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

EMIGRATION CANYON HOME OWNERS ASSOCIATION, a Utah Corporation, Petitioner, vs. KENT L. JONES, Division Director of the Utah State Division of Water Rights, and EMIGRATION IMPROVEMENT DISTRICT, a special service district of the state of Utah, Respondents.	**MOTION FOR ATTORNEY FEES** Case No. 190904621 Judge: Honorable Laura Scott

Respondent Emigration Improvement District (**"EID"**), through counsel, respectfully moves the Court to award EID its reasonable attorney fees against Mark Christopher Tracy dba Emigration Canyon Home Owners Association ("**Petitioner**" or "**ECHO**") because the *Petition for De Novo Judicial Review of Informal Adjudicative Proceeding* (the "**Petition**") lacked merit and was not brought in good faith.

EID acknowledges the "high hurdle" that must be overcome to obtain an award of fees under Utah Code Ann. § 78B-5-825(1). However, substantial evidence demonstrates that ECHO

acted in bad faith in bringing an action without merit. Through the so-called ECHO Association, Mark Christopher Tracy ("**Mr. Tracy**") is attempting to use the judicial process to carry out a political attack against EID and its elected board of trustees. After EID obtained two fee awards in U.S. District Court against Mr. Tracy, he attempted to acquire a .25 acre-foot water right to obtain standing to challenge EID's change applications and extension requests. After asserting, unsuccessfully, that ECHO acquired a water right in November 2018, the Third Judicial District Court for the State of Utah, the Honorable Su Chon presiding, found that the water right had not been deeded until February 11, 2019.

Knowing he had not acquired a water right and knowing that under Utah Code Ann. § 73-3-12(2)(f), only a "person who owns a water right or holds an application from the water source referred to in Subsection (2)(e) may file a protest with the state engineer" to challenge an extension of time request, Mr. Tracy proceeded with this lawsuit. And, despite having received email notice of the State Engineer's order granting EID's extension request, Mr. Tracy wasted the time and resources of EID's counsel and the Court by asserting he had not timely received notice.

LEGAL STANDARD

Utah Code Ann. § 78B-5-825(1) calls for an award of attorney fees in civil actions when "the court determines that the action or defense to the action was without merit and not brought or asserted in good faith." This provision requires proof on "two distinct elements." *In re Discipline of Sonnenreich*, 2004 UT 3, ¶ 46, 86 P.3d 712. An award of fees under this provision requires a determination that the losing party's claim was "(1) without merit, and (2) not brought or asserted in good faith." *Id*.

A determination under the first element, as to the merits of a claim, typically will turn on a conclusion of law—as to whether the losing party's claim lacks a "basis in law or fact." *Id*. ¶

47 (citation omitted) (internal quotation marks omitted). Such a determination is reviewed for correctness. *Id*. ¶ 45. The second element, by contrast, implicates fact-intensive questions about the losing party's "subjective intent." *Id*. ¶ 49. A party's good faith may be established by proof of "[a]n honest belief in the propriety of the activities in question;" a lack of "intent to take unconscionable advantage of others;" and a lack of "intent to, or knowledge of the fact that the activities in question will hinder, delay, or defraud others." *Id*. ¶ 48 (alteration in original) (citation omitted) (internal quotation marks omitted). A lower court's findings on this element typically will be afforded a substantial measure of discretion. *Id*. ¶ 45.

PERTINENT FACTS

1. EID is a local district created by the Salt Lake County Council in 1968 that has authority to provide water and sewer service to residents within Emigration Canyon.

2. EID has a three-member board of trustees who are elected at-large from residents in Emigration Canyon.

3. On March 9, 1983, Permanent Change Application 57-8865 (a12710b) (the "**Change Application**") was filed in the name of Emigration Improvement District to divert .334 cubic foot per second or 94.04 acre feet, and was approved on March 9, 1983. *See* Petition, Exhibit B (Order of the State Engineer on Extension of Time Request for Permanent Change Application Number 57-8865 (a12710b)).

4. In 2014, ECHO was formed by Mr. Tracy.

5. ECHO is not a traditional homeowners' association that governs a specific neighborhood or development or has authority vested through CC&Rs.

6. Instead, ECHO is a dba entity for Mr. Tracy personally that purports to be a "complex-litigation association." A true and correct copy of the homepage for ECHO's website is attached hereto as Exhibit 1.

7. In 2014, Mr. Tracy filed Case No.: 2:14-cv-00701-JNP-PMW against EID and multiple other parties in Utah federal district court (the "**FCA Action**").

8. The FCA Action generally alleges that EID violated the federal false claims act as part of a loan that EID obtained in 2002 from the Utah Division of Drinking Water to make improvements to its public drinking water system by failing to disclose or misrepresenting that the alleged purpose of the loan was not to benefit existing residents, but to construct an oversized water system to allow for massive future development.

9. On March 9, 2017, the United States District Court for the District of Utah, the Honorable Jill N. Parrish presiding, ordered entry of judgment in the FCA Action against Mr. Tracy and his attorneys, Christensen and Jensen, awarding EID $29,936.00 in damages based on Mr. Tracy filing a lis pendens against EID's water rights, which the Court found was a wrongful lien. A true and correct copy of the Order for Entry of Judgment is attached hereto as Exhibit 2.

10. On February 15, 2019, Judge Parrish issued another *Order Granting in Part and Denying in Part Defendant's Motion for Attorneys' Fees and Costs* (the "**FCA Fee Order**") awarding EID $92,665.00 to be paid by Mr. Tracy. A true and correct copy of the FCA Fee Order is attached hereto as Exhibit 3.

11. In the FCA Fee Order, Judge Parrish found that: "Tracy's behavior was vexatious and that the suit was brought primarily for purposes of harassment. Accordingly, the court will award attorneys' fees to Defendants pursuant to 31 U.S.C. section 3730(d)(4)." *Id.*, p. 12.

12. On January 15, 2019, the Utah State Engineer sent a Final Notice of Lapsing to the EID (the "**Lapse Notice**"). *See* Petition ¶ 75; Exhibit N (sub-exhibit E).

13. As indicated in the Lapse Notice, if the Change Application was not reinstated within sixty (60) days, the Change Application would have permanently lapsed. *Id.*

14. On January 18, 2018, EID filed a Request for Extension of Time to File Proof of Beneficial Use (After Fourteen Years) (the "**Extension Request**"). *See* Petition, ¶ 76, Exhibit F.

15. On the same day, January 18, 2018, the State Engineer sent EID a letter indicating that the Change Application had been reinstated with a priority date of the Change Application of January 18, 2019. *See* Petition, ¶ 19, Exhibit A.

16. Specifically, the letter stated: "The application was reinstated on January 18, 2019, **because an Extension Request was received in our office**." *Id*. (emphasis added).

17. On January 22, 2019, ECHO filed a protest against the Extension Request (the "**ECHO Protest**").

18. On April 23, 2019, the State Engineer issued its Order of the State Engineer on Extension of Time Request for Permanent Change Application Number 57-8865 (a12710b) (the "**Extension Order**") pursuant to which the State Engineer granted the Extension Request.

19. On May 13, 2019, Petitioner filed a Request for Reconsideration of the State Engineer's Extension Order (the "**Request for Reconsideration**"). *See* Petition, Exhibit N.

20. On August 19, 2019, Judge Chon issued a Memorandum Decision and Order dismissing another case filed by ECHO against Kent L. Jones and EID (Case No. 190901675) on the grounds that ECHO lacked standing to challenge a change application filed by EID because ECHO was not an aggrieved party at the time it filed its protest (the "**First Dismissal Order**"). A copy of the First Dismissal Order is attached hereto as Exhibit 4.

21. In the First Dismissal Order, Judge Chon found that ECHO did not acquire any water rights in Emigration Canyon until February 11, 2019.

22. Accordingly, on January 22, 2019, the date ECHO filed the ECHO Protest, ECHO did not own any water rights in Emigration Canyon.

23. Although ECHO and/or Mr. Tracy purport to have acquired a water right in February, 2019, Mr. Tracy, either individually or through his dba ECHO, does not own any real property in Emigration Canyon or own any real property that utilizes water rights from Emigration Canyon.

24. Although the caption of the Petition indicates that the Emigration Canyon Homeowner's Association is a corporation, the first allegation in the Petition states: "Petitioner The ECHO-Association is registered with the Utah Department of Commerce as a "dba entity" of Mark Christopher Tracy and is the owner of water right no. 57-8947 (a16183)." Accordingly,

the Emigration Canyon Homeowner's Association is not a legal entity, but merely a name registration for Mr. Tracy.

25. On September 17, 2019, the Utah Division of Water Rights provided a response to a Governmental Records Access and Management Act (GRAMA) request that indicated that electronic notice of the Memorandum Decision was sent to Mr. Tracy on May 24, 2019 at the following two emails mark.tracy72@gmail.com and m.tracy@echo-association.com. A true and correct copy of the response to the GRAMA request is attached hereto as Exhibit 5.

26. On May 27, 2019, three days after receiving electronic notice of the Memorandum Decision, Mr. Tracy sent an email from the email address m.tracy@echo-association.com to numerous parties, including his attorneys in this matter. A true and correct copy of the email is attached hereto as Exhibit 6.

