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February 1, 2018

VIA HAND DELIVERY AND MAIL

Kent L. Jones, State Engineer
Utah Division of Water Rights
2594 W. North Temple, Suite 220
Salt Lake City, UT 84114-6300

cc:

Amanda A. Berndt
Assistant U.S. Attorney
District of Utah
111 S. Main, Suite 1800
Salt Lake City, UT 84111

**Re: Request for Reconsideration Under Utah Administrative Code R655-6-17
regarding temporary change application "t43182" (57-7796)**

Dear Mr. Jones:

On January 16, 2018, you approved temporary change application "t43182" filed by Scott Clark of Barnett Intermountain Water Consulting on behalf of Emigration Improvement District ("EID") for the temporary change of twenty-eight (28) points-of-diversion under water right #57-7796 including the **Brigham Fork** (point-of-diversion Nr. 18) and the **Upper Freeze Creek Wells** (point-of-diversion Nr. 28) (*see Exhibit A*).

The Order of the State Engineer executed on your behalf by Boyd Clayton P.E. provided that "[t]he water *will be stored ... in an excavated storage pool*" and "[t]he water is to be used for year-round municipal purposes *within the service area of Emigration Improvement District* (emphasis mine) (*id.*)."

As this decision appears to be contrary to both established facts and the statutory provisions governing the approval of temporary change applications as mandated under Utah State Code, it requires reconsideration.

Please note the following:

- In ECHO'S correspondence from April 20, 2017, the Division of Water Rights was informed that EID continued to operate the Brigham Fork and Upper Freeze Creek Wells despite the lapse of the previous temporary change application "t41129" on October 26, 2016 (*see Exhibit B*);

- Drinking-water distributed by EID under the Safe Drinking Water Act from both the Brigham Fork and Upper Freeze Creek Wells are not stored in an “excavated storage pool” located on property belonging to land developer R. Steve Creamer but is delivered to EID water customers via the “Emigration/Oaks Reservoir” (Utah Division of Drinking Water inventory “ST001”) and the “Wildflower Reservoir” (unapproved water storage facility under “ST002”) (*see* 2015 Sanitation Survey attached as **Exhibit C**; *see also* handwritten notes of former DDW Engineer Steve Onysko Ph.D., P.E attached as **Exhibit D**);
- As noted in the April 20, 2017 correspondence, the following points-of-diversion are not located within EID’s service area contrary to EID’s temporary change application:
 - **Nr. 2** (N 922 ft W 2251 ft from SE cor, Sec 16, T 1N, R 2E),
 - **Nr. 4** (N 1030 ft E 40 ft from S4 cor, Sec 01, T 1S, R 1E),
 - **Nr. 5** (N 1425 ft W 1350 ft from SE cor, Sec 16, T 1N, R 2E),
 - **Nr. 6** (S 280 ft E 1200 ft from NW cor, Sec 05, T 1S, R 2E),
 - **Nr. 14** (N 1370 ft E 2875 ft from SW cor, Sec 01, T 1S, R 1E),
 - **Nr. 15** (S 1555 ft W 1060 ft from E4 cor, Sec 32, T 1N, R 2E),
 - **Nr. 23** (S 852 ft W 1684 ft from E4 cor, Sec 01, T 1S, R 1E),
 - **Nr. 24** (N 565 ft E 713 ft from S4 cor, Sec 01, T 1S, R 2E),
 - **Nr. 27** (N 793 ft W 2427 ft from SE cor, Sec 16, T 1N, R 2E).
- Moreover, the Division was informed in the aforementioned correspondence that,
 - In the 1966 Barnett Theses (an extensive study of the exact hydrology of Emigration Canyon) on file with your office under permanent change application “a6538”, the operation of large diameter wells was not recommended due to “*the almost certain*” impairment of existing water shares (emphasis mine);
 - Independent review of the Canyon’s hydrology by expert hydrologist David E. Hansen Ph.D., P.E. in April 2015 revealed that the Emigration Canyon Stream has not maintained adequate flow in eight (8) of the past fourteen (14) years in violation of EID’s own Water Conservation and Management Plans mandated under the Safe Drinking Water Act (*see* **Exhibits E and F**);
 - Upon information and belief, multiple Emigration Canyon Home Owners possessing superior water shares have reported impairment of private wells directly to your office. As you are aware, because of a previous change in the point of diversion of 57-7796, the existing water rights of these homeowners are superior to those of 57-7796;

- Although EID publically purports to provide water service to 278 domestic units, your office has only approved 233 domestic unit connections under permanent and temporary change applications (*see* Riley Report attached as **Exhibit G**). This discrepancy suggests that EID is impermissibly providing water to an additional 45 homes; and
- In direct violation of the Memorandum Decisions of your office under “t31547, t41129” and “t42153”, EID failed to properly meter water discharge from the Brigham Fork Well since April 8, 2008 possibly due to the fact that EID Trustees discovered a **3-million gallon water loss** for the month of July 2008 (*see* excerpt EID Trustee Meeting from August 7, 2008 attached as **Exhibit H**).

In your renewed review of EID temporary change application “t43182” it is important to note:

- Temporary change applications filed with your office are regulated by Utah Code §73-3-8, which requires that the State Engineer shall investigate all temporary change applications and shall deny the temporary change if the state engineer finds there *is reason to believe* the change would impair an existing right; and
- The willful failure to obtain a change permit is a criminal offense if the change to the point-of-diversion or the point-of-use is made knowingly and willingly under Utah Code §73-3-3(7) whereby interference with water flow or taking water out of turn or in excess is likewise criminally sanctioned under Utah Code §§76-10-201 and 76-20-202.

As you should be aware, federal legal action under the False Claims Act was commenced against EID trustees, managers and land developer R. Steve Creamer for the alleged fraudulent consolidation of water rights in Emigration Canyon necessary for massive new building development.

Finally, on the website currently maintained by EID General Manager/Financial Manager/Election Specialist Eric Hawkes, EID continues to falsely maintain that it “holds one of the most senior water rights in the canyon,” and for “specific information regarding property water rights, water right priorities, or enforcement of water right issues, contact the State Engineer's office, Division of Water Rights” (emphasis mine) (*see* <https://www.ecid.org/price-list>) despite the fact that temporary change application “t43182” filed for the continued operation of the Brigham Fork and Upper Freeze Creek Wells has a priority date of December 26, 2017 (*see* Application of Temporary Change of Water attached as **Exhibit I**).

We hereby demand final disposition of this matter before **April 1, 2018** to include the prohibition of water extraction and use at the locations identified in the ECHO's correspondence from April 20, 2017 (*see* **Exhibit B**).

Letter to Kent Jones and Amanda Berndt
February 1, 2018
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Please refer any questions regarding this request for reconsideration to me.

Sincerely,

CHRISTENSEN & JENSEN, P.C.

A handwritten signature in blue ink, appearing to read 'SAB', is written over the firm name.

Scot A. Boyd

Enclosures: a/s

cc Amanda A. Berndt
Assistant U.S. Attorney
District of Utah
111 S. Main, Suite 1800
Salt Lake City, UT 84111

SAB/arw



GARY R. HERBERT
Governor
SPENCER J. COX
Lieutenant Governor

State of Utah
DEPARTMENT OF NATURAL RESOURCES
Division of Water Rights

MICHAEL R. STYLER
Executive Director

KENT L. JONES
State Engineer/Division Director

EXHIBIT A

ORDER OF THE STATE ENGINEER

For Temporary Change Application Number 57-7796 (t43182) JAN 1 6 2018

Temporary Change Application Number 57-7796 (t43182) in the name of Emigration Improvement District was filed on December 26, 2017, to change the point of diversion, places of use, and uses of 200.00 acre-feet of water as evidenced by Water Right Number 57-7796. Heretofore, the water has been diverted from a surface source located North 700 feet and East 465 feet from the W $\frac{1}{4}$ Corner of Section 11, T1S, R1E, SLB&M. The water has been used for the irrigation of 50.00 acres from April 1 to October 31. The water has been used in all or portion(s) of Sections 10 & 15, T1S, R1E, SLB&M.

Hereafter, it is proposed to divert 200.00 acre-feet of water from points of diversion changed to:

- (1) Well - South 295 feet and West 315 feet from the NE Corner of Section 33, T1N, R2E, SLB&M (6-inch well, 100-500 feet deep);
- (2) Well - North 922 feet and West 2251 feet from the SE Corner of Section 16, T1N, R2E, SLB&M (existing);
- (3) Well - North 275 feet and West 1065 feet from the SE Corner of Section 16, T1N, R2E, SLB&M (existing 5.5-inch well, 145 feet deep, drilled in 1999);
- (4) Well - North 1030 feet and East 40 feet from the S $\frac{1}{4}$ Corner of Section 1, T1S, R1E, SLB&M (existing);
- (5) Well - North 1425 feet and West 1350 feet from the NE Corner of Section 21, T1N, R2E, SLB&M (existing);
- (6) Well - South 280 feet and East 1200 feet from the NW Corner of Section 5, T1S, R2E, SLB&M (existing);
- (7) Well - South 165 feet and East 610 feet from the NW Corner of Section 5, T1S, R2E, SLB&M (existing);
- (8) Well - South 195 feet and West 975 feet from the NE Corner of Section 6, T1S, R2E, SLB&M (originally proposed as an 8-inch well, but constructed in 1994 as a 6-inch well, 105 feet deep);
- (9) Well - South 5 feet and East 1228 feet from the NW Corner of Section 27, T1N, R2E, SLB&M (originally proposed as a 6-inch well, 0-285 feet deep, but constructed in 1994 as a 6-inch well, 285 feet deep);
- (10) Well - South 40 feet and East 605 feet from the N $\frac{1}{4}$ Corner of Section 27, T1N, R2E, SLB&M (existing);
- (11) Well - South 1000 feet and East 1340 feet from the NW Corner of Section 27, T1N, R2E, SLB&M (existing);
- (12) Well - South 715 feet and East 255 feet from the N $\frac{1}{4}$ Corner of Section 27, T1N, R2E, SLB&M (existing);
- (13) Well - North 1950 feet and East 1400 feet from the SW Corner of Section 33, T1N, R2E, SLB&M (existing);

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- (14) Well - North 1370 feet and East 2875 feet from the SW Corner of Section 1, T1S, R1E, SLB&M (existing);
- (15) Well - South 1555 feet and West 1060 feet from the E $\frac{1}{4}$ Corner of Section 32, T1N, R2E, SLB&M (existing);
- (16) Well - North 578 feet and East 529 feet from the S $\frac{1}{4}$ Corner of Section 32, T1N, R2E, SLB&M (existing 6-inch well, 120 feet deep, drilled in 1996);
- (17) Well - South 1220 feet and West 1140 feet from the NE Corner of Section 33, T1N, R2E, SLB&M (existing);
- (18) Well - North 1280 feet and West 2028 feet from the E $\frac{1}{4}$ Corner of Section 28, T1N, R2E, SLB&M (existing 10-inch well, 1200 feet deep);
- (19) Surface - South 1000 feet and East 1400 feet from the NW Corner of Section 27, T1N, R2E, SLB&M (Emigration Creek (Block));
- (20) Well - North 492 feet and West 1850 feet from the E $\frac{1}{4}$ Corner of Section 28, T1N, R2E, SLB&M (existing);
- (21) Surface - South 1995 feet and West 1810 feet from the NE Corner of Section 33, T1N, R2E, SLB&M (Contract Holder: Mather (6392 Emigration));
- (22) Well - North 310 feet and East 1280 feet from the W $\frac{1}{4}$ Corner of Section 33, T1N, R2E, SLB&M (originally proposed as a 6-inch well, 0-110 feet deep, but constructed in 1993 as a 4.5-inch well, 110 feet deep);
- (23) Well - South 852 feet and West 1684 feet from the E $\frac{1}{4}$ Corner of Section 1, T1S, R1E, SLB&M (8-inch well, 0-60 feet deep);
- (24) Well - North 565 feet and West 713 feet from the S $\frac{1}{4}$ Corner of Section 1, T1S, R1E, SLB&M (existing);
- (25) Well - North 210 feet and West 300 feet from the SE Corner of Section 31, T1N, R2E, SLB&M (existing);
- (26) Well - North 170 feet and East 710 feet from the SW Corner of Section 32, T1N, R2E, SLB&M (6-inch well, 100-500 feet deep);
- (27) Well - North 793 feet and West 2427 feet from the SE Corner of Section 16, T1N, R2E, SLB&M (existing);
- (28) Well - South 1840 feet and East 145 feet from the NW Corner of Section 28, T1N, R2E, SLB&M (12-inch well, 1140 feet deep).

The water will be stored the same as heretofore in the following reservoir: unnamed - from July 1 to June 30, having a capacity of 6.00 acre-feet in an excavated storage pool, and inundating 1.25 acres in all or portion(s) of Section 1, T1N, R1E, SLB&M. The water is to be used for year-round municipal purposes within the service area of Emigration Improvement District.

Notice of this temporary change application was not published in a newspaper. It is the opinion of the State Engineer that it meets the criteria of Section 73-3-3 and 73-3-8 of the Utah Code for the approval of temporary change applications.

In evaluating applications that propose to change the nature of use of a water right, the State Engineer believes it is appropriate to examine the rates and amounts of hydrologic depletion associated with the historical water use as compared to the proposed use to assure that there is no

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enlargement of the underlying water right. In this case, it is believed that the historical water uses would have incurred the following rates and amounts of hydrologic depletion:

<u>Prior Beneficial Use</u>	<u>Allowed Diversion</u>	<u>Rate of Depletion</u>	<u>Amount of Depletion</u>
Irrigation: 50.00 acres	200.00 acre-feet	48.875% ¹	97.75 acre-feet

The State Engineer has reviewed the change application and underlying water rights. It appears this change can be made provided certain precautions are observed.

It is the opinion of the State Engineer that this temporary change application can be approved without adversely affecting existing rights.

It is, therefore, **ORDERED** and Temporary Change Application Number 57-7796 (t43182) is hereby **APPROVED** subject to prior rights and the following condition(s):

- 1) **This application shall automatically expire one year from the date of this approval.**
- 2) The total diversion of water under this application for municipal uses by Emigration Improvement District is limited to the amount of water reasonably necessary to deplete 97.75 acre-feet up to a maximum diversion of 200.0 acre-feet. The applicant must maintain records sufficient to demonstrate that the depletion from its uses under this application do not exceed 97.75 acre-feet.
- 3) Each source developed under this application must be individually metered and the diversions of water reported annually under the **Utah Water Use Program**.
- 4) The applicants shall install and maintain measuring devices to record all water diverted from all sources under this application and report this information to the Division's Water Use Program.

It is the applicants' responsibility to maintain a current address with this office and to update ownership of their water right. Please notify this office immediately of any change of address or for assistance in updating ownership. Additionally, if ownership of this water right or the property with which it is associated changes, the records of the Division of Water Rights should be updated. For assistance in updating title to the water right please contact the Division at the phone number below.

¹ *Consumptive Use of Irrigated Crops in Utah*, Research Report 145, Utah Agricultural Experiment Station, Utah State University, Logan, Utah, October 1994, Table 25" University of Utah Station, p342. The benchmark crop for the referenced calculation is alfalfa, the most typical and consumptive crop evaluated in the study, (23.46-inches or 1.95 feet/5.0 feet duty = 48.875%.)

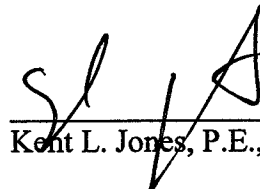
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ORDER OF THE STATE ENGINEER
Temporary Change Application Number
57-7796 (t43182)
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Your contact with this office, should you need it, is with the Utah Lake/Jordan River Regional Office. The telephone number is 801-538-7240.

This Order is subject to the provisions of Administrative Rule R655-6-17 of the Division of Water Rights and to Sections 63G-4-302, 63G-4-402, and 73-3-14 of the Utah Code which provide for filing either a Request for Reconsideration with the State Engineer or an appeal with the appropriate District Court. A Request for Reconsideration must be filed with the State Engineer within 20 days of the date of this Order. However, a Request for Reconsideration is not a prerequisite to filing a court appeal. A court appeal must be filed within 30 days after the date of this Order, or if a Request for Reconsideration has been filed, within 30 days after the date the Request for Reconsideration is denied. A Request for Reconsideration is considered denied when no action is taken 20 days after the Request is filed.

Dated this 16th day of January, 2018.


Kent L. Jones, P.E., State Engineer

Boyd CLAYTON FOR

Mailed a copy of the foregoing Order this 16th day of January, 2018 to:

Emigration Improvement District
P. O. Box 58945
Salt Lake City UT 84158

Emigration Improvement District
c/o Barnett Intermountain Water Consulting
106 West 500 South, Suite 101
Bountiful UT 84010

Division of Water Rights
Stream Alteration Section

Division of Water Rights
Water Use Program

BY: 
Doralee Cannon, Applications/Records Secretary

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