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IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

MARK TRACY, dba as EMIGRATION CANYON HOME OWNERS ASSOCIATION, Plaintiff, v. KENT L. JONES, the Utah State Engineer, and EMIGRATION IMPROVEMENT DISTRICT, a special service district of the State of Utah, Defendants.	**REPLY MEMORANDUM SUPPORTING STATE ENGINEER'S MOTION TO DISMISS AND JOINDER IN EMIGRATION IMPROVEMENT DISTRICT'S MOTION TO DISMISS** **Tier 3** Case No.: 190901675 Judge: Su Chon

NEW MATTERS RAISED

Plaintiff Emigration Canyon Home Owners Association (ECHO) filed its Memorandum in Opposition to Respondents' Motions to Dismiss Petition for De Novo Judicial Review (Opposition Memo) and argues ECHO meets the traditional and alternative tests for standing to seek the de novo review of change application decisions the State Engineer made based on applications Emigration Improvement District (EID) filed.

Regarding the traditional standing test, ECHO offers that ECHO acquired Water Right No. 57-8947 before the date of its February, 2019, deed. Allegedly, now, based on documents outside the pleadings, ECHO claims it "purchased" 57-8947 on September 27, 2018. Opposition Memo at 6. ECHO then argues it secured, by this purchase, the "aggrieved" status needed to seek review of the State Engineer's order on change applications EID filed on September 12, 2018. Opposition Memo at 7 (ECHO "secured any *remaining formal* requirements of legal standing"); Utah Code § 73-3-14(1)(a) (aggrieved status required to seek de novo review); Applications, ¶ 1.B., Exhibits D and E to Complaint (identical filing dates).

ECHO argues in the alternative that its status merits recognition of standing under an exception to the traditional standing requirement.

ARGUMENT

I. ECHO lacks traditional standing.

The State Engineer's January 16 and 25, 2019, decisions on EID's change applications could not have injured ECHO because ECHO did not own a water right in Emigration Canyon at that time. ECHO asserts an injury and, therefore, standing to bring this action, because it acquired 57-8947 "prior to the expiration of the [administrative] protest period, prior to the Protest Hearing on December 19, 2018, and prior to commencement of this Action." Opposition Memo at 6. But, ECHO's basis for this assertion rests on the alleged "purchase" of the right in September 2018. Opposition Memo at 6. This assertion is largely irrelevant to the State Engineer's arguments under *Badger v. Brooklyn Canal Co.*, 966 P.2d 844 (Utah 1998). To the extent that it is relevant, ECHO is mistaken in the law.

A. ECHO failed to preserve an injury before the State Engineer.

The Supreme Court has stated, "general and vague allegations cannot satisfy the requirement that the ... plaintiff make known the nature of their rights[,]" *id.* at 848, and, further, "it is the protesters' responsibility to make known the nature of their protest[.]" *Id.* at 849. ECHO, however, asserted in its protest, that "[t]he property right *of Canyon resident Mather* ... suffered total impairment when the Emigration Canyon Stream dried up this past month[.]" Protest, Exhibit F to Complaint, p. 5 (emphasis supplied, original emphasis removed). This protest

letter, dated October 17, 2018 raises no issues regarding injury to ECHO. It did not describe "the nature of [ECHO's] rights[.]" *Badger* at 848. As the State Engineer's motion to dismiss describes, because ECHO failed to preserve the issue of an injury to *its* rights in the State Engineer's administrative process, ECHO cannot, under *Badger*, present that argument to this Court for the first time. And, because the alleged injury cannot be raised in the context of de novo review, such injury simply cannot constitute ECHO's standing to *bring* this suit.