ARGUMENT

I. ECHO'S CLAIMS LACKED MERIT.

A. ECHO's Claims Lacked Merit Based on the Arguments and Concessions in the Motion to Dismiss Hearing.

ECHO's Protest, Request for Reconsideration, and Petition focused almost exclusively on ECHO's position that EID does not have authority to utilize Boyer Well No. 1 and Boyer Well No. 2 because Mt. Olivet cemetery required congressional authorization to transfer water right to the Boyer Company, and therefore EID did not actually own the water right that EID or Boyer Company have been utilizing for over 30 years.[1] For example, in its Protest, ECHO stated "[w]e hereby protest the Request for Extension of Time for "a12710b" (57-8865) until which time EID produces evidence of Congressional authorization for the continued operation of Boyer Well

[1] Boyer Well No. 1 and Boyer Well No. 2 (as Mr. Tracy refers to them) are also both approved points of diversion under other rights owned by EID. Therefore, even if EID somehow lost its ability to utilize Water Right 57-8865, EID would still be able to utilize the wells.

#1." Likewise, ECHO's Petition begins with the statement: "This matter concerns the illegal transfer of water rights from the Mount Olivet Cemetery Association ("Mt. Olivet Cemetery"), and the illegal diversion and use of water via two (2) large-diameter commercial wells designated as Boyer Well Nr. 1 (Well ID Nr. 10643, aka Freeze Creek Well #1) and Boyer Well Nr. 2 (Well ID Nr. 4677, aka Freeze Creek Well #2), from one of the most historically significant areas of the State of Utah." Petition, p. 2.

However, in its *Memorandum in Opposition to Motion to Dismiss*, ECHO didn't even attempt to argue that these claims were properly before the Court. *Id*., at fn. 5 ("Having reviewed the District's opposition to claims for relief nos. 4 and 5, Mr. Tracy does not oppose dismissal of the same.).[2] In other words, despite the fact that ECHO holds itself out to be a "complex-litigation association," ECHO did not have <u>any</u> legal basis for filing a petition to dispute ownership of the water right. Clearly, ECHO does not have standing to adjudicate a claim that Mt. Olivet Cemetery (which is not a party) didn't have authority to convey water to The Boyer Company (which is not a party) and therefore title to a water right which is now owned by EID should revert to the federal government (which is not a party). Accordingly, ECHO's Second, Fourth and Fifth Causes of Action, which are the primary focus of the Protest and Petition, lacked a basis in law and were without merit.

ECHO's other two causes of action are equally without merit.

In the First Cause of Action, ECHO alleged that "The ECHO-Association **<u>did not receive notice of the Memorandum Decision</u>** until sometime after May 9, 2019" and that the "alleged untimeliness of The ECHO-Association sent its Request for Reconsideration was a

[2] ECHO conceded that all allegations in the Second Cause of Action were repeated verbatim in the Fourth Cause of Action, and therefore the Second Cause of Action was also not properly before Court.

result of the State Engineer's failure to timely serve a copy of the Memorandum Decision to The ECHO-Association's address of record." Petition, p. 21, ¶ 105, 108 (emphasis added). However, contrary to the allegation, Mr. Tracy did receive electronic notice via two different emails used by Mr. Tracy on April 24, 2019. Mr. Tracy actively uses at least one of those email addresses because Mr. Tracy sent an email from the email address m.tracy@echo-association.com three days after receiving electronic notice of the Memorandum Decision. *See* Exhibit 6. Likewise, although ECHO's legal counsel was able to avoid disclosing to the Court whether they had notice of the Memorandum Decision prior to receiving the mailed notice, it is extremely unlikely that ECHO's counsel received notice on or after Friday, May 10, 2019, and was still able to draft and mail a seven page single spaced letter by Monday, May 13, 2019.[3]

Accordingly, ECHO's First Cause of Action lacked merit because it was based on allegations that Mr. Tracy, and potentially his counsel, knew were false. This is also not the first time that Mr. Tracy has taken liberty with the facts in order to appear to have a valid claim. In the FCA Order, Judge Parrish found that "[Mr. Tracy's] course of conduct suggests that when he recognized the futility of his legal position, he began taking liberty with the facts to avoid the inevitable conclusion that his claim was time-barred." Exhibit 3, p. 8. Mr. Tracy should not be allowed to continue to require EID, which is a public entity with limited funds, to spend significant resources responding to manufactured claims based on false allegations.

ECHO remaining two arguments are combined in the Third Cause of Action. First, ECHO argued that the State Engineer erred in granting the Extension Request. However, neither the Protest nor the Petition ever reference the statutory requirements found in Utah Code Ann. §

[3] It is also telling that Christensen and Jensen had an associate, Bryson Brown, argue the motion to dismiss, but Christensen and Jensen had Mr. Brown and two partners, including the firm's managing partner, on the September 27, 2019 telephonic conference.

73-3-12(2)(h) (which require the State Engineer to approve an extension request made by a public water supplier holding the water to meet the reasonable future water requirements of the public), and neither the Protest or the Petition provide any argument as to why the District is not holding the water to meet the reasonable future needs of the public. ECHO was clearly aware of the statutory requirements before filing the Petition because the Extension Order stated:

> The protestant has expressed concern for a myriad of issues. These issues range from concerns over timeliness of responses and administrative actions by the Division of Water Rights, to concerns about conflicts in water right ownership, and potential for interference with existing water rights in streams, springs and wells. <u>This order, however, only addresses those issues pertinent to the extension request decision making criteria (Utah Code §73-3-12).</u>

Extension Order, p. 2 (emphasis added).

In addition, even if ECHO had preserved this issue for appeal, which it did not, the allegations in the Petition directly contradict the argument. For example, allegation 87 states in part: "Moreover, as the water share only allowed for diversion of 94.04 acre feet, water use for approximately half of the 224 parcels of the Oaks PUD sold to unsuspecting buyers was not allowed *even if* all points-of diversion operated by EID were approved." The assertion that the water right is necessary to supply water to less than half the existing platted lots in the Oaks PUD is obviously inconsistent with the argument that EID is not holding the water for the reasonable future use of the public. Thus, because ECHO's own allegations contradict any claim that EID was not holding the water for the reasonable future use of the public, the claim lacked merit.

Accordingly, the only part of the Petition that had any possible legal merit was ECHO's claim that the process that the State Engineer follows to reinstate a change application is not supported by a strict interpretation of the statute. However, even if ECHO could have prevailed in a facial challenge to the State Engineer's process, EID clearly followed the procedure established by the State Engineer's Office. Specifically, the letter from the State Engineer

reinstating the Change Application, which was issued the same day EID filed its Extension Request, stated: "The application was reinstated on January 18, 2019, **because an Extension Request was received in our office**."

Therefore, even if ECHO believed it could convince the Court that the State Engineer's procedure was not supported by a strict interpretation of the statute, ECHO could not have reasonably believed that the remedy would be that the Change Application lapsed without any chance for EID to comply with the procedure articulated by the Court.[4]

B. ECHO's Claims Lacked Merit Based on Additional Undisputed Facts.

In addition to lacking merit based on the allegations in the Petition, ECHO's claims lacked merit because neither ECHO or Mark Christopher Tracy owned a water right at the time ECHO filed its Protest, and therefore ECHO lacked standing to file the Protest or Petition.

With respect to an extension of time request, Utah Code Ann. § 73-3-12(f) states: "a person who owns a water right or holds an application from the water source referred to in Subsection (2)(e) may file a protest with the state engineer." On January 22, 2019, Christensen and Jensen filed the Protest purportedly on behalf of the Emigration Canyon Home Owners Association. However, notwithstanding that the caption of the Petition indicates that ECHO is a Utah corporation, ECHO is not a legal entity. Thus, ECHO could not have owned a water right and did not have standing to file a Protest.[5]

[4] It is also likely that the State Engineer would have been able to better articulate why the procedure he follows with respect to reinstatement is supported by statute and case law.

[5] *See, Sharp v. Riekhof*, 747 P.2d 1044, 1046 (Utah 1987)(holding, "An attempted conveyance of land to a nonexisting entity is void," and, *Utah Valley Bank v. Tanner, 636 P.2d 1060, 1062 (Utah 1981)* (holding "Paul Tanner Homes is not a legal entity, it being only a 'dba' of Paul Tanner.").

Mr. Tracy attempts to overcome the standing issue by arguing that the Protest and Petition was really filed in the name of Mark Christopher Tracy dba Emigration Canyon Homeowners Association. However, even if Mr. Tracy could substitute himself for ECHO, Mr. Tracy did not own a water right on January 22, 2019. As Judge Chon recently held in the First Dismissal Order, Mr. Tracy did not acquire a water right until at least February 11, 2019.[6]

Therefore, not only did ECHO not have standing to protest the Extension Request, but the fact that ECHO did not have a valid water right establishes that ECHO's purpose for filing the Protest and Petition was not to protect a valid property interest, but instead to wage a political attack on EID in hopes of undermining the credibility of EID and its elected official and forcing EID to expend its limited resources to defend against litigation.

In summary, the Petition lacked merit in both law and fact.

II. Plaintiff's Actions Show That the Claims Were Not Assert in Good Faith.

This case is yet another example of Mr. Tracy (this time through the so-called Emigration Canyon Homeowners' Association) asserting bad faith claims against EID, which claims are clearly intended to attack and disparage EID and its elected officials, and create a perception among residents that EID may not be able to provide water to residents, but not to state actual claims for relief.

A. EID Has Previously Been Awarded Fees Against Mr. Tracy for Similar Frivolous and Vexatious Litigation.

As indicated on the attached Exhibits 6 and 7, Mr. Tracy routinely signs emails and other correspondence as "*qui tam* Relator / ECHO President." The "*qui tam* Relator" is in reference to a lawsuit that Mr. Tracy filed against Emigration Improvement District in 2014, which generally

[6] ECHO purportedly acquired a .25 acre-foot water right, which Mr. Tracy apparently claims is really owned by him individually since ECHO is not an actual entity.

alleges that EID (and multiple other defendants) violated the federal false claims act by failing to disclose certain information as part of a loan that EID obtained from the Utah Division of Drinking Water in 2002 to make improvements to its public drinking water system.

On February 15, 2019, after granting EID's motion to dismiss the Third Amended Complaint in the FCA Action, Judge Parrish issued the FCA Fee Order. *See* Exhibit 3. In the FCA Fee Order, Judge Parrish found that "Tracy's behavior was vexatious and that the suit was brought primarily for purposes of harassment. Accordingly, the court will award attorneys' fees to Defendants pursuant to 31 U.S.C. section 3730(d)(4)." *Id.*, p. 12. Judge Parrish also found that "Tracy's behavior leads the court to conclude that Tracy brought his *qui tam* suit to air personal grievances against the Defendants in pursuit of an ulterior motive, rather than seek money damages on behalf of the United States." *Id.* Based on her finding that the suit was vexatious and brought primarily for the purpose of harassment, Judge Parrish awarded defendants, including Emigration Improvement District, $92,665.00 in attorney fees against Mr. Tracy.[7]

B. The Allegations in This Case Were Clearly Not Intended to State a Legitimate Claim for Relief.

Like the FCA Action, Mr. Tracy's main goal in this litigation appears to be to thwart any expansion of a public drinking water system in Emigration Canyon, which Mr. Tracy apparently believes will facilitate development, by attempting to create distrust in EID and its elected officials, and attempting to create a perception among residents that EID does not have the ability to provide water to residents. This bad faith motive is apparent from the following facts.

First, the Protest Letter, which was signed by ECHO's attorney Scot Boyd, carbon copied (cc:d) Brigadier General Craig A. Bugano Fort Douglas Commanding Officer and Board

[7] The case is currently on appeal to the Tenth Circuit Court of Appeals.

Members of the Mount Olivet Cemetery Association. The only reason for Mr. Tracy to send the letter to Fort Douglas and Mt. Olivet was to try to validate his theory that Mt. Olivet or Fort Douglas may take action with respect to the water rights. Again, although his Mt. Olivet theory is the primary focus of the Protest and Petition, Mr. Tracy didn't even attempt to argue that it was properly before this Court.

Second, like the FCA Action, the majority of the allegations in the Petition have absolutely nothing to do with an argument that the State Engineer erred in granting the Extension Requests. For example, paragraphs 30 and 31 of the Petition state:

> 30. Sometime in 2000, Boyer and City Development obtained approval for phases 4a, 6 and 6a of the Oaks PUD allowing yet further expansion of the development to 224 domestic units.
>
> 31. Sometime in 2002, EID promised future water service to the Walter J. Plumb and land-developer R. Steve Creamer for still yet further developments north and north-east of the Oaks PUD.

These paragraphs are consistent with Mr. Tracy's theory in the FCA Action that the primary purpose of EID's public drinking water system was to allow for development in Emigration Canyon. However, the assertion that EID has promised future water service is completely inconsistent with the only potential argument in this case, namely that EID is not holding the water for the reasonable future use of the public.

Third, in a recent email purportedly to residents in Emigration Canyon, Mr. Tracy, on behalf of the so-called ECHO Association, stated:

> Furthermore, in April 2015, we learned that The Boyer Company LC allegedly obtained water rights from the Mount Olivet Cemetery Association, the only active federal military cemetery created by an Act of Congress in 1874, in order to create the Emigration Oaks Private Urban Development ("Oaks PUD") on the north side of Emigration Canyon.
>
> Yesterday, The ECHO-Association filed petition in the Utah State Third District Court against EID and Utah State Engineer Kent L. Jones regarding Mt. Olivet Cemetery Water

> Right 57-8865 currently claimed by EID and the continued operation of Boyer Wells Nr. 1 and Nr. 2 by EID.

A true and correct copy of the email is attached hereto as Exhibit 7.

Like numerous emails Mr. Tracy has sent with respect to the FCA Action, the purpose of the email is clearly to create a perception that Mr. Tracy's theory must be valid since it is part of a lawsuit, despite that fact that Mr. Tracy knew that there was no legal basis for including the claims in this Petition.

In summary, like the FCA Action, the purpose of the Petition was not to allege legitimate claims that the State Engineer erred in granting the Extension Request, but was instead just a convenient excuse to file yet another litigation case against EID in pursuit of an ulterior motive. Mr. Tracy is certainly entitled to his opinion whether development should occur in Emigration Canyon, but he is not entitled to continue to file completely meritless litigation in order to attack EID and its policies.

III. The Fees Should be Awarded Against Mr. Tracy Individually.

In the *Memorandum in Opposition to Motion to Dismiss*, Petitioner argues: "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." *Id.*, p. 12. In other words, it is the position of Petitioner that Mr. Tracy is the real property in interest. Accordingly, any fees awarded by the Court should be awarded against Mr. Tracy. In the alternative, to the extent Petitioner argues that fees should be awarded against the non-existent, i.e., Emigration Canyon Homeowners Association, a Utah corporation, the Court should award the fees against the lawyers who filed the lawsuit for bringing an action in the name of an entity that they knew or should have known didn't exist.

In summary, Mr. Tracy and/or his attorneys shouldn't be able to escape paying attorney fees simply by filing frivolous lawsuits in the name of non-existent entities and then asserting that Mr. Tracy is the real party in interest.

CONCLUSION

The residents and taxpayers in Emigration Canyon who fund EID through taxes and user fees should not be forced to continue to pay attorney fees to defend EID against frivolous, harassing and bad faith litigation by Mr. Tracy. Accordingly, the Court should find that the Petition was meritless and not asserted in good faith and award EID its reasonable attorney fees in accordance with Utah Code Ann. § 78B-5-825(1). In addition, because Mr. Tracy claims that petitioner, Emigration Canyon Homeowners' Association is not actual corporation, but is merely a dba of him personally, the Court should award the fees against Mark Christopher Tracy individually.

DATED this 2nd day of October, 2019.

COHNE KINGHORN

/s/ Jeremy R. Cook
William G. Garbina
Jeremy R. Cook
ATTORNEYS FOR RESPONDENT
Emigration Improvement District

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of October 2019, a true and correct copy of the foregoing document was served by the CMECF system which will send notice of filing to counsel of record:

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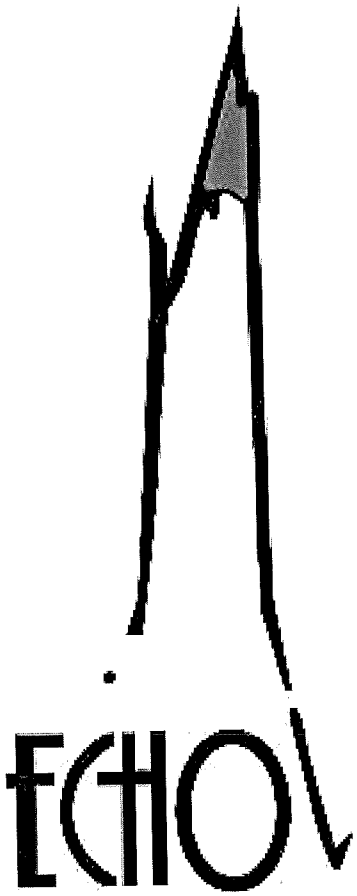
EXHIBIT
1

Emigration Canyon Home Owners Association

"The ECHO-Association"



"As a Complex-Litigation Association, ECHO is dedicated to protecting the private interests of our members as well as preserving the historic Emigration Canyon as birthplace of the state of Utah as a public good."

– Mark Christopher Tracy

(*qui tam* Relator / ECHO President)

EXHIBIT
2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

UNITED STATES of AMERICA ex rel. Mark Christopher Tracy, Plaintiff, v. EMIGRATION IMPROVEMENT DISTRICT, et al., Defendants.	**ORDER FOR ENTRY OF JUDGMENT AGAINST PLAINTIFF/RELATOR TRACY AND FORMER COUNSEL C&J** Case No. 2:14-cv-00701-JNP-PMW District Judge Jill N. Parrish

On May 25, 2016, this court granted a motion to release a wrongful lien recorded by Plaintiff/Relator Mark Tracy and his attorneys at Christensen & Jensen ("C&J") against Defendant Emigration Improvement District ("EID") and ordered that statutory damages and attorneys' fees be awarded to EID pursuant to Utah Code § 38-9-203. (Docket No. 118). EID subsequently filed an affidavit of costs and proposed judgment with the court. (Docket No. 140). C&J thereafter objected to the entry of judgment against them as outlined in the proposed judgment. (Docket No. 145). Most recently, C&J has withdrawn this objection and has agreed to the entry of judgment against them. (Docket No. 169). EID also filed an updated proposed judgment, which reflects new costs incurred in relation to the wrongful lien. (Docket No. 170). In light of C&J's withdrawal of its previous objection, entry of judgment is now appropriate.

Accordingly, the court hereby **ORDERS** the clerk of court to enter judgement against Mr. Tracy and C&J in the amount of twenty-nine thousand nine hundred thirty-six dollars ($29,936) pursuant to Utah Code § 38-9-203 as outlined in Docket No. 170.[1]

IT IS SO ORDERED.

Signed, this 9th day of March, 2017,

BY THE COURT:

Jill N. Parrish
United States District Court Judge

[1] The post-judgment interest rate will be adjusted to accord with statutory requirements.

EXHIBIT
3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

UNITED STATES OF AMERICA *ex rel.* MARK CHRISTOPHER TRACY, Plaintiff, v. EMIGRATION IMPROVEMENT DISTRICT, *et al.*, Defendants.	**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR ATTORNEYS' FEES AND COSTS** Case No. 2:14-cv-00701 District Judge Jill N. Parrish

This matter comes before the court on the Motion for Attorneys' Fees and Costs Pursuant to 31 U.S.C. § 3730(d)(4) and 28 U.S.C. § 1927 filed by Defendants Emigration Improvement District (the "District"), Michael Hughes, Mark Stevens, David Bradford, Fred R. Smolka, Eric Hawkes, and Lynn Hales (collectively, "Defendants") against *qui tam* relator Mark Christopher Tracy ("Tracy") and his counsel, Christensen and Jensen, P.C. ("Christensen & Jensen").

