
IN THE UTAH COURT OF APPEALS

EMIGRATION CANYON HOME
OWNERS ASSOCIATION, a Utah
Corporation,

Appellant

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,

Appellees.

Court of Appeals No. 20180037

BRIEF OF APPELLEE EMIGRATION IMPROVEMENT DISTRICT

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LIST OF PARTIES

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- Emigration Improvement District, Respondent/Appellee
- Kent L. Jones, Respondent/Appellee

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INTRODUCTION

The Emigration Improvement District (“**EID**”) is a local district and public entity that provides water service to residents in Emigration Canyon. EID owns multiple water rights, including a portion of two of the most senior water rights in Emigration Canyon. EID provides water to some residents in Emigration Canyon through its municipal water system. EID also leases a portion of its water rights to residents with private wells.

On September 12, 2018, EID filed change application for water right nos. 57-7796 (a44045) and 57-10711 (a44046) (the “**Change Applications**”). The Change Applications were filed to correct and update points diversion along Emigration Creek for private wells, to correct the points of diversion for two previously approved springs, to add two existing public drinking water wells that were already approved for use under other water rights owned by EID, and to add five potential public drinking water well locations as points of diversion.

The Appellant, Emigration Canyon Home Owners Association (“**ECHO**” or “**Appellant**”), is not a traditional home owners association. Instead, ECHO is registered with the Utah Department of Commerce as a DBA of Mark Christopher Tracy (“**Mr. Tracy**”), and according to Petitioner, is a for-profit sole proprietorship of Mr. Tracy. On October 17, 2018, ECHO filed a protest against the Change Applications (the “**ECHO Protest**”). However, at the time of filing the ECHO Protest, neither ECHO nor Mr. Tracy claimed to own any real property or water rights in Emigration Canyon, and thus did not have any water rights that could have been impaired as a result of the Change Applications.

On December 19, 2018, the State Engineer held a hearing on EID’s Permanent Change Application (the “**Protest Hearing**”). The Order of the State Engineer for Permanent Change Application Number 577796 (a44045) was issued on January 16,

2019, and the Order of the State Engineer for Permanent Change Application Number 57-10711 (a44045) was issued on January 25, 2019.

On February 11, 2019, in an apparent attempt to obtain standing to file the Petition, ECHO acquired water right no. 57-8947 (a16183) from an individual named Nelson R. Mather (“**Mr. Mather**”). However, it is undisputed that Mr. Mather had not filed a protest in the informal adjudicative proceeding before the State Engineer, and ECHO did not claim in its protest that it was the owner of water right no. 57-8947.

PERTINENT ALLEGATIONS OF THE PETITION

Petition ¶ 1. Petitioner, the ECHO-Association is registered with the Utah Department of Commerce, is a dba entity of Mark Christopher Tracy and is the owner of water right no. 57-8947 (a16183).

Petition ¶ 8. Pursuant to Utah Code Ann. § 63G-4-402, Petitioner identifies the following entities and individuals who were parties to the underlying informal adjudicative proceedings and who submitted timely protests to EID's permanent change applications:

- a. Emigration Improvement District;
- b. Emigration Canyon Home Owners Association (representative Mark Christopher Tracy) c/o Scot A. Boyd, 257 East 200 South, Ste 1100, SLC, Utah 84111;
- c. Salt Lake City, a municipal corporation, do Laura Briefer, 1530 South West Temple, SLC, Utah 84115;
- d. Pinecrest Pipeline Operating Company, c/o Steve Moore, 6424 E. Lefthand Fork Ln, SLC, Utah 84108;
- e. Tierra Investments, LLC, 6440 Wasatch Blvd Ste 340, SLC, Utah 84121;

