



PROTEST FEE PAID

CP# 5290 15.00
20-04017

echo-association.com

September 3, 2020

VIA CERTIFIED FIRST CLASS MAIL, POSTAGE PREPAID

Teresa Wilhelmsen, State Engineer
Utah Division of Water Rights
1594 W. North Temple, Suite 220
Salt Lake City, UT 84114-6300

Re: Protest of Extension of Time Request for Permanent Change Application “a14474” (57-8855) Submitted by Salt Lake City Corporation and Demand for the Utah State Engineer to Prevent Illegal Water Diversion and Use in Emigration Canyon

Dear Ms. Wilhelmsen:

The Emigration Canyon Home Owners Association (“**The ECHO-Association**”) hereby submits the following protest to the Request for Extension of Time for permanent change application “a14474” (57-8855) submitted by Salt Lake City Corporation purportedly being held for “future requirements of the public” for water use “in Salt Lake City’s System.”

Please note the following for the record:

- The ECHO-Association is owner of perfected surface water right 57-8947 and is therefore entitled to file protest as per Utah Code Ann § 73-3-12(2)(f);
- The proposed judicial determination of base water right 57-8855 is currently under protest by the Mt. Olivet Cemetery Association (“Mt. Olivet”) with the Utah State Third District Court, Civil Case. 360057298 (pending) and has not yet been resolved;
- Contrary to the certification of the Request for Extension of Time executed for Salt Lake City Corporation by Tamara Prue, the place-of-use approved under permanent change application is not in “Salt Lake City’s System” but is limited to the Emigration Place Private Urban Development (“Emigration Place PUD”), which is located outside of Salt Lake City municipal boundaries (*see* illustrative map attached as **Exhibit A**).

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- Both Laura Briefer and Rusty Vetter, *Esq.* are aware that Salt Lake City Corporation is current providing water service to the Emigration Place PUD via the Emigration Canyon Tunnel as a non-approved place-of-use under water share 57-3568);
- Salt Lake City Corporation claims to have acquired 40 acre feet from the Sorenson Development Company (and in turn from the Mt. Olivet), although this claim cannot be verified by the Special Warranty Deed notarized by Rosemary Beless and Ms. Beless' own correspondence to your office dated June 4, 2014 (*see* Special Warranty Deed, attached as **Exhibit B**, and correspondence to Kent L. Jones, attached as **Exhibit C**);
- The recital of “poor water quality” of a well drilled 32 years ago in 1988 and “economically unfeasible” water use do not show any type of due diligence or reasonable cause for delay as required for approval of an extension request under Utah Code Ann. § 73-3-12;
- During the protest hearing of water right 57-7796 (a44045), Salt Lake City’s own hydrologist Dr. David Hansen (“Dr. Hansen”) testified that the Emigration Canyon stream has not maintained minimum flow in 10 out of the last 17 years (*see* Dr. Hansen Report available at The ECHO-Association website <https://echo-association.com/wp-admin/post.php?post=7408&action=edit>);
- As you are aware, the record shows that over forty (40) private-well owners have reported quantity and quality impairment to your office, including *total depletion* of the Emigration Canyon Stream less than two miles from Utah’s Hogle Zoo;
- On June 16th of this year, The ECHO-Association documented massive earth collapse and a 700-foot fissure in the Freeze Creek Drainage area of Emigration Canyon believed to be caused by groundwater mining of the Freeze Creek Aquifer by Emigration Improvement District as approved by you under permanent change application “a44045” (57-7796) over Salt Lake City’s own objections to the proposed permanent change allowing for the construction of over 500 new homes in Emigration Canyon (*see* https://echo-association.com/?page_id=3310).

Until which time as Salt Lake City provides documentation that the base water right 57-8855 has been fully adjudicated in Utah State Court and has not reverted back to the United States of America under the terms of the 1909 deed to Mt. Olivet, the present application for extension of time must be rejected as per Utah Code Ann. § 73-3-12 (2)(b)(ii).

Lastly, as Salt Lake City’s own expert Dr. Hansen has testified directly to you regarding major impairment of the Emigration Canyon Stream, we demand that your office prevent further illegal water use at the Emigration Place PUD until which time as Salt Lake City files, and your office approves water use outside of Salt Lake City’s municipal boundaries as required under Utah State statute.

Enclosed you will find payment of \$15.00 for the administrative cost of this protest. We hereby request a hearing of this protest.

