer denied the request for reconsideration on grounds that it was untimely. The fact that the State Engineer expressly denied the request for reconsideration precludes the request for reconsideration from being deemed denied. Moreover, as discussed above, the State Engineer's decision violates Mr. Tracy's rights to due process. Accordingly, an order from this Court finding the request for reconsideration timely and remanding issue to the State Engineer to decide on the merits is the appropriate course of action.

III. CONCLUSION

For the foregoing reason, Mr. Tracy requests that the Court deny the District's motion to dismiss.

DATED this 26th day of July, 2019.

s/Scott A Boyd
SCOTT A BOYD
CHRISTENSEN & JENSEN
Attorneys for Petitioner Emigration Canyon Home Owners Association

[28] Opp'n Mem., p. 12.
[29] Opp'n Mem., p. 12.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of July, 2019, I caused a true and correct copy of the foregoing **MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS** to be filed electronically via Greenfiling, which sent notification of such filing on the following:

Jeremy R. Cook
William R. Garbina
COHNE KINGHORN, P.C.
111 E. Broadway, Suite 1100
Salt Lake City, UT 84111
Attorneys for Emigration Improvement District

Norman K. Johnson
Julie I. Valdes
Assistant Attorneys General
Sean D. Reyes
Utah Attorney General
1594 West North Temple, #300
Salt Lake City, UT 84116
Attorneys for Kent L. Jones, the Utah State Engineer

/s/Stephanie Smith
Legal Secretary