BACKGROUND

The District is a special service district organized under the laws of the State of Utah. The District was created to provide water and sewer services to the residents of Emigration Canyon, a township in Salt Lake County, Utah. The District has the power to issue bonds, charge fees and assessments, and levy taxes on the residents of Emigration Canyon. On or about September 29, 2004, the District received the final disbursement of a $1.846 million loan from Utah's Drinking Water State Revolving Fund, which uses federal funds to finance the construction of water systems for drinking or culinary water.

Tracy filed his initial *qui tam* complaint on September 26, 2014. He amended the complaint on May 01, 2015 ("First Amended Complaint") and on August 18, 2015 ("Second Amended

Complaint"). Tracy filed a wrongful *lis pendens* on August 20, 2015.[1] After the court's dismissal of the case and Tracy's successful appeal to the Tenth Circuit, on remand Tracy again amended his complaint ("Third Amended Complaint"). Tracy's Third Amended Complaint asserted two causes of action under the False Claims Act. First, Tracy alleged that the District and its alleged co-conspirators made false statements that induced the Government to disburse the proceeds of the $1.846 million loan. Second, Tracy alleged that the District, after the loan proceeds were disbursed, failed to comply with conditions of the loan and failed to report this noncompliance to the Government. The United States declined to intervene in the matter on three separate occasions: (1) after reviewing the Amended Complaint on May 7, 2015 (ECF No. 11); (2) after reviewing the Second Amended Complaint on November 20, 2015 (ECF No. 69); and (3) after reviewing the Third Amended Complaint on March 20, 2018 (ECF No. 199). On June 22, 2018, the court dismissed Tracy's Third Amended Complaint as to defendants Emigration Improvement District, Smolka, Hughes, Stevens, Bradford, Hales, Hawkes, Creamar and Carollo Engineers and ordered Tracy to show cause as to why his remaining claims should not also be dismissed. Pursuant to Tracy's response, the court dismissed with prejudice all remaining claims on June 25, 2018. Defendants filed the present motion for attorneys' fees and costs that same day.

[1] In the course of litigating defendants' motion for attorneys' fees and costs due to the wrongful filing of the *lis pendens*, the court disqualified Christensen & Jensen P.C. (ECF No. 159) and denied Tracy's motion to reconsider their disqualification. When Tracy failed to appoint new counsel, the court dismissed the complaint without prejudice on March 28, 2017. Tracy appealed to the Court of Appeals for the Tenth Circuit. The Tenth Circuit upheld the initial disqualification, but reversed the district court's denial of the motion to reconsider and the dismissal of the case. On remand, the court granted the motion to reconsider and reinstated Christensen & Jensen as counsel. ECF No. 187.

ANALYSIS

Defendants' motion for fees relies on two separate fee provisions. First under 31 U.S.C. section 3730(d)(4), the district court may award Defendants their reasonable attorneys' fees and expenses if (1) "the Government does not proceed with the action;" (2) the Defendants prevail in the action; and (3) "the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." In this case, the United States Government declined to intervene three times[2] and Defendants prevailed.[3] Thus, the only element in dispute is whether Tracy's action was clearly frivolous, vexatious, or brought primarily for purposes of harassment.

Additionally, Defendants ask that Tracy's counsel, Christensen & Jensen, be held jointly and severally liable for the award of attorneys' fees and costs. Under 28 U.S.C. section 1927, the court may require "any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously" to "satisfy personally the excess costs, expenses, and attorneys' fees" incurred by the opposing party.

Tracy opposes the motion for attorneys' fees under both provisions on the grounds that he had reasonable arguments supporting his claims, and thus they were not frivolous, vexatious, or brought primarily for purposes of harassment. The court addresses each of the provisions at issue in turn.

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[2] The Government declined to intervene on May 7, 2015 (ECF No. 11), November 20, 2015 (ECF No. 69), and on March 20, 2018 (ECF No. 199).

[3] The court dismissed the case and entered Judgment against plaintiff on June 25, 2018. ECF No. 230.

A. ATTORNEYS' FEES PURSUANT TO 31 U.S.C. § 3730(D)(4)

Pursuant to 31 U.S.C. section 3730(d)(4) the court may award attorneys' fees if the court "finds that the claim of the person bringing the action was [1] clearly frivolous, [2] clearly vexatious, or [3] brought primarily for purposes of harassment." "The FCA does not define the terms 'clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment,'" but most courts treat the attorney fee provision of 31 U.S.C. section 3730(d)(4) as "analogous to that used for claims for attorney fees brought under 42 U.S.C. § 1988." *U.S. ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1055 (10th Cir. 2004) (citing *Christiansburg Garment Co. v. EEOC. Grynberg,* 434 U.S. 412, (1978)). Although courts often analyze all three elements, each element can independently sustain an award of attorney fees. *See In re Nat. Gas Royalties Qui Tam Litig.*, 845 F.3d 1010, 1017–18 (10th Cir.), *cert. denied sub nom. U.S. ex rel. Grynberg v. Agave Energy Co.*, 138 S. Ct. 84 (2017) (upholding an award of attorneys' fees solely because the relator's claim was clearly frivolous without reaching the other two elements).

1. Clearly Frivolous

The Supreme Court in *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 421 (1978) defined the standard for whether a suit is clearly frivolous. *See ex rel. Grynberg*, 389 F.3d at 1058 (addressing the fee provision analysis under 42 U.S.C. § 1988 as applied to 31 U.S.C. § 3730(d)(4))). Under *Christiansburg*, to be held frivolous, "[t]he plaintiff's action must be meritless in the sense that it is groundless or without foundation. The fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for the assessment of fees . . . ." *Id.* (quoting *Houston v. Norton,* 215 F.3d 1172, 1174 (10th Cir. 2000)). This standard is "a difficult standard to meet, to the point that rarely will a case be sufficiently frivolous to justify imposing attorney fees on the plaintiff." *Id.* at 1059 (quoting *Mitchell v. City of Moore, Okla.,* 218 F.3d 1190, 1203 (10th Cir. 2000)).

In assessing whether a case is frivolous, "the district court [must] review the entire course of the litigation." *Ex rel. Grynberg*, 389 F.3d at 1059 (citing *Christiansburg Garment Co.*, 434 U.S. at 421–22). "[A] plaintiff should not be assessed his opponent's attorneys' fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so . . . ." *Id.* at 1058 (quoting *Houston v. Norton,* 215 F.3d at 1174). Defendants allege that Tracy's entire complaint was clearly frivolous, if not from the outset, then at least from the point when the United States declined to intervene for a second time.

In Tracy's Third Amended Complaint, he asserted two causes of action. First, Tracy alleged that the District and its co-conspirators made false statements that induced the Government to disburse the proceeds of the $1.846 million loan in violation of 31 U.S.C. § 3729(a)(1)(A) and U.S.C. § 3729(a)(1)(B). These sections of the False Claims Act impose liability on any person who (A) "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" or (B) "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(A)–(B). Second, Tracy alleged that the District, after the loan proceeds were disbursed, failed to comply with conditions of the loan and failed to report this noncompliance to the Government in violation of 31 U.S.C. § 3729(a)(1)(G).[4] This section imposes liability on any person who (1) "knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government" or (2) "knowingly conceals or knowingly and improperly

[4] Claims brought under § 3729(a)(1)(G) have been referred to as reverse false claims: "instead of creating liability for wrongfully *obtaining* money from the government, the reverse-false-claims provision creates liability for wrongfully *avoiding* payments that should have been made to the government." *United States ex rel. Barrick v. Parker-Migliorini Int'l, LLC*, 878 F.3d 1224, 1226 (10th Cir. 2017).

avoids or decreases an obligation to pay or transmit money or property to the Government." The court addresses each cause of action in turn.

a. First Cause of Action

Defendants allege that Tracy's first cause of action was clearly frivolous because it was barred by the applicable statute of limitations. Two distinct statute of limitations apply in *qui tam* cases. These can be found at 31 U.S.C. section 3731(b), which provides:

> (b) A civil action under section 3730 may not be brought—
>
> (1) more than 6 years after the date on which the violation of section 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
> whichever occurs last.

Tracy's suit is a private *qui tam* suit. The Tenth Circuit has held repeatedly that the six-year statute of limitations found at subsection 3731(b)(1) "applies to actions pursued by private *qui tam* relators" and that subsection 3731(b)(2) "was not intended to apply. . ." to private *qui tam* relator suits at all. *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 725-26 (10th Cir. 2006); *see also United States ex rel. Told v. Interwest Const. Co.*, 267 F. App'x 807, 809 (10th Cir. 2008). Because subsection 3731(b)(2) does not apply to private relator suits, neither the ten-year statute of limitations nor the tolling provisions apply. Thus, the six-year statute of limitations runs from the date of the violation, *not* the date of the relator's discovery of the violation.

Tracy filed suit on September 26, 2014. In his initial complaint, Tracy alleged that the bond at issue in this suit closed on May 3, 2005. But the bond actually closed on November 21, 2002, placing the suit well outside both the ten-year and the six-year statute of limitations. Tracy then

amended his suit to allege that the statute of limitations began on the date of the final disbursement of the loan—on September 29, 2004. But even assuming that the final disbursement date is the date on which the statute of limitations began, which is disputed, Tracy's suit was still outside the six-year statute of limitations applicable to private *qui tam* suits. Defendants allege that fact renders Tracy's suit clearly frivolous.

To defend against the motion to dismiss, and to defend against the attorneys' fee motion here, Tracy argued that this court should ignore Tenth Circuit precedent and follow "better-reasoned cases," such as *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1217 (9th Cir. 1996) and *United States ex rel. Hunt v. Cochise Consultancy, Inc.*, 887 F.3d 1081, 1088–90 (11th Cir. 2018), that have allowed private *qui tam* relators to rely on the statute of limitations and the tolling provisions of subsection 3731(b)(2). *See* Pl.'s Opp. Mot. Dismiss at 16, ECF No. 211. The tolling provision would allow Tracy ten years from the date of *his* discovery of the violation to file suit, not ten years from the violation itself. But these arguments are clearly contrary to the Tenth Circuit's holding in *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702 (2006).

Arguing that a previous court decision was incorrectly decided is not in and of itself frivolous, but Tracy's entire argument was based upon his request that this court simply ignore Tenth Circuit precedence by which it is bound. *United States v. Spedalieri*, 910 F.2d 707, 709 n.2 (10th Cir. 1990). And Tracy had no reason to believe that the Tenth Circuit would reconsider its holding because it has already declined at least once to reconsider its interpretation of section 3731(b). *See United States ex rel. Told v. Interwest Const. Co., Inc.*, 267 F. App'x 807, 809 (internal citation and quotation marks omitted) ("Because we are bound by the precedent of prior panels absent *en banc* reconsideration or a superseding contrary decision by the Supreme

Court, we decline the relator's novel invitation to revisit our decision in *Sikkenga*."). Moreover, while Tracy may have had a good faith argument as to when the statute of limitations began to run and which statute of limitations should apply at the outset of his suit, his course of conduct suggests that when he recognized the futility of his legal position, he began taking liberty with the facts to avoid the inevitable conclusion that his claim was time-barred. Each time the underlying facts were disproved, Tracy changed the basic factual assertions giving rise to his complaint and made arguments clearly contrary to Tenth Circuit law. The court agrees with the Defendants that Tracy should have known his suit was frivolous at least when the United States declined to intervene for the second time. Alternatively, Tracy should have realized his suit was frivolous when, according to his own representations, twenty-four other law firms refused to take the case after his counsel was disqualified.

Finally, Tracy argued that the government suffered "new, never-before-incurred damages" within the six-year statute of limitations. But Tracy failed to sufficiently allege any "new damages" during the six-year period. He did not allege any in his complaints. The issue was first raised in a memorandum opposing a motion to dismiss and even then, it was alleged without supporting factual assertions. The court does not see how these alleged new damages offer any support for his claims. The court therefore concludes that Tracy litigated his first cause of action past the point when it became frivolous. The court does not reach a conclusion as to when the claim became frivolous because, as discussed below, the court finds that the entire suit was vexatious and brought primarily for purposes of harassment.

b. Plaintiff's Second Cause of Action

Tracy's second cause of action alleged that the District "knowingly made, used, or caused to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the United States Government, or knowingly concealed or knowingly and

improperly avoided or decreased an obligation to pay or transmit money or property to the United States Government" in violation of 31 U.S.C. section 3729(a)(1)(G). Third Am. Compl. ¶ 516. Specifically, Tracy's complaint alleged that the District defaulted on the loan by failing to comply with certain conditions and, because it was in default, the District was obligated to transmit money to the Government. But the plain language of the loan documents contradicts Tracy's allegation.

To state a claim for relief under the second provision of 31 U.S.C. section 3729(a)(1)(G), Tracy had to plausibly allege that the District knowingly concealed or knowingly and improperly avoided or decreased an obligation to pay or transmit money or property to the Government. Tracy alleged in a conclusory manner that "[b]ecause [the District] . . . defaulted on the loan, it has an established duty to transmit or pay money to the United States Government." Third Am. Compl. ¶ 530. But nowhere in the Third Amended Complaint did Tracy allege any *facts* showing that the District was obligated to transmit money or property to the Government in the event of default. Even if the court could credit Tracy's conclusory allegations, those allegations are contradicted by the terms of the loan documents, which Tracy did not attach to any of his complaints, but the court considered upon request by Defendants. Upon considering the loan documents, the court found that Tracy failed to allege an event of default and thus failed to establish that the District was required to pay an interest penalty. And even if there were an event of default, the District was not necessarily required to pay an interest penalty. In short, the terms of the loan documents are inconsistent with Tracy's conclusory allegation that the District was in default and was therefore required to pay or transmit money or property to the Government. Tracy had no grounds to bring his second cause of action. Thus, this claim was also frivolous.

2. Clearly Vexatious or Brought Primarily for Purposes of Harassment

The court now turns to the second and third prongs of 31 U.S.C. section 3730(d)(4) under which it must assess whether Tracy's claims were vexatious or brought primarily for purposes of

harassment. The court concludes they were both. Because these two prongs are closely linked and evidence of vexatiousness supplies evidence of intent to harass, the court analyzes these two prongs together:

> Evidence of vexatiousness or an intent to harass on the part of a plaintiff includes, but is not limited to, actions that deliberately delay the proceedings, attempts to relitigate a previously decided claim against the same defendant, the raising of new allegations in an effort to circumvent the arguments in a defendant's motion to dismiss, and the inclusion of counts for which the available evidence defeats any inference of a false claim.

In re Nat. Gas Royalties Qui Tam Litig., 2011 WL 12854134, at *11 (D. Wyo. 2011), *aff'd*, 845 F.3d 1010 (10th Cir. 2017) (quoting *U.S. ex rel. J. Cooper & Assocs., Inc. v. Bernard Hodes Grp., Inc.*, 422 F. Supp. 2d 225, 238 (D.D.C. 2006)). "The distinction between vexatious conduct and harassment stems from the intentions of the plaintiff." *J. Cooper & Assocs.*, 422 F. Supp. at 238 n19. "[T]he term "vexatious" means that the losing party's actions were 'frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.'" *Washington Hosp. Ctr. v. Serv. Employees Int'l Union Local 722, AFL-CIO*, 746 F.2d 1503, 1510 (D.C. Cir. 1984) (quoting *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 421 (1978)). In contrast, "the word 'harassment' suggests bad faith on the part of the plaintiff." *J. Cooper & Assocs.*, 422 F. Supp. 2d at 238 n19. "[A] Plaintiff uses the *qui tam* provisions for the purposes of harassment" when "the Plaintiff [does] little more than dress up his personal grievance[s] . . . as a *qui tam* claim . . . ." *U.S. ex rel. Herbert v. Nat'l Acad. of Scis.*, No. CIV. A. 90-2568, 1992 WL 247587, at *9 (D.D.C. Sept. 15, 1992). The court finds that Tracy's behavior was both vexatious and harassing.

a. Vexatious

First, Tracy's behavior was clearly vexatious. Not long after the initiation of his suit, Tracy filed a *lis pendens* indicating that the lawsuit had put at issue Defendants' water rights. But in fact,

there was no good faith basis for suggesting that Tracy's lawsuit for damages under the False Claims Act had any bearing at all on the ownership of Defendants' water rights. Nevertheless, Tracy immediately followed his wrongful *lis pendens* filing by sending letters to the residents of Emigration Canyon describing the *lis pendens* and accusing the District of fraudulently manipulating water rights. And when Defendants challenged the *lis pendens*, Tracy made no serious effort to defend its filing. Indeed, during oral argument on the motion to release the *lis pendens*, Tracy's counsel admitted that the *lis pendens* was based upon the premise that equitable relief was available to a relator under the False Claims Act, but he could not identify a single case supporting that proposition. Hr'g Mot. Release Lis Pendens Tr. 21:1–25:8, ECF No. 141. Tracy's counsel further admitted that Tracy had not even included in his prayer for relief anything that would affect the property interest in the water rights that were the subject of the *lis pendens*. *Id.* at 35:18–36:8. He also acknowledged that Tracy had continued to send out letters to clients of the District referencing the *lis pendens* even after the government had declined to intervene in the case and after Tracy had offered to withdraw the *lis pendens* if the District would withdraw its request for attorney fees. *Id.* at 36:9–40:8. The court thereafter concluded that the *lis pendens* was "unreasonable" and "without foundation." Accordingly, the court held the *lis pendens* was wrongful and ordered the *lis pendens* be released. This behavior was clearly vexatious.

b. Brought Primarily for Purposes of Harassment

The court also finds that Tracy's actions indicate bad faith and a clear intent to harass. During the course of the litigation, Tracy continued to make specious accusations against Defendants that he aired to the public. Tracy wrote letters and emails to the residents of Emigration Canyon. His correspondence included allegations from court documents describing the fraud allegations that he had levied against Defendants. For example, in September of 2015, Tracy wrote a letter specifically discussing the alleged involvement of David Bradford and Michael Hughes in

the lawsuit at the time that Bradford and Hughes were both running for reelection on the District's Board. Other letters that Tracy sent in 2017 and 2018 repeated the allegations that the District intended to use residents' money and tax dollars to pay the fees and federal debt at issue in the lawsuit. Tracy sent these letters as self-proclaimed president of the Emigration Canyon Homeowner's Association. His letters, immediately following new filings with the court, are evidence of his bad faith in pursing this lawsuit. Tracy's behavior leads the court to conclude that Tracy brought his *qui tam* suit to air personal grievances against the Defendants in pursuit of an ulterior motive, rather than seek money damages on behalf of the United States. The court finds that Tracy's behavior was vexatious and that the suit was brought primarily for purposes of harassment. Accordingly, the court will award attorneys' fees to Defendants pursuant to 31 U.S.C. section 3730(d)(4).

B. ATTORNEYS' FEES PURSUANT TO 28 U.S.C. § 1927

Defendants also move for Tracy's counsel, Christensen & Jensen, to be held jointly and severally liable pursuant to 28 U.S.C. section 1927. That statute states:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927 (emphasis added). On May 25, 2016, the court granted the motion to release the wrongful *lis pendens* and entered judgment, including attorneys' fees, against Tracy. Defendants moved to hold Tracy's attorneys, Christensen & Jensen, jointly and severally liable for the filing of the wrongful *lis pendens*. Christensen & Jensen opposed this motion, which led to the court's subsequent disqualification of Christensen & Jensen. Christensen & Jensen later withdrew its objection to being held jointly and severally liable and filed a motion for reconsideration regarding

its disqualification. The court denied the motion to reconsider and dismissed Tracy's Second Amended Complaint when he failed to appoint new counsel. Tracy appealed to the Tenth Circuit. On appeal, the Tenth Circuit upheld the district court's decision to disqualify Christensen & Jensen, but reversed the denial of the motion for reconsideration and the dismissal of the Second Amended Complaint.

On remand, the district court reinstated Christensen & Jensen and ordered that it be held jointly and severally liable for defendants' attorneys' fees and costs in the amount of $19,936.00 related to the wrongfully filed *lis pendens*. Because the court has already held Christensen & Jensen jointly and severally liable for actions related to the wrongful *lis pendens*, the court must now consider whether its behavior unrelated to the *lis pendens* has "so multiplie[d] the proceedings in [this] case unreasonably and vexatiously" that further judgment should be entered against it jointly and severally with Tracy. The court finds that it has not.

After being reinstated, Christensen & Jensen continued to litigate the case on behalf of its client. When the court granted Tracy permission to file an amended complaint, Christensen & Jensen filed the Third Amended Complaint based upon factual representations made by Tracy. Christensen & Jensen then pursued the litigation through the dismissal of the complaint and the entry of judgment against Tracy. Although the court holds that the case is frivolous and vexatious, this determination is primarily based upon Tracy's actions in using the lawsuit and its allegations to attack the District and its business operations. The court has seen no evidence that Christensen & Jensen sent harassing letters, nor did it multiply the proceedings unreasonably and vexatiously after being disciplined for the wrongful *lis pendens*. Thus the court will not hold Christen & Jensen jointly and severally liable with Tracy.

C. Reasonable Attorneys' Fees

31 U.S.C. section 3730(d)(4) states that "the court may award to the defendant its reasonable attorneys' fees and expenses . . . ." Defendants request attorneys' fees in the amount of $118,831.00 for 497.2 hours billed by counsel after the government's second notice of intent not to intervene, at the rate of $220.00 to $280.00 per hour. The court finds that the billing rates of Jeremy R. Cook ($220.00 per hour) and William Garbina ($265.00–$280.00 per hour) are reasonable. In Jeremy R. Cook's affidavit in support of the motion for attorneys' fees, Cook includes a detailed summary of the time spent by each attorney in the course of the litigation. *See* Affidavit/Declaration of Jeremy R. Cook, Ex. 1, ECF No. 228. The billing summary is sufficiently detailed and the hours recorded therein are reasonable. Counsel has already excluded fees awarded by the court in the previous judgment for hours billed on the wrongful *lis pendens*. However, even though the amount requested is reasonable, the court cannot award fees in the full amount requested by Defendants. Defendants' request includes fees related to the litigation in this court following the disqualification of Christensen & Jensen, the overturned dismissal of the case, and the fees incurred while litigating the appeal to the Tenth Circuit. The court will not award those fees for the reasons explained below.

First, the court's denial of the motion to reconsider the disqualification of Christensen & Jensen and the subsequent dismissal of the lawsuit due to Tracy's lack of counsel were reversed on appeal, meaning that Defendants did not prevail on these issues. Accordingly, the court declines to award fees for the period from the filing of the motion for reconsideration on September 14, 2016 through the order that dismissed the case for Tracy's failure to appoint a new attorney on March 28, 2017.

Second, this court is not authorized to award fees related to the appeal. The Tenth Circuit has held "that a district court lack[s] authority to award appellate-related fees to a prevailing party

absent explicit statutory authorization." *See In re Nat. Gas Royalties Qui Tam Litig.*, 845 F.3d 1010, 1024 (10th Cir.), *cert. denied sub nom. U.S. ex rel. Grynberg v. Agave Energy Co.*, 138 S. Ct. 84, 199 L. Ed. 2d 184 (2017) (quoting *Hoyt v. Robson Cos., Inc.*, 11 F.3d 983, 985 (10th Cir. 1993)). Defendants have not alleged that this court has any such statutory authorization. Although there is a narrow exception to this rule available in the context of interlocutory appeals, that exception is only available if the party seeking attorneys' fees prevails on the interlocutory appeal. *Id.* (citing *Crumpacker v. Kansas*, 474 F.3d 747, 756 (10th Cir. 2007)). As Defendants did not prevail in the Tenth Circuit, the court cannot award fees related to the appeal and the court will not award fees related to the initial litigation regarding the issues on which the court was reversed.

The fees incurred litigating Christensen & Jensen's and Tracy's motions to reconsider and the dismissal of the case include 24.9 hours billed from September 14, 2016 through March 28, 2017, at various rates, for a total sum of $5,906.00[5] and the fees related to the appeal include 87.5 hours billed from April 21, 2017 through December 14, 2017, at various rates, for a total sum of $20,260.00.[6] The court will therefore reduce the fee award requested by a total amount of $26,166.00.

[5] *See* Affidavit/Declaration of Jeremy R. Cook, Ex. 1 at 5-7. The court considers the 24.9 hours billed from September 14, 2016 through March 28, 2017 to be fees incurred litigating the issues for which Defendants were not the prevailing parties. These entries total $5,906.00. The court does not exclude the hours billed between the disqualification order on August 6, 2016 and the filing of the motion to reconsider on September 14, 2016, because the court was not reversed on its initial disqualification of Christensen & Jensen.

[6] *See* Affidavit/Declaration of Jeremy R. Cook, Ex. 1 at 7-8. The court considers the 61 billing entries from April 21, 2017 through December 14, 2017 to be fees incurred during the appeal. These 61 entries total $20,260.00.

ORDER

The court **GRANTS** Defendants' motion for an award of attorneys' fees and costs against plaintiff-relator Tracy pursuant to 31 U.S.C. § 3730(d)(4) in the amount of **$92,665.00** for 384.8 hours billed. The court **DENIES** the motion to hold plaintiff's counsel, Christensen & Jensen, jointly and severally liable pursuant to 28 U.S.C. § 1927. **IT IS HEREBY ORDERED** that the Clerk of Court enter Judgment for Defendants against plaintiff Mark Christopher Tracy in the amount of **$92,665.00.**

Signed February 5, 2019

BY THE COURT

Jill N. Parrish
United States District Court Judge

EXHIBIT
4

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

EMIGRATION CANYON HOME OWNERS ASSOCIATION, Petitioner, vs. KENT L. JONES, Division Director of the Utah State Division of Water Rights, and EMIGRATION IMPROVEMENT DISTRICT, Respondents.	**MEMORANDUM DECISION AND ORDER** Case No. 190901675 Judge Su Chon

This matter is before the Court on Defendants' Motions to Dismiss. Oral arguments were held July 9, 2019. The parties submitted additional briefing and a renewed notice to submit on July 29. In addition, Plaintiff filed a Motion for Leave to Submit Additional Briefing in which it requests leave to brief the issue of "backdating," as it claims it has been denied the opportunity to make that defense. Contemporaneously, however, Plaintiff filed the supplemental brief requested by the Court, in which it squarely addresses backdating. The Court therefore considers Plaintiff's motion for additional briefing moot and denies the same. However, the Court also believes that it gave the parties the opportunity to address that issue after the hearing, and there was no further need for additional briefing.

This case is a petition for de novo judicial review of the State Engineer's issuance of change applications for water usage. As background, Nelson Mather, who is not a party in this case, owned water right # 57-8947. The protest period for a change application regarding that water right ran from September 10, 2018 through

January 25, 2019. Mr. Mather did not file a protest. On October 17, ECHO did file a timely protest, although at the time it did not own any water rights of record. On either September 27 or November 8, 2018, ECHO claims it purchased the water right from Mr. Mather by quitclaim deed. During the hearing, ECHO stated that the sale had occurred earlier, but Mr. Mather was not in town to sign the documents. On February 11, 2019, the quitclaim deed was signed by Mr. Mather, notarized, and conveyed to ECHO. The quitclaim deed states: "On November 08, 2018 THE GRANTOR(S)... conveys, releases and quitclaims to the GRANTEE(S)...." On February 21, 2019, ECHO recorded the quitclaim deed.

Defendants move the Court to dismiss the petition, arguing that plaintiff ECHO lacks standing, both individualized standing and the public policy exception. They first argue that ECHO was not an "aggrieved" party who participated in the administrative proceeding and exhausted its administrative remedies.

> (1) A party aggrieved may obtain judicial review of final agency action, except in actions where judicial review is expressly prohibited by statute.
> (2) A party may seek judicial review only after exhausting all administrative remedies available, except that:
> (a) a party seeking judicial review need not exhaust administrative remedies if this chapter or any other statute states that exhaustion is not required;
> (b) the court may relieve a party seeking judicial review of the requirement to exhaust any or all administrative remedies if:
> (i) the administrative remedies are inadequate; or
> (ii) exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion.