B. ECHO acquired 57-8947 only upon delivery of the deed.

Further, ECHO provides no legal authority or rationale for its theory that it could have owned 57-8947 prior to delivery of the related deed, except to assert that facts in the Complaint must be taken as true. Opposition Memo at 4. However, the legal principle that only delivery of a deed conveys ownership under that deed, is established law Plaintiff cannot circumvent. The Utah Supreme Court is unequivocal on this point: "[t]he rule is well settled that a deed, to be operative as a transfer of the ownership of land, or an interest or estate therein, must be delivered." *Wiggill v. Cheney*, 597 P.2d 1351, 1351 (Utah 1979) (*citing Peck v. Rees*, 27 P. 581 (Utah 1891)). *Wiggill* also indicates "delivery" of a deed "requires it pass beyond the control or domain of the grantor." *Id.* (citations omitted). As the State Engineer stated in his Motion to Dismiss, "[b]ecause a change application was filed and approved on 57-8947, it is now evidenced by a water certificate and

must be transferred by deed." Motion to Dismiss, p. 4, fn. 3 (*citing* Utah Code § 73-1-10(1)(a)). Plaintiff did not refute or address this point and in fact did transfer the water right by deed. Utah Code § 73-1-10 ("[a] water right ... evidenced by ... a certificate of appropriation ... *shall be* transferred by deed") (emphasis provided). But, that conveyance came too late.

Obviously, a deed cannot be delivered to a grantee before the deed is written. Because the Mather to ECHO deed is dated February 11, 2019, no interest in 57-8947 was conveyed until then. Exchange of money or other consideration for the conveyance is irrelevant, as are discussions, intentions, or related business dealings. Contrary to Plaintiff's assertion, ECHO did not purchase water right 57-8947 "[o]n September 27, 2018" and did not, and legally could not have, "[become] the sole owner of water right 57-8947 ... prior to the expiration of the protest period, ... the Protest Hearing ... and ... [the] commencement of this Action." Opposition Memo, p. 6. ECHO tacitly admits as much in its protest. Protest Letter, dated October 17, 2018, at 5 (indicating *Mather* suffered "total impairment" as the owner of "[t]he property right ...as evidenced by surface water share 57-8947") (emphasis removed from first quote). Presumably, Mather delivered the deed to ECHO sometime between February 11, 2019, and February 21, 2019. ECHO's assertion that it completed "any *remaining formal* requirements of legal standing," Opposition Memo, at 7, during that time-frame is incorrect.

Because ECHO could not possibly have owned 57-8947 when the State Engineer issued his order approving EID's change applications, ECHO could not have been injured by the order. Thus, ECHO did not suffer the harm necessary to bring this action.[1]

ECHO lacks traditional standing because 1) neither Mather nor ECHO preserved the issue of an asserted injury that occurred to either of them because of the State Engineer's administrative decision; Mather failed to exhaust his administrative remedies and ECHO could not raise an injury it had not yet suffered; and 2) ECHO only acquired 57-8947 after the State Engineer's order was issued, thus precluding any injury to ECHO by the order. For the foregoing reasons, ECHO cannot meet the traditional standing requirement to bring suit for the de novo review of the EID change applications.

II. ECHO does not meet the exception to traditional standing.

ECHO's Opposition Memo argues that the de novo review of the State Engineer's decisions on the EID change applications warrant public interest standing because, essentially, Emigration Canyon is a place of historical interest, EID impairs the private wells of canyon residents, the State Engineer "conducted

[1] In response to ECHO's argument that Mather transferred ownership to ECHO on September 27, 2018, EID's Reply Memorandum, pages 2 through 5, asserts that ECHO cannot own the Mather water right because ECHO is not a properly formulated legal entity.

no investigation" before approving the applications, and approving the applications will, in some vague sense, harm the canyon's ecosystem. However, these allegations are rooted in a mistaken view of the State Engineer's administrative process and the nature of EID's change applications on its existing water rights.

The State Engineer, as an administrative agency, "lacks authority to adjudicate water rights[.]" *Jensen v. Jones*, 2011 UT 67, ¶ 18 (2011). Rather, he approves or denies administrative applications presented to him by evaluating them under relevant statutory criteria. *Id.* ("the state engineer is limited to considering the factors presented in Utah Code section 73-3-8(1) when deciding whether to approve or deny a change application").