- f. Willy Stokman, 86 S Skycrest Lane, SLC, Utah 84108;
- g. Jack Samuel Plumb, 6378 E Emigration Canyon Road, SLC, Utah 84108;
- h. Margot McCallum, 1167 Pinecrest Canyon Road, SLC, Utah 84108;
- i. Larry and Susan Henchel, 3806 Sunnydale Ln, SLC, Utah 84108;
- j. Patricia [Pat] Sheya, 1111 Alvarado Ave., Apt. 116, Davis, California 95616-5919;
- k. Eric M. Simon, 6627 E, Emigration Canyon Rd, SLC, Utah 84108;
- l. Laura Gray, 1195 Pinecrest Canyon Road, SLC, Utah 84108;
- m. Daniel Walker, 3762 E Sunnydale Ln, SLC, Utah 84108;
- n. Michael Martin, PO Box 58602, SLC, Utah 84158;
- o. Brett Wheelock, 6571 East Quartermile Road, SLC, Utah 84108;
- p. Jamie White, c/o JAMIE WHITE, 7290 Las Vistas Drive, Las Cruces, New Mexico 88005;
- q. Robert Jordan, 749 N Emigration Canyon Rd, SLC, Utah 84108;
- r. Mary Jo Sweeney, Trustee for Michael James Ballantyne, 865 N Pinecrest Canyon Road, SLC, Utah 84108;
- s. Jessica Lucas, 4801 E Skycrest Park Cove, SLC, Utah 84108;
- t. Donald L. Clark, 100 South Skycrest Lane, SLC, Utah 84108;
- u. Lowell Miyagi, 6298 E Lefthand Fork Lane, SLC, Utah 84108;
- v. Melinda McIlwaine, 2148 N Pinecrest Canyon Road, SLC, Utah 84108;
- w. Phil Davis, 1832 N, Pinecrest Canyon, SLC, Utah 84108;
- x. John Porcher, 2238 Pinecrest Canyon Road, SLC, Utah 84108;
- y. Dr. Jessica Kramer, 4801 E Skycrest Park Cove, SLC, Utah 84108;
- z. Barbara Babson and Ben Dobbin, 2230 Pinecrest Canyon Road, SLC, Utah 84108;
- aa. Dr. Sarah K. and Jason P. Hall, 1761 N. Pinecrest Canyon Road, SLC, Utah 84108;
- bb. David L. Phillips, 907 North Pinecrest Canyon Road, SLC, Utah 84108;
- cc. Andrew B. Walker, 6016 E. Red Hill Lane, SLC, Utah 84108;
- dd. Stephen B. and Michelle D. Andersen, 3980 E, Emigration Canyon Rd, SLC, Utah 84108;
- ee. Chris and Kirtly Jones, 3798 E Sunnydale Lane, SLC, Utah 84108;
- ff. Ronald Hallett, 290 Margarethe Lane, SLC, Utah 84108;
- gg. Dinko Duheric, 6392 Emigration Canyon Road, SLC, Utah 84108;
- hh. Karen Penske, 1278 N Pinecrest Canyon Road, SLC, Utah 84108;
- ii. Caroline Biggs, c/o Caroline Biggs, 6740 E Emigration Canyon Road, SLC, Utah 84108;

- jj. Kate and James Bert Bunnell, 3962 East Emigration Canyon Road, SLC, Utah 84108;
- kk. Daniel Craig, c/o Daniel Boone Craig, 2137 N Pinecrest Canyon Road, SLC, Utah 84108;
- ll. Gregory Palis, 6771 E Emigration Canyon Road, SLC, Utah 84108;
- mm. Michael Terry, 6226 E Emigration Canyon Road, SLC, Utah 84108; and
- nn. Robert J. Reid IV, 6788 Emigration Canyon Road, SLC, Utah 84108.

Petition ¶ 16. On September 10, 2018, EID filed the two subject change applications, Nos. 577796 (a44045) and 57-10711 (a44045).

Petition ¶ 17. On September 12, 2018, EID filed revised change applications to replace those filed on September 10, 2018 (the "Permanent Change Applications"), *See* Exs. D and E.

