

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

Mark Christopher Tracy d/b/a Emigration
Canyon Home Owners Association

Plaintiff - Appellant,

v.

Simplifi Company, Jeremy Rand Cook,
Jennifer Hawkes, Eric Hawkes and David M.
Bennion

Defendant - Appellee.

Case No. 22-4032

Appellant's Opening Brief

NOTICE AND INSTRUCTIONS

If you proceed on appeal pro se, the court will accept a properly completed Form A-12 in lieu of a formal brief. This form is intended to guide you in presenting your appellate issues and arguments to the court. If you need more space, additional pages may be attached. A short statement of each issue presented for review should precede your argument. Citations to legal authority may also be included. This brief should fully set forth all of the arguments that you wish the court to consider in connection with this case.

New issues raised for the first time on appeal generally will not be considered. An appeal is not a retrial but rather a review of the proceedings in the district court. A copy of the completed form must be served on all opposing counsel and on all unrepresented parties and a proper certificate of service furnished to this court. A form certificate is attached.

APPELLANT/PETITIONER’S OPENING BRIEF

1. Statement of the Case. (This should be a brief summary of the proceedings in the district court.)

Following assignment of federal civil rights, Appellant Mark Christopher Tracy (“Mr. Tracy”) commenced legal action under 42 U.S.C. §§ 1983 and 1985 against Defendants-Appellees (hereafter “Defendants”) alleging willful contamination of assignee’s underground water source providing safe culinary drinking water to a private residence, improper commencement of tax foreclosure proceedings, and fraudulent consolidation of senior water rights under the color of state law.

Following Mr. Tracy’s timely objection, the Utah district court adopted the Report and Recommendation of the magistrate judge ruling that federal civil rights may not be assigned under Utah State law and ruled that Mr. Tracy had failed to properly plead Mr. Tracy’s alternative motion to amend the complaint in order to assert Mr. Tracy’s own federal civil rights.

This Appeal followed.

2. Statement of Facts Relevant to the Issues Presented for Review.

- a. In 1968, the Utah State Engineer closed Emigration Canyon (“Canyon”) to new residential development after determining that all water sources of the area were “fully appropriated,” and the operation of large-diameter commercial wells would impair senior water rights belonging to Canyon Resident Karen Penske (“Ms. Penske”) and Mr. Tracy’s dba entity Emigration Canyon Home Owners Association “with almost certainty.”
- b. On June 16, 1984, although not approved by the Utah State Engineer, private land-developers and members of the Church-of-Latter-Day Saints (“LDS Members”) completed construction of Boyer Well Nr. 1 in the Canyon’s Twin Creek Aquifer under authority of a water right deeded by the United States of America “to be forever used for the burial of the dead,” to the Mount Olivet Cemetery, the only active federal military cemetery created by an Act of Congress, in order to provide culinary drinking water to the luxurious Emigration Oaks Private Urban Development (“Boyer Water System”).

- c. In August 1998, Emigration Improvement District (“EID) through LDS Members Lynn Hales and Fred Smolka assumed legal title and liability of the Boyer Water System even though EID's own hydrologist had testified before the Utah State Engineer on December 15, 1995, the same large-diameter wells constructed in the Twin Creek Aquifer by LDS Members would interfere with artesian pressure supporting surface water flow of the Canyon Stream “for decades, twenty-five, fifty, seventy-five years.”
- d. Sometime in 2013, EID transferred operation of the Boyer Water System from LDS Member Fred Smolka's private Utah corporation to LDS members and Defendants Jennifer and Eric Hawkes through Defendant Simplifi.
- e. In September 2018, the Emigration Canyon Stream suffered total depletion for the first time in recorded history as predicted by EID’s own hydrological studies.
- f. On July 6, 2020, in an email to Defendant Jeremy R. Cook (“Utah Attorney Cook”), Defendant Eric Hawkes acknowledged that the Boyer Water System had exceeded federal reporting requirements for lead contamination of drinking water believed to be caused by groundwater mining of the Canyon’s Twin Creek Aquifer as predicted in EID own hydrology studies but failed to warn residents of drinking water contamination.
- g. With the positive knowledge that the Boyer Water System's distribution lines were grossly undersized and unable to provide adequate flow in a fire emergency, underground water sources were contaminated with lead and were being operated under duplicitous water claims deeded to an active federal military cemetery, Defendants began charging Canyon residents with homes serviced by private wells operated under senior perfected water rights a “fire hydrant rental fee.”
- h. Unable to terminate water service to private homes not connected to the Boyer Water System serviced by senior perfected water rights, beginning in January 2014, Simplifi through Utah Attorney Cook began certifying “delinquent accounts” of LDS Nonmembers with the Salt Lake County Treasurer leading to tax foreclosure proceedings.

- i. Sometime in the fall of 2015, Emigration Oaks PUD resident and LDS religious leader Defendant David M. Bennion (“Utah Attorney Bennion”) admonished fellow LDS members of their “moral obligation” to pay fees and costs billed by Simplifi during an LDS religious meeting.
- j. Upon information and belief, Defendants have commenced no tax-foreclosure proceedings against active LDS Members consistent with the instructions of Utah Attorneys Cook and Bennion since November 2014.
- k. On March 13, 2019, to prevent final tax-foreclosure sale of her private residence, Ms. Penske rendered payment in the amount of \$1,304.86 to the Salt Lake County Treasurer for the fees and costs assessed by Defendants with consistent with the instructions of Utah Attorneys Cook and Bennion.
- l. On June 2, 2021, for the first time since recording on March 29, 2018, Ms. Penske documented that her private well had exceeded Utah State drinking water standards for Total Dissolved Solids as predicted in an EID hydrological study warning against continued groundwater mining of the Twin Creek Aquifer including a study of the United States Geological Survey dated October 2005 warning against continued residential development of the Canyon.
- m. On June 16, 2020, Mr. Tracy documented a 700-foot fissure and massive ground subsidence in the Twin Creek drainage area consistent with groundwater mining believed to provide a direct path for surface water contaminates to taint the aquifer providing safe culinary drinking water to Ms. Penske's private residence.
- n. On September 9, 2020, for good and valuable consideration, Ms. Penske assigned present and future federal Civil Rights Claims to Mr. Tracy’s dba entity.

3. Statement of Issues.

- a. First Issue: Does state law determine if a federal civil right may be assigned?**

Argument and Authorities:

For Utah common law to govern disposition of the present case, two (2) requirements must first be met:

1. [the federal laws] are not adapted to the [goal of protecting all persons in the United States in their civil rights], or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law; and
2. Any assessment of the applicability of a state law to federal civil rights litigation . . . must be made in light of the purpose and nature of the federal right. *Wilson v. Garcia*, 471 U.S. 261, 267 (1985) (citation omitted) (internal quotation marks omitted).

The district court failed to apply these standards to the present case.

- b. Second Issue: If a federal civil right may not be assigned in the State of Utah, may a plaintiff amend a complaint to assert his own civil rights?**

Argument and Authorities:

Under Rule 15(a)(2) Fed. R. Civ. P. the court should freely give leave when justice so requires.

4. Do you think the district court applied the wrong law? If so, what law do you want applied?

Since enactment of the Civil Rights Act of 1871, no federal court has ruled in a published decision that the assignment of federal civil rights is determined by state law. This legal conclusion is inconsistent with the legislative history of the Act.

5. Did the district court incorrectly decide the facts? If so, what facts?

No.

6. Did the district court fail to consider important grounds for relief? If so, what grounds?

Yes. Under Rule 15(a)(2) Fed. R. Civ. P. the district court should freely give leave when justice so requires.

The district court ruled that Mr. Tracy had not provided sufficient objection to the Report and Recommendation and was unable to render a de novo ruling if the complaint should be dismissed with prejudice.

As a pro se litigant, the Court should construe Mr. Tracy's pleadings liberally, despite "failure to cite proper legal authority" or "confusion of various legal theories." *Diversey v. Schmidly*, 738 F.3d 1196, 1199 (10th Cir. 2013).

It is improper for the district court to impose heightened pleading standards following Mr. Tracy's timely objection to the Report and Recommendation and reference to Mr. Tracy own federal civil rights.

7. Do you feel that there are any other reasons why the district court's judgment was wrong? If so, what?

No.

8. What action do you want this court to take in your case?

The Court should reverse dismissal and remand for further proceedings.

9. Do you think the court should hear oral argument in this case? If so, why?

The basis for this request is the issues and arguments set forth herein, are a matter of first impression in the 10th Circuit and oral argument will assist the Court in ruling on this appeal by permitting Mr. Tracy and attorneys for opposing counsel to address the Court's questions regarding the issues outlined in the parties' briefs.

June 1, 2022
Date

/s/ Mark Christopher Tracy
Signature

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2022 I sent a copy of
(date)
the Appellant/Petitioner’s Opening Brief to Jeremy R. Cook, Bradley Strassberg, and Eric Olsen, at jcook@ck.law, bstrassberg@ck.law, and eolson@mohtrial.com, the last known address/email address, by electronic correspondence.

June 1, 2022
Date

/s/ Mark Christopher Tracy
Signature

CERTIFICATE OF COMPLIANCE

I certify that the total number of pages I am submitting as my Appellant/Petitioner’s Opening Brief is 30 pages or less or alternatively, if the total number of pages exceeds 30, I certify that I have counted the number of words and the total is 1,408 words, which is less than 13,000. I understand that if my Appellant/Petitioner’s Opening Brief exceeds 13,000 words, my brief may be stricken and the appeal dismissed.

June 1, 2022
Date

/s/ Mark Christopher Tracy
Signature