

Jeremy R. Cook (10325)  
William G. Garbina (13960)  
**COHNE KINGHORN, P.C.**  
111 E. Broadway, Suite 1100  
Salt Lake City, UT 84111  
Telephone: (801) 363-4300  
Facsimile: (801) 363-4378  
Email: [jcook@cohnekinghorn.com](mailto:jcook@cohnekinghorn.com)  
[wgarbina@cohnekinghorn.com](mailto:wgarbina@cohnekinghorn.com)

*Attorneys for Emigration Improvement District*

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

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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.

**EMIGRATION IMPROVEMENT  
DISTRICT'S RESPONSE TO  
SUPPLEMENTAL BRIEF**

Case No. 190901675

Judge: Su Chon

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Respondent Emigration Improvement District (“**EID**”), through counsel, submits this response to the *Supplement Brief in Opposition to Respondent’s Motion to Dismiss* (the “**Supplemental Brief**”) filed by Emigration Canyon Home Owners Association (“**ECHO**”).

**ARGUMENT**

At the hearing, Mr. Johnson, counsel for the Utah State Engineer, citing *Wiggle v. Cheney*, 597 p.2d 1351 (1979), argued that Utah law is well-settled that the transfer of property is effective upon delivery of the deed, and therefore the purported transfer of the water right from

Mr. Mathers to ECHO could not have been effective until at least February 11, 2019, which was the date the quitclaim deed was signed and notarized by Mr. Mathers. The Court recognized that a deed is typically effective on delivery, but posed the question whether backdating the quitclaim deed could alter the effective date of the purported property transfer. ECHO's counsel was not aware of any case law that would support the position that the effective date of the transfer of a water right could be altered by backdating the deed, but asked for the opportunity to submit a supplemental brief on the issue. As set forth below, not only did ECHO fail to find any case from any jurisdiction to support the position that the effective date of a deed can be altered by backdating the deed, but ECHO's own argument contradicts that position.<sup>1</sup>

**I. Section I of ECHO's Supplemental Brief Supports the Position of EID and the State Engineer.**

Section I of ECHO's Supplemental Brief begins with the argument: "Pursuant to Utah case law, "[a] conveyance is valid **upon delivery of a deed** with present intent to transfer." (emphasis added); and Section I ends with the argument: "Pursuant to Utah law, **the controlling date of ownership is therefore, the date of delivery** and not the date pf (sic) recording." (emphasis added). Supplemental Brief, p. 2.

Initially, although EID agrees with ECHO that the controlling date of ownership is the date of delivery, for purposes of this matter, it makes no difference if ownership of the water rights transferred on February 11, 2019 (the date of quitclaim deed was executed) or February

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<sup>1</sup> In its Protest, dated October 17, 2018 (which was the last day to timely file a protest), ECHO alleged that "[t]he property right of Canyon resident Mather as evidenced by surface water share 57-8947 . . ." Petition, Exhibit F, p. 5. Thus, even if backdating the quitclaim deed could make the transfer effective as of November 8, 2018, Mr. Mathers owned the water right on October 17, 2018 and failed to exhaust his administrative remedies by timely filing a protest. Therefore, even if ECHO had acquired the water right on November 8, 2018, ECHO still would not have standing because Mr. Mather's failed to timely file a protest and ECHO indicated in its protest that it did not own the water right. In addition, in neither its briefs or the oral argument has ECHO ever presented any case law or argument to counter EID's argument that a DBA cannot own water rights, which is absolutely fatal to ECHO's claim that a DBA (which is not a legal entity) can have a "particularized injury" which would make it a "person aggrieved by the order of the state engineer." See *Haik v. Jones*, 427 P.3d 1155, 1159 (Utah 2018).

21, 2019 (the date of recording), which is probably why the Court did not ask for supplemental briefing on that issue. It is unclear if ECHO is trying to confuse the issues, or if ECHO just decided to address an issue that is not in dispute and not relevant.

However, it is undisputed that the quitclaim deed at issue in this matter was signed on February 11, 2019. Thus, based on ECHO's own argument that the controlling date of ownership is the date of delivery, ownership could not have transferred until at least February 11, 2019. In other words, ECHO's own argument unequivocally acknowledges that, notwithstanding that the quitclaim deed was backdated, ownership of the water right did not transfer until delivery of the deed, which had to occur after the quitclaim deed was signed and notarized on February 11, 2019.

Therefore, because Mr. Mathers owned the water right throughout the protest period and failed to exhaust his administrative remedies by filing a protest, ECHO lacks standing to bring this action based on the purported transfer of the water right to ECHO, and the Court should grant respondents' Motions to Dismiss.

## **II. Utah Law is Clear That a Deed Cannot Be Backdated to Change the Effective Date of the Transfer.**

In Section II of the Supplemental Brief, ECHO begins by indicating that: "Counsel for The ECHO-Association could find no Utah case law on point regarding "backdating" of property on a quitclaim deed." Although EID agrees that there are no Utah cases on point that support ECHO's position, this statement is somewhat baffling considering the ECHO started Section I of ECHO's Supplement Brief with Utah case law stating that a "conveyance is valid upon delivery of a deed" and ECHO argued that "pursuant to Utah law, the controlling date of ownership is therefore, the date of delivery . . . ." Supplemental Brief, p. 2 (*citing Crowther v. Mower*, 878 P.2d 876, 879 (Utah Ct. App. 1994)). In fact, there are numerous Utah cases on point regarding

the effective date of a quitclaim deed.

For example, in *Julian v. Petersen*, 966 P.2d 878, 881 (Utah App. 1998), the Utah Court of Appeals recognized:

In Utah, a quitclaim deed has the effect of a conveyance only when "executed as required by law." Utah Code Ann. § 57-1-13 (1994). This has been interpreted to mean that a deed must be in writing, *see* Utah Code Ann. § 25-5-1 (1995); signed by the creator, *see id.*; 26 C.J.S. Deeds § 34 (1956); supported by consideration, *see Cereghino v. Einberg*, 4 Utah 514, 11 P. 568 (Utah 1886); and delivered to the grantee. *See Wiggill v. Cheney*, 597 P.2d 1351, 1351 (Utah 1979) (emphasis added).

The Court in *Julian* further recognized that Utah Code Ann. § 57-1-13 provides that a quitclaim deed operates to convey estate of grantor at the date of such conveyance. *Id.*<sup>2</sup> Thus, Utah law is clear that a quitclaim deed operates to convey the estate at the date of the conveyance, and the deed has the effect of a conveyance only when signed by the grantor and delivered to the grantee. Accordingly, there are Utah cases on point regarding backdating, they just clearly indicate that the effective date of a property transfer is the date of delivery of the deed, regardless of whether the deed is backdated.

Not only is Utah law clear with respect to backdating deeds, ECHO was apparently not able to find any case from any jurisdiction that held that the effective date of a property transfer could be changed by backdating a deed. For example, ECHO cites to an unreported Sixth Circuit Court of Appeals case that found that an assignment of a deed of trust could have a retroactive effective date for purposes of a trust deed foreclosure action. *See Deutsche Bank Nat'l Trust Co. v. Burke*, 655 Fed. App'x. 251 (6th Cir. 2016). However, the retroactive assignment of a deed

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<sup>2</sup> The Court in *Julian* also recognized: "It is well-settled that an attempted conveyance of land to a nonexistent entity is void. *See Sharp v. Riekhof*, 747 P.2d 1044, 1046 (Utah 1987) (citations omitted). A deed naming a deceased person or his or her estate as a grantee is void because neither the estate nor the decedent is a legal entity. *See id.*" *Id.* Likewise, a DBA is not a legal entity that can own real property, and a purported transfer of water rights to a DBA is void.

of trust for purposes of a foreclosure action is certainly not the same as backdating a deed transferring real property.

Likewise, ECHO cites a 1977 tax court case. *See Baird v. Commissioner*, 68 T.C. 115 (T.C. 1977). In *Baird*, the issues before the Court were: “(1) On what date did petitioner John N. Baird become the owner of a certain building and personal property located therein, **for tax purposes**; and (2) what amount, if any, may petitioners claim as deductible interest expense under section 163, I.R.C. 1954, with respect to payments made for loan commitment fees, loan transfer fees, and mortgage points. *Id.*, at 116 (emphasis added).” Thus, although the court in *Baird* found that for tax purposes an equitable ownership to real property could pass based on a written agreement of the parties, the court recognized that legal ownership did not pass until the deed was executed. *Id.* at 126 (“While legal ownership of the Midgley real estate may not have passed to petitioner until the deed was executed on October 28, 1970 . . .”).

In contrast to the cases cited by ECHO, which are not on point, there are numerous cases that hold that a deed takes effective on delivery. *See also Ligon v. City of Detroit*, 739 N.W. 2d 900 (Mich. App. 2007) (“A deed takes effect from the time of its delivery, and not from the time of its date, execution or record[ing].” (citations omitted); *Jones v. Wolfe*, 203 W.Va. 613, 615, 509 S.E.2d 894, 896 (1998) (“The law in this State is rather clear that a deed takes effect from its actual or constructive delivery. . . . Recording of the deed is not critical”) (citations omitted); *McCoy v. Love*, 382 So.2d 647, 649 (Fla.1979) (“A deed takes effect upon delivery, and nothing passes until delivery”).

In summary, because the quitclaim deed was not delivered until at least February 11, 2019, Mr. Mathers owned the water right prior February 11, 2019.

### **III. Additional Supplemental Briefing Is Unnecessary.**

ECHO inexplicably requests additional briefing on the issue of backdating, which was the issue ECHO asked to address in this supplemental briefing. Clearly, ECHO's counsel conducted an extensive search of both Utah cases and cases outside of Utah and was not able to find any cases to support ECHO's position. Accordingly, the Court should deny ECHO's Motion for Leave to Submit Additional Briefing, and not allow ECHO to further delay resolution of this matter.

### **CONCLUSION**

ECHO has cited no cases from Utah or any other jurisdiction holding that a quitclaim deed can be backdated to change the effective date of the property transfer, and Utah law is clear that the transfer of property is effective upon delivery of the deed. Therefore, the purported transfer of the water right from Mr. Mathers to ECHO could not have been effective until at least February 11, 2019. Because Mr. Mather owned the water right prior to February 11, 2019, and Mr. Mather failed to exhaust his administrative remedies by filing a protest, ECHO lacks standing based on its purported ownership of the water right and the Court should dismiss this action.

DATED this 25<sup>th</sup> day of July, 2019.

COHNE KINGHORN

/s/ Jeremy R. Cook  
William G. Garbina  
Jeremy R. Cook  
ATTORNEYS FOR DEFENDANTS

## CERTIFICATE OF SERVICE

I hereby certify that on the 25<sup>th</sup> day of July 2019, a true and correct copy of the foregoing document was served by the CMECF system which will send notice of filing to the following counsel of record:

Scot A. Boyd  
Stephen D. Kelson  
Bryson R. Brown  
CHRISTENSEN and JENSEN  
257 East 200 South, Suite 1100  
Salt Lake City, Utah 84111  
*Attorneys for ECHO*

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

/s/ Janelle Dannenmueller