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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 TO DISMISS

PETITION FOR DE NOVO JUDICIAL REVIEW OF INFORMAL ADJUDICATIVE PROCEEDING RE:

(1) REJECTION OF REQUEST FOR RECONSIDERATION;
(2) ORDER OF THE STATE ENGINEER SUA SPONTE REINSTATEMENT OF RIGHTS UNDER PERMANENT CHANGE APPLICATION NO 57-8865 (A12710B);
(3) ORDER OF THE STATE ENGINEER FOR EXTENSION OF TIME FOR PERMANENT CHANGE APPLICATION NO. 57-8865 (A12710B);
(4) FAILURE OF THE UTAH STATE ENGINEER TO PROHIBIT ILLEGAL WATER EXTRACTION AND USE IN VIOLATION OF UTAH LAW; AND
(5) FAILURE TO ASSESS ADMINISTRATIVE FINES AND PENALTIES

Case No.: 190904621
Judge: Honorable Laura Scott

Respondent Emigration Improvement District (**"EID"**), through counsel, submits this *Motion to Dismiss the Petition for De Novo Judicial Review of Informal Adjudicative Proceeding* (the "**Petition**") filed by Emigration Canyon Home Owners Association ("**Petitioner**" or "**ECHO**").

RELIEF SOUGHT AND GROUNDS FOR THE MOTION

EID moves the Court, pursuant to Utah R. Civ. P. 12(b)(6), for an Order dismissing the Petition, with prejudice. The grounds for this Motion are as follows:

1. ECHO lacks standing to assert the claims set forth in the Petition because ECHO is a "dba" and therefore cannot own a water right, which is a prerequisite to challenge a request for extension of time;
2. The facts unequivocally establish that the State Engineer correctly reinstated the Change Application and correctly granted the Request for Extension of Time; and
3. ECHO has failed to state a claim on which relief can be granted.

EID respectfully requests that its motion be granted, and the Petition be dismissed, with prejudice.

INTRODUCTION

This is an extremely simple case. On January 18, 2019, EID filed a Request for Extension of Time with the Utah Division of Water Rights to extend the time to file proof of beneficial use on Change Application 57-8865 (a12710b). Utah Code § 73-3-12(2)(b) states: "The state engineer shall extend the time in which an applicant shall comply with Subsection (2)(a) if: (i) the date set by the state engineer is not after 50 years from the day on which the application is approved; and (ii) the applicant shows: (A) reasonable and due diligence in

completing the appropriation; or (B) a reasonable cause for delay in completing the appropriation."

However, EID is a "public water supplier" as defined in Utah Code § 73-3-12(1)(a), and Utah Code § 73-3-12(2)(h) states: "The state engineer shall consider the holding of an approved application by a public water supplier . . . to meet the reasonable future water . . . requirements of the public to be reasonable and due diligence in completing the appropriation for the purposes of this section for 50 years from the date on which the application is approved." In other words, for purposes of a public water supplier such as EID, the only issue for the State Engineer to consider on an Extension of Time Request is whether the public water supplier is holding the approved application to meet the reasonable future water requirements of the public.

Petitioner does not appear to challenge that the state engineer's application of Utah Code § 73-3-12 was accurate. In fact, Petitioner does not even reference Utah Code § 73-3-12 in the Petition. Thus, the decision of the State Engineer to grant the Extension of Time Request was correct, and the Court should dismiss the Petition with prejudice.

Moreover, to even have standing to protest the State Engineer's decision on a request for extension of time, the person or entity filing the protest must own a water right or hold an application from the water source. *See* Utah Code § 73-3-12(2)(f). According to the Petition, ECHO is merely a "dba", and is therefore not an entity that can own a water right. Thus, Petitioner lacks standing to protest the decision of the state engineer or bring this Petition.

Finally, the Court does not have jurisdiction to consider Petitioner's request that the Court terminate EID's use of its wells or that the Court impose fines against EID because those are not matters that have been determined by State Engineer. A matter not presented, considered

or decided, cannot be subject to judicial review.