Utah Code § 63G-4-401(1) and (2). Standing requires a palpable ad particularized injury that gives rise to a personal stake in the outcome of the dispute. *Washington Cty. Water Conservancy Dist. v. Morgan*, 2003 UT 58, ¶ 14, 82 P.3d 1125 ("The commonly

understood meaning of the term "aggrieved" is consistent with our traditional standing requirement that a plaintiff show particularized injury."). Without ownership of a water right affected by the change applications, a party generally does not have standing in a dispute.

The issue here is when ECHO acquired the water rights. "The rule is well settled that a deed, to be operative as a transfer of the ownership of land, or an interest or estate therein, must be delivered." *Wiggill v. Cheney*, 597 P.2d 1351, 1351 (Utah 1979) *See* Utah Code Ann. § 73-1-10 ("[a] water right ... evidenced by ... a certificate of appropriation ... shall be transferred by deed").

ECHO claims the transfer of the water right occurred in either September or November 2018 when Mr. Mather conveyed the water right to ECHO. ECHO relies on non-Utah cases that retroactively applied ownership of deeds of trust out of equity. *See Deutsche Bank Nat'l Trust Co. v. Burke*, 655 Fed. App'x. 251, 254 (6th Cir. 2016), *Baird v. Comm'r of Internal Revenue*, 68 T.C. 115 (1977). But these cases cited by ECHO are distinguishable as not dealing with foreclosures and outside of Utah's jurisdiction, which is clearly delineated by statute.

The conveyance in this case occurred on February 11, after the protest period expired. "In Utah, a quitclaim deed has the effect of a conveyance only when executed as required by law. This has been interpreted to mean that a deed must be in writing, signed by the creator, supported by consideration, and delivered to the grantee." *Julian v. Petersen*, 966 P.2d 878, 881 (Utah App. 1998) (cleaned up). *See Wiggill v. Cheney*, 597 P. 3d 1351 (Utah 1979) ("It is well settled that a deed, to be operative as a transfer of the ownership of land, or an interest or estate therein, must be delivered.") A quit

claim deed "when executed as required by law shall have the effect of a conveyance of all right, title, interest and estate of the grantor in and to the premises therein described and all rights, privileges and appurtenances thereunto belonging, at the date of such conveyance." Utah Code Ann. § 57-1-13. Here, ECHO did not own the water right when it protested the change applications, and therefore it is not an aggrieved party.

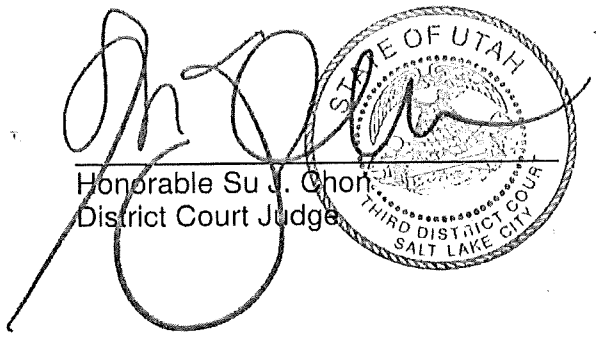
Second, Defendants argue that ECHO is not a valid corporation or dba and thus cannot own a water right or sue and be sued. It appears that on May 23, 2018, Mark Christopher Tracy registered "Emigraiton" Canyon Home Owners Association as a dba of himself. Clearly there was a typo, and Defendant's argument isn't well taken.

Lastly, ECHO claims it has standing under the public interest exception. But the issues here are not "so unique and of such great importance to Utah that they ought to be decided in furtherance of public interest." Utah Code Ann. § 63G-4- 402. "A party can acquire standing to litigate an important public issue if no one else has a greater interest in the outcome, the issues are unlikely to be raised at all unless that particular plaintiff has standing to raise the issues, and the legal issues are sufficiently crystallized to be subject to judicial resolution." *Washington Cty.*, 2003 UT 58, ¶ 27 (citations omitted, cleaned up). ECHO argues that the impact of the change applications could impact 415 private wells, the Hogle Zoo, and Mount Olivet Cemetery. It claims that over 40 residents of the canyon have reported substantial impairment of their water rights, and the change applications could have catastrophic consequences to the aquifers in the area. But under *Washington County* and *Haik v. Jones*, it is clear that the instant case is not the type of situation to invoke public interest exception to standing. The Utah Supreme Court has stated: "We remain open to the possibility that some issues

concerning water rights might present questions of great public importance. That importance, however, likely would be found in a case where a large number of people would be affected by the outcome." *Washington County*, 2003 UT 58 at ¶ 27. If anything, ECHO has even fewer grounds to assert the public interest exception than the parties in *Washington County* and *Haik*.

In sum, ECHO does not have standing to challenge the change applications because he was not an aggrieved party at the time, given that he did not acquire the water right until after the protest period. The Court grants the Defendants' motions. No further order is needed.

DATED this 29th day of August, 2019.



Honorable Su J. Chon
District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 190901675 by the method and on the date specified.

EMAIL: JEREMY COOK JCOOK@CK.LAW
EMAIL: WILLIAM GARBINA WGARBINA@CK.LAW
EMAIL: NORMAN JOHNSON NORMANJOHNSON@AGUTAH.GOV
EMAIL: STEPHEN KELSON STEPHEN.KELSON@CHRISJEN.COM
EMAIL: JULIE VALDES JVALDES@AGUTAH.GOV

Date: 08/29/2019

/s/ REFUGIO RANGEL

Deputy Court Clerk

EXHIBIT
5

GARY R. HERBERT
Governor
SPENCER J. COX
Lieutenant Governor

State of Utah
DEPARTMENT OF NATURAL RESOURCES
BRIAN C. STEED
Executive Director
Division of Water Rights
KENT L. JONES
State Engineer/Division Director

September 17, 2019

Jeremy Cook
VIA-EMAIL
jcook@ck.law
1415 East Downington Avenue
Salt Lake City, Utah 84015

Re: GRAMA RECORDS REQUEST
Emigration Improvement District

Dear Mr. Cook:

The State Engineer's Office has been working on its response to your GRAMA request received September 16, 2019 and offers the following information.

- The Division of Water Rights has reviewed our files with respect to your specific concerns and determines that all documents which are subject to disclosure under GRAMA can be found on our website. The State Engineer's Office files are open to the public during business hours and/or may be searched on line at www.waterrights.utah.gov. You may inspect all documents for information concerning the listed Utah water right(s) by using the State Engineer's database to search for each listed water right number.

We offer this response to your request.

1. List of all email addresses that have been listed to receive electronic Filings notification for Water Right 57-8865 since January 18, 2019.

   Here is the list of emails that were receiving notifications for water right 57-8865 prior to April 23 2019

   - jmabey@mwjlaw.com
   - jamie.q.white@gmail.com
   - dbarnett@barnettwater.com
   - mark.tracy72@gmail.com
   - m.tracy@echo-association.com

2. A list of each date that an electronic notation was sent to the each of the emails and description of the reason for the notification.

The email notification service sends an email to the registered addresses whenever a new record is added to a water right file. An email was sent to the five address listed above notifying the individuals that a new document had been added to the water right file on the following dates since January 18, 2019.

Date	Document Added to Water Right File 57-8865
01/18/2019	Extension of time Request, Lapsed and Reinstate Letter
01/25/2019	Letter Of Concern Received (Scot A Boyd)
01/31/2019	Notice Letter to Applicant of Letter of Concern
02/27/2019	Proof Of Publication of Extension Publication Received
03/06/2019	Protest Received (Emigration Canyon Home Owners Association)
03/08/2019	Notice Letter to Applicant of Protest
04/24/2019	Memorandum Decision/Order of the State Engineer
05/13/2019	Returned Mail (Emigration Canyon Home Owners Association, C/O Scot Boyd)
05/16/2019	Request for Reconsideration (Emigration Canyon Home Owners Association)
05/17/2019	Notice to Late Request of Reconsideration

3. With respect to the GRAMA requests, I really just need the list of email addresses that signed up to receive notification for Water Right 57-8865 prior to April 23, 2019, and a verification that notice of the April 23, 2019 decision on the Extension of Time Request was sent to those email addresses.

   On April 24, 2019 notification was sent to each of the email addresses listed above that a new document had been added to water right file 57-8865. The new document that was added was a Memorandum Decision/Order of the State Engineer granting an extension of time to submit proof.

   Here is the contents of the email that was sent to each of the email address listed above:

   Address From: waterrights@utah.gov

   Date Sent: 2019-04-24

   Email Subject: Activity on Water Right File: 57-8865

   Email Body: The Utah Division of Water Rights is sending this notice because new document(s) have been added to file 57-8865.

   You will find new document(s) pertaining to the file at the end of the Scanned Document list here: http://waterrights.utah.gov/cgi-bin/docview.exe?Folder=57-8865

To view the details of this Water Right, please click on the following link: https://www.waterrights.utah.gov/search/?q=57-8865

If you have not requested this email or believe that you are receiving it in error, you may contact the Utah Division of Water Rights by calling (801) 538-7240 to discontinue service.

You may customize your personal notice list at http://maps.waterrights.utah.gov/asp_apps/EmailNoticeFolder.asp

Please review the documents available online, print any that apply to your needs, or call to designate which items you wish to obtain from our office or to request certified copies, and we will make arrangements to have this done. Please give me a call for clarification or concerns at (801) 538-7370.

If you have any further concerns please feel free to contact the office at:

Department of Natural Resources
Division of Water Rights
1594 West North Temple, Suite 220
Salt Lake City, Utah 84116
(801) 538-7370

Sincerely,
Marianne Burbidge
Administrative Assistant/ Records Officer
Division of Water Rights

cc: wrtgeneral@gmail.com
Julie Valdes, Attorney General's office
jvaldes@agutah.gov
James Greer, Asst. State Engineer
jamesgreer@utah.gov

GRAMA Request Form

Note: Utah Code § 63G-2-204 (GRAMA) requires a person making a records request furnish the governmental entity with a written request containing the requester's name, mailing address, daytime telephone number (if available); and a description of the record requested that identifies the record with reasonable specificity.