Petition ¶ 18. On October 17, 2018, The ECHO-Association filed its protest to both permanent change applications with two subsequent addendums. *See* Exs. F, G and H.

Petition ¶ 20. On December 19, 2018, the State Engineer held a hearing on EID's Permanent Change Application (the "Protest hearing").

Petition ¶ 21. The Order of the State Engineer for Permanent Change Application Number 577796 (a44045) was issued on January 16, 2019, *See* Ex. B.

Petition ¶ 22. The Order of the State Engineer for Permanent Change Application Number 57-10711 (a44045) was issued on January 25, 2019, *See* Ex. C.

The Water Right Deed

1. On February 11, 2019, Mr. Mather signed and notarized a Quitclaim Deed conveying water right no. 57-8947 (a16183) (the “**Water Right**”) to Emigration Canyon Home Owners Association. *See Memorandum Decision and Order*, p. 2.

ISSUES PRESENTED BY THE APPEAL

1. Does ECHO have standing to file the Petition based on its acquisition of the Water Right on February 11, 2019?
2. Does ECHO have standing based on the public policy exception?
3. Does ECHO have standing based on the protests of other water right holders?

SUMMARY OF THE ARGUMENT

ECHO does not have standing because ECHO did not own any water rights when it filed and argued its protest before the State Engineer, and ECHO could not have acquired standing by obtaining the Water Right after the decisions of the State Engineer because Mr. Mather did not file a protest. Likewise, because ECHO purports to be a for profit sole proprietorship of Mr. Tracy, ECHO does not have standing based on the protests filed by other parties. Finally, the public policy exception is only applicable in limited circumstances where a matter raises issues that are so unique and of such great importance that they ought to be decided in furtherance of public interest. This case clearly does not meet the standard to obtain standing under the public policy argument.

ARGUMENT

I. ECHO’S OWNERSHIP OF WATER RIGHT NO. 57-8947 (a16183) DOES NOT GIVE ECHO STANDING.

It is a fundamental premise of our legal system that only those who are aggrieved by an action may file a lawsuit to obtain relief. Relative to district court review of an action by the State Engineer on a change application, “standing is a jurisdictional requirement that must be satisfied before a district court may even entertain the question of whether the state engineer's decision was consistent with the requirements of Utah law. *Washington County Water Conservancy Dist. v. Morgan*, 82 P.3d 1125, 1128 (Utah 2003)(citing *Harris v. Springville City*, 712 P.2d 188, 190 (Utah 1986) (“[L]ack of standing is jurisdictional,”) and *Jenkins v. Swan*, 675 P.2d 1145, 1150–51 (Utah 1983) (holding that a party must have standing to invoke the jurisdiction of the court)).

When pursuing relief afforded by statute, a party seeking the benefit of the statute must be within the class of parties the legislature has authorized to file suit. *Washington County Water Conservancy Dist. v. Morgan*, 82 P.3d 1125, 1128 (Utah 2003). To obtain judicial review of a determination by the state engineer on a change application, a petitioner must be “[a] person aggrieved by an order of the state engineer.” Utah Code Ann. § 73-3-14(1)(a). See *Haik v. Jones*, 427 P.3d 1155, 1159 (Utah 2018). See also *Washington County Water Conservancy Dist. v. Morgan*, 82 P.3d 1125, 1128 (Utah 2003). This means the petitioner must be able to show “particularized injury.” *Id.* at 1130. In the context of judicial review of the state engineer, the Utah Supreme Court

held the following:

We have recognized that 'the first and most widely employed standard' for establishing standing 'requires a plaintiff to show some distinct and palpable injury that gives rise to a personal stake in the outcome of the dispute.' This requirement that a plaintiff demonstrate such 'particularized' injury is part of the 'traditional' test for standing." *Id.* ¶ 20 (citations omitted). The traditional standing requirement is generally justified on grounds that in the absence of a requirement that a plaintiff have a 'personal stake in the outcome' or a 'particularized injury,' the courts might permit themselves to be drawn into disputes that are not fit for judicial resolution or amount to 'generalized grievances that are more appropriately directed to the legislative and executive branches of the state government.' *Soc'y of Profl Journalists, Utah Chapter v. Bullock*, 743 P.2d 1166, 1170 (Utah 1987) (citation omitted).