Regards,



Mark Christopher Tracy
Emigration Canyon Home Owners Association

cc: Mount Olivet Cemetery Association
c/o Rosemary J. Beless, Esq.
Fabian & Cledenin P.C.
215 South State, Suite 1200
Salt Lake City, Utah 84111-2323

Enclosure: check # 528

EXHIBIT A



EXHIBIT B

EXHIBIT
I

WHEN RECORDED, MAIL TO:

Successors Development
Attention: Cindy Larson
7511 South Main Street

Salt Lake City, UT 84115 Space Above for Recorder's Use

4636380

SPECIAL WARRANTY DEED

(CORPORATE FORM)

MOUNT OLIVET CEMETERY ASSOCIATION, a corporation organized and existing under the laws of the State of Utah, with its principal office at Salt Lake City, of County of Salt Lake, State of Utah, grantor, hereby CONVEYS AND WARRANTS against all claiming by, through or under it to

SORERSON DEVELOPMENT, INC.

of Salt Lake City, Utah Ten and 00/100 the following ~~unincorporated~~ water rights in Salt Lake State of Utah: grantor for the sum of DOLLARS County.

40 acre-feet of water and water rights from those water rights more particularly described on Exhibit "A" attached hereto and by this reference made a part hereof.

4636380
JUNE 18 11 57 AM '88
KATIE L. DIXON
RECORDER, SALT LAKE COUNTY, UTAH
SORERSON DEVELOPMENT
REC BY: RENEEA GRAY, DEPUTY

The officers who sign this deed hereby certify that this deed and the transfer represented thereby was duly authorized under a resolution duly adopted by the board of directors of the grantor at a lawful meeting duly held and attended by a quorum. In witness whereof, the grantor has caused its corporate name and seal to be hereunto affixed by its duly authorized officers this 7th day of July, 1987.

Attorn:
By Robert J. Cook President

(CORPORATE SEAL)

STATE OF UTAH,
County of Salt Lake

On the 7th day of July, 1987, personally appeared before me Robert J. Cook, who was being by me duly sworn did not, under the penalty, this is, the said Robert J. Cook is the President of Mount Olivet Cemetery Association, and that the within and foregoing instrument was signed in behalf of said corporation by authority of a resolution of its board of directors and said Robert J. Cook is duly authorized to execute and deliver this deed and to acknowledge to me this said corporation entered the same and that the seal affixed is the seal of said corporation.

A. D. 1987



Robert J. Cook
Notary Public
My residence is Salt Lake City, Utah

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EXHIBIT C



Rosemary J. Beless

Facsimile: (801) 532-3370
rbeless@fabianlaw.com

June 4, 2014

- Peter W. Billings
- David J. Lyon
- Jay B. Bell
- Gary E. Jubber
- Rosemary J. Beless
- W. Cullen Battle
- Kevin N. Anderson
- Mark H. Anderson
- Norman J. Younker
- John E.S. Robson
- Douglas B. Cannon
- Douglas J. Payne
- Diane H. Banks
- P. Bruce Badger
- John (Jack) D. Ray
- Scott R. Sabey
- Scott M. Petersen
- Matthew L. Andersen
- Jason W. Hardin
- David N. Kelley
- Christian D. Austin
- James C. Waddoups
- Kyle C. Jones
- Timothy K. Clark
- Nora K. Brunelle
- Robert G. Crockett
- Clint R. Hansen
- Rachel S. Anderson
- Artemis D. Vamianakis
- Jess A. Cheney
- Ashton J. Hyde
- Brenda L. Taylor
- Melanie S. Grayson
- Andrew B. Sellers
- John M. Macfarlane
- Of Counsel
- William H. Adams
- Michele Mitchell
- Steven R. McMurray
- Neil R. Sabin
- Victor A. Pollak
- Jennifer E. Decker
- Joan M. Andrews
- Philip D. Dracht
- David R. Hague
- Samantha R. Siegel
- Jeremy K. Cooper
- J. Charles Coons
- Serena Baig
- Jeffrey B. Setness

HAND-DELIVERED

Kent L. Jones, P.E., State Engineer
Utah Division of Water Rights
1594 West North Temple, Suite 220
P.O. Box 146300
Salt Lake City, UT 84114-6300

Re: Mount Olivet Cemetery's Request for Reconsideration of the
Order of the State Engineer for Permanent Change Application
No. 57-69 (a39380)

Dear Mr. Jones:

We are writing this letter on behalf of Mount Olivet Cemetery ("Mount Olivet") to request your reconsideration of an observation, made in the Order of the State Engineer for Permanent Change Application No. 57-69 (a39380) dated May 20, 2014 (the "Order"), which is unnecessary to the decision in the Order but should be corrected as a matter of record.

This Order approves the Change Application No. a39380 filed by Mount Olivet on October 25, 2013, on Water Right No. 57-69 (the "Emigration Creek Water Right"), to change the point of diversion on Emigration Creek in order to accommodate Hogle Zoo's moving the diversion structure about 39 feet upstream to make room for the Zoo's African Savannah exhibit.

The Order approves this change of point of diversion for the 243.9 acre feet of water from the Emigration Creek Water Right to be used to irrigate 48.78 acres of the Mount Olivet cemetery grounds. However, the Order goes beyond Mount Olivet's request in its change application to change the point of diversion of Emigration Creek, in that the Order assumes that all three of Mount Olivet's water rights (Water Right 57-7825 (the "Red Butte Creek Water Right"), Water Right No. 57-2526 (the "Water Well Water Right"), and the Emigration Creek Water Right) are supplemental.

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FABIAN & CLENDENIN
215 SO. STATE ST., SUITE 1200, SALT LAKE CITY, UT 84111-2323
TEL: 801.531.8900 FAX: 801.596.2814
WWW.FABIANLAW.COM

Kent L. Jones, P.E., State Engineer
Utah Division of Water Rights
June 4, 2014
Page 2

A review of Mount Olivet's three water rights will show that the three water rights are not all supplemental to each other. While the Water Well Water Right is supplemental to both Red Butte Creek Water Right and the Emigration Creek Water Right, the two creek water rights (Red Butte Creek Water Right and Emigration Creek Water Right) are not supplemental water rights.

The Red Butte Creek Water Right

The Red Butte Creek Water Right is a 100 acre-foot federal reserved water right in Red Butte Creek for the irrigation of 20 acres of the federal land reserved within the Fort Douglas Reservation for Mount Olivet Cemetery purposes under the May 16, 1874 Act of Congress. The original 20-acre tract "set apart" for cemetery purposes is still federal land reserved for cemetery purposes and is still irrigated by water from Red Butte Creek, as a federal reserved water right.¹ Also, the Red Butte Creek Water Right was excepted and reserved, as a federal reserved water right for the irrigation of 20 acres of the Fort Douglas Reservation, from the quitclaim deed from the United States of America to the Central Utah Water Conservancy District, dated July 20, 2004.

¹ This federal reserved water right cannot be transferred for use on other land for a non-federal purpose. Although there was an attempted transfer of 2/7^{ths} of the Red Butte Creek Water Right in the early 1980's, the transfer was never completed because the point of diversion for the water right could never be changed by the Boyer Company to Emigration Canyon. The Agreement between Mount Olivet and the Boyer Company is summarized by the Boyer Company in Change Application No. a-12711 (rejected by the State Engineer) as follows:

It should be expressly noted, however, that Mt. Olivet Cemetery Association will continue to use the water on its cemetery grounds until such time as the water is placed to use in the canyon. Also, in the event all of Mt. Olivet's water rights are not placed to use in the canyon or Mt. Olivet retains an ownership interest in its various rights and decides not to use them in the canyon, then Mt. Olivet Cemetery Association will so inform the State Engineer and that portion of Mt. Olivet's water rights will revert to use upon the cemetery grounds. The remainder of the water will be segregated and proof submitted thereon.

Change Application No. a-12711, Exhibit B, p. 1, dated March 9, 1983, and rejected by the State Engineer by Memorandum Decision dated January 20, 1984.

The Red Butte Creek Water Right cannot be supplemental to additional acreage subsequently acquired by Mount Olivet, in addition to the original 20 acres of federal reserved land, because there was no additional acreage when the original 20-acre tract was “set apart” for cemetery purposes to be irrigated by Red Butte Creek, as a federal reserved water right. Consequently, the Red Butte Creek Water Right remains for the irrigation of the initial 20-acre tract of federal land reserved for the cemetery.

The Emigration Creek Water Right

The Order is correct in stating that the Emigration Creek Water Right is for the irrigation of 48.78 acres of the cemetery grounds. However, the Emigration Creek Water Right is a primary water right for this acreage and is not supplemental to the Red Butte Creek Water Right or the Water Well Water Right. The 48.78 acres of irrigation is derived under the Emigration Creek Water Right by subtracting the 10 acres of irrigation transferred to Sorenson Development Inc. and the 23.51 acres of irrigation transferred to the Boyer Company. The transferred acreage was moved to points of diversion in Emigration Canyon. This leaves the remaining acreage of 48.78 acres for the Emigration Creek Water Right, but this water right is not supplemental to the Red Butte Creek Water Right or the Water Well Water Right.

Also, the 10 acres of irrigation were transferred to Sorenson Development only from the Emigration Creek Water Right—not from the Red Butte Creek Water Right or the Water Well Water Right. Therefore, the remaining 48.78 acres of irrigation applies only to the Emigration Creek Water Right—not the other two water rights.

The Water Well Water Right

As stated in the Order, the Water Well Water Right is supplemental to both the Red Butte Creek Water Right and the Emigration Creek Water Right. The Water Well Water Right is used supplementally when the amount of water from Red Butte Creek and Emigration Creek decreases in the late summer, and the Water Well Water Right is used with the remaining water from the creeks to irrigate the cemetery grounds. Again, there was an attempted transfer of 2/7^{ths} of the Water Well Water Right to the Boyer Company, but this portion of the water right reverted back to Mount Olivet because it could not be changed by the Boyer Company to Emigration Canyon, as explained above in reference to the Boyer Company’s Change Application No. a-12711, dated March 9, 1983, Exhibit B at p.1 (rejected by the State Engineer by Memorandum Decision dated January 20, 1984).