Here, EID's change applications request the addition of, or change to, existing points of diversion up Emigration Canyon. When change applications are approved, the quantity of water to be diverted and used remains unchanged and such is the case here. Application a44045 (57-7796), Exhibit D to Complaint, at 2.A. and 5.A. ("28.0 cfs [cubic feet per second] OR 600.0 acre-feet [volume]"); Application a44046 (57-10711), Exhibit E to Complaint, at 2.A. and 5.A. ("5.0 cfs OR 49.99 acre-feet"). Likewise, in this instance, the uses to which the water is put, and all other parameters of the water rights, remain the same, except for the points of diversion. Application a44045; Application a44046. Notably, the applications do not seek to change diversion points from outside Emigration Canyon to sources

inside Emigration Canyon. The *existing* source for each of the water rights, listed in paragraph 2.B. of each, describes the existing source as "Emigration Cr. Springs & Underground Water Wells[.]" Exhibits D and E to Complaint, ¶ 2.B. of each. Therefore, these EID change applications neither increase the amount of water diverted by any points of diversion, nor do they, for the first time, move the rights up the canyon. Rather, the rights were moved up the canyon by State Engineer order dated December 31, 1996 on change application a17521 when both EID's current water rights – 57-7796 and 57-10711 – were a single right (57-7796) totaling 33 cfs or a volume of 649.99 acre-feet. *See* Exhibit B to Complaint, at 3. ECHO did not protest that 1993 application and now is long out of time to challenge its approval.

Notwithstanding ECHO's Opposition Memo that argues against EID's right to take water to the detriment of others, or to take water from the canyon at all, EID is entitled to divert 33 cfs of water, up to a volume limit of 649.99 acre-feet, under both of the water rights that underlie the current change applications, which do not alter those characteristics of the rights. As outlined in Utah Code § 73-3-21.1, water "[a]ppropriators shall have priority among themselves according to the dates of their respective appropriations, so that each appropriator is entitled to receive the appropriator's whole supply before any subsequent appropriator has any right." Utah Code § 73-3-21.1(2)(a). This basic water concept can be stated in

shorthand as "first in time is first in rights." Utah Code § 73-3-1(5)(a). EID's two water rights have a shared priority date of 1872. Therefore, even if other water rights with later priority dates get less water in a given year due to drought, EID's appropriation priority entitled it to get its full share unless water rights that pre-date 1872 are impaired. Importantly, a change application does not alter the underlying appropriation date because an "appropriation" takes place at the time a water right is created. *See* Utah Code § 73-3-2 (appropriations of unappropriated water must follow the state engineer's process); Utah Code § 73-3-8(1)(a)(i) (indicating only an application to appropriate water must ensure there is unappropriated water, other applications, such as change applications, need not do so). Once water is appropriated, appropriators may alter characteristics of their water right as long as the *change* comports with Utah Code § 73-3-8(1)(a) subparagraphs (ii) through (vi).

Although ECHO asserts in its Opposition Memo that the EID change applications will initiate chaos, the change applications are not applications to appropriate water in Emigration Canyon. EID already has the right to divert and use water in the canyon. Rather, the change applications simply add or change points of diversion, which is the only decision on which the State Engineer could opine in his orders.

With this background information in mind, it is difficult to imagine why such a change is of "sufficient public importance to justify departure from traditional standing requirements." *Washington County Water Conservancy Dist. v. Morgan*, 2003 UT 58, ¶ 27. In the *Washington County* case, the Supreme Court remained "open to the possibility that some issues concerning water rights might present questions of great public importance[,]" but the Court opined that such importance would "likely ... be found in a case where a large number of people would be affected by the outcome." *Id.* (in that case, the Court had "no reason to believe that the dispute [would] affect large numbers of people or involve an issue of great public importance"). Likewise, in *Haik v. Jones*, the approval of a change application to serve 10 additional homes on 25 acres added to an existing place of use "does not present a matter of great public importance as we described that term in *Washington County*." *Haik v.* Jones, 2018 UT 39, ¶ 25. Even Haik's separate constitutional violation claims did not automatically rise to the level of great public importance. *Id.* ¶ 26 ("[w]e have recognized that '[n]ot every constitutional provision, to be sure, is of such importance that a claim of its violation will necessarily rise to the level of 'significant public importance' required for public interest standing ....'"). EID's change applications to add or change points of diversion to take the 33 cfs it is already entitled to under existing water rights, simply involves no issue of "great public importance." *Id.* ¶ 25. ECHO's

arguments in its Opposition Memo seem to pertain to EID's right to appropriate water in the canyon in the first instance and not to the change applications themselves (or a particular concern with the change application decisions).

Neither do ECHO's allegