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**IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

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EMIGRATION CANYON HOME  
OWNERS ASSOCIATION, a Utah  
Corporation

Petitioner,

vs.

KENT L. JONES, Division Director, Utah  
State Division of Water Rights, and  
EMIGRATION IMPROVEMENT  
DISTRICT, a Utah Special Service District

Respondents.

**PETITIONER'S SUPPLEMENTAL  
BRIEF IN OPPOSITION TO  
RESPONDENTS' MOTIONS TO  
DISMISS**

Case No. 190901675

Judge: Su Chon

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Petitioner Emigration Canyon Home Owners Association (“The ECHO-Association”), through counsel of record, submits the following supplemental brief in opposition to Respondents’ motions to dismiss.

## **PROCEDURAL BACKGROUND**

On July 9, 2019, the above-entitled matter came before the Court for oral argument on Respondent Emigration Improvement District's ("EID") Motion to Dismiss Petition for *De Novo* Judicial Review of Informal Adjudicative Hearing Re: Orders of the State Engineer for Permanent Change Applications Nos. 57-7796 (a44045) and 57-10711 (a44046), filed April 3, 2019 ("EID's Motion to Dismiss") and Respondent Kent L. Jones's ("Jones") Motion to Dismiss and Joinder in Emigration Improvement District's Motion to Dismiss.

At the conclusion of oral argument, the Court requested supplemental briefing from the parties, limited to the presentation of case law, in response to the following questions: (1) Which is controlling, the date of delivery of property or recording of a deed?, and (2) Can the parties to the conveyance of a water right "backdate" the transfer of property on a quitclaim deed?

## **ARGUMENT**

### **I. Which is Controlling, the Date of Delivery of Property or Recording of a Deed?**

Pursuant to Utah case law, "[a] conveyance is valid upon delivery of a deed with present intent to transfer." *See Crowther v. Mower*, 878 P.2d 876, 879 (Utah Ct. App. 1994) (citing *Winegar v. Froerer Corp.*, 813 P.2d 104, 110 (Utah 1991); *Baker v. Pattee*, 684 P.2d 632, 635 (Utah 1984)). A quit claim deed, "when executed as required by law shall have the effect of a conveyance of all right, title, interest and estate of the grantor in and to the premises therein described and all rights, privileges and appurtenances thereunto belonging, at the date of such conveyance." Utah Code Ann. § 57-1-13 (2011).

However, recording of a quitclaim deed is not required in order to validly convey property because the conveyance occurs upon delivery of the deed. "In Utah, real estate

documents filed with the county recorder ‘impart notice to all persons of their contents.’” *Haik v. Sandy City*, 254 P.3d 171, 177 (Utah 2011). “Utah’s recording laws ‘do not make recordation a prerequisite to the validity of a deed.’” *Crowther*, 878 P.2d at 879 (citing *Gregerson v. Jensen*, 669 P.2d 396, 398 (Utah 1983) (unrecorded deed valid against interest of subsequent buyers who failed to record their own interest); *Tarpey v. Deseret Salt Co.*, 5 Utah 205, 14 P.338, 339 (Utah 1887) (unrecorded conveyance valid between parties and to all parties having actual notice), *aff’d*, 142 U.S. 241, 12 S. Ct. 158, 35 L. Ed. 999 (1891)). Utah Code Ann. § 57-3- 102 states:

(1) Each document executed . . . shall, from the time of recording with the appropriate county recorder, impart notice to all persons of their contents.

. . .

(3) This section does not affect the validity of a document with respect to the parties to the document and all other persons who have notice of the document.

Recording does not convey property, but only serves to protect the interests of the grantee. “The recording statute’s purpose is not to make the transfer of property effective as between the parties, but to protect the purchaser’s interest against the asserted interest of any third parties.” *Horman v. Clark*, 744 P.2d 1014, 1016 (Utah Ct. App. 1987).<sup>1</sup>

In *Crowther*, a mother conveyed by quitclaim deed her interest in a property, owned in joint tenancy with her husband, to her son on December 15, 1988. The son delayed recording the deed. The mother passed-away on August 9, 1991, and her son recorded the deed six days later. The Utah Court of Appeals concluded that the delay in recording did not affect the validity of the conveyance because the mother had clearly conveyed her interest in the property to her son by quitclaim deed, stating:

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<sup>1</sup> Moreover, “compliance with the recording statute is not a prerequisite to enforcing the terms of a deed. *Crowther*, 878 P.2d at 879 (citation omitted).

The fact that such a [quit claim] deed is not recorded or that recording is delayed “does not affect the validity of the document with respect to the parties to the document and all other persons who have notice of the document.

*Id.* (citing Utah Code Ann. § 57-3-2(3), subsequently renumbered Utah Code Ann. § 57-3-102(3)).

In the present case, the subject Quitclaim Deed, identifies the notice of transfer of Water Right #57-8947 (a16183) from the grantor, Nelson R. Mather, to the grantee, “Emigration Canyon Home Owners Association, Mark Christopher Tracy, President,” on November 8, 2018. The Quitclaim Deed was subsequently recorded on February 21, 2019. Pursuant to Utah law, the controlling date of ownership is therefore, the date of delivery and not the date of recording.

## **II. Can the Parties to the Conveyance of a Water Right “Backdate” the Transfer of Property on a Quitclaim Deed?**

“Backdating” is defined as: “Predating a document or instrument prior to the date it was actually drawn.” BLACKS LAW DICTIONARY 93 (6<sup>th</sup> ed. 1991). The issue of whether “backdating” has occurred in this case has not been briefed and the court has limited the parties’ supplemental memorandum from presenting new argument. Accordingly, The ECHO-Association has filed a Motion for Leave to Submit Additional Briefing, filed herewith to address the new issue.

Counsel for The ECHO-Association could find no Utah case law on point regarding “backdating” of property on a quitclaim deed. However, courts have recognized the legitimacy of memorializing a prior agreement through backdating. For example, in *U.S. v. Micke*, 859 F.2d 473 (7th Cir. 1988). In *Micke*, the defendant, who claimed deductions stemming from a tax shelter investment on his 1982 tax return, asserted that Documents executed in January 1983 memorialized an investment made in December 1982. *Id.* at 476. While the court affirmed a

criminal fraud conviction in that matter, it explained that backdating is permitted when a receding agreement is reached:

The sole issue at trial was whether the deal had been agreed on in December, or subsequently in January. If the former, the backdating was legitimate and the returns were not fraudulent; if the latter, the backdating and the returns were not fraudulent.

*Id.* at 478.

In *Deutsche Bank Nat'l Trust Co. v. Burke*, 655 Fed. App'x. 251 (6th Cir. 2016), the court concluded that an assignment by deed may be backdated if there is no language preventing it. "At least two Texas Court of Appeals have considered this very question, and both have held that an assignment may have a retroactive effective date." *Id.* at 254 (citing *Transcon. Realty Inv'rs, Inc. v. Wicks*, 442 S.W.3d 676, 680 (Tex. App.—Dallas 2014, pet. denied) and *Crowell v. Bexar Cty.*, 351 S.W.3d 114, 118-19 (Tex. App. 2011)).

Moreover, case law from the federal tax court treats backdating intended to memorialize a prior agreement as merely evidencing the existence of that agreement. In *Baird v. Commission*, 68 T.C. 115 (1977), a taxpayer entered into a preliminary agreement to purchase property on August 29, 1970, and the deed was dated August 29, 1970. However, the deed was not executed until October 28, 1970, and wasn't recorded until November 17, 1970. *See Baird*, at 120-124. The court agreed that ownership transferred when the original agreement was reached on August 29, 1970. The Baird court concluded that the backdating merely memorialized a prior event. *Id.* at 128.

## **CONCLUSION**

Based on the arguments previously presented by The ECHO-Association and the foregoing reasons, The ECHO-Association respectfully requests that the Court deny EID's and Jones's respective motions to dismiss.

DATED this 19<sup>th</sup> day of July, 2019.

CHRISTENSEN & JENSEN, P.C.

/s/ Stephen D. Kelson

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 10<sup>th</sup> day of May, 2019, I caused a true and correct copy of the foregoing **PETITIONER’S SUPPLEMENTAL BRIEF IN OPPOSITION TO RESPONDENTS’ MOTIONS TO DISMISS** to be filed electronically via Greenfiling, which sent notification of such filing on the following:

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