Haik v. Jones, 427 P.3d 1155, 1159 (Utah 2018).

Likewise, "the requirement that a party exhaust administrative remedies before seeking judicial review is a matter of subject matter jurisdiction." *Ramsay v. Kane County Human Resource Spec. Serv. Dist.*, 322 P.3d 1163, 1166 (Utah 2014).

ECHO asserts two positions in its appeal. First, ECHO argues that it acquired the Water Right prior to filing its protest with the State Engineer. Second, ECHO argues that even if it acquired the Water Right after the decision of the State Engineer, it still has standing because it acquired the Water Right prior to filing the Petition. However, neither of these arguments have merit.

A. ECHO Acquired the Water Right On February 11, 2019.

It is undisputed that the quitclaim deed transferring the water right from Mr. Mather to ECHO was signed and notarized on February 11, 2019, and Utah law is clear

that title to water right, which is a real property interest in Utah, may only be transferred by operation of law or by a deed or conveyance in writing. Specifically, Utah Code Ann. § 25-5-1 states:

No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

(emphasis added).

It is also a fundamental principal that “parol evidence may not contradict, vary, or add to deeds.” *See Neeley v. Kelsch*, 600 P.2d 979, 981 (Utah 1979).

ECHO acknowledges that Mr. Mather executed and delivered the quitclaim deed on February 21, 2019. However, despite Utah Code Ann. § 25-5-1 being clear, ECHO does not provide any legal analysis or support to contradict the language in Utah Code Ann. § 25-5-1. *See* ECHO Brief, p. 21. In fact, without any legal analysis, ECHO simply asserts that the transfer happened at an earlier date. *Id.*

Accordingly, the Court should uphold the decision of the District Court that ECHO did not own the Water Right until February 11, 2019, after the hearing and decisions of the State Engineer.

B. ECHO’s Acquisition of the Water Right On February 11, 2019 Does Not Give It Standing.

The timeline in this matter is undisputed. EID filed the initial Change

Applications on September 10, 2018. The Utah Division of Water Rights published notice of the Change Applications on September 27, 2018. In accordance with Utah Code Ann. § 73-3-7, the Notice indicated that protest must be filed by October 17, 2018. On December 19, 2018, the State Engineer held the Protest Hearing. (Petition ¶¶ 20). The Order of the State Engineer Approving the Permanent Change Application Number 577796 (a44045) was issued on January 16, 2019 while the Order of the State Engineer Approving Permanent Change Application Number 57- 10711 (a44045) was issued on January 25, 2019. (Petition ¶¶ 21-22).

ECHO argues that even if it obtained the Water Right on February 11, 2019, nearly two weeks after the State Engineer concluded his proceedings, it still has standing because it obtained the Water Right prior to filing the Petition. However, ECHO ignores one critical fact. On September 10, 2018, and continuing through February 11, 2019, Water Right 57-8947 was owned by Mr. Mather, and Mr. Mather did not file a protest with the State Engineer. Thus, Mr. Mather would not have had standing to appeal based on his ownership of Water Right 57-8947. Clearly, if Mr. Mathers lacks standing to appeal based on a failure to exhaust administrative remedies, then a subsequent owner, such as ECHO, cannot have exhausted its administrative remedies relative the Water Right.

Thus, because Mr. Mathers lacked standing to appeal based on his ownership of Water Right 57-8947, the conveyance of Water Right 57-8947 to ECHO on February 11,

2019 does not create standing for ECHO to seek judicial review.