LEGAL STANDARD

A motion to dismiss under Utah R. Civ. P. 12(b)(6) admits the facts alleged in the complaint but challenges the plaintiff's right to relief based on those facts. *St. Benedicts Dev. Co. v. St. Benedict's Hosp*, 811 P.2d 194 (Utah 1991).

PERTINENT FACTS

1. Petitioner, the ECHO-Association is registered with the Utah Department of Commerce, as a dba entity of Mark Christopher Tracy. *See* Petition ¶ 1.

2. Petitioner claims to be the owner of water right no. 57-8947 (a16183). *See* Petition ¶ 1.

3. Emigration Improvement District is a Special Service District created by the Salt Lake County Council in 1968. *See* Petition ¶ 3.

4. 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)).

5. 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).

6. 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*.

7. 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.

8. On January 18, 2018, the State Engineer sent EID notice that the Change

Application had been reinstated with a priority date of January 18, 2019. *See* Petition, ¶ 19, Exhibit A.

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

10. 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.

ARGUMENT

I. The State Engineer Correctly Reinstated the Change Application and Correctly Granted the Extension of Time Request.

The crux of Petitioner's argument appears to be that the State Engineer should have denied EID's request to reinstate the Change Application and denied EID's Extension Request. In support of Petitioner's argument, Petitioner appears to suggest that the both the State Engineer and this Court should consider a myriad of issues outside the statutory requirements. However, in *Searle v. Milburn Irr. Co.*, 2006 UT 16, ¶ 35, the Utah Supreme Court recognized:

> Accordingly, the conclusion is inescapable that a district court, when reviewing the state engineer's decision to approve or reject an application, is not sitting in its capacity as an adjudicator of rights, but is merely charged with ensuring that the state engineer correctly performed an administrative task. We stated as much in *Eardley*, when we acknowledged that, when conducting a de novo review of the state engineer's approval or rejection of an application, the court simply "determines whether the application should be approved or rejected and does not fix the rights of the parties beyond the determination of that matter."

Thus, the only issue before this Court is whether the State Engineer correctly applied the statutory requirements to approve or reject the request to reinstate the Change Application and the Extension Request.

A. The State Engineer's Reinstatement of the Change Application was Correct.

Utah Code § 73-3-18(2) states: "Within 60 days after notice of a lapse described in Subsection (1), the state engineer may, upon a showing of reasonable cause, reinstate the application with the date of priority changed to the date of reinstatement." On January 15, 2019, the State Engineer sent the Lapse Notice to EID. *See* Petition ¶ 75; Exhibit N (sub-exhibit E). Consistent with Utah Code § 73-3-18(2), the Lapse Notice indicated that if the Change Application was not reinstated within sixty (60) days, the Change Application would permanently lapse. *Id*. On January 18, 2018, EID filed its Extension Request. *See* Petition, ¶ 76, Exhibit F. Consistent with the routine practice of the State Engineer's Office, the State Engineer treated the Extension Request as a showing of reasonable cause and reinstated the Change Application with a priority date of January 18, 2019.

In summary, the State Engineer's decision to reinstate the Change Application was clearly consistent with the statutory requirements and should be upheld by this Court.

B. The State Engineer's Decision to Grant the Request for Extension of Time was Correct.

Utah Code § 73-3-12(2)(b) states: "The state engineer shall extend the time in which an applicant shall comply with Subsection (2)(a) if: (i) the date set by the state engineer is not after 50 years from the day on which the application is approved; and (ii) the applicant shows: (A) reasonable and due diligence in completing the appropriation; or (B) a reasonable cause for delay in completing the appropriation." In addition, Utah Code § 73-3-12(2)(h) states: "The state engineer shall consider the holding of an approved application by a public water supplier . . . to meet the reasonable future water . . . requirements of the public to be reasonable and due

diligence in completing the appropriation for the purposes of this section for 50 years from the date on which the application is approved." EID is a "public water supplier" as defined in Utah Code § 73-3-12(1)(a).

On January 18, 2019, EID filed a Request for Extension of Time with the Utah Division of Water Rights to extend the time to file proof of beneficial use on Change Application 57-8865 (a12710b). Thus, the **only** issue for the State Engineer to consider on EID's Extension Request was whether EID was holding the approved application to meet the reasonable future water requirements of the public. The State Engineer correctly applied the criteria in granting the Extension Request. Specifically, the Extension Order stated: "The applicant is a public water supplier and has indicated the water right is being held to meet the future needs of the public. The applicant has evidently satisfied the requirements of Section 73-3-12 and the extension request can be granted."

Accordingly, the State Engineer's decision to approve the Extension Request was clearly consistent with the statutory requirements and should be upheld by this Court.

C. In the Alternative, Petitioner Lacks Standing to Challenge the Extension Order Because a DBA Cannot Own a Water Right.

In accordance with Utah Code § 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. Petitioner claims to own water right no. 57-8947 (a16183). *See* Petition ¶ 1. However, according to the allegations in the Petition, ECHO is a registered dba of Mark Christopher Tracy. Petition ¶ 1. A "dba" is not an entity. *See 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.").

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 holding 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.*

Thus, because Petitioner cannot own a water right, Petitioner does not have standing to challenge the Extension Order.

II. Petitioner's Request for Relief Nos. 4 and 5 are Not Subject to De Novo Review.

The Court does not have jurisdiction to consider the Petitioner's Fourth and Fifth Requests for Relief because the State Engineer does not have authority to adjudicate title issues, and because the State Engineer has sole discretion to determine if and when to bring an enforcement action. In *W. Water, LLC v. Olds*, 2008 UT 18, ¶ 18, 184 P.3d 578, the Utah Supreme Court recognized:

> Authority for judicial review arises only after the parties have exhausted their administrative remedies unless an exception applies. *Id.* § 63-46b-14(2) ("A party may seek judicial review only after exhausting all administrative remedies available...."). "The basic purpose underlying the doctrine of exhaustion of administrative remedies is to allow an administrative agency to perform functions within its special competence — to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." *Maverik Country Stores v. Indus. Comm'n*, 860 P.2d 944, 947 (Utah Ct.App.1993) (internal

> quotations omitted). The exhaustion requirement also ensures that the district court considers **only** "issues subject to determination by the [State] Engineer" because the effect of the court's judgment "is the same as it would have been if the Engineer had reached the same conclusion in the first instance." *United States v. District Court*, 121 Utah 1, 238 P.2d 1132, 1137 (1951).

(emphasis added).

Petitioners' Fourth and Fifth Requests for Relief are both based on two general assertions. First, Petitioner asserts that EID does not have valid title to water right 57-8865 because the water rights should have reverted to the federal government in 1983 pursuant to a purported reversionary clause in the 1909 congressional authorization to transfer Mount Olivet Cemetery. Second, Petitioner asserts that EID's wells were not drilled in the locations approved in the Change Application. Based on these assertions, Petitioner requests "an order terminating EID's use of Boyer Well Nrs. 1 and 2" and that "the Court assess mandatory fines and penalties against EID for illegal water extraction." *See* Petition, ¶¶ 132, 137. However, neither of these issues are subject to review by this Court.

First, with respect to the purported title issue, the State Engineer does not have authority to adjudicate title issues. Moreover, even if the State Engineer did have authority to adjudicate title issues, ECHO does not allege that ECHO has any interest in water right 57-8865. Thus, ECHO does not have standing to assert what would be akin to a quiet title action on behalf of the federal government. *See Andrus v. Bagley*, 775 P. 2d 934, 935 (Utah 1989) ("The purpose of a quiet title action is to perfect an interest in property that exists at the time suit is filed (citations omitted). Because [Plaintiff] had no interest, he had no standing to bring the action."). The lack of standing is particularly relevant in this matter because ECHO is asking the Court to adjudicate title issues that directly impact the federal government, Mt. Olivet Cemetery and The Boyer

Company, none of which are parties to this action.[1]

Second, with respect to the request for fines and penalties, Utah Code § 73-2-25(2) states in part: " . . . the state engineer may commence an enforcement action under this section if the state engineer finds . . . ." (emphasis added). Utah Code § 73-2-25(4) also states: "A person may not intervene in an enforcement action commenced under this section." Therefore, not only does the State Engineer have discretion as to whether to bring an enforcement action, but ECHO would not be entitled to intervene in the action if the State Engineer decided to bring an enforcement action.

Furthermore, such an action is certainly not ripe for *de novo* review. Utah Code § 73-2-25 establishes a process for the State Engineer to follow with respect to enforcement actions. The process includes giving the person against whom an initial order is issued the right to request a hearing. *See* Utah Code § 73-2-25(3)(b). Only after the State Engineer issues a final order may a person file a petition for judicial review of the State Engineer's final order. *See* Utah Code § 73-2-25(6). It is undisputed that the State Engineer has not initiated an enforcement action against EID, provided EID with an opportunity to respond, or issued a final appealable order. Judicial review is therefore inappropriate.

As set forth above, the basic purpose underlying the doctrine of exhaustion of administrative remedies is to allow an administrative agency to perform functions within its special competence — to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies. *Maverik Country Stores v. Indus. Comm'n*, 860 P.2d

[1] Petitioner attached the Special Warranty Deed(s) from Mount Olivet Cemetery to The Boyer Company. Because a Special Warranty Deed warrants against any encumbrances created during the time the grantor owned the property, if Mount Olivet Cemetery did not transfer valid title to the water rights then it would be liable to both The Boyer Company and EID.

944, 947 (Utah Ct.App.1993). Accordingly, the Court should dismiss the Petition because ECHO does not have standing to seek *de novo* review of the State Engineer's discretion to not bring an enforcement action, and this Court does not have authority to conduct judicial review of a decision that has not been made by the State Engineer.

III. Petitioner's Request for Reconsideration Was Not Timely and is Moot.

A. Petitioner Request for Reconsideration Was Not Timely.

Petitioner's Request for Reconsideration was not timely because Petitioner failed to include a notice address on Petitioner's Protest Letter and the State Engineer is not obligated to review its files to find an address for notice. Ironically, although Petitioner alleges that the State Engineer was required to provide Petitioner notice of the State's Engineer's decision on the Extension Request, Petitioner's Protest was submitted to the State Engineer on letterhead of the law firm of Christensen and Jensen, and the Protest Letter did not include an address for either Christensen and Jensen or Petitioner. *See* Petition, Exhibit N. Instead, Petitioner argues that the State Engineer had Petitioner's correct address "on file," but still mailed a copy of the Extension Order to an inaccurate address. Petition, ¶ 103.

Contrary to Petitioner's position, it is not the obligation of the State Engineer's office to review its files to try to locate an accurate address for Petitioner. Therefore, to the extent the State Engineer found the wrong address in its files, Petitioner should not be able to file an untimely request for reconsideration because Petitioner, or Petitioner's attorneys, failed to provide a correct address in its Protest Letter.

Accordingly, the State Engineer's denial of ECHO's Request for Reconsideration was correct.

B. Petitioner's Request for Reconsideration is Moot.

Petitioner's request that the Court find that Petitioner's Request for Reconsideration was timely is moot because the State Engineer does not have to rule on the Request for Reconsideration. Utah Code § 63G-4-302(b) states: "If the agency head or the person designated for that purpose does not issue an order within 20 days after the filing of the request, the request for reconsideration shall be considered to be denied." Petitioner filed its Request for Reconsideration on May 13, 2019. Therefore, even if the Request for Reconsideration was considered timely on May 13, 2019, because the State Engineer did not issue an order within 20 days, the Request for Reconsideration would have been deemed denied.

Moreover, if the State Engineer argues it prior decisions were correct, which EID anticipates the State Engineer will argue, then the State Engineer is not going to issue an order reconsidering the prior decision and will instead just wait the 20 days to effectively deny the request for reconsideration. Therefore, because a request for reconsideration is not a prerequisite for appeal, and the State Engineer can effectively deny the request for reconsideration by just not taking any action within 20 days, remanding the case back to the State Engineer to just wait out the 20-day period would be frivolous.

CONCLUSION

The Court should dismiss the Petition because ECHO lacks standing to appeal the State Engineer's approval of the Change Applications.

DATED this 11th day of July, 2019.

COHNE KINGHORN

/s/ Jeremy R. Cook
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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on the11th day of July 2019, a true and correct copy of the foregoing document was served by the CM/ECF system which will send notice of filing to counsel of record:

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