Requester's information

Name: Jeremy Cook Date: September 13, 2019

Address: 1415 E. Downington Avenue

City/State/zip: Salt Lake City, Utah 84105

Daytime telephone number: 801-363-4300

Request made to

Government agency or office: Utah Division of Water Rights

Address: _____

City/State/zip: _____

Records requested

Note: The more specific and narrow the request, the easier it will be for an agency or office to respond to the request. If you are unsure about the records' description, contact the agency or office records officer.

Note: Government keeps records in "series" or groups of records. To find out what series an agency or office maintains, visit the Archives' website, http://archives.utah.gov. The record series retention schedules on the Archives' website include relevant descriptions.

Title or series number of records (if known): _____

Description of records including all relevant information—location of event(s) described in records, city, county, address; date range of the records; names of the person(s); and subject of the request.

1. A list of all email addressess that have been listed to receive electronic filing notifications for Water Right 57-8865 since January 18, 2019.

2. A list of each date that an electronic noficiation was sent to the each of the emails and description of the reason for the notificaiton.

If it is convenient, please email a response to jcook@ck.law

EXHIBIT
6

---------- Forwarded message ---------
From: **ECHO Association** <m.tracy@echo-association.com>
Date: Sat, Apr 27, 2019 at 1:45 AM
Subject: Emigration Canyon Lawsuit Update - United States Supreme Court Oral Arguments
To: Scot Boyd <scot.boyd@chrisjen.com>, Steve Kelson <Steve.Kelson@chrisjen.com>, Bryson Brown <bryson.brown@chrisjen.com>
Cc: <jfahys@kuer.org>, <jnguyen@abc4.com>, Emma Penrod <elpenrod@gmail.com>, Amy Joi O'Donoghue <amyjoi@deseretnews.com>, Brian Maffly <bmaffly@sltrib.com>, <tstevens@sltrib.com>, <dharrie@sltrib.com>, <ldavidson@sltrib.com>, Katie McKellar <kmckellar@deseretnews.com>, <lpacker@xmission.com>, <lindsaywhitehurst@gmail.com>, <newsdesk@kutv2.com>, <news@fox13now.com>, <laura.briefer@slcgov.com>, <cwoodward@slco.org>, <mrjohnson@slco.org>, <rosshansen@utah.gov>, <boydclayton@utah.gov>, <kentljones@utah.gov>, <uasd@uasd.org>, <briandavis@utah.gov>, <uag@utah.gov>, <districtattorney@slco.org>, wendy@utahopenlands.org <wendy@utahopenlands.org>, <mike@utahopenlands.org>, <carl@saveourcanyons.org>, <jdougall@utah.gov>, <amatheson@utah.gov>, <slcotreasurer@slco.org>, <newsmedia@ldschurch.org>, <btippets@vcbo.com>, <flowerpixel@hotmail.com>, <kate.miyagi@gmail.com>, <paul.h.brown@verizon.net>, Rin Harris <rinharris@gmail.com>, <agarybowen@msn.com>, mike@ecid.org <mike@ecid.org>, brent@ecid.org <brent@ecid.org>, dave@ecid.org <dave@ecid.org>, eric@ecid.org <eric@ecid.org>, <dbarnett@barnettwater.com>, <craign@aquaeng.com>, <joesmolka@ecmetro.org>, <jenhawkes@comcast.net>, <SteveECCC@gmail.com>, <lincmnehring@gmail.com>, <danderson760@gmail.com>, <harpsts@gmail.com>, <bill_tobey@yahoo.com>, Paul Brown <paulhandybrown@gmail.com>, <emigrationweb@gmail.com>, <tyler@tippetts.cc>, <marciascott52@yahoo.com>, <tab5k@yahoo.com>, <dbrems@gsbsarchitects.com>, <robertpaine@ecmetro.org>, <claire.clark@hsc.utah.edu>, Mike Jimenez <manazejimenez@gmail.com>

Dear Emigration Canyon Home Owner,

As you are aware, in September 2014, The ECHO-Association through Mark Christoper Tracy filed legal action against Emigration Improvement District ("***EID***" aka ECID), its trustees, managers, independent contractors, and land-developers R. Steve Creamer, The Boyer Company LC and City Development Inc. (*see* https://echo-association.com/?page_id=434) for alleged violations of the federal False Claims Act ("***FCA***") during the massive expansion of the Emigration Oaks development in Emigration Canyon.

Federal District Court judge Jill N. Parish had dismissed the FCA litigation based entirely upon EID & R. Steve Creamer's claim of a 6-year statute of limitations defense as per precedent of the United States Court of Appeals for the 10th Circuit (*see* https://echo-association.com/?page_id=2895).

However, during appellate review of Judge Parish's decision, the 10th Circuit Court of Appeals ordered abatement of the proceedings pending final decision of the United States Supreme Court regarding a three-way circuit split if federal whistle-blowers ("***qui tam Relators***") are allowed a 6 or 10-year deadline for filing legal action under the FCA.

Yesterday, the following article was posted by the law firm Holland & Knight summarizing the oral arguments presented to the United States Supreme Court in that case:

See https://echo-association.com/?page_id=3975.

We will continue to keep you informed of all developments in these matters.

Feel free to contact me directly with any questions, concerns or comments.

Kind Regards,

Mark Christopher Tracy
- *qui tam* Relator / ECHO President
Tel. 929-208-6010

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Eric Hawkes
(p) 801.243.5741
(e) eric@ECID.org
(w) www.ECID.org

EXHIBIT
7

From: The ECHO-Association <m.tracy@echo-association.com>
Date: June 13, 2019 at 4:07:55 PM MDT
To: Scot Boyd <scot.boyd@chrisjen.com>, Steve Kelson <Steve.Kelson@chrisjen.com>, Bryson Brown <bryson.brown@chrisjen.com>
Cc: bill.r.crouse.mil@mail.mil, christopher.l.arne.civ@mail.mil, jfahys@kuer.org, jnguyen@abc4.com, Emma Penrod <elpenrod@gmail.com>, Amy Joi O'Donoghue <amyjoi@deseretnews.com>, Brian Maffly <bmaffly@sltrib.com>, tstevens@sltrib.com, dharrie@sltrib.com, ldavidson@sltrib.com, Katie McKellar <kmckellar@deseretnews.com>, lpacker@xmission.com, lindsaywhitehurst@gmail.com, newsdesk@kutv2.com, news@fox13now.com, laura.briefer@slcgov.com, "cwoodward@slco.org" <cwoodward@slco.org>, mrjohnson@slco.org, rosshansen@utah.gov, boydclayton@utah.gov, kentljones@utah.gov, uasd@uasd.org, briandavis@utah.gov, uag@utah.gov, districtattorney@slco.org, "wendy@utahopenlands.org" <wendy@utahopenlands.org>, mike@utahopenlands.org, carl@saveourcanyons.org, jdougall@utah.gov, amatheson@utah.gov, slcotreasurer@slco.org, newsmedia@ldschurch.org, btippets@vcbo.com, flowerpixel@hotmail.com, kate.miyagi@gmail.com, paul.h.brown@verizon.net, Rin Harris <rinharris@gmail.com>, agarybowen@msn.com, "mike@ecid.org" <mike@ecid.org>, "brent@ecid.org" <brent@ecid.org>, "dave@ecid.org" <dave@ecid.org>, "eric@ecid.org" <eric@ecid.org>, dbarnett@barnettwater.com, craign@aquaeng.com, joesmolka@ecmetro.org, jenhawkes@comcast.net, SteveECCC@gmail.com, lincmnehring@gmail.com, danderson760@gmail.com, harpsts@gmail.com, bill_tobey@yahoo.com, Paul Brown <paulhandybrown@gmail.com>, emigrationweb@gmail.com, tyler@tippetts.cc, marciascott52@yahoo.com, tab5k@yahoo.com, dbrems@gsbsarchitects.com, robertpaine@ecmetro.org, claire.clark@hsc.utah.edu, Mike Jimenez <manazejimenez@gmail.com>
Subject: Legal Update - Emigration Canyon Water Litigation (Mt. Olivet Cemetery Water Rights)

Dear Emigration Canyon Home Owner,

As you are aware, on February 25, 2019, The ECHO-Association commenced water litigation against Emigration Improvement District ("EID" aka ECID) and Utah State Engineer Kent L. Jones regarding water right 57-7796.

See https://echo-association.com/?page_id=635.

Oral hearings in that matter are scheduled for July 9, 2019 (*see* https://echo-association.com/?page_id=4266)

Furthermore, in April 2015, we learned that The Boyer Company LC allegedly obtained water rights from the Mount Olivet Cemetery Association, the only active federal military cemetery created by an Act of Congress in 1874, in order to create the Emigration Oaks Private Urban Development ("Oaks PUD") on the north side of Emigration Canyon.

Yesterday, The ECHO-Association filed petition in the Utah State Third District Court against EID and Utah State Engineer Kent L. Jones regarding Mt. Olivet Cemetery Water Right 57-8865 currently claimed by EID and the continued operation of Boyer Wells Nr. 1 and Nr. 2 by EID.

See https://echo-association.com/?page_id=4275.

We will continue to keep you informed of developments in the Emigration Water Litigation as well as the Federal False Claims Act litigation currently pending with the United State Court of Appeals for the 10th Circuit.

Please feel free to contact me directly with any questions, concerns or comments.

Kind Regards,

Mark Christoper Tracy
- *qui tam* Relator / ECHO President
Tel. 929-208-6010