II. ECHO LACKS “PUBLIC INTEREST” STANDING.

ECHO lacks public interest standing because this matter is not so unique and of such great public importance to that it ought to be decided in furtherance of the public interest.

In *Nat. Parks & Cons. Ass'n v. Bd. of St. Lands*, 869 P. 2d 909, 913 (Utah 1993), the Utah Supreme Court recognized two possible alternative grounds for standing. First, the Court held:

[S]tanding may still be established for important "public issues" 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," *Terracor*, 716 P.2d at 799, and the legal issues are sufficiently crystallized to be subject to judicial resolution. The rationale underlying this standard is that important issues regarding the lawfulness of governmental action ought to be judicially resolved if they can be presented by one having the necessary adverseness.

ECHO does not argue that it meets this standard, presumably because it is obvious that other parties, including the numerous other parties that have real property and wells located along Emigration Creek, have a greater interest in the outcome of the litigation. Instead, ECHO relies on the second ground for standing established in *National Park*, which recognized:

[A] plaintiff may maintain a suit against governmental action in those limited circumstances in which a case raises issues that are so "unique and of such great importance that they ought to be decided in furtherance of the public interest." *Terracor*, 716 P.2d at 799; *see also Jenkins v. State*, 585 P.2d 442, 443 (Utah 1978). This standard recognizes the need to have issues of great public importance resolved in compliance with the law when a court can act

within its institutional and constitutional limitations. The dispute must (1) raise a statutory or constitutional issue of substantial public import, (2) be presented by adverse parties, and (3) otherwise be suitable for resolution by the courts.

See also Washington County Water Conservancy District, 82 P.3d 1125 (Utah 2003)

(“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”).

Thus, ECHO would have to establish that this is one of those “limited circumstances” that is “so unique” and of such “great importance” to warrant public interest standing.

ECHO’s primary argument is that the State Engineer’s orders directly affect over 415 individuals with private wells in the Canyon, Hogle Zoo and Mt. Olivet. However, there is absolutely no evidence that the change application could possibly impact every private well in Emigration Canyon, and the State Engineer, who is the expert in the matter, found that reasonable belief that the change application would not impair existing rights. *See* Utah Code Ann. § 73-3-8(1)(a)(ii). Moreover, even if ECHO could establish that the change applications had the potential to impact 415 individuals with private wells, the potential impairment of private wells in a discrete geographical area is clearly not the type of limited circumstance to justify public interest standing because any private well owners had the ability to protest the change applications.

ECHO also argues that the change application is of great importance because the Canyon is the location of Utah’s Hogle Zoo. However, Salt Lake City owns the water

rights utilized by Hogle Zoo and Salt Lake City filed a protest on behalf of Hogle Zoo. Thus, if Salt Lake City believed that the decision of the State Engineer was incorrect and would have a significant negative impact on the operations of Hogle Zoo, Salt Lake City would certainly have been in the best position to seek judicial review. It did not do so.

ECHO's argument that this matter is one of great public importance is also contradicted by the fact that EID already had numerous approved points of diversion for public drinking water wells in Emigration Canyon. Primarily, the Order of the State Engineer recognized:

The subject change application is based on existing water right 57-7796, which is a portion of a right to use water established prior to 1903 by diverting water from Emigration Creek to use for irrigation, domestic, and stock watering purposes in the Salt Lake Valley. Change application a17521 (55-7796), approved December 31, 1996, authorizes the use of 33.0 cfs or 649.99 acre-feet of water from the same base water right to be diverted for municipal purposes inside the EID service area. Said change application grants EID the authorization to divert water from 19 surface sources and 22 wells located upstream from the historical point of diversion, which was located near the mouth of the canyon.

See Petition, Exhibit B (Order of State Engineer), p. 3.

Thus, notwithstanding the change applications, EID already had the right to divert water under Water Right 57-7796 from numerous points of diversion in Emigration Canyon, and the change applications did not increase the amount of water EID could potentially remove from the Canyon. Instead, as noted by the State Engineer, the addition of "strategically located points of diversion would allow flexibility and can serve to reduce the any future demonstrated localized interference issues." *Id.*, p. 4-5.

In summary, this is certainly not one of those “limited circumstances” that is “so unique” and of such “great importance” to warrant public interest standing, and the Court should uphold the decision of the District Court.

III. ECHO DOES NOT HAVE STANDING BASED ON PROTESTS OF OTHER WATER RIGHT OWNERS.

In its Brief, Petitioner argues that ECHO is a for profit sole proprietorship of Mr. Tracy individually. Specifically, Petitioner asserts:

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

ECHO Brief, p. 19.

Likewise, in the Petition, Petitioner asserts that “[t]he ECHO-Association is registered with the Utah Department of Commerce, is a dba entity of Mark Christopher Tracy and is the owner of Water Right No. 57-8947 (a16183).” Petition, ¶ 1. Petitioner did not assert in the Petition or argue to the District Court that the Petitioner was representing third-parties in this action who filed protests with the State Engineer, or that Petitioner has authority to represent those parties in this action. In fact, such a position would be directly contradicted by Petitioner’s assertion that ECHO is just a DBA of Mr. Tracy personally and only represents his interest. Accordingly, the fact that other water right owners filed protests does confer on Petitioner standing to file the Petition.

In addition, as Petitioner acknowledges, it is uncontested that an unincorporated association cannot hold or transfer title to property in Utah. *Crane v. Crane*, 683 P.2d 1062, 1067 (UT 1984) *citing* 6 *Am.Jur.2d Associations and Clubs* § 13 (1963); Annot., 15 A.L.R.2d 1451 (1951). Thus, to the extent that Petitioner did operate as an unincorporated association, Water Right No. 57-8947 would have to be owned by Mr. Tracy, and any of the other water rights would be owned by the third-party individuals or entities. Each of those individuals or entities filed the protests in their name, and not in the name of Petitioner. Accordingly, because protests were filed by the actual water right owners individually, an appeal to the District Court based on the protest of the individual water rights owners would have also had to be filed in the name of the individual water right owners, not ECHO.

Finally, because an unincorporated association cannot own water rights, the unincorporated association cannot show a “particularized injury” that would confer standing on the unincorporated association. *See Washington County*, 82 P.3d 1125, 1130 (Utah 2003). Again, any particularized injury would be to the owner of the water right, and not to the unincorporated association.

In summary, Petitioner does not have standing based on the protests filed by other water right owners.

CONCLUSION

The Court should affirm the decision of the District Court.

DATED this 23rd day of February, 2022.

COHNE KINGHORN

/s/ Jeremy R. Cook

Jeremy R. Cook

CERTIFICATE OF COMPLIANCE

I, Jeremy R. Cook, counsel for Emigration Improvement District, hereby certify that the foregoing Brief of Appellees, complies with the type-volume limitation of Utah Rule of Appellate Procedure 24(g) and contains **3,716 words**, excluding the parts of the brief exempted by Utah Rules of Appellate Procedure 24(g)(2). This brief has been prepared using Microsoft Word for Office 365 MSO (16.011929.20708).

I also certify that the foregoing Brief of Appellee complies with the Utah Rule of Appellate Procedure 21(h) and does not contain non-public information.

Dated this 23rd day of February 2022.

By: /s/ Jeremy R. Cook

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of February 2022, a true and correct copy of the **BRIEF OF APPELLEE EMIGRATION IMPROVEMENT DISTRICT** was served by the CMECF system which will send notice of filing to counsel of record:

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I further certify that on the 23rd day of February 2022, a true and correct copy of the

BRIEF OF APPELLEE EMIGRATION IMPROVEMENT DISTRICT was served *via* email and regular U.S. Mail to the following:

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