CIVIL COURT OF APPEAL CASE NO. H052028
Superior Court No. 23CV423435

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MARK CHRISTOPHER TRACY
Plaintiff and Appellant

v.

COHNE KINGHORN PC., et al.,
Defendants and Respondents

Appeal from the Superior Court of the State of California,
Santa Clara, Honorable Evette D. Pennypacker
Case No. 23CV423435

RESPONDENTS' APPENDIX ON APPEAL

Vol. II of III

Nicholas C. Larson - 275870
E-mail: NLarson@mpbf.com
Miguel E. Mendez-Pintado - 323372
E-mail: mmendezpintado@mpbf.com
MURPHY, PEARSON, BRADLEY & FEENEY

Attorneys for Defendant and Respondent
PAUL BROWN

Timothy Kassouni
Kassouni Law
455 Capitol Mall, Suite 604
Sacramento, CA 95814
Tel. 916-930-0030
E-mail: timothy@kassounilaw.com

Attorneys for Defendants and Respondents
COHNE KINGHORN, PC,
JEREMY RAND COOK, ERIC HAWKES,

JENNIFER HAWKES, MICHAEL SCOTT HUGHES, DAVID BRADFORD, DAVID BENNION, SIMPLIFI COMPANY, A UTAH CORPORATION, and GARY BOWEN

RESPONDENTS' APPENDIX

CHRONOLOGICAL INDEX

Volume I

Exhibit No.	Date	Description	Bates Nos.
1	11/20/2023	Specially Appearing Defendant Paul Brown's Notice of Motion and Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum	RA000012-RA000013
2	11/20/2023	Memorandum of Points and Authorities In Support of Specially Appearing Defendant Paul Brown's Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum	RA000014-RA000021
3	11/20/2023	Declaration of Paul Brown In Support of Memorandum of Points and Authorities	RA000022-RA000048
4	11/21/2023	Declaration of Miguel Mendez-Pintado In Support of Memorandum of Points and Authorities	RA000049-RA000076
5	11/21/2023	Amended Declaration of Paul Brown In Support of Memorandum of Points and Authorities	RA000077-RA000079
6	11/28/2023	Notice of Motion and Motion of Specially Appearing Defendant Gary Bowen to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum	RA000080-RA000081
7	11/28/2023	Memorandum of Points and Authorities In Support of Specially Appearing Defendant Gary Bowen's Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum	RA000082-RA000089

Exhibit No.	Date	Description	Bates Nos.
8	11/28/2023	Declaration of Gary Bowen in Support of Memorandum of Points and Authorities	RA000090-RA000098
9	12/06/2023	Amended Declaration of Gary Bowen In Support of Memorandum of Points and Authorities 9	RA000099-RA000107
10	12/29/2023	Declaration of Sarah E. Burns In Support of Specially Appearing Defendant Kem C. Gardner's Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction.	RA000108-RA000116
11	12/29/2023	Motion of Specially Appearing Defendant Kem Gardner to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction	RA000117-RA000131
12	1/02/2024	Memorandum of Points and Authorities In Support of Specially Appearing Defendants Cohne Kinghorn, P.C., Simplifi Company, Jeremy Rand Cook, Eric Hawkes, Jennifer Hawkes, Michael Scott Hughes, David Bradford, and David Bennion's Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum	RA000132-RA000142
13	1/4/2024	Amended Declaration of Paul Brown In Support of Memorandum of Points and Authorities	RA000143-RA000145
14	1/4/2024	Amended Declaration of Miguel Mendez-Pintado In Support of Memorandum of Points and Authorities	RA000146-RA000173
15	1/4/2024	Reply Memorandum In Support of Specially Appearing Defendant Paul Brown's Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum	RA000174-RA000179

Exhibit No.	Date	Description	Bates Nos.
16	1/4/2024	Reply Memorandum In Support of Specially Appearing Defendant Gary Bowen's Motion to Quash Service of Summons and Complain for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum	RA000180-RA000187
17	2/09/24	Reply In support of motion of Specially Appearing Defendant Kem Gardner to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction.	RA000188-RA000195
18	2/09/2024	Reply Memorandum In Support of Specially Appearing Defendant Cohne Kinghorn, P.C., Simplifi Company, Jeremy Rand Cook, Eric Hawkes, Jennifer Hawkes, Michael Scott Hughes, David Bradford, and David Bennion's Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum	RA000196-RA000204
19	3/05/2024	Specially Appearing Defendant Paul Brown's Notice of Motion and Motion for Order Finding Plaintiff Mark Christopher Tracy to be a Vexatious Litigant and Entry of Prefiling Order	RA000205-RA000207
20	3/05/24	Memorandum of Points and Authorities In Support of Specially Appearing Defendant Paul Brown's Motion for Order Finding Plaintiff Mark Christopher Tracy to be a Vexatious Litigant and Entry of Prefiling Order	RA000208-RA000224

Volume II

Exhibit No.	Date	Description	Bates Nos.
21	3/05/2024	Declaration of Miguel Mendez-Pintado In Support of Motion for Order Finding Plaintiff Mark Christopher Tracy to be a Vexatious Litigant and Entry of Prefiling Order	RA000236-RA000394
22	3/11/2024	Supplemental Request for Judicial Notice In Support of Specially Appearing Defendant Paul Brown's Motion for Order Finding Plaintiff Mark Christopher Tracy to be a Vexatious Litigant and Entry of Prefiling Order	RA000395-RA000553

Volume III

Exhibit No.	Date	Description	Bates Nos.
23	3/13/2023	Specially Appearing Defendant Paul Brown's Opposition to Plaintiff's Motion for Reconsideration	RA000565-RA000575
24	3/13/2024	Specially Appearing Defendants Cohne Kinghorn, P.C., Simplifi Company, Jeremy Rand Cook, Eric Hawkes, Jennifer Hawkes, Michael Scott Hughes, David Bradford, and David Bennion's Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum	RA000576-RA000583

Exhibit No.	Date	Description	Bates Nos.
25	3/13/2024	Specially Appearing Defendant Kem C Gardner's Opposition to Plaintiff's Motion for Reconsideration	RA000584-RA000593
26	3/26/2024	Memorandum and Point of Authority in Support of Opposition to Defendant Paul Hand Brown's Motion for Vexatious Litigant Order	RA000594-RA000599
27	3/26/2024	Declaration of Mark Christopher Tracy In Support of Opposition to Paul Handy Brown's Motion for Vexatious Litigant Order	RA000600-RA000617
28	3/26/2024	Request for Judicial Notice In Support of Opposition to Defendant Paul Handy Brown's Motion for Vexatious Litigant Order	RA000618-RA000688
29	4/03/2024	Specially Appearing Defendant Paul Brown's Reply in Support of Motion for Order Finding Plaintiff Mark Christopher Tracy to be a Vexatious Litigant and Entry of Prefiling Order	RA000689-RA000699
30	4/16/2024	Order Declaring Plaintiff a Vexatious Litigant	RA000700-RA000708

ALPHABETIC INDEX

Exhibit No.	Date	Description	Vol. No.	Bates Nos.
9	12/06/2023	Amended Declaration of Gary Bowen In Support of Memorandum of Points and Authorities 9	I	RA000099-RA0000107
14	1/4/2024	Amended Declaration of Miguel Mendez-Pintado In Support of Memorandum of Points and Authorities	I	RA000146-RA000173
5	11/21/2023	Amended Declaration of Paul Brown In Support of Memorandum of Points and Authorities	I	RA000077-RA000079
13	1/4/2024	Amended Declaration of Paul Brown In Support of Memorandum of Points and Authorities	I	RA000143-RA000145
8	11/28/2023	Declaration of Gary Bowen in Support of Memorandum of Points and Authorities	I	RA000090-RA000098
27	3/26/2024	Declaration of Mark Christopher Tracy In Support of Opposition to Paul Handy Brown's Motion for Vexatious Litigant Order	III	RA000600-RA000617
4	11/21/2023	Declaration of Miguel Mendez-Pintado In Support of Memorandum of Points and Authorities	I	RA000049-RA000076
21	3/05/2024	Declaration of Miguel Mendez-Pintado In Support of Motion for Order Finding Plaintiff Mark Christopher Tracy to be a Vexatious Litigant and Entry of Prefiling Order	II	RA000236-RA000394
3	11/20/2023	Declaration of Paul Brown In Support of Memorandum of Points and Authorities	I	RA000022-RA000048
10	12/29/2023	Declaration of Sarah E. Burns In Support of Specially Appearing Defendant Kem C. Gardner's Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction.	I	RA000108-RA000116
26	3/26/2024	Memorandum and Point of Authority in Support of Opposition to Defendant Paul	III	RA000594-RA000599

Exhibit No.	Date	Description	Vol. No.	Bates Nos.
		Hand Brown's Motion for Vexatious Litigant Order		
2	11/20/2023	Memorandum of Points and Authorities In Support of Specially Appearing Defendant Paul Brown's Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum	I	RA000014-RA000021
7	11/28/2023	Memorandum of Points and Authorities In Support of Specially Appearing Defendant Gary Bowen's Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum	I	RA000082-RA000089
12	1/02/2024	Memorandum of Points and Authorities In Support of Specially Appearing Defendants Cohne Kinghorn, P.C., Simplifi Company, Jeremy Rand Cook, Eric Hawkes, Jennifer Hawkes, Michael Scott Hughes, David Bradford, and David Bennion's Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum	I	RA000132-RA000142
20	3/05/24	Memorandum of Points and Authorities In Support of Specially Appearing Defendant Paul Brown's Motion for Order Finding Plaintiff Mark Christopher Tracy to be a Vexatious Litigant and Entry of Prefiling Order	I	RA000208-RA000224
11	12/29/2023	Motion of Specially Appearing Defendant Kem Gardner to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction	I	RA000117-RA000131
6	11/28/2023	Notice of Motion and Motion of Specially Appearing Defendant Gary Bowen to Quash Service of Summons and Complaint for Lack of Personal	I	RA000080-RA000081

Exhibit No.	Date	Description	Vol. No.	Bates Nos.
		Jurisdiction and Motion to Dismiss for Inconvenient Forum		
30	4/16/2024	Order Declaring Plaintiff a Vexatious Litigant	III	RA000700-RA000708
17	2/09/24	Reply In support of motion of Specially Appearing Defendant Kem Gardner to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction.	I	RA000188-RA000195
18	2/09/2024	Reply Memorandum In Support of Specially Appearing Defendant Cohne Kinghorn, P.C., Simplifi Company, Jeremy Rand Cook, Eric Hawkes, Jennifer Hawkes, Michael Scott Hughes, David Bradford, and David Bennion's Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum	I	RA000196-RA000204
16	1/4/2024	Reply Memorandum In Support of Specially Appearing Defendant Gary Bowen's Motion to Quash Service of Summons and Complain for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum	I	RA000180-RA000187
15	1/4/2024	Reply Memorandum In Support of Specially Appearing Defendant Paul Brown's Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum	I	RA000174-RA000179
28	3/26/2024	Request for Judicial Notice In Support of Opposition to Defendant Paul Handy Brown's Motion for Vexatious Litigant Order	III	RA000618-RA000688
25	3/13/2024	Specially Appearing Defendant Kem C Gardner's Opposition to Plaintiff's Motion for Reconsideration	III	RA000584-RA000593

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19	3/05/2024	Specially Appearing Defendant Paul Brown's Notice of Motion and Motion for Order Finding Plaintiff Mark Christopher Tracy to be a Vexatious Litigant and Entry of Prefiling Order	I	RA000205-RA000207
23	3/13/2023	Specially Appearing Defendant Paul Brown's Opposition to Plaintiff's Motion for Reconsideration	III	RA000565-RA000575
29	4/03/2024	Specially Appearing Defendant Paul Brown's Reply in Support of Motion for Order Finding Plaintiff Mark Christopher Tracy to be a Vexatious Litigant and Entry of Prefiling Order	III	RA000689-RA000699
24	3/13/2024	Specially Appearing Defendants Cohne Kinghorn, P.C., Simplifi Company, Jeremy Rand Cook, Eric Hawkes, Jennifer Hawkes, Michael Scott Hughes, David Bradford, and David Bennion's Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum	III	RA000576-RA000583
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Nicholas C. Larson - 275870
NLarson@mpbf.com
Miguel E. Mendez-Pintado - 323372
MMendezpintado@mpbf.com
MURPHY, PEARSON, BRADLEY & FEENEY
520 Pike Street, Suite 1205
Seattle, WA 98101
(206) 219-2008 - Main
(206) 489-5101 – Fax

Mark Shem, Esq. – 152860
mshem@bortonpetrini.com
Borton Petrini, LLP
95 South Market Street, Suite 400
San Jose, CA 95113
(408)535-0870

Attorneys for Defendant
PAUL BROWN

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

MARK CHRISTOPHER TRACY, an individual,

Plaintiff,

v.

COHNE KINGHORN PC, a Utah Professional Corporation; SIMPLIFI COMPANY, a Utah Corporation; JEREMY RAND COOK, an individual; JENNIFER HAWKES, an individual; MICHAEL SCOTT HUGHES, an individual; DAVID BRADFORD, an individual; KEM KROSBY GARDNER, an individual; WALTER J. PLUMB III, an individual; DAVID BENNION, an individual; R. STEVE CREAMER, an individual PAUL BROWN, an individual; GARY BOWEN, an individual,

Defendants.

Case No. 23CV423435

DECLARATION OF MIGUEL MENDEZ-PINTADO IN SUPPORT OF MOTION FOR ORDER FINDING PLAINTIFF MARK CHRISTOPHER TRACY TO BE A VEXATIOUS LITIGANT AND ENTRY OF PREFILING ORDER

Date: April 9, 2024
Time: 9:00 A.M.
Dept: 6
Judge: The Honorable Evette D. Pennypacker

I, Miguel Mendez-Pintado, declare as follows:

1. I am an attorney duly licensed to practice in the State of California and before this Court and with the law firm of Murphy, Pearson, Bradley, and Feeney, attorneys of record for Specially Appearing Defendant Paul Brown. I have personal knowledge of the information set forth below, unless noted as based on information and belief, all of which is true and correct of my own personal knowledge, and if called upon to testify, I could and would competently testify thereto.

2. Attached hereto as **Exhibit A** is a true and correct copy of A Petition for: (1) Judicial Review of Denied Request for Disclosure of Public Records; (2) Injunction for Violations of the Government Records Access and Management Act; (3) Award of Attorney Fees and Costs filed with the Third District Court of the State of Utah on August 10, 2020, with the Case Number 200905074.

3. Attached hereto as **Exhibit B** is a true and correct copy of a Memorandum Decision and Order issued by the Honorable Mark Kouris of the Third District Court of the State of Utah on February 24, 2021, for Case Number: 200905074.

4. Attached hereto as **Exhibit C** is a true and correct copy of a Decision and Order Denying Motion to Vacate, Awarding Attorney's Fees and Finding Petitioner Mark Christopher Tracy to Be a Vexatious Litigant and Subject to Rule 83 of the Utah Rules of Civil Procedure issued by the Honorable Mark Kouris of the Third District Court of the State of Utah on April 15, 2021, for Case Number: 200905074.

5. Attached hereto as **Exhibit D** is a true and correct copy of a Civil Rights Complaint filed with the United States District Court for the District of Utah on July 22, 2021, under the Case Number: 2:21-cv-00444.

6. Attached hereto as **Exhibit E** is a true and correct copy of the Order and Judgment Issued by the United States Court of Appeals for the Tenth Circuit issued on June 8, 2023, related to the District Court Case Number 2:21-CV-00444-RJS.

7. Attached hereto as **Exhibit F** is a true and correct copy of the Third Amended Complaint alleging a Federal False Claims Act filed with the United States District Court for the District of Utah on April 16, 2018, under the Case Number: 2:14-cv-00701-JNP-PMW.

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8. Attached hereto as **Exhibit G** is a true and correct copy of the Order Granting In Part and Denying In Part Defendant's Motion for Attorney's Fees and Costs and Granting Defendant's Motion to Amend issued by the Honorable Jill N. Parrish of the United States District Court for the District of Utah issued on October 29, 2021 in the Case Number 2:14-cv-701-JNP.

9. I declare that under the penalty of perjury under the laws of California that the foregoing is true and correct and that this Declaration was executed on this 5th day of March 2024, in Seattle, Washington.

Miguel Mendez-Pintado

EXHIBIT A

Mark Christopher Tracy
dba Emigration Canyon Home Owners Association
1160 E. Buchnell Dr.
Sandy, Utah 84094
Telephone: (929) 208-6010
Email: m.tracy@echo-association.com
Pro se Petitioner

IN THE THIRD DISTRICT COURT OF THE STATE OF UTAH

MARK CHRISTOPHER TRACY, dba EMIGRATION CANYON HOME OWNERS ASSOCIATION,

Petitioner,

vs.

SIMPLIFI COMPANY, a Utah Corporation; ERIC HAWKES, an individual; and JENNIFER HAWKES, an individual,

Respondents.

PETITION FOR:

(1) JUDICIAL REVIEW OF DENIED REQUEST FOR DISCLOSURE OF PUBLIC RECORDS;

(2) INJUNCTION FOR VIOLATIONS OF THE GOVERNMENT RECORDS ACCESS AND MANAGEMENT ACT;

(3) AWARD OF ATTORNEY FEES AND COSTS

RE: WATER LEVEL TELEMETRY DATA OF A PUBLIC DRIKING WATER SYSTEM

TIER 2

Case No.: 200905074

Judge: Kouris

Petitioner Mark Christopher Tracy ("Mr. Tracy") dba Emigration Canyon Home Owners Association ("The ECHO-Association") brings this action under Utah Code Ann. §§ 63G-2-404 and 63G-2-802 for judicial review of the denied request and *de facto* denied appeal[1] of the chief administrative officer of Emigration Improvement District ("EID") for the release of public records of water-level telemetry reports and graphs required to be collected and maintained by the Simplifi Company ("Simplifi") in the physical custody of Eric and Jennifer Hawkes ("Mr. Hawkes" and "Mrs. Hawkes") (collectively "Respondents") in violation of the Government Access to Records and Management Act ("GRAMA").

The names and addresses of the Respondents are:

1) Simplifi Company, 271 N. Margarethe LN, Salt Lake City, Utah, 84108;

2) Eric Lee Hawkes, *id.*; and

3) Jennifer Hawkes, *id.*

INTRODUCTION

This matter concerns the failure of the Respondents to disclose public records of water-level telemetry data of four (4) underground large-diameter commercial wells and two (2) water-storage reservoirs of a public drinking-water system servicing over 300 existing homes and 253 future homes[2] through so-called "stand-by" agreements in Emigration Canyon, Salt Lake County, Utah (the "Canyon").

Petitioner seeks an Order from this Court requiring all water-level recordings, telemetry data, graphs and reports believed to have been recorded by hand and/or electronically formatted as "LGH files" complied, transmitted and accessed by the software program "LGH File Inspector",

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[1] *See* Utah Code Ann. § 63-2-401(5)(b).

[2] EID financial records reveal that property owners of 97 vacant parcels were promised future water service from EID trustees and managers. *See* true and correct copy of excerpt of EID records, attached as Ex. A.

an Order enjoining Respondents for GRAMA violations, and an Order awarding Petitioner reasonable attorney fees and costs of this action.

PARTIES

1. Petitioner The ECHO-Association is registered with the Utah Division of Corporations and Commercial Code as a "dba entity" of Mr. Tracy and is the owner of surface water right no. 57-8947 (a16183) located in Emigration Canyon, Salt Lake County, Utah.

2. On information and belief, Respondent Simplifi Company is a Utah Corporation, registered with the Utah Division of Corporations and Commercial Code under the business purpose of "NAICS Title 5511-Management of Companies and Enterprises", with its headquarters located in Salt Lake County, Utah.

3. On information and belief, Respondent Eric Hawkes, is a director of Simplifi, is the spouse of Jennifer Hawkes and is a resident of Salt Lake County, Utah.

4. On information and belief, Respondent Jennifer Hawkes is a current elected member of the Emigration Canyon Metro Township Council, is an officer and director of Simplifi, is the spouse of Mr. Hawkes and is a resident of Salt Lake County, Utah.

JURISDICTION AND VENUE

5. The acts set forth herein occurred in Salt Lake County, State of Utah.

6. The final agency action constituting exhaustion of administrative proceedings occurred in Salt Lake County, Utah.

7. Jurisdiction is appropriate pursuant to Utah Code Ann. § 63G-4-402.

8. Venue is properly laid before the Third District Court in and for Salt Lake County, State of Utah, pursuant to the provisions of Utah Code Ann. § 78-3-307(1)(a).

BACKGROUND

9. There are currently approximately 677 residential units located in the Canyon, whereby circa 300 homes are connected to public water system No. 18143 owned by EID and operated by Simplifi through Mr. and Mrs. Hawkes under the unregistered designation "Emigration Canyon Improvement District"[3] ("EID Water System"), circa 370 homes are serviced by individual, private domestic wells located near the Emigration Canyon Stream ("Canyon Stream") and approximately 37 homes are connected to Salt Lake City Public Utilities.

10. Although less than half of Canyon homes are connected to the EID Water System, all non-exempt developed and undeveloped properties are assessed property taxes and fees for the operation and maintenance of the EID Water System by the Respondents to include the retirement of $6.3 million dollars of outstanding federally-backed loan obligations as outlined below.

11. In an extensive study of the Canyon's hydrology in 1966, the Utah State Engineer's Office concluded that the Canyon's groundwater was in direct communication with the Canyon Stream and expressly recommended *against* the construction and operation of large-diameter commercial wells ("1966 Barnett Thesis"). *See* excerpt pages 95 and 96 of *Ground-water Hydrogeology of Emigration Canyon, Salt Lake County, Utah* by Jack Arnold Barnett submitted to University of Utah Department of Geology as filed in federal district court, attached as Ex. C; *see also* entire publication available at https://echo-association.com/?page_id=3310.

[3] The EID website maintained by Simplifi is recorded under the designation "Emigration Canyon Improvement District" and "ECID" although no such name or entity is registered with the Utah Division of Corporations and Commercial Code as per Utah Code Ann. § 42-2-5(2) and no such entity is registered with the Utah Lt. Governor's Office as a special service district as required under Utah Code Ann. § 67-1a-15(3). *See* true and correct copy of website listed under assumed name at "https://www.ecid.org/" last visited on July 29, 2020, attached as Ex. B.

12. Moreover, if the Canyon's water table dropped below the level of the Canyon Stream, the loss of artesian pressure augmenting stream flow would reverse the flow of clean, safe water *into* the stream thereby allowing contaminated surface water to penetrate the circa 300 private-water sources located nearby. *See id.*; *see also* excerpt diagrams "Figure 15" and "Figure 34" of *Ground Water in Utah's Densely Populated Wasatch Front Area – The Challenge and Crisis - Water-Supply Paper 2232* published by the United States Geological Survey, 1985, attached as Ex. D.

13. Contrary to conclusions of the 1966 Barnett Thesis, between May 1984 and February 1994, private land developers constructed water system No. 18143 consisting of a small 330,000 gallon storage tank identified as the "Boyer Tank" and 2 large-diameter commercial wells designated as "Boyer Well No. 1" and "Boyer Well No. 2" to service the luxurious Emigration Oaks Private Urbane Development ("Emigration Oaks PUD").

14. In testimony before the Utah State Engineers' Office on December 15, 1995, EID through hydrologists Jack Arnold and Don A. Barnett testified that the operation of these large-diameter commercial wells in the Brigham Fork and Freeze Creek drainage areas would interrupt the movement of groundwater providing artesian pressure to the Canyon Stream and thus surface water flow at Utah's Hogle Zoo "for decades...*twenty-five, fifty or seventy-five years*" ("1995 Barnett Testimony")(emphasis added). *See* written transcript excerpt of State Engineer protest hearing and illustrative maps, attached as Ex. E; *see also* excerpt of audio recording, available The ECHO-Association website https://echo-association.com/?page_id=2204.

15. However, in order to facilitate the further massive expansion of the Emigration Oaks PUD at the expense of existing Canyon residents and taxpayers, and contrary to the 1966 Barnett Thesis and 1995 Barnett Testimony, EID acquired title and assumed operation of water

system No. 18143 in August 1998 at extraordinary private profit as alleged in federal district court.[4,5]

16. Having assumed the legal liability of water system no. 18143 constructed in violation of the 1966 Barnett Thesis and 1995 Barnett Testimony, in an extensive hydrological study completed in July 2000, EID hydrologist Don A. Barnett and the Weber State University Geology Department Chairman W. Adolph Yonkee concluded that Boyer Well No. 2 had extracted more groundwater than was replenished in a "good water year" of 1998 and expressly warned against continued groundwater mining of the Twin Creek Aquifer located in the Freeze Creek drainage area ("2000 Barnett-Yonkee Study"). *See* excerpt pages 36-38 of *Geologic and Hydrologic Setting of the Upper Emigration Canyon Area* by W. Adolph Yonkee and Don A. Barnett, attached as Ex. F; *see also* entire publication available at The ECHO-Association website https://echo-association.com/?page_id=7139.

17. Contrary to the conclusions, warnings and recommendations of the 1966 Barnett Thesis, the 1995 Barnett Testimony and the 2000 Barnett-Yonkee Study, at the cost of $6.3 million dollars of federally-backed loans to be paid by existing Canyon residents and property owners, between October 2003 and January 2013 EID drilled two (2) additional large-diameter commercial wells in the Canyon's Twin Creek Aquifer identified as the "Brigham Fork Well" drilled at 1,220 feet and the "Upper Freeze Creek Well" drilled at 1,148 feet and constructed the Wildflower Reservoir altogether equaling more than **4 times** the required water source capacity and more than **6 times** the required water storage capacity vis-à-vis existing Canyon residents connected to the

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[4] *See United States of America ex rel. Mark Christopher Tracy v. Emigration Improvement District et al.*, (D. Utah) Case No. 2:14-cv-701-JNP-JCB.

[5] Sometime after June 2014, Simplifi through Mr. and Mrs. Hawkes assumed operation of the EID Water System from Management Enterprises through Canyon resident Fred A. Smolka (deceased).

EID Water System. *See* footnote no. 4 and excerpt of "Water System Capacity Calculation Sheet" for existing water source capacity dated January 1, 2014, attached as Ex. G and excerpt of "Water System Capacity Calculation Sheet" for existing water storage capacity dated October 19, 2018, attached as Ex. H.

18. Despite have constructed a massively oversized water system intended for future yet to be built homes, a report published by the United States Geological Survey determined that development in the Canyon was a cause of deteriorating water quality thereby posing a risk to human health ("2008 USGS Report"). *See* excerpt pages 1, 2, 20-22 of *Principle Locations of Major-Ion, Trace Element, Nitrate, and Escherichia coli Loading to Emigration Canyon Creek, Salt Lake County, Utah, October 2005* United States Geological Survey, 2008, attached as Ex. I; *see also* publication in its entirety available at The ECHO-Association website https://echo-association.com/?page_id=7139.

19. As accurately predicted in the 1966 Barnett Thesis, the 1995 Barnett Testimony and the 2000 Barnett-Yonkee Study, in September 2018, for the first time in recorded history, with the collapse of artesian pressure due to a declining water table, the Canyon Stream suffered total depletion less than 2 miles from Utah's Hogle Zoo thereby forcing many long-time Canyon residents to abandon private wells with senior water rights and involuntarily connect to the EID Water System at substantial cost and possible risk to health and safety as follows.

STATEMENT OF FACTUAL GROUNDS FOR RELIEF

20. On June 16, 2020, The ECHO-Association recorded massive ground subsidence and a 700-foot fissure in the Canyon's Freeze Creek drainage area near Emigration Oaks PUD lots 171, 178, 180, 182, 184 and 199 believed to have been caused by the groundwater mining of the Canyon's Twin Creek Aquifer as documented in the 2000 Barnett-Yonkee Study. *See* illustrative

map and photo, attached as Ex. J; *see also* audio and video recording available at The ECHO-Association website https://echo-association.com/?page_id=3310.

21. In a study of groundwater mining in Cedar Valley, Utah, the Utah Geological Society concluded that fissures provided a direct path of contaminated surface water to reach the Cedar Valley aquifer, the primary drinking-water source for the Cedar Valley ("2015 Cedar Valley Report). *See* excerpt pages 1, 2 of *Investigation of Land Subsidence and Earth Fissures in Cedar Valley, Iron County, Utah, Special Study 150,* Utah Department of Natural Resources, 2014, attached as Ex. K; *see also* publication in its entirety available at The ECHO-Association website https://echo-association.com/?page_id=3919.

22. Despite impairment of the Canyon Stream, massive earth collapse and fissures, decreased surface water flow at Utah's Hogle Zoo, and impairment of numerous private wells, financial records reveal that EID promised future water service to the owners of 98 vacant lots through "stand-by agreements" and recently secured approval from the State Engineer to allow construction of more than 500 additional homes in the Canyon to include future water service to a "Gun Range and Wedding Resort" proposed by private land developers. *See* Ex. A.[6]

23. On June 30, 2020, EID through an unregistered "Utah non-profit organization" identified as the "Emigration Canyon Sustainability Alliance" through "President" Willy Stokman

[6] Permanent changes to water rights claimed by EID was protested by The ECHO-Association and is currently pending with the Utah Court of Appeals under *Emigration Canyon Home Owners Association v. Kent L. Jones and Emigration Improvement District* (UT App) Docket No. 20200295-CA.

and "Vice President" Mindy McAnulty[7,8] circulated a correspondence to Canyon residents purporting that "faulty septic systems in the Canyon" was a "attributed" cause of surface-water contamination, despite the fact that the 2008 USGS Report expressly concluded that older septic systems were not related to the loading of *E. coli*, lithium, and nitrate in Canyon Stream. *See* correspondence signed by Willy Stokman and Mindy McAnulty, attached as Exhibit L.

24. Contrary to EID's representations through Ms. Stokman and Ms. McAnulty, continued development of the Canyon (or another undetermined source) was cited as the probable cause of deteriorated drinking-water quality and risk to human health. *See* Exhibit I.

25. Financial records reveal that in the calendar year 2019, EID through Mr. Hawkes paid Mr. and Mrs. Hawkes through Simplifi $97,321.08 for "Manager Compensation", "Office Expenses" and "Internet and Computer Expenses" equaling more than 20% of EID's operating expenses for that year. *See* true and correct copy of Utah Transparency Website, attached as Ex. M; *see also* comparison of EID "Manager Compensation" with two (2) Big Cottonwood Improvement District employees available at The ECHO-Association website https://echo-association.com/?page_id=6054.

26. Contrary to the express conclusions of the 1966 Barnett Thesis, 1995 Barnett Testimony, the 2000 Barnett-Yonkee Study and the 2008 USGS Report, Mr. and Mrs. Hawkes have a vital personal and economic interest in EID's sustained and continued revenue flow secured

[7] In an email correspondence from August 7, 2020, Ms. Stokman confirmed having received public funds for the printing and postage costs of the letter from the Simplifi Company, although no such allocation to Ms. Stockman and/or the "Emigration Canyon Sustainability Alliance" was recorded as approved during the public portion of the EID trustee meeting on June 10, 2020.
[8] To date, other than a "Business Name Registration" on July 9, 2020, no filings have been made for the "Emigration Canyon Sustainability Alliance" with the Utah Department of Corporations and Commercial Code under entity no. 11847526-0111 in violation of Utah Code Ann. § 42-2-5(2).

from owners of vacant lots unaware of the actual source of deteriorated drinking-water quality and the risk posed to human health in the Canyon should development in the Canyon continue as planned.

27. With EID's current expenditures identified in the 2020 budget, EID will default on its federally-backed loan obligations if Mr. and Mrs. Hawkes are unable to maintain projected revenue consisting of water-usage fees, monthly "fire-hydrant rental fees" and monthly "standby fees" paid by Canyon residents and property owners unaware of the extensive contamination of surface and drinking water in the Canyon.

28. Although EID is a limited purpose local government entity created by Salt Lake County, EID trustees maintain that statutory provisions prohibiting nepotism under Utah Code Ann. §§ 52-3-1(2) and 17B-1-110 do not apply to EID due to the fact that EID has "no employees" and all services are provided to EID by "independent contractors" such as Simplifi through Mr. and Mrs. Hawkes. *See* EID correspondence dated June 2014, attached as Ex. N.

29. Mr. Hawkes is currently listed as the primary contact for EID with the Utah Lt. Governor's Office at Mr. and Mrs. Hawkes' private residence.

30. Mr. and Mrs. Hawkes are listed as directors of Simplifi, which is registered at the same private residence recorded for EID with the Utah Lt. Governor's Office.

31. It does not appear that Simplifi possess legal or equitable title to any real property, maintains an office separate from the private residence of Mr. and Mrs. Hawkes, has any employees or provides services to any customer or client other than EID.

32. In August 1998, EID assumed ownership and operation of water system No. 18143 despite the fact that all underground water sources operated at that time had previously tested positive for lead contamination on February 25, 1994 and March 19, 1997 and use of Boyer Well

No. 2 had been expressly forbidden by the Utah Division of Drinking Water ("DDW") prior to issuance of an operating permit required under the federal Safe Drinking Water Act of 1974.[9] *See* Chemical and Biological Analysis of Ford Analytical Laboratories, attached as Ex. O and Ex. P and DDW correspondence dated September 20, 1995, attached as Ex. Q.

33. In October 2003 and January 2013, EID secured operating permits for the Brigham Fork (aka "EID Well #3") and the Upper Freeze Creek Wells located in the Brigham Fork and Freeze Creek drainage areas, although both water sources had tested positive for lead contamination prior thereto and were expressly forbidden under the 1966 Barnett Thesis, 1995 Barnett Testimony, the 2000 Barnett-Yonkee Study and the 2008 USGS Report. *See* Certificates of Analysis, Chemtech-Ford Analytical Laboratories, attached as Ex. R and S.

34. From October 2003 to the present date, EID through Simplifi continues to operate the Wildflower Reservoir without a valid operating permit. *See* footnote no. 4.

35. On October 29, 2019, a single Canyon resident connected to the EID Water System reported on the internet platform "Nextdoor" to have received notice that the drinking-water sample collected from the home connected to the EID Water System had exceed the "action level" of 0.015 mg/L for lead contamination. *See* true and correct copy of Nextdoor electronic post, attached as Ex. T.

36. Mr. Hawkes responded that only "3 [of the 10 sampled homes] exceeded the water standard for lead (*this is the first time ever*)" and "*we do not believe the lead is coming from our water sources*, but likely from the lead solder used in the plumbing of homes" despite the fact that federal guidelines do not allow for any amount of lead contamination in drinking water, it appears

[9] To date, EID through Simplify continues operation of Boyer Well No. 2 without a valid operating permit. *See* 2015 Sanitary Survey of EID Water System available at https://echo-association.com/wp-content/uploads/EID-Sanitary-Survey-2015.pdf.

that all homes sampled and connected to the EID Water System had tested positive for lead contamination since 1995 and all EID underground water sources had previously tested positive for lead contamination (emphasis added). *See id.* and Ex. O, P, R and S and map of lead contamination test results of EID Water System since 1994 complied by The ECHO-Association, attached as Exhibit U; *see also* links to lead test results also available at ECHO-Association website https://echo-association.com/?page_id=4950.

37. During the EID trustee meeting on June 11, 2020, at the insistence of Utah Attorney Jeremy Cook of the Salt Lake City law firm Cohne Kinghorn P.C., Mr. Hawkes and EID trustees Michael Scott Hughes, Brett Tippets and David Bradford refused to answer any questions regarding lead contamination of the 20 Canyon homes connected to the EID Water System required to be tested prior to June 30, 2020 by DDW. *See* audio/video excerpt of electronic meeting conducted via the Zoom internet platform, available at The ECHO-Association website https://echo-association.com/?page_id=1661 and DDW correspondence dated November 12, 2019, attached as Ex. V.

38. During the November 11, 2019 EID trustee meeting, Mr. Hawkes disclosed that the water distribution lines on both the east and west side of the EID Water System had tested positive for lead contamination. *See* excerpt of audio recording available The ECHO-Association website https://echo-association.com/?page_id=1442.

39. During the June 11, 2020 EID trustee meeting, Mr. Hawkes disclosed the repair of distribution lines of the EID Water System not approved for drinking water (*i.e.*, black PVC). *See* audio-video excerpt of electronic trustee meeting conducted via the Zoom internet platform, available at The ECHO-Association website https://echo-association.com/?page_id=1661.

40. Between August 1998 to the present day, Simplifi failed to inform EID water users and "standby customers" of the lead-contamination of EID's water sources, lead contamination of EID's water-distribution lines, lack of valid operating permits for Boyer Well No. 2 and the Wildflower Reservoir, and use of unapproved drinking-water lines in the annual Customer Confidence Reports and triannual Sanitary Surveys required under the federal Safe Drinking Water Act of 1974. *See* reports and surveys of EID Water System, available at The ECHO-Association website https://echo-association.com/?page_id=1221.

41. During the EID trustee meeting on August 6, 2020, Mr. Hawkes failed to inform EID trustees that all 20 homes connected to the EID water system had again tested positive for lead contamination in June 2020. *See id.* and "90th Percentile Result Calculator, Lead and Cooper Sampling Summary" dated July 17, 2020, attached as Ex. W.

42. On July 25, 2020, in an undated correspondence under the letterhead "Emigration Canyon Improvement District", Mr. Hawkes reported copper contamination in excess of federally-mandated drinking water standards of 3 homes connected to EID Water System the but failed to inform its existing and "stand-by" customers that all 20 homes and all water samples had tested positive for lead contamination and failed to record that 1 water sample had tested 18 times the level for copper contamination allowed under federal drinking water requirements. *See* System-Wide Public Notice attached as Ex. X and Lead and Copper Sampling Summary at Ex. W.

STATEMENT OF LEGAL GROUNDS FOR RELIEF

43. Under the Water Management and Conservation Plan dated November 14, 2003, required for the receipt of federally-backed funds administered under the Safe Drinking Water Act of 1974, EID purported that the telemetry system installed in the year 2000 "measures and records well depths, reservoir levels and pumping volumes, rates of pumping and electrical usage"

whereby [a]ll of these levels, volumes, ect. are available for observation and print-out [sic] on-line [sic] through PC Anywhere [sic]" and "[p]ermanent hard copy table and graphs are created and kept in EID files in addition to the electronic files created by the computer program in use." *See* excerpt of "Telemetry System" at Nr. B (4), attached as Ex. Y.

44. In the Water Conservation and Management Plan dated March 14, 2013, EID further reported that the original telemetry system was "updated in 2003 to include the new reservoir [i.e., Wildflower Reservoir]" and "will also include the new well [i.e., Upper Freeze Creek Well]" under the same system of easily accessible recording. *See* "Telemetry System at Nr. B (4), attached as Ex. Z.

45. Under Utah Code Ann. § 63G-2-201, every person has a right to inspect a public record free of charge, and the right to take a copy of a public record during normal working hours if the record is not confidential and exempt from disclosure.

46. Although GRAMA typically applies to "any political subdivision of the state" such as EID and not private individuals and for-profit corporations operating under an unregistered fictitious name at a private residence, under Utah Code Ann. § 63G-2-103(11)(a)(v), a "government entity" also includes "every office, agency, board, bureau, committee, department, advisory board, or commission of an entity listed in Subsection (11)(a) that is funded or established by the government to carry out the public's business."

47. The only "office" and "premises" of EID operated during normal working hours is the private residence of Mr. and Mrs. Hawkes accessible only by Mr. and Mrs. Hawkes.

48. Because EID has no employees and operates entirely through the shell of Simplifi at the private residence of Mr. and Mrs. Hawkes under the unregistered assumed name "Emigration Canyon Improvement District", all Respondents to the present action are subject to the judicial

review of the denied request/denied appeal for disclosure of public records, injunctive relief, and the recovery of attorney fees and costs under Utah Code Ann. §§ 63G-2-404 and 63G-2-802.

49. On June 10, 2020, The ECHO-Association submitted a request for all telemetry data for EID production wells and water storage facilities since September 1, 1998 ("Water-Level Telemetry GRAMA") to Mr. Hawkes. *See* GRAMA request form, attached as Ex. AA.

50. Upon non-response and non-confirmation of receipt of the Water-Level Telemetry GRAMA, on June 27, 2020 The ECHO-Association filed appeal to the chief administrative officer whereby on July 9, Mr. Hawkes responded that "data requires custom software programs to access the data" and then identified the Software program "LGH File Inspector" with an alternative demand for payment of $3,000.00 to provide the data in the format of a Microsoft Excel spreadsheet. *See* email correspondence attached as Ex. BB.

51. After receipt of the data file from Mr. Hawkes, The ECHO-Association reported that the file transmitted by Mr. Hawkes on July 15, 2020 did not match the water levels previously reported by Mr. Hawkes to EID trustees as captured in audio recordings and all telemetry data collected as "LGH files" could be easily converted to an Excel spreadsheet in an easy 5-step process in less than 15 minutes. *See* email entitled "Final Deadline for Judicial Review Filing" dated July 17, 2020, attached as Ex. CC.

52. During the following EID trustee meeting on August 6, 2020 Mr. Hawkes failed to identify or discuss the Water-Telemetry GRAMA during the trustee meeting and refused to disclose current water levels despite the fact that "Water Level Report" and "System Water Levels and Consumption Report" was identified in the EID meeting agenda under Nr. 6 and subsection A. *See* EID Board Meeting Agenda, attached as Ex. DD.

53. Previous reports of water levels by Mr. Hawkes to the EID trustees document that the EID's main production well is pumping water below the level of the Canyon Stream. *See* illustrative map of the Upper Freeze Creek Well in relation to the surface water level of the Canyon Stream, attached as Ex. EE.

54. To date, Respondents have failed to disclose the requested public records identified in the Water-Level Telemetry GRAMA thereby necessitating the present litigation.

REQUEST FOR RELIEF

Petitioner requests this Court enter the following relief:

1. An Order directing the Respondents to disclose all water level reports of Boyer Well No. 1, Boyer Well Nr. 2, the Brigham Fork Well, the Upper Freeze Creek Well, the Boyer Tank and the Wildflower Reservoir to include pumping volumes, rates of pumping and electrical usage and all tables and graphs from September 1, 1998 to the date of the Order;

2. An Order enjoining Respondents for violations the Government Records Access and Management Act per Utah Code Ann. § 63G-2-802(1);

3. An Order awarding Petitioner reasonable attorney fees and costs per Utah Code Ann. § 63G-2-802(2).

DATED this 10th day of August, 2020.

MARK CHRISTOPHER TRACY dba
EMIGRATION CANYON HOME OWNERS
ASSOCIATION

/s/ Mark Christopher Tracy
Mark Christopher Tracy
Pro se Petitioner

EXHIBIT B

The Order of the Court is stated below:
Dated: February 24, 2021 01:34:01 PM
/s/ MARK KOURIS
District Court Judge

Prepared and Submitted by:

Jeremy R. Cook (10325)
COHNE KINGHORN, P.C.
111 E. Broadway, Suite 1100
Salt Lake City, UT 84111
Telephone: (801) 363-4300
Facsimile: (801) 363-4378
Email: jcook@ck.law

Attorneys for Eric Hawkes, Jennifer Hawkes and Simplifi Company

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

MARK CHRISTOPHER TRACY, DBA EMIGRATION CANYON HOME OWNERS ASSOCIATION, Petitioner, vs. SIMPLIFI COMPANY, a Utah Corporation, ERIC HAWKES, an individual, and JENNIFER HAWKES, an individual Respondents.	**MEMORANDUM DECISION AND ORDER** Case No. 200905074 Judge: Kouris

This case is a petition for *de novo* judicial review of a denial of a request for documents pursuant to the Utah Government Records Access and Management Act ("GRAMA"). This matter is before the Court on Respondents' Motion to Dismiss. Oral arguments were held on February 10, 2021.

As background, Emigration Improvement District ("EID") is a local district that is subject to GRAMA. On June 10, 2020, petitioner Mark Christopher Tracy ("Mr. Tracy") sent an email to EID's records officer, Eric Hawkes ("Mr. Hawkes") at the email address "eric@ecid.org." The email included a GRAMA request form requesting telemetry data for EID's water wells and water tanks (the "GRAMA Request"). The GRAMA request form correctly designated the governmental entity as EID.

On June 27, 2020, Mr. Tracy sent an email to Mr. Hawkes acknowledging receipt of a different GRAMA request for a link to a Zoom meeting of EID's board of trustees, and appealing the *de facto* denial of the GRAMA request for the telemetry data. On July 9, 2020, Mr. Hawkes sent an email to Mr. Tracy that stated: "We can get the raw data files copied to a memory stick in Windows Format. The cost would be $60 for an estimated one hour of labor, memory stick, and postage. The software needed for the "raw data" is LGH File Inspector available at Softwaretoolbox.com. The alternative option is to provide the data to you in an excel format, however the cost would be an estimated $3000.00 for the software and the engineer/ IT to extract the data to an excel file. Please let me know how you would like to proceed."

On July 15, 2020, at the request of Mr. Tracy, Mr. Hawkes emailed a link to a "zip" file that contained all of the telemetry data from 2004 to present. In the email, Mr. Hawkes stated: "The following link is the data files for EID's In Touch Telemetry as per your request to have the data files emailed. The files go from 2004 to present. Again the data can be converted to an excel file, but would require EID to purchase software and a consultant to complete the process and a

fee would be associated with completing the task. Let me know if you have any questions regarding the GRAMA."

In accordance with Utah Code Ann. § 63G-2-401, on July 17, 2020, Mr. Tracy sent an email to EID's Chief Administrative Officer, Michael Scott Hughes, appealing the purported denial of the GRAMA request. Mr. Tracy's basis for the appeal was that the water levels reported in EID's board of trustees meeting on May 5, 2016 didn't reflect the data provided by EID in response to the GRAMA request, and EID should have provided the data in Microsoft Excel format at no cost. Throughout the appeal to Mr. Hughes, Mr. Tracy indicated that the governmental entity was EID. A copy of the appeal is attached as Exhibit CC of the Petition. After the appeal to the Chief Administrator of EID was denied, Mr. Tracy filed the instant appeal.

However, instead of bringing the action against EID, Mr. Tracy named only Eric Hawkes, Jennifer Hawkes and Simplifi Company ("Respondents"). GRAMA provides that a records request must be made to a governmental entity. *See* Utah Code Ann. § 63G-2-204(1)(a) ("A person making a request for a record shall submit to the governmental entity that retains the record a written request . . ."). GRAMA further provides that a requester may petition for judicial review of the decision of the chief administrative officer of the governmental entity. *See* Utah Code Ann. § 63G-2-404(1) ("If the decision of the chief administrative officer of a governmental entity under Section 63G-2-401 is to affirm the denial of a record request, the requester may: (a)(ii) petition for judicial review of the decision in district court.") EID is the governmental entity. The records are public records because they are records of EID. Accordingly, EID is a necessary party.

In contrast, Respondents are not governmental entities. *See* Utah Code Ann. § 63G-2-103(11). Mr. Tracy failed to cite any case law to support the position that Respondents are proper or necessary parties to this action; or cite any provision or language in GRAMA supporting the position he can sue an individual or private company based on a governmental entity's alleged failure to respond to a GRAMA request.

The Court further finds that an award of attorney fees is proper. Utah Code Ann. § 78B-5-825(1) calls for an award of attorney fees in civil actions when "the court determines that the action or defense to the action was without merit and not brought or asserted in good faith." This provision requires proof on "two distinct elements." *In re Discipline of Sonnenreich,* 2004 UT 3, ¶ 46, 86 P.3d 712. An award of fees under this provision requires a determination that the losing party's claim was "(1) without merit, and (2) not brought or asserted in good faith." *Id.*

As set forth above, this action was without merit. The action was also not brought in good faith. First, the majority of the allegations in the Petition have nothing to do with a purported appeal of the denial of a GRAMA request for telemetry data. In fact Mr. Tracy does not reference the actual GRAMA request until paragraph 49 of the Petition, and the GRAMA form that is the purported basis of the appeal is Exhibit AA of the Petition. The vast majority of the allegations and exhibits relate to other complaints and issues that Mr. Tracy has with EID or Respondents, and are not necessary or proper for this action.

Second, Mr. Tracy's GRAMA request, appeal to the chief administrative officer of EID, and this appeal, establish that Mr. Tracy understood that EID was the governmental entity. There is no evidence that EID has ever taken the position that the telemetry data was not a public

record of EID, or that Mr. Tracy has any reason to believe it was necessary to sue Respondents to obtain EID's records. The GRAMA request was made to EID, and EID responded and provided the request data to Mr. Tracy. The Court is not persuaded that Mr. Tracy believed he had any legitimate basis to sue Respondents, and his motivation for suing Respondents, as opposed to EID, was simply to harass Respondents.

Third, throughout the Petition and his argument, Mr. Tracy refers to Mrs. Hawkes as Deputy Mayor Hawkes. Mr. Tracy has not alleged that Mrs. Hawkes had any involvement with EID's response to the GRAMA request, or that her position as Deputy Mayor of a separate governmental entity has any relevance to this action. Instead, her inclusion in this matter, and Mr. Tracy's reference to her position as Deputy Mayor of Emigration Canyon Metro Township, is indicative of the fact that the Petition is not about obtaining records from EID, but is instead about attacking and harassing Mr. and Mrs. Hawkes.

Finally, on September 16, 2020, Judge Faust issued a *Memorandum Decision and Order* addressing the identical issue in this action. *See* Case No. 200905123. Judge Faust determined that EID was a necessary party and that there was no basis to sue Respondents. *Id.* Instead of amending the Petition to properly name EID, Mr. Tracy served and prosecuted this action after the decision of Judge Faust, and after knowing that there was no legal basis for suing Respondents.

In summary, the Court grants Respondents' motion to dismiss and the Court awards Respondents their reasonable attorney fees against Mark Christopher Tracy. Respondents shall

submit a declaration of their attorney fees. This Memorandum and Order constitutes the Order regarding the matters addressed herein. No further order is required.

COURT'S SIGNATURE AND DATE APPEAR AT TOP OF FIRST PAGE OF THIS DOCUMENT

EXHIBIT C

The Order of the Court is stated below:
Dated: April 15, 2021 02:53:03 PM
/s/ MARK KOURIS
District Court Judge

Prepared and Submitted by:

Jeremy R. Cook (10325)
COHNE KINGHORN, P.C.
111 E. Broadway, Suite 1100
Salt Lake City, UT 84111
Telephone: (801) 363-4300
Facsimile: (801) 363-4378
Email: jcook@ck.law

Attorneys for Eric Hawkes, Jennifer Hawkes and Simplifi Company

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

MARK CHRISTOPHER TRACY, DBA EMIGRATION CANYON HOME OWNERS ASSOCIATION, Petitioner, vs. SIMPLIFI COMPANY, a Utah Corporation, ERIC HAWKES, an individual, and JENNIFER HAWKES, an individual Respondents.	**DECISION AND ORDER DENYING MOTION TO VACATE, AWARDING ATTORNEY FEES, AND FINDING PETITIONER MARK CHRISTOPHER TRACY TO BE A VEXATIOUS LITIGANT AND SUBJECT TO RULE 83 OF THE UTAH RULES OF CIVIL PROCEDURE** Case No. 200905074 Judge: Kouris

This case is a petition for *de novo* judicial review of a denial of a request for documents pursuant to the Utah Government Records Access and Management Act ("**GRAMA**"). This matter is before the Court on Petitioner's *Motion to Vacate Memorandum Decision and*

Judgement (sic) (the "**Motion**"). Oral arguments were held on April 7, 2021. The Court having considered the Motion, related memoranda, and the arguments of the parties at the hearing, hereby enters the following decision and order:

BACKGROUND

Emigration Improvement District ("**EID**") is a Utah local district that is subject to GRAMA. On June 10, 2020, petitioner Mark Christopher Tracy ("**Mr. Tracy**") submitted a GRAMA request to EID requesting telemetry data for EID's water wells and water tanks (the "**GRAMA Request**"). The GRAMA Request correctly designated the governmental entity as EID, and EID responded to the GRAMA request. After appealing the purported denial of the GRAMA Request to the chair of EID's board of trustees, Mr. Tracy brought this action. However, instead of bringing the action against EID, Mr. Tracy named only Eric Hawkes, Jennifer Hawkes and Simplifi Company ("**Respondents**").

On February 10, 2021, the Court held a hearing on Respondent's *Motion to Dismiss*. During the hearing, the Court issued is verbal ruling finding in part that GRAMA provides that a records request must be made to a governmental entity, and that EID was the governmental entity. *See* Utah Code Ann. § 63G-2-204(1)(a) ("A person making a request for a record shall submit to the governmental entity that retains the record a written request . . ."). This Court's decision was the same as a decision issued by Judge Faust on September 16, 2020. *See* Case No. 200905123. In addition, on February 11, 2021, the day after the hearing in this matter, the State Records Committee of the State of Utah (the "**Records Committee**") heard the appeal of three separate GRAMA requests submitted by Mr. Tracy for records of EID. The Records Committee

found that submitting a GRAMA request to Simplifi Company or Respondents, as opposed to EID, was not proper and denied Mr. Tracy's appeals.

On February 11, 2021 (the day after this Court's decision), Mr. Tracy submitted a new GRAMA request to EID in which he again cc:d Jennifer Hawkes and again stated that the governmental entity was "Emigration Improvement District aka Emigration Canyon Improvement District c/o Simplifi Company." (the "**New GRAMA Request**"). In response to the New GRAMA Request, EID's attorney sent Mr. Tracy an email informing Mr. Tracy that based on his continued inclusion of Simplifi Company and Mrs. Hawkes in the New GRAMA Request, the fees awarded by this Court would need to be paid prior to a response to the New GRAMA Request (the "**Response Email**").

MOTION TO VACATE

Mr. Tracy brought this Motion based on the argument that the Response Email established "factual representations made to this court regarding the status of Simplifi as a 'private corporation' and Mrs. Hawkes having 'no direct involvement with EID' were designed to improperly influence the decision of the Court and were therefore fraudulent under Rule 60(b)(3) URCP.'" *See Motion*, p. 3. The Court finds that the Motion does not establish any fraud, misrepresentations, or other misconduct of Respondents, or justify relief under Rule 60(b)(3). Specifically, the Response Email only indicated that if Mr. Tracy wanted to continue to take the position that it was proper to submit a GRAMA request to EID c/o Simplifi Company or include Mrs. Hawkes in the GRAMA request, which position is contrary to the decision of this Court,

that Mr. Tracy would be required to pay the fees awarded to Respondents in this case. Nothing in the Response Email suggests that Respondents changed their representations to this Court or their legal arguments in this matter. Accordingly, the Court denies the Motion.

ATTORNEYS FEES

Mr. Tracy was informed at least six times by this Court, Judge Faust, the State Records Committee or EID's attorney that GRAMA requests should be made only to the public entity, Emigration Improvement District. At the hearing, Mr. Tracy was not able to provide any plausible explanation for disregarding the decision of this Court and continuing to include Simplifi Company or Mrs. Hawkes in the New GRAMA Request, which leads this Court to conclude that Mr. Tracy's reason for continuing to include Simplifi Company and Mrs. Hawkes was to continue to harass Respondents. Simply put, Mr. Tracy could have easily avoided any issues by following the decision and order of this Court, but inexplicably chose to disregard the Court's decision and continue to harass Respondents by including them in GRAMA requests that Mr. Tracy knew should be served only on EID.

The Court has previously found that an award of attorney fees is proper pursuant to Utah Code Ann. § 78B-5-825(1), and the Court finds that Respondents should be awarded their reasonable attorneys' fees responding to the Motion.

VEXATIOUS LITIGANT

Rule 83(a)(1) of the Utah Rules of Civil Procedure states that the court may find a person to be a "vexatious litigant" if the person does any of the following:

> (a)(1)(B) After a claim for relief or an issue of fact or law in the claim has been finally determined, the person two or more additional times re-litigates or attempts to re-litigate

the claim, the issue of fact or law, or the validity of the determination against the same party in whose favor the claim or issue was determined.

(a)(1)(C) In any action, the person three or more times does any one or any combination of the following:

(a)(1)(C)(i) files unmeritorious pleadings or other papers,

(a)(1)(C)(ii) files pleadings or other papers that contain redundant, immaterial, impertinent or scandalous matter,

(a)(1)(C)(iii) conducts unnecessary discovery or discovery that is not proportional to what is at stake in the litigation, or

(a)(1)(C)(iv) engages in tactics that are frivolous or solely for the purpose of harassment or delay.

The Court finds that Mr. Tracy has violated Rule 83(a)(1)(B) and 83(a)(1)(C). With respect to Rule 83(a)(1)(B), Mr. Tracy served and prosecuted this action after Judge Faust previously issued a decision on the same issue of law. *See* Case No. 200905123. After this Court issued its decision, Mr. Tracy ignored both decisions, again served GRAMA request to EID that were served c/o Simplifi Company and included Mrs. Hawkes, and then Mr. Tracy attempted to utilize EID's response to again argue to this Court that filing an action against on Respondents, and not EID, was proper. With respect to 83(a)(1)(C), the Court has previously found that the Petition in this action including redundant and immaterial allegations that appear to relate to other claims and issues that Mr. Tracy has against EID, and that the Petition was frivolous and filed for the purpose of harassment. The Court also finds that the Motion was unmeritorious.

The Court also finds that the Petition and the Motion were filed for the purpose of harassing Respondents in violation of Rule 11(b)(1) of the Utah Rules of Civil Procedure. As

set forth above, despite repeated opportunities from this Court, Mr. Tracy has failed to ever provide a plausible explanation of why he brought this action against Respondents, but intentionally failed to name the governmental entity, EID; or why Mr. Tracy continued to include Respondents in GRAMA requests despite repeatedly being informed that their inclusion was improper. In accordance with Rule 11(c)(2), the Court finds that an appropriate sanction to deter repetition of such conduct is to find that Mr. Tracy is a vexatious litigant.

Based on the foregoing, the Court finds petitioner Mark Christopher Tracy to be a vexatious litigant in accordance with U.R.C.P. 83(b)(4), and the Court orders that Mr. Tracy must obtain leave from the Presiding Judge of the Court prior to Mr. Tracy filing any future actions in Utah State Courts.

Approved as to Form:

/s/ Mark Christopher Tracy
Mark Christopher Tracy

COURT'S SIGNATURE AND DATE APPEAR AT TOP OF FIRST PAGE OF THIS DOCUMENT

EXHIBIT D

Mark Christopher Tracy
dba Emigration Canyon Home Owners Association
Pro se Plaintiff
1160 E. Buchnell Dr.
Sandy, Utah 84094
Telephone: (929) 208-6010
Email: m.tracy@echo-association.com

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

MARK CHRISTOPHER TRACY, d/b/a Emigration Canyon Home Owners Association, Plaintiff, vs. SIMPLIFI COMPANY, a Utah corporation; JENNIFER HAWKES, an individual; ERIC LEE HAWKES, an individual; JEREMY R. COOK, an individual, DAVID M. BENNION, an individual and DOES 1-46, Defendants.	**CIVIL RIGHTS COMPLAINT** **FILED PURSUANT TO 42 U.S.C. § 1983, § 1985** **REF: PENSKE** **JURY TRIAL DEMANDED** Case: 2:21-cv-00444 Assigned To : Oberg, Daphne A. Assign. Date : 7/22/2021 Description: Tracy v Simplifi et al

Mark Christopher Tracy ("Mr. Tracy") d/b/a Emigration Canyon Home Owners Association ("The ECHO-Association"), brings this action under 42 U.S.C. § 1983 and § 1985 to recover all damages, penalties and other remedies established under the Civil Rights Act of 1871 ("***Civil Rights Act***").

Plaintiff complains and alleges against Defendants as follows.

I. INTRODUCTION

Upon information and belief, from sometime in 2013 to the present day, acting under the color of state law, Defendants knowingly conspired to impair a constitutionally protected property right to safe drinking water and thus the use and enjoyment of a private home in Emigration Canyon, Salt Lake County, Utah (the "Canyon") in order to unlawfully enrich themselves through the operation of a destructive water system and improper billing of fees and costs collected via Salt Lake County tax-foreclosure proceedings against nonmembers of the Church of Jesus Christ of Latter-Day Saints Emigration Canyon Ward ("LDS Non-members").

For good and valuable consideration, Canyon property owner and LDS Non-member Karen Penske ("Ms. Penske" aka Annarino) assigned legal right and title to Civil Rights Act claims to The ECHO-Association.

II. PARTIES

1. The ECHO-Association is a registered dba entity of Mr. Tracy and is located in the city of Sandy, State of Utah.

2. Mr. Tracy is informed and believes that Defendant Simplifi Company ("Simplifi") is a private corporation organized and existing under the law of the State of Utah, with its headquarters located within Salt Lake County, State of Utah.

3. Mr. Tracy is informed and believes that Defendant Jennifer Hawkes ("Deputy Mayor Hawkes") is a current officer and director of Simplifi, is the current Deputy Mayor of the Emigration Canyon Metro Township, is the spouse of Eric Lee Hawkes, is a LDS Member, and is a resident of Salt Lake County, State of Utah.

4. Mr. Tracy is informed and believes that Defendant Eric Lee Hawkes ("Mr. Hawkes")(collectively "Simplifi Defendants") is the current general manager of the Utah special service water district Emigration Improvement District ("EID" aka Emigration Canyon Improvement District aka ECID), the current EID financial manager, the current EID election

specialist, the current EID certified public records officer, is a current officer and director of Simplifi, is a LDS Member, and is a resident of Salt Lake County, State of Utah.

5. Mr. Tracy is informed and believes that Defendant Jeremy R. Cook ("Utah Attorney Cook"), is a shareholder of the Salt Lake City law firm Cohne Kinghorn P.C., is the current legal representative of Deputy Mayor Hawkes, Mr. Hawkes and EID in pending state and federal litigation, is a LDS Member and is a resident of Salt Lake City, State of Utah.

6. Mr. Tracy is informed and believes that Defendant David M. Bennion ("Bishop Bennion") is a religious leader and LDS Member and is a resident of Salt Lake County, State of Utah.

III. JURISDICTION

7. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1343(a), which specifically confers jurisdiction on this Court.

8. This Court is the proper venue for this action pursuant to 28 U.S.C. § 1391(b)(1) because at least one of the Defendants resides in this federal district.

9. This Court has personal jurisdiction over all Defendants because each is a resident of this district, or has its headquarters in this district, or conducts substantial business within this district.

IV. NATURE OF THE CASE

A. Background.

10. EID is a special service water district and "quasi-governmental entity" created in 1968 by Salt Lake County.

11. Upon information and belief, EID has no physical presence, no employees and operates entirely though LDS Members acting as "independent contractors" such as Simplifi Defendants and Utah Attorney Cook.

12. On March 29, 1985, Ms. Penske acquired perfected underground water right 57-8582 ("a13203") with a senior base priority date of May 1, 1902 and a change application priority of

May 11, 1984 as a constitutionally protected property right to safe drinking water attained from the Canyon's Twin Creek Aquifer servicing her private home.

13. Originally built in the late 1980's to provide culinary water service to the luxurious Emigration Oaks Private Urban Development ("Emigration Oaks PUD"), Simplifi Defendants currently operate water system no. 18143 under duplicitous water claims described below ("Boyer Water System").

14. At present, approximately 300 Canyon residents are connected to the Boyer Water System while approximately 37 homes are connected to Salt Lake City Public Utilities and 340 homes are serviced by single-family domestic wells including Ms. Penske.

B. Willful Contamination of the Twin Creek Aquifer and Destruction of the Canyon Stream for Private Profit.

15. In 1968, the Utah State Engineer closed the Canyon to new water use applications after determining that water sources of the area were "fully appropriated" and the operation of large-diameter commercial wells would impair senior water rights "with almost certainty."

16. On June 16, 1984, upon information and belief, although not approved by the Utah State Engineer as a point-of-diversion, private land-developers The Boyer Company LC through LDS Member Kem C. Gardner and City Development Inc. through LDS Member Walter J. Plumb III completed construction of Boyer Well Nr. 1 in the Twin Creek Aquifer approximately 6,625 feet from Ms. Penske's private well as the crow flies in order to provide culinary drinking water to the luxurious Emigration Oaks PUD at extraordinary private profit.

17. In August 1998, EID trustees assumed legal title and liability of the Boyer Water System from LDS Members Gardner and Plumb despite the fact that 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 Gardner and Plumb would interfere with artesian pressure supporting surface water flow of the Canyon Stream "for decades, twenty-five, fifty, seventy-five years."

18. EID assumed liability of the Boyer Water System, although the Boyer Well Nr. 1 was drilled into the Twin Creek aquifer with a Canyon Stream surface water right, which had been stripped from Mt. Olivet Cemetery Association in violation of the the deed from the United States of America dated May 16, 1874 that property "[and water right appurtenant thereto] shall forever used for the burial of the dead" as the only active military cemetery created by an Act of Congress ("Cemetery Water Right").[1]

19. Upon information and belief, upon EID's acquisition of the Boyer Water System in August 1998, LDS religious leader and member Fred A. Smolka ("Bishop Smolka"), stepped down as EID Trustee Chairman after first awarding his own private Utah corporation Management Enterprises LLC a no-bid contract to operate the Boyer Water System with Bishop Smolka christening himself as EID operations manager, EID financial manager, EID election specialist, and EID public records officer.

20. Sometime in 2013, EID transferred operation of the Boyer Water System from Bishop Smolka's private Utah corporation to Simplifi through fellow LDS members Deputy Mayor Hawkes and Mr. Hawkes.

[1] Although the United States of America retained a reversionary interest in cemetery property (and water rights appurtenant thereto), to date both Salt Lake City and EID have refused to return water rights to hallowed cemetery grounds maintaining water claims for underground points of diversion for future private-urban developments in the Canyon. *See* open letter to United States congressional leaders available at the website maintained by The ECHO-Association at https://echo-association.com/?page_id=6908.

21. Upon information and belief, Simplifi has no employees, owns no property, and is operated from the private residence of Deputy Mayor Hawkes and Mr. Hawkes, which is simultaneously the place of business for EID registered with the Utah State Lt. Governor's Office.

22. Immediately following the acquisition of the Boyer Water System and the Cemetery Water Right, in order to allow further massive development of Phases 4A, 6 and 6A of the Emigration Oaks PUD at extraordinary private profit and at the expense of existing Canyon homes serviced by individual private wells, EID trustees and managers fraudulently acquired and then diverted federally-backed funds earmarked for "financially disadvantaged communities" for the construction of the Wildflower Reservoir, the Brigham Fork and the Upper Freeze Creek Wells on property belonging to wealthy private land developers under a likewise duplicitous water right acquired from the Emigration Dam and Ditch Company ("Dam & Ditch Water Right") as alleged in legal action commenced by Mr. Tracy against EID, Mr. Hawkes, The Boyer Company LC, City Development Inc. *et. al* under the federal False Claims Act ("FCA Litigation").[2,3]

23. In the 2015 and 2018 Sanitary surveys required under the federal Safe Drinking Water Act ("SDWA"), Simplifi falsely reported that the water distribution lines of the Boyer Water System were at least 8 inches in diameter, and could provide adequate water flow in a fire emergency contrary to the EID's own Water Conservation and Management Plan dated March 14, 2013 and public EID trustee meetings.

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[2] *United States of America ex rel. Mark Christopher Tracy v. Emigration Improvement District et al.*, 10th Cir., Case No. 21-4059 (pending).

[3] Although Simplifi is a private independent contractor of EID, Utah Attorney Cook entered appearance for Mr. Hawkes in FCA litigation at public expense.

24. On July 6, 2020 in an email to Utah Attorney Cook, Simplifi through Mr. Hawkes acknowledged that the Boyer Water System had exceeded SDWA reporting requirements for lead contamination of drinking water believed to be caused by groundwater mining of the Twin Creek Aquifer via operation of lager-diameter commercial wells but then refused to answer questions from The ECHO-Association regarding lead testing during the August 6, 2020 public EID trustee meeting and failed to warn Canyon residents of drinking water contamination.

25. On March 31, 2021, Simplifi through Mr. Hawkes, falsely certified to the Utah State Records Committee that all lead testing results of the Boyer Water System had been posted on the EID website maintained by Simplifi.

26. Upon information and belief, laboratory test results dated November 4, 2019 for the underground water sources of the Boyer Water System were fabricated by Simplifi Defendants to indicate "Non-Detect" for lead contamination.

C. Unlawful Agreement to Retire Perfected Senior Water Rights to the Canyon's Twin Creek Aquifer under Duplicitous Water Claims.

27. On the EID website maintained by Simplifi under the unregistered designation "Emigration Canyon Improvement District" and "ECID" and with the knowledge of Utah Attorney Cook, Simplifi falsely maintains that "EID holds one of the most senior water right in the Canyon" and homeowners "can exchange their water right for the District's senior water right" despite the fact that all underground water sources of the Boyer Water System have the most junior water right priority date of September 12, 2018 under permanent change application "a44045" (57-7796) under the duplicitous Dam & Ditch Water Right or are unapproved points-of-diversion under the Cemetery Water Right.

28. Upon information and belief, since October 15, 2014, with the positive knowledge of Utah Attorney Cook, water letters issued by Simplifi Respondents for new residential construction in the Canyon fell under the duplicitous Dam & Ditch Water Right as documented in a study funded by the United States Department of Housing and Urban Development in November 1970.

29. In September 2018, the Emigration Canyon Stream suffered total depletion less than 2 miles from Utah's Hogle Zoo and in June 2021 Ms. Penske's private well exceeded Utah State drinking water standards for Total Dissolved Solids ("TDS") as predicted in a study completed by the Utah State Engineer in 1966, oral testimony presented to the Utah State Engineer on December 15, 1995 by the predecessor in interest to the Salt Lake City law firm Cohne Kinghorn P.C. of Utah Attorney Cook as well as the hydrological studies completed in July 2000 and September 2006.

30. In 2019, water revenue collected by Simplifi from the operation of the Boyer Water System equaled $165,170.00 while the current annual federally-backed water revenue bond payments are $253,000.00.

31. Upon information and belief, in the current calendar year, the EID budget prepared by Simplifi Defendants recorded operating expenses of the Boyer Water System at $461,400.00 whereby Simplifi Defendants pay themselves 26% thereof ($120,000.00).

32. Simplifi Defendants' compensation of public funds is comparable to the Utah State governor and Salt Lake City mayor.

33. Upon information and belief, the Salt Lake City law firm of Cohne Kinghorn P.C. through Utah Attorney Cook has secured over $320,000.00 of public funds for the legal defense of EID and Simplifi Respondents in pending state and federal litigation since January 1, 2018.

V. CAUSE OF ACTION

34. Unable to service EID's current federally-backed debt obligations, sometime in June 2013, EID announced that it would began charging 86 Canyon residents not connected to the Boyer Water System a "fire-hydrant rental fee."

35. With the positive knowledge that the Boyer Water System's distribution lines were grossly undersized and unable to provide adequate flown in a fire emergency, underground water sources were contaminated with lead and were being operated under duplicitous water claims, Simplifi Defendants began charging Ms. Penske "fire hydrant rental fee" but then for unknown reasons changed billing to a "water availability fee" and then a "water base fee" without explanation.

36. Upon information and belief, in order to increase the revenue of "account receivables," Simplifi Defendants created duplicate "accounts" for LDS Nonmembers not connected to the Boyer Water System.

37. Unable to terminate water service to private homes not connected to the Boyer Water System serviced by senior water rights, beginning in January 2014, Simplifi began certifying "delinquent accounts" with the Salt Lake County Treasurer of LDS Nonmembers leading to tax foreclosure proceedings although on August 7, 2008 the Salt Lake City law firm Cohne Kinghorn P.C. of Utah Attorney Cook had informed EID trustees that it may only certify outstanding fees for water usage.

38. In a bill dated 2/15/2021 [sic] for account "1022," Simplifi demanded payment from Ms. Penske in the amount of $553.75 for a "Water Base Fee (3 months @ $15 per month)" although Ms. Penske is not connected to the Boyer Water System operated by Simplifi, was not informed of undersized water distribution lines, lead contamination, operation of underground water sources under duplicitous water claims and constructed contrary to hydrological studies expressly warning against the operation of large diameter-commercial wells and groundwater mining of the Twin Creek Aquifer.

39. Upon information and belief, sometime in the fall of 2015, Emigration Oaks PUD Phase 4A resident, LDS religious leader and member Bishop Bennion admonished fellow LDS members of their "moral obligation" to pay fees and costs billed by Simplifi Defendants during a LDS religious meeting.

40. Upon information and belief, Defendants have commenced no tax-foreclosure proceedings against active LDS Members consistent with the instructions of Bishop Bennion since November 2014.

VI. INJURY

41. On March 13, 2019, in order 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 Simplifi Defendants consistent with the instructions of Utah Attorney Cook and Bishop Bennion.

42. On June 15, 2021, Ms. Penske received an additional "Statement of Delinquent Taxes Due" from the Salt Lake County Treasurer under the designation "259-Emigration Improvement District" in the amount of $361.49 certified by Simplifi Defendants consistent with the instructions of Utah Attorney Cook and Bishop Bennion indicating that a Redemption Certificate releasing the property from tax foreclosure proceedings would not be issued until the fees and costs certified to Salt Lake County were paid in full.

43. 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 TDS as predicted in a hydrological study dated July 2000 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.

44. Upon information and belief, as the aforementioned hydrological studies and reports were presented to Simplifi Defendants and Utah Attorney Cook during state and federal proceedings,

the Defendants knowingly and willfully impaired Ms. Penske's constitutional right to the use and enjoyment of a senior perfected water share providing safe culinary drinking water to her private home while simultaneously clouding title to her property.

45. On June 16, 2020, Mr. Tracy documented a 700-foot fissure and massive ground subsidence in the Twin Creek drainage area[4] consistent with documentation of groundwater mining in Cedar Valley, Utah and believed to provide a direct path for surface water contaminates to taint the aquifer providing culinary drinking water to Ms. Penske's private residence.

46. On September 9, 2020, for good and valuable consideration, Ms. Penske assigned present and future Civil Rights Claims to The ECHO-Association.

VII. REQUEST FOR RELIEF

WHEREFORE, Mr. Tracy requests the Court enter the following relief:

A. That this Court enter judgment against Defendants in the amount of damages for each payment made by Ms. Penske to include any past and future lien placed on her property by Defendants to include monetary renumeration for economic damage and loss;

B. The Defendants pay punitive damages for malicious and/or reckless conduct described above, in amounts to be determined at trial;

C. Grant such further relief as the Court deems necessary and proper; and lastly,

D. Award Mr. Tracy legal fees and costs in this action.

VIII. JURY TRIAL DEMANDED

Mr. Tracy respectfully requests a jury trial on all questions of fact raised by this Complaint.

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[4] *See* YouTube video aerial recording entitled "Ground Collapse and Fissures in the Emigration Oaks PUD (Freeze Creek Drainage Area)" available at the website administered by The ECHO-Association at https://echo-association.com/?page_id=3310.

EXHIBIT E

FILED
United States Court of Appeals
Tenth Circuit

June 8, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MARK CHRISTOPHER TRACY,

Plaintiff - Appellant,

v.

SIMPLIFI COMPANY, a Utah corporation; JENNIFER HAWKES, an individual; ERIC LEE HAWKES, an individual; JEREMY R. COOK, an individual; DAVID M. BENNION, an individual; and DOES 1-46,

Defendants - Appellees.

No. 22-4032
(D.C. No. 2:21-CV-00444-RJS)
(D. Utah)

ORDER AND JUDGMENT*

Before **HOLMES**, Chief Judge, **HARTZ** and **ROSSMAN**, Circuit Judges.

Mark Christopher Tracy, proceeding pro se, appeals the district court's dismissal with prejudice of his civil-rights action for lack of standing. Mr. Tracy asserted claims under 42 U.S.C. §§ 1983 and 1985, alleging someone assigned the claims to an entity

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

through which Mr. Tracy does business. A magistrate judge recommended that the district court rule as follows: (1) that Mr. Tracy lacked standing to prosecute these claims because they were akin to personal-injury torts that, under Utah law, could not be assigned; (2) that because Mr. Tracy did not allege anything to support claims of his own, allowing him to amend his complaint would be futile; and (3) that the action be dismissed with prejudice.

The district court agreed with the magistrate judge's recommendation that the claims should be characterized as personal-injury torts that are unassignable under Utah law. It also concluded that Mr. Tracy failed to specifically object to the magistrate judge's determination that it would be futile to amend the complaint. Accordingly, the district court reviewed that determination for clear error and, finding none, concurred with that ruling, adopted the magistrate judge's report and recommendation, and dismissed the action with prejudice.

Ordinarily, we review de novo a district court's dismissal for lack of standing. *See Colo. Env't Coal. v. Wenker*, 353 F.3d 1221, 1227 (10th Cir. 2004). Here, however, Mr. Tracy has forfeited appellate review by failing to adequately brief any issue.

Federal Rule of Appellate Procedure 28(a)(8)(A) requires that an appellant's opening brief set forth "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." "Consistent with this requirement, we routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief." *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007). Our rules of procedure apply to counselled and

pro se parties alike. *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).[1]

Mr. Tracy's opening brief expends three pages describing the factual background of this case. The "Argument and Authorities" section on the first issue—"Does state law determine if a federal civil right may be assigned?"—then begins by stating that two requirements must be met for Utah law to govern the disposition of this case:

> 1. [T]he 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).

Aplt. Opening Br. at 5 (original brackets and ellipsis omitted). The section then abruptly concludes with the sentence: "The district court failed to apply these standards to the

[1] Mr. Tracy says we should afford his pro se materials a liberal construction, but he identified himself as an attorney in a prior appeal, *see United States ex rel. Tracy v. Emigration Improvement Dist.*, 717 F. App'x 778, 782 (10th Cir. 2017) ("Mr. Tracy, himself an attorney, should be able to adequately assess the risk of a conflict."); *see also* Aplt. App. at 212 (Mr. Tracy's Resp. to Show-Cause Order, identifying himself as an attorney), *United States ex rel. Tracy v. Emigration Improvement Dist.*, 717 F. App'x 778 (10th Cir. 2017) (No. 17-4062). We need not extend the liberal-construction rule to pro se pleadings filed by lawyers who elect to represent themselves. *See Mann v. Boatright*, 477 F.3d 1140, 1148 n.4 (10th Cir. 2007). Yet even if we liberally construed Mr. Tracy's materials, the outcome here would be the same. Mr. Tracy's reply brief protests that he is not subject to our appellate rules because he filed his opening brief on a pro se form, *see* Reply Br. at 15, but "this court has repeatedly insisted that pro se parties follow the same rules of procedure that govern other litigants," *Garrett*, 425 F.3d at 840 (brackets and internal quotation marks omitted). The use of the pro se form does not excuse compliance with the appellate rules aside from those regarding the format of the brief.

present case." *Id.* Later, in the part of the court form asking whether the court applied the wrong law, the brief states, in its entirety: "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." *Id.* at 6.

These arguments are inadequate to preserve appellate review. Mr. Tracy's opening brief does not cite the legislative history he references, nor does it cite the portions of the record on which he relies. It also fails to explain why the two requirements he cites for applying Utah law should govern this case or how they would favor his position if they did apply. "[This] court cannot take on the responsibility of serving as the litigant's attorney in constructing arguments and searching the record" on his behalf. *Garrett*, 425 F.3d at 840. "[C]ursory statements, without supporting analysis and case law, fail to constitute the kind of briefing that is necessary to avoid application of the forfeiture doctrine." *Bronson*, 500 F.3d at 1105. We therefore reject Mr. Tracy's arguments on the first issue.

Faring no better are Mr. Tracy's arguments regarding the second issue—which complains that he was not permitted to file an amended complaint—and his assertion in paragraph 6 of his brief that the district court improperly imposed heightened pleading standards. His opening brief, although correctly citing Fed. R. Civ. P. 15(a)(2) for the proposition that the district court should freely give leave to amend when justice so requires, does not discuss the specifics of the situation in this case and, in particular, does not challenge the magistrate judge's determination that an amendment would be futile.

And that brief also fails to identify where the district court applied a heightened pleading standard and why that standard was incorrect. Insofar as Mr. Tracy's reply brief may add further argument on these issues, that argument comes too late. *See Cahill v. Am. Fam. Mut. Ins. Co.*, 610 F.3d 1235, 1239 (10th Cir. 2010) ("arguments first raised in a reply brief come too late").

On the other hand, we agree with Mr. Tracy that the complaint should have been dismissed without prejudice. The dismissal was predicated on his lack of standing, which means that the district court lacked Article III jurisdiction. A dismissal for lack of subject-matter jurisdiction should be without prejudice. *See Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1218 (10th Cir. 2006).

For the foregoing reasons, we affirm the judgment below except that we remand to the district court to enter a dismissal without prejudice.

Entered for the Court

Harris L Hartz
Circuit Judge

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157
Clerk@ca10.uscourts.gov

Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

June 08, 2023

Mark Christopher Tracy
1160 East Buchnell Drive
Sandy, UT 84094

RE: **22-4032, Tracy v. Simplifi Company, et al**
Dist/Ag docket: 2:21-CV-00444-RJS

Dear Appellant:

Enclosed is a copy of the order and judgment issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Christopher D. Ballard
Jeremy Rand Cook
Erik A Olson
Bradley M. Strassberg

CMW/at

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157
Clerk@ca10.uscourts.gov

Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

June 30, 2023

Gary P. Serdar
United States District Court for the District of Utah
351 South West Temple
Salt Lake City, UT 84101

RE: 22-4032, Tracy v. Simplifi Company, et al
Dist/Ag docket: 2:21-CV-00444-RJS

Dear Clerk:

Pursuant to Federal Rule of Appellate Procedure 41, the Tenth Circuit's mandate in the above-referenced appeal issued today. The court's June 8, 2023 judgment takes effect this date. With the issuance of this letter, jurisdiction is transferred back to the lower court/agency.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Christopher D. Ballard
Jeremy Rand Cook
Erik A Olson
Bradley M. Strassberg
Mark Christopher Tracy

CMW/mlb

EXHIBIT F

Scot A. Boyd (9503)
scot.boyd@chrisjen.com
Stephen D. Kelson (8458)
stephen.kelson@chrisjen.com
Bryson R. Brown (14146)
bryson.brown@chrisjen.com
Christensen and Jensen, P.C.
257 East 200 South, Suite 1100,
Salt Lake City, Utah 84111
Attorneys for Relator

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF UTAH

UNITED STATES OF AMERICA Ex. rel. Mark Christopher Tracy, Plaintiff, vs. EMIGRATION IMPROVEMENT DISTRICT, a Utah Special Service District; BARNETT INTERMOUNTAIN WATER CONSULTING, a Utah corporation; CAROLLO ENGINEERS Inc., a California professional corporation; AQUA ENVIRONMENTAL SERVICES, INC., a Utah corporation; AQUA ENGINEERING. INC., a Utah corporation; R. STEVE CREAMER, an individual; FRED A. SMOLKA, an individual; MICHAEL HUGHES (AKA MICHAEL SCOTT HUGHES), an individual; MARK STEVENS, an individual; DAVID BRADFORD, an individual; LYNN HALES, an individual; ERIC HAWKES, an individual; DON A. BARNETT, an individual; JOE SMOLKA, an individual; RONALD R. RASH, an individual; KENNETH WILDE, an individual; MICHAEL B. GEORGESON , an individual;	**THIRD AMENDED COMPLAINT** Case No.: 2:14-cv-00701-JNP-PMW District Judge: Jill N. Parrish Magistrate Judge: Paul M. Warner

KEVIN W. BROWN, an individual; ROBERT ROUSSELLE; an individual; LARRY HALL, an individual; THE BOYER COMPANY, L.C., a Utah company; CITY DEVELOPMENT, INC., a Utah Corporation, and DOES 1-145, Defendants.	

The United States of America, by and through qui tam relator Mark Christopher Tracy, brings this action under 31 U.S.C. § 3729 *et seq.*, to recover all damages, penalties and other remedies established by the False claims Act on behalf of the United States, complains and alleges against Defendants as follows:

I. INTRODUCTION

This lawsuit is simple. Mr. Tracy seeks to recover federal funds intended for economically disadvantaged communities suffering from unsafe drinking water – like Flint, Michigan – that Emigration Improvement District ("EID") and other conspirators fraudulently acquired to build a "preposterously oversized" water system for the benefit millionaire land developers while simultaneously endangering public health and safety and the habitat of a federally protected species.

EID is a special service district created under Utah law to provide water and sewer services to the residents of Emigration Canyon.[1] It is comprised of a three-member board of trustees, a manager, and various other engineers and consultants.[2] It has the power to issue

[1] https://www.ecid.org/about-us.

[2] https://www.ecid.org/contact-us.

bonds, charge fees and assessments, and levy taxes on the residents of Emigration Canyon to pay for the water services that it provides.[3]

On or about September 29, 2004, EID received the final disbursement of a twenty-year, $1.846 million loan for the construction of two large-diameter commercial wells, a reservoir, and multiple water lines in Emigration Canyon for 312 existing households.[4] The loan came from the Utah's Drinking Water State Revolving Fund, which uses federal funds to finance the construction of water systems for drinking or culinary water, and carried a bargain-basement interest rate of 2.1 percent.

Congress created the Drinking Water State Revolving Fund (the "DWSRS") program in 1996 via amendments to the Safe Drinking Water Act, 42 U.S.C. § 300f *et seq*. (the "SDWA"). The purpose of the SDWA is to protect the quality of drinking water in the United States through the creation and enforcement of minimum standards for culinary or drinking water.[5] The DWSRS furthers this purpose by providing low-interest financing or grants for infrastructure projects that "address a current violation or will prevent a future violation of health-based drinking water standards."[6]

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[3] Utah Code 17D-1-103(2).

[4] See Exhibit A. The September 29, 2004 payment was a "retainage release" payment. The government disbursed funds for the construction of the well, reservoir and water lines via five progress payments. However, the government retained a portion of each progress payment to assure that EID would satisfy its obligations and successfully complete the construction of the well, reservoir and water lines. Once EID certified that the project was complete, the government disbursed the "retainage." Accordingly, the September 29, 2004 payment constituted final payment for all work done on the project.

[5] https://www.epa.gov/laws-regulations/summary-safe-drinking-water-act.

[6] United States Environmental Protection Agency. Drinking Water State Revolving Fund Program Operations Manual, p. 31. https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P1007ZKN.txt, last accessed January 27, 2018.

Under guidelines from the United States Environmental Protection Agency, states administering federal funds under the DWSRS program must give priority to projects that will ameliorate the most serious risk to public health, enable compliance with the SDWA, and make access to clean water more affordable. Federal and state regulations governing the use of DWSRS funds prohibit their use for projects intended primarily for "fire protection" or to "serve future population growth."[7] In short, the funds are not for subsidizing wealthy land developers and speculators.

When applying for the $1.846 million loan, EID made various representations to the government authorities administering the loan. For instance, EID represented that it would use part of the $1.846 million to build three water lines to connect 67 residents to its then-existing community water system. These 67 residents lived in the Killyon Canyon, Burr Fork, and Young Oaks neighborhoods of Emigration Canyon and, at the time of the loan application, were obtaining drinking water from private wells.

EID also represented that these 67 residents needed access to a community water system because their private wells had problems with bacterial contamination, chemical composition, and low water supply. Finally, EID represented that it would use the remainder of the $1.846 million to build a large-diameter commercial well (the "Brigham Fork Well") and a commercial reservoir (the "Wildflower Reservoir") to ensure that it had capacity to provide water to these 67 new customers.

[7] 40 C.F.R. § 35.3520(e)(3) and (e)(5); *see also* 40 C.F.R. § 35.3520(a)(2)(5) ("Capacity to serve future population growth cannot be a substantial portion of a project"); Utah Admin. Code § 309-705-4(3)(c) ("Projects which are ineligible for financial assistance include … [a]ny project meant to finance the expansion of a drinking water system to supply or attract future population growth").

Based on EID's representations when applying for the $1.846 million loan, the proposed project appeared to fall within the parameters of the DWSRF program, as it appeared to be intended to bring clean water to 67 existing households within Emigration Canyon. As discussed below, EID's story amounted to nothing more than a front to use federal funds for the benefit of wealthy developers, including the Boyer Company, L.C. ("Boyer Company") and Steve Creamer ("Mr. Creamer"), with whom it had conspired.

Both Boyer Company and Mr. Creamer were instrumental in EID acquiring the $1.846 million loan from the DWSRF. For the loan to close, EID needed a $650,000 down payment (the total project cost was $2,400,000) and land for the proposed commercial well and reservoir. Boyer Company paid the $650,000. Mr. Creamer provided the land. Each had a financial interest to do so.

In the case of Boyer Company, the construction of the Brigham Fork Well and Wildflower Reservoir rescued it from potential legal liability for a defunct water system it had built in Emigration Canyon. In the late 1980s, Boyer Company and City Development, Inc. created a large residential development in Emigration Canyon called Emigration Oaks. Rather than incur the enormous costs of connecting the development to Salt Lake County's existing water and sewer infrastructure, Boyer Company decided to supply water to the development by building two commercial wells and a 355,000 gallon reservoir in Emigration Canyon.

There were two problems with this plan. The Boyer Company/City Development did not have the legal right to pump the amount of water needed to supply all the 223 parcels in Emigration Oaks, and the wells, reservoir and water distribution lines were insufficient to do so in any event. One of the wells pumped dry in 1994. If the entire Emigration Oaks' water system

went dry, Boyer Company/City Development would face potential legal action from property owners who had purchased vacant lots within Emigration Oaks.

Boyer Company turned to EID trustees Hughes and Smolka for help. It convinced EID to take ownership of the Emigration Oaks water system, relieving Boyer Company of legal liability should the system run out of water. In exchange Boyer Company deeded 300 acres of land to EID. However, for EID to fulfill the needs of its existing customers and future residents of Emigration Oaks, it needed the additional water infrastructure purchased with the $1.846 million federal loan.

Additionally, at the time of the $1.846 million loan, the Emigration Oaks development was incomplete and EID diverted at least $72,000.00 to pay for the installation of water distribution lines for 57 vacant parcels within "Phase 6" and "Phase 6A" of the Emigration Oaks development.

In the case of Mr. Creamer, the $1.846 million loan presented an opportunity to install water infrastructure with the capacity to support future development on land owned by him, Siv and Charles Gillmor (the "Gillmors"), and David Neuscheler ("Mr. Neuscheler"), and to do so at taxpayer expense. The $1.846 million was a low-interest loan to EID, not Mr. Creamer. As a result, payments made to service the loan have come from the residents of Emigration Canyon in the form of increased taxes, assessments and fees – a masterclass in privatizing profits while socializing costs and economic risk.

Mr. Creamer and EID currently own approximately 500 acres of vacant, developable land within Emigration Canyon, while the Gillmors own 172 acres in an area of the canyon called Spring Glenn and Mr. Neuscheler own 124 in an area of the canyon called Little Mountain. After

having exhausted all funds once EID had completed construction of the Brigham Fork Well and Wildflower Reservoir with the $1.846 million in DWSFR funds, it completed the remainder of the project with additional funds from the State of Utah in 2007, 2013 and 2015 that it used to finance a second large-diameter commercial well called the "Upper Freeze Creek Well" on property owned by Mr. Creamer, and a pipeline connecting the Upper Freeze Creek Well to a 3-mile section along the Emigration Canyon Road. EID also used the 2007 and 2013 funds to finance oversized pipelines that run from the Wildflower Reservoir to the vacant, developable land owned by Mr. Creamer, the Gillmors and Mr. Neuscheler, where the pipelines, curiously, dead-end. Like the $1.846 million loan, repayment of the funds obtained in 2007 and 2013 comes from taxes, fees, assessments on the residents of Emigration Canyon.

Based on the foregoing, Mr. Tracy seeks recovery under the False Claim Act, 31 U.S.C. §§ 3729 *et seq.*, which provides the federal government with a right of action against persons or entities who acquire federal funds via fraud on the government or its agents.[8] The False Claim Act contains a *qui tam* and reverse *qui tam* provision, [9] which allows private citizens, called relators or whistleblowers, to bring an action under the False Claim Act on behalf of the United States government.[10] On a successful claim brought by a relator, the government is entitled to

[8] *See generally* 31 U.S.C. §§ 3729 *et seq.*

[9] The term *qui tam* is short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac part sequitur*, which means "he who brings an action for the king as well as for himself."

[10] *See* 31 U.S.C. § 3730(b).

treble damages and penalties, which it must share with the relator,[11] while the relator is entitled to costs and attorney fees.[12]

Mr. Tracy's theories of recovery under the False Claim Act are twofold. First, Mr. Tracy alleges that EID and its co-conspirators made misrepresentations to the federal government or its agents that induced the federal government or its agents to disburse the $1.846 million loan. Second, Mr. Tracy alleges that, after disbursement of the $1.846 million, EID not only failed to comply with certain conditions of the $1.846 million loan but also failed to report the noncompliance despite having a duty to do so.

For instance, as part of the terms of its loan from DWSRF, EID assumed a duty to comply with conditions and requirements set forth in a January 3, 2001 letter from the Utah Department of Environmental Quality, Division of Drinking Water captioned "Federal SRF Loan Authorization and Procedures for Committal of Funds" ("Commitment of Funds Letter") throughout the loan repayment schedule.[13] Under the terms of the letter EID had to do the following: First, EID had to certify that it would comply with state and federal DWSRF regulations. Second, EID had to obtain "firm commitments" from at least 57 of the 67 homeowners that EID anticipated would participate in the project; the letter defined "firm commitment" as "actual payment of a connection fee and a signed contract to pay water utility bills." Third, EID had to certify that it had sufficient water rights to operate the system. Fourth, EID had to adopt a Water Management and Conservation Plan. Fifth, EID had to comply with

[11] 31 U.S.C. § 3729(a)(1).

[12] 31 U.S.C § 3730(d)(1).

[13] A copy of the letter is attached as Exhibit B.

"cross-cutting" federal statutes, including the Clean Water Act, the Endangered Species Act, and the Safe Drinking Water Act.

EID and its coconspirators made multiple misrepresentation to obtain the $1.846 million loan. First, EID and its coconspirators misrepresented that they intended to use $1.846 million for the benefit of 67 existing households within the canyon, when, in fact, they intended to use the funds to build "capacity" for future growth and development. As discussed above, EID has built oversized pipelines that run from the Wildflower Reservoir to the vacant, developable land owned by Mr. Creamer, the Gillmors and Mr. Neuscheler while installing insufficient pipelines to existing Canyon residents. While these pipelines evidence an intent to use the infrastructure built with the $1.846 million to facilitate growth and development at the expense of existing residents, this is not the only evidence of such intent.

In a memorandum dated October 18, 2002, a staff engineer for the Utah Division of Drinking Water, Steve Onysko, opined that the Wildflower Reservoir only needed capacity of 300,000 gallons to serve EID's existing customers and the proposed 67 new customers and that the proposed 1-million-gallon capacity was "preposterously oversized."[14] After Mr. Onysko submitted his memorandum, Mr. Creamer met with the EID board and EID's attorneys to discuss the "recommendation for smaller reservoir"[15] As built, the Wildflower Reservoir's actual capacity exceeds 1 million gallons.

In a meeting held on February 19, 2013, the trustees of one of the homeowners associations within Emigration Canyon discussed an agreement the association had reached with

[14] A copy of the memorandum is attached as Exhibit C.

[15] A copy of a billing statement from EID's attorneys is attached as Exhibit D.

Mr. Creamer concerning the subdivision of Mr. Creamer's property into multiple lots.[16] After the filing of the current lawsuit, the association scuttled the agreement. Additionally, via legislation enacted in 2015, Emigration Canyon become a "metro township," which vested five elected officials with authority to establish zoning requirements in the canyon. One of the township's first orders of business was to remove a previously-established, 725-home limit on the amount of homes allowed to be built in the canyon.

Second, EID misrepresented that 57 households from the Killyon Canyon, Burr Fork, and Young Oaks neighborhoods had committed to connect to the EID's system, paid the connection fee, and agreed to make monthly water payments. To be sure, fourteen years later, no more than 30 households from these neighborhoods have connected to the system. EID perpetrated the fraud by convincing 57 residents and owners of vacant parcels to sign "standby" agreements, which gave the resident and/or property owner the option to connect to the system at a later date but did not require them to do so. EID then altered the "standby" agreements so that, when presented to government officials for review, the agreements appeared to require connection to the system. EID also misrepresented that, at the time of the $1.846 million loan, households from these neighborhoods were having problems with well contamination. There only was one well that actually had contamination issues. All this only reinforces Mr. Tracy's claim that, far from using the $1.846 million for the benefit of 67 existing canyon residents, EID used the funds to put in infrastructure for land developers like Mr. Creamer and Boyer Company.

Third, EID withheld material information about the ability of Emigration Canyon to sustain the operation of large-diameter commercial wells. In 1966, one of EID's hydrologists,

[16] A copy of the meeting minutes is attached as Exhibit E.

Jack Barnett, published a master's thesis concerning Emigration Canyon's hydrology. The thesis concluded that the canyon could not sustain large-diameter commercial wells and, even if such wells were to successfully draw large quantities of water from the canyon's riparian system, impairment of private wells within the canyon "would be almost a certainty." EID did not disclose this information when applying for the $1.846 million loan.

This nondisclosure was material. When EID was applying for the $1.846 million loan, in addition to the 67 households in Killyon Canyon, Burr Fork, and Young Oaks that drew water from private wells, most all other households within Emigration Canyon obtained drinking water from private wells. If a commercial well decreased the water within these private wells, the wells would become more susceptible to contamination, as wells with low water flows are prone to bacterial contamination and chemical imbalances. In short, EID failed to inform the government that construction of a commercial well most likely would result in contamination of the water supplies of many canyon residents. As of today, at least twenty-seven canyon residents have reported no or low water flows in their wells since installation of the Brigham Fork Well.

Fourth, when applying for the $1.846 million loan, EID misrepresented that its water rights had priority over all other water rights in the canyon. This misrepresentation was material. In Utah, water rights are allocated according to the doctrine of prior appropriation.[17] If the overall water supply in a riparian system decreases due to drought, overuse or any other reason, holders of superior rights have first priority to the water.[18] EID's water rights originally had a point of diversion at the mouth of Emigration Canyon. To operate the Brigham Fork Well, EID

[17] https://waterrights.utah.gov/wrinfo/default.asp.

[18] *Id*.

had to change the point of diversion to the wellsite, which caused the EID's water rights to lose priority and become inferior to all other water rights of canyon residents. To this day, EID operates the Brigham Fork Well under a "temporary use permit," which it must renew on a yearly basis. If the Brigham Fork Well were to interfere with water flows of private wells of canyon residents who have water rights superior EID's water rights, any one of those residents would have a legal right to shut down EID's entire system.

As discussed above, since obtaining the $1.846 million loan, EID has failed to comply with certain conditions of the loan. First, as discussed above, EID promised not to use the funds to create "capacity" for future population growth. However, since obtaining the loan, EID has taken action in derogation of that promise. It built a "preposterously oversized" reservoir. It built the Upper Freeze Creek well and connected it to the Wildflower Reservoir. It ran oversized water lines from the Wildflower Reservoir to vacant land owned by Mr. Creamer and others while providing undersized, undersized deficient water lines to existing residents who are or chose to connect to the EID water system.

Second, EID promised to comply with crosscutting environmental statutes, including the Clean Water Act, Safe Drinking Water Act, and Endangered Species Act. EID has failed to comply with this promise. By pumping water sufficient to fill the "preposterously oversized" Wildflower Reservoir, EID has depleted the water flows in the canyon. This has diminished water flows in private wells within the canyon and in Emigration Creek. The impaired private wells are more susceptible to water contamination, which frustrates the purposes of the Clean Drinking Water Act. Low flows in Emigration Creek threatens the habitat of the Utah Cutthroat Trout, which frustrates the purposes of the Endangered Species Act.

Moreover, EID's system has created environmental hazards. Due to flaws in the design and construction of the Brigham Fork Well and Upper Freeze Creek well, water supplied by EID is prone to iron bacterial contamination. Residents have reported foul, red tap water, which frustrates the purposes of the Safe Drinking Water Act. Due to undersized waterlines maintained at excessive pressure and structural defects of the Wildflower Reservoir, there are numerous leaks in EID's water system with an estimated loss of 1-million gallons per month causing chlorine levels in groundwater and Emigration Creek to skyrocket, which violates the purposes of the Clean Water Act.

Finally, because the $1.846 million loan involved federal funds, EID could not receive the funds unless and until applicable federal agencies complied with the exigencies of the National Environmental Policy Act ("NEPA")[19] NEPA generally requires federal agencies to assess the environmental effects of their proposed actions prior to making decisions.[20] To comply with NEPA, before disbursement of the $1.846 million, the Utah Department of Environmental Quality Division of Drinking Water created what's called an "Environmental Assessment" that evaluated the impact that the proposed Brigham Fork Well and Wildflower Reservoir would have on the environment. The Environmental Assessment also evaluated the effect that a proposed future well intended to tie into the Wildflower Reservoir would have on the environment. The division subsequently issued a finding that the Brigham Fork Well, Wildflower Reservoir, a 3-mile water distribution line and the proposed future well would have no significant adverse impact on the environment.

[19] 42 U.S.C. § 4321 et seq.

[20] https://www.epa.gov/nepa/what-national-environmental-policy-act.

The Environmental Assessment assumed EID would construct a 3-mile water distribution line along Emigration Canyon Road and the proposed future well in an area of Emigration Canyon called the Nugget Formation. When EID obtained funding for the future well in 2007 and 2013, however, it did not build it in the Nugget Formation. Instead it used the funds to build the Upper Freeze Creek Well on property owned by Mr. Creamer. In short EID built the Upper Freeze Creek well without first having the environmental impacts of the well assessed by the federal government as required by NEPA.

Third, EID failed to comply with its Water Management Plan, which required EID to measure water levels in "5 monitor wells" to "determine whether there are changes in the aquifers upon which [c]anyon residents are dependent for their culinary water supply."[21] Since obtaining the $1.846 million loan, EID has failed to measure water levels in the five monitoring wells and otherwise has failed to ensure that operation of the Brigham Fork Well, Upper Freeze Creek Well, and the Wildflower Reservoir are not depleting aquifers relied upon by other canyon residents.

Of course one question remains. Why would EID, a governmental entity, participate in a conspiracy to divert federal funds for the benefit of wealthy land developers? The answer is simple. EID's trustees, engineers and contractors personally benefitted from the construction of the water infrastructure and enlargement of EID's system and revenue. The more money coming into EID through taxes, fees and assessments, the more money the trustees can divert to family, friends and themselves through lucrative government contracts.

[21] Water Management and Conservation Plan, dated November 14, 2002, p. 3.

Since January of 2000, EID has made payments to Fred Smolka totaling $594,613.47. Historically, Mr. Smolka has worked for EID in a variety of positions, including trustee and general manager. Mr. Smolka currently works for EID as an "independent contractor," receiving an annual salary of $120,000. Since 2004, EID has paid over $150,000 to Fred Smolka's family and friends for services rendered to EID.

Other trustees have received similar financial benefits. In November 2014, EID awarded a $60,000 contract to a company owned by Hughes to construct a septic system within Emigration Canyon. Between 2004 to present, EID has waived impact and water usage fees for the personal benefit of Scott Hughes, David Bradford and Mark Stevens. Finally, since 2004, two firms that EID hired to do engineering and hydrological work for EID, Carollo and Aqua, have received over $1 million in payments from EID.

In conclusion, everything that EID has done with the $1.846 million loan frustrates the purpose of the DWSRF program. Rather than using it to provide 67 existing residents with clean water as promised, EID built a 12-million dollar water system to serve future population growth. Why else build a "preposterously oversized" reservoir and oversized water lines to three separate tracts of vacant, developable land? Rather than heighten the overall water quality within the canyon, EID's system delivers water contaminated with iron bacteria to residents connected to the system since 2003, while simultaneously drying up the private wells of residents not connected to the system. As water levels in private wells go down, the risk of bacterial or mineral contamination go up. Rather than making drinking water more affordable, EID has levied exorbitant fees, taxes and assessments to service the $1.846 million loan.

In short, this case presents a masterclass in public corruption. Rather than protect its constituents, EID has forced them to shoulder the costs of water infrastructure, while EID's trustees and developers like Boyer Company and Mr. Creamer reap the windfall.

II. THE PARTIES

1. Relator is a resident of Salt Lake County, State of Utah.

2. On information and belief, Defendant Emigration Improvement District ("EID") is a special service district organized under the laws of the State of Utah, endowed with governmental authority to provide water and sewage service to residents of the Emigration Canyon. EID's headquarters are located within Salt Lake County, State of Utah.

3. On information and belief, Defendant Barnett Intermountain Water Consulting ("BIWC") is a corporation organized and existing under the laws of the State of Utah, with its headquarters located within Davis County, Utah.

4. On information and belief, Defendant Carollo Engineers, Inc. ("Carollo Engineers") is a California professional corporation headquartered in Walnut Creek, State of California.

5. On information and belief, Defendant Aqua Environmental Services, Inc. ("AES") is a corporation organized and existing under the law of the State of Utah, with its headquarters located within Davis County, State of Utah.

6. On information and belief, Defendant Aqua Engineering, Inc. ("Aqua Engineering") is a corporation organized and existing under the law of the State of Utah, with its headquarters located within Davis County, State of Utah.

7. On information and belief, Defendant R. Steve Creamer ("Mr. Creamer") is a former Environmental Engineer with the Utah Department of Environmental Quality, is the former CEO of Energy Solutions, is the current Chairman of the "EID Advisory Committee," is the former President of Emigration Oaks, and is a resident of Salt Lake County, State of Utah.

8. On information and belief, Defendant Fred A. Smolka, CPA ("Mr. Smolka") is the former EID Trustee Chairman, former EID Clerk, former EID General Manager, former EID Election Specialist, current EID Treasurer, current EID Consultant, former member of the EID Engineering, Finance and Audit Committee, current principle of Management Enterprises, and a resident of Salt Lake County, State of Utah.

9. On information and belief, Defendant Michael Scott Hughes ("Mr. Hughes") has been a Co-Chairman Trustee of EID since January 2000 and is the principle of Ecosens and a resident of Salt Lake County, State of Utah.

10. On information and belief, Defendant Mark H. Stevens ("Mr. Stevens") is a former Co-Chairman and Trustee of EID (elected in November 2005), a former member of EID's Audit Committee, and a resident of Salt Lake County, State of Utah.

11. On information and belief, Defendant David C. Bradford ("Mr. Bradford") has been a Trustee Clerk of EID, is a former member of the EID's Finance Committee, and is a resident of Salt Lake County, State of Utah.

12. On information and belief, Defendant Lynn B. Hales ("Mr. Hales") is the former Chairman and Trustee of EID (elected in January 2000) and is the current Chairman of the EID's Engineering Committee and a resident of Salt Lake County, State of Utah.

13. On information and belief, Defendant Eric L. Hawkes ("Mr. Hawkes") is EID's current District Manager, Financial Manager, Election Specialist and is the principle of Simplifi and a resident of Salt Lake County, State of Utah.

14. On information and belief, Defendant Don A. Barnett, P.E. ("Don Barnett") is the current EID Hydrologist, a principal of BIWC, and a resident of Davis County, State of Utah.

15. On information and belief, Defendant Joseph D. Smolka ("Joe Smolka") is a member of the EID Advisory Board (appointed December 16, 2010), the current EID Operations Manager (appointed October 14, 2004), a former member of the Emigration Canyon Community Counsel, the current chairman of the Metro Council, the brother of Fred Smolka, a principal of Smolka Construction, and a resident of Salt Lake County, State of Utah.

16. On information and belief, Defendant Ronald L. Rash, P.E. ("Mr. Rash") is a shareholder of Carollo Engineers and is a resident of Salt Lake County, State of Utah.

17. On information and belief, Defendant Kenneth Wilde, P.E. ("Mr. Wilde") is a former Engineering Section Manager of DDW and a resident of West Valley City, State of Utah.

18. On information and belief, Michael B. Georgeson, P.E. ("Mr. Georgeson") is a former Engineering Section Manager with DDW and a resident of American Fork, State of Utah.

19. On information and belief, Defendant The Boyer Company, L.C. ("Boyer Company") is a corporation organized and existing under the law of the State of Utah, with its headquarters located within Salt Lake City, State of Utah.

20. On information and belief, Defendant City Development, Inc. ("City Development") is a corporation organized and existing under the law of the State of Utah, with its headquarters located within Salt Lake City, State of Utah.

II. JURISDICTION

21. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §1331, and 31 U.S.C. §3732, the latter of which specifically confers jurisdiction on this Court for actions brought pursuant to 31 U.S.C. §§ 3729 and 3730.

22. On information and belief, there have been no public disclosures of the allegations or transactions contained herein that bar jurisdiction under 31 U.S.C. §3730(e).

23. This Court is the proper venue for this action pursuant to 31 U.S.C. §3732(a) because at least one of the Defendants resides in this federal district.

24. This Court has personal jurisdiction over all Defendants because each is a resident of this district, or has its headquarters in this district, or conducts substantial business within this district.

III. GENERAL ALLEGATIONS

A. General Background

1. Emigration Improvement District.

25. EID is a special service district created under Utah law to provide water and sewer services to the residents of Emigration Canyon.

26. It is comprised of a three-member board of trustees, a manager, and various other engineers and consultants.

27. It has the power to issue bonds, charge fees and assessments, and levy taxes on the residents of Emigration Canyon to pay for the water services that it provides.

28. EID is comprised of a three-member board of trustees, a manager, and various other engineers and consultants.

29. EID's charter does not grant it authority to use taxpayer funds to finance development in Emigration Canyon for private profit.

30. EID does not fall within the authority of the Utah Public Utilities Commission.

31. Since 1985 EID has collected property tax revenue for all real properties located within the Canyon

32. Prior to 1998, EID did not own or operate any drinking water or sewage systems.

2. Applicable Utah Water and Zoning Laws

33. In the State of Utah, any change to the point-of-diversion (geographic point where water is extracted) or the point-of-use (geographic area where water may be used) of a water right requires the approval of the State Engineer in the form of either a permanent or temporary change application.

34. Under current building regulations of Salt Lake County, any new home constructed within Emigration Canyon must prove legal access to water with either a water share approved by the State Engineer or a promise of future water service issued by a Special Service Water District such as EID and be within 600 feet of a fire hydrant.

35. A domestic unit of 0.45 acre feet of water rights is needed for the culinary water use of one single-family residence in Emigration as mandated by the State Engineer (excluding exterior irrigation).

36. A domestic unit of 0.75 acre feet of water rights is needed for the culinary water use of one single-family residence in Emigration Canyon as mandated by the State Engineer (including exterior irrigation).

37. Under Utah Code Sec. 73-3-8 (b) and (c), "if the state engineer has reason to believe that an application [for water use] will interfere with the water's more beneficial use … or will unreasonably affect public recreation or the natural stream environment, or will prove detrimental to the public welfare, the state engineer shall withhold approval or rejection of the application until the state engineer has investigated the matter" whereby "[i]f an application does not meet the requirements of this section, it shall be rejected."

38. Under Utah Code 73-3-55, any right to divert water under a temporary change permit is inferior to any right to divert water under a permeant change permit or any perfected water rights.

39. Under Utah Code 73-3-5.5(d)(i)and (d)(ii), unlike permanent change applications, temporary change applications expire automatically after one year and cancel according to its own terms.

B. The $1.846 Million Loan

1. EID received at least some of the $1.846 million on or after September 29, 2004.

40. On or about September 29, 2004, EID received the final disbursement of a twenty-year, $1.846 million loan intended for the construction of two large-diameter commercial wells, a reservoir, and multiple water lines in Emigration Canyon for 312 existing households who would eventually connect to the water system.

41. The September 29, 2004 payment was the final release of "retainage" funds. The government disbursed the $1.846 million in funds for the construction of the well, reservoir and water lines via five progress payments.

42. However, the government retained a portion of each progress payment to assure that EID would satisfy its obligations and complete the construction of the well, reservoir and water lines.

43. Once EID's engineer – Carollo Engineering – certified that the project as complete, the government disbursed the "retainage." The September 29, 2014 payment constituted final payment for all work done on the project.

2. The Drinking Water State Revolving Fund Program

44. Congress created the Drinking Water State Revolving Fund (the "DWSRS") program in 1996 via amendments to the Safe Drinking Water Act, 42 U.S.C. § 300f *et seq*. (the "SDWA").

45. The purpose of the SDWA is to protect the quality of drinking water in the United States through the creation and enforcement of minimum standards for culinary or drinking water.

46. The DWSRS furthers this purpose by providing low-interest financing or grants for infrastructure projects that address a current violation or will prevent a future violation of health-based drinking water standards.

47. Under guidelines from the United States Environmental Protection Agency, states administering federal funds under the DWSRS program must give priority to projects that will ameliorate the most serious risk to public health, enable compliance with the SDWA, and make access to clean water more affordable.

48. Federal and state regulations governing the use of DWSRS funds prohibit their use for projects intended primarily for fire protection or to serve future population growth. In short, the funds are not for subsidizing wealthy land developers and speculators.

3. Terms of the $1.846 Million Loan

a. Financial Terms.

49. On October 13, 2000, EID secured a commitment of funds from DDW for the sale of federally-backed bonds administered under the authority of the Safe Drinking Water Act at 2.01% in the amount of $1,256,000.00.

50. EID subsequently requested three amendments to the loan agreement, which increased the commitment of funds to $1,846,000.00, for the total project cost of $2,400,750.00 (as a condition of getting the loan, EID had to secure the remaining portion).

51. Upon closing of the bond sale, all federal, matching state and EID's own co-payment were to be placed in an escrow account administered by DDW.

52. The funds were disbursed in six actual payments, the last of which occurred on or after September 29, 2004.

53. EID agreed to repay the funds over a twenty-year period at 2.01 percent interest.

54. In applying for the loan, EID represented that it would use the funds to build a reservoir, two large-diameter commercial wells, and three water lines.

55. In applying for the loan, EID represented that it intended to use Brigham Fork Well and the Wildflower Reservoir to bring clean water to 67 residents purported to be residing in the Killyon Canyon, Burr Fork, and Young Oaks neighborhoods of Emigration Canyon.

56. DDW gave Fred Smolka complete and plenary control over the $1.846 million loan and allowed him to receive the disbursement of funds without requiring a second signature on the applicable negotiable instruments.

b. Commitment of Funds Letter.

57. As a condition of the loan, EID agreed to abide by the conditions and requirements set forth in a January 3, 2001 letter from the Utah Department of Environmental Quality, Division of Drinking Water captioned "Federal SRF Loan Authorization and Procedures for Committal of Funds" ("Commitment of Funds Letter").[22]

58. The Commitment of Funds Letter required EID had to certify that it would comply with state and federal DWSRF regulations.

59. The Commitment of Funds Letter required EID to obtain "firm commitments" from at least 57 of the 67 homeowners that EID anticipated would participate in the project; the letter defined "firm commitment" as "actual payment of a connection fee and a signed contract to pay water utility bills."

60. The Commitment of Funds Letter required EID had to certify that it had sufficient water rights to operate the system.

61. The Commitment of Funds Letter required EID had to adopt a Water Management and Conservation Plan.

62. The Commitment of Funds Letter required EID had to comply with "cross-cutting" federal statutes, including the Clean Water Act, the Endangered Species Act, and the Safe Drinking Water Act.

[22] A copy of the letter is attached as Exhibit A.

c. Compliance with NEPA.

63. As a condition of obtaining the $1.846 million loan, EID had to cooperate with state and federal authorities in their efforts to comply with the National Environmental Policy Act ("NEPA").

64. This cooperation included providing state and federal authorities with complete, truthful, and accurate information about the proposed project.

65. NEPA generally requires federal agencies to assess the environmental effects of their proposed actions prior to making decisions.

66. The first step in the NEPA process is the creation of an Environmental Assessment, which determines whether or not a federal action has the potential to cause significant environmental effects.

67. If state and federal authorities determine that a project using federal funds does not have the potential to cause significant environmental impacts, the authorities issue a Finding of No Significant Impact, which has the effect of greenlighting the project allowing for actual construction to begin.

68. As a condition of receiving the $1.846 million loan, EID had to wait for completion of an Environmental Assessment and issuance of a Finding of No Significant Impact.

C. EID builds a preposterously oversized water system with $1.846 million loan.

1. Environmental Assessment and Finding of No Significant Impact.

69. To comply with NEPA, before disbursement of the $1.846 million loan, the Utah Department of Environmental Quality Division of Drinking Water in conjunction with applicable federal agencies evaluated the impact that the proposed wells and reservoir would have on the environment.

70. Based on information submitted by EID and Carollo Engineering, an engineering firm that EID had hired to assist with the NEPA process, federal and state authorities created an Environmental Assessment that evaluated what impact the proposed large-diameter commercial wells, reservoir and water lines would have on the environment (the "EA").

71. When evaluating the environmental impacts of the Brigham Fork Well, the Wildflower Reservoir, and the proposed future well, the government relied on plans, reports, data and representation created or made by EID or Carollo Engineering.

72. In an email to Don Hayes, Environmental & Water Resources Engineering Leader, at the Department of Civil & Environmental Engineering, University of Utah on July 22, 2002, Mr. Wilde reported that EID trustees were "vague and evasive" during public meetings and EID "has never sent us any of the documents and letters they have been giving to the people…they have been vague and have given conflicting answers and dodging questions/answers in the 2 public meetings I have attended." Mr. Wilde also expressed concern that "a couple of the things [EID] stated in the letters and documents were probably illegal."

73. Mr. Wilde however concluded that federal and state agencies "have little influence in development" due to the fact that "the NEPA processes … give[] us very little ability to evaluate what will happen in the canyon."

74. During the public comment period held on the Environmental Assessment in 2002, several residents of Emigration Canyon informed Mr. Brown, Mr. Georgeson and Mr. Wilde that the proposed project expressly violated federal-funding requirements under the Safe Drinking Water Act.

75. Despite these reservations, federal and state authorities – acting through Mr. Wilde – issued a Finding of No Significant impact on August 5, 2002 for the development of the two commercial wells, the reservoir and various commercial lines. This infrastructure was intended to service 312 households within Emigration Canyon.

76. Mr. Brown subsequently approved issuance of the $1.846 million loan, despite the fact that Environmental Protection Agency Rule 62-552.370 provided for construction grants only for "Financially Disadvantaged Communities" and not the multi-million dollar homes of Emigration Oaks, Young Oak, Pinecrest PUD and Killyon Canyon. EID through Carollo Engineering certified successful project completion on September 2004.

77. On September 29, 2004, the retainage funds were release to EID.

78. On May 5, 2005, the project was closed after EID falsely certified that it had obtained a federally-mandated post-construction inspection and all necessary permits for the operation a public-drinking water system under the Safe Drinking Water Act.

2. Construction of the Brigham Fork Well.

79. On November 16, 2001, Creamer agreed to purchase 135 acres of prime, developable property on the east side of Emigration Oaks from the Gillmor(s).

80. On December 14, 2001, Steve Creamer and EID – acting through Mr. Hughes and Mr. Hales – executed an agreement under which Mr. Creamer agreed to allow EID to construct the Brigham Fork Well in exchange for $75,000.00.

81. Earlier that same year, EID had created a plan that called for the Brigham Fork Well to be built at a different location.

82. EID disregarded thirty-three other possible well site previously approved by the State Engineer under permanent change applications.

83. To build the well on Mr. Creamer's property, EID was required to file temporary change applications subject to yearly review and approval of the State Engineer.

84. On December 14, 2001, EID agreed to employ Mr. Creamer as the contractor for the construction of water-system infrastructure in direct violation of federal bidding and procurement requirements.

85. Fred Smolka paid Mr. Creamer $119,652.33 for construction work that Mr. Creamer allegedly performed on the Brigham Fork Well.

86. Mr. Wilde allowed construction of the Brigham Fork Well to begin before issuance of the FONSI, in violation of the federal funding requirements of the Safe Drinking Water Act.

87. Due to shoddy workmanship, the Brigham Fork Well was built with a cracked casing.

88. Although the EAR and FONSI assumed the Wildflower Reservoir would be underground and made of concrete, on September 9, 2002, EID submitted invitations to bid for an above-ground steel tank.

3. Construction of the Wildflower Reservoir with $1.846 million.

89. Both the EA and FONSI assumed that EID would construct the Wildflower Reservoir on a specific parcel of flat ground belonging to Salt Lake City.

90. Instead, EID actually built the Wildflower Reservoir on property owned by Mr. Creamer, which is located within 60 feet of the proposed reservoir site and is steeply grated.

91. During construction, Mr. Creamer personally supervised the excavation of a 150-foot cut into the south hilltop in order to place the reservoir on property belonging to him.

92. Although EID had rendered payment to Salt Lake City on August 30, 2001 in the amount of $14,500.00 for a permanent easement for an underground, concrete tank, EID never built an underground tank on the property.

93. When surveying the boundaries of the Salt Lake City property in August 2002, Carollo Engineering – acting through Mr. Rash – failed to place permanent markers on the site and failed to register the survey with Salt Lake County, thereby actively concealing the fact that EID intended to build the Wildflower Reservoir on land owned by Mr. Creamer.

94. Although construction drawings provided for a 1-million gallon steel tank at 71 foot in diameter and 31 foot in height, under supervision of Carollo Engineering, ABCO Construction Inc. – upon information and belief a company owned or controlled by Creamer – completed a 100-foot diameter tank at a height between 23 and 30 feet, which yields a capacity between 1.3 and 2 million gallons.

95. Current records of DDW record the volume of the Wildflower Reservoir at 1.3 million gallons.

96. In an EID document dated "November 2003," Fred Smolka references a "2mil tank" when describing mechanical operations of water facilities operated by EID.

97. During the subsequent plan review, DDW staff engineer Steve Onysko in a memorandum dated October 18, 2002, informed Mr. Georgeson that the planned 1-million gallon Wildflower Reservoir was "preposterously oversized" beyond the 300,000 gallon capacity needed to fulfill the federal requirements and once again repeated that the Safe Drinking Water Act "prohibit[s] the use of State Revolving Funds (SFR) monies for construction of water system infrastructure for future growth."

98. Mr. Onysko concluded that, "I will not jeopardize my Utah Professional Engineering license by preparing an approval letter for the subject project under these circumstances. If you believe that approval of the subject project is appropriate, you will have to assign the task of approval letter preparation to someone other than myself."

99. On October 29, 2002, EID's attorney met with Mr. Creamer, Fred Smolka, Mr. Hales, and Mr. Rash to discuss "DWD [i.e., DDW] staff issues... concerning recommendation for smaller reservoir, economics [sic] of project and related issues," but then failed to report Mr. Onysko's objections to other EID trustee or report Onysko's objections to canyon residents in the following EID Trustee meeting on November 14, 2002.

100. Carollo Engineering – acting through Rash – "refused" to consider a cost savings of $500,000.00 by engineering an appropriately sized 300,000 gallon reservoir.

101. Because EID built an oversized, tank with a capacity between 1.3 and 2 million gallons, the overall project experienced "unforeseen cost overruns," which prevented EID from using the $1.846 million loan to build a second well within the canyon.

102. In 1995, Carollo prepared a report indicating that a 500,000 gallon reservoir would be sufficient to service 700 households within the Emigration Canyon.

103. Although hired by EID sometime prior to October 9, 2003 to inspect and supervise the construction of the Wildflower Reservoir, Carollo Engineering failed to report that the reservoir had not been constructed according to the submissions made during the NEPA process, i.e., Carollo Engineering failed to report that the reservoir was larger than planned and built on Mr. Creamer's property.

104. EID allowed the temporary operating permit for the use of the Wildflower Reservoir as a drinking-water source to expire on February 1, 2004 by failing to secure a post-construction inspection and permanent operating permit in violation of the Safe Drinking Water Act.

105. Under the Commitment of Funds Letter, EID had a duty to certify "valid legal title to the rights-of-way both for the project to be constructed and the remainder of the existing water system."

106. EID did not record the easements showing EID had placed the Wildflower Reservoir on Mr. Creamer's property, thereby actively concealing the fact that the reservoir was on Mr. Creamer's property.

107. EID failed to record easements showing that the water lines running from and to the Brigham Fork Well crossed Mr. Creamer's property.

108. Relator reviewed the documents submitted in connection with the $1.8 million loan on August 12, 2015; the documents did not include certification that EID had rights of way

for the Wildflower Reservoir, the Brigham Fork Well, or the water lines that connected the reservoir and well to the remainder of the system.

4. Construction of water lines with the $1.846 million loan.

109. During construction of the Wildflower Reservoir, on November 19, 2002, EID contracted with Mr. Creamer to construct an 8-inch water supply line between the Wildflower Reservoir, the Brigham Fork Well and the existing water system in Emigration Oaks to the west of the Wildflower Reservoir, in violation of federally-mandated open bidding requirements.

110. Mr. Onysko informed EID that the 8-inch water lines could not provide adequate fire flow to all 312 houses.

111. EID asked the fire marshal to approve a minimum of 1,000 gallons per minute but the fire marshal refused to drop it that low.

112. EID failed to contract with licensed engineers to inspect the work performed by Mr. Creamer and failed to inform Salt Lake County that construction of the water-supply lines by Mr. Creamer would not be inspected by a licensed engineer.

113. Rather than construct an 8-inch water-supply line, sometime in the year 2004, Mr. Creamer placed a 10-inch line through his property and hastily covered the trench;

114. On August 22, 2003, Carollo Engineering issued a change order to Condie Construction Co. for "2-inch waterline used in Killyon Canyon and Muddy Hallow," despite the fact that construction drawings in these areas required the installation of 8-inch water lines.

115. On the same date, Carollo Engineers issued a change order to Condie Construction to "[c]hange from 8-inch to 4-inch PVC C-900 waterline on Quad Road," despite the fact that construction drawings in this area required the installation of 8-inch water lines.

116. Carollo Engineering – though Rash – refused to consider upsizing the water distribution lines in the main canyon from 8 inches to 10 inches at a cost of $119,000.00 despite the fact that Mr. Onysko refused to certify compliance with Regulation R309-510-9 regulating the size of the distribution system need for adequate fire protection.

5. False Certification re $1.846 million project.

117. Despite the aforementioned, on September 22, 2004, Mr. Rash reported that the project as completed in compliance with the pre-construction plans.

118. On May 3, 2005, Mr. Maculey, then DDW staff engineer and current DDW Deputy Director, recorded in the DDW database that "[a]ll project components have received operating permits," despite the fact that the Wildflower Reservoir had not received a permanent operating permit following the federally mandated post-construction inspection.

119. Wildflower Reservoir, Boyer Well No. 2 and the chlorinator for the Brigham Fork lack federally mandated operating permits to date.

120. The aforementioned certification of project completion was itself expressly refuted by former EID Trustee Bowen who personally confronted Rash at the Carollo office in Midvale, Utah shortly thereafter.

D. Completion of the EID's water system.

1. The 2007 bond.

121. EID used state grants to build a 3.3 mile waterline down Emigration Canyon a second well, both of which connected to the Wildflower Reservoir and Brigham Fork Well.

122. As part of the NEPA process conducted before issuance of the $1.8 million loan, the state and federal authorities evaluated what impact construction of a future 3.3-mile water line (located in the main canyon for the purported benefit of 312 households) and a future well (located in a section of Emigration Canyon called the Nugget Formation) would have on the environment.

123. The government's evaluation assumed that the future 3.3-mile water line and the future well would connect to the Wildflower Reservoir and other infrastructure built with federal funds. The government evaluated the impacts of these future projects at the insistence of Fred Smolka and Mr. Creamer.

124. On September 15, 2006, EID secured another commitment of funds from the State of Utah for the amount of $2,860,000.00 for the purpose of constructing the 3.3-mile water line along Emigration Canyon Road (the primary thoroughfare through the canyon).

125. EID subsequently built the waterline.

2. The 2013 bond.

126. On October 11, 2012, EID secured another commitment of funds in the amount of $1,600,000.00 from the Utah Division of Water Rights for the construction of the second large-diameter commercial well.

127. Though the EA and the FONSI assumed that EID would build any future well connected to the Wildflower Reservoir in the "Nugget Formation," EID actually built the well

(the "Upper Freeze Creek Well") on property owned by Mr. Creamer and located two miles from the Nugget Formation.

128. In a correspondence to canyon resident Irons on April 28, 2014, EID through Hawkes reported that "the District was required to get another loan for $1.6 million (0% interest) to provide some added protection or 'redundancy' in the system."

129. Despite concerns expressed in a 1994 report that two wells in the canyon – the Boyer Well No. 1 and Boyer Well No. 2 – were placed in close proximity and in the same drainage area and would therefore prove to be unproductive water sources, BIWC – acting through Barnett – insisted that the Upper Freeze Creek Well also be placed in close proximity with Boyer Well No. 1 and Boyer Well No. 2.

130. On October 8, 2013, EID recorded the purchase of a 20-acre parcel for the Upper Freeze Creek Well from land developer Walter Plumb of City Development for $140,000.00 – an amount well above what Walter Plumb expected to receive for a property without water rights and well above market value.

131. On November 7, 2013, EID obtained approval from the State Engineer to provide water to 69 new homes "yet to be constructed in the [c]anyon" under permanent change application #a18651 for water share #57-7479, which EID had acquired from Walter Plumb and City Development on December 28, 2017.

132. Relator is informed and believes that EID verbally promised to bring water service to an area directly north of the UFC Well identified as "Emigration Peaks LLC," which owned and controlled by Ira Sachs and Walter Plumb.

133. EID failed to have the value of the property appraised before closing.

134. Meeting minutes prepared by EID failed to record the terms of the agreement or the title transfer.

135. EID did not have authorization to purchase the property for construction of the Upper Freeze Creek Well, but rather was required to obtain easements for placement of the well.

136. In the construction documents from January 17, 2014 submitted to DDW by Aqua Engineering through Mr. Rousselle, EID reported to have secured an easement from developer Walter Plumb despite the fact that no such easement agreement had been recorded with Salt Lake County. Walter Plumb recorded fee simple title transfer to EID on September 13, 2013.

137. In a letter dated April 19, 2013, Fred Smolka stated that the site for the Upper Freeze Creek Well was chosen because EID wanted to stay as "far away from [a popular walking] trail as possible with the road to keep this treasure as pristine as possible."

138. Both the trail and well site are currently protected by no less than six no-trespassing signs warning of "criminal prosecution to the fullest extent of the law."

139. EID made no effort to obtain an easement from Salt Lake City although the actual well site of the Upper Freeze Creek Well is located within 10 feet of property belonging to the city.

140. Contrary to the construction drawings prepared by Aqua Engineering indicating that Walter Plumb had granted EID a permanent easement for the construction of the Upper Freeze Creek Well, on October 8, 2013, EID recorded a permanent easement to Rocky Mountain Power on the property previously belonging to Walter Plumb.

141. Contrary to construction drawings submitted by Aqua Engineering through Mr. Rousselle to DDW, Aqua Engineering completed the easement documents submitted to Salt Lake County for the benefit of Rocky Mountain Power.

142. Under the construction oversight by Aqua Engineering and Joseph Smolka, EID installed four electrical "pullboxes" allowing for future development of the property formerly belonging to Walter Plumb.

143. The electrical conduit installed for operation of the Upper Freeze Creek Well far exceeds the power requirements of a large-diameter commercial well but was rather intended to service multiple single-family residents.

144. Contrary to the site plan submitted to DDW by Aqua Engineering through Mr. Rousselle, EID under the construction oversight of Aqua Engineering and Joe Smolka installed several water connections for individual water meters.

145. Despite the aforementioned deficiencies, on January 14, 2014, Mr. Rousselle falsely certified that the Upper Freeze Creek Well was compliant with all requirements of the 2013 Bond Agreement.

146. While pump testing the proposed Upper Freeze Creek Well in 2013, BIWC and Don Barnett failed to observe the five existing monitoring wells owned by EID and installed at tax-payer expense in the early 1990's, as required by the Water Conservation Management Plan.

147. In June 2014, Don Barnett informed Canyon resident and Geophysicist Dr. Irons that he had wanted to install monitoring wells during the development of the Upper Freeze Creek Well, but he [Don Barnett] had been "admonished" by Fred Smolka, Mr. Hughes, Mr. Stevens

and Mr. Bradford for making such a suggestion due to "prohibitive costs" and thus dropped the issue.

148. On October 31, 2010 at a presentation of the Geological Society of America in Denver, Colorado, Don Barnett and Dr. Yonkee concluded, "[t]hus, development of fractured bedrock aquifers should include detailed hydrogeological [sic] mapping, and long term monitoring of water levels and chemistry from production wells…such an inclined well drilled in 2004 [the Brigham Fork Well] has provided a consistent water source for the upper Emigration Canyon area."

149. To date, there is no evidence that hydrological mapping or recording of water levels from monitoring wells was completed by Don Barnett or BIWC during development of the Upper Freeze Creek Well and no age-testing of ground water was completed.

150. In an open letter to Canyon residents from August 6, 2013, Fred Smolka, Mr. Hughes, Mr. Bradford and Mr. Stevens reported that EID had spent "years of due diligence, research and preparing a master plan," EID had hired "professionals, a hydrologist, a geologist, and engineers to assure the best possible plan and to implement the current system expansion," EID had decided that a new well was quickly needed and EID had gone "through a long and arduous process of deciding to add the new well, where to locate it and all the resulting detail."

151. Organizational minutes reveal that BIWC and Don Barnett first recommended a new well on April 19, 2012.

152. On November 17, 2011, Steve Creamer inquired if EID had "any written information regarding what water sources the EID [sic] is looking at [sic]."

153. No hydrological data or study supported the placement of the new well on the property previously owned by Walter Plumb.

154. The EAR and FONSI approved by Wilde on August 5, 2002 expressly concluded that the Brigham Fork Well would be sufficient for 312 connections.

155. To date, EID reports to service only 233 connections with the Utah State Division of Water Rights.

156. Upon inquiry as to the reason for the inflated purchase price of $140,000 for Walter Plumb's property, Mr. Hughes responded that EID "didn't like dealing with easement issues" and if EID did not purchase the property, Walter Plumb would be "put under pressure to develop the property."

157. On October 8, 2013, after the Upper Freeze Creek Well became operational, EID transferred title of the 20 acres on which the well sits to Mr. Creamer.

158. During construction of the water and electrical supply lines, EID – acting through Joe Smolka – installed four water and electrical connection hubs, thereby allowing unhindered sale of later parceled lots as "buildable." On December 12, 2010, EID reported to the State Engineer that over $12,000,000.00 dollars of public funds had been expended on the large-diameter well system at that time.

159. With the completion of the Upper Freeze Creek well at a cost of $2,069,000.00 in June 2014, the large diameter well system operated by EID has cost the taxpayers of Emigration Canyon over $14,000,000.00 to date.

E. EID used the $1.846 million to benefit wealthy land developers.

1. EID uses the $1.846 million to rescue developers with failed water systems.

a. Boyer Company.

160. In a bond election held in November 1995, the residents of Emigration Canyon residents rejected EID's proposal to construct a canyon-wide drinking water system proposed by Fred Smolka, Mr. Hales and Jack Barnett.

161. During the late 1980's, Boyer Company and City Development created the Emigration Oaks development, which consisted of 223 residential lots.

162. Boyer Company and City Development not only acquired 94.04 acre feet of surface water rights from Mt. Olivet Cemetery (water right #57-8865), which had a surface point-of-diversion near the University of Utah, but also obtained the consent of the State Engineer to draw water from underground sources higher up the canyon.

163. Under water right #57-8865, Boyer Company and City Development owned sufficient water rights for only 125 residential units (including irrigation) under water right #57-8865; nonetheless, under permanent change application #a12710b, the State Engineer approved water service to 188 domestic units.

164. The water rights held by Boyer Company and City Development were inferior to some of the water rights held by residents of Emigration Canyon who owned and obtained culinary water from private wells.

165. Boyer Company and City Development constructed a large-diameter, commercial well and a 355,000 gallon tank to supply water to the Emigration Oaks development.

166. Even though the well and tank were undersized to provide water service to all 223 residential units Boyer Company and City Development had sold as "buildable," Salt Lake County approved the Emigration Oaks plat, which prevented Boyer Company and City Development from having to incur the $4,200,000.00 cost of having to bring water and sewer services from the base of the canyon.

167. Sometime in January 1993, the well that Boyer Company and City Development had installed pumped dry, potentially causing permanent damage to Emigration's Canyon's riparian system.

168. Sometime in the early 1990's, the US Forest Service designated the area of Emigration Oaks as a "Wildfire Danger Zone" leading to exorbitant monthly fire insurance premiums of $1,000.00 for affluent residents of Emigration Oaks, including Mr. Hales.

169. To remedy the deficient water infrastructure, in 1994 Boyer Company and City Development constructed a second large-diameter, commercial well in Emigration Canyon.

170. Though Boyer Company and City Development owned and operated the well, for unknown reasons, the State Engineer approved construction and operation of the well under water right #57-7796, which was owned by EID. The point-of-diversion for the second well was not listed on EID's original permanent change application filed with the State Engineer, and there is no record of a lease agreement between Boyer Company and EID on file with the State Engineer or recorded in EID's meeting minutes.

171. As of 1998, 105 multi-million dollar homes had been constructed in Emigration Oaks, and Boyer Company was obligated to supply water to another 118 vacant properties it had sold as "buildable."

172. Boyer Company and City Development also had failed to construct a water distribution system in Phases 6 and 6A of the Emigration Oaks development designated as the luxurious Emigration Estates.

173. Many of the water distribution lines constructed in Emigration Oaks by Boyer Company were undersized and incapable of providing adequate water service and fire protection.

174. Boyer Company and City Development did not own water rights sufficient to provide water to the residential parcels they sold as "buildable" to affluent private investors, a fact which both Boyer Company and City Development knew.

175. The second well, tank and water distribution lines were insufficient for the 105 homes already built, also a fact which both Boyer Company and City Development knew.

176. The water rights held by other residents within Emigration Canyon were superior to the Boyer Company's and City Development's water rights, a fact which both Boyer Company and City Development knew.

177. The operation of large-diameter commercial wells in the Canyon would impair existing private wells with superior water rights "with almost certainty," a fact which both Boyer Company and City Development knew.

178. Because Boyer Company and City Development had sold lots without putting in place sufficient water infrastructure, Boyer Company and City Development faced potential legal liability exposure to those who had purchased lots and built multi-million dollar homes within the Emigration Oaks development.

179. In 1998, EID agreed to assume ownership and legal liability of Boyer Company's and City Development's incomplete, dilapidated and deficient large-diameter commercial well system.

180. EID also assumed Boyer Company's and City Development's legal obligation to provide water service to the additional 130 vacant lots within Emigration Oaks.

181. In exchange, Boyer Company gave EID 300 acres of vacant, developable land.

182. Boyer Company and City Development also agreed to pay a $650,000 towards construction of new well and water tank, which allowed EID to obtain a $1.846 million loan from the Utah Drinking Water State Revolving Fund.

183. Although EID publicly announced that it would place the 300 acres into trust to prevent future development, it never did so.

184. As part of the exchange with Boyer Company and City Development, EID assumed operation of both wells and water tank, even though EID knew that Boyer Company and City Development had been operating the second well without a valid operating permit, which cannot be obtained. The lack of a valid operating permit had been published in DDW's 1996 Sanitation Survey.

185. On May 25, 2000, Utah State Environmental Health Division informed Mr. Hughes and Fred Smolka that the Boyer Tank was improperly sized at 355,000 gallons instead of the required capacity of 415,500 gallons for 225 single-family units.

b. Pinecrest PUD.

186. Similar to Emigration Oaks, sometime in the early 1980's, the Pinecrest PUD was constructed by an unknown developer.

187. Despite having water rights sufficient for only one (single-family resident under permanent change application #a19606 under water right #57-10005, Pinecrest PUD under the direction of Mr. Steve Hook connected five affluent homes to a single, large-diameter commercial well.

188. Shortly after construction, the Pinecrest PUD Well proved deficient, producing "barely 3 ½ gallons per hour."

c. Young Oak.

189. Similar to Emigration Oaks and Pinecrest PUD, sometime in the early 1980s, the luxurious Young Oak development was constructed by an unknown developer.

190. The Young Oaks Water Company supplied water service to 35 homes from a single, large-diameter commercial well and small reservoir.

191. By 2003, more homes had connected to the Young Oak Water System than allowed under Safe Drinking Water regulations thereby requiring substantial system expansion at great expense to the affluent homeowners of the Young Oak.

2. EID used the $1.846 million loan to build "capacity" for future development on Mr. Creamer's property.

192. After having been thwarted in the 1995 Bond Election, between January 1, 1998 and October 13, 2000, Mr. Creamer, Boyer Company, City Development and EID – acting through Fred Smolka, Mr. Hughes and Mr. Hales – conspired to acquire federal funds from the Drinking Water State Revolving Fund to construct a water system for the benefit of Mr. Creamer, Boyer Company, City Development, David Neuscheler and Siv and Charles Gillmor.

193. Indeed, sometime prior to June 14, 2000, EID – acting through Fred Smolka, Mr. Hughes and Mr. Hales – and Mr. Creamer agreed that Mr. Creamer would allow EID to build

two commercial wells on 130 acres that Mr. Creamer would acquire from Siv and Charles Gillmor. In exchange, EID would use funds obtained from the Drinking Water State Revolving Fund to construct a water system with the capacity to provide water to a future residential development on 560 acres of land that Mr. Creamer and EID owned within Emigration Canyon.

a. EID never intended to use the $1.846 million to provide clean water to canyon residents.

194. In a letter to Canyon residents dated June 2014, EID purported that it was providing water service to 273 homes within the canyon; however, EID recently reported to DDW that it provides water services to 236 residents within the canyon.

195. The State Engineer has approved water service to only 233 homes in Emigration Canyon under EID's permanent and temporary change applications. Accordingly, if EID is in fact delivering water to 273 homes, it is doing so without the approval of the State Engineer.

b. Land acquisition.

196. Prior to January 2000, Mr. Creamer and David Neuscheler did not own any property in Emigration Canyon.

197. Sometime before November 16, 2001, Steve Creamer agreed to purchase 135 developable property on the east side of Emigration Oaks from Siv and Charles Gillmor.

198. In exchange for the Gillmors' selling 170 acres to Mr. Creamer, EID – acting through Fred Smolka, Mr. Hughes and Mr. Hales – agreed to bring water service to 170 acres of land (located in Spring Glen) owned by the Gillmors.

199. In exchange for Mr. Creamer buying 170 acres from the Gillmors, the Gillmors agreed to sell 59 acres of developable real estate to David Neuscheler in the area known as "Little Mountain."

200. Mr. Creamer and EID currently owns approximately 500 acres of vacant, developable land within Emigration Canyon, while the Gillmors own 172 acres in an area of the canyon called Spring Glenn and Mr. Neuscheler own 124 in an area of the canyon called Little Mountain.

c. Zoning for development.

201. Most undeveloped properties within the EID's water service area are zoned as "FR-20" thereby requiring 20 acres of land for a single-family residence.

202. Prior to January 1, 2017, all changes to zoning laws within the Emigration Canyon fell within the final authority of Salt Lake County.

203. In 2001, the Emigration Canyon Community Counsel and Emigration Township Planning Commission under the direction of Fred Smolka approved rezoning of a single 80-acre parcel now owned by Mr. Creamer from FR-20 to FR-5 thereby quadrupling the number of single family residents which could be developed on the property.

204. Since 2002, the Emigration Canyon Community Counsel and Emigration Township Planning Commission have attempted to similarly down-zone all undeveloped property located within Emigration Canyon without success.

205. On January 1, 2017, Emigration Canyon became a Metro Township controlled by five elected officials.

206. On January 11, 2017, in an undisclosed meeting, the Metro Township Council passed a new land-use ordinance, which eliminated the previous 725-unit limit on the number of domestic residences within Emigration Canyon, paving the way for massive new building development within the Canyon. Joe Smolka, Mr. Brems, and Jennifer Hawkes, the spouse of EID manager Eric Hawkes were member of the council and voted in favor of the new ordinance.

d. Express statements of intent to develop.

207. On November 18, 2002, DDW executed the project approval letter in order for EID "to meet future demands since building additional storage would be extremely difficult given the sensitive nature of the canyon environment."

208. During the EID Trustee meeting on August 20, 2015, EID Hydrologist Don Barnett voiced no objection to the construction of 5,000 new homes within the Canyon, misrepresenting that he "was unaware of any maximum number" of residential units the Canyon hydrology could support.

209. During the presentation of the aforementioned Waste Water Study by Aqua through Rasmussen at the EID Trustee meeting in September 2014, Rasmussen falsely reported that the total Canyon buildout was limited to 685 domestic units, despite the fact that, on August 20, 2015, EID through Don Barnett reported that there was no objection to the construction of 5,000 additional homes in the Canyon and at that date 677 homes had already been constructed. Moreover, on information and belief, EID has assumed contractual obligations to provide water service to an additional sixty (60) vacant lots in Emigration Oaks alone.

210. Sometime in 2002, unaware of Onysko's objections to the project, one of EID's trustees demanded that Don Barnett draft a memo stating that the 1-million gallon Wildflower

Reservoir far exceeded the needs of the existing Canyon homeowners. Citing the fact that his profession was "directed toward development," Don Barnett refused.

e. Water lines to vacant, developable land.

211. EID constructed pipelines that run from the Wildflower Reservoir to vacant, developable land owned by Mr. Creamer, the Gillmors and Nuescheler using federal funds.

i. T-converter to Mr. Creamer's 500-plus acres.

212. In 2013, during construction of the Upper Freeze Creek Well supervised by Joseph Smolka and Aqua Engineering, EID diverted loan proceeds in order to retrofit an additional 10-inch t-valve diverter to supply water service to vacant, developable property owned by Mr. Creamer.

213. Meeting minutes prepared by EID failed to record the additional water-system changes.

214. During construction of the Upper Freeze Creek Well in 2013, Mr. Creamer or EID – acting through Joseph Smolka – and Aqua Engineering covered the 1-ton, t-valve-diverter with a manhole cover labeled "SEWAGE" in order to conceal the actual purpose of bringing water service to Creamer's property to the immediate north via a 10-inch, water supply pipe and connection flange.

215. Under the express direction of Mr. Creamer on October 18, 2013 EID connected the 335,000 gallon Boyer Tank to the water distribution lines on Pioneer Fork Road via a 4-inch water supply line in order to increase pressure for future water service on property belonging to Mr. Creamer.

ii. Spring Glen Development (Gillmors' 172 acres)

216. Sometime in the year 2007, during completion of the water-supply line along the main-Canyon road, EID constructed an additional 1 mile of water-supply lines through an area of Emigration called Spring Glen, a small community with a water system of its own already in place. The system consisted of a small well, reservoir and fire hydrants.

217. The diameter of the water supply line at 8 inches far exceed the capacity needed for 17 potential water users.

218. EID built the line with the intent to provide water service to future development of 130 acres owned by Charles and Siv Gillmor located above Spring Glen.

219. EID installed fire hydrants between 2 and 20 feet from the existing fire hydrants already servicing the Spring Glen community.

220. Despite the enormous cost of adding one mile of supply lines and four fire hydrants, of the 17 households connected to the Spring Glen water system at that time, only Mr. Bradford and resident TJ Winger had requested water service from EID.

221. Sometime in 2007, Fred Smolka waived the water-right lease fees for the benefit of Mr. Bradford and TJ Winger in violation of 14.2 of the Uniform Rules and Regulations for Water Service of Emigration Improvement District from June 11, 1998 as amended January 14, 1999.

222. In addition to placing redundant fire hydrants right next to already existing fire hydrants, EID extended an additional 8-inch water supply line approximately one-fourth of a mile to provide water service to the single residence of Catherine Gillmor and placed a fire hydrant on her vacant, private property protected by a no-trespassing sign and private gate.

223. In January 2014, Larry Gillmor purchased an additional 47 acres above the Spring Glen Community.

224. To date, Gillmors collectively own 172 contiguous acres of vacant, developable land near the Spring Glen community.

225. Sometime in the year 2007, EID constructed an 8-inch water supply line to the Gillmors' 172 acres at a substantial cost.

226. Contrary to the Utah Open Meetings Law requiring proper notice and scheduling of public meetings, EID scheduled a "trustee work meeting" on January 12, 2015. At the meeting, Mr. Hughes, Mr. Bradford, Mr. Stevens, Fred Smolka and Mr. Hawkes agreed to waive water connection and impact fees in order to induce the 17 residents of Spring Glen to relinquish their superior water rights to EID and connect to EID's system.

iii. Little Mountain Development (Neuscheler).

227. During construction of the main-canyon water line in the year 2007, EID – acting through Fred Smolka – diverted funds in order to extend an 8-inch water supply line into the area known as "Little Mountain." The water line included placement of two fire hydrants at a cost of $4,000.00 each.

228. Despite the enormous cost of constructing water lines and two fire hydrants, only two residents on private wells resided in the area of Little Mountain.

229. Fred Smolka induced a resident of Little Mountain to request EID service, by promising to waive impact fees.

230. To date, the only other resident in the area of Little Mountain remains on a private well.

231. In the plans submitted as part of its application for the $1.846 million loan, EID did not indicate any plan of extending water service into the area of Little Mountain.

232. The EA did not contemplate the extension of a water service line into the Little Mountain area.

233. The EA did not contemplate any stream crossings in the area of lower Pinecrest Canyon despite the fact no less than six stream crossings occurred.

234. On April 28, 2013, Catherine Gillmor agreed to the sale of 59 acres of prime developable property to Neuscheler immediately adjacent to property belonging to Neuscheler, thus providing the Neuscheler with a total of 124.18 contiguous acres in the area of Little Mountain.

235. In the EID Trustee meeting on March 12, 2015, Mr. Bradford insisted that the 8-inch water supply line constructed in 2007 be extended another 1,200 feet in order to provide water service to Neuscheler's "single home."

236. When questioned as to the enormous costs of extending a water-service line to otherwise vacant property by canyon resident S. Plumb, Mr. Bradford insisted that "several" fire hydrants were needed for "fire protection" all along property belonging to Neuscheler.

237. Mr. Bradford required at least an 8-inch water-supply line before EID would provide water service to Neuscheler's single home.

f. Efforts to prevent other developers from getting in the game.

238. Sometime prior to July 2, 2009 a private investor approached EID with plans to develop a property in Emigration Canyon known as "Skycrest Ranch."

239. During the trustee meeting, EID – acting through Hughes – verbally informed the developer that EID had "a master plan that designates specific numbers of connections for certain areas, and they have to work within that plan."

240. Mr. Hughes further verbally informed the developer that there existed certain "pressure problems related to putting a large development on the water system in that area."

241. Mr. Hughes is not a licensed engineer nor a member of EID's "Engineering Committee."

242. On December 19, 2002, EID instructed Don Barnett to prepare a hydrology report for a remuneration of $1,500.00 supporting the effort of Utah Open Lands to acquire a conservation easement of all property owned by Salt Lake City in Emigration Canyon.

243. In November 2005, 190 acres immediately west of the Spring Glen Community appraised at $2,400,000.00 known as "Perkins Flats" was purchased by Utah Open Lands for $1,400,000.00.

244. Among other donors, Envirocare Environmental Foundation, a company owned and controlled by Mr. Creamer, contributed an unknown amount to the cost of removing the entire area from future development.

245. In the year 2011, 265 acres located in upper Killyon Canyon area was purchased and then donated to Utah Open Lands at a reduced cost of $1,800,000.00.

246. Relator is informed and believes that the anonymous donor who contributed $500,000.00 toward the purchase price was Mr. Creamer.

247. In November 2017, with a financial contribution of $250,000.00 from Salt Lake County, Utah Open Lands purchased a single parcel of 4.6 acres designated as "Owl Meadows" for $700,000.00 from an undisclosed property owner.

248. In making the purchase, a representative of Utah Open Lands argued that channeling $700,000.00 of funds to a confidential seller was necessary because "[t]his highly visible piece of bird habitat, … will most likely be replaced by high-end human dwellings if the group fails to meet the deadline."

g. Road access to Mr. Creamer's property.

249. Between September 2002 and May 2005, EID – acting through Fred Smolka – diverted an unknown portion of the $1.846 million loan to purchase and construct an unknown number of fire hydrants and individual water meters on Mr. Creamer's vacant, developable property.

250. In a homeowners association meeting held in February 2013, there was open discussion concerning the subdivision of property belonging to Mr. Creamer and incorporation into the Emigration Oaks development. Since the federal seal on the First Amended Complaint of the present action was lifted on June 12, 2015, no such open discussion has occurred.

251. Mr. Creamer attempted to have a road built in Emigration Canyon that would have provided better access to his vacant, developable land. The purported reason for the road was to provide a "fire escape" for canyon residents. The road would not have served as an effective fire escape, but would have created road access to Mr. Creamer's vacant, developable land.

252. After the plan for a "fire escape" and access through the Emigraiton Oaks development fell through, Mr. Creamer purchased the vacant "Sun and Moon Café," which will allow him to create road access to his vacant, developable land.

F. EID has known all along that Emigration Canyon cannot support large-commercial wells and private wells.

253. In the Master's Thesis presented to the Department of Geology, University of Utah in 1966, Jack Barnett concluded that the hydrology of Emigration Canyon is not conducive to the operation of large-diameter commercial wells and, even if such wells were to successfully draw large quantities of water from the canyon's riparian system, impairment of private wells within the canyon "would be almost a certainty."

254. Because the stream that runs down Emigration Canyon is part of the same riparian system as the canyon's groundwater, Jack Barnett also predicted that impairment of one would negatively impact the other.

255. Finally, Jack Barnett predicted that reduced flows in either the streams or groundwater would substantially increase bacterial levels in the stream and in private wells in the canyon.

256. Jack Barnett's thesis concluded that "development [in Emigration Canyon] should be limited to small-diameter domestic wells" for a single-family residences.

G. EID built its preposterously oversized water system on a bedrock of lies, misrepresentations, and cover ups.

1. Misrepresentations during the NEPA process.

257. In order to appear to have fulfilled the requirements to obtain the $1.8 million loan, EID – acting through Fred Smolka, Mr. Hughes, Mr. Hales, BIWC, Carollo Engineering

and Mr. Rash – made the following false and misleading statements on behalf of EID to the government prior to the certification of successful project completion by Maculey on May 3, 2005.

258. During the NEPA process, EID failed to inform the government that, back in 1983, the State Engineer had denied EID's request to divert water under its water rights on grounds that, in so doing, EID would interfere with the private wells of canyon residents holding superior water rights.

259. During the NEPA process, EID failed to inform the government that its legal right to draw water from the Brigham Fork Well had been secured under temporary change application "t26672" (57-7796) filed on May 14, 2002, which required annual review and approval of the State Engineer, the last of which occurred on February 13, 2017 under "t42153."

260. During the NEPA process, EID failed to inform the Government that EID's authorization to operate the Brigham Fork Well would automatically lapse every year under applicable state law.

261. EID failed to inform the Government that, on March 18, 2003, EID began a program to purchase superior water rights from Canyon residents with public funds "in an attempt to get as much paper water off the stream as possible," as recorded in the meeting minutes on the aforementioned date.

262. EID expressly assured the Government that federally-backed funds would not be used to cure deficiencies of the Emigration Oaks development such as the completion of water supply line in the Phase 6 and Phase 6A section of Emigration Oaks.

263. EID failed to inform the Government that federally-backed fund would be used to cure the deficiencies of the affluent Pinecrest PUD and Young Oak developments.

264. During the NEPA process, EID falsely reported that many private wells in the service area were contaminated with coliform bacteria; however, upon inquiry from EID Trustee Bowen, in 2001, Mr. Wilde clarified that only one well was contaminated with coliform bacteria to his knowledge.

265. During the NEPA process, EID falsely represented that the Young Oak Water System was producing 50 gallons per minute as a part of the existing EID water system, when the well was in fact was not connected to the Emigration Oaks Water system and remains to date under the ownership and control of the Young Oak Water Company for exterior irrigation.

266. Even though the Young Oak had conveyed its water rights to EID on June 24, 2004, EID reported to the State Engineers that it leased water rights to Young Oaks on June 2, 2006.

267. During the NEPA process, EID falsely represented that 67 existing household were located within the proposed service area when, in fact, less than 50 properties had been developed within the areas.

268. During the NEPA process, EID falsely represented that the 67 households that the Brigham Fork Well and Wildflower Reservoir would service had private wells, when, in fact, a substantial portion of the households were part of exclusive private urban developments supplied with water from large-diameter wells of Young Oak, and Pinecrest PUD or were vacant lots with no well at all.

269. Homes within the Silver Oak area of the Canyon did not connect to the EID system once it became operational and remain on individual wells to date.

270. Of the 57 households required to sign firm commitment contracts, no household within the extended service area actually complied with all federally-backed loan requirements.

271. Sometime in 1988, BIWC acquired 649 acre feet of surface water rights from Emigration Dam and Ditch Company for the benefit of EID (water right #57-7796).

272. In its Memorandum Decision from October 8, 1982, the State Engineer approved EID's permanent change application "a-6538" to change the point-of-diversion of 628.87 acre feet from a surface water right located at the mouth of Emigration Canyon to a single underground point-of-diversion located high in Emigration Canyon under water right #57-7796, which had the legal effect of reducing the 1873 priority date of the water share to a priority date of 1983.

273. In the aforementioned decision, the State Engineer expressly rejected two points-of-diversion due to potential inference with existing water shares.

274. EID through BIWC has been diverting water pursuant to temporary change permits obtained on an annual basis from the State Engineer.

275. On August 3, 1993, EID through BIWC submitted a permanent change application under the designation "a17521" for the operation of Boyer Well #2 to the DWR in order to "develop an adequate water supply for canyon residents," despite the fact that most canyon residents at that time were on private-wells and Boyer Well #2 remained under the ownership of the Boyer Company and City Development until May 2003.

276. The application was approved on December 14, 1995.

277. With over 583 households located within the Canyon possessing individual water rights to date, when applying for the $1.846 million loan, EID failed to report to federal authorities that a single impairment of one private well with an earlier priority date carried the risk of complete forfeiture of water service and total loss of federal funds under the applicable Utah State Water laws.

278. EID represented to the public that only water users who wished to connect to the system would pay for system expansion.

279. However, a fiscal study prepared by Carollo Engineers assumed that all vacant and developed property within the extended service area to the east and west of the existing Emigration Oaks water system would be charged a flat fee.

280. At a September 9, 2000 trustee meeting, EID represented to the public that connection to the EID system would be "entirely voluntary" for those households wishing to connect to the water system once operational.

2. Forgery of firm commitment contracts.

281. In order to obtain 57 executed "firm commitment contracts" from 57 households, and 57 negotiable instruments for the amount of $500.00 as required by the Commitment of Funds Letter, Fred Smolka executed two contracts with each resident wishing to "go on stand-by."

282. Although the language on the contract clearly indicated an unconditional obligation to connect to the water system once operational, Fred Smolka amended the agreement by handwriting the word "STANDBY."

283. On a second exact replica of the aforementioned contract, Fred Smolka omitted the handwritten amendment believed to have been presented to the Government at the time of the bond sale review.

284. Other than the aforementioned handwritten amendment by Fred Smolka, the "stand-by" and "firm commitment" contracts were identical.

285. In order to obtain a negotiable instrument for $500.00, Fred Smolka verbally informed Canyon resident Eckert sometime between September 2001 and May 2005 that a special "water connection hub" would have to be purchased by the property owner; however, no such water connection hub was installed nor does it exist.

286. Between September 10, 2002 and May 3, 2005, Fred Smolka executed firm commitment contracts for vacant lots with Mr. Creamer and Walter Plumb.

287. Actual payment was never received from Steve Creamer.

3. Failure to comply with Water Management and Conservation Plan.

288. Under the express terms of the Commitment of Funds Letter, EID was required to adopt a Water Management and Conservation Plan.

289. On November 14, 2002, EID – acting through Mr. Hughes and Mr. Hales – adopted the plan, thereby noting, "[a]fter substantial investigation, it was determined that the Canyon hydrology could not support more than approximately 700 homes without meaningful impacts to the flows in Emigration Creek," and assured the Government that "EID will continue to monitor both the monitoring wells owned by EID, stream flows, and use by our customers to determine if there is a deterioration in our conservation program."

290. Notwithstanding the foregoing, on August 20, 2015, EID through BIWC reported that the five monitoring wells constructed and owned by EID had not been observed for the past ten years, EID had no data on the flow of the creek running through Emigration Canyon, and there was no hydrological data preventing the addition of 5,000 new homes in the Canyon.

291. EID failed to properly meter water discharge from the Brigham Fork Well and individual water leases contrary to the express requirements of temporary change application t41129.

4. Failure to comply with crosscutting environmental statutes and coverup.

a. Mr. Creamer polluted Emigration Canyon's creek during installation of water pipes in derogation of the Clean Water Act.

292. During installation of water pipes in 2002, Mr. Creamer disposed construction waste directly in the Emigration Canyon Creek.

293. Mr. Creamer willfully concealed the disposal of construction waste in Emigration Canyon creek by hiding debris under concrete encasements.

294. Canyon residents law and McCallum reported the disposal of debris in the Emigration Canyon Creek to Mr. Wilde who conducted an on-site inspection of the complaint shortly thereafter.

295. Despite personally removing construction debris from the creek, Mr. Wilde failed to inform federal authorities and failed to record the incident in the case file.

296. Despite complaints from canyon residents Law and McCallum directly to Fred Smolka, Mr. Hughes and Mr. Hales, EID failed to record the violation in the organizational meeting minutes.

297. Despite the foregoing, the documents submitted by Carollo Engineering as part of the NEPA process stated that "the construction work" relating to the stream crossing had been "accomplished in an acceptable manner."

298. Despite this false representation, Mr. Wilde issue the FONSI on August 9, 2002.

299. EID – acting through Fred Smolka, Mr. Hughes, and Mr. Hales – Mr. Creamer, and Mr. Wilde actively concealed the disposal of construction waste by Mr. Creamer.

b. EID allowed a canyon resident to cross-contaminate its system with well water in derogation of the Safe Drinking Water Act.

300. To induce canyon resident S. Plumb to connect to the EID water system, sometime in 2007, Fred Smolka allowed S. Plumb to have a "t-valve" installed by Joe Smolka of Smolka Construction, which made it possible for S. Plumb to alternate between his private well and EID's system.

301. Such a mechanical device is strictly forbidden under the terms of the Safe Drinking Water Act due to in inherent possibility of contamination of the entire public drinking water system from a single private well.

302. Aware of the t-diverter, Mr. Hughes, Mr. Bradford, Mr. Stevens and Mr. Hawkes did not report it in the 2015 Sanitation Survey, the 2015 Water Quality Report or the 2016 Water Quality Report prepared by Aqua Engineering and mandated under the Safe Drinking Water Act.

c. Mr. Creamer and EID contaminated the Wildflower Reservoir in derogation of the Clean Water Act.

303. Under the Commitment of Funds Letter, EID assumed the contractual obligation to comply with all provisions of the Clean Water Act.

304. EID failed to report that, due to the substantial divergence from the original design and placement of the Wildflower Reservoir, the reservoir's structure proved deficient and immediately began leaking water after it became operational sometime before October 2003.

305. After canyon resident Law informed DDW that the structure was leaking sometime before October 23, 2003, Creamer immediately covered the entire structure with large amounts of construction debris including petroleum asphalt waste.

306. When EID Trustee Bowen asked Mr. Creamer to stop dumping hazardous material on the construction site, Mr. Creamer ignored the request.

307. In a letter dated October 9, 2003, canyon resident McCallum requested the DDW supervise the cleanup of the reservoir site. EID did not heed the request.

308. Instead, Fred Smolka reported that Mr. Creamer and five other people spent five hours cleaning asphalt out of the fill and "did a great job."

d. EID – working in concert with Aqua Engineering and AES – repeatedly failed to report contamination in its water system in derogation of the Safe Drinking Water Act.

309. Under the Safe Drinking Water Act, EID has an obligation to report contamination of drinking water delivered to canyon residents to both federal authorities and canyon residents.

310. Due to the placement of the Brigham Fork Well on property owned by Mr. Creamer without sufficient hydrological study, the well pump began pulling gravel into the system when put into operation sometime in 2003.

311. Several Canyon residents reported to EID Trustee Bowen that contaminated water ruined clothing and had an unpleasant odor.

312. In order to conceal the fact that Brigham Fork Well had been constructed prior to the issuance of the FONSI in September 2002, EID never secured a permanent operating permit for the well as a source of drinking water under the Safe Drinking Water Act.

313. On December 19, 2007, EID reported in its trustee meeting minutes that "[e]ven though the Brigham Fork well has been a 'workhorse,' complaints about colored water have been minimal."

314. During the EID Trustee meeting on March 12, 2015, Mr. Hawkes revealed that the Brigham Fork well was pumping water into EID's system three times per week despite the fact that water from the well was contaminated with iron bacteria.

315. On January 16, 2016 EID discontinued the use of the Brigham Fork Well "due to due to complaints of turbidity in the water and sulfur odor."

316. In a letter from May 5, 2014, DDW informed Fred Smolka of EID that AES had violated the State of Utah Public Drinking Water Rules by failing to test for radionuclides in the Upper Freeze Creek Well during the compliance period from 1/1/2014 through 3/31/2014 and that the Section 220-7 required EID to inform all customers within one year of the violation. EID never reported the violation.

317. EID instead reported on June 4, 2014 that EID was "supplying high quality water tested three times a week."

318. In a letter from August 8, 2014, DDW informed Fred Smolka of EID that AES had again violated the State of Utah Public Drinking Water Rules by failing to test for radionuclides in the Upper Freeze Creek Well from the period from 4/1/2014 through 6/30/2014 as well as Gross Alpha, Radium 226, Radium 228 and Uranium in Boyer Well # 2. EID was

again required to inform all customers within one year of the aforementioned violation. EID never reported the violation.

319. Between June 3, 2008 and August 8, 2014, EID has received 10 violations issued by DDW for various water testing and monitoring violations.

320. During the EID Trustee meeting from March 12, 2015, canyon residents John and Carrol Massion reported that they disliked the taste of EID water and preferred to stay on their own private wells.

321. In July 2015, canyon resident Crombie reported that water supplied by EID frequently "smelled like rotten eggs" and had a reddish-brown color which would not be consumed by her household pets.

322. Upon inquiry by canyon resident White during the EID trustee meeting on July 9, 2015 as to water-testing violations, Mr. Hawkes admitted that EID had received two violations for the "same violation" in the past, but AES has assured EID that the State of Utah simply "lost" the water tests.

323. Since initial testing of the Brigham Fork Well on November 1, 2002, water samples have been collected solely by Mr. Hall who travels 80 miles between the AES office, the Emigration well test sites, and the water testing facility for the collection of a single water sample.

324. Canyon resident FitzGerald asked Mr. Hall about the Utah State Drinking Water Rules sometime in 2013. Mr. Hall informed her that the state requirements were "nothing to worry about" because her water testing was fine.

325. On August 8, 2015 a canyon resident J. Edwards requested that EID publicly discuss removing Mr. Hall and AES from conducting tests of drinking water supplied by EID during the August 20, 2015 trustee meeting. EID refused.

326. EID, AES, Fred Smolka, Mr. Hughes, Mr. Stevens, Mr. Bradford, Mr. Hawkes and Mr. Hall failed to report the contamination of the drinking water to federal authorities.

e. EID failed to fix leaks to or obtain an operating permit for the Wildflower Reservoir in derogation of its duties under the Safe Drinking Water Act.

327. Under the Commitment of Funds Letter, EID has a continuing obligation to comply with the Clean Water Act.

328. Due to the substantial divergence from the original design and placement of the Wildflower Reservoir, the reservoir's structure proved deficient and immediately began leaking water after it became operational sometime before October 2003.

329. Canyon resident McCallum informed Mr. Wilde that the structure was leaking sometime before October 23, 2003 and provided photographs of water escaping from mortar patches in no less than six areas of the reservoir wall.

330. A few days after informing Mr. Wilde, Mr. Creamer immediately covered the entire structure with large amounts of construction debris including petroleum asphalt waste under a thin layer of seeded top soil.

331. In a letter to EID from March 3, 2004, Mr. Brown granted a temporary operating permit for the reservoir until October 1, 2004 at which time EID was to submit proof that the "construction defects responsible for substantial leakage from the tank … have been corrected."

332. EID never provided proof that the leaks had been fixed.

333. Mr. Wilde made no official record of the complaint by Canyon resident McCallum and did not include the photographs provided in the case file.

334. Despite the aforementioned deficiencies, on September 22, 2004, Mr. Rash of Carollo Engineering falsely certified that the Wildflower Reservoir and Brigham Fork Well had been constructed according to plans and specifications submitted as part of the loan application process and NEPA review.

335. To date, no permanent operating permit has been issued by DDW for the continued operation of the reservoir in violation of the Safe Drinking Water Act.

f. EID's well has leached chlorine into Emigration Canyon's riparian system in derogation of the Clean Water Act.

336. Due to the substantial divergence from the original design and placement of the Brigham Fork Well, the well began pulling gravel into the pump immediately upon commencement of operation sometime in 2003.

337. Upon replacement of the well pump in 2004, the well began pumping a "slime-like substance," requiring the replacement of the well casing.

338. During the EID Trustee meeting of March 12, 2015, Mr. Hawkes informed Mr. Hughes, Mr. Stevens and Mr. Bradford that the water from the Brigham Fork Well was being pumped "out" three times a week in order to "clear out the system."

339. The well house for the Brigham Fork Well is located immediately adjacent to the Brigham Fork Creek – a federally protected waterway.

340. EID, AES and Mr. Hall have failed to report the tri-weekly discharge of contaminated water into the canyon's since initial operation sometime in 2003.

341. The private well of Canyon resident McCallum, who resides directly below the Brigham Fork Well, no longer can be cleared of iron bacteria.

342. Despite the aforementioned deficiencies, on September 22, 2004, Mr. Rash of Carollo Engineering falsely certified that the Wildflower Reservoir and Brigham Fork Well had been constructed according to plans and specifications submitted as part of the loan application process and NEPA review.

g. EID destroyed habitat of a sensitive species.

343. Under the Commitment of Funds Letter, EID had a duty to adopt a Water Management and Conservation Plan.

344. As part of the plan, EID agreed to monitor stream flow and observe the five monitor wells within the canyon to ensure "as little impact as possible on the animals, flora, fauna."

345. The Bonneville cutthroat trout is a "sensitive species" (due to the fact that it was a possible "99% pure, core population") inhabiting the proposed project area.

346. Mr. Wilde knew that building the Wildflower Reservoir and Brigham Fork Well would cause degradation or loss of the Bonneville cutthroat habitat.

347. In a letter to Wilde from March 29, 2001, David N. Hintz of the Utah State Department of Natural Resources Division of Wildlife Resources also expressed "serious concern" for the core population of Bonneville cutthroat, a designated "Conservation Species" under the Conservation Agreement and Strategy for Bonneville Cutthroat Trout in the State of Utah (1997), which identified water development and diversion of stream flows as one of the "greatest concerns of habitat loss or degradation for this species."

348. In the aforementioned letter, Hintz recited that the proposal "does not indicate the current and historical flow patterns in the Emigration Creek and its Burr Fork, Killyon Canyon and other tributaries, and future flow patterns under the proposed housing and water development, and their effects on the stream and riparian environment. Information is also lacking regarding sources of water for the future development."

349. Sometime in May 2002, EID through Creamer installed water lines across the Emigration Canyon Stream, even though it was identified as a habitat for the Bonneville cutthroat trout, a federally protected species.

350. In a letter from May 15, 2002, DDW informed EID that the construction costs for the stream crossing were ineligible for federal funds because construction had commenced before the FONSI had been issued by DDW.

351. Construction methods used by EID proved grossly inadequate and "caused negative impacts to the riparian habitat" that "impacted [the] spawning habitat" of the Bonneville cutthroat trout.

352. Despite the aforementioned, the EA concluded that "the construction work [for the stream cross] itself may have been accomplished in an acceptable manner."

353. EID, BIWC and Don Barnett willfully failed to observe water levels of the five monitoring wells during the development of the Brigham Fork Well in 2002.

354. During the Trustee meeting from January 20, 2015, Barnett admitted to Canyon resident Irons that the five monitoring wells were not used during the pump test of the Upper Freeze Creek Well in 2013 and "had not been used for a long period of time" even though

Emigration Canyon Creek had been identified as a federally protected habitat for the Bonneville cutthroat trout.

355. During the meeting, Don Barnett conceded that BIWC had not performed testing to determine the age of the ground water during the development of the Upper Freeze Creek Well, even though canyon groundwater was in direct communication with Emigration Canyon Creek, which provided habitat for the Bonneville cutthroat trout.

356. In the June 18, 2015 EID Trustee meeting, Don Barnett reported Emigration Creek was flowing only at 25% of average even though snowpack in Northern Utah was between 130 % and 150 % of normal.

357. Upon inquiry of canyon resident S. Plumb in June 2015 as to the reason for decreased stream flow, Mr. Hughes responded that S. Plumb "should take that up with the Utah Legislature" because stream flow has "nothing to do with EID."

358. Upon inquiry of Canyon resident J. Edwards, in June 2015 as to decreased stream flow, Don Barnett responded that "there is no way EID was affecting stream flow" despite the fact that Mr. Hawkes reported minutes earlier that the four wells controlled by EID had drawn over 9 million gallons of water from Canyon groundwater since January 2015 and thirteen million gallons as of August 2016.

359. Since completion of the Brigham Fork Well and Upper Freeze Creek Well, the Bonneville cutthroat trout has ceased spawning in and around the area of the creek where EID and Mr. Creamer constructed the stream crossing..

360. Relator is informed and believes that Mr. Creamer, EID, BIWC, Don Barnett, Fred Smolka, Mr. Hughes, Mr. Hales, Mr. Stevens, Mr. Bradford, and Mr. Hawkes have

actively destroyed the habitat of the Bonneville cutthroat trout by improper construction methods and due to willful refusal to comply with the aforementioned provisions of the 2005 Bond Agreement and Water Conservation Plan.

5. EID has concealed its efforts to build a water system for the benefit of land developers.

a. Influencing *The History of Emigration Canyon*.

361. As set forth in the Commitment of Funds Letter, if DDW had determined that there was "sufficient public opposition" to the construction of the Brigham Fork Well and the Wildflower Reservoir, a bond election would have been required.

362. On October 1, 2003, Dr. Furse published book called *The History of Emigration Canyon: Gateway to Salt Lake Valley*.

363. Under footnote 80 of the section entitled "Pains of Progress," Dr. Furse recorded that EID had assumed the Emigration Oaks water system but that property development was limited to "105 homes," when in fact EID had assumed the legal liability of 223 individual properties.

364. In the book, Dr. Furse included a diagram from Jack Barnett's master's thesis concerning the general geologic makeup of the Emigration Canyon; however, Dr. Furse makes no mention of Jack Barnett's ultimate conclusion that Emigration Canyon could not sustain large-diameter commercial wells.

365. Since the publication of *The History of Emigration Canyon: Gateway to Salt Lake Valley*, EID has not collected water-right lease fees from Dr. Furse.

b. Impeding access to public records.

366. EID published no meeting minutes between May 2001 and March 2002.

367. During a visit to the State Engineers office by canyon resident D. Jones sometime in June 2014 concerning the priority date of EID water shares, an employee under the direction of Jones stated that any questions regarding EID should be answered by EID hydrologist Don Barnett.

368. In a preliminary meeting with Ryan Roberts of the Utah State Auditor's Office in June 2014, EID – acting through Mr. Bradford – responded that EID owned "useless, undevelopable property" when questioned about EID's extensive property holdings.

369. In response to the GRAMA request submitted by Relator on October 25, 2017, EID refused to provide copies of all "standby contracts."

370. Immediately following the December 17, 2015 EID Trustee meeting, the EID "Advisory Committee" members, including Mr. Creamer and Joseph Smolka, convened in closed session in violation of the Utah Open Meetings Law and failed to voice record the meeting as required under Utah State law.

371. On December 12, 2013 Canyon resident S. Plumb placed a GRAMA request with Mr. Hawkes for EID's financial records.

372. When Canyon resident S. Plumb inquired as to the status of the GRAMA request on January 29, 2014, EID – acting through Mr. Hawkes – posted a letter signed by Fred Smolka threatening to discontinue water service in two days, if S. Plumb failed to bring his account current within two days.

373. During the initial review of the EID project file by the Relator in August 2014, the memorandum in which Mr. Onysko called the Wildflower Reservoir "preposterously oversized"

was not discovered in the EID project file; the memorandum was only recovered after Onysko filed a GRAMA request with DDW.

374. The aforementioned Onysko memorandum does not appear to have been scanned into the electronic record of the DDW database.

375. On August 7, 2015, Relator learned from the DDW records manager Copfer that the EID project file was unavailable because it was "being cataloged" by Mr. Grange.

376. The contract between EID and Creamer was discovered by the Relator on August 2014, but appears to have been removed by unknown person after the seal on this action was lifted on June 12, 2015. Moreover, the contract does not appear to have been scanned into the electronic record of the DDW database.

377. Mr. Hughes refused to comply with a GRAMA request for records of water lease payments from individuals who had leased water rights from EID.

c. Denying public inspection of water infrastructure.

378. Both the Wildflower Reservoir and Brigham Fork Well are only accessible through a 12-foot, French style, steel gate owned and controlled exclusively by Mr. Creamer.

379. On August 6, 2015 in an email to Mr. Hawkes, canyon resident McCallum requested to inspect the water lines located on Mr. Creamer's property.

380. In an email dated August 11, 2015, Mr. Hawkes refused to allow access, citing "security issue or other concerns" that must first be addressed by the EID Board of Trustees before access to Mr. Creamer's property could be granted.

381. During the August 20, 2015 Trustee Meeting, Mr. Hughes and Mr. Stevens again denied access to EID water lines located on Mr. Creamer's property citing "security concerns."

d. Potential interference with EPA investigation.

382. Sometime in January 2014, the EPA Office of Inspector General initiated an investigation of the allegations contained in Relator's original complaint in this action.

383. In a subsequent telephone conversation, Mr. Grange, the DDW construction assistance section manager, assured Daniel Hawthorn of the EPA Office of the Inspector General that he would "investigate" the allegations with the "readily available" documents and provide the EPA with his findings.

384. During the telephone conversation, Mr. Grange falsely reported that the EID project file was located in the state archives, when, in fact, it had been already retrieved at the request of Relator in August 2014 and was in the custody of the DDW records manager.

385. Mr. Grange subsequently provided EPA Investigator Hawthorn with a screenshot of the following note from DDW's files: "[o]n 9/23/2003 the final inspection was completed. Pumphouse [sic] and waterline appear to have been constructed according to plan and compliance [sic] with Drinking Water Rules."

386. Carollo Engineers did not certify the project as complete until September 22, 2004.

387. In an email from Mr. Grange to Mr. Hawthorn, Mr. Grange stated that, apart from the "loan in 2000," "[a]ny other monies were unrelated to the feds," even though any infrastructure subsequently connected to the Brigham Fork Well or the Wildflower Reservoir had to comply with the terms of the Commitment of Funds Letter and the Water Conservation and Management Plan.

388. In the email, Mr. Grange failed to report that the EID project file comprising "one and one-half file boxes" located "in the state archives" had been duplicated in electronic form in August 2014 and could have been easily searched and transmitted via computer.

389. In the email from Mr. Grange to Mr. Hawthorn, Mr. Grange represented that the "Date Closed" was "12/5/2002," despite the fact that DDW had first approved the construction design on November 15, 2002.

390. In the email exchange from Mr. Grange to Mr. Hawthorn, Mr. Grange specifically emphasized that the "Date Closed" was "12/5/2002," despite the fact that federally-backed funds were first distributed to EID from the DDW escrow account sometime after May 7, 2003 and continued through September 29, 2004.

391. In the aforementioned email correspondence from Mr. Grange to Mr. Hawthorn, Mr. Grange emphasized that the "Date Closed" was on "12/5/2002," but failed to mention that the project closed out on May 3, 2005.

392. Shortly after Mr. Hawthorn reported that the federal government would not further investigate the present action "based upon information provided by [Mr. Grange] and [his] office," Mr. Grange assured Mr. Hawthorne that he had provided the government with "appropriate and relevant information" as a result of Grange's "investigation" of the allegations filed under court seal.

393. On January 20, 2015, Mr. Grange informed EID that DDW had been contacted by Danial Hawthorne of the EPA's Office of the Inspector General regarding the present litigation filed by Relator on September 29, 2014 and provided Fred Smolka all email correspondence

between DDW and EPA Investigator Hawthorne regarding the matter filed under federal court seal.

e. Failure to report cross connection in the 2015 Sanitation Survey.

394. In August 2015, EID had to submit a federally mandated Sanitation Survey of the EID Water System.

395. Prior to receiving the sanitation survey, Mr Hughes, Mr. Bradford, Mr. Stevens and Mr. Hawkes that learned that EID's water system had a single valve at one of its connections, which allowed the homeowner to simultaneously receive water from both his private well and EID's water system, potentially exposing EID's system to bacterial contamination. EID did not report the cross connection in the 2015 sanitation survey.

H. EID's trustees and employees used EID for personal enrichment.

396. Of the six payments dispersed under the $1.8 million loan, Fred Smolka rendered payments for individual personal gain as follows: $106,993.00 to himself ($26,993.00 over budget); $7,915.75 to Joe Smolka for unknown services;; $34,145.30 to Steve Creamer for placing water lines; $400.00 to Tyson and Ryan Creamer for unknown services; and $1,140.00 to Mr. Hughes for dirt bags and snow removal.

397. Mr. Hughes, Mr. Hales, Mr. Bradford and Mr. Stevens permitted Fred Smolka to render payments on behalf of EID in excess of $150,000.00 to Fred Smolka's family, including his wife (Marilyn Smolka), his brother (Joe Smolka), his daughter (Tanya Bergstrom), his son-in-law, his daughter, and his grandson.

398. EID – acting through Fred Smolka – leased water rights without remuneration to the following: Mr. Bradford in 2002; Steve Creamer in 2013 for the construction of a large pond

in front of his personal residence; and Dr. Furse, which allowed her to purchase property at a reduced price and then immediately obtain building permits from Salt Lake County with a water right leased from EID.

399. Between 2004 to present, EID – acting through Fred Smolka – waived impact and water usage fees for the personal benefit of Mr. Hughes, Mr. Bradford, Mr. Stevens, Mr. Creamer, and Dr. Furse.

400. Fred Smolka's draws an annual salary of $120,000.00 from EID.

401. After the 2001 EID trustee election, Fred Smolka stepped down as EID Trustee Chairman and assumed the position of EID's general manager. EID did not publicly announce Fred Smolka's appointment, nor did EID allow other members of the public to apply for the position.

402. According to EID financial records, EID has rendered direct payments to Fred Smolka totaling $594,613.47 since January 2000.

403. According to EID financial records, EID has rendered direct payments to Marilyn Smolka totaling $6,836.86 since January 2000.

404. In its yearly budget since 2004, EID has designated payments to Carollo Engineering, BIWC and Aqua Engineering in excess of $1,000,000.00 for engineering and hydrological studies.

405. On February 13, 2014, despite EID's financial inability to service its debt obligations, Mr. Hughes, Mr. Bradford and Mr. Stevens unanimously voted to increase their yearly compensation from $2,000.00 to $5,000.00.

406. EID gave Mr. Bradford a water right for the construction of his private residence, but failed to collect lease and impact fees totaling $11,000.00 from Mr. Bradford.

407. Kem Gardner of the Boyer Company had hired Mr. Hughes to complete the community septic system in the area of Emigration Oaks known as "Emigration Estates" through the company Ecosens even though Mr. Hughes had diverted the funds for another project, Kem Gardner had waived recovery of fees paid to Mr. Hughes.

1. Construction contract awarded to Aqua without bidding.

408. In December 2014, when questioned by canyon resident S. Plumb why proposed projects were not being submitted to competitive bidding, EID responded that EID prefers to work with people who "know Emigration Canyon."

409. In January 2015, EID announced during its trustee meeting the construction of a waste-water system to service seventeen "existing and future" homes.

410. In February 2015, EID confirmed that Aqua Engineering would complete the "Request for Statement of Qualifications" needed for the competitive bidding of engineering services.

411. When questioned by Canyon resident S. Plumb as to the appropriateness of having Aqua Engineering perform such a task if it would be in fact one of the bidders for the project, Mr. Neeley responded that Aqua "had no interest" in submitting a statement of qualifications necessary to bid the project.

412. Aqua Engineering submitted the only statement of qualifications.

413. In February 2015, Mr. Hawkes failed to return calls from Engineer Greg Olsen who intended to present a statement of qualifications necessary to bid the project.

414. Despite having received only one statement of qualification from Aqua Engineering, EID – acting through Mr. Stevens and Mr. Bradford – awarded Aqua Engineering the contract for engineering services on March 12, 2015.

2. The $60K planning grant and Hughes septic system.

415. On June 24, 2015, DEQ Water Quality Board unanimously awarded EID a $60,000.00 federally-backed planning grant to study the coliform pollution of the stream that runs down Emigration Canyon.

416. A 1981 study by two University of Utah experts found that only five percent of the coliform pollution in the stream was coming from underground disposal systems such as septic and holding tanks.

417. Fred Smolka, Mr. Hawkes, Aqua Engineering, Carollo Engineering, and Mr. Rasmussen participated in the application process for the grant.

418. During the 2015 EID trustee election for the reelection of incumbents Mr. Hughes and Mr. Bradford, Fred Smolka, Mr. Hughes and Mr. Bradford cited the grant as evidence that EID was taking necessary steps to prevent contamination of the canyon stream.

419. On information and belief, EID intended to use the grant funds to service the $1.8 million loan.

420. During the EID Trustee meeting on November 8, 2014, Mr. Hughes insisted that the proposed septic-system project be completed by his company Ecosens – also called High Science – although Mr. Hughes is not a licensed contractor.

421. Mr. Hughes is listed under the email address "highscience@gmail.com" in the official EID correspondence from October 25, 2017.

422. The company "Ecosens" registered with the Utah Department of Commerce is listed under defendant Hugh's current cell phone number, but reflects a non-existent address in Holiday, Utah as its primary place of business.

423. On the EID website, Mr. Hughes's email address is listed as "highscience@gmail.com."

424. Sometime in 2001, Boyer Company – acting through Kem Gardner –hired Mr. Hughes to construct a community septic system in the area of Emigration Oaks known as "Emigration Estates."

425. Even though Mr. Hughes did not complete the project, and Boyer Company allowed Hughes to retain all monies rendered for the project.

426. In a EID correspondence to canyon residents from June 2014, Mr. Hughes, Mr. Stevens and Mr. Bradford insisted that Fred Smolka and Mr. Hawkes were "independent contractors" and thus exempt from Utah state nepotism regulations.

427. Contrary to the aforementioned, in June 2015, Mr. Hughes, Mr. Stevens and Mr. Bradford approved using EID public funds to pay for the legal expenses of Fred Smolka and Mr. Hawkes in the present action. EID did not record this decision in its organizational minutes.

428. Mr. Hughes insisted that his company Ecosens be awarded contracts for the DWQ grant of $60,000.00 during the November 2014 EID Trustee meeting.

I. EID has abused its power to detriment of canyon residents.

429. With 677 United States postal mailboxes in Emigration Canyon, EID provides water service to less than 34% of the households as reported to the State Engineer; however,

EID taxes every developed and vacant property owner at the highest rate allowed under Utah law.

1. EID has mislead residents into giving up their water rights.

430. In order to coerce 57 households to agree to connect to the expanded water system, EID – acting through Fred Smolka, Mr. Hales, Mr. Hughes, Carollo Engineering, and BIWC – made the following false and misleading statements to canyon resident.

431. At numerous public meetings, Fred Smolka told canyon residents that EID possessed superior water rights to those of all existing homes on private wells.

432. At a public meeting held on March 7, 2002, Mr. Hales told canyon residents that it was "impossible" for EID to transfer water rights from Salt Lake Valley to Emigration.

433. At a public meeting held on March 18, 2002, Fred Smolka told canyon residents that the primary purpose of the construction of the 1-million-gallon Wildflower Reservoir was for "fire protection."

434. At a meeting held on March 18, 2002, Mr. Hughes told canyon residents that, while the planned size of the 1-million gallon Wildflower Reservoir was excessive, it was the best decision based on "the economies of scale" and not for future development.

435. At a meeting held on March 7, 2002, Don Barnet of VIWC told canyon residents that, if smaller wells were replaced by one large-diameter commercial well, impact on the canyon "aquifer" would be the same.

436. In 2003, Fred Smolka told a canyon resident by the name of Eckert that private wells might "go bad" or "dry up" in the future, and if Mr. Eckert did not sign a "firm

commitment contract," or at least a "stand-by agreement," the home would be without essential water service.

437. During trustee meetings held in 2002, Fred Smolka, Mr. Hughes and Mr. hales told canyon residents that private water rights in the Canyon were "worthless" due to EID's superior water shares.

438. In 2003, Fred Smolka told Eckert that, for residents who signed a "stand-by agreement," payment in the amount of $500.00 was necessary in order to purchase a special "water connection hub" even though no such hub was installed nor does it exist.

439. EID told canyon residents by the names of McCallum, Biggs, and Block that, if a resident refused to participate in the water system, EID would encumber title thereto, so that any future owner would be unable to connect to the EID water system in the future, thereby decreasing the resale and appraised value of the home.

440. At a public meeting held on March 7, 2002, Fred Smolka told property owners unwilling to sign either a "firm-commitment contract" or a "stand-by agreement" that they would not be required to pay for the system expansion and maintenance because it was "entirely voluntary."

441. In a letter dated May 31, 2002, Fred Smolka told canyon residents that, if 57 households signed water-connection agreements, water fee assessments "would stay the same no matter how many people join the system."

442. In a letter dated May 31, 2002, Fred Smolka told canyon residents that the proposed system would not increase future development in the Canyon due to the fact that

current zoning restrictions controlled development in the Canyon and not access to a readily available water system.

443. EID told canyon residents that it would not take any action which would "accommodate connections that will cause demand on the canyon's resources in excess of 700 equivalent residential units."

444. Upon inquiry of Canyon resident McCallum in 2002 as to the possible impact of the Brigham Fork Well on her private well located in the area of lower Pinecrest Canyon, Don Barnett responded that McCallum's well was located in a "different aquifer" than that of the Brigham Fork well even though the actual distance between the two underground water sources was less than 1 mile.

445. Since August 16, 1988, forty-six residents of Emigration Canyon have relinquished water rights to EID in order to connect to a water system that EID has constructed in the canyon. Residents did so because they mistakenly believed that their water rights were inferior to EID's water rights. In 2007, EID through Fred Smolka informed single-mother and canyon resident Ross during the purchase of a home located within the canyon that she would forfeit her "leased" water right from EID if she did not sign a "stand-by contract" and render immediate payment of $750.00 prior to closing of the home purchase.

446. Fearing that she would be without water from her private well, Canyon resident Ross rendered full payment as well as monthly payments of $40.00 per quarter until 2012.

447. During the sale of the property in 2012, EID informed canyon resident Ross sometime in 2012 that she must discontinue use of her private well as stipulated under the express terms of the "stand-by contract."

448. After placing a lien on the residence shortly prior to closing, the impact fee for connecting to the EID water system of $6,250.00 was collected from the escrow account of the title company upon closing.

449. No such lease contract was executed by the previous owner nor does it exist.

450. Canyon Ross discontinued use of her private well and connected to the EID water system shortly thereafter.

451. A search of the Utah Division of Water Rights records reveals that Canyon resident Ross possessed a superior water right to that owned by EID.

452. Sometime prior to March 12, 2015, EID informed Canyon residents Massion and Duheric along with 6 other unidentified Canyon residents that they had "leased" water rights from EID and were therefore contractually obligated under the "lease contract" to discontinue use of their private wells and to connect to EID's water system.

453. During the Trustee meeting of March 12, 2015, Mr. Stevens and Mr. Bradford ordered EID's counsel to enforce the aforementioned "lease contracts."

454. Mr. Duheric's water rights were superior to those held by EID.

455. On August 13, 2015, Mr. Hawkes informed Duheric that he had to connect to EID's system by September 16, 2016 or face criminal charges.

456. Mr. Bradford neither leased nor relinquished water rights upon connection to the EID water system.

457. In an interview with Salt Lake Tribune reporter Brian Maffly sometime between June 12 and 18, 2015, Mr. Hawkes reported that EID held "the canyon's most senior water right dating back to 1872."

458. On December 13, 2013, EID – acting through Don Barnett – failed to prevent the permanent change application "a12710b" for 94.04 acre feet supplying water to 188 families from lapsing under water right #57-8865.

459. Having failed to file a timely extension to the aforementioned water right, all 188 families supplied with water from EID now have a priority date of January 2014.

460. Any impairment of a single water right perfected prior to January 30, 2014, could lead to discontinuance of water service to all 188 homes should the holder of the perfected water right bring legal action against EID.

461. EID through BIWC and Don Barnett purposefully allowed the permanent-change application to lapse in order to secure a better priority date for the 649 acre feet under water right #57-7796 to be utilized for the massive planned development of property belonging to Mr. Creamer, the Gillmors and Neuscheler.

462. During the EID trustee meeting of March 12, 2015, Mr. Bradford reported that the Emigration Creek was down 50% of its normal flow due to high-water consumption within the area of Emigration Oaks.

463. Since 2014, canyon residents Irons, McCallum, Penske, Terry and Karrington have reported substantial decrease in the productivity of their private wells and have issued complaints with the DWR for the impairment of superior water rights.

464. To date, over 27 private wells with superior water rights have reported impairment due to the extraction of water via large-diameter commercial wells operated by EID as predicted in the 1966 Barnett Thesis.

2. EID's trustees meddled in an election to remain in power.

465. On May 11, 2011, Mr. Hughes, Mr. Bradford and Mr. Stevens unanimously appointed Fred Smolka as the EID's "Election Specialist."

466. During the November 2013 EID-trustee election, Fred Smolka and his spouse Marilyn Smolka inappropriately supported the re-election of Mr. Stevens by encouraging voters during balloting to cast their vote for Mr. Stevens, even going so far as commenting, "thank-you for voting for Mark [Stevens]. He really needs your vote"; withholding ballots from residents antagonistic to the management of EID; improperly asking a canyon resident Terry how he intended to vote before giving a replacement ballot; improperly sending ballots outside of Emigration Canyon to non-existent mailing addresses; and improperly collecting and opening ballots prior to ballot counting by election judges.

467. Mr. Hughes, Mr. Bradford and Mr. Stevens agreed to compensate Fred Smolka over $6,000.00 to conduct the trustee election despite the fact that the same service provided by Salt Lake County would have cost canyon taxpayers $1,594.60.

3. EID has serviced the debt on its "preposterously oversized" water system by levying exorbitant fees and taxes on canyon residents.

468. On May 11, 2011, EID's attorney opined that EID could not retire federally-backed debt with general property taxes.

469. Despite this unequivocal legal opinion, on July 7, 2011, EID, through Mr. Bradford and Mr. Hughes, approved a "loan" of $135,000.00 from the "General Fund" to the "Emigration Oaks Fund."

470. On December 13, 2007 EID through Fred Smolka deposited an impact payment of $6,100.00 into the Emigration Oaks account despite the fact that Canyon resident White did not reside in the Emigration Oaks development.

471. On December 6, 2012, EID combined the Emigration Oaks and General accounts in order to conceal the diversion of property taxes to service EID's massive federally-back debt obligations.

472. In the Trustee meeting from March 12, 2015, Mr. Stevens revealed that revenue from general property taxes was being used to service EID's debt obligations.

473. During the EID Trustee meeting from June 18, 2015, Mr. Hughes, Mr. Stevens and Mr. Bradford approved moving $50,000.00 from the "operation and maintenance" budget to "legal expenses" for the current legal action.

474. Sometime in June 2105, EID's insurance carrier denied coverage for legal expenses associated with the present litigation.

475. Salt Lake City charges an impact fee of $3,000.00 for a new residential home located within the limits of Salt Lake City.

476. By contrast, in 2007, EID raised the water connection impact fee from $5,500.00 to $17,000.00 for all homeowners not "on stand-by." There is no record in EID's meeting minutes that EID's trustees ever voted on this issue.

477. Every year since 2007, EID has set property taxes at the highest rate allowed under Utah law.

478. For example, in 2014, S. Plumb's property taxes skyrocketed from $40.74 to$290.90 due to the taxes and fees imposed by EID.

479. To increase water usage fees, EID has refused to install valves on its water system that would decrease water pressure. Higher water pressure leads to higher water consumption.

480. As measured in April 2013, the water pressure at S. Plumb's residence was twice that of a residence with normal water pressure, which led to the rupture of a water tank and extensive water damage possible due to the 4-inch water supply line placed by EID in violation of federal construction standards.

481. In 2007, EID intentionally installed pressure reducing valves on fire hydrant supply lines instead of domestic water connections in order to maintain high water pressure thereby increasing consumption rates and water usage fees.

482. EID has issued monthly water bills to canyon resident S. Plumb in excess of $2,500.

483. On June 1, 2013, EID proposed raising "base" and "stand-by" fees by $25.00 per month to include a new monthly surcharge of $1,400.00 for excessive water use despite the fact that EID through Fred Smolka has assured Canyon residents in a letter dated May 31, 2001 that water fee assessments would never change.

484. On June 1, 2013, EID proposed a "fire-hydrant-rental fee" of $15.00 per month to eight-six households on private wells "who pay nothing" for the water service provided by EID.

485. All 17 residents of Spring Glen who already owned four fire hydrants in their community before EID installed 4 additional hydrants have all been charged a "fire-hydrant rental fee" of $15.00 per month since September 2013.

486. In June 2013, Joseph Smolka, informed Canyon resident Karrington that EID intended to raise the fire-hydrant rental fee to $50.00 per month "as soon as possible."

487. Despite the clear language of the correspondence from June 1, 2013 requiring fire-hydrant rental fee payments from "households," EID – acting through Fred Smolka – levied fees not only for developed properties but also numerous vacant lots.

488. In the period from September 2013 to September 2014, EID assessed a $520.00 fire-hydrant rental fee on a single vacant parcel belonging to a 86 year-old, widowed resident on a private well.

489. In June 2015, EID though Eric Hawkes billed canyon resident O'Connor for $320.00 for a "water base fee," even though the aforementioned resident was on a private well and did not receive any water service from EID.

490. On November 14, 2013, six unidentified Canyon residents on fixed-monthly incomes requested relief from the fire-hydrant rental fees under Salt Lake County's "circuit breaker program."

491. Even though the $1.8 million loan was intended to make water more affordable for these six residents, EID – acting through Mr. Hughes – refused to waive the fire-hydrant rental-fees.

492. When canyon residents protected EID's exorbitant fees, Mr. Hughes replied that Canyon residents who "didn't like EID fees … were welcome to move out of Emigration Canyon."

493. In a meeting held on January 13, 2015, Mr. Bradford stated that canyon residents living along Emigration Canyon Road were "second-class citizens." Mr. Hughes commented that the area was like "the ghetto." Mr. also stated, "if [EID] were giving out gold in Emigration Canyon, they [the canyon residents] would complain about the color."

494. On February 6, 2003, Canyon resident Christensen informed EID that the water rates charged by EID was twice that of Salt Lake City.

495. In September 2014, under Salt Lake County's "certified delinquent program," EID – acting through Mr. Hawkes – certified forty-eight canyon property owners as delinquent in "fire-hydrant-rental" and "stand-by fees," which had the collateral effect of increasing EID's tax revenues through tax foreclosure despite the fact that on August 7, 2008 EID legal counsel Kinghorn opined that EID may not collect fee through property taxes.

496. In the year 2013, EID certified only three property owners as delinquent to Salt Lake County.

497. EID – acting through Mr. Hawkes – certified a single, vacant parcel belonging to a 86-year old, widowed Canyon resident to Salt Lake County for the amount of $520.00.

4. EID's preposterously oversized water system has depleted Emigration Canyon's water reserves.

498. Since installation of EID's large commercial wells, five residents of the canyon have filed complaints with the State Engineer citing substantial decreases in the productive capacity of their private wells.

499. In April 2015, blind review of Emigration Canyon's hydrology by renowned hydrologist Dr. Hansen revealed that that the stream running down the canyon has not maintained minimum flow in 8 of the past 14 years contrary to the Water Conservation and Management Plan.

500. Since commencement of the present proceedings, eight residents of Emigration Canyon have reported substantial impairment of private wells.

IV. FIRST CAUSE OF ACTION
(Direct False Claims under 31 U.S.C. § 3729)

501. Relator incorporates all preceding paragraphs, including the Introduction.

502. Defendants knowingly presented or caused to be presented a false or fraudulent claim to an officer or employee of the United States Government – or to a contractor, grantee, or other recipient – in order to induce disbursement of $1.846 million in federal funds.

503. Defendants falsely claimed that they intended to use the funds to bring clean water to 67 canyon residents, when in fact they always intended to use the funds to build water infrastructure for the benefit of wealthy land developers.

504. Defendants falsely claimed that 57 households had signed binding agreements to connect to EID's water system.

505. Defendants falsely claimed that Emigration Canyon's hydrological system could support large-diameter commercial wells.

506. Defendants falsely claimed that its water rights had priority other water rights within Emigration Canyon.

507. Defendants knowingly made, used, or caused to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the United States Government – or by a contractor, grantee, or other recipient – in order to induce disbursement of $1.846 million in federal funds.

508. Defendants falsely certified that the Brigham Fork Well, Wildflower Reservoir, and water pipelines had been built according to the plans and specifications.

509. Defendants falsely certified that construction of the Brigham Fork Well, Wildflower Reservoir, and water pipelines was done in compliance with crosscutting environmental statutes.

510. Defendants falsely certified that the Wildflower Reservoir had a valid operating permit.

511. Defendants falsely certified that EID had sufficient water rights to operate the Brigham Fork Well.

512. Defendants falsely certified that Emigration Canyon's hydrological system could sustain large-diameter commercial wells.

513. Defendants conspired to defraud the United States Government by fraudulently inducing disbursement of $1.846 million in federal funds.

514. Defendants false claims damaged the government in an amount to be proven at trial.

V. SECOND CAUSE OF ACTION
(Reverse False Claims under 31 U.S.C. § 3729)

515. Relator incorporates all preceding paragraphs, including the Introduction.

516. EID knowingly made, used, or caused to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the United States Government, or knowingly concealed or knowingly and improperly avoided or decreased an obligation to pay or transmit money or property to the United States Government.

517. Alternatively, Defendants conspired to commit the violation described in paragraph 530.

518. EID obtained a $1.846 million loan.

519. The loan consists of federal funds.

520. The loan carries a below-market interest rate of 2.1 percent.

521. EID has not paid off the loan's balance and is making ongoing, monthly payments.

522. Because of the below-market interest rate, each and every time EID makes a payment on the loan, EID receives a benefit from the United States Government in the form of a lower monthly payment.

523. EID accepted the loan on condition that it would use the funds to bring clean water to 67 existing residents of Emigration Canyon who had contaminated wells.

524. EID accepted the loan on condition that it would comply with cross-cutting environmental statutes like the Clean Water Act or Endangered Species Act.

525. EID accepted the loan on condition that it would not use the funds for the benefit of land developers or speculators.

526. EID accepted the loan on condition that it would monitor the output of its wells so as not to decrease flows in private wells or the Emigration Canyon stream.

527. EID accepted the loan on condition that it would build its water system in accordance with the plans submitted during the NEPA process and otherwise maintain valid permits for the system under the Safe Drinking Water Act.

528. By accepting the loan, EID created an express or implied contractual relationship.

529. EID defaulted on the loan by failing to comply with the foregoing conditions.

530. Because EID has defaulted on the loan, it has an established duty to transmit or pay money to the United States Government.

531. Defendants concealed or conspired to conceal from the United States Government that EID had defaulted on the loan in order to help EID avoid a duty to transmit or pay money to the United States Government.

532. Defendants conduct has damaged the United States Government in an amount to be proven at trial.

VI. PRAYER FOR RELIEF

WHEREFORE, Relator, on behalf of the United States of America, requests the Court enter the following relief:

A. That this Court enter judgment against Defendants in an amount equal to three times the amount of damages the United States has sustained because of Defendants' actions, plus a civil penalty of not less than $5,500.00 and not more than $11,000.00 for each violation of 31 U.S.C. § 3729 as well as a forfeiture of any unjust enrichment and/or unlawful profit;

B. That Relator be awarded the maximum amount allowed under § 3730 of the False Claims Act;

C. That Relator be awarded all costs of this action, including attorney fees and expenses; and

D. That Relator and the United States of America recover such other and further relief as the Court deems just and proper.

DATED: 16 April 2018

CHRISTENSEN & JENSEN, P.C.

s/Scot A. Boyd
Scot A. Boyd
Stephen D. Kelson
Bryson R. Brown

EXHIBIT G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

UNITED STATES OF AMERICA *ex rel.* MARK CHRISTOPHER TRACY, Plaintiff, v. EMIGRATION IMPROVEMENT DISTRICT, *et al.*, Defendants.	**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR ATTORNEYS' FEES AND COSTS AND GRANTING DEFENDANTS' MOTION TO AMEND** Case No. 2:14-cv-701-JNP District Judge Jill N. Parrish

Defendants Emigration Improvement District ("the District"), Michael Hughes, Mark Stevens, David Bradford, Fred R. Smolka (deceased), Eric Hawkes, and Lynn Hales (collectively, "Defendants") filed a motion for attorneys' fees and costs pursuant to 31 U.S.C. § 3730(d)(4) and 28 U.S.C. § 1927 against *qui tam* relator Mark Christopher Tracy ("Tracy") and his counsel, Christensen and Jensen, P.C. ("Christensen & Jensen"). Defendants subsequently moved to amend the motion to withdraw claims against Christensen & Jensen. For the reasons stated below, the court awards attorneys' fees and costs against Tracy.

BACKGROUND AND PROCEDURAL HISTORY

The District is organized under Utah law as a special service district to provide water and sewer services to Emigration Canyon residents. The District can issue bonds, charge fees and assessments, and levy taxes on Emigration Canyon residents. The District received a $1.846 million loan from Utah's Drinking Water State Revolving Fund, which uses federal funds to

finance the construction of water systems for drinking or culinary water. The District received the final disbursement on the loan around September 2004.

Tracy, acting as a relator, filed a *qui tam* complaint against Defendants under the False Claims Act, 31 U.S.C. §§ 3729 *et seq.*, on September 26, 2014. Tracy amended his complaint three times. He filed his First Amended Complaint on May 1, 2015, his Second Amended Complaint on August 18, 2015, and his Third Amended Complaint on April 16, 2018. Tracy also recorded a *lis pendens* against a portion of the District's water rights on August 20, 2015, claiming that they were the subject of the present litigation.[1] The United States declined to intervene in the matter on three separate occasions: (1) after reviewing the First Amended Complaint on May 8, 2015 (ECF No. 11); (2) after reviewing the Second Amended Complaint on November 20, 2015 (ECF No. 69); and (3) after reviewing the Third Amended Complaint on March 20, 2018 (ECF No. 199).

The final operative complaint alleged two causes of action. First, Tracy alleged that the District and its supposed co-conspirators made false statements that induced the government to disburse the proceeds of the $1.846 million loan. Second, Tracy alleged that the District, after the loan proceeds were disbursed, failed to comply with conditions of the loan and failed to report this noncompliance to the Government.

On June 22, 2018, the court dismissed Tracy's Third Amended Complaint as to defendants as Smolka, Hughes, Stevens, Bradford, Hales, Hawkes, Creamar, Carollo Engineers, and the District. The court also ordered Tracy to show cause as to why the court should not also dismiss his claims as to the remaining defendants. After considering Tracy's response, the court dismissed with prejudice all remaining claims as to all remaining defendants on June 25, 2018.

[1] On May 25, 2016, the court heard oral argument on Defendants' motion to release the *lis pendens*. The court granted the motion from the bench, ruling that the *lis pendens* was a wrongful lien and awarding statutory damages and attorneys' fees.

Following the June 22, 2018 dismissal of both claims, Tracy appealed the dismissal of his first cause of action to the Tenth Circuit. This court had dismissed Tracy's first claim as time barred, applying then-binding Tenth Circuit precedent that required this court to enforce the six-year repose period found in 31 U.S.C. § 3731(b)(1), not the ten-year repose period found in 31 U.S.C. § 3731(b)(2). *See U.S. ex rel. Tracy v. Emigration Improvement Dist.*, No. 2:14-cv-00701, 2018 WL 3111687, at *3 (D. Utah June 22, 2018) (citing *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah,* 472 F.3d 702, 725 (10th Cir. 2006), *abrogated by Cochise Consultancy, Inc. v. U.S. ex rel. Hunt*, 139 S. Ct. 1507 (2019)), *vacated and remanded*, 804 F. App'x 905 (10th Cir. 2020). This court found that Tracy clearly failed to meet the six-year period but did not evaluate the timeliness of his claim relative to the ten-year period. While Tracy's appeal was pending in the Tenth Circuit, the Supreme Court ruled that False Claims Act actions initiated by private relators are subject to the ten-year repose period found in 31 U.S.C. § 3731(b)(2), even where the government declines to intervene (as was the case in Tracy's lawsuit). *Cochise*, 139 S.Ct. at 1511-14. In light of the *Cochise* decision, the Tenth Circuit vacated this court's dismissal of Tracy's first claim and remanded the case for this court to determine whether Tracy filed his complaint within the ten-year repose period. On March 30, 2021, this court found that Tracy did not meet the ten-year repose period and again dismissed his complaint.

The court has previously awarded attorneys' fees and costs against both Tracy and Christensen & Jensen. On March 20, 2017, the court entered a joint and several judgment against Christensen & Jensen and Tracy for Defendants' attorneys' fees and costs in the amount of $29,936 related to the wrongfully filed *lis pendens*. On February 5, 2019, after dismissing both of Tracy's claims, the court awarded attorneys' fees and costs in the amount of $92,665 against Tracy ("Initial Attorneys' Fees Order"). The court declined to hold Christensen & Jensen jointly and severally

liable because it found no evidence that Christensen & Jensen had acted unreasonably or vexatiously beyond the wrongfully filed *lis pendens*, for which it had already been billed pursuant to the court's March 20, 2017 order. When the Tenth Circuit vacated this court's June 22, 2018 dismissal order, it also vacated the court's Initial Attorneys' Fees Order and remanded for this court to reconsider whether Defendants prevailed and thus were entitled to attorneys' fees and costs.

After the court found that Defendants indeed prevailed on remand, Defendants filed another motion for attorneys' fees and costs against Tracy and Christensen & Jensen on April 7, 2021. Following the motion, the parties began to discuss a potential settlement conference. Tracy declined to participate. On June 29, 2021, Christensen & Jensen and Defendants reached a settlement wherein Christensen & Jensen paid the Defendants $87,500 in consideration for releasing it from all suits and obligations related to its representation of Tracy. Following Tracy's motion for access to the settlement agreement, Christensen & Jensen filed the written settlement agreement with the court.

In light of the settlement with Christensen & Jensen, Defendants filed a motion to amend their motion for attorneys' fees and costs. The motion to amend sought two changes to the requested relief. First, Defendants moved to withdraw their claims against Christensen & Jensen. Second, Defendants moved to release Tracy from any fees and costs awarded by the Court for the period of time between the court's February 5, 2019 order granting in part and denying in part Defendants' motion for attorneys' fees and costs (ECF No. 243) and the court's order granting Defendants' motion to dismiss on March 30, 2021 (ECF No. 298) ("the Release Period"). On July

19, 2021, the court acknowledged that Defendants had withdrawn their claim for attorneys' fees as to Christensen & Jensen. [2]

LEGAL STANDARD

Although Defendants' motion for attorneys' fees and costs cites both 31 U.S.C. § 3730(d)(4) and 28 U.S.C. § 1927, the motion as to Tracy relies solely on 31 U.S.C. § 3730(d)(4). Therefore, the court relies only on 31 U.S.C. § 3730(d)(4) in resolving Defendants' motion. Pursuant to 31 U.S.C. § 3730(d)(4), a court may award attorneys' fees to Defendants if (1) the government elects not to proceed with the action; (2) the Defendants prevail; and (3) the court finds that the claim was "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." The False Claims Act "does not define the terms 'clearly frivolous, clearly vexatious, or brought primarily for the purposes of harassment,'" but the Tenth Circuit has found that the § 3730(d)(4) standard is "analogous" to the standard applied to claims for attorneys' fees under 42 U.S.C. § 1988. *U.S. ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1055 (10th Cir. 2004).

ANALYSIS

I. BASIS FOR AWARD OF ATTORNEYS' FEES AGAINST TRACY

In this case, the government declined to intervene three times (ECF Nos. 11, 69, 199) and Defendants prevailed (ECF No. 298). Therefore, the only element in dispute is whether Tracy's action was clearly frivolous, vexatious, or brought primarily for purposes of harassment. Although courts often analyze all three elements of the third prong, each element can independently sustain an award of attorney's fees. *See In re Nat. Gas Royalties Qui Tam Litig.*, 845 F.3d 1010, 1017-18

[2] Tracy also filed an objection to the court's docket text order, which stated that the court would consider Defendants' motion for attorneys' fees only insofar as it sought fees from Tracy, as specified in Defendants' motion to amend. Tracy objected that he was unaware of the settlement terms between Defendants and Christensen & Jensen. Because the settlement is now filed on the docket, the court finds this objection to be moot.

(10th Cir. 2017) (upholding attorneys' fees solely because relator's claim was clearly frivolous without reaching the two other elements).

The court previously found that Tracy's behavior satisfied all three elements. ECF No. 243. And, when remanding the case, the Tenth Circuit noted that if this court determined that Defendants prevailed, this court "may again find Tracy's claims clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." *U.S. ex rel. Tracy v. Emigration Improvement Dist.*, 804 F. App'x 905, 909 (10th Cir. 2020) (citation and alteration omitted). For the reasons stated below, the court so finds.

A. Clearly Vexatious

Vexatious refers to actions that are taken "without reasonable or probable cause or excuse." *United States v. Gilbert*, 198 F.3d 1293, 1298 (11th Cir. 1999) (quoting *Vexatious*, BLACK'S LAW DICTIONARY 1559 (7th ed. 1999)). The court need not find bad faith on the part of the plaintiff-relator in order to find vexatiousness. *See Christiansburg Garment Co. v. Equal Emp. Opportunity Comm'n*, 434 U.S. 412, 421 (1978) ("[T]he term 'vexatious' in no way implies that the plaintiff's subjective bad faith is a necessary prerequisite to a fee award against him."). In its order on Defendants' first motion for attorneys' fees and costs, this court found that Tracy's actions related to this litigation were vexatious. *See* ECF No. 243. Subsequent litigation has not disturbed the basis for the court's decision in that order.

On August 20, 2015, Tracy filed a *lis pendens* against certain water rights in the district that Tracy claimed were the subject of the present lawsuit. Tracy's wrongful *lis pendens* led the court to find that Tracy's behavior was clearly vexatious. As the court previously wrote, "there was no good faith basis for suggesting that Tracy's lawsuit for damages under the False Claims Act had any bearing at all on the ownership of Defendants' water rights." ECF No. 243, p. 11.

And, when pressed, Tracy's counsel could not identify a single case supporting the *lis pendens* nor any language in Tracy's prayer for relief that would affect the District's property interest in the subject matter of the *lis pendens*. Hr'g Mot. Release Lis Pendens Tr. 21:1-25:8. Despite the fact that Tracy made no serious effort to defend filing the lien, he continued to send out letters to clients referencing the *lis pendens*, even after the government declined to intervene in this case. *Id.* at 36:9-40:8. The court's finding that the *lis pendens* was unreasonable and without foundation stands independent from any disagreements between the parties as to whether the lawsuit as a whole was frivolous because of the ten-year repose period. As such, the court found Tracy's behavior clearly vexatious when it first occurred, and no subsequent developments change that finding.

B. Brought Primarily for the Purposes of Harassment

In its original order on attorneys' fees, the court also found that Tracy's actions indicated bad faith and a clear intent to harass. *U.S. ex rel. J. Cooper & Assocs., Inc. v. Bernard Hodes Grp., Inc.*, 422 F. Supp. 2d 225, 238 n.19 (D.D.C. 2006) ("[T]he word 'harassment' suggests bad faith on the part of the plaintiff . . . ."). The court noted that Tracy wrote letters and emails to the residents of Emigration Canyon repeating specious allegations he made in his filings with the court. For example, Tracy used allegations he levied in court against two of the individual defendants in one of his letters at a time when the two defendants were running for reelection to the District's board. Tracy's letters to residents usually immediately followed new filings with the court, further bolstering the court's view that Tracy acted in bad faith in pursuing this lawsuit. Tracy's communications led the court to conclude that Tracy brought this case to air personal grievances against Defendants in pursuit of his own ulterior motives, rather than to seek money damages for the United States. *See U.S. ex rel. Herbert v. Nat'l Acad. of Scis.*, No. Civ. A. 90-2568, 1992 WL 247587, at *9 (D.D.C. Sept. 15, 1992) ("Plaintiff uses the *qui* tam provisions for

the purposes of harassment . . . [when] the Plaintiff has done little more than dress up his personal grievance[s] . . . as a *qui tam* claim."). Again, none of the subsequent developments in this case alters the court's conclusion regarding Tracy's harassing behavior.

Tellingly, although Tracy argues vehemently that his claims were not frivolous, he never addresses the court's reasoning in the Initial Attorneys' Fees Order that he acted vexatiously and with the primary purpose to harass by filing a wrongful *lis pendens* and using the present lawsuit to air his own personal grievances. But the court need only find that a party acted vexatiously, with the purpose to harass, *or* frivolously to award attorneys' fees and costs. *See In re Nat. Gas Royalties Qui Tam Litig.*, 845 F.3d 1010, 1017-18 (10th Cir. 2017). Thus, having found that Tracy's actions were both clearly vexatious and brought for the purpose of harassment, the court need not reach the question of whether Tracy's claim was clearly frivolous.

II. REASONABLE ATTORNEYS' FEES

Under 31 U.S.C. § 3730(d)(4) any fees awarded to Defendants must be "reasonable." This court has already determined that Defendants are entitled to $92,665 in attorneys' fees and costs for expenses related to this litigation prior to the court's Initial Attorneys' Fees Order on February 5, 2019. And the court need not gather evidence to determine the proper amount of attorneys' fees for expenses following the Initial Attorneys' Fees Order because Defendants and Christensen & Jensen have reached a settlement agreement that appears to roughly cover Defendants' fees for that period of time and have released Tracy from any fees and costs incurred by Defendants during that period.

Awarding $92,665 in attorneys' fees and costs against Tracy raises no concern about double recovery for Defendants. Defendants estimate that they incurred approximately $100,000 in fees and costs related to the litigation after the initial attorneys' fees order on February 5, 2019.

Therefore, Defendants would be entitled to approximately $193,000 in fees and costs—the costs adjudicated by the court in its Initial Attorneys' Fees Order plus the costs accrued by Defendants following that order. In consideration for an $87,500 settlement payment from Christensen & Jensen, Defendants released Tracy from any obligations for the period following the court's Initial Attorneys' Fees Order. Thus, Christensen & Jensen's payment went towards the Defendants' fees and costs that postdated the Initial Attorneys' Fees Order whereas the present judgment against Tracy accounts for Defendants' reasonable fees and costs that preceded the Initial Attorneys' Fees Order.

ORDER

The court GRANTS Defendants' motion for an award of attorneys' fees and costs against relator Tracy pursuant to 31 U.S.C. § 3730(d)(4) in the amount of $92,665.00 for 384.8 hours billed. The court DENIES the motion to hold plaintiff's counsel jointly and severally liable and instead GRANTS Defendants' motion to amend the motion for attorneys' fees and costs to withdraw all claims against Christensen & Jensen and to release Tracy from any claims for fees incurred between February 5, 2019, and March 30, 2021. The court shall enter Judgment for Defendants against Mark Christopher Tracy in the amount of $92,665.

Signed October 29, 2021.

BY THE COURT

Jill N. Parrish
United States District Court Judge

CERTIFICATE OF SERVICE

I, Joan E. Soares, declare:

I am a citizen of the United States, am over the age of eighteen years, and am not a party to or interested in the within entitled cause. My business address is 580 California Street, Suite 1100, San Francisco, California 94104.

On March 5, 2024, I served the following document(s) on the parties in the within action:

DECLARATION OF MIGUEL MENDEZ-PINTADO IN SUPPORT OF MOTION FOR ORDER FINDING PLAINTIFF MARK CHRISTOPHER TRACY TO BE A VEXATIOUS LITIGANT AND ENTRY OF PREFILING ORDER

XX	**VIA E-MAIL:** I attached the above-described document(s) to an e-mail message, and to transmit the e-mail message to the person(s) at the e-mail address(es) listed below. My email address is JSoares@mpbf.com.

Mark Christopher Tracy
1130 Wall St #561
La Jolla, CA 92037
E-mail: mark.tracy72@gmail.com
m.tracy@echo-association.com
Phone: (929) 208-6010

Attorney For Plaintiff in Pro per

Charlie Y. Chou
Kessenick Gamma LLP
1 Post Street, Suite 2500
San Francisco, CA 94014
Legal Assistant: Sarah Nguyen
snguyen@kessenick.com
Administrative Assistant: Anna Mao
amao@kessenick.com
E-mail: cchou@kessenick.com
Phone: (415) 568-2016

Attorney For Defendants COHNE KINGHORN, P.C., SIMPLIFI COMPANY, JEREMY RAND COOK, ERIC HAWKES, JENNIFER HAWKES, JENNIFER HAWKES, MICHAEL SCOTT HUGHES, DAVID BRADFORD, DAVID BENNION AND GARY BOWEN

I declare under penalty of perjury under the laws of the State of California that the foregoing is a true and correct statement and that this Certificate was executed on March 5, 2024.

By _____
Joan E. Soares

Nicholas C. Larson - 275870
NLarson@mpbf.com
Miguel E. Mendez-Pintado - 323372
MMendezpintado@mpbf.com
MURPHY, PEARSON, BRADLEY & FEENEY
520 Pike Street, Suite 1205
Seattle, WA 98101
(206) 219-2008 - Main
(206) 489-5101 – Fax

Mark Shem, Esq. – 152860
mshem@bortonpetrini.com
Borton Petrini, LLP
95 South Market Street, Suite 400
San Jose, CA 95113
(408)535-0870

Attorneys for Defendant
PAUL BROWN

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

MARK CHRISTOPHER TRACY, an individual,

Plaintiff,

v.

COHNE KINGHORN PC, a Utah Professional Corporation; SIMPLIFI COMPANY, a Utah Corporation; JEREMY RAND COOK, an individual; JENNIFER HAWKES, an individual; MICHAEL SCOTT HUGHES, an individual; DAVID BRADFORD, an individual; KEM KROSBY GARDNER, an individual; WALTER J. PLUMB III, an individual; DAVID BENNION, an individual; R. STEVE CREAMER, an individual PAUL BROWN, an individual; GARY BOWEN, an individual,

Defendants.

Case No.: 23CV423435

SUPPLEMENTAL REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF SPECIALLY APPEARING DEFENDANT PAUL BROWN'S MOTION FOR ORDER FINDING PLAINTIFF MARK CHRISTOPHER TRACY TO BE A VEXATIOUS LITIGANT AND ENTRY OF A PREFILING ORDER

Date: April 9, 2024
Time: 9:00 A.M.
Dept: 6
Judge: The Honorable Evette D. Pennypacker

Pursuant to California Evidence Code §§ 452, 453, Specially Appearing Defendant Brown hereby requests, in support of the Motion for Order Finding Plaintiff Mark Christopher Tracy to be a Vexatious Litigant and Entry of Prefiling Order, that the Court take judicial notice of the following:

1. Plaintiff's Petition for: (1) Judicial Review of Denied Request for Disclosure of Public Records; (2) Injunction for Violations of the Government Records Access and Management Act; (3) Award of Attorney Fees and Costs, which Plaintiff filed with the Third District Court of the State of Utah on August 10, 2020, with the Case Number 200905074. A true and correct copy of this Petition is attached hereto as **Exhibit A.**

2. The Memorandum Decision and Order issued by the Honorable Mark Kouris of the Third District Court of the State of Utah on February 24, 2021, for Case Number: 200905074. A true and correct copy of this Memorandum Decision and Order is attached as **Exhibit B**.

3. The Decision and Order Denying Motion to Vacate, Awarding Attorney's Fees and Finding Petitioner Mark Christopher Tracy to Be a Vexatious Litigant and Subject to Rule 83 of the Utah Rules of Civil Procedure issued by the Honorable Mark Kouris of the Third District Court of the State of Utah on April 15, 2021, for Case Number: 200905074. A true and correct copy of this Decision and Order is attached as **Exhibit C**.

4. Plaintiff's Civil Rights Complaint filed with the United States District Court for the District of Utah on July 22, 2021, under the Case Number: 2:21-cv-00444. A true and correct copy of this Complaint is attached as **Exhibit D**.

5. The United States Court of Appeals for the Tenth Circuit's Order and Judgment issued on June 8, 2023, related to the District Court Case Number 2:21-cv-00444-RJS. A true and correct copy of this Order and Judgment is attached as **Exhibit E**.

6. Plaintiff's Third Amended Complaint alleging violation of the Federal False Claims Act filed on April 16, 2018, before the United States District Court for the District of Utah, under the Case Number 2:14-cv-00701-JNP-PMW. A true and correct copy of this Third Amended Complaint is attached as **Exhibit F**.

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7. Order Granting In Part and Denying In Part Defendant's Motion for Attorney's Fees and Costs and Granting Defendant's Motion to Amend issued by the Honorable Jill N. Parrish of the United States District Court for the District of Utah issued on October 29, 2021 in the Case Number 2:14-cv-701-JNP. A true and correct copy of this Order is attached as **Exhibit G**.

These documents were each attached to the Declaration of Miguel Mendez-Pintado filed in support of the Motion for Order Finding Plaintiff Mark Christopher Tracy to be a Vexatious Litigant and Entry of a Prefiling Order. These documents are properly the subject of judicial notice as records of a court of record of the United States or of any state of the United States – namely the Third District Court of Utah, the United States District Court for the District of Utah. and the United States Court of Appeals for the Tenth Circuit. Accordingly, the documents are subject of judicial notice pursuant to Evidence Code Section 452(d)(2).

Dated: March 11, 2024

MURPHY, PEARSON, BRADLEY & FEENEY

By _____
Miguel E. Mendez-Pintado
Attorneys for Defendant
PAUL BROWN

EXHIBIT A

Mark Christopher Tracy
dba Emigration Canyon Home Owners Association
1160 E. Buchnell Dr.
Sandy, Utah 84094
Telephone: (929) 208-6010
Email: m.tracy@echo-association.com
Pro se Petitioner

IN THE THIRD DISTRICT COURT OF THE STATE OF UTAH

MARK CHRISTOPHER TRACY, dba EMIGRATION CANYON HOME OWNERS ASSOCIATION,

Petitioner,

vs.

SIMPLIFI COMPANY, a Utah Corporation; ERIC HAWKES, an individual; and JENNIFER HAWKES, an individual,

Respondents.

PETITION FOR:

(1) JUDICIAL REVIEW OF DENIED REQUEST FOR DISCLOSURE OF PUBLIC RECORDS;

(2) INJUNCTION FOR VIOLATIONS OF THE GOVERNMENT RECORDS ACCESS AND MANAGEMENT ACT;

(3) AWARD OF ATTORNEY FEES AND COSTS

RE: WATER LEVEL TELEMETRY DATA OF A PUBLIC DRIKING WATER SYSTEM

TIER 2

Case No.: 200905074

Judge: Kouris

Petitioner Mark Christopher Tracy ("Mr. Tracy") dba Emigration Canyon Home Owners Association ("The ECHO-Association") brings this action under Utah Code Ann. §§ 63G-2-404 and 63G-2-802 for judicial review of the denied request and *de facto* denied appeal[1] of the chief administrative officer of Emigration Improvement District ("EID") for the release of public records of water-level telemetry reports and graphs required to be collected and maintained by the Simplifi Company ("Simplifi") in the physical custody of Eric and Jennifer Hawkes ("Mr. Hawkes" and "Mrs. Hawkes") (collectively "Respondents") in violation of the Government Access to Records and Management Act ("GRAMA").

The names and addresses of the Respondents are:

1) Simplifi Company, 271 N. Margarethe LN, Salt Lake City, Utah, 84108;

2) Eric Lee Hawkes, *id.*; and

3) Jennifer Hawkes, *id.*

INTRODUCTION

This matter concerns the failure of the Respondents to disclose public records of water-level telemetry data of four (4) underground large-diameter commercial wells and two (2) water-storage reservoirs of a public drinking-water system servicing over 300 existing homes and 253 future homes[2] through so-called "stand-by" agreements in Emigration Canyon, Salt Lake County, Utah (the "Canyon").

Petitioner seeks an Order from this Court requiring all water-level recordings, telemetry data, graphs and reports believed to have been recorded by hand and/or electronically formatted as "LGH files" complied, transmitted and accessed by the software program "LGH File Inspector",

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[1] *See* Utah Code Ann. § 63-2-401(5)(b).

[2] EID financial records reveal that property owners of 97 vacant parcels were promised future water service from EID trustees and managers. *See* true and correct copy of excerpt of EID records, attached as Ex. A.

an Order enjoining Respondents for GRAMA violations, and an Order awarding Petitioner reasonable attorney fees and costs of this action.

PARTIES

1. Petitioner The ECHO-Association is registered with the Utah Division of Corporations and Commercial Code as a "dba entity" of Mr. Tracy and is the owner of surface water right no. 57-8947 (a16183) located in Emigration Canyon, Salt Lake County, Utah.

2. On information and belief, Respondent Simplifi Company is a Utah Corporation, registered with the Utah Division of Corporations and Commercial Code under the business purpose of "NAICS Title 5511-Management of Companies and Enterprises", with its headquarters located in Salt Lake County, Utah.

3. On information and belief, Respondent Eric Hawkes, is a director of Simplifi, is the spouse of Jennifer Hawkes and is a resident of Salt Lake County, Utah.

4. On information and belief, Respondent Jennifer Hawkes is a current elected member of the Emigration Canyon Metro Township Council, is an officer and director of Simplifi, is the spouse of Mr. Hawkes and is a resident of Salt Lake County, Utah.

JURISDICTION AND VENUE

5. The acts set forth herein occurred in Salt Lake County, State of Utah.

6. The final agency action constituting exhaustion of administrative proceedings occurred in Salt Lake County, Utah.

7. Jurisdiction is appropriate pursuant to Utah Code Ann. § 63G-4-402.

8. Venue is properly laid before the Third District Court in and for Salt Lake County, State of Utah, pursuant to the provisions of Utah Code Ann. § 78-3-307(1)(a).

BACKGROUND

9. There are currently approximately 677 residential units located in the Canyon, whereby circa 300 homes are connected to public water system No. 18143 owned by EID and operated by Simplifi through Mr. and Mrs. Hawkes under the unregistered designation "Emigration Canyon Improvement District"[3] ("EID Water System"), circa 370 homes are serviced by individual, private domestic wells located near the Emigration Canyon Stream ("Canyon Stream") and approximately 37 homes are connected to Salt Lake City Public Utilities.

10. Although less than half of Canyon homes are connected to the EID Water System, all non-exempt developed and undeveloped properties are assessed property taxes and fees for the operation and maintenance of the EID Water System by the Respondents to include the retirement of $6.3 million dollars of outstanding federally-backed loan obligations as outlined below.

11. In an extensive study of the Canyon's hydrology in 1966, the Utah State Engineer's Office concluded that the Canyon's groundwater was in direct communication with the Canyon Stream and expressly recommended *against* the construction and operation of large-diameter commercial wells ("1966 Barnett Thesis"). *See* excerpt pages 95 and 96 of *Ground-water Hydrogeology of Emigration Canyon, Salt Lake County, Utah* by Jack Arnold Barnett submitted to University of Utah Department of Geology as filed in federal district court, attached as Ex. C; *see also* entire publication available at https://echo-association.com/?page_id=3310.

[3] The EID website maintained by Simplifi is recorded under the designation "Emigration Canyon Improvement District" and "ECID" although no such name or entity is registered with the Utah Division of Corporations and Commercial Code as per Utah Code Ann. § 42-2-5(2) and no such entity is registered with the Utah Lt. Governor's Office as a special service district as required under Utah Code Ann. § 67-1a-15(3). *See* true and correct copy of website listed under assumed name at "https://www.ecid.org/" last visited on July 29, 2020, attached as Ex. B.

12. Moreover, if the Canyon's water table dropped below the level of the Canyon Stream, the loss of artesian pressure augmenting stream flow would reverse the flow of clean, safe water *into* the stream thereby allowing contaminated surface water to penetrate the circa 300 private-water sources located nearby. *See id.*; *see also* excerpt diagrams "Figure 15" and "Figure 34" of *Ground Water in Utah's Densely Populated Wasatch Front Area – The Challenge and Crisis - Water-Supply Paper 2232* published by the United States Geological Survey, 1985, attached as Ex. D.

13. Contrary to conclusions of the 1966 Barnett Thesis, between May 1984 and February 1994, private land developers constructed water system No. 18143 consisting of a small 330,000 gallon storage tank identified as the "Boyer Tank" and 2 large-diameter commercial wells designated as "Boyer Well No. 1" and "Boyer Well No. 2" to service the luxurious Emigration Oaks Private Urbane Development ("Emigration Oaks PUD").

14. In testimony before the Utah State Engineers' Office on December 15, 1995, EID through hydrologists Jack Arnold and Don A. Barnett testified that the operation of these large-diameter commercial wells in the Brigham Fork and Freeze Creek drainage areas would interrupt the movement of groundwater providing artesian pressure to the Canyon Stream and thus surface water flow at Utah's Hogle Zoo "for decades...*twenty-five, fifty or seventy-five years*" ("1995 Barnett Testimony")(emphasis added). *See* written transcript excerpt of State Engineer protest hearing and illustrative maps, attached as Ex. E; *see also* excerpt of audio recording, available The ECHO-Association website https://echo-association.com/?page_id=2204.

15. However, in order to facilitate the further massive expansion of the Emigration Oaks PUD at the expense of existing Canyon residents and taxpayers, and contrary to the 1966 Barnett Thesis and 1995 Barnett Testimony, EID acquired title and assumed operation of water

system No. 18143 in August 1998 at extraordinary private profit as alleged in federal district court.[4,5]

16. Having assumed the legal liability of water system no. 18143 constructed in violation of the 1966 Barnett Thesis and 1995 Barnett Testimony, in an extensive hydrological study completed in July 2000, EID hydrologist Don A. Barnett and the Weber State University Geology Department Chairman W. Adolph Yonkee concluded that Boyer Well No. 2 had extracted more groundwater than was replenished in a "good water year" of 1998 and expressly warned against continued groundwater mining of the Twin Creek Aquifer located in the Freeze Creek drainage area ("2000 Barnett-Yonkee Study"). *See* excerpt pages 36-38 of *Geologic and Hydrologic Setting of the Upper Emigration Canyon Area* by W. Adolph Yonkee and Don A. Barnett, attached as Ex. F; *see also* entire publication available at The ECHO-Association website https://echo-association.com/?page_id=7139.

17. Contrary to the conclusions, warnings and recommendations of the 1966 Barnett Thesis, the 1995 Barnett Testimony and the 2000 Barnett-Yonkee Study, at the cost of $6.3 million dollars of federally-backed loans to be paid by existing Canyon residents and property owners, between October 2003 and January 2013 EID drilled two (2) additional large-diameter commercial wells in the Canyon's Twin Creek Aquifer identified as the "Brigham Fork Well" drilled at 1,220 feet and the "Upper Freeze Creek Well" drilled at 1,148 feet and constructed the Wildflower Reservoir altogether equaling more than **4 times** the required water source capacity and more than **6 times** the required water storage capacity vis-à-vis existing Canyon residents connected to the

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[4] *See United States of America ex rel. Mark Christopher Tracy v. Emigration Improvement District et al.*, (D. Utah) Case No. 2:14-cv-701-JNP-JCB.

[5] Sometime after June 2014, Simplifi through Mr. and Mrs. Hawkes assumed operation of the EID Water System from Management Enterprises through Canyon resident Fred A. Smolka (deceased).

EID Water System. *See* footnote no. 4 and excerpt of "Water System Capacity Calculation Sheet" for existing water source capacity dated January 1, 2014, attached as Ex. G and excerpt of "Water System Capacity Calculation Sheet" for existing water storage capacity dated October 19, 2018, attached as Ex. H.

18. Despite have constructed a massively oversized water system intended for future yet to be built homes, a report published by the United States Geological Survey determined that development in the Canyon was a cause of deteriorating water quality thereby posing a risk to human health ("2008 USGS Report"). *See* excerpt pages 1, 2, 20-22 of *Principle Locations of Major-Ion, Trace Element, Nitrate, and Escherichia coli Loading to Emigration Canyon Creek, Salt Lake County, Utah, October 2005* United States Geological Survey, 2008, attached as Ex. I; *see also* publication in its entirety available at The ECHO-Association website https://echo-association.com/?page_id=7139.

19. As accurately predicted in the 1966 Barnett Thesis, the 1995 Barnett Testimony and the 2000 Barnett-Yonkee Study, in September 2018, for the first time in recorded history, with the collapse of artesian pressure due to a declining water table, the Canyon Stream suffered total depletion less than 2 miles from Utah's Hogle Zoo thereby forcing many long-time Canyon residents to abandon private wells with senior water rights and involuntarily connect to the EID Water System at substantial cost and possible risk to health and safety as follows.

STATEMENT OF FACTUAL GROUNDS FOR RELIEF

20. On June 16, 2020, The ECHO-Association recorded massive ground subsidence and a 700-foot fissure in the Canyon's Freeze Creek drainage area near Emigration Oaks PUD lots 171, 178, 180, 182, 184 and 199 believed to have been caused by the groundwater mining of the Canyon's Twin Creek Aquifer as documented in the 2000 Barnett-Yonkee Study. *See* illustrative

map and photo, attached as Ex. J; *see also* audio and video recording available at The ECHO-Association website https://echo-association.com/?page_id=3310.

21. In a study of groundwater mining in Cedar Valley, Utah, the Utah Geological Society concluded that fissures provided a direct path of contaminated surface water to reach the Cedar Valley aquifer, the primary drinking-water source for the Cedar Valley ("2015 Cedar Valley Report). *See* excerpt pages 1, 2 of *Investigation of Land Subsidence and Earth Fissures in Cedar Valley, Iron County, Utah, Special Study 150,* Utah Department of Natural Resources, 2014, attached as Ex. K; *see also* publication in its entirety available at The ECHO-Association website https://echo-association.com/?page_id=3919.

22. Despite impairment of the Canyon Stream, massive earth collapse and fissures, decreased surface water flow at Utah's Hogle Zoo, and impairment of numerous private wells, financial records reveal that EID promised future water service to the owners of 98 vacant lots through "stand-by agreements" and recently secured approval from the State Engineer to allow construction of more than 500 additional homes in the Canyon to include future water service to a "Gun Range and Wedding Resort" proposed by private land developers. *See* Ex. A.[6]

23. On June 30, 2020, EID through an unregistered "Utah non-profit organization" identified as the "Emigration Canyon Sustainability Alliance" through "President" Willy Stokman

[6] Permanent changes to water rights claimed by EID was protested by The ECHO-Association and is currently pending with the Utah Court of Appeals under *Emigration Canyon Home Owners Association v. Kent L. Jones and Emigration Improvement District* (UT App) Docket No. 20200295-CA.

and "Vice President" Mindy McAnulty[7,8] circulated a correspondence to Canyon residents purporting that "faulty septic systems in the Canyon" was a "attributed" cause of surface-water contamination, despite the fact that the 2008 USGS Report expressly concluded that older septic systems were not related to the loading of *E. coli*, lithium, and nitrate in Canyon Stream. *See* correspondence signed by Willy Stokman and Mindy McAnulty, attached as Exhibit L.

24. Contrary to EID's representations through Ms. Stokman and Ms. McAnulty, continued development of the Canyon (or another undetermined source) was cited as the probable cause of deteriorated drinking-water quality and risk to human health. *See* Exhibit I.

25. Financial records reveal that in the calendar year 2019, EID through Mr. Hawkes paid Mr. and Mrs. Hawkes through Simplifi $97,321.08 for "Manager Compensation", "Office Expenses" and "Internet and Computer Expenses" equaling more than 20% of EID's operating expenses for that year. *See* true and correct copy of Utah Transparency Website, attached as Ex. M; *see also* comparison of EID "Manager Compensation" with two (2) Big Cottonwood Improvement District employees available at The ECHO-Association website https://echo-association.com/?page_id=6054.

26. Contrary to the express conclusions of the 1966 Barnett Thesis, 1995 Barnett Testimony, the 2000 Barnett-Yonkee Study and the 2008 USGS Report, Mr. and Mrs. Hawkes have a vital personal and economic interest in EID's sustained and continued revenue flow secured

[7] In an email correspondence from August 7, 2020, Ms. Stokman confirmed having received public funds for the printing and postage costs of the letter from the Simplifi Company, although no such allocation to Ms. Stockman and/or the "Emigration Canyon Sustainability Alliance" was recorded as approved during the public portion of the EID trustee meeting on June 10, 2020.
[8] To date, other than a "Business Name Registration" on July 9, 2020, no filings have been made for the "Emigration Canyon Sustainability Alliance" with the Utah Department of Corporations and Commercial Code under entity no. 11847526-0111 in violation of Utah Code Ann. § 42-2-5(2).

from owners of vacant lots unaware of the actual source of deteriorated drinking-water quality and the risk posed to human health in the Canyon should development in the Canyon continue as planned.

27. With EID's current expenditures identified in the 2020 budget, EID will default on its federally-backed loan obligations if Mr. and Mrs. Hawkes are unable to maintain projected revenue consisting of water-usage fees, monthly "fire-hydrant rental fees" and monthly "standby fees" paid by Canyon residents and property owners unaware of the extensive contamination of surface and drinking water in the Canyon.

28. Although EID is a limited purpose local government entity created by Salt Lake County, EID trustees maintain that statutory provisions prohibiting nepotism under Utah Code Ann. §§ 52-3-1(2) and 17B-1-110 do not apply to EID due to the fact that EID has "no employees" and all services are provided to EID by "independent contractors" such as Simplifi through Mr. and Mrs. Hawkes. *See* EID correspondence dated June 2014, attached as Ex. N.

29. Mr. Hawkes is currently listed as the primary contact for EID with the Utah Lt. Governor's Office at Mr. and Mrs. Hawkes' private residence.

30. Mr. and Mrs. Hawkes are listed as directors of Simplifi, which is registered at the same private residence recorded for EID with the Utah Lt. Governor's Office.

31. It does not appear that Simplifi possess legal or equitable title to any real property, maintains an office separate from the private residence of Mr. and Mrs. Hawkes, has any employees or provides services to any customer or client other than EID.

32. In August 1998, EID assumed ownership and operation of water system No. 18143 despite the fact that all underground water sources operated at that time had previously tested positive for lead contamination on February 25, 1994 and March 19, 1997 and use of Boyer Well

No. 2 had been expressly forbidden by the Utah Division of Drinking Water ("DDW") prior to issuance of an operating permit required under the federal Safe Drinking Water Act of 1974.[9] *See* Chemical and Biological Analysis of Ford Analytical Laboratories, attached as Ex. O and Ex. P and DDW correspondence dated September 20, 1995, attached as Ex. Q.

33. In October 2003 and January 2013, EID secured operating permits for the Brigham Fork (aka "EID Well #3") and the Upper Freeze Creek Wells located in the Brigham Fork and Freeze Creek drainage areas, although both water sources had tested positive for lead contamination prior thereto and were expressly forbidden under the 1966 Barnett Thesis, 1995 Barnett Testimony, the 2000 Barnett-Yonkee Study and the 2008 USGS Report. *See* Certificates of Analysis, Chemtech-Ford Analytical Laboratories, attached as Ex. R and S.

34. From October 2003 to the present date, EID through Simplifi continues to operate the Wildflower Reservoir without a valid operating permit. *See* footnote no. 4.

35. On October 29, 2019, a single Canyon resident connected to the EID Water System reported on the internet platform "Nextdoor" to have received notice that the drinking-water sample collected from the home connected to the EID Water System had exceed the "action level" of 0.015 mg/L for lead contamination. *See* true and correct copy of Nextdoor electronic post, attached as Ex. T.

36. Mr. Hawkes responded that only "3 [of the 10 sampled homes] exceeded the water standard for lead (*this is the first time ever*)" and "*we do not believe the lead is coming from our water sources*, but likely from the lead solder used in the plumbing of homes" despite the fact that federal guidelines do not allow for any amount of lead contamination in drinking water, it appears

[9] To date, EID through Simplify continues operation of Boyer Well No. 2 without a valid operating permit. *See* 2015 Sanitary Survey of EID Water System available at https://echo-association.com/wp-content/uploads/EID-Sanitary-Survey-2015.pdf.

that all homes sampled and connected to the EID Water System had tested positive for lead contamination since 1995 and all EID underground water sources had previously tested positive for lead contamination (emphasis added). *See id.* and Ex. O, P, R and S and map of lead contamination test results of EID Water System since 1994 complied by The ECHO-Association, attached as Exhibit U; *see also* links to lead test results also available at ECHO-Association website https://echo-association.com/?page_id=4950.

37. During the EID trustee meeting on June 11, 2020, at the insistence of Utah Attorney Jeremy Cook of the Salt Lake City law firm Cohne Kinghorn P.C., Mr. Hawkes and EID trustees Michael Scott Hughes, Brett Tippets and David Bradford refused to answer any questions regarding lead contamination of the 20 Canyon homes connected to the EID Water System required to be tested prior to June 30, 2020 by DDW. *See* audio/video excerpt of electronic meeting conducted via the Zoom internet platform, available at The ECHO-Association website https://echo-association.com/?page_id=1661 and DDW correspondence dated November 12, 2019, attached as Ex. V.

38. During the November 11, 2019 EID trustee meeting, Mr. Hawkes disclosed that the water distribution lines on both the east and west side of the EID Water System had tested positive for lead contamination. *See* excerpt of audio recording available The ECHO-Association website https://echo-association.com/?page_id=1442.

39. During the June 11, 2020 EID trustee meeting, Mr. Hawkes disclosed the repair of distribution lines of the EID Water System not approved for drinking water (*i.e.*, black PVC). *See* audio-video excerpt of electronic trustee meeting conducted via the Zoom internet platform, available at The ECHO-Association website https://echo-association.com/?page_id=1661.

40. Between August 1998 to the present day, Simplifi failed to inform EID water users and "standby customers" of the lead-contamination of EID's water sources, lead contamination of EID's water-distribution lines, lack of valid operating permits for Boyer Well No. 2 and the Wildflower Reservoir, and use of unapproved drinking-water lines in the annual Customer Confidence Reports and triannual Sanitary Surveys required under the federal Safe Drinking Water Act of 1974. *See* reports and surveys of EID Water System, available at The ECHO-Association website https://echo-association.com/?page_id=1221.

41. During the EID trustee meeting on August 6, 2020, Mr. Hawkes failed to inform EID trustees that all 20 homes connected to the EID water system had again tested positive for lead contamination in June 2020. *See id.* and "90th Percentile Result Calculator, Lead and Cooper Sampling Summary" dated July 17, 2020, attached as Ex. W.

42. On July 25, 2020, in an undated correspondence under the letterhead "Emigration Canyon Improvement District", Mr. Hawkes reported copper contamination in excess of federally-mandated drinking water standards of 3 homes connected to EID Water System the but failed to inform its existing and "stand-by" customers that all 20 homes and all water samples had tested positive for lead contamination and failed to record that 1 water sample had tested 18 times the level for copper contamination allowed under federal drinking water requirements. *See* System-Wide Public Notice attached as Ex. X and Lead and Copper Sampling Summary at Ex. W.

STATEMENT OF LEGAL GROUNDS FOR RELIEF

43. Under the Water Management and Conservation Plan dated November 14, 2003, required for the receipt of federally-backed funds administered under the Safe Drinking Water Act of 1974, EID purported that the telemetry system installed in the year 2000 "measures and records well depths, reservoir levels and pumping volumes, rates of pumping and electrical usage"

whereby [a]ll of these levels, volumes, ect. are available for observation and print-out [sic] on-line [sic] through PC Anywhere [sic]" and "[p]ermanent hard copy table and graphs are created and kept in EID files in addition to the electronic files created by the computer program in use." *See* excerpt of "Telemetry System" at Nr. B (4), attached as Ex. Y.

44. In the Water Conservation and Management Plan dated March 14, 2013, EID further reported that the original telemetry system was "updated in 2003 to include the new reservoir [i.e., Wildflower Reservoir]" and "will also include the new well [i.e., Upper Freeze Creek Well]" under the same system of easily accessible recording. *See* "Telemetry System at Nr. B (4), attached as Ex. Z.

45. Under Utah Code Ann. § 63G-2-201, every person has a right to inspect a public record free of charge, and the right to take a copy of a public record during normal working hours if the record is not confidential and exempt from disclosure.

46. Although GRAMA typically applies to "any political subdivision of the state" such as EID and not private individuals and for-profit corporations operating under an unregistered fictitious name at a private residence, under Utah Code Ann. § 63G-2-103(11)(a)(v), a "government entity" also includes "every office, agency, board, bureau, committee, department, advisory board, or commission of an entity listed in Subsection (11)(a) that is funded or established by the government to carry out the public's business."

47. The only "office" and "premises" of EID operated during normal working hours is the private residence of Mr. and Mrs. Hawkes accessible only by Mr. and Mrs. Hawkes.

48. Because EID has no employees and operates entirely through the shell of Simplifi at the private residence of Mr. and Mrs. Hawkes under the unregistered assumed name "Emigration Canyon Improvement District", all Respondents to the present action are subject to the judicial

review of the denied request/denied appeal for disclosure of public records, injunctive relief, and the recovery of attorney fees and costs under Utah Code Ann. §§ 63G-2-404 and 63G-2-802.

49. On June 10, 2020, The ECHO-Association submitted a request for all telemetry data for EID production wells and water storage facilities since September 1, 1998 ("Water-Level Telemetry GRAMA") to Mr. Hawkes. *See* GRAMA request form, attached as Ex. AA.

50. Upon non-response and non-confirmation of receipt of the Water-Level Telemetry GRAMA, on June 27, 2020 The ECHO-Association filed appeal to the chief administrative officer whereby on July 9, Mr. Hawkes responded that "data requires custom software programs to access the data" and then identified the Software program "LGH File Inspector" with an alternative demand for payment of $3,000.00 to provide the data in the format of a Microsoft Excel spreadsheet. *See* email correspondence attached as Ex. BB.

51. After receipt of the data file from Mr. Hawkes, The ECHO-Association reported that the file transmitted by Mr. Hawkes on July 15, 2020 did not match the water levels previously reported by Mr. Hawkes to EID trustees as captured in audio recordings and all telemetry data collected as "LGH files" could be easily converted to an Excel spreadsheet in an easy 5-step process in less than 15 minutes. *See* email entitled "Final Deadline for Judicial Review Filing" dated July 17, 2020, attached as Ex. CC.

52. During the following EID trustee meeting on August 6, 2020 Mr. Hawkes failed to identify or discuss the Water-Telemetry GRAMA during the trustee meeting and refused to disclose current water levels despite the fact that "Water Level Report" and "System Water Levels and Consumption Report" was identified in the EID meeting agenda under Nr. 6 and subsection A. *See* EID Board Meeting Agenda, attached as Ex. DD.

53. Previous reports of water levels by Mr. Hawkes to the EID trustees document that the EID's main production well is pumping water below the level of the Canyon Stream. *See* illustrative map of the Upper Freeze Creek Well in relation to the surface water level of the Canyon Stream, attached as Ex. EE.

54. To date, Respondents have failed to disclose the requested public records identified in the Water-Level Telemetry GRAMA thereby necessitating the present litigation.

REQUEST FOR RELIEF

Petitioner requests this Court enter the following relief:

1. An Order directing the Respondents to disclose all water level reports of Boyer Well No. 1, Boyer Well Nr. 2, the Brigham Fork Well, the Upper Freeze Creek Well, the Boyer Tank and the Wildflower Reservoir to include pumping volumes, rates of pumping and electrical usage and all tables and graphs from September 1, 1998 to the date of the Order;

2. An Order enjoining Respondents for violations the Government Records Access and Management Act per Utah Code Ann. § 63G-2-802(1);

3. An Order awarding Petitioner reasonable attorney fees and costs per Utah Code Ann. § 63G-2-802(2).

DATED this 10th day of August, 2020.

MARK CHRISTOPHER TRACY dba
EMIGRATION CANYON HOME OWNERS
ASSOCIATION

/s/ Mark Christopher Tracy
Mark Christopher Tracy
Pro se Petitioner

EXHIBIT B

The Order of the Court is stated below:
Dated: February 24, 2021 01:34:01 PM
/s/ MARK KOURIS
District Court Judge

Prepared and Submitted by:

Jeremy R. Cook (10325)
COHNE KINGHORN, P.C.
111 E. Broadway, Suite 1100
Salt Lake City, UT 84111
Telephone: (801) 363-4300
Facsimile: (801) 363-4378
Email: jcook@ck.law

Attorneys for Eric Hawkes, Jennifer Hawkes and Simplifi Company

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

MARK CHRISTOPHER TRACY, DBA EMIGRATION CANYON HOME OWNERS ASSOCIATION, Petitioner, vs. SIMPLIFI COMPANY, a Utah Corporation, ERIC HAWKES, an individual, and JENNIFER HAWKES, an individual Respondents.	**MEMORANDUM DECISION AND ORDER** Case No. 200905074 Judge: Kouris

This case is a petition for *de novo* judicial review of a denial of a request for documents pursuant to the Utah Government Records Access and Management Act ("GRAMA"). This matter is before the Court on Respondents' Motion to Dismiss. Oral arguments were held on February 10, 2021.

As background, Emigration Improvement District ("EID") is a local district that is subject to GRAMA. On June 10, 2020, petitioner Mark Christopher Tracy ("Mr. Tracy") sent an email to EID's records officer, Eric Hawkes ("Mr. Hawkes") at the email address "eric@ecid.org." The email included a GRAMA request form requesting telemetry data for EID's water wells and water tanks (the "GRAMA Request"). The GRAMA request form correctly designated the governmental entity as EID.

On June 27, 2020, Mr. Tracy sent an email to Mr. Hawkes acknowledging receipt of a different GRAMA request for a link to a Zoom meeting of EID's board of trustees, and appealing the *de facto* denial of the GRAMA request for the telemetry data. On July 9, 2020, Mr. Hawkes sent an email to Mr. Tracy that stated: "We can get the raw data files copied to a memory stick in Windows Format. The cost would be $60 for an estimated one hour of labor, memory stick, and postage. The software needed for the "raw data" is LGH File Inspector available at Softwaretoolbox.com. The alternative option is to provide the data to you in an excel format, however the cost would be an estimated $3000.00 for the software and the engineer/ IT to extract the data to an excel file. Please let me know how you would like to proceed."

On July 15, 2020, at the request of Mr. Tracy, Mr. Hawkes emailed a link to a "zip" file that contained all of the telemetry data from 2004 to present. In the email, Mr. Hawkes stated: "The following link is the data files for EID's In Touch Telemetry as per your request to have the data files emailed. The files go from 2004 to present. Again the data can be converted to an excel file, but would require EID to purchase software and a consultant to complete the process and a

fee would be associated with completing the task. Let me know if you have any questions regarding the GRAMA."

In accordance with Utah Code Ann. § 63G-2-401, on July 17, 2020, Mr. Tracy sent an email to EID's Chief Administrative Officer, Michael Scott Hughes, appealing the purported denial of the GRAMA request. Mr. Tracy's basis for the appeal was that the water levels reported in EID's board of trustees meeting on May 5, 2016 didn't reflect the data provided by EID in response to the GRAMA request, and EID should have provided the data in Microsoft Excel format at no cost. Throughout the appeal to Mr. Hughes, Mr. Tracy indicated that the governmental entity was EID. A copy of the appeal is attached as Exhibit CC of the Petition. After the appeal to the Chief Administrator of EID was denied, Mr. Tracy filed the instant appeal.

However, instead of bringing the action against EID, Mr. Tracy named only Eric Hawkes, Jennifer Hawkes and Simplifi Company ("Respondents"). GRAMA provides that a records request must be made to a governmental entity. *See* Utah Code Ann. § 63G-2-204(1)(a) ("A person making a request for a record shall submit to the governmental entity that retains the record a written request . . ."). GRAMA further provides that a requester may petition for judicial review of the decision of the chief administrative officer of the governmental entity. *See* Utah Code Ann. § 63G-2-404(1) ("If the decision of the chief administrative officer of a governmental entity under Section 63G-2-401 is to affirm the denial of a record request, the requester may: (a)(ii) petition for judicial review of the decision in district court.") EID is the governmental entity. The records are public records because they are records of EID. Accordingly, EID is a necessary party.

In contrast, Respondents are not governmental entities. *See* Utah Code Ann. § 63G-2-103(11). Mr. Tracy failed to cite any case law to support the position that Respondents are proper or necessary parties to this action; or cite any provision or language in GRAMA supporting the position he can sue an individual or private company based on a governmental entity's alleged failure to respond to a GRAMA request.

The Court further finds that an award of attorney fees is proper. Utah Code Ann. § 78B-5-825(1) calls for an award of attorney fees in civil actions when "the court determines that the action or defense to the action was without merit and not brought or asserted in good faith." This provision requires proof on "two distinct elements." *In re Discipline of Sonnenreich,* 2004 UT 3, ¶ 46, 86 P.3d 712. An award of fees under this provision requires a determination that the losing party's claim was "(1) without merit, and (2) not brought or asserted in good faith." *Id.*

As set forth above, this action was without merit. The action was also not brought in good faith. First, the majority of the allegations in the Petition have nothing to do with a purported appeal of the denial of a GRAMA request for telemetry data. In fact Mr. Tracy does not reference the actual GRAMA request until paragraph 49 of the Petition, and the GRAMA form that is the purported basis of the appeal is Exhibit AA of the Petition. The vast majority of the allegations and exhibits relate to other complaints and issues that Mr. Tracy has with EID or Respondents, and are not necessary or proper for this action.

Second, Mr. Tracy's GRAMA request, appeal to the chief administrative officer of EID, and this appeal, establish that Mr. Tracy understood that EID was the governmental entity. There is no evidence that EID has ever taken the position that the telemetry data was not a public

record of EID, or that Mr. Tracy has any reason to believe it was necessary to sue Respondents to obtain EID's records. The GRAMA request was made to EID, and EID responded and provided the request data to Mr. Tracy. The Court is not persuaded that Mr. Tracy believed he had any legitimate basis to sue Respondents, and his motivation for suing Respondents, as opposed to EID, was simply to harass Respondents.

Third, throughout the Petition and his argument, Mr. Tracy refers to Mrs. Hawkes as Deputy Mayor Hawkes. Mr. Tracy has not alleged that Mrs. Hawkes had any involvement with EID's response to the GRAMA request, or that her position as Deputy Mayor of a separate governmental entity has any relevance to this action. Instead, her inclusion in this matter, and Mr. Tracy's reference to her position as Deputy Mayor of Emigration Canyon Metro Township, is indicative of the fact that the Petition is not about obtaining records from EID, but is instead about attacking and harassing Mr. and Mrs. Hawkes.

Finally, on September 16, 2020, Judge Faust issued a *Memorandum Decision and Order* addressing the identical issue in this action. *See* Case No. 200905123. Judge Faust determined that EID was a necessary party and that there was no basis to sue Respondents. *Id.* Instead of amending the Petition to properly name EID, Mr. Tracy served and prosecuted this action after the decision of Judge Faust, and after knowing that there was no legal basis for suing Respondents.

In summary, the Court grants Respondents' motion to dismiss and the Court awards Respondents their reasonable attorney fees against Mark Christopher Tracy. Respondents shall

submit a declaration of their attorney fees. This Memorandum and Order constitutes the Order regarding the matters addressed herein. No further order is required.

COURT'S SIGNATURE AND DATE APPEAR AT TOP OF FIRST PAGE OF THIS DOCUMENT

EXHIBIT C

The Order of the Court is stated below:
Dated: April 15, 2021 02:53:03 PM
/s/ MARK KOURIS
District Court Judge

Prepared and Submitted by:

Jeremy R. Cook (10325)
COHNE KINGHORN, P.C.
111 E. Broadway, Suite 1100
Salt Lake City, UT 84111
Telephone: (801) 363-4300
Facsimile: (801) 363-4378
Email: jcook@ck.law

Attorneys for Eric Hawkes, Jennifer Hawkes and Simplifi Company

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

MARK CHRISTOPHER TRACY, DBA EMIGRATION CANYON HOME OWNERS ASSOCIATION, Petitioner, vs. SIMPLIFI COMPANY, a Utah Corporation, ERIC HAWKES, an individual, and JENNIFER HAWKES, an individual Respondents.	**DECISION AND ORDER DENYING MOTION TO VACATE, AWARDING ATTORNEY FEES, AND FINDING PETITIONER MARK CHRISTOPHER TRACY TO BE A VEXATIOUS LITIGANT AND SUBJECT TO RULE 83 OF THE UTAH RULES OF CIVIL PROCEDURE** Case No. 200905074 Judge: Kouris

This case is a petition for *de novo* judicial review of a denial of a request for documents pursuant to the Utah Government Records Access and Management Act ("**GRAMA**"). This matter is before the Court on Petitioner's *Motion to Vacate Memorandum Decision and*

Judgement (sic) (the "**Motion**"). Oral arguments were held on April 7, 2021. The Court having considered the Motion, related memoranda, and the arguments of the parties at the hearing, hereby enters the following decision and order:

BACKGROUND

Emigration Improvement District ("**EID**") is a Utah local district that is subject to GRAMA. On June 10, 2020, petitioner Mark Christopher Tracy ("**Mr. Tracy**") submitted a GRAMA request to EID requesting telemetry data for EID's water wells and water tanks (the "**GRAMA Request**"). The GRAMA Request correctly designated the governmental entity as EID, and EID responded to the GRAMA request. After appealing the purported denial of the GRAMA Request to the chair of EID's board of trustees, Mr. Tracy brought this action. However, instead of bringing the action against EID, Mr. Tracy named only Eric Hawkes, Jennifer Hawkes and Simplifi Company ("**Respondents**").

On February 10, 2021, the Court held a hearing on Respondent's *Motion to Dismiss*. During the hearing, the Court issued is verbal ruling finding in part that GRAMA provides that a records request must be made to a governmental entity, and that EID was the governmental entity. *See* Utah Code Ann. § 63G-2-204(1)(a) ("A person making a request for a record shall submit to the governmental entity that retains the record a written request . . ."). This Court's decision was the same as a decision issued by Judge Faust on September 16, 2020. *See* Case No. 200905123. In addition, on February 11, 2021, the day after the hearing in this matter, the State Records Committee of the State of Utah (the "**Records Committee**") heard the appeal of three separate GRAMA requests submitted by Mr. Tracy for records of EID. The Records Committee

found that submitting a GRAMA request to Simplifi Company or Respondents, as opposed to EID, was not proper and denied Mr. Tracy's appeals.

On February 11, 2021 (the day after this Court's decision), Mr. Tracy submitted a new GRAMA request to EID in which he again cc:d Jennifer Hawkes and again stated that the governmental entity was "Emigration Improvement District aka Emigration Canyon Improvement District c/o Simplifi Company." (the "**New GRAMA Request**"). In response to the New GRAMA Request, EID's attorney sent Mr. Tracy an email informing Mr. Tracy that based on his continued inclusion of Simplifi Company and Mrs. Hawkes in the New GRAMA Request, the fees awarded by this Court would need to be paid prior to a response to the New GRAMA Request (the "**Response Email**").

MOTION TO VACATE

Mr. Tracy brought this Motion based on the argument that the Response Email established "factual representations made to this court regarding the status of Simplifi as a 'private corporation' and Mrs. Hawkes having 'no direct involvement with EID' were designed to improperly influence the decision of the Court and were therefore fraudulent under Rule 60(b)(3) URCP.'" *See Motion*, p. 3. The Court finds that the Motion does not establish any fraud, misrepresentations, or other misconduct of Respondents, or justify relief under Rule 60(b)(3). Specifically, the Response Email only indicated that if Mr. Tracy wanted to continue to take the position that it was proper to submit a GRAMA request to EID c/o Simplifi Company or include Mrs. Hawkes in the GRAMA request, which position is contrary to the decision of this Court,

that Mr. Tracy would be required to pay the fees awarded to Respondents in this case. Nothing in the Response Email suggests that Respondents changed their representations to this Court or their legal arguments in this matter. Accordingly, the Court denies the Motion.

ATTORNEYS FEES

Mr. Tracy was informed at least six times by this Court, Judge Faust, the State Records Committee or EID's attorney that GRAMA requests should be made only to the public entity, Emigration Improvement District. At the hearing, Mr. Tracy was not able to provide any plausible explanation for disregarding the decision of this Court and continuing to include Simplifi Company or Mrs. Hawkes in the New GRAMA Request, which leads this Court to conclude that Mr. Tracy's reason for continuing to include Simplifi Company and Mrs. Hawkes was to continue to harass Respondents. Simply put, Mr. Tracy could have easily avoided any issues by following the decision and order of this Court, but inexplicably chose to disregard the Court's decision and continue to harass Respondents by including them in GRAMA requests that Mr. Tracy knew should be served only on EID.

The Court has previously found that an award of attorney fees is proper pursuant to Utah Code Ann. § 78B-5-825(1), and the Court finds that Respondents should be awarded their reasonable attorneys' fees responding to the Motion.

VEXATIOUS LITIGANT

Rule 83(a)(1) of the Utah Rules of Civil Procedure states that the court may find a person to be a "vexatious litigant" if the person does any of the following:

> (a)(1)(B) After a claim for relief or an issue of fact or law in the claim has been finally determined, the person two or more additional times re-litigates or attempts to re-litigate

the claim, the issue of fact or law, or the validity of the determination against the same party in whose favor the claim or issue was determined.

(a)(1)(C) In any action, the person three or more times does any one or any combination of the following:

(a)(1)(C)(i) files unmeritorious pleadings or other papers,

(a)(1)(C)(ii) files pleadings or other papers that contain redundant, immaterial, impertinent or scandalous matter,

(a)(1)(C)(iii) conducts unnecessary discovery or discovery that is not proportional to what is at stake in the litigation, or

(a)(1)(C)(iv) engages in tactics that are frivolous or solely for the purpose of harassment or delay.

The Court finds that Mr. Tracy has violated Rule 83(a)(1)(B) and 83(a)(1)(C). With respect to Rule 83(a)(1)(B), Mr. Tracy served and prosecuted this action after Judge Faust previously issued a decision on the same issue of law. *See* Case No. 200905123. After this Court issued its decision, Mr. Tracy ignored both decisions, again served GRAMA request to EID that were served c/o Simplifi Company and included Mrs. Hawkes, and then Mr. Tracy attempted to utilize EID's response to again argue to this Court that filing an action against on Respondents, and not EID, was proper. With respect to 83(a)(1)(C), the Court has previously found that the Petition in this action including redundant and immaterial allegations that appear to relate to other claims and issues that Mr. Tracy has against EID, and that the Petition was frivolous and filed for the purpose of harassment. The Court also finds that the Motion was unmeritorious.

The Court also finds that the Petition and the Motion were filed for the purpose of harassing Respondents in violation of Rule 11(b)(1) of the Utah Rules of Civil Procedure. As

set forth above, despite repeated opportunities from this Court, Mr. Tracy has failed to ever provide a plausible explanation of why he brought this action against Respondents, but intentionally failed to name the governmental entity, EID; or why Mr. Tracy continued to include Respondents in GRAMA requests despite repeatedly being informed that their inclusion was improper. In accordance with Rule 11(c)(2), the Court finds that an appropriate sanction to deter repetition of such conduct is to find that Mr. Tracy is a vexatious litigant.

Based on the foregoing, the Court finds petitioner Mark Christopher Tracy to be a vexatious litigant in accordance with U.R.C.P. 83(b)(4), and the Court orders that Mr. Tracy must obtain leave from the Presiding Judge of the Court prior to Mr. Tracy filing any future actions in Utah State Courts.

Approved as to Form:

/s/ Mark Christopher Tracy
Mark Christopher Tracy

COURT'S SIGNATURE AND DATE APPEAR AT TOP OF FIRST PAGE OF THIS DOCUMENT

EXHIBIT D

Mark Christopher Tracy
dba Emigration Canyon Home Owners Association
Pro se Plaintiff
1160 E. Buchnell Dr.
Sandy, Utah 84094
Telephone: (929) 208-6010
Email: m.tracy@echo-association.com

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

MARK CHRISTOPHER TRACY, d/b/a Emigration Canyon Home Owners Association, Plaintiff, vs. SIMPLIFI COMPANY, a Utah corporation; JENNIFER HAWKES, an individual; ERIC LEE HAWKES, an individual; JEREMY R. COOK, an individual, DAVID M. BENNION, an individual and DOES 1-46, Defendants.	**CIVIL RIGHTS COMPLAINT** **FILED PURSUANT TO 42 U.S.C. § 1983, § 1985** **REF: PENSKE** **JURY TRIAL DEMANDED** Case: 2:21-cv-00444 Assigned To : Oberg, Daphne A. Assign. Date : 7/22/2021 Description: Tracy v Simplifi et al

Mark Christopher Tracy ("Mr. Tracy") d/b/a Emigration Canyon Home Owners Association ("The ECHO-Association"), brings this action under 42 U.S.C. § 1983 and § 1985 to recover all damages, penalties and other remedies established under the Civil Rights Act of 1871 (***"Civil Rights Act"***).

Plaintiff complains and alleges against Defendants as follows.

I. INTRODUCTION

Upon information and belief, from sometime in 2013 to the present day, acting under the color of state law, Defendants knowingly conspired to impair a constitutionally protected property right to safe drinking water and thus the use and enjoyment of a private home in Emigration Canyon, Salt Lake County, Utah (the "Canyon") in order to unlawfully enrich themselves through the operation of a destructive water system and improper billing of fees and costs collected via Salt Lake County tax-foreclosure proceedings against nonmembers of the Church of Jesus Christ of Latter-Day Saints Emigration Canyon Ward ("LDS Non-members").

For good and valuable consideration, Canyon property owner and LDS Non-member Karen Penske ("Ms. Penske" aka Annarino) assigned legal right and title to Civil Rights Act claims to The ECHO-Association.

II. PARTIES

1. The ECHO-Association is a registered dba entity of Mr. Tracy and is located in the city of Sandy, State of Utah.

2. Mr. Tracy is informed and believes that Defendant Simplifi Company ("Simplifi") is a private corporation organized and existing under the law of the State of Utah, with its headquarters located within Salt Lake County, State of Utah.

3. Mr. Tracy is informed and believes that Defendant Jennifer Hawkes ("Deputy Mayor Hawkes") is a current officer and director of Simplifi, is the current Deputy Mayor of the Emigration Canyon Metro Township, is the spouse of Eric Lee Hawkes, is a LDS Member, and is a resident of Salt Lake County, State of Utah.

4. Mr. Tracy is informed and believes that Defendant Eric Lee Hawkes ("Mr. Hawkes")(collectively "Simplifi Defendants") is the current general manager of the Utah special service water district Emigration Improvement District ("EID" aka Emigration Canyon Improvement District aka ECID), the current EID financial manager, the current EID election

specialist, the current EID certified public records officer, is a current officer and director of Simplifi, is a LDS Member, and is a resident of Salt Lake County, State of Utah.

5. Mr. Tracy is informed and believes that Defendant Jeremy R. Cook ("Utah Attorney Cook"), is a shareholder of the Salt Lake City law firm Cohne Kinghorn P.C., is the current legal representative of Deputy Mayor Hawkes, Mr. Hawkes and EID in pending state and federal litigation, is a LDS Member and is a resident of Salt Lake City, State of Utah.

6. Mr. Tracy is informed and believes that Defendant David M. Bennion ("Bishop Bennion") is a religious leader and LDS Member and is a resident of Salt Lake County, State of Utah.

III. JURISDICTION

7. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1343(a), which specifically confers jurisdiction on this Court.

8. This Court is the proper venue for this action pursuant to 28 U.S.C. § 1391(b)(1) because at least one of the Defendants resides in this federal district.

9. This Court has personal jurisdiction over all Defendants because each is a resident of this district, or has its headquarters in this district, or conducts substantial business within this district.

IV. NATURE OF THE CASE

A. Background.

10. EID is a special service water district and "quasi-governmental entity" created in 1968 by Salt Lake County.

11. Upon information and belief, EID has no physical presence, no employees and operates entirely though LDS Members acting as "independent contractors" such as Simplifi Defendants and Utah Attorney Cook.

12. On March 29, 1985, Ms. Penske acquired perfected underground water right 57-8582 ("a13203") with a senior base priority date of May 1, 1902 and a change application priority of

May 11, 1984 as a constitutionally protected property right to safe drinking water attained from the Canyon's Twin Creek Aquifer servicing her private home.

13. Originally built in the late 1980's to provide culinary water service to the luxurious Emigration Oaks Private Urban Development ("Emigration Oaks PUD"), Simplifi Defendants currently operate water system no. 18143 under duplicitous water claims described below ("Boyer Water System").

14. At present, approximately 300 Canyon residents are connected to the Boyer Water System while approximately 37 homes are connected to Salt Lake City Public Utilities and 340 homes are serviced by single-family domestic wells including Ms. Penske.

B. Willful Contamination of the Twin Creek Aquifer and Destruction of the Canyon Stream for Private Profit.

15. In 1968, the Utah State Engineer closed the Canyon to new water use applications after determining that water sources of the area were "fully appropriated" and the operation of large-diameter commercial wells would impair senior water rights "with almost certainty."

16. On June 16, 1984, upon information and belief, although not approved by the Utah State Engineer as a point-of-diversion, private land-developers The Boyer Company LC through LDS Member Kem C. Gardner and City Development Inc. through LDS Member Walter J. Plumb III completed construction of Boyer Well Nr. 1 in the Twin Creek Aquifer approximately 6,625 feet from Ms. Penske's private well as the crow flies in order to provide culinary drinking water to the luxurious Emigration Oaks PUD at extraordinary private profit.

17. In August 1998, EID trustees assumed legal title and liability of the Boyer Water System from LDS Members Gardner and Plumb despite the fact that 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 Gardner and Plumb would interfere with artesian pressure supporting surface water flow of the Canyon Stream "for decades, twenty-five, fifty, seventy-five years."

18. EID assumed liability of the Boyer Water System, although the Boyer Well Nr. 1 was drilled into the Twin Creek aquifer with a Canyon Stream surface water right, which had been stripped from Mt. Olivet Cemetery Association in violation of the the deed from the United States of America dated May 16, 1874 that property "[and water right appurtenant thereto] shall forever used for the burial of the dead" as the only active military cemetery created by an Act of Congress ("Cemetery Water Right").[1]

19. Upon information and belief, upon EID's acquisition of the Boyer Water System in August 1998, LDS religious leader and member Fred A. Smolka ("Bishop Smolka"), stepped down as EID Trustee Chairman after first awarding his own private Utah corporation Management Enterprises LLC a no-bid contract to operate the Boyer Water System with Bishop Smolka christening himself as EID operations manager, EID financial manager, EID election specialist, and EID public records officer.

20. Sometime in 2013, EID transferred operation of the Boyer Water System from Bishop Smolka's private Utah corporation to Simplifi through fellow LDS members Deputy Mayor Hawkes and Mr. Hawkes.

[1] Although the United States of America retained a reversionary interest in cemetery property (and water rights appurtenant thereto), to date both Salt Lake City and EID have refused to return water rights to hallowed cemetery grounds maintaining water claims for underground points of diversion for future private-urban developments in the Canyon. *See* open letter to United States congressional leaders available at the website maintained by The ECHO-Association at https://echo-association.com/?page_id=6908.

21. Upon information and belief, Simplifi has no employees, owns no property, and is operated from the private residence of Deputy Mayor Hawkes and Mr. Hawkes, which is simultaneously the place of business for EID registered with the Utah State Lt. Governor's Office.

22. Immediately following the acquisition of the Boyer Water System and the Cemetery Water Right, in order to allow further massive development of Phases 4A, 6 and 6A of the Emigration Oaks PUD at extraordinary private profit and at the expense of existing Canyon homes serviced by individual private wells, EID trustees and managers fraudulently acquired and then diverted federally-backed funds earmarked for "financially disadvantaged communities" for the construction of the Wildflower Reservoir, the Brigham Fork and the Upper Freeze Creek Wells on property belonging to wealthy private land developers under a likewise duplicitous water right acquired from the Emigration Dam and Ditch Company ("Dam & Ditch Water Right") as alleged in legal action commenced by Mr. Tracy against EID, Mr. Hawkes, The Boyer Company LC, City Development Inc. *et. al* under the federal False Claims Act ("FCA Litigation").[2,3]

23. In the 2015 and 2018 Sanitary surveys required under the federal Safe Drinking Water Act ("SDWA"), Simplifi falsely reported that the water distribution lines of the Boyer Water System were at least 8 inches in diameter, and could provide adequate water flow in a fire emergency contrary to the EID's own Water Conservation and Management Plan dated March 14, 2013 and public EID trustee meetings.

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[2] *United States of America ex rel. Mark Christopher Tracy v. Emigration Improvement District et al.*, 10th Cir., Case No. 21-4059 (pending).

[3] Although Simplifi is a private independent contractor of EID, Utah Attorney Cook entered appearance for Mr. Hawkes in FCA litigation at public expense.

24. On July 6, 2020 in an email to Utah Attorney Cook, Simplifi through Mr. Hawkes acknowledged that the Boyer Water System had exceeded SDWA reporting requirements for lead contamination of drinking water believed to be caused by groundwater mining of the Twin Creek Aquifer via operation of lager-diameter commercial wells but then refused to answer questions from The ECHO-Association regarding lead testing during the August 6, 2020 public EID trustee meeting and failed to warn Canyon residents of drinking water contamination.

25. On March 31, 2021, Simplifi through Mr. Hawkes, falsely certified to the Utah State Records Committee that all lead testing results of the Boyer Water System had been posted on the EID website maintained by Simplifi.

26. Upon information and belief, laboratory test results dated November 4, 2019 for the underground water sources of the Boyer Water System were fabricated by Simplifi Defendants to indicate "Non-Detect" for lead contamination.

C. Unlawful Agreement to Retire Perfected Senior Water Rights to the Canyon's Twin Creek Aquifer under Duplicitous Water Claims.

27. On the EID website maintained by Simplifi under the unregistered designation "Emigration Canyon Improvement District" and "ECID" and with the knowledge of Utah Attorney Cook, Simplifi falsely maintains that "EID holds one of the most senior water right in the Canyon" and homeowners "can exchange their water right for the District's senior water right" despite the fact that all underground water sources of the Boyer Water System have the most junior water right priority date of September 12, 2018 under permanent change application "a44045" (57-7796) under the duplicitous Dam & Ditch Water Right or are unapproved points-of-diversion under the Cemetery Water Right.

28. Upon information and belief, since October 15, 2014, with the positive knowledge of Utah Attorney Cook, water letters issued by Simplifi Respondents for new residential construction in the Canyon fell under the duplicitous Dam & Ditch Water Right as documented in a study funded by the United States Department of Housing and Urban Development in November 1970.

29. In September 2018, the Emigration Canyon Stream suffered total depletion less than 2 miles from Utah's Hogle Zoo and in June 2021 Ms. Penske's private well exceeded Utah State drinking water standards for Total Dissolved Solids ("TDS") as predicted in a study completed by the Utah State Engineer in 1966, oral testimony presented to the Utah State Engineer on December 15, 1995 by the predecessor in interest to the Salt Lake City law firm Cohne Kinghorn P.C. of Utah Attorney Cook as well as the hydrological studies completed in July 2000 and September 2006.

30. In 2019, water revenue collected by Simplifi from the operation of the Boyer Water System equaled $165,170.00 while the current annual federally-backed water revenue bond payments are $253,000.00.

31. Upon information and belief, in the current calendar year, the EID budget prepared by Simplifi Defendants recorded operating expenses of the Boyer Water System at $461,400.00 whereby Simplifi Defendants pay themselves 26% thereof ($120,000.00).

32. Simplifi Defendants' compensation of public funds is comparable to the Utah State governor and Salt Lake City mayor.

33. Upon information and belief, the Salt Lake City law firm of Cohne Kinghorn P.C. through Utah Attorney Cook has secured over $320,000.00 of public funds for the legal defense of EID and Simplifi Respondents in pending state and federal litigation since January 1, 2018.

V. CAUSE OF ACTION

34. Unable to service EID's current federally-backed debt obligations, sometime in June 2013, EID announced that it would began charging 86 Canyon residents not connected to the Boyer Water System a "fire-hydrant rental fee."

35. With the positive knowledge that the Boyer Water System's distribution lines were grossly undersized and unable to provide adequate flown in a fire emergency, underground water sources were contaminated with lead and were being operated under duplicitous water claims, Simplifi Defendants began charging Ms. Penske "fire hydrant rental fee" but then for unknown reasons changed billing to a "water availability fee" and then a "water base fee" without explanation.

36. Upon information and belief, in order to increase the revenue of "account receivables," Simplifi Defendants created duplicate "accounts" for LDS Nonmembers not connected to the Boyer Water System.

37. Unable to terminate water service to private homes not connected to the Boyer Water System serviced by senior water rights, beginning in January 2014, Simplifi began certifying "delinquent accounts" with the Salt Lake County Treasurer of LDS Nonmembers leading to tax foreclosure proceedings although on August 7, 2008 the Salt Lake City law firm Cohne Kinghorn P.C. of Utah Attorney Cook had informed EID trustees that it may only certify outstanding fees for water usage.

38. In a bill dated 2/15/2021 [sic] for account "1022," Simplifi demanded payment from Ms. Penske in the amount of $553.75 for a "Water Base Fee (3 months @ $15 per month)" although Ms. Penske is not connected to the Boyer Water System operated by Simplifi, was not informed of undersized water distribution lines, lead contamination, operation of underground water sources under duplicitous water claims and constructed contrary to hydrological studies expressly warning against the operation of large diameter-commercial wells and groundwater mining of the Twin Creek Aquifer.

39. Upon information and belief, sometime in the fall of 2015, Emigration Oaks PUD Phase 4A resident, LDS religious leader and member Bishop Bennion admonished fellow LDS members of their "moral obligation" to pay fees and costs billed by Simplifi Defendants during a LDS religious meeting.

40. Upon information and belief, Defendants have commenced no tax-foreclosure proceedings against active LDS Members consistent with the instructions of Bishop Bennion since November 2014.

VI. INJURY

41. On March 13, 2019, in order 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 Simplifi Defendants consistent with the instructions of Utah Attorney Cook and Bishop Bennion.

42. On June 15, 2021, Ms. Penske received an additional "Statement of Delinquent Taxes Due" from the Salt Lake County Treasurer under the designation "259-Emigration Improvement District" in the amount of $361.49 certified by Simplifi Defendants consistent with the instructions of Utah Attorney Cook and Bishop Bennion indicating that a Redemption Certificate releasing the property from tax foreclosure proceedings would not be issued until the fees and costs certified to Salt Lake County were paid in full.

43. 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 TDS as predicted in a hydrological study dated July 2000 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.

44. Upon information and belief, as the aforementioned hydrological studies and reports were presented to Simplifi Defendants and Utah Attorney Cook during state and federal proceedings,

the Defendants knowingly and willfully impaired Ms. Penske's constitutional right to the use and enjoyment of a senior perfected water share providing safe culinary drinking water to her private home while simultaneously clouding title to her property.

45. On June 16, 2020, Mr. Tracy documented a 700-foot fissure and massive ground subsidence in the Twin Creek drainage area[4] consistent with documentation of groundwater mining in Cedar Valley, Utah and believed to provide a direct path for surface water contaminates to taint the aquifer providing culinary drinking water to Ms. Penske's private residence.

46. On September 9, 2020, for good and valuable consideration, Ms. Penske assigned present and future Civil Rights Claims to The ECHO-Association.

VII. REQUEST FOR RELIEF

WHEREFORE, Mr. Tracy requests the Court enter the following relief:

A. That this Court enter judgment against Defendants in the amount of damages for each payment made by Ms. Penske to include any past and future lien placed on her property by Defendants to include monetary renumeration for economic damage and loss;

B. The Defendants pay punitive damages for malicious and/or reckless conduct described above, in amounts to be determined at trial;

C. Grant such further relief as the Court deems necessary and proper; and lastly,

D. Award Mr. Tracy legal fees and costs in this action.

VIII. JURY TRIAL DEMANDED

Mr. Tracy respectfully requests a jury trial on all questions of fact raised by this Complaint.

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[4] *See* YouTube video aerial recording entitled "Ground Collapse and Fissures in the Emigration Oaks PUD (Freeze Creek Drainage Area)" available at the website administered by The ECHO-Association at https://echo-association.com/?page_id=3310.

EXHIBIT E

FILED
United States Court of Appeals
Tenth Circuit

June 8, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MARK CHRISTOPHER TRACY,

Plaintiff - Appellant,

v.

SIMPLIFI COMPANY, a Utah corporation; JENNIFER HAWKES, an individual; ERIC LEE HAWKES, an individual; JEREMY R. COOK, an individual; DAVID M. BENNION, an individual; and DOES 1-46,

Defendants - Appellees.

No. 22-4032
(D.C. No. 2:21-CV-00444-RJS)
(D. Utah)

ORDER AND JUDGMENT*

Before **HOLMES**, Chief Judge, **HARTZ** and **ROSSMAN**, Circuit Judges.

Mark Christopher Tracy, proceeding pro se, appeals the district court's dismissal with prejudice of his civil-rights action for lack of standing. Mr. Tracy asserted claims under 42 U.S.C. §§ 1983 and 1985, alleging someone assigned the claims to an entity

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

through which Mr. Tracy does business. A magistrate judge recommended that the district court rule as follows: (1) that Mr. Tracy lacked standing to prosecute these claims because they were akin to personal-injury torts that, under Utah law, could not be assigned; (2) that because Mr. Tracy did not allege anything to support claims of his own, allowing him to amend his complaint would be futile; and (3) that the action be dismissed with prejudice.

The district court agreed with the magistrate judge's recommendation that the claims should be characterized as personal-injury torts that are unassignable under Utah law. It also concluded that Mr. Tracy failed to specifically object to the magistrate judge's determination that it would be futile to amend the complaint. Accordingly, the district court reviewed that determination for clear error and, finding none, concurred with that ruling, adopted the magistrate judge's report and recommendation, and dismissed the action with prejudice.

Ordinarily, we review de novo a district court's dismissal for lack of standing. *See Colo. Env't Coal. v. Wenker*, 353 F.3d 1221, 1227 (10th Cir. 2004). Here, however, Mr. Tracy has forfeited appellate review by failing to adequately brief any issue.

Federal Rule of Appellate Procedure 28(a)(8)(A) requires that an appellant's opening brief set forth "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." "Consistent with this requirement, we routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief." *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007). Our rules of procedure apply to counselled and

pro se parties alike. *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).[1]

Mr. Tracy's opening brief expends three pages describing the factual background of this case. The "Argument and Authorities" section on the first issue—"Does state law determine if a federal civil right may be assigned?"—then begins by stating that two requirements must be met for Utah law to govern the disposition of this case:

> 1. [T]he 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).

Aplt. Opening Br. at 5 (original brackets and ellipsis omitted). The section then abruptly concludes with the sentence: "The district court failed to apply these standards to the

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[1] Mr. Tracy says we should afford his pro se materials a liberal construction, but he identified himself as an attorney in a prior appeal, *see United States ex rel. Tracy v. Emigration Improvement Dist.*, 717 F. App'x 778, 782 (10th Cir. 2017) ("Mr. Tracy, himself an attorney, should be able to adequately assess the risk of a conflict."); *see also* Aplt. App. at 212 (Mr. Tracy's Resp. to Show-Cause Order, identifying himself as an attorney), *United States ex rel. Tracy v. Emigration Improvement Dist.*, 717 F. App'x 778 (10th Cir. 2017) (No. 17-4062). We need not extend the liberal-construction rule to pro se pleadings filed by lawyers who elect to represent themselves. *See Mann v. Boatright*, 477 F.3d 1140, 1148 n.4 (10th Cir. 2007). Yet even if we liberally construed Mr. Tracy's materials, the outcome here would be the same. Mr. Tracy's reply brief protests that he is not subject to our appellate rules because he filed his opening brief on a pro se form, *see* Reply Br. at 15, but "this court has repeatedly insisted that pro se parties follow the same rules of procedure that govern other litigants," *Garrett*, 425 F.3d at 840 (brackets and internal quotation marks omitted). The use of the pro se form does not excuse compliance with the appellate rules aside from those regarding the format of the brief.

present case." *Id.* Later, in the part of the court form asking whether the court applied the wrong law, the brief states, in its entirety: "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." *Id.* at 6.

These arguments are inadequate to preserve appellate review. Mr. Tracy's opening brief does not cite the legislative history he references, nor does it cite the portions of the record on which he relies. It also fails to explain why the two requirements he cites for applying Utah law should govern this case or how they would favor his position if they did apply. "[This] court cannot take on the responsibility of serving as the litigant's attorney in constructing arguments and searching the record" on his behalf. *Garrett*, 425 F.3d at 840. "[C]ursory statements, without supporting analysis and case law, fail to constitute the kind of briefing that is necessary to avoid application of the forfeiture doctrine." *Bronson*, 500 F.3d at 1105. We therefore reject Mr. Tracy's arguments on the first issue.

Faring no better are Mr. Tracy's arguments regarding the second issue—which complains that he was not permitted to file an amended complaint—and his assertion in paragraph 6 of his brief that the district court improperly imposed heightened pleading standards. His opening brief, although correctly citing Fed. R. Civ. P. 15(a)(2) for the proposition that the district court should freely give leave to amend when justice so requires, does not discuss the specifics of the situation in this case and, in particular, does not challenge the magistrate judge's determination that an amendment would be futile.

And that brief also fails to identify where the district court applied a heightened pleading standard and why that standard was incorrect. Insofar as Mr. Tracy's reply brief may add further argument on these issues, that argument comes too late. *See Cahill v. Am. Fam. Mut. Ins. Co.*, 610 F.3d 1235, 1239 (10th Cir. 2010) ("arguments first raised in a reply brief come too late").

On the other hand, we agree with Mr. Tracy that the complaint should have been dismissed without prejudice. The dismissal was predicated on his lack of standing, which means that the district court lacked Article III jurisdiction. A dismissal for lack of subject-matter jurisdiction should be without prejudice. *See Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1218 (10th Cir. 2006).

For the foregoing reasons, we affirm the judgment below except that we remand to the district court to enter a dismissal without prejudice.

Entered for the Court

Harris L Hartz
Circuit Judge

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157
Clerk@ca10.uscourts.gov

Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

June 08, 2023

Mark Christopher Tracy
1160 East Buchnell Drive
Sandy, UT 84094

RE: 22-4032, Tracy v. Simplifi Company, et al
Dist/Ag docket: 2:21-CV-00444-RJS

Dear Appellant:

Enclosed is a copy of the order and judgment issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Christopher D. Ballard
Jeremy Rand Cook
Erik A Olson
Bradley M. Strassberg

CMW/at

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157
Clerk@ca10.uscourts.gov

Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

June 30, 2023

Gary P. Serdar
United States District Court for the District of Utah
351 South West Temple
Salt Lake City, UT 84101

RE: 22-4032, Tracy v. Simplifi Company, et al
Dist/Ag docket: 2:21-CV-00444-RJS

Dear Clerk:

Pursuant to Federal Rule of Appellate Procedure 41, the Tenth Circuit's mandate in the above-referenced appeal issued today. The court's June 8, 2023 judgment takes effect this date. With the issuance of this letter, jurisdiction is transferred back to the lower court/agency.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Christopher D. Ballard
Jeremy Rand Cook
Erik A Olson
Bradley M. Strassberg
Mark Christopher Tracy

CMW/mlb

EXHIBIT F

Scot A. Boyd (9503)
scot.boyd@chrisjen.com
Stephen D. Kelson (8458)
stephen.kelson@chrisjen.com
Bryson R. Brown (14146)
bryson.brown@chrisjen.com
Christensen and Jensen, P.C.
257 East 200 South, Suite 1100,
Salt Lake City, Utah 84111
Attorneys for Relator

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF UTAH

UNITED STATES OF AMERICA
Ex. rel. Mark Christopher Tracy,

Plaintiff,

vs.

EMIGRATION IMPROVEMENT DISTRICT, a Utah Special Service District; BARNETT INTERMOUNTAIN WATER CONSULTING, a Utah corporation; CAROLLO ENGINEERS Inc., a California professional corporation; AQUA ENVIRONMENTAL SERVICES, INC., a Utah corporation; AQUA ENGINEERING. INC., a Utah corporation; R. STEVE CREAMER, an individual; FRED A. SMOLKA, an individual; MICHAEL HUGHES (AKA MICHAEL SCOTT HUGHES), an individual; MARK STEVENS, an individual; DAVID BRADFORD, an individual; LYNN HALES, an individual; ERIC HAWKES, an individual; DON A. BARNETT, an individual; JOE SMOLKA, an individual; RONALD R. RASH, an individual; KENNETH WILDE, an individual; MICHAEL B. GEORGESON , an individual;

THIRD AMENDED COMPLAINT

Case No.: 2:14-cv-00701-JNP-PMW

District Judge: Jill N. Parrish

Magistrate Judge: Paul M. Warner

KEVIN W. BROWN, an individual; ROBERT ROUSSELLE; an individual; LARRY HALL, an individual; THE BOYER COMPANY, L.C., a Utah company; CITY DEVELOPMENT, INC., a Utah Corporation, and DOES 1-145, Defendants.	

The United States of America, by and through qui tam relator Mark Christopher Tracy, brings this action under 31 U.S.C. § 3729 *et seq.*, to recover all damages, penalties and other remedies established by the False claims Act on behalf of the United States, complains and alleges against Defendants as follows:

I. INTRODUCTION

This lawsuit is simple. Mr. Tracy seeks to recover federal funds intended for economically disadvantaged communities suffering from unsafe drinking water – like Flint, Michigan – that Emigration Improvement District ("EID") and other conspirators fraudulently acquired to build a "preposterously oversized" water system for the benefit millionaire land developers while simultaneously endangering public health and safety and the habitat of a federally protected species.

EID is a special service district created under Utah law to provide water and sewer services to the residents of Emigration Canyon.[1] It is comprised of a three-member board of trustees, a manager, and various other engineers and consultants.[2] It has the power to issue

[1] https://www.ecid.org/about-us.

[2] https://www.ecid.org/contact-us.

bonds, charge fees and assessments, and levy taxes on the residents of Emigration Canyon to pay for the water services that it provides.[3]

On or about September 29, 2004, EID received the final disbursement of a twenty-year, $1.846 million loan for the construction of two large-diameter commercial wells, a reservoir, and multiple water lines in Emigration Canyon for 312 existing households.[4] The loan came from the Utah's Drinking Water State Revolving Fund, which uses federal funds to finance the construction of water systems for drinking or culinary water, and carried a bargain-basement interest rate of 2.1 percent.

Congress created the Drinking Water State Revolving Fund (the "DWSRS") program in 1996 via amendments to the Safe Drinking Water Act, 42 U.S.C. § 300f *et seq*. (the "SDWA"). The purpose of the SDWA is to protect the quality of drinking water in the United States through the creation and enforcement of minimum standards for culinary or drinking water.[5] The DWSRS furthers this purpose by providing low-interest financing or grants for infrastructure projects that "address a current violation or will prevent a future violation of health-based drinking water standards."[6]

---

[3] Utah Code 17D-1-103(2).

[4] See Exhibit A. The September 29, 2004 payment was a "retainage release" payment. The government disbursed funds for the construction of the well, reservoir and water lines via five progress payments. However, the government retained a portion of each progress payment to assure that EID would satisfy its obligations and successfully complete the construction of the well, reservoir and water lines. Once EID certified that the project was complete, the government disbursed the "retainage." Accordingly, the September 29, 2004 payment constituted final payment for all work done on the project.

[5] https://www.epa.gov/laws-regulations/summary-safe-drinking-water-act.

[6] United States Environmental Protection Agency. Drinking Water State Revolving Fund Program Operations Manual, p. 31. https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P1007ZKN.txt, last accessed January 27, 2018.

Under guidelines from the United States Environmental Protection Agency, states administering federal funds under the DWSRS program must give priority to projects that will ameliorate the most serious risk to public health, enable compliance with the SDWA, and make access to clean water more affordable. Federal and state regulations governing the use of DWSRS funds prohibit their use for projects intended primarily for "fire protection" or to "serve future population growth."[7] In short, the funds are not for subsidizing wealthy land developers and speculators.

When applying for the $1.846 million loan, EID made various representations to the government authorities administering the loan. For instance, EID represented that it would use part of the $1.846 million to build three water lines to connect 67 residents to its then-existing community water system. These 67 residents lived in the Killyon Canyon, Burr Fork, and Young Oaks neighborhoods of Emigration Canyon and, at the time of the loan application, were obtaining drinking water from private wells.

EID also represented that these 67 residents needed access to a community water system because their private wells had problems with bacterial contamination, chemical composition, and low water supply. Finally, EID represented that it would use the remainder of the $1.846 million to build a large-diameter commercial well (the "Brigham Fork Well") and a commercial reservoir (the "Wildflower Reservoir") to ensure that it had capacity to provide water to these 67 new customers.

[7] 40 C.F.R. § 35.3520(e)(3) and (e)(5); *see also* 40 C.F.R. § 35.3520(a)(2)(5) ("Capacity to serve future population growth cannot be a substantial portion of a project"); Utah Admin. Code § 309-705-4(3)(c) ("Projects which are ineligible for financial assistance include … [a]ny project meant to finance the expansion of a drinking water system to supply or attract future population growth").

Based on EID's representations when applying for the $1.846 million loan, the proposed project appeared to fall within the parameters of the DWSRF program, as it appeared to be intended to bring clean water to 67 existing households within Emigration Canyon. As discussed below, EID's story amounted to nothing more than a front to use federal funds for the benefit of wealthy developers, including the Boyer Company, L.C. ("Boyer Company") and Steve Creamer ("Mr. Creamer"), with whom it had conspired.

Both Boyer Company and Mr. Creamer were instrumental in EID acquiring the $1.846 million loan from the DWSRF. For the loan to close, EID needed a $650,000 down payment (the total project cost was $2,400,000) and land for the proposed commercial well and reservoir. Boyer Company paid the $650,000. Mr. Creamer provided the land. Each had a financial interest to do so.

In the case of Boyer Company, the construction of the Brigham Fork Well and Wildflower Reservoir rescued it from potential legal liability for a defunct water system it had built in Emigration Canyon. In the late 1980s, Boyer Company and City Development, Inc. created a large residential development in Emigration Canyon called Emigration Oaks. Rather than incur the enormous costs of connecting the development to Salt Lake County's existing water and sewer infrastructure, Boyer Company decided to supply water to the development by building two commercial wells and a 355,000 gallon reservoir in Emigration Canyon.

There were two problems with this plan. The Boyer Company/City Development did not have the legal right to pump the amount of water needed to supply all the 223 parcels in Emigration Oaks, and the wells, reservoir and water distribution lines were insufficient to do so in any event. One of the wells pumped dry in 1994. If the entire Emigration Oaks' water system

went dry, Boyer Company/City Development would face potential legal action from property owners who had purchased vacant lots within Emigration Oaks.

Boyer Company turned to EID trustees Hughes and Smolka for help. It convinced EID to take ownership of the Emigration Oaks water system, relieving Boyer Company of legal liability should the system run out of water. In exchange Boyer Company deeded 300 acres of land to EID. However, for EID to fulfill the needs of its existing customers and future residents of Emigration Oaks, it needed the additional water infrastructure purchased with the $1.846 million federal loan.

Additionally, at the time of the $1.846 million loan, the Emigration Oaks development was incomplete and EID diverted at least $72,000.00 to pay for the installation of water distribution lines for 57 vacant parcels within "Phase 6" and "Phase 6A" of the Emigration Oaks development.

In the case of Mr. Creamer, the $1.846 million loan presented an opportunity to install water infrastructure with the capacity to support future development on land owned by him, Siv and Charles Gillmor (the "Gillmors"), and David Neuscheler ("Mr. Neuscheler"), and to do so at taxpayer expense. The $1.846 million was a low-interest loan to EID, not Mr. Creamer. As a result, payments made to service the loan have come from the residents of Emigration Canyon in the form of increased taxes, assessments and fees – a masterclass in privatizing profits while socializing costs and economic risk.

Mr. Creamer and EID currently own approximately 500 acres of vacant, developable land within Emigration Canyon, while the Gillmors own 172 acres in an area of the canyon called Spring Glenn and Mr. Neuscheler own 124 in an area of the canyon called Little Mountain. After

having exhausted all funds once EID had completed construction of the Brigham Fork Well and Wildflower Reservoir with the $1.846 million in DWSFR funds, it completed the remainder of the project with additional funds from the State of Utah in 2007, 2013 and 2015 that it used to finance a second large-diameter commercial well called the "Upper Freeze Creek Well" on property owned by Mr. Creamer, and a pipeline connecting the Upper Freeze Creek Well to a 3-mile section along the Emigration Canyon Road. EID also used the 2007 and 2013 funds to finance oversized pipelines that run from the Wildflower Reservoir to the vacant, developable land owned by Mr. Creamer, the Gillmors and Mr. Neuscheler, where the pipelines, curiously, dead-end. Like the $1.846 million loan, repayment of the funds obtained in 2007 and 2013 comes from taxes, fees, assessments on the residents of Emigration Canyon.

Based on the foregoing, Mr. Tracy seeks recovery under the False Claim Act, 31 U.S.C. §§ 3729 *et seq.*, which provides the federal government with a right of action against persons or entities who acquire federal funds via fraud on the government or its agents.[8] The False Claim Act contains a *qui tam* and reverse *qui tam* provision, [9] which allows private citizens, called relators or whistleblowers, to bring an action under the False Claim Act on behalf of the United States government.[10] On a successful claim brought by a relator, the government is entitled to

[8] *See generally* 31 U.S.C. §§ 3729 *et seq.*

[9] The term *qui tam* is short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac part sequitur*, which means "he who brings an action for the king as well as for himself."

[10] *See* 31 U.S.C. § 3730(b).

treble damages and penalties, which it must share with the relator,[11] while the relator is entitled to costs and attorney fees.[12]

Mr. Tracy's theories of recovery under the False Claim Act are twofold. First, Mr. Tracy alleges that EID and its co-conspirators made misrepresentations to the federal government or its agents that induced the federal government or its agents to disburse the $1.846 million loan. Second, Mr. Tracy alleges that, after disbursement of the $1.846 million, EID not only failed to comply with certain conditions of the $1.846 million loan but also failed to report the noncompliance despite having a duty to do so.

For instance, as part of the terms of its loan from DWSRF, EID assumed a duty to comply with conditions and requirements set forth in a January 3, 2001 letter from the Utah Department of Environmental Quality, Division of Drinking Water captioned "Federal SRF Loan Authorization and Procedures for Committal of Funds" ("Commitment of Funds Letter") throughout the loan repayment schedule.[13] Under the terms of the letter EID had to do the following: First, EID had to certify that it would comply with state and federal DWSRF regulations. Second, EID had to obtain "firm commitments" from at least 57 of the 67 homeowners that EID anticipated would participate in the project; the letter defined "firm commitment" as "actual payment of a connection fee and a signed contract to pay water utility bills." Third, EID had to certify that it had sufficient water rights to operate the system. Fourth, EID had to adopt a Water Management and Conservation Plan. Fifth, EID had to comply with

[11] 31 U.S.C. § 3729(a)(1).

[12] 31 U.S.C § 3730(d)(1).

[13] A copy of the letter is attached as Exhibit B.

"cross-cutting" federal statutes, including the Clean Water Act, the Endangered Species Act, and the Safe Drinking Water Act.

EID and its coconspirators made multiple misrepresentation to obtain the $1.846 million loan. First, EID and its coconspirators misrepresented that they intended to use $1.846 million for the benefit of 67 existing households within the canyon, when, in fact, they intended to use the funds to build "capacity" for future growth and development. As discussed above, EID has built oversized pipelines that run from the Wildflower Reservoir to the vacant, developable land owned by Mr. Creamer, the Gillmors and Mr. Neuscheler while installing insufficient pipelines to existing Canyon residents. While these pipelines evidence an intent to use the infrastructure built with the $1.846 million to facilitate growth and development at the expense of existing residents, this is not the only evidence of such intent.

In a memorandum dated October 18, 2002, a staff engineer for the Utah Division of Drinking Water, Steve Onysko, opined that the Wildflower Reservoir only needed capacity of 300,000 gallons to serve EID's existing customers and the proposed 67 new customers and that the proposed 1-million-gallon capacity was "preposterously oversized."[14] After Mr. Onysko submitted his memorandum, Mr. Creamer met with the EID board and EID's attorneys to discuss the "recommendation for smaller reservoir"[15] As built, the Wildflower Reservoir's actual capacity exceeds 1 million gallons.

In a meeting held on February 19, 2013, the trustees of one of the homeowners associations within Emigration Canyon discussed an agreement the association had reached with

[14] A copy of the memorandum is attached as Exhibit C.

[15] A copy of a billing statement from EID's attorneys is attached as Exhibit D.

Mr. Creamer concerning the subdivision of Mr. Creamer's property into multiple lots.[16] After the filing of the current lawsuit, the association scuttled the agreement. Additionally, via legislation enacted in 2015, Emigration Canyon become a "metro township," which vested five elected officials with authority to establish zoning requirements in the canyon. One of the township's first orders of business was to remove a previously-established, 725-home limit on the amount of homes allowed to be built in the canyon.

Second, EID misrepresented that 57 households from the Killyon Canyon, Burr Fork, and Young Oaks neighborhoods had committed to connect to the EID's system, paid the connection fee, and agreed to make monthly water payments. To be sure, fourteen years later, no more than 30 households from these neighborhoods have connected to the system. EID perpetrated the fraud by convincing 57 residents and owners of vacant parcels to sign "standby" agreements, which gave the resident and/or property owner the option to connect to the system at a later date but did not require them to do so. EID then altered the "standby" agreements so that, when presented to government officials for review, the agreements appeared to require connection to the system. EID also misrepresented that, at the time of the $1.846 million loan, households from these neighborhoods were having problems with well contamination. There only was one well that actually had contamination issues. All this only reinforces Mr. Tracy's claim that, far from using the $1.846 million for the benefit of 67 existing canyon residents, EID used the funds to put in infrastructure for land developers like Mr. Creamer and Boyer Company.

Third, EID withheld material information about the ability of Emigration Canyon to sustain the operation of large-diameter commercial wells. In 1966, one of EID's hydrologists,

[16] A copy of the meeting minutes is attached as Exhibit E.

Jack Barnett, published a master's thesis concerning Emigration Canyon's hydrology. The thesis concluded that the canyon could not sustain large-diameter commercial wells and, even if such wells were to successfully draw large quantities of water from the canyon's riparian system, impairment of private wells within the canyon "would be almost a certainty." EID did not disclose this information when applying for the $1.846 million loan.

This nondisclosure was material. When EID was applying for the $1.846 million loan, in addition to the 67 households in Killyon Canyon, Burr Fork, and Young Oaks that drew water from private wells, most all other households within Emigration Canyon obtained drinking water from private wells. If a commercial well decreased the water within these private wells, the wells would become more susceptible to contamination, as wells with low water flows are prone to bacterial contamination and chemical imbalances. In short, EID failed to inform the government that construction of a commercial well most likely would result in contamination of the water supplies of many canyon residents. As of today, at least twenty-seven canyon residents have reported no or low water flows in their wells since installation of the Brigham Fork Well.

Fourth, when applying for the $1.846 million loan, EID misrepresented that its water rights had priority over all other water rights in the canyon. This misrepresentation was material. In Utah, water rights are allocated according to the doctrine of prior appropriation.[17] If the overall water supply in a riparian system decreases due to drought, overuse or any other reason, holders of superior rights have first priority to the water.[18] EID's water rights originally had a point of diversion at the mouth of Emigration Canyon. To operate the Brigham Fork Well, EID

[17] https://waterrights.utah.gov/wrinfo/default.asp.

[18] *Id*.

had to change the point of diversion to the wellsite, which caused the EID's water rights to lose priority and become inferior to all other water rights of canyon residents. To this day, EID operates the Brigham Fork Well under a "temporary use permit," which it must renew on a yearly basis. If the Brigham Fork Well were to interfere with water flows of private wells of canyon residents who have water rights superior EID's water rights, any one of those residents would have a legal right to shut down EID's entire system.

As discussed above, since obtaining the $1.846 million loan, EID has failed to comply with certain conditions of the loan. First, as discussed above, EID promised not to use the funds to create "capacity" for future population growth. However, since obtaining the loan, EID has taken action in derogation of that promise. It built a "preposterously oversized" reservoir. It built the Upper Freeze Creek well and connected it to the Wildflower Reservoir. It ran oversized water lines from the Wildflower Reservoir to vacant land owned by Mr. Creamer and others while providing undersized, undersized deficient water lines to existing residents who are or chose to connect to the EID water system.

Second, EID promised to comply with crosscutting environmental statutes, including the Clean Water Act, Safe Drinking Water Act, and Endangered Species Act. EID has failed to comply with this promise. By pumping water sufficient to fill the "preposterously oversized" Wildflower Reservoir, EID has depleted the water flows in the canyon. This has diminished water flows in private wells within the canyon and in Emigration Creek. The impaired private wells are more susceptible to water contamination, which frustrates the purposes of the Clean Drinking Water Act. Low flows in Emigration Creek threatens the habitat of the Utah Cutthroat Trout, which frustrates the purposes of the Endangered Species Act.

Moreover, EID's system has created environmental hazards. Due to flaws in the design and construction of the Brigham Fork Well and Upper Freeze Creek well, water supplied by EID is prone to iron bacterial contamination. Residents have reported foul, red tap water, which frustrates the purposes of the Safe Drinking Water Act. Due to undersized waterlines maintained at excessive pressure and structural defects of the Wildflower Reservoir, there are numerous leaks in EID's water system with an estimated loss of 1-million gallons per month causing chlorine levels in groundwater and Emigration Creek to skyrocket, which violates the purposes of the Clean Water Act.

Finally, because the $1.846 million loan involved federal funds, EID could not receive the funds unless and until applicable federal agencies complied with the exigencies of the National Environmental Policy Act ("NEPA")[19] NEPA generally requires federal agencies to assess the environmental effects of their proposed actions prior to making decisions.[20] To comply with NEPA, before disbursement of the $1.846 million, the Utah Department of Environmental Quality Division of Drinking Water created what's called an "Environmental Assessment" that evaluated the impact that the proposed Brigham Fork Well and Wildflower Reservoir would have on the environment. The Environmental Assessment also evaluated the effect that a proposed future well intended to tie into the Wildflower Reservoir would have on the environment. The division subsequently issued a finding that the Brigham Fork Well, Wildflower Reservoir, a 3-mile water distribution line and the proposed future well would have no significant adverse impact on the environment.

[19] 42 U.S.C. § 4321 et seq.

[20] https://www.epa.gov/nepa/what-national-environmental-policy-act.

The Environmental Assessment assumed EID would construct a 3-mile water distribution line along Emigration Canyon Road and the proposed future well in an area of Emigration Canyon called the Nugget Formation. When EID obtained funding for the future well in 2007 and 2013, however, it did not build it in the Nugget Formation. Instead it used the funds to build the Upper Freeze Creek Well on property owned by Mr. Creamer. In short EID built the Upper Freeze Creek well without first having the environmental impacts of the well assessed by the federal government as required by NEPA.

Third, EID failed to comply with its Water Management Plan, which required EID to measure water levels in "5 monitor wells" to "determine whether there are changes in the aquifers upon which [c]anyon residents are dependent for their culinary water supply."[21] Since obtaining the $1.846 million loan, EID has failed to measure water levels in the five monitoring wells and otherwise has failed to ensure that operation of the Brigham Fork Well, Upper Freeze Creek Well, and the Wildflower Reservoir are not depleting aquifers relied upon by other canyon residents.

Of course one question remains. Why would EID, a governmental entity, participate in a conspiracy to divert federal funds for the benefit of wealthy land developers? The answer is simple. EID's trustees, engineers and contractors personally benefitted from the construction of the water infrastructure and enlargement of EID's system and revenue. The more money coming into EID through taxes, fees and assessments, the more money the trustees can divert to family, friends and themselves through lucrative government contracts.

[21] Water Management and Conservation Plan, dated November 14, 2002, p. 3.

Since January of 2000, EID has made payments to Fred Smolka totaling $594,613.47. Historically, Mr. Smolka has worked for EID in a variety of positions, including trustee and general manager. Mr. Smolka currently works for EID as an "independent contractor," receiving an annual salary of $120,000. Since 2004, EID has paid over $150,000 to Fred Smolka's family and friends for services rendered to EID.

Other trustees have received similar financial benefits. In November 2014, EID awarded a $60,000 contract to a company owned by Hughes to construct a septic system within Emigration Canyon. Between 2004 to present, EID has waived impact and water usage fees for the personal benefit of Scott Hughes, David Bradford and Mark Stevens. Finally, since 2004, two firms that EID hired to do engineering and hydrological work for EID, Carollo and Aqua, have received over $1 million in payments from EID.

In conclusion, everything that EID has done with the $1.846 million loan frustrates the purpose of the DWSRF program. Rather than using it to provide 67 existing residents with clean water as promised, EID built a 12-million dollar water system to serve future population growth. Why else build a "preposterously oversized" reservoir and oversized water lines to three separate tracts of vacant, developable land? Rather than heighten the overall water quality within the canyon, EID's system delivers water contaminated with iron bacteria to residents connected to the system since 2003, while simultaneously drying up the private wells of residents not connected to the system. As water levels in private wells go down, the risk of bacterial or mineral contamination go up. Rather than making drinking water more affordable, EID has levied exorbitant fees, taxes and assessments to service the $1.846 million loan.

In short, this case presents a masterclass in public corruption. Rather than protect its constituents, EID has forced them to shoulder the costs of water infrastructure, while EID's trustees and developers like Boyer Company and Mr. Creamer reap the windfall.

II. THE PARTIES

1. Relator is a resident of Salt Lake County, State of Utah.

2. On information and belief, Defendant Emigration Improvement District ("EID") is a special service district organized under the laws of the State of Utah, endowed with governmental authority to provide water and sewage service to residents of the Emigration Canyon. EID's headquarters are located within Salt Lake County, State of Utah.

3. On information and belief, Defendant Barnett Intermountain Water Consulting ("BIWC") is a corporation organized and existing under the laws of the State of Utah, with its headquarters located within Davis County, Utah.

4. On information and belief, Defendant Carollo Engineers, Inc. ("Carollo Engineers") is a California professional corporation headquartered in Walnut Creek, State of California.

5. On information and belief, Defendant Aqua Environmental Services, Inc. ("AES") is a corporation organized and existing under the law of the State of Utah, with its headquarters located within Davis County, State of Utah.

6. On information and belief, Defendant Aqua Engineering, Inc. ("Aqua Engineering") is a corporation organized and existing under the law of the State of Utah, with its headquarters located within Davis County, State of Utah.

7. On information and belief, Defendant R. Steve Creamer ("Mr. Creamer") is a former Environmental Engineer with the Utah Department of Environmental Quality, is the former CEO of Energy Solutions, is the current Chairman of the "EID Advisory Committee," is the former President of Emigration Oaks, and is a resident of Salt Lake County, State of Utah.

8. On information and belief, Defendant Fred A. Smolka, CPA ("Mr. Smolka") is the former EID Trustee Chairman, former EID Clerk, former EID General Manager, former EID Election Specialist, current EID Treasurer, current EID Consultant, former member of the EID Engineering, Finance and Audit Committee, current principle of Management Enterprises, and a resident of Salt Lake County, State of Utah.

9. On information and belief, Defendant Michael Scott Hughes ("Mr. Hughes") has been a Co-Chairman Trustee of EID since January 2000 and is the principle of Ecosens and a resident of Salt Lake County, State of Utah.

10. On information and belief, Defendant Mark H. Stevens ("Mr. Stevens") is a former Co-Chairman and Trustee of EID (elected in November 2005), a former member of EID's Audit Committee, and a resident of Salt Lake County, State of Utah.

11. On information and belief, Defendant David C. Bradford ("Mr. Bradford") has been a Trustee Clerk of EID, is a former member of the EID's Finance Committee, and is a resident of Salt Lake County, State of Utah.

12. On information and belief, Defendant Lynn B. Hales ("Mr. Hales") is the former Chairman and Trustee of EID (elected in January 2000) and is the current Chairman of the EID's Engineering Committee and a resident of Salt Lake County, State of Utah.

13. On information and belief, Defendant Eric L. Hawkes ("Mr. Hawkes") is EID's current District Manager, Financial Manager, Election Specialist and is the principle of Simplifi and a resident of Salt Lake County, State of Utah.

14. On information and belief, Defendant Don A. Barnett, P.E. ("Don Barnett") is the current EID Hydrologist, a principal of BIWC, and a resident of Davis County, State of Utah.

15. On information and belief, Defendant Joseph D. Smolka ("Joe Smolka") is a member of the EID Advisory Board (appointed December 16, 2010), the current EID Operations Manager (appointed October 14, 2004), a former member of the Emigration Canyon Community Counsel, the current chairman of the Metro Council, the brother of Fred Smolka, a principal of Smolka Construction, and a resident of Salt Lake County, State of Utah.

16. On information and belief, Defendant Ronald L. Rash, P.E. ("Mr. Rash") is a shareholder of Carollo Engineers and is a resident of Salt Lake County, State of Utah.

17. On information and belief, Defendant Kenneth Wilde, P.E. ("Mr. Wilde") is a former Engineering Section Manager of DDW and a resident of West Valley City, State of Utah.

18. On information and belief, Michael B. Georgeson, P.E. ("Mr. Georgeson") is a former Engineering Section Manager with DDW and a resident of American Fork, State of Utah.

19. On information and belief, Defendant The Boyer Company, L.C. ("Boyer Company") is a corporation organized and existing under the law of the State of Utah, with its headquarters located within Salt Lake City, State of Utah.

20. On information and belief, Defendant City Development, Inc. ("City Development") is a corporation organized and existing under the law of the State of Utah, with its headquarters located within Salt Lake City, State of Utah.

II. JURISDICTION

21. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §1331, and 31 U.S.C. §3732, the latter of which specifically confers jurisdiction on this Court for actions brought pursuant to 31 U.S.C. §§ 3729 and 3730.

22. On information and belief, there have been no public disclosures of the allegations or transactions contained herein that bar jurisdiction under 31 U.S.C. §3730(e).

23. This Court is the proper venue for this action pursuant to 31 U.S.C. §3732(a) because at least one of the Defendants resides in this federal district.

24. This Court has personal jurisdiction over all Defendants because each is a resident of this district, or has its headquarters in this district, or conducts substantial business within this district.

III. GENERAL ALLEGATIONS

A. General Background

1. Emigration Improvement District.

25. EID is a special service district created under Utah law to provide water and sewer services to the residents of Emigration Canyon.

26. It is comprised of a three-member board of trustees, a manager, and various other engineers and consultants.

27. It has the power to issue bonds, charge fees and assessments, and levy taxes on the residents of Emigration Canyon to pay for the water services that it provides.

28. EID is comprised of a three-member board of trustees, a manager, and various other engineers and consultants.

29. EID's charter does not grant it authority to use taxpayer funds to finance development in Emigration Canyon for private profit.

30. EID does not fall within the authority of the Utah Public Utilities Commission.

31. Since 1985 EID has collected property tax revenue for all real properties located within the Canyon

32. Prior to 1998, EID did not own or operate any drinking water or sewage systems.

2. Applicable Utah Water and Zoning Laws

33. In the State of Utah, any change to the point-of-diversion (geographic point where water is extracted) or the point-of-use (geographic area where water may be used) of a water right requires the approval of the State Engineer in the form of either a permanent or temporary change application.

34. Under current building regulations of Salt Lake County, any new home constructed within Emigration Canyon must prove legal access to water with either a water share approved by the State Engineer or a promise of future water service issued by a Special Service Water District such as EID and be within 600 feet of a fire hydrant.

35. A domestic unit of 0.45 acre feet of water rights is needed for the culinary water use of one single-family residence in Emigration as mandated by the State Engineer (excluding exterior irrigation).

36. A domestic unit of 0.75 acre feet of water rights is needed for the culinary water use of one single-family residence in Emigration Canyon as mandated by the State Engineer (including exterior irrigation).

37. Under Utah Code Sec. 73-3-8 (b) and (c), "if the state engineer has reason to believe that an application [for water use] will interfere with the water's more beneficial use … or will unreasonably affect public recreation or the natural stream environment, or will prove detrimental to the public welfare, the state engineer shall withhold approval or rejection of the application until the state engineer has investigated the matter" whereby "[i]f an application does not meet the requirements of this section, it shall be rejected."

38. Under Utah Code 73-3-55, any right to divert water under a temporary change permit is inferior to any right to divert water under a permeant change permit or any perfected water rights.

39. Under Utah Code 73-3-5.5(d)(i)and (d)(ii), unlike permanent change applications, temporary change applications expire automatically after one year and cancel according to its own terms.

B. The $1.846 Million Loan

1. EID received at least some of the $1.846 million on or after September 29, 2004.

40. On or about September 29, 2004, EID received the final disbursement of a twenty-year, $1.846 million loan intended for the construction of two large-diameter commercial wells, a reservoir, and multiple water lines in Emigration Canyon for 312 existing households who would eventually connect to the water system.

41. The September 29, 2004 payment was the final release of "retainage" funds. The government disbursed the $1.846 million in funds for the construction of the well, reservoir and water lines via five progress payments.

42. However, the government retained a portion of each progress payment to assure that EID would satisfy its obligations and complete the construction of the well, reservoir and water lines.

43. Once EID's engineer – Carollo Engineering – certified that the project as complete, the government disbursed the "retainage." The September 29, 2014 payment constituted final payment for all work done on the project.

2. The Drinking Water State Revolving Fund Program

44. Congress created the Drinking Water State Revolving Fund (the "DWSRS") program in 1996 via amendments to the Safe Drinking Water Act, 42 U.S.C. § 300f *et seq*. (the "SDWA").

45. The purpose of the SDWA is to protect the quality of drinking water in the United States through the creation and enforcement of minimum standards for culinary or drinking water.

46. The DWSRS furthers this purpose by providing low-interest financing or grants for infrastructure projects that address a current violation or will prevent a future violation of health-based drinking water standards.

47. Under guidelines from the United States Environmental Protection Agency, states administering federal funds under the DWSRS program must give priority to projects that will ameliorate the most serious risk to public health, enable compliance with the SDWA, and make access to clean water more affordable.

48. Federal and state regulations governing the use of DWSRS funds prohibit their use for projects intended primarily for fire protection or to serve future population growth. In short, the funds are not for subsidizing wealthy land developers and speculators.

3. Terms of the $1.846 Million Loan

a. Financial Terms.

49. On October 13, 2000, EID secured a commitment of funds from DDW for the sale of federally-backed bonds administered under the authority of the Safe Drinking Water Act at 2.01% in the amount of $1,256,000.00.

50. EID subsequently requested three amendments to the loan agreement, which increased the commitment of funds to $1,846,000.00, for the total project cost of $2,400,750.00 (as a condition of getting the loan, EID had to secure the remaining portion).

51. Upon closing of the bond sale, all federal, matching state and EID's own co-payment were to be placed in an escrow account administered by DDW.

52. The funds were disbursed in six actual payments, the last of which occurred on or after September 29, 2004.

53. EID agreed to repay the funds over a twenty-year period at 2.01 percent interest.

54. In applying for the loan, EID represented that it would use the funds to build a reservoir, two large-diameter commercial wells, and three water lines.

55. In applying for the loan, EID represented that it intended to use Brigham Fork Well and the Wildflower Reservoir to bring clean water to 67 residents purported to be residing in the Killyon Canyon, Burr Fork, and Young Oaks neighborhoods of Emigration Canyon.

56. DDW gave Fred Smolka complete and plenary control over the $1.846 million loan and allowed him to receive the disbursement of funds without requiring a second signature on the applicable negotiable instruments.

b. Commitment of Funds Letter.

57. As a condition of the loan, EID agreed to abide by the conditions and requirements set forth in a January 3, 2001 letter from the Utah Department of Environmental Quality, Division of Drinking Water captioned "Federal SRF Loan Authorization and Procedures for Committal of Funds" ("Commitment of Funds Letter").[22]

58. The Commitment of Funds Letter required EID had to certify that it would comply with state and federal DWSRF regulations.

59. The Commitment of Funds Letter required EID to obtain "firm commitments" from at least 57 of the 67 homeowners that EID anticipated would participate in the project; the letter defined "firm commitment" as "actual payment of a connection fee and a signed contract to pay water utility bills."

60. The Commitment of Funds Letter required EID had to certify that it had sufficient water rights to operate the system.

61. The Commitment of Funds Letter required EID had to adopt a Water Management and Conservation Plan.

62. The Commitment of Funds Letter required EID had to comply with "cross-cutting" federal statutes, including the Clean Water Act, the Endangered Species Act, and the Safe Drinking Water Act.

[22] A copy of the letter is attached as Exhibit A.

c. Compliance with NEPA.

63. As a condition of obtaining the $1.846 million loan, EID had to cooperate with state and federal authorities in their efforts to comply with the National Environmental Policy Act ("NEPA").

64. This cooperation included providing state and federal authorities with complete, truthful, and accurate information about the proposed project.

65. NEPA generally requires federal agencies to assess the environmental effects of their proposed actions prior to making decisions.

66. The first step in the NEPA process is the creation of an Environmental Assessment, which determines whether or not a federal action has the potential to cause significant environmental effects.

67. If state and federal authorities determine that a project using federal funds does not have the potential to cause significant environmental impacts, the authorities issue a Finding of No Significant Impact, which has the effect of greenlighting the project allowing for actual construction to begin.

68. As a condition of receiving the $1.846 million loan, EID had to wait for completion of an Environmental Assessment and issuance of a Finding of No Significant Impact.

C. EID builds a preposterously oversized water system with $1.846 million loan.

1. Environmental Assessment and Finding of No Significant Impact.

69. To comply with NEPA, before disbursement of the $1.846 million loan, the Utah Department of Environmental Quality Division of Drinking Water in conjunction with applicable federal agencies evaluated the impact that the proposed wells and reservoir would have on the environment.

70. Based on information submitted by EID and Carollo Engineering, an engineering firm that EID had hired to assist with the NEPA process, federal and state authorities created an Environmental Assessment that evaluated what impact the proposed large-diameter commercial wells, reservoir and water lines would have on the environment (the "EA").

71. When evaluating the environmental impacts of the Brigham Fork Well, the Wildflower Reservoir, and the proposed future well, the government relied on plans, reports, data and representation created or made by EID or Carollo Engineering.

72. In an email to Don Hayes, Environmental & Water Resources Engineering Leader, at the Department of Civil & Environmental Engineering, University of Utah on July 22, 2002, Mr. Wilde reported that EID trustees were "vague and evasive" during public meetings and EID "has never sent us any of the documents and letters they have been giving to the people…they have been vague and have given conflicting answers and dodging questions/answers in the 2 public meetings I have attended." Mr. Wilde also expressed concern that "a couple of the things [EID] stated in the letters and documents were probably illegal."

73. Mr. Wilde however concluded that federal and state agencies "have little influence in development" due to the fact that "the NEPA processes … give[] us very little ability to evaluate what will happen in the canyon."

74. During the public comment period held on the Environmental Assessment in 2002, several residents of Emigration Canyon informed Mr. Brown, Mr. Georgeson and Mr. Wilde that the proposed project expressly violated federal-funding requirements under the Safe Drinking Water Act.

75. Despite these reservations, federal and state authorities – acting through Mr. Wilde – issued a Finding of No Significant impact on August 5, 2002 for the development of the two commercial wells, the reservoir and various commercial lines. This infrastructure was intended to service 312 households within Emigration Canyon.

76. Mr. Brown subsequently approved issuance of the $1.846 million loan, despite the fact that Environmental Protection Agency Rule 62-552.370 provided for construction grants only for "Financially Disadvantaged Communities" and not the multi-million dollar homes of Emigration Oaks, Young Oak, Pinecrest PUD and Killyon Canyon. EID through Carollo Engineering certified successful project completion on September 2004.

77. On September 29, 2004, the retainage funds were release to EID.

78. On May 5, 2005, the project was closed after EID falsely certified that it had obtained a federally-mandated post-construction inspection and all necessary permits for the operation a public-drinking water system under the Safe Drinking Water Act.

2. Construction of the Brigham Fork Well.

79. On November 16, 2001, Creamer agreed to purchase 135 acres of prime, developable property on the east side of Emigration Oaks from the Gillmor(s).

80. On December 14, 2001, Steve Creamer and EID – acting through Mr. Hughes and Mr. Hales – executed an agreement under which Mr. Creamer agreed to allow EID to construct the Brigham Fork Well in exchange for $75,000.00.

81. Earlier that same year, EID had created a plan that called for the Brigham Fork Well to be built at a different location.

82. EID disregarded thirty-three other possible well site previously approved by the State Engineer under permanent change applications.

83. To build the well on Mr. Creamer's property, EID was required to file temporary change applications subject to yearly review and approval of the State Engineer.

84. On December 14, 2001, EID agreed to employ Mr. Creamer as the contractor for the construction of water-system infrastructure in direct violation of federal bidding and procurement requirements.

85. Fred Smolka paid Mr. Creamer $119,652.33 for construction work that Mr. Creamer allegedly performed on the Brigham Fork Well.

86. Mr. Wilde allowed construction of the Brigham Fork Well to begin before issuance of the FONSI, in violation of the federal funding requirements of the Safe Drinking Water Act.

87. Due to shoddy workmanship, the Brigham Fork Well was built with a cracked casing.

88. Although the EAR and FONSI assumed the Wildflower Reservoir would be underground and made of concrete, on September 9, 2002, EID submitted invitations to bid for an above-ground steel tank.

3. Construction of the Wildflower Reservoir with $1.846 million.

89. Both the EA and FONSI assumed that EID would construct the Wildflower Reservoir on a specific parcel of flat ground belonging to Salt Lake City.

90. Instead, EID actually built the Wildflower Reservoir on property owned by Mr. Creamer, which is located within 60 feet of the proposed reservoir site and is steeply grated.

91. During construction, Mr. Creamer personally supervised the excavation of a 150-foot cut into the south hilltop in order to place the reservoir on property belonging to him.

92. Although EID had rendered payment to Salt Lake City on August 30, 2001 in the amount of $14,500.00 for a permanent easement for an underground, concrete tank, EID never built an underground tank on the property.

93. When surveying the boundaries of the Salt Lake City property in August 2002, Carollo Engineering – acting through Mr. Rash – failed to place permanent markers on the site and failed to register the survey with Salt Lake County, thereby actively concealing the fact that EID intended to build the Wildflower Reservoir on land owned by Mr. Creamer.

94. Although construction drawings provided for a 1-million gallon steel tank at 71 foot in diameter and 31 foot in height, under supervision of Carollo Engineering, ABCO Construction Inc. – upon information and belief a company owned or controlled by Creamer – completed a 100-foot diameter tank at a height between 23 and 30 feet, which yields a capacity between 1.3 and 2 million gallons.

95. Current records of DDW record the volume of the Wildflower Reservoir at 1.3 million gallons.

96. In an EID document dated "November 2003," Fred Smolka references a "2mil tank" when describing mechanical operations of water facilities operated by EID.

97. During the subsequent plan review, DDW staff engineer Steve Onysko in a memorandum dated October 18, 2002, informed Mr. Georgeson that the planned 1-million gallon Wildflower Reservoir was "preposterously oversized" beyond the 300,000 gallon capacity needed to fulfill the federal requirements and once again repeated that the Safe Drinking Water Act "prohibit[s] the use of State Revolving Funds (SFR) monies for construction of water system infrastructure for future growth."

98. Mr. Onysko concluded that, "I will not jeopardize my Utah Professional Engineering license by preparing an approval letter for the subject project under these circumstances. If you believe that approval of the subject project is appropriate, you will have to assign the task of approval letter preparation to someone other than myself."

99. On October 29, 2002, EID's attorney met with Mr. Creamer, Fred Smolka, Mr. Hales, and Mr. Rash to discuss "DWD [i.e., DDW] staff issues... concerning recommendation for smaller reservoir, economics [sic] of project and related issues," but then failed to report Mr. Onysko's objections to other EID trustee or report Onysko's objections to canyon residents in the following EID Trustee meeting on November 14, 2002.

100. Carollo Engineering – acting through Rash – "refused" to consider a cost savings of $500,000.00 by engineering an appropriately sized 300,000 gallon reservoir.

101. Because EID built an oversized, tank with a capacity between 1.3 and 2 million gallons, the overall project experienced "unforeseen cost overruns," which prevented EID from using the $1.846 million loan to build a second well within the canyon.

102. In 1995, Carollo prepared a report indicating that a 500,000 gallon reservoir would be sufficient to service 700 households within the Emigration Canyon.

103. Although hired by EID sometime prior to October 9, 2003 to inspect and supervise the construction of the Wildflower Reservoir, Carollo Engineering failed to report that the reservoir had not been constructed according to the submissions made during the NEPA process, i.e., Carollo Engineering failed to report that the reservoir was larger than planned and built on Mr. Creamer's property.

104. EID allowed the temporary operating permit for the use of the Wildflower Reservoir as a drinking-water source to expire on February 1, 2004 by failing to secure a post-construction inspection and permanent operating permit in violation of the Safe Drinking Water Act.

105. Under the Commitment of Funds Letter, EID had a duty to certify "valid legal title to the rights-of-way both for the project to be constructed and the remainder of the existing water system."

106. EID did not record the easements showing EID had placed the Wildflower Reservoir on Mr. Creamer's property, thereby actively concealing the fact that the reservoir was on Mr. Creamer's property.

107. EID failed to record easements showing that the water lines running from and to the Brigham Fork Well crossed Mr. Creamer's property.

108. Relator reviewed the documents submitted in connection with the $1.8 million loan on August 12, 2015; the documents did not include certification that EID had rights of way

for the Wildflower Reservoir, the Brigham Fork Well, or the water lines that connected the reservoir and well to the remainder of the system.

4. Construction of water lines with the $1.846 million loan.

109. During construction of the Wildflower Reservoir, on November 19, 2002, EID contracted with Mr. Creamer to construct an 8-inch water supply line between the Wildflower Reservoir, the Brigham Fork Well and the existing water system in Emigration Oaks to the west of the Wildflower Reservoir, in violation of federally-mandated open bidding requirements.

110. Mr. Onysko informed EID that the 8-inch water lines could not provide adequate fire flow to all 312 houses.

111. EID asked the fire marshal to approve a minimum of 1,000 gallons per minute but the fire marshal refused to drop it that low.

112. EID failed to contract with licensed engineers to inspect the work performed by Mr. Creamer and failed to inform Salt Lake County that construction of the water-supply lines by Mr. Creamer would not be inspected by a licensed engineer.

113. Rather than construct an 8-inch water-supply line, sometime in the year 2004, Mr. Creamer placed a 10-inch line through his property and hastily covered the trench;

114. On August 22, 2003, Carollo Engineering issued a change order to Condie Construction Co. for "2-inch waterline used in Killyon Canyon and Muddy Hallow," despite the fact that construction drawings in these areas required the installation of 8-inch water lines.

115. On the same date, Carollo Engineers issued a change order to Condie Construction to "[c]hange from 8-inch to 4-inch PVC C-900 waterline on Quad Road," despite the fact that construction drawings in this area required the installation of 8-inch water lines.

116. Carollo Engineering – though Rash – refused to consider upsizing the water distribution lines in the main canyon from 8 inches to 10 inches at a cost of $119,000.00 despite the fact that Mr. Onysko refused to certify compliance with Regulation R309-510-9 regulating the size of the distribution system need for adequate fire protection.

5. False Certification re $1.846 million project.

117. Despite the aforementioned, on September 22, 2004, Mr. Rash reported that the project as completed in compliance with the pre-construction plans.

118. On May 3, 2005, Mr. Maculey, then DDW staff engineer and current DDW Deputy Director, recorded in the DDW database that "[a]ll project components have received operating permits," despite the fact that the Wildflower Reservoir had not received a permanent operating permit following the federally mandated post-construction inspection.

119. Wildflower Reservoir, Boyer Well No. 2 and the chlorinator for the Brigham Fork lack federally mandated operating permits to date.

120. The aforementioned certification of project completion was itself expressly refuted by former EID Trustee Bowen who personally confronted Rash at the Carollo office in Midvale, Utah shortly thereafter.

D. Completion of the EID's water system.

1. The 2007 bond.

121. EID used state grants to build a 3.3 mile waterline down Emigration Canyon a second well, both of which connected to the Wildflower Reservoir and Brigham Fork Well.

122. As part of the NEPA process conducted before issuance of the $1.8 million loan, the state and federal authorities evaluated what impact construction of a future 3.3-mile water line (located in the main canyon for the purported benefit of 312 households) and a future well (located in a section of Emigration Canyon called the Nugget Formation) would have on the environment.

123. The government's evaluation assumed that the future 3.3-mile water line and the future well would connect to the Wildflower Reservoir and other infrastructure built with federal funds. The government evaluated the impacts of these future projects at the insistence of Fred Smolka and Mr. Creamer.

124. On September 15, 2006, EID secured another commitment of funds from the State of Utah for the amount of $2,860,000.00 for the purpose of constructing the 3.3-mile water line along Emigration Canyon Road (the primary thoroughfare through the canyon).

125. EID subsequently built the waterline.

2. The 2013 bond.

126. On October 11, 2012, EID secured another commitment of funds in the amount of $1,600,000.00 from the Utah Division of Water Rights for the construction of the second large-diameter commercial well.

127. Though the EA and the FONSI assumed that EID would build any future well connected to the Wildflower Reservoir in the "Nugget Formation," EID actually built the well

(the "Upper Freeze Creek Well") on property owned by Mr. Creamer and located two miles from the Nugget Formation.

128. In a correspondence to canyon resident Irons on April 28, 2014, EID through Hawkes reported that "the District was required to get another loan for $1.6 million (0% interest) to provide some added protection or 'redundancy' in the system."

129. Despite concerns expressed in a 1994 report that two wells in the canyon – the Boyer Well No. 1 and Boyer Well No. 2 – were placed in close proximity and in the same drainage area and would therefore prove to be unproductive water sources, BIWC – acting through Barnett – insisted that the Upper Freeze Creek Well also be placed in close proximity with Boyer Well No. 1 and Boyer Well No. 2.

130. On October 8, 2013, EID recorded the purchase of a 20-acre parcel for the Upper Freeze Creek Well from land developer Walter Plumb of City Development for $140,000.00 – an amount well above what Walter Plumb expected to receive for a property without water rights and well above market value.

131. On November 7, 2013, EID obtained approval from the State Engineer to provide water to 69 new homes "yet to be constructed in the [c]anyon" under permanent change application #a18651 for water share #57-7479, which EID had acquired from Walter Plumb and City Development on December 28, 2017.

132. Relator is informed and believes that EID verbally promised to bring water service to an area directly north of the UFC Well identified as "Emigration Peaks LLC," which owned and controlled by Ira Sachs and Walter Plumb.

133. EID failed to have the value of the property appraised before closing.

134. Meeting minutes prepared by EID failed to record the terms of the agreement or the title transfer.

135. EID did not have authorization to purchase the property for construction of the Upper Freeze Creek Well, but rather was required to obtain easements for placement of the well.

136. In the construction documents from January 17, 2014 submitted to DDW by Aqua Engineering through Mr. Rousselle, EID reported to have secured an easement from developer Walter Plumb despite the fact that no such easement agreement had been recorded with Salt Lake County. Walter Plumb recorded fee simple title transfer to EID on September 13, 2013.

137. In a letter dated April 19, 2013, Fred Smolka stated that the site for the Upper Freeze Creek Well was chosen because EID wanted to stay as "far away from [a popular walking] trail as possible with the road to keep this treasure as pristine as possible."

138. Both the trail and well site are currently protected by no less than six no-trespassing signs warning of "criminal prosecution to the fullest extent of the law."

139. EID made no effort to obtain an easement from Salt Lake City although the actual well site of the Upper Freeze Creek Well is located within 10 feet of property belonging to the city.

140. Contrary to the construction drawings prepared by Aqua Engineering indicating that Walter Plumb had granted EID a permanent easement for the construction of the Upper Freeze Creek Well, on October 8, 2013, EID recorded a permanent easement to Rocky Mountain Power on the property previously belonging to Walter Plumb.

141. Contrary to construction drawings submitted by Aqua Engineering through Mr. Rousselle to DDW, Aqua Engineering completed the easement documents submitted to Salt Lake County for the benefit of Rocky Mountain Power.

142. Under the construction oversight by Aqua Engineering and Joseph Smolka, EID installed four electrical "pullboxes" allowing for future development of the property formerly belonging to Walter Plumb.

143. The electrical conduit installed for operation of the Upper Freeze Creek Well far exceeds the power requirements of a large-diameter commercial well but was rather intended to service multiple single-family residents.

144. Contrary to the site plan submitted to DDW by Aqua Engineering through Mr. Rousselle, EID under the construction oversight of Aqua Engineering and Joe Smolka installed several water connections for individual water meters.

145. Despite the aforementioned deficiencies, on January 14, 2014, Mr. Rousselle falsely certified that the Upper Freeze Creek Well was compliant with all requirements of the 2013 Bond Agreement.

146. While pump testing the proposed Upper Freeze Creek Well in 2013, BIWC and Don Barnett failed to observe the five existing monitoring wells owned by EID and installed at tax-payer expense in the early 1990's, as required by the Water Conservation Management Plan.

147. In June 2014, Don Barnett informed Canyon resident and Geophysicist Dr. Irons that he had wanted to install monitoring wells during the development of the Upper Freeze Creek Well, but he [Don Barnett] had been "admonished" by Fred Smolka, Mr. Hughes, Mr. Stevens

and Mr. Bradford for making such a suggestion due to "prohibitive costs" and thus dropped the issue.

148. On October 31, 2010 at a presentation of the Geological Society of America in Denver, Colorado, Don Barnett and Dr. Yonkee concluded, "[t]hus, development of fractured bedrock aquifers should include detailed hydrogeological [sic] mapping, and long term monitoring of water levels and chemistry from production wells…such an inclined well drilled in 2004 [the Brigham Fork Well] has provided a consistent water source for the upper Emigration Canyon area."

149. To date, there is no evidence that hydrological mapping or recording of water levels from monitoring wells was completed by Don Barnett or BIWC during development of the Upper Freeze Creek Well and no age-testing of ground water was completed.

150. In an open letter to Canyon residents from August 6, 2013, Fred Smolka, Mr. Hughes, Mr. Bradford and Mr. Stevens reported that EID had spent "years of due diligence, research and preparing a master plan," EID had hired "professionals, a hydrologist, a geologist, and engineers to assure the best possible plan and to implement the current system expansion," EID had decided that a new well was quickly needed and EID had gone "through a long and arduous process of deciding to add the new well, where to locate it and all the resulting detail."

151. Organizational minutes reveal that BIWC and Don Barnett first recommended a new well on April 19, 2012.

152. On November 17, 2011, Steve Creamer inquired if EID had "any written information regarding what water sources the EID [sic] is looking at [sic]."

153. No hydrological data or study supported the placement of the new well on the property previously owned by Walter Plumb.

154. The EAR and FONSI approved by Wilde on August 5, 2002 expressly concluded that the Brigham Fork Well would be sufficient for 312 connections.

155. To date, EID reports to service only 233 connections with the Utah State Division of Water Rights.

156. Upon inquiry as to the reason for the inflated purchase price of $140,000 for Walter Plumb's property, Mr. Hughes responded that EID "didn't like dealing with easement issues" and if EID did not purchase the property, Walter Plumb would be "put under pressure to develop the property."

157. On October 8, 2013, after the Upper Freeze Creek Well became operational, EID transferred title of the 20 acres on which the well sits to Mr. Creamer.

158. During construction of the water and electrical supply lines, EID – acting through Joe Smolka – installed four water and electrical connection hubs, thereby allowing unhindered sale of later parceled lots as "buildable." On December 12, 2010, EID reported to the State Engineer that over $12,000,000.00 dollars of public funds had been expended on the large-diameter well system at that time.

159. With the completion of the Upper Freeze Creek well at a cost of $2,069,000.00 in June 2014, the large diameter well system operated by EID has cost the taxpayers of Emigration Canyon over $14,000,000.00 to date.

E. EID used the $1.846 million to benefit wealthy land developers.

1. EID uses the $1.846 million to rescue developers with failed water systems.

a. Boyer Company.

160. In a bond election held in November 1995, the residents of Emigration Canyon residents rejected EID's proposal to construct a canyon-wide drinking water system proposed by Fred Smolka, Mr. Hales and Jack Barnett.

161. During the late 1980's, Boyer Company and City Development created the Emigration Oaks development, which consisted of 223 residential lots.

162. Boyer Company and City Development not only acquired 94.04 acre feet of surface water rights from Mt. Olivet Cemetery (water right #57-8865), which had a surface point-of-diversion near the University of Utah, but also obtained the consent of the State Engineer to draw water from underground sources higher up the canyon.

163. Under water right #57-8865, Boyer Company and City Development owned sufficient water rights for only 125 residential units (including irrigation) under water right #57-8865; nonetheless, under permanent change application #a12710b, the State Engineer approved water service to 188 domestic units.

164. The water rights held by Boyer Company and City Development were inferior to some of the water rights held by residents of Emigration Canyon who owned and obtained culinary water from private wells.

165. Boyer Company and City Development constructed a large-diameter, commercial well and a 355,000 gallon tank to supply water to the Emigration Oaks development.

166. Even though the well and tank were undersized to provide water service to all 223 residential units Boyer Company and City Development had sold as "buildable," Salt Lake County approved the Emigration Oaks plat, which prevented Boyer Company and City Development from having to incur the $4,200,000.00 cost of having to bring water and sewer services from the base of the canyon.

167. Sometime in January 1993, the well that Boyer Company and City Development had installed pumped dry, potentially causing permanent damage to Emigration's Canyon's riparian system.

168. Sometime in the early 1990's, the US Forest Service designated the area of Emigration Oaks as a "Wildfire Danger Zone" leading to exorbitant monthly fire insurance premiums of $1,000.00 for affluent residents of Emigration Oaks, including Mr. Hales.

169. To remedy the deficient water infrastructure, in 1994 Boyer Company and City Development constructed a second large-diameter, commercial well in Emigration Canyon.

170. Though Boyer Company and City Development owned and operated the well, for unknown reasons, the State Engineer approved construction and operation of the well under water right #57-7796, which was owned by EID. The point-of-diversion for the second well was not listed on EID's original permanent change application filed with the State Engineer, and there is no record of a lease agreement between Boyer Company and EID on file with the State Engineer or recorded in EID's meeting minutes.

171. As of 1998, 105 multi-million dollar homes had been constructed in Emigration Oaks, and Boyer Company was obligated to supply water to another 118 vacant properties it had sold as "buildable."

172. Boyer Company and City Development also had failed to construct a water distribution system in Phases 6 and 6A of the Emigration Oaks development designated as the luxurious Emigration Estates.

173. Many of the water distribution lines constructed in Emigration Oaks by Boyer Company were undersized and incapable of providing adequate water service and fire protection.

174. Boyer Company and City Development did not own water rights sufficient to provide water to the residential parcels they sold as "buildable" to affluent private investors, a fact which both Boyer Company and City Development knew.

175. The second well, tank and water distribution lines were insufficient for the 105 homes already built, also a fact which both Boyer Company and City Development knew.

176. The water rights held by other residents within Emigration Canyon were superior to the Boyer Company's and City Development's water rights, a fact which both Boyer Company and City Development knew.

177. The operation of large-diameter commercial wells in the Canyon would impair existing private wells with superior water rights "with almost certainty," a fact which both Boyer Company and City Development knew.

178. Because Boyer Company and City Development had sold lots without putting in place sufficient water infrastructure, Boyer Company and City Development faced potential legal liability exposure to those who had purchased lots and built multi-million dollar homes within the Emigration Oaks development.

179. In 1998, EID agreed to assume ownership and legal liability of Boyer Company's and City Development's incomplete, dilapidated and deficient large-diameter commercial well system.

180. EID also assumed Boyer Company's and City Development's legal obligation to provide water service to the additional 130 vacant lots within Emigration Oaks.

181. In exchange, Boyer Company gave EID 300 acres of vacant, developable land.

182. Boyer Company and City Development also agreed to pay a $650,000 towards construction of new well and water tank, which allowed EID to obtain a $1.846 million loan from the Utah Drinking Water State Revolving Fund.

183. Although EID publicly announced that it would place the 300 acres into trust to prevent future development, it never did so.

184. As part of the exchange with Boyer Company and City Development, EID assumed operation of both wells and water tank, even though EID knew that Boyer Company and City Development had been operating the second well without a valid operating permit, which cannot be obtained. The lack of a valid operating permit had been published in DDW's 1996 Sanitation Survey.

185. On May 25, 2000, Utah State Environmental Health Division informed Mr. Hughes and Fred Smolka that the Boyer Tank was improperly sized at 355,000 gallons instead of the required capacity of 415,500 gallons for 225 single-family units.

b. Pinecrest PUD.

186. Similar to Emigration Oaks, sometime in the early 1980's, the Pinecrest PUD was constructed by an unknown developer.

187. Despite having water rights sufficient for only one (single-family resident under permanent change application #a19606 under water right #57-10005, Pinecrest PUD under the direction of Mr. Steve Hook connected five affluent homes to a single, large-diameter commercial well.

188. Shortly after construction, the Pinecrest PUD Well proved deficient, producing "barely 3 ½ gallons per hour."

c. Young Oak.

189. Similar to Emigration Oaks and Pinecrest PUD, sometime in the early 1980s, the luxurious Young Oak development was constructed by an unknown developer.

190. The Young Oaks Water Company supplied water service to 35 homes from a single, large-diameter commercial well and small reservoir.

191. By 2003, more homes had connected to the Young Oak Water System than allowed under Safe Drinking Water regulations thereby requiring substantial system expansion at great expense to the affluent homeowners of the Young Oak.

2. EID used the $1.846 million loan to build "capacity" for future development on Mr. Creamer's property.

192. After having been thwarted in the 1995 Bond Election, between January 1, 1998 and October 13, 2000, Mr. Creamer, Boyer Company, City Development and EID – acting through Fred Smolka, Mr. Hughes and Mr. Hales – conspired to acquire federal funds from the Drinking Water State Revolving Fund to construct a water system for the benefit of Mr. Creamer, Boyer Company, City Development, David Neuscheler and Siv and Charles Gillmor.

193. Indeed, sometime prior to June 14, 2000, EID – acting through Fred Smolka, Mr. Hughes and Mr. Hales – and Mr. Creamer agreed that Mr. Creamer would allow EID to build

two commercial wells on 130 acres that Mr. Creamer would acquire from Siv and Charles Gillmor. In exchange, EID would use funds obtained from the Drinking Water State Revolving Fund to construct a water system with the capacity to provide water to a future residential development on 560 acres of land that Mr. Creamer and EID owned within Emigration Canyon.

a. EID never intended to use the $1.846 million to provide clean water to canyon residents.

194. In a letter to Canyon residents dated June 2014, EID purported that it was providing water service to 273 homes within the canyon; however, EID recently reported to DDW that it provides water services to 236 residents within the canyon.

195. The State Engineer has approved water service to only 233 homes in Emigration Canyon under EID's permanent and temporary change applications. Accordingly, if EID is in fact delivering water to 273 homes, it is doing so without the approval of the State Engineer.

b. Land acquisition.

196. Prior to January 2000, Mr. Creamer and David Neuscheler did not own any property in Emigration Canyon.

197. Sometime before November 16, 2001, Steve Creamer agreed to purchase 135 developable property on the east side of Emigration Oaks from Siv and Charles Gillmor.

198. In exchange for the Gillmors' selling 170 acres to Mr. Creamer, EID – acting through Fred Smolka, Mr. Hughes and Mr. Hales – agreed to bring water service to 170 acres of land (located in Spring Glen) owned by the Gillmors.

199. In exchange for Mr. Creamer buying 170 acres from the Gillmors, the Gillmors agreed to sell 59 acres of developable real estate to David Neuscheler in the area known as "Little Mountain."

200. Mr. Creamer and EID currently owns approximately 500 acres of vacant, developable land within Emigration Canyon, while the Gillmors own 172 acres in an area of the canyon called Spring Glenn and Mr. Neuscheler own 124 in an area of the canyon called Little Mountain.

c. Zoning for development.

201. Most undeveloped properties within the EID's water service area are zoned as "FR-20" thereby requiring 20 acres of land for a single-family residence.

202. Prior to January 1, 2017, all changes to zoning laws within the Emigration Canyon fell within the final authority of Salt Lake County.

203. In 2001, the Emigration Canyon Community Counsel and Emigration Township Planning Commission under the direction of Fred Smolka approved rezoning of a single 80-acre parcel now owned by Mr. Creamer from FR-20 to FR-5 thereby quadrupling the number of single family residents which could be developed on the property.

204. Since 2002, the Emigration Canyon Community Counsel and Emigration Township Planning Commission have attempted to similarly down-zone all undeveloped property located within Emigration Canyon without success.

205. On January 1, 2017, Emigration Canyon became a Metro Township controlled by five elected officials.

206. On January 11, 2017, in an undisclosed meeting, the Metro Township Council passed a new land-use ordinance, which eliminated the previous 725-unit limit on the number of domestic residences within Emigration Canyon, paving the way for massive new building development within the Canyon. Joe Smolka, Mr. Brems, and Jennifer Hawkes, the spouse of EID manager Eric Hawkes were member of the council and voted in favor of the new ordinance.

d. Express statements of intent to develop.

207. On November 18, 2002, DDW executed the project approval letter in order for EID "to meet future demands since building additional storage would be extremely difficult given the sensitive nature of the canyon environment."

208. During the EID Trustee meeting on August 20, 2015, EID Hydrologist Don Barnett voiced no objection to the construction of 5,000 new homes within the Canyon, misrepresenting that he "was unaware of any maximum number" of residential units the Canyon hydrology could support.

209. During the presentation of the aforementioned Waste Water Study by Aqua through Rasmussen at the EID Trustee meeting in September 2014, Rasmussen falsely reported that the total Canyon buildout was limited to 685 domestic units, despite the fact that, on August 20, 2015, EID through Don Barnett reported that there was no objection to the construction of 5,000 additional homes in the Canyon and at that date 677 homes had already been constructed. Moreover, on information and belief, EID has assumed contractual obligations to provide water service to an additional sixty (60) vacant lots in Emigration Oaks alone.

210. Sometime in 2002, unaware of Onysko's objections to the project, one of EID's trustees demanded that Don Barnett draft a memo stating that the 1-million gallon Wildflower

Reservoir far exceeded the needs of the existing Canyon homeowners. Citing the fact that his profession was "directed toward development," Don Barnett refused.

e. Water lines to vacant, developable land.

211. EID constructed pipelines that run from the Wildflower Reservoir to vacant, developable land owned by Mr. Creamer, the Gillmors and Nuescheler using federal funds.

i. T-converter to Mr. Creamer's 500-plus acres.

212. In 2013, during construction of the Upper Freeze Creek Well supervised by Joseph Smolka and Aqua Engineering, EID diverted loan proceeds in order to retrofit an additional 10-inch t-valve diverter to supply water service to vacant, developable property owned by Mr. Creamer.

213. Meeting minutes prepared by EID failed to record the additional water-system changes.

214. During construction of the Upper Freeze Creek Well in 2013, Mr. Creamer or EID – acting through Joseph Smolka – and Aqua Engineering covered the 1-ton, t-valve-diverter with a manhole cover labeled "SEWAGE" in order to conceal the actual purpose of bringing water service to Creamer's property to the immediate north via a 10-inch, water supply pipe and connection flange.

215. Under the express direction of Mr. Creamer on October 18, 2013 EID connected the 335,000 gallon Boyer Tank to the water distribution lines on Pioneer Fork Road via a 4-inch water supply line in order to increase pressure for future water service on property belonging to Mr. Creamer.

ii. Spring Glen Development (Gillmors' 172 acres)

216. Sometime in the year 2007, during completion of the water-supply line along the main-Canyon road, EID constructed an additional 1 mile of water-supply lines through an area of Emigration called Spring Glen, a small community with a water system of its own already in place. The system consisted of a small well, reservoir and fire hydrants.

217. The diameter of the water supply line at 8 inches far exceed the capacity needed for 17 potential water users.

218. EID built the line with the intent to provide water service to future development of 130 acres owned by Charles and Siv Gillmor located above Spring Glen.

219. EID installed fire hydrants between 2 and 20 feet from the existing fire hydrants already servicing the Spring Glen community.

220. Despite the enormous cost of adding one mile of supply lines and four fire hydrants, of the 17 households connected to the Spring Glen water system at that time, only Mr. Bradford and resident TJ Winger had requested water service from EID.

221. Sometime in 2007, Fred Smolka waived the water-right lease fees for the benefit of Mr. Bradford and TJ Winger in violation of 14.2 of the Uniform Rules and Regulations for Water Service of Emigration Improvement District from June 11, 1998 as amended January 14, 1999.

222. In addition to placing redundant fire hydrants right next to already existing fire hydrants, EID extended an additional 8-inch water supply line approximately one-fourth of a mile to provide water service to the single residence of Catherine Gillmor and placed a fire hydrant on her vacant, private property protected by a no-trespassing sign and private gate.

223. In January 2014, Larry Gillmor purchased an additional 47 acres above the Spring Glen Community.

224. To date, Gillmors collectively own 172 contiguous acres of vacant, developable land near the Spring Glen community.

225. Sometime in the year 2007, EID constructed an 8-inch water supply line to the Gillmors' 172 acres at a substantial cost.

226. Contrary to the Utah Open Meetings Law requiring proper notice and scheduling of public meetings, EID scheduled a "trustee work meeting" on January 12, 2015. At the meeting, Mr. Hughes, Mr. Bradford, Mr. Stevens, Fred Smolka and Mr. Hawkes agreed to waive water connection and impact fees in order to induce the 17 residents of Spring Glen to relinquish their superior water rights to EID and connect to EID's system.

iii. Little Mountain Development (Neuscheler).

227. During construction of the main-canyon water line in the year 2007, EID – acting through Fred Smolka – diverted funds in order to extend an 8-inch water supply line into the area known as "Little Mountain." The water line included placement of two fire hydrants at a cost of $4,000.00 each.

228. Despite the enormous cost of constructing water lines and two fire hydrants, only two residents on private wells resided in the area of Little Mountain.

229. Fred Smolka induced a resident of Little Mountain to request EID service, by promising to waive impact fees.

230. To date, the only other resident in the area of Little Mountain remains on a private well.

231. In the plans submitted as part of its application for the $1.846 million loan, EID did not indicate any plan of extending water service into the area of Little Mountain.

232. The EA did not contemplate the extension of a water service line into the Little Mountain area.

233. The EA did not contemplate any stream crossings in the area of lower Pinecrest Canyon despite the fact no less than six stream crossings occurred.

234. On April 28, 2013, Catherine Gillmor agreed to the sale of 59 acres of prime developable property to Neuscheler immediately adjacent to property belonging to Neuscheler, thus providing the Neuscheler with a total of 124.18 contiguous acres in the area of Little Mountain.

235. In the EID Trustee meeting on March 12, 2015, Mr. Bradford insisted that the 8-inch water supply line constructed in 2007 be extended another 1,200 feet in order to provide water service to Neuscheler's "single home."

236. When questioned as to the enormous costs of extending a water-service line to otherwise vacant property by canyon resident S. Plumb, Mr. Bradford insisted that "several" fire hydrants were needed for "fire protection" all along property belonging to Neuscheler.

237. Mr. Bradford required at least an 8-inch water-supply line before EID would provide water service to Neuscheler's single home.

f. Efforts to prevent other developers from getting in the game.

238. Sometime prior to July 2, 2009 a private investor approached EID with plans to develop a property in Emigration Canyon known as "Skycrest Ranch."

239. During the trustee meeting, EID – acting through Hughes – verbally informed the developer that EID had "a master plan that designates specific numbers of connections for certain areas, and they have to work within that plan."

240. Mr. Hughes further verbally informed the developer that there existed certain "pressure problems related to putting a large development on the water system in that area."

241. Mr. Hughes is not a licensed engineer nor a member of EID's "Engineering Committee."

242. On December 19, 2002, EID instructed Don Barnett to prepare a hydrology report for a remuneration of $1,500.00 supporting the effort of Utah Open Lands to acquire a conservation easement of all property owned by Salt Lake City in Emigration Canyon.

243. In November 2005, 190 acres immediately west of the Spring Glen Community appraised at $2,400,000.00 known as "Perkins Flats" was purchased by Utah Open Lands for $1,400,000.00.

244. Among other donors, Envirocare Environmental Foundation, a company owned and controlled by Mr. Creamer, contributed an unknown amount to the cost of removing the entire area from future development.

245. In the year 2011, 265 acres located in upper Killyon Canyon area was purchased and then donated to Utah Open Lands at a reduced cost of $1,800,000.00.

246. Relator is informed and believes that the anonymous donor who contributed $500,000.00 toward the purchase price was Mr. Creamer.

247. In November 2017, with a financial contribution of $250,000.00 from Salt Lake County, Utah Open Lands purchased a single parcel of 4.6 acres designated as "Owl Meadows" for $700,000.00 from an undisclosed property owner.

248. In making the purchase, a representative of Utah Open Lands argued that channeling $700,000.00 of funds to a confidential seller was necessary because "[t]his highly visible piece of bird habitat, … will most likely be replaced by high-end human dwellings if the group fails to meet the deadline."

g. Road access to Mr. Creamer's property.

249. Between September 2002 and May 2005, EID – acting through Fred Smolka – diverted an unknown portion of the $1.846 million loan to purchase and construct an unknown number of fire hydrants and individual water meters on Mr. Creamer's vacant, developable property.

250. In a homeowners association meeting held in February 2013, there was open discussion concerning the subdivision of property belonging to Mr. Creamer and incorporation into the Emigration Oaks development. Since the federal seal on the First Amended Complaint of the present action was lifted on June 12, 2015, no such open discussion has occurred.

251. Mr. Creamer attempted to have a road built in Emigration Canyon that would have provided better access to his vacant, developable land. The purported reason for the road was to provide a "fire escape" for canyon residents. The road would not have served as an effective fire escape, but would have created road access to Mr. Creamer's vacant, developable land.

252. After the plan for a "fire escape" and access through the Emigraiton Oaks development fell through, Mr. Creamer purchased the vacant "Sun and Moon Café," which will allow him to create road access to his vacant, developable land.

F. EID has known all along that Emigration Canyon cannot support large-commercial wells and private wells.

253. In the Master's Thesis presented to the Department of Geology, University of Utah in 1966, Jack Barnett concluded that the hydrology of Emigration Canyon is not conducive to the operation of large-diameter commercial wells and, even if such wells were to successfully draw large quantities of water from the canyon's riparian system, impairment of private wells within the canyon "would be almost a certainty."

254. Because the stream that runs down Emigration Canyon is part of the same riparian system as the canyon's groundwater, Jack Barnett also predicted that impairment of one would negatively impact the other.

255. Finally, Jack Barnett predicted that reduced flows in either the streams or groundwater would substantially increase bacterial levels in the stream and in private wells in the canyon.

256. Jack Barnett's thesis concluded that "development [in Emigration Canyon] should be limited to small-diameter domestic wells" for a single-family residences.

G. EID built its preposterously oversized water system on a bedrock of lies, misrepresentations, and cover ups.

1. Misrepresentations during the NEPA process.

257. In order to appear to have fulfilled the requirements to obtain the $1.8 million loan, EID – acting through Fred Smolka, Mr. Hughes, Mr. Hales, BIWC, Carollo Engineering

and Mr. Rash – made the following false and misleading statements on behalf of EID to the government prior to the certification of successful project completion by Maculey on May 3, 2005.

258. During the NEPA process, EID failed to inform the government that, back in 1983, the State Engineer had denied EID's request to divert water under its water rights on grounds that, in so doing, EID would interfere with the private wells of canyon residents holding superior water rights.

259. During the NEPA process, EID failed to inform the government that its legal right to draw water from the Brigham Fork Well had been secured under temporary change application "t26672" (57-7796) filed on May 14, 2002, which required annual review and approval of the State Engineer, the last of which occurred on February 13, 2017 under "t42153."

260. During the NEPA process, EID failed to inform the Government that EID's authorization to operate the Brigham Fork Well would automatically lapse every year under applicable state law.

261. EID failed to inform the Government that, on March 18, 2003, EID began a program to purchase superior water rights from Canyon residents with public funds "in an attempt to get as much paper water off the stream as possible," as recorded in the meeting minutes on the aforementioned date.

262. EID expressly assured the Government that federally-backed funds would not be used to cure deficiencies of the Emigration Oaks development such as the completion of water supply line in the Phase 6 and Phase 6A section of Emigration Oaks.

263. EID failed to inform the Government that federally-backed fund would be used to cure the deficiencies of the affluent Pinecrest PUD and Young Oak developments.

264. During the NEPA process, EID falsely reported that many private wells in the service area were contaminated with coliform bacteria; however, upon inquiry from EID Trustee Bowen, in 2001, Mr. Wilde clarified that only one well was contaminated with coliform bacteria to his knowledge.

265. During the NEPA process, EID falsely represented that the Young Oak Water System was producing 50 gallons per minute as a part of the existing EID water system, when the well was in fact was not connected to the Emigration Oaks Water system and remains to date under the ownership and control of the Young Oak Water Company for exterior irrigation.

266. Even though the Young Oak had conveyed its water rights to EID on June 24, 2004, EID reported to the State Engineers that it leased water rights to Young Oaks on June 2, 2006.

267. During the NEPA process, EID falsely represented that 67 existing household were located within the proposed service area when, in fact, less than 50 properties had been developed within the areas.

268. During the NEPA process, EID falsely represented that the 67 households that the Brigham Fork Well and Wildflower Reservoir would service had private wells, when, in fact, a substantial portion of the households were part of exclusive private urban developments supplied with water from large-diameter wells of Young Oak, and Pinecrest PUD or were vacant lots with no well at all.

269. Homes within the Silver Oak area of the Canyon did not connect to the EID system once it became operational and remain on individual wells to date.

270. Of the 57 households required to sign firm commitment contracts, no household within the extended service area actually complied with all federally-backed loan requirements.

271. Sometime in 1988, BIWC acquired 649 acre feet of surface water rights from Emigration Dam and Ditch Company for the benefit of EID (water right #57-7796).

272. In its Memorandum Decision from October 8, 1982, the State Engineer approved EID's permanent change application "a-6538" to change the point-of-diversion of 628.87 acre feet from a surface water right located at the mouth of Emigration Canyon to a single underground point-of-diversion located high in Emigration Canyon under water right #57-7796, which had the legal effect of reducing the 1873 priority date of the water share to a priority date of 1983.

273. In the aforementioned decision, the State Engineer expressly rejected two points-of-diversion due to potential inference with existing water shares.

274. EID through BIWC has been diverting water pursuant to temporary change permits obtained on an annual basis from the State Engineer.

275. On August 3, 1993, EID through BIWC submitted a permanent change application under the designation "a17521" for the operation of Boyer Well #2 to the DWR in order to "develop an adequate water supply for canyon residents," despite the fact that most canyon residents at that time were on private-wells and Boyer Well #2 remained under the ownership of the Boyer Company and City Development until May 2003.

276. The application was approved on December 14, 1995.

277. With over 583 households located within the Canyon possessing individual water rights to date, when applying for the $1.846 million loan, EID failed to report to federal authorities that a single impairment of one private well with an earlier priority date carried the risk of complete forfeiture of water service and total loss of federal funds under the applicable Utah State Water laws.

278. EID represented to the public that only water users who wished to connect to the system would pay for system expansion.

279. However, a fiscal study prepared by Carollo Engineers assumed that all vacant and developed property within the extended service area to the east and west of the existing Emigration Oaks water system would be charged a flat fee.

280. At a September 9, 2000 trustee meeting, EID represented to the public that connection to the EID system would be "entirely voluntary" for those households wishing to connect to the water system once operational.

2. Forgery of firm commitment contracts.

281. In order to obtain 57 executed "firm commitment contracts" from 57 households, and 57 negotiable instruments for the amount of $500.00 as required by the Commitment of Funds Letter, Fred Smolka executed two contracts with each resident wishing to "go on stand-by."

282. Although the language on the contract clearly indicated an unconditional obligation to connect to the water system once operational, Fred Smolka amended the agreement by handwriting the word "STANDBY."

283. On a second exact replica of the aforementioned contract, Fred Smolka omitted the handwritten amendment believed to have been presented to the Government at the time of the bond sale review.

284. Other than the aforementioned handwritten amendment by Fred Smolka, the "stand-by" and "firm commitment" contracts were identical.

285. In order to obtain a negotiable instrument for $500.00, Fred Smolka verbally informed Canyon resident Eckert sometime between September 2001 and May 2005 that a special "water connection hub" would have to be purchased by the property owner; however, no such water connection hub was installed nor does it exist.

286. Between September 10, 2002 and May 3, 2005, Fred Smolka executed firm commitment contracts for vacant lots with Mr. Creamer and Walter Plumb.

287. Actual payment was never received from Steve Creamer.

3. Failure to comply with Water Management and Conservation Plan.

288. Under the express terms of the Commitment of Funds Letter, EID was required to adopt a Water Management and Conservation Plan.

289. On November 14, 2002, EID – acting through Mr. Hughes and Mr. Hales – adopted the plan, thereby noting, "[a]fter substantial investigation, it was determined that the Canyon hydrology could not support more than approximately 700 homes without meaningful impacts to the flows in Emigration Creek," and assured the Government that "EID will continue to monitor both the monitoring wells owned by EID, stream flows, and use by our customers to determine if there is a deterioration in our conservation program."

290. Notwithstanding the foregoing, on August 20, 2015, EID through BIWC reported that the five monitoring wells constructed and owned by EID had not been observed for the past ten years, EID had no data on the flow of the creek running through Emigration Canyon, and there was no hydrological data preventing the addition of 5,000 new homes in the Canyon.

291. EID failed to properly meter water discharge from the Brigham Fork Well and individual water leases contrary to the express requirements of temporary change application t41129.

4. Failure to comply with crosscutting environmental statutes and coverup.

a. Mr. Creamer polluted Emigration Canyon's creek during installation of water pipes in derogation of the Clean Water Act.

292. During installation of water pipes in 2002, Mr. Creamer disposed construction waste directly in the Emigration Canyon Creek.

293. Mr. Creamer willfully concealed the disposal of construction waste in Emigration Canyon creek by hiding debris under concrete encasements.

294. Canyon residents law and McCallum reported the disposal of debris in the Emigration Canyon Creek to Mr. Wilde who conducted an on-site inspection of the complaint shortly thereafter.

295. Despite personally removing construction debris from the creek, Mr. Wilde failed to inform federal authorities and failed to record the incident in the case file.

296. Despite complaints from canyon residents Law and McCallum directly to Fred Smolka, Mr. Hughes and Mr. Hales, EID failed to record the violation in the organizational meeting minutes.

297. Despite the foregoing, the documents submitted by Carollo Engineering as part of the NEPA process stated that "the construction work" relating to the stream crossing had been "accomplished in an acceptable manner."

298. Despite this false representation, Mr. Wilde issue the FONSI on August 9, 2002.

299. EID – acting through Fred Smolka, Mr. Hughes, and Mr. Hales – Mr. Creamer, and Mr. Wilde actively concealed the disposal of construction waste by Mr. Creamer.

b. EID allowed a canyon resident to cross-contaminate its system with well water in derogation of the Safe Drinking Water Act.

300. To induce canyon resident S. Plumb to connect to the EID water system, sometime in 2007, Fred Smolka allowed S. Plumb to have a "t-valve" installed by Joe Smolka of Smolka Construction, which made it possible for S. Plumb to alternate between his private well and EID's system.

301. Such a mechanical device is strictly forbidden under the terms of the Safe Drinking Water Act due to in inherent possibility of contamination of the entire public drinking water system from a single private well.

302. Aware of the t-diverter, Mr. Hughes, Mr. Bradford, Mr. Stevens and Mr. Hawkes did not report it in the 2015 Sanitation Survey, the 2015 Water Quality Report or the 2016 Water Quality Report prepared by Aqua Engineering and mandated under the Safe Drinking Water Act.

c. Mr. Creamer and EID contaminated the Wildflower Reservoir in derogation of the Clean Water Act.

303. Under the Commitment of Funds Letter, EID assumed the contractual obligation to comply with all provisions of the Clean Water Act.

304. EID failed to report that, due to the substantial divergence from the original design and placement of the Wildflower Reservoir, the reservoir's structure proved deficient and immediately began leaking water after it became operational sometime before October 2003.

305. After canyon resident Law informed DDW that the structure was leaking sometime before October 23, 2003, Creamer immediately covered the entire structure with large amounts of construction debris including petroleum asphalt waste.

306. When EID Trustee Bowen asked Mr. Creamer to stop dumping hazardous material on the construction site, Mr. Creamer ignored the request.

307. In a letter dated October 9, 2003, canyon resident McCallum requested the DDW supervise the cleanup of the reservoir site. EID did not heed the request.

308. Instead, Fred Smolka reported that Mr. Creamer and five other people spent five hours cleaning asphalt out of the fill and "did a great job."

d. EID – working in concert with Aqua Engineering and AES – repeatedly failed to report contamination in its water system in derogation of the Safe Drinking Water Act.

309. Under the Safe Drinking Water Act, EID has an obligation to report contamination of drinking water delivered to canyon residents to both federal authorities and canyon residents.

310. Due to the placement of the Brigham Fork Well on property owned by Mr. Creamer without sufficient hydrological study, the well pump began pulling gravel into the system when put into operation sometime in 2003.

311. Several Canyon residents reported to EID Trustee Bowen that contaminated water ruined clothing and had an unpleasant odor.

312. In order to conceal the fact that Brigham Fork Well had been constructed prior to the issuance of the FONSI in September 2002, EID never secured a permanent operating permit for the well as a source of drinking water under the Safe Drinking Water Act.

313. On December 19, 2007, EID reported in its trustee meeting minutes that "[e]ven though the Brigham Fork well has been a 'workhorse,' complaints about colored water have been minimal."

314. During the EID Trustee meeting on March 12, 2015, Mr. Hawkes revealed that the Brigham Fork well was pumping water into EID's system three times per week despite the fact that water from the well was contaminated with iron bacteria.

315. On January 16, 2016 EID discontinued the use of the Brigham Fork Well "due to due to complaints of turbidity in the water and sulfur odor."

316. In a letter from May 5, 2014, DDW informed Fred Smolka of EID that AES had violated the State of Utah Public Drinking Water Rules by failing to test for radionuclides in the Upper Freeze Creek Well during the compliance period from 1/1/2014 through 3/31/2014 and that the Section 220-7 required EID to inform all customers within one year of the violation. EID never reported the violation.

317. EID instead reported on June 4, 2014 that EID was "supplying high quality water tested three times a week."

318. In a letter from August 8, 2014, DDW informed Fred Smolka of EID that AES had again violated the State of Utah Public Drinking Water Rules by failing to test for radionuclides in the Upper Freeze Creek Well from the period from 4/1/2014 through 6/30/2014 as well as Gross Alpha, Radium 226, Radium 228 and Uranium in Boyer Well # 2. EID was

again required to inform all customers within one year of the aforementioned violation. EID never reported the violation.

319. Between June 3, 2008 and August 8, 2014, EID has received 10 violations issued by DDW for various water testing and monitoring violations.

320. During the EID Trustee meeting from March 12, 2015, canyon residents John and Carrol Massion reported that they disliked the taste of EID water and preferred to stay on their own private wells.

321. In July 2015, canyon resident Crombie reported that water supplied by EID frequently "smelled like rotten eggs" and had a reddish-brown color which would not be consumed by her household pets.

322. Upon inquiry by canyon resident White during the EID trustee meeting on July 9, 2015 as to water-testing violations, Mr. Hawkes admitted that EID had received two violations for the "same violation" in the past, but AES has assured EID that the State of Utah simply "lost" the water tests.

323. Since initial testing of the Brigham Fork Well on November 1, 2002, water samples have been collected solely by Mr. Hall who travels 80 miles between the AES office, the Emigration well test sites, and the water testing facility for the collection of a single water sample.

324. Canyon resident FitzGerald asked Mr. Hall about the Utah State Drinking Water Rules sometime in 2013. Mr. Hall informed her that the state requirements were "nothing to worry about" because her water testing was fine.

325. On August 8, 2015 a canyon resident J. Edwards requested that EID publicly discuss removing Mr. Hall and AES from conducting tests of drinking water supplied by EID during the August 20, 2015 trustee meeting. EID refused.

326. EID, AES, Fred Smolka, Mr. Hughes, Mr. Stevens, Mr. Bradford, Mr. Hawkes and Mr. Hall failed to report the contamination of the drinking water to federal authorities.

e. EID failed to fix leaks to or obtain an operating permit for the Wildflower Reservoir in derogation of its duties under the Safe Drinking Water Act.

327. Under the Commitment of Funds Letter, EID has a continuing obligation to comply with the Clean Water Act.

328. Due to the substantial divergence from the original design and placement of the Wildflower Reservoir, the reservoir's structure proved deficient and immediately began leaking water after it became operational sometime before October 2003.

329. Canyon resident McCallum informed Mr. Wilde that the structure was leaking sometime before October 23, 2003 and provided photographs of water escaping from mortar patches in no less than six areas of the reservoir wall.

330. A few days after informing Mr. Wilde, Mr. Creamer immediately covered the entire structure with large amounts of construction debris including petroleum asphalt waste under a thin layer of seeded top soil.

331. In a letter to EID from March 3, 2004, Mr. Brown granted a temporary operating permit for the reservoir until October 1, 2004 at which time EID was to submit proof that the "construction defects responsible for substantial leakage from the tank … have been corrected."

332. EID never provided proof that the leaks had been fixed.

333. Mr. Wilde made no official record of the complaint by Canyon resident McCallum and did not include the photographs provided in the case file.

334. Despite the aforementioned deficiencies, on September 22, 2004, Mr. Rash of Carollo Engineering falsely certified that the Wildflower Reservoir and Brigham Fork Well had been constructed according to plans and specifications submitted as part of the loan application process and NEPA review.

335. To date, no permanent operating permit has been issued by DDW for the continued operation of the reservoir in violation of the Safe Drinking Water Act.

f. EID's well has leached chlorine into Emigration Canyon's riparian system in derogation of the Clean Water Act.

336. Due to the substantial divergence from the original design and placement of the Brigham Fork Well, the well began pulling gravel into the pump immediately upon commencement of operation sometime in 2003.

337. Upon replacement of the well pump in 2004, the well began pumping a "slime-like substance," requiring the replacement of the well casing.

338. During the EID Trustee meeting of March 12, 2015, Mr. Hawkes informed Mr. Hughes, Mr. Stevens and Mr. Bradford that the water from the Brigham Fork Well was being pumped "out" three times a week in order to "clear out the system."

339. The well house for the Brigham Fork Well is located immediately adjacent to the Brigham Fork Creek – a federally protected waterway.

340. EID, AES and Mr. Hall have failed to report the tri-weekly discharge of contaminated water into the canyon's since initial operation sometime in 2003.

341. The private well of Canyon resident McCallum, who resides directly below the Brigham Fork Well, no longer can be cleared of iron bacteria.

342. Despite the aforementioned deficiencies, on September 22, 2004, Mr. Rash of Carollo Engineering falsely certified that the Wildflower Reservoir and Brigham Fork Well had been constructed according to plans and specifications submitted as part of the loan application process and NEPA review.

g. EID destroyed habitat of a sensitive species.

343. Under the Commitment of Funds Letter, EID had a duty to adopt a Water Management and Conservation Plan.

344. As part of the plan, EID agreed to monitor stream flow and observe the five monitor wells within the canyon to ensure "as little impact as possible on the animals, flora, fauna."

345. The Bonneville cutthroat trout is a "sensitive species" (due to the fact that it was a possible "99% pure, core population") inhabiting the proposed project area.

346. Mr. Wilde knew that building the Wildflower Reservoir and Brigham Fork Well would cause degradation or loss of the Bonneville cutthroat habitat.

347. In a letter to Wilde from March 29, 2001, David N. Hintz of the Utah State Department of Natural Resources Division of Wildlife Resources also expressed "serious concern" for the core population of Bonneville cutthroat, a designated "Conservation Species" under the Conservation Agreement and Strategy for Bonneville Cutthroat Trout in the State of Utah (1997), which identified water development and diversion of stream flows as one of the "greatest concerns of habitat loss or degradation for this species."

348. In the aforementioned letter, Hintz recited that the proposal "does not indicate the current and historical flow patterns in the Emigration Creek and its Burr Fork, Killyon Canyon and other tributaries, and future flow patterns under the proposed housing and water development, and their effects on the stream and riparian environment. Information is also lacking regarding sources of water for the future development."

349. Sometime in May 2002, EID through Creamer installed water lines across the Emigration Canyon Stream, even though it was identified as a habitat for the Bonneville cutthroat trout, a federally protected species.

350. In a letter from May 15, 2002, DDW informed EID that the construction costs for the stream crossing were ineligible for federal funds because construction had commenced before the FONSI had been issued by DDW.

351. Construction methods used by EID proved grossly inadequate and "caused negative impacts to the riparian habitat" that "impacted [the] spawning habitat" of the Bonneville cutthroat trout.

352. Despite the aforementioned, the EA concluded that "the construction work [for the stream cross] itself may have been accomplished in an acceptable manner."

353. EID, BIWC and Don Barnett willfully failed to observe water levels of the five monitoring wells during the development of the Brigham Fork Well in 2002.

354. During the Trustee meeting from January 20, 2015, Barnett admitted to Canyon resident Irons that the five monitoring wells were not used during the pump test of the Upper Freeze Creek Well in 2013 and "had not been used for a long period of time" even though

Emigration Canyon Creek had been identified as a federally protected habitat for the Bonneville cutthroat trout.

355. During the meeting, Don Barnett conceded that BIWC had not performed testing to determine the age of the ground water during the development of the Upper Freeze Creek Well, even though canyon groundwater was in direct communication with Emigration Canyon Creek, which provided habitat for the Bonneville cutthroat trout.

356. In the June 18, 2015 EID Trustee meeting, Don Barnett reported Emigration Creek was flowing only at 25% of average even though snowpack in Northern Utah was between 130 % and 150 % of normal.

357. Upon inquiry of canyon resident S. Plumb in June 2015 as to the reason for decreased stream flow, Mr. Hughes responded that S. Plumb "should take that up with the Utah Legislature" because stream flow has "nothing to do with EID."

358. Upon inquiry of Canyon resident J. Edwards, in June 2015 as to decreased stream flow, Don Barnett responded that "there is no way EID was affecting stream flow" despite the fact that Mr. Hawkes reported minutes earlier that the four wells controlled by EID had drawn over 9 million gallons of water from Canyon groundwater since January 2015 and thirteen million gallons as of August 2016.

359. Since completion of the Brigham Fork Well and Upper Freeze Creek Well, the Bonneville cutthroat trout has ceased spawning in and around the area of the creek where EID and Mr. Creamer constructed the stream crossing..

360. Relator is informed and believes that Mr. Creamer, EID, BIWC, Don Barnett, Fred Smolka, Mr. Hughes, Mr. Hales, Mr. Stevens, Mr. Bradford, and Mr. Hawkes have

actively destroyed the habitat of the Bonneville cutthroat trout by improper construction methods and due to willful refusal to comply with the aforementioned provisions of the 2005 Bond Agreement and Water Conservation Plan.

5. EID has concealed its efforts to build a water system for the benefit of land developers.

a. Influencing *The History of Emigration Canyon*.

361. As set forth in the Commitment of Funds Letter, if DDW had determined that there was "sufficient public opposition" to the construction of the Brigham Fork Well and the Wildflower Reservoir, a bond election would have been required.

362. On October 1, 2003, Dr. Furse published book called *The History of Emigration Canyon: Gateway to Salt Lake Valley*.

363. Under footnote 80 of the section entitled "Pains of Progress," Dr. Furse recorded that EID had assumed the Emigration Oaks water system but that property development was limited to "105 homes," when in fact EID had assumed the legal liability of 223 individual properties.

364. In the book, Dr. Furse included a diagram from Jack Barnett's master's thesis concerning the general geologic makeup of the Emigration Canyon; however, Dr. Furse makes no mention of Jack Barnett's ultimate conclusion that Emigration Canyon could not sustain large-diameter commercial wells.

365. Since the publication of *The History of Emigration Canyon: Gateway to Salt Lake Valley*, EID has not collected water-right lease fees from Dr. Furse.

b. Impeding access to public records.

366. EID published no meeting minutes between May 2001 and March 2002.

367. During a visit to the State Engineers office by canyon resident D. Jones sometime in June 2014 concerning the priority date of EID water shares, an employee under the direction of Jones stated that any questions regarding EID should be answered by EID hydrologist Don Barnett.

368. In a preliminary meeting with Ryan Roberts of the Utah State Auditor's Office in June 2014, EID – acting through Mr. Bradford – responded that EID owned "useless, undevelopable property" when questioned about EID's extensive property holdings.

369. In response to the GRAMA request submitted by Relator on October 25, 2017, EID refused to provide copies of all "standby contracts."

370. Immediately following the December 17, 2015 EID Trustee meeting, the EID "Advisory Committee" members, including Mr. Creamer and Joseph Smolka, convened in closed session in violation of the Utah Open Meetings Law and failed to voice record the meeting as required under Utah State law.

371. On December 12, 2013 Canyon resident S. Plumb placed a GRAMA request with Mr. Hawkes for EID's financial records.

372. When Canyon resident S. Plumb inquired as to the status of the GRAMA request on January 29, 2014, EID – acting through Mr. Hawkes – posted a letter signed by Fred Smolka threatening to discontinue water service in two days, if S. Plumb failed to bring his account current within two days.

373. During the initial review of the EID project file by the Relator in August 2014, the memorandum in which Mr. Onysko called the Wildflower Reservoir "preposterously oversized"

was not discovered in the EID project file; the memorandum was only recovered after Onysko filed a GRAMA request with DDW.

374. The aforementioned Onysko memorandum does not appear to have been scanned into the electronic record of the DDW database.

375. On August 7, 2015, Relator learned from the DDW records manager Copfer that the EID project file was unavailable because it was "being cataloged" by Mr. Grange.

376. The contract between EID and Creamer was discovered by the Relator on August 2014, but appears to have been removed by unknown person after the seal on this action was lifted on June 12, 2015. Moreover, the contract does not appear to have been scanned into the electronic record of the DDW database.

377. Mr. Hughes refused to comply with a GRAMA request for records of water lease payments from individuals who had leased water rights from EID.

c. Denying public inspection of water infrastructure.

378. Both the Wildflower Reservoir and Brigham Fork Well are only accessible through a 12-foot, French style, steel gate owned and controlled exclusively by Mr. Creamer.

379. On August 6, 2015 in an email to Mr. Hawkes, canyon resident McCallum requested to inspect the water lines located on Mr. Creamer's property.

380. In an email dated August 11, 2015, Mr. Hawkes refused to allow access, citing "security issue or other concerns" that must first be addressed by the EID Board of Trustees before access to Mr. Creamer's property could be granted.

381. During the August 20, 2015 Trustee Meeting, Mr. Hughes and Mr. Stevens again denied access to EID water lines located on Mr. Creamer's property citing "security concerns."

d. Potential interference with EPA investigation.

382. Sometime in January 2014, the EPA Office of Inspector General initiated an investigation of the allegations contained in Relator's original complaint in this action.

383. In a subsequent telephone conversation, Mr. Grange, the DDW construction assistance section manager, assured Daniel Hawthorn of the EPA Office of the Inspector General that he would "investigate" the allegations with the "readily available" documents and provide the EPA with his findings.

384. During the telephone conversation, Mr. Grange falsely reported that the EID project file was located in the state archives, when, in fact, it had been already retrieved at the request of Relator in August 2014 and was in the custody of the DDW records manager.

385. Mr. Grange subsequently provided EPA Investigator Hawthorn with a screenshot of the following note from DDW's files: "[o]n 9/23/2003 the final inspection was completed. Pumphouse [sic] and waterline appear to have been constructed according to plan and compliance [sic] with Drinking Water Rules."

386. Carollo Engineers did not certify the project as complete until September 22, 2004.

387. In an email from Mr. Grange to Mr. Hawthorn, Mr. Grange stated that, apart from the "loan in 2000," "[a]ny other monies were unrelated to the feds," even though any infrastructure subsequently connected to the Brigham Fork Well or the Wildflower Reservoir had to comply with the terms of the Commitment of Funds Letter and the Water Conservation and Management Plan.

388. In the email, Mr. Grange failed to report that the EID project file comprising "one and one-half file boxes" located "in the state archives" had been duplicated in electronic form in August 2014 and could have been easily searched and transmitted via computer.

389. In the email from Mr. Grange to Mr. Hawthorn, Mr. Grange represented that the "Date Closed" was "12/5/2002," despite the fact that DDW had first approved the construction design on November 15, 2002.

390. In the email exchange from Mr. Grange to Mr. Hawthorn, Mr. Grange specifically emphasized that the "Date Closed" was "12/5/2002," despite the fact that federally-backed funds were first distributed to EID from the DDW escrow account sometime after May 7, 2003 and continued through September 29, 2004.

391. In the aforementioned email correspondence from Mr. Grange to Mr. Hawthorn, Mr. Grange emphasized that the "Date Closed" was on "12/5/2002," but failed to mention that the project closed out on May 3, 2005.

392. Shortly after Mr. Hawthorn reported that the federal government would not further investigate the present action "based upon information provided by [Mr. Grange] and [his] office," Mr. Grange assured Mr. Hawthorne that he had provided the government with "appropriate and relevant information" as a result of Grange's "investigation" of the allegations filed under court seal.

393. On January 20, 2015, Mr. Grange informed EID that DDW had been contacted by Danial Hawthorne of the EPA's Office of the Inspector General regarding the present litigation filed by Relator on September 29, 2014 and provided Fred Smolka all email correspondence

between DDW and EPA Investigator Hawthorne regarding the matter filed under federal court seal.

e. Failure to report cross connection in the 2015 Sanitation Survey.

394. In August 2015, EID had to submit a federally mandated Sanitation Survey of the EID Water System.

395. Prior to receiving the sanitation survey, Mr Hughes, Mr. Bradford, Mr. Stevens and Mr. Hawkes that learned that EID's water system had a single valve at one of its connections, which allowed the homeowner to simultaneously receive water from both his private well and EID's water system, potentially exposing EID's system to bacterial contamination. EID did not report the cross connection in the 2015 sanitation survey.

H. EID's trustees and employees used EID for personal enrichment.

396. Of the six payments dispersed under the $1.8 million loan, Fred Smolka rendered payments for individual personal gain as follows: $106,993.00 to himself ($26,993.00 over budget); $7,915.75 to Joe Smolka for unknown services;; $34,145.30 to Steve Creamer for placing water lines; $400.00 to Tyson and Ryan Creamer for unknown services; and $1,140.00 to Mr. Hughes for dirt bags and snow removal.

397. Mr. Hughes, Mr. Hales, Mr. Bradford and Mr. Stevens permitted Fred Smolka to render payments on behalf of EID in excess of $150,000.00 to Fred Smolka's family, including his wife (Marilyn Smolka), his brother (Joe Smolka), his daughter (Tanya Bergstrom), his son-in-law, his daughter, and his grandson.

398. EID – acting through Fred Smolka – leased water rights without remuneration to the following: Mr. Bradford in 2002; Steve Creamer in 2013 for the construction of a large pond

in front of his personal residence; and Dr. Furse, which allowed her to purchase property at a reduced price and then immediately obtain building permits from Salt Lake County with a water right leased from EID.

399. Between 2004 to present, EID – acting through Fred Smolka – waived impact and water usage fees for the personal benefit of Mr. Hughes, Mr. Bradford, Mr. Stevens, Mr. Creamer, and Dr. Furse.

400. Fred Smolka's draws an annual salary of $120,000.00 from EID.

401. After the 2001 EID trustee election, Fred Smolka stepped down as EID Trustee Chairman and assumed the position of EID's general manager. EID did not publicly announce Fred Smolka's appointment, nor did EID allow other members of the public to apply for the position.

402. According to EID financial records, EID has rendered direct payments to Fred Smolka totaling $594,613.47 since January 2000.

403. According to EID financial records, EID has rendered direct payments to Marilyn Smolka totaling $6,836.86 since January 2000.

404. In its yearly budget since 2004, EID has designated payments to Carollo Engineering, BIWC and Aqua Engineering in excess of $1,000,000.00 for engineering and hydrological studies.

405. On February 13, 2014, despite EID's financial inability to service its debt obligations, Mr. Hughes, Mr. Bradford and Mr. Stevens unanimously voted to increase their yearly compensation from $2,000.00 to $5,000.00.

406. EID gave Mr. Bradford a water right for the construction of his private residence, but failed to collect lease and impact fees totaling $11,000.00 from Mr. Bradford.

407. Kem Gardner of the Boyer Company had hired Mr. Hughes to complete the community septic system in the area of Emigration Oaks known as "Emigration Estates" through the company Ecosens even though Mr. Hughes had diverted the funds for another project, Kem Gardner had waived recovery of fees paid to Mr. Hughes.

1. Construction contract awarded to Aqua without bidding.

408. In December 2014, when questioned by canyon resident S. Plumb why proposed projects were not being submitted to competitive bidding, EID responded that EID prefers to work with people who "know Emigration Canyon."

409. In January 2015, EID announced during its trustee meeting the construction of a waste-water system to service seventeen "existing and future" homes.

410. In February 2015, EID confirmed that Aqua Engineering would complete the "Request for Statement of Qualifications" needed for the competitive bidding of engineering services.

411. When questioned by Canyon resident S. Plumb as to the appropriateness of having Aqua Engineering perform such a task if it would be in fact one of the bidders for the project, Mr. Neeley responded that Aqua "had no interest" in submitting a statement of qualifications necessary to bid the project.

412. Aqua Engineering submitted the only statement of qualifications.

413. In February 2015, Mr. Hawkes failed to return calls from Engineer Greg Olsen who intended to present a statement of qualifications necessary to bid the project.

414. Despite having received only one statement of qualification from Aqua Engineering, EID – acting through Mr. Stevens and Mr. Bradford – awarded Aqua Engineering the contract for engineering services on March 12, 2015.

2. The $60K planning grant and Hughes septic system.

415. On June 24, 2015, DEQ Water Quality Board unanimously awarded EID a $60,000.00 federally-backed planning grant to study the coliform pollution of the stream that runs down Emigration Canyon.

416. A 1981 study by two University of Utah experts found that only five percent of the coliform pollution in the stream was coming from underground disposal systems such as septic and holding tanks.

417. Fred Smolka, Mr. Hawkes, Aqua Engineering, Carollo Engineering, and Mr. Rasmussen participated in the application process for the grant.

418. During the 2015 EID trustee election for the reelection of incumbents Mr. Hughes and Mr. Bradford, Fred Smolka, Mr. Hughes and Mr. Bradford cited the grant as evidence that EID was taking necessary steps to prevent contamination of the canyon stream.

419. On information and belief, EID intended to use the grant funds to service the $1.8 million loan.

420. During the EID Trustee meeting on November 8, 2014, Mr. Hughes insisted that the proposed septic-system project be completed by his company Ecosens – also called High Science – although Mr. Hughes is not a licensed contractor.

421. Mr. Hughes is listed under the email address "highscience@gmail.com" in the official EID correspondence from October 25, 2017.

422. The company "Ecosens" registered with the Utah Department of Commerce is listed under defendant Hugh's current cell phone number, but reflects a non-existent address in Holiday, Utah as its primary place of business.

423. On the EID website, Mr. Hughes's email address is listed as "highscience@gmail.com."

424. Sometime in 2001, Boyer Company – acting through Kem Gardner –hired Mr. Hughes to construct a community septic system in the area of Emigration Oaks known as "Emigration Estates."

425. Even though Mr. Hughes did not complete the project, and Boyer Company allowed Hughes to retain all monies rendered for the project.

426. In a EID correspondence to canyon residents from June 2014, Mr. Hughes, Mr. Stevens and Mr. Bradford insisted that Fred Smolka and Mr. Hawkes were "independent contractors" and thus exempt from Utah state nepotism regulations.

427. Contrary to the aforementioned, in June 2015, Mr. Hughes, Mr. Stevens and Mr. Bradford approved using EID public funds to pay for the legal expenses of Fred Smolka and Mr. Hawkes in the present action. EID did not record this decision in its organizational minutes.

428. Mr. Hughes insisted that his company Ecosens be awarded contracts for the DWQ grant of $60,000.00 during the November 2014 EID Trustee meeting.

I. EID has abused its power to detriment of canyon residents.

429. With 677 United States postal mailboxes in Emigration Canyon, EID provides water service to less than 34% of the households as reported to the State Engineer; however,

EID taxes every developed and vacant property owner at the highest rate allowed under Utah law.

1. EID has mislead residents into giving up their water rights.

430. In order to coerce 57 households to agree to connect to the expanded water system, EID – acting through Fred Smolka, Mr. Hales, Mr. Hughes, Carollo Engineering, and BIWC – made the following false and misleading statements to canyon resident.

431. At numerous public meetings, Fred Smolka told canyon residents that EID possessed superior water rights to those of all existing homes on private wells.

432. At a public meeting held on March 7, 2002, Mr. Hales told canyon residents that it was "impossible" for EID to transfer water rights from Salt Lake Valley to Emigration.

433. At a public meeting held on March 18, 2002, Fred Smolka told canyon residents that the primary purpose of the construction of the 1-million-gallon Wildflower Reservoir was for "fire protection."

434. At a meeting held on March 18, 2002, Mr. Hughes told canyon residents that, while the planned size of the 1-million gallon Wildflower Reservoir was excessive, it was the best decision based on "the economies of scale" and not for future development.

435. At a meeting held on March 7, 2002, Don Barnet of VIWC told canyon residents that, if smaller wells were replaced by one large-diameter commercial well, impact on the canyon "aquifer" would be the same.

436. In 2003, Fred Smolka told a canyon resident by the name of Eckert that private wells might "go bad" or "dry up" in the future, and if Mr. Eckert did not sign a "firm

commitment contract," or at least a "stand-by agreement," the home would be without essential water service.

437. During trustee meetings held in 2002, Fred Smolka, Mr. Hughes and Mr. hales told canyon residents that private water rights in the Canyon were "worthless" due to EID's superior water shares.

438. In 2003, Fred Smolka told Eckert that, for residents who signed a "stand-by agreement," payment in the amount of $500.00 was necessary in order to purchase a special "water connection hub" even though no such hub was installed nor does it exist.

439. EID told canyon residents by the names of McCallum, Biggs, and Block that, if a resident refused to participate in the water system, EID would encumber title thereto, so that any future owner would be unable to connect to the EID water system in the future, thereby decreasing the resale and appraised value of the home.

440. At a public meeting held on March 7, 2002, Fred Smolka told property owners unwilling to sign either a "firm-commitment contract" or a "stand-by agreement" that they would not be required to pay for the system expansion and maintenance because it was "entirely voluntary."

441. In a letter dated May 31, 2002, Fred Smolka told canyon residents that, if 57 households signed water-connection agreements, water fee assessments "would stay the same no matter how many people join the system."

442. In a letter dated May 31, 2002, Fred Smolka told canyon residents that the proposed system would not increase future development in the Canyon due to the fact that

current zoning restrictions controlled development in the Canyon and not access to a readily available water system.

443. EID told canyon residents that it would not take any action which would "accommodate connections that will cause demand on the canyon's resources in excess of 700 equivalent residential units."

444. Upon inquiry of Canyon resident McCallum in 2002 as to the possible impact of the Brigham Fork Well on her private well located in the area of lower Pinecrest Canyon, Don Barnett responded that McCallum's well was located in a "different aquifer" than that of the Brigham Fork well even though the actual distance between the two underground water sources was less than 1 mile.

445. Since August 16, 1988, forty-six residents of Emigration Canyon have relinquished water rights to EID in order to connect to a water system that EID has constructed in the canyon. Residents did so because they mistakenly believed that their water rights were inferior to EID's water rights. In 2007, EID through Fred Smolka informed single-mother and canyon resident Ross during the purchase of a home located within the canyon that she would forfeit her "leased" water right from EID if she did not sign a "stand-by contract" and render immediate payment of $750.00 prior to closing of the home purchase.

446. Fearing that she would be without water from her private well, Canyon resident Ross rendered full payment as well as monthly payments of $40.00 per quarter until 2012.

447. During the sale of the property in 2012, EID informed canyon resident Ross sometime in 2012 that she must discontinue use of her private well as stipulated under the express terms of the "stand-by contract."

448. After placing a lien on the residence shortly prior to closing, the impact fee for connecting to the EID water system of $6,250.00 was collected from the escrow account of the title company upon closing.

449. No such lease contract was executed by the previous owner nor does it exist.

450. Canyon Ross discontinued use of her private well and connected to the EID water system shortly thereafter.

451. A search of the Utah Division of Water Rights records reveals that Canyon resident Ross possessed a superior water right to that owned by EID.

452. Sometime prior to March 12, 2015, EID informed Canyon residents Massion and Duheric along with 6 other unidentified Canyon residents that they had "leased" water rights from EID and were therefore contractually obligated under the "lease contract" to discontinue use of their private wells and to connect to EID's water system.

453. During the Trustee meeting of March 12, 2015, Mr. Stevens and Mr. Bradford ordered EID's counsel to enforce the aforementioned "lease contracts."

454. Mr. Duheric's water rights were superior to those held by EID.

455. On August 13, 2015, Mr. Hawkes informed Duheric that he had to connect to EID's system by September 16, 2016 or face criminal charges.

456. Mr. Bradford neither leased nor relinquished water rights upon connection to the EID water system.

457. In an interview with Salt Lake Tribune reporter Brian Maffly sometime between June 12 and 18, 2015, Mr. Hawkes reported that EID held "the canyon's most senior water right dating back to 1872."

458. On December 13, 2013, EID – acting through Don Barnett – failed to prevent the permanent change application "a12710b" for 94.04 acre feet supplying water to 188 families from lapsing under water right #57-8865.

459. Having failed to file a timely extension to the aforementioned water right, all 188 families supplied with water from EID now have a priority date of January 2014.

460. Any impairment of a single water right perfected prior to January 30, 2014, could lead to discontinuance of water service to all 188 homes should the holder of the perfected water right bring legal action against EID.

461. EID through BIWC and Don Barnett purposefully allowed the permanent-change application to lapse in order to secure a better priority date for the 649 acre feet under water right #57-7796 to be utilized for the massive planned development of property belonging to Mr. Creamer, the Gillmors and Neuscheler.

462. During the EID trustee meeting of March 12, 2015, Mr. Bradford reported that the Emigration Creek was down 50% of its normal flow due to high-water consumption within the area of Emigration Oaks.

463. Since 2014, canyon residents Irons, McCallum, Penske, Terry and Karrington have reported substantial decrease in the productivity of their private wells and have issued complaints with the DWR for the impairment of superior water rights.

464. To date, over 27 private wells with superior water rights have reported impairment due to the extraction of water via large-diameter commercial wells operated by EID as predicted in the 1966 Barnett Thesis.

2. EID's trustees meddled in an election to remain in power.

465. On May 11, 2011, Mr. Hughes, Mr. Bradford and Mr. Stevens unanimously appointed Fred Smolka as the EID's "Election Specialist."

466. During the November 2013 EID-trustee election, Fred Smolka and his spouse Marilyn Smolka inappropriately supported the re-election of Mr. Stevens by encouraging voters during balloting to cast their vote for Mr. Stevens, even going so far as commenting, "thank-you for voting for Mark [Stevens]. He really needs your vote"; withholding ballots from residents antagonistic to the management of EID; improperly asking a canyon resident Terry how he intended to vote before giving a replacement ballot; improperly sending ballots outside of Emigration Canyon to non-existent mailing addresses; and improperly collecting and opening ballots prior to ballot counting by election judges.

467. Mr. Hughes, Mr. Bradford and Mr. Stevens agreed to compensate Fred Smolka over $6,000.00 to conduct the trustee election despite the fact that the same service provided by Salt Lake County would have cost canyon taxpayers $1,594.60.

3. EID has serviced the debt on its "preposterously oversized" water system by levying exorbitant fees and taxes on canyon residents.

468. On May 11, 2011, EID's attorney opined that EID could not retire federally-backed debt with general property taxes.

469. Despite this unequivocal legal opinion, on July 7, 2011, EID, through Mr. Bradford and Mr. Hughes, approved a "loan" of $135,000.00 from the "General Fund" to the "Emigration Oaks Fund."

470. On December 13, 2007 EID through Fred Smolka deposited an impact payment of $6,100.00 into the Emigration Oaks account despite the fact that Canyon resident White did not reside in the Emigration Oaks development.

471. On December 6, 2012, EID combined the Emigration Oaks and General accounts in order to conceal the diversion of property taxes to service EID's massive federally-back debt obligations.

472. In the Trustee meeting from March 12, 2015, Mr. Stevens revealed that revenue from general property taxes was being used to service EID's debt obligations.

473. During the EID Trustee meeting from June 18, 2015, Mr. Hughes, Mr. Stevens and Mr. Bradford approved moving $50,000.00 from the "operation and maintenance" budget to "legal expenses" for the current legal action.

474. Sometime in June 2105, EID's insurance carrier denied coverage for legal expenses associated with the present litigation.

475. Salt Lake City charges an impact fee of $3,000.00 for a new residential home located within the limits of Salt Lake City.

476. By contrast, in 2007, EID raised the water connection impact fee from $5,500.00 to $17,000.00 for all homeowners not "on stand-by." There is no record in EID's meeting minutes that EID's trustees ever voted on this issue.

477. Every year since 2007, EID has set property taxes at the highest rate allowed under Utah law.

478. For example, in 2014, S. Plumb's property taxes skyrocketed from $40.74 to$290.90 due to the taxes and fees imposed by EID.

479. To increase water usage fees, EID has refused to install valves on its water system that would decrease water pressure. Higher water pressure leads to higher water consumption.

480. As measured in April 2013, the water pressure at S. Plumb's residence was twice that of a residence with normal water pressure, which led to the rupture of a water tank and extensive water damage possible due to the 4-inch water supply line placed by EID in violation of federal construction standards.

481. In 2007, EID intentionally installed pressure reducing valves on fire hydrant supply lines instead of domestic water connections in order to maintain high water pressure thereby increasing consumption rates and water usage fees.

482. EID has issued monthly water bills to canyon resident S. Plumb in excess of $2,500.

483. On June 1, 2013, EID proposed raising "base" and "stand-by" fees by $25.00 per month to include a new monthly surcharge of $1,400.00 for excessive water use despite the fact that EID through Fred Smolka has assured Canyon residents in a letter dated May 31, 2001 that water fee assessments would never change.

484. On June 1, 2013, EID proposed a "fire-hydrant-rental fee" of $15.00 per month to eight-six households on private wells "who pay nothing" for the water service provided by EID.

485. All 17 residents of Spring Glen who already owned four fire hydrants in their community before EID installed 4 additional hydrants have all been charged a "fire-hydrant rental fee" of $15.00 per month since September 2013.

486. In June 2013, Joseph Smolka, informed Canyon resident Karrington that EID intended to raise the fire-hydrant rental fee to $50.00 per month "as soon as possible."

487. Despite the clear language of the correspondence from June 1, 2013 requiring fire-hydrant rental fee payments from "households," EID – acting through Fred Smolka – levied fees not only for developed properties but also numerous vacant lots.

488. In the period from September 2013 to September 2014, EID assessed a $520.00 fire-hydrant rental fee on a single vacant parcel belonging to a 86 year-old, widowed resident on a private well.

489. In June 2015, EID though Eric Hawkes billed canyon resident O'Connor for $320.00 for a "water base fee," even though the aforementioned resident was on a private well and did not receive any water service from EID.

490. On November 14, 2013, six unidentified Canyon residents on fixed-monthly incomes requested relief from the fire-hydrant rental fees under Salt Lake County's "circuit breaker program."

491. Even though the $1.8 million loan was intended to make water more affordable for these six residents, EID – acting through Mr. Hughes – refused to waive the fire-hydrant rental-fees.

492. When canyon residents protected EID's exorbitant fees, Mr. Hughes replied that Canyon residents who "didn't like EID fees … were welcome to move out of Emigration Canyon."

493. In a meeting held on January 13, 2015, Mr. Bradford stated that canyon residents living along Emigration Canyon Road were "second-class citizens." Mr. Hughes commented that the area was like "the ghetto." Mr. also stated, "if [EID] were giving out gold in Emigration Canyon, they [the canyon residents] would complain about the color."

494. On February 6, 2003, Canyon resident Christensen informed EID that the water rates charged by EID was twice that of Salt Lake City.

495. In September 2014, under Salt Lake County's "certified delinquent program," EID – acting through Mr. Hawkes – certified forty-eight canyon property owners as delinquent in "fire-hydrant-rental" and "stand-by fees," which had the collateral effect of increasing EID's tax revenues through tax foreclosure despite the fact that on August 7, 2008 EID legal counsel Kinghorn opined that EID may not collect fee through property taxes.

496. In the year 2013, EID certified only three property owners as delinquent to Salt Lake County.

497. EID – acting through Mr. Hawkes – certified a single, vacant parcel belonging to a 86-year old, widowed Canyon resident to Salt Lake County for the amount of $520.00.

4. EID's preposterously oversized water system has depleted Emigration Canyon's water reserves.

498. Since installation of EID's large commercial wells, five residents of the canyon have filed complaints with the State Engineer citing substantial decreases in the productive capacity of their private wells.

499. In April 2015, blind review of Emigration Canyon's hydrology by renowned hydrologist Dr. Hansen revealed that that the stream running down the canyon has not maintained minimum flow in 8 of the past 14 years contrary to the Water Conservation and Management Plan.

500. Since commencement of the present proceedings, eight residents of Emigration Canyon have reported substantial impairment of private wells.

IV. FIRST CAUSE OF ACTION
(Direct False Claims under 31 U.S.C. § 3729)

501. Relator incorporates all preceding paragraphs, including the Introduction.

502. Defendants knowingly presented or caused to be presented a false or fraudulent claim to an officer or employee of the United States Government – or to a contractor, grantee, or other recipient – in order to induce disbursement of $1.846 million in federal funds.

503. Defendants falsely claimed that they intended to use the funds to bring clean water to 67 canyon residents, when in fact they always intended to use the funds to build water infrastructure for the benefit of wealthy land developers.

504. Defendants falsely claimed that 57 households had signed binding agreements to connect to EID's water system.

505. Defendants falsely claimed that Emigration Canyon's hydrological system could support large-diameter commercial wells.

506. Defendants falsely claimed that its water rights had priority other water rights within Emigration Canyon.

507. Defendants knowingly made, used, or caused to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the United States Government – or by a contractor, grantee, or other recipient – in order to induce disbursement of $1.846 million in federal funds.

508. Defendants falsely certified that the Brigham Fork Well, Wildflower Reservoir, and water pipelines had been built according to the plans and specifications.

509. Defendants falsely certified that construction of the Brigham Fork Well, Wildflower Reservoir, and water pipelines was done in compliance with crosscutting environmental statutes.

510. Defendants falsely certified that the Wildflower Reservoir had a valid operating permit.

511. Defendants falsely certified that EID had sufficient water rights to operate the Brigham Fork Well.

512. Defendants falsely certified that Emigration Canyon's hydrological system could sustain large-diameter commercial wells.

513. Defendants conspired to defraud the United States Government by fraudulently inducing disbursement of $1.846 million in federal funds.

514. Defendants false claims damaged the government in an amount to be proven at trial.

V. SECOND CAUSE OF ACTION
(Reverse False Claims under 31 U.S.C. § 3729)

515. Relator incorporates all preceding paragraphs, including the Introduction.

516. EID knowingly made, used, or caused to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the United States Government, or knowingly concealed or knowingly and improperly avoided or decreased an obligation to pay or transmit money or property to the United States Government.

517. Alternatively, Defendants conspired to commit the violation described in paragraph 530.

518. EID obtained a $1.846 million loan.

519. The loan consists of federal funds.

520. The loan carries a below-market interest rate of 2.1 percent.

521. EID has not paid off the loan's balance and is making ongoing, monthly payments.

522. Because of the below-market interest rate, each and every time EID makes a payment on the loan, EID receives a benefit from the United States Government in the form of a lower monthly payment.

523. EID accepted the loan on condition that it would use the funds to bring clean water to 67 existing residents of Emigration Canyon who had contaminated wells.

524. EID accepted the loan on condition that it would comply with cross-cutting environmental statutes like the Clean Water Act or Endangered Species Act.

525. EID accepted the loan on condition that it would not use the funds for the benefit of land developers or speculators.

526. EID accepted the loan on condition that it would monitor the output of its wells so as not to decrease flows in private wells or the Emigration Canyon stream.

527. EID accepted the loan on condition that it would build its water system in accordance with the plans submitted during the NEPA process and otherwise maintain valid permits for the system under the Safe Drinking Water Act.

528. By accepting the loan, EID created an express or implied contractual relationship.

529. EID defaulted on the loan by failing to comply with the foregoing conditions.

530. Because EID has defaulted on the loan, it has an established duty to transmit or pay money to the United States Government.

531. Defendants concealed or conspired to conceal from the United States Government that EID had defaulted on the loan in order to help EID avoid a duty to transmit or pay money to the United States Government.

532. Defendants conduct has damaged the United States Government in an amount to be proven at trial.

VI. PRAYER FOR RELIEF

WHEREFORE, Relator, on behalf of the United States of America, requests the Court enter the following relief:

A. That this Court enter judgment against Defendants in an amount equal to three times the amount of damages the United States has sustained because of Defendants' actions, plus a civil penalty of not less than $5,500.00 and not more than $11,000.00 for each violation of 31 U.S.C. § 3729 as well as a forfeiture of any unjust enrichment and/or unlawful profit;

B. That Relator be awarded the maximum amount allowed under § 3730 of the False Claims Act;

C. That Relator be awarded all costs of this action, including attorney fees and expenses; and

D. That Relator and the United States of America recover such other and further relief as the Court deems just and proper.

DATED: 16 April 2018

CHRISTENSEN & JENSEN, P.C.

s/Scot A. Boyd
Scot A. Boyd
Stephen D. Kelson
Bryson R. Brown

EXHIBIT G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

UNITED STATES OF AMERICA *ex rel.* MARK CHRISTOPHER TRACY, Plaintiff, v. EMIGRATION IMPROVEMENT DISTRICT, *et al.*, Defendants.	**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR ATTORNEYS' FEES AND COSTS AND GRANTING DEFENDANTS' MOTION TO AMEND** Case No. 2:14-cv-701-JNP District Judge Jill N. Parrish

Defendants Emigration Improvement District ("the District"), Michael Hughes, Mark Stevens, David Bradford, Fred R. Smolka (deceased), Eric Hawkes, and Lynn Hales (collectively, "Defendants") filed a motion for attorneys' fees and costs pursuant to 31 U.S.C. § 3730(d)(4) and 28 U.S.C. § 1927 against *qui tam* relator Mark Christopher Tracy ("Tracy") and his counsel, Christensen and Jensen, P.C. ("Christensen & Jensen"). Defendants subsequently moved to amend the motion to withdraw claims against Christensen & Jensen. For the reasons stated below, the court awards attorneys' fees and costs against Tracy.

BACKGROUND AND PROCEDURAL HISTORY

The District is organized under Utah law as a special service district to provide water and sewer services to Emigration Canyon residents. The District can issue bonds, charge fees and assessments, and levy taxes on Emigration Canyon residents. The District received a $1.846 million loan from Utah's Drinking Water State Revolving Fund, which uses federal funds to

finance the construction of water systems for drinking or culinary water. The District received the final disbursement on the loan around September 2004.

Tracy, acting as a relator, filed a *qui tam* complaint against Defendants under the False Claims Act, 31 U.S.C. §§ 3729 *et seq.*, on September 26, 2014. Tracy amended his complaint three times. He filed his First Amended Complaint on May 1, 2015, his Second Amended Complaint on August 18, 2015, and his Third Amended Complaint on April 16, 2018. Tracy also recorded a *lis pendens* against a portion of the District's water rights on August 20, 2015, claiming that they were the subject of the present litigation.[1] The United States declined to intervene in the matter on three separate occasions: (1) after reviewing the First Amended Complaint on May 8, 2015 (ECF No. 11); (2) after reviewing the Second Amended Complaint on November 20, 2015 (ECF No. 69); and (3) after reviewing the Third Amended Complaint on March 20, 2018 (ECF No. 199).

The final operative complaint alleged two causes of action. First, Tracy alleged that the District and its supposed co-conspirators made false statements that induced the government to disburse the proceeds of the $1.846 million loan. Second, Tracy alleged that the District, after the loan proceeds were disbursed, failed to comply with conditions of the loan and failed to report this noncompliance to the Government.

On June 22, 2018, the court dismissed Tracy's Third Amended Complaint as to defendants as Smolka, Hughes, Stevens, Bradford, Hales, Hawkes, Creamar, Carollo Engineers, and the District. The court also ordered Tracy to show cause as to why the court should not also dismiss his claims as to the remaining defendants. After considering Tracy's response, the court dismissed with prejudice all remaining claims as to all remaining defendants on June 25, 2018.

[1] On May 25, 2016, the court heard oral argument on Defendants' motion to release the *lis pendens*. The court granted the motion from the bench, ruling that the *lis pendens* was a wrongful lien and awarding statutory damages and attorneys' fees.

Following the June 22, 2018 dismissal of both claims, Tracy appealed the dismissal of his first cause of action to the Tenth Circuit. This court had dismissed Tracy's first claim as time barred, applying then-binding Tenth Circuit precedent that required this court to enforce the six-year repose period found in 31 U.S.C. § 3731(b)(1), not the ten-year repose period found in 31 U.S.C. § 3731(b)(2). *See U.S. ex rel. Tracy v. Emigration Improvement Dist.*, No. 2:14-cv-00701, 2018 WL 3111687, at *3 (D. Utah June 22, 2018) (citing *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah,* 472 F.3d 702, 725 (10th Cir. 2006), *abrogated by Cochise Consultancy, Inc. v. U.S. ex rel. Hunt*, 139 S. Ct. 1507 (2019)), *vacated and remanded*, 804 F. App'x 905 (10th Cir. 2020). This court found that Tracy clearly failed to meet the six-year period but did not evaluate the timeliness of his claim relative to the ten-year period. While Tracy's appeal was pending in the Tenth Circuit, the Supreme Court ruled that False Claims Act actions initiated by private relators are subject to the ten-year repose period found in 31 U.S.C. § 3731(b)(2), even where the government declines to intervene (as was the case in Tracy's lawsuit). *Cochise*, 139 S.Ct. at 1511-14. In light of the *Cochise* decision, the Tenth Circuit vacated this court's dismissal of Tracy's first claim and remanded the case for this court to determine whether Tracy filed his complaint within the ten-year repose period. On March 30, 2021, this court found that Tracy did not meet the ten-year repose period and again dismissed his complaint.

The court has previously awarded attorneys' fees and costs against both Tracy and Christensen & Jensen. On March 20, 2017, the court entered a joint and several judgment against Christensen & Jensen and Tracy for Defendants' attorneys' fees and costs in the amount of $29,936 related to the wrongfully filed *lis pendens*. On February 5, 2019, after dismissing both of Tracy's claims, the court awarded attorneys' fees and costs in the amount of $92,665 against Tracy ("Initial Attorneys' Fees Order"). The court declined to hold Christensen & Jensen jointly and severally

liable because it found no evidence that Christensen & Jensen had acted unreasonably or vexatiously beyond the wrongfully filed *lis pendens*, for which it had already been billed pursuant to the court's March 20, 2017 order. When the Tenth Circuit vacated this court's June 22, 2018 dismissal order, it also vacated the court's Initial Attorneys' Fees Order and remanded for this court to reconsider whether Defendants prevailed and thus were entitled to attorneys' fees and costs.

After the court found that Defendants indeed prevailed on remand, Defendants filed another motion for attorneys' fees and costs against Tracy and Christensen & Jensen on April 7, 2021. Following the motion, the parties began to discuss a potential settlement conference. Tracy declined to participate. On June 29, 2021, Christensen & Jensen and Defendants reached a settlement wherein Christensen & Jensen paid the Defendants $87,500 in consideration for releasing it from all suits and obligations related to its representation of Tracy. Following Tracy's motion for access to the settlement agreement, Christensen & Jensen filed the written settlement agreement with the court.

In light of the settlement with Christensen & Jensen, Defendants filed a motion to amend their motion for attorneys' fees and costs. The motion to amend sought two changes to the requested relief. First, Defendants moved to withdraw their claims against Christensen & Jensen. Second, Defendants moved to release Tracy from any fees and costs awarded by the Court for the period of time between the court's February 5, 2019 order granting in part and denying in part Defendants' motion for attorneys' fees and costs (ECF No. 243) and the court's order granting Defendants' motion to dismiss on March 30, 2021 (ECF No. 298) ("the Release Period"). On July

19, 2021, the court acknowledged that Defendants had withdrawn their claim for attorneys' fees as to Christensen & Jensen. [2]

LEGAL STANDARD

Although Defendants' motion for attorneys' fees and costs cites both 31 U.S.C. § 3730(d)(4) and 28 U.S.C. § 1927, the motion as to Tracy relies solely on 31 U.S.C. § 3730(d)(4). Therefore, the court relies only on 31 U.S.C. § 3730(d)(4) in resolving Defendants' motion. Pursuant to 31 U.S.C. § 3730(d)(4), a court may award attorneys' fees to Defendants if (1) the government elects not to proceed with the action; (2) the Defendants prevail; and (3) the court finds that the claim was "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." The False Claims Act "does not define the terms 'clearly frivolous, clearly vexatious, or brought primarily for the purposes of harassment,'" but the Tenth Circuit has found that the § 3730(d)(4) standard is "analogous" to the standard applied to claims for attorneys' fees under 42 U.S.C. § 1988. *U.S. ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1055 (10th Cir. 2004).

ANALYSIS

I. BASIS FOR AWARD OF ATTORNEYS' FEES AGAINST TRACY

In this case, the government declined to intervene three times (ECF Nos. 11, 69, 199) and Defendants prevailed (ECF No. 298). Therefore, the only element in dispute is whether Tracy's action was clearly frivolous, vexatious, or brought primarily for purposes of harassment. Although courts often analyze all three elements of the third prong, each element can independently sustain an award of attorney's fees. *See In re Nat. Gas Royalties Qui Tam Litig.*, 845 F.3d 1010, 1017-18

[2] Tracy also filed an objection to the court's docket text order, which stated that the court would consider Defendants' motion for attorneys' fees only insofar as it sought fees from Tracy, as specified in Defendants' motion to amend. Tracy objected that he was unaware of the settlement terms between Defendants and Christensen & Jensen. Because the settlement is now filed on the docket, the court finds this objection to be moot.

(10th Cir. 2017) (upholding attorneys' fees solely because relator's claim was clearly frivolous without reaching the two other elements).

The court previously found that Tracy's behavior satisfied all three elements. ECF No. 243. And, when remanding the case, the Tenth Circuit noted that if this court determined that Defendants prevailed, this court "may again find Tracy's claims clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." *U.S. ex rel. Tracy v. Emigration Improvement Dist.*, 804 F. App'x 905, 909 (10th Cir. 2020) (citation and alteration omitted). For the reasons stated below, the court so finds.

A. Clearly Vexatious

Vexatious refers to actions that are taken "without reasonable or probable cause or excuse." *United States v. Gilbert*, 198 F.3d 1293, 1298 (11th Cir. 1999) (quoting *Vexatious*, BLACK'S LAW DICTIONARY 1559 (7th ed. 1999)). The court need not find bad faith on the part of the plaintiff-relator in order to find vexatiousness. *See Christiansburg Garment Co. v. Equal Emp. Opportunity Comm'n*, 434 U.S. 412, 421 (1978) ("[T]he term 'vexatious' in no way implies that the plaintiff's subjective bad faith is a necessary prerequisite to a fee award against him."). In its order on Defendants' first motion for attorneys' fees and costs, this court found that Tracy's actions related to this litigation were vexatious. *See* ECF No. 243. Subsequent litigation has not disturbed the basis for the court's decision in that order.

On August 20, 2015, Tracy filed a *lis pendens* against certain water rights in the district that Tracy claimed were the subject of the present lawsuit. Tracy's wrongful *lis pendens* led the court to find that Tracy's behavior was clearly vexatious. As the court previously wrote, "there was no good faith basis for suggesting that Tracy's lawsuit for damages under the False Claims Act had any bearing at all on the ownership of Defendants' water rights." ECF No. 243, p. 11.

And, when pressed, Tracy's counsel could not identify a single case supporting the *lis pendens* nor any language in Tracy's prayer for relief that would affect the District's property interest in the subject matter of the *lis pendens*. Hr'g Mot. Release Lis Pendens Tr. 21:1-25:8. Despite the fact that Tracy made no serious effort to defend filing the lien, he continued to send out letters to clients referencing the *lis pendens*, even after the government declined to intervene in this case. *Id.* at 36:9-40:8. The court's finding that the *lis pendens* was unreasonable and without foundation stands independent from any disagreements between the parties as to whether the lawsuit as a whole was frivolous because of the ten-year repose period. As such, the court found Tracy's behavior clearly vexatious when it first occurred, and no subsequent developments change that finding.

B. Brought Primarily for the Purposes of Harassment

In its original order on attorneys' fees, the court also found that Tracy's actions indicated bad faith and a clear intent to harass. *U.S. ex rel. J. Cooper & Assocs., Inc. v. Bernard Hodes Grp., Inc.*, 422 F. Supp. 2d 225, 238 n.19 (D.D.C. 2006) ("[T]he word 'harassment' suggests bad faith on the part of the plaintiff . . . ."). The court noted that Tracy wrote letters and emails to the residents of Emigration Canyon repeating specious allegations he made in his filings with the court. For example, Tracy used allegations he levied in court against two of the individual defendants in one of his letters at a time when the two defendants were running for reelection to the District's board. Tracy's letters to residents usually immediately followed new filings with the court, further bolstering the court's view that Tracy acted in bad faith in pursuing this lawsuit. Tracy's communications led the court to conclude that Tracy brought this case to air personal grievances against Defendants in pursuit of his own ulterior motives, rather than to seek money damages for the United States. *See U.S. ex rel. Herbert v. Nat'l Acad. of Scis.*, No. Civ. A. 90-2568, 1992 WL 247587, at *9 (D.D.C. Sept. 15, 1992) ("Plaintiff uses the *qui* tam provisions for

the purposes of harassment . . . [when] the Plaintiff has done little more than dress up his personal grievance[s] . . . as a *qui tam* claim."). Again, none of the subsequent developments in this case alters the court's conclusion regarding Tracy's harassing behavior.

Tellingly, although Tracy argues vehemently that his claims were not frivolous, he never addresses the court's reasoning in the Initial Attorneys' Fees Order that he acted vexatiously and with the primary purpose to harass by filing a wrongful *lis pendens* and using the present lawsuit to air his own personal grievances. But the court need only find that a party acted vexatiously, with the purpose to harass, *or* frivolously to award attorneys' fees and costs. *See In re Nat. Gas Royalties Qui Tam Litig.*, 845 F.3d 1010, 1017-18 (10th Cir. 2017). Thus, having found that Tracy's actions were both clearly vexatious and brought for the purpose of harassment, the court need not reach the question of whether Tracy's claim was clearly frivolous.

II. REASONABLE ATTORNEYS' FEES

Under 31 U.S.C. § 3730(d)(4) any fees awarded to Defendants must be "reasonable." This court has already determined that Defendants are entitled to $92,665 in attorneys' fees and costs for expenses related to this litigation prior to the court's Initial Attorneys' Fees Order on February 5, 2019. And the court need not gather evidence to determine the proper amount of attorneys' fees for expenses following the Initial Attorneys' Fees Order because Defendants and Christensen & Jensen have reached a settlement agreement that appears to roughly cover Defendants' fees for that period of time and have released Tracy from any fees and costs incurred by Defendants during that period.

Awarding $92,665 in attorneys' fees and costs against Tracy raises no concern about double recovery for Defendants. Defendants estimate that they incurred approximately $100,000 in fees and costs related to the litigation after the initial attorneys' fees order on February 5, 2019.

Therefore, Defendants would be entitled to approximately $193,000 in fees and costs—the costs adjudicated by the court in its Initial Attorneys' Fees Order plus the costs accrued by Defendants following that order. In consideration for an $87,500 settlement payment from Christensen & Jensen, Defendants released Tracy from any obligations for the period following the court's Initial Attorneys' Fees Order. Thus, Christensen & Jensen's payment went towards the Defendants' fees and costs that postdated the Initial Attorneys' Fees Order whereas the present judgment against Tracy accounts for Defendants' reasonable fees and costs that preceded the Initial Attorneys' Fees Order.

ORDER

The court GRANTS Defendants' motion for an award of attorneys' fees and costs against relator Tracy pursuant to 31 U.S.C. § 3730(d)(4) in the amount of $92,665.00 for 384.8 hours billed. The court DENIES the motion to hold plaintiff's counsel jointly and severally liable and instead GRANTS Defendants' motion to amend the motion for attorneys' fees and costs to withdraw all claims against Christensen & Jensen and to release Tracy from any claims for fees incurred between February 5, 2019, and March 30, 2021. The court shall enter Judgment for Defendants against Mark Christopher Tracy in the amount of $92,665.

Signed October 29, 2021.

BY THE COURT

Jill N. Parrish
United States District Court Judge

CERTIFICATE OF SERVICE

I, Joan E. Soares, declare:

I am a citizen of the United States, am over the age of eighteen years, and am not a party to or interested in the within entitled cause. My business address is 580 California Street, Suite 1100, San Francisco, California 94104.

On March 11, 2024, I served the following document(s) on the parties in the within action:

SUPPLEMENTAL REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF SPECIALLY APPEARING DEFENDANT PAUL BROWN'S MOTION FOR ORDER FINDING PLAINTIFF MARK CHRISTOPHER TRACY TO BE A VEXATIOUS LITIGANT AND ENTRY OF A PREFILING ORDER

XX	**VIA E-MAIL:** I attached the above-described document(s) to an e-mail message, and to transmit the e-mail message to the person(s) at the e-mail address(es) listed below. My email address is JSoares@mpbf.com.

Mark Christopher Tracy
1130 Wall St #561
La Jolla, CA 92037
E-mail: mark.tracy72@gmail.com
m.tracy@echo-association.com
Phone: (929) 208-6010

Attorney For Plaintiff in Pro per

Charlie Y. Chou
Kessenick Gamma LLP
1 Post Street, Suite 2500
San Francisco, CA 94014
Legal Assistant: Sarah Nguyen
snguyen@kessenick.com
Administrative Assistant: Anna Mao
amao@kessenick.com
E-mail: cchou@kessenick.com
Phone: (415) 568-2016

Attorney For Defendants
COHNE KINGHORN, P.C., SIMPLIFI COMPANY, JEREMY RAND COOK, ERIC HAWKES, JENNIFER HAWKES, JENNIFER HAWKES, MICHAEL SCOTT HUGHES, DAVID BRADFORD, DAVID BENNION AND GARY BOWEN

I declare under penalty of perjury under the laws of the State of California that the foregoing is a true and correct statement and that this Certificate was executed on March 11, 2024.

By Joan E. Soares
Joan E. Soares