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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.

**REPLY MEMORANDUM OF  
EMIGRATION IMPROVEMENT  
DISTRICT IN SUPPORT OF  
MOTION TO DISMISS**

**RE: ORDERS OF THE STATE  
ENGINEER FOR PERMANENT  
CHANGE APPLICATIONS NOS. 57-7796  
(a44045) AND 57-10711 (a44046)**

Case No. 190901675

Judge: Su Chon

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Respondent Emigration Improvement District (“**EID**”), through counsel, submits this  
*Reply Memorandum in Support of its Motion to Dismiss the Petition for De Novo Judicial  
Review of Informal Adjudicative Hearing* (the “**Petition**”) filed by Emigration Canyon Home  
Owners Association (“**ECHO**”).

## **INTRODUCTION**

In its Opposition to the Motions to Dismiss, ECHO offers evidence regarding ECHO's purported ownership of Water Right 57-8947, which is contradicted by the allegations of its Petition and the deed by which it purportedly acquired the right. Contrary to its assertions, ECHO is neither a corporation nor a properly registered "d/b/a." As a result, ECHO cannot bring or maintain a lawsuit. It cannot even own a water right. Clearly, ECHO has no standing and this matter should be dismissed.

## **ARGUMENT**

### **I. ECHO Lacks Standing Because It is Not a Legal Entity.**

In its Opposition, ECHO attempts to introduce new evidence regarding ECHO's purported ownership of Water Right 57-8947. Specifically, paragraph 8 of the *Declaration of Nelson R. Mather* states: "On September 27, 2018 I transferred ownership of my surface water right to the Emigration Canyon Home Owners Association." Likewise, paragraph 3 of the Declaration of Mark Christopher Tracy states: "On September 27, 2018, The ECHO-Association purchased surface water right 57-8947 (a16183) located directly on the Emigration Canyon Stream from Mr. Nelson R. Mather."

The caption of the Petition states that ECHO is "a Utah corporation." In contrast, the allegations in the Petition allege that ECHO is a "dba entity" of Mark Christopher Tracy. *See* Petition, p. 4, ¶ 1. In fact, ECHO is neither. "Emigration Canyon Home Owners Association" is not registered as either a d/b/a or a corporation with the Utah Department of Commerce.<sup>1</sup> *See Declaration of Jeremy R. Cook*, attached hereto as Exhibit A.

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<sup>1</sup> Mark Christopher Tracy does have a "d/b/a" registered as "Emigraiton Canyon Home Owners Association." (Note that the word Emigration is either intentionally or inadvertently misspelled).

Because ECHO is neither a separate legal entity (corporation) nor a properly registered assumed name (d/b/a), the Court must dismiss the Petition. In order to do business under an assumed name, a person must file a certificate with the Utah Division of Corporations and Commercial Code. Utah Code Ann. § 42-2-5(2). That section states:

- (2) A person who carries on, conducts, or transacts business in this state under an assumed name, whether that business is carried on, conducted, or transacted as an individual, association, partnership, corporation, or otherwise, shall:
  - (a) file with the Division of Corporations and Commercial Code a certificate setting forth:
    - (i) the name under which the business is, or is to be carried on, conducted, or transacted;
    - (ii) the full true name, or names, of the person owning, and the person carrying on, conducting, or transacting the business; and
    - (iii) the location of the principal place of business, and the street address of the person;

Mr. Tracy has not complied with this statute with respect to ECHO. *See* Ex. A.

Because Mr. Tracy has not complied with Utah law governing conducting business under an assumed name, Mr. Tracy is not entitled to avail himself of Utah's courts. This is because Utah Code Ann. § 42-2-10 states, "Any person who carries on, conducts, or transacts business under an assumed name without having complied with the provisions of this chapter, and until the provisions of this chapter are complied with: (1) *shall not sue, prosecute, or maintain any action, suit, counterclaim, cross complaint, or proceeding in any of the courts of this state.*"

Additionally, a purported corporation that does not really exist does not have the power to sue or be sued. Utah Code Ann. § 16-10a-302 grants "[e]very corporation . . . the power (1) to sue and be sued, complain and defend in the corporation's corporate name." *See also, Vincent Drug Co. v. Utah State Tax Comm'n*, 17 Utah 2d 202, 407 P.2d 683, 684 (1965) (noting that "a corporation begins to exist upon the issuance of the certificate of incorporation").

In summary, ECHO (and Mr. Tracy) cannot establish that a non-existent entity has the statutory authority to appeal the orders of the state engineer for permanent change applications 57-7796 (a44045) and 57-10711 (a44046). ECHO and Mr. Tracy are not legally entitled to maintain or pursue actions in this court. Utah Code Ann. § 42-2-10.

**II. As a Non-Entity, ECHO Did Not, Does Not and Cannot Own a Water Right, and therefore Lacks Standing.**

The Supreme Court of Utah, “has long held that the rights to the use of water reflect ‘an interest in real property.’ *In re Bear River Drainage Area*, 2 Utah 2d 208, 211, 271 P.2d 846, 848 (1954).” *Salt Lake City Corp. v. Cahoon and Maxfield Irr. Co.*, 879 P.2d 248, 251 (Utah 1994). Additionally, the Court has held that “an action to determine the rights to the use of water, and the legal principles by which it is controlled, are the same as in an action to determine title to real estate.” *Id.*

With respect to interests in land, the existence of a “natural or artificial person” is an absolute requirement. *See, Sharp v. Riekhof*, 747 P.2d 1044, 1046 (Utah 1987). In *Sharp*, the Utah Supreme Court held, “An attempted conveyance of land to a nonexisting entity is void.” *Id. citing Nilson v. Hamilton*, 53 Utah 594, 600, 174 P. at 626 (1918). A conveyance of a real property interest requires the existence of a “natural or artificial person,” and “if no such person exists, attempted conveyances are deemed “mere nullities.” *Id.*

According to the allegations of the Petition, ECHO is a registered dba of Mark Christopher Tracy. (Petition ¶ 1). ECHO is merely an assumed name of an individual. A “dba” is not an entity. *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.”). As the purported transfer of the Water Right was made to a non-entity, the conveyance was “void,” a “nullity.” ECHO does not own the Water Right. It never did and never can.

Because ECHO cannot establish ownership of a water right, ECHO cannot establish that it has traditional standing to challenge the orders of the state engineer for permanent change applications.

**III. ECHO's Assertion Regarding the Date of the Water Right Transfer Violates the Statute of Frauds and is Contradicted by ECHO's Own Protest.**

The Supreme Court of Utah has held that “an action to determine the rights to the use of water, and the legal principles by which it is controlled, are the same as in an action to determine title to real estate.” *Id.* Given that a water right is a real property right, the Statute of Frauds applies. The Statute of Frauds is found at Utah Code Ann. § 25-5-1. It provides:

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 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.)

In *Cutwright v. Union Savings & Investment Co.*, 33 Utah 486, 491-92, 94 P. 984, 985 (1908), this Court interpreted section 25-5-1 as follows:

No doubt the transfer of any interest in real property, whether equitable or legal, is within the statute of frauds; and no such interest can either be *created, transferred, or surrendered* by parol merely.... No doubt, if a parol agreement to surrender or rescind a contract for the sale of lands is wholly executory, and nothing has been done under it, it is within the statute of frauds, and cannot be enforced any more than any other agreement concerning an interest in real property may be.

(Emphasis added.) *See also Allen v. Kingdon*, 723 P. 2d 394 (Utah 1986).

It is fundamental that “parol evidence may not contradict, vary, or add to deeds.” *Neeley v. Kelsch*, 600 P.2d 979, 981 (Utah 1979). Notwithstanding this clear principle, ECHO has submitted Declarations to the Court clearly attempting to do that very thing. The Declarations

ECHO submitted assert the water right ECHO is relying upon was transferred from Nelson Mather to ECHO on September 27, 2018. The Declarations expressly contradict the deed, which was signed before a notary public on February 11, 2019, and therefore any assertion that the water share was transferred on September 27, 2018 must be disregarded. (Ex. A.1.). On this basis, EID objects to the Declarations, and submits they should not be admitted.<sup>2</sup>

In addition to contradicting the deed, the assertion by Mr. Tracy and Mr. Mather that Mr. Mather transferred the water right to ECHO on September 27, 2018 is contradicted by ECHO's own Protest. Specifically, in its Protest, dated October 17, 2018, ECHO alleged that "[t]he property right of Canyon resident Mather as evidenced by surface water share 57-8947 . . . ." Petition, Exhibit F, p. 5. Clearly, if Mr. Mather had transferred his interest in water share 57-8947 to ECHO on September 27, 2018, then water share 57-8947 would not have been a "property right" of Mr. Mather on October 17, 2018.<sup>3</sup>

Accordingly, even if the Court were to find that the purported conveyance of water share 57-8947 to a non-existent corporation and/or non-existent DBA was somehow valid, ECHO did not own water share 57-8947 when it protested before the State Engineer, and Mr. Mather, the owner of water share 57-8947, did not protest the subject change applications. Thus, ECHO cannot now assert standing based on its purported ownership of water share 57-8947.

#### **IV. ECHO Does Not Have Public Interest Standing.**

As set forth above, ECHO is a non-existent entity and therefore lacks the legal power to challenge the Orders. However, even if the Court found that ECHO had the power to sue,

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<sup>2</sup> The Court certainly has the option to refuse to admit the Declarations and decline the implicit request to convert this motion to dismiss to a motion for summary judgment. However, if the Declarations of Mr. Mather and Mr. Tracy are going to be considered, Mr. Cook's Declaration is also entitled to consideration.

<sup>3</sup> Ironically, Mr. Mather states that he does not have a leased water right from EID and that he was using water share 57-8947 to irrigate his property. Therefore, either Mr. Mather no longer has the ability to irrigate his property, or the purported transfer was really just a sham transaction and Mr. Mather is continuing to utilize water share 57-8947.

ECHO's assertion that it has public interest standing is without merit.<sup>4</sup>

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."). Thus, ECHO would have to establish that this is one of those

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<sup>4</sup> It should be noted that ECHO, to the extent it exists, is not a real home owner's association or a nonprofit environmental group. Instead, Mr. Tracy alleges in his declaration that "[i]n January 2014, The Emigration Canyon Home Owners Association ("The ECHO-Association") was formed as a collective remedy to perceived gross mismanagement of public funds by the Emigration Improvement District's ("EID") trustees, managers and private consultants." *Tracy Declaration*, ¶ 2. Thus, even if ECHO legally existed, it is certainly not akin to the Sierra Club or other non-profit corporations that have a broad public interest focus.

“limited circumstances” that is “so unique” and of such “great importance” to warrant public interest standing.

ECHO’s primary argument is that the 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.

### **CONCLUSION**

ECHO is not a corporation. ECHO is not a registered assumed name (d/b/a). ECHO cannot own a water right. The Court should dismiss the Petition because ECHO lacks standing to appeal the State Engineer’s approval of the Change Applications.

DATED this 6th day of May, 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 6<sup>th</sup> day of May 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 A

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*Attorneys for Emigration Improvement District*

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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.

**DECLARATION OF  
JEREMY R. COOK**

Case No. 190901675

Judge: Su Chon

Jeremy R. Cook hereby declares and states as follows:

1. I am over the age of eighteen and competent to testify as to the matters set forth herein.
2. I am counsel for respondent Emigration Improvement District in this matter.
3. On May 2, 2019, I searched the Utah Department Business Entity Database.
4. I performed a search for any registered business entity beginning with the words Emigration Canyon. A true and correct copy of the search results are attached hereto as Exhibit

1. The search results show that Emigration Canyon Home Owners Association is not listed as either a registered corporation or a DBA.

5. I also performed a search specifically for Emigration Canyon Home Owners Association. A true and correct copy of the search results are attached hereto as Exhibit 2. The search results show that Emigration Canyon Home Owners Association is not listed as either a registered corporation or a DBA, and that the business name Emigration Canyon Home Owners Association is available.

6. I was able to find a Business Name Registration / DBA Application for "Emigraiton Canyon Home Owners Association" which was filed by Mark Christopher Tracy. A true and correct copy is attached hereto as Exhibit 3.

I declare under criminal penalty of the State of Utah that the foregoing is true and correct as to the best of my knowledge.

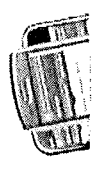
DATED this 2<sup>nd</sup> day of May, 2019.

/s/ Jeremy R. Cook  
Jeremy R. Cook

# Exhibit 1

Search Results for "emigration canyon"

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Business Name: emigration canyon

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Name	Status	Type	City	Details
EMIGRATION CANYON ASSOCIATION	Expired	Corporation	Salt Lake City	Details
EMIGRATION CANYON COMMUNITY COUNCIL	Active	Corporation	SALT LAKE CITY	Details
EMIGRATION CANYON HISTORICAL SOCIETY THE	Expired	Corporation	Salt Lake City	Details
EMIGRATION CANYON HISTORICAL SOCIETY THE	Delinquent	Corporation	Salt Lake City	Details
EMIGRATION CANYON LAND FUND LLC	Expired	Limited Liability Company	Salt Lake City	Details
EMIGRATION CANYON PARTNERS LLC	Expired	Limited Liability Company	West Valley City	Details
EMIGRATION CANYON PIPE LINE CO	Expired	Corporation	Salt Lake City	Details
EMIGRATION CANYON PROPERTIES LLC	Expired	Limited Liability Company	Salt Lake City	Details

Total Results: 8

# Exhibit 2



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## Search Results for "emigration canyon home owners association"

Search by: Business Name Number Executive Name Search Hints

Business Name: emigration canyon home owners association

[Search](#)



The business name "emigration canyon home owners association" appears to be available. To find out register the business name, "emigration canyon home owners association".  
NOTE: There may be businesses that are not distinguishable from the name you submitted, therefore it is possible that the name may not be available. Read more about Naming Restrictions.

No results found for "emigration canyon home owners association"

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# Exhibit 3



State of Utah  
DEPARTMENT OF COMMERCE  
Division of Corporations & Commercial Code

File Number: 10847808

## Business Name Registration / DBA Application

Requested Business Name: **EMIGRAITON CANYON HOME OWNERS ASSOCIATION**  
Entity Number: 10847808  
Application Date: 05/23/2018  
Approved Date: 05/23/2018  
Expiration Date: 05/23/2021  
Filer Electronic Signature: Mark Christopher Tracy

Business Information  
Purpose: Private Households  
Address: P.O. Box 58531  
Salt Lake City, UT 84158  
Female Owned: No  
Minority Owned: No

Registered Agent  
Name: John Pagnanelli  
Type: Regular  
Address: 1160 Buchnell Dr.  
Sandy, UT 84094

Applicant / Owner(s):  
Name: Mark Christopher Tracy  
Entity Number:  
Address: P.O. Box 58531  
Salt Lake City, UT 84158



Under GRAMA (63-2-201), all registration information maintained by the Division is classified as public record. For confidentiality purposes, the business entity physical address may be provided rather than the residential or private address of any individual affiliated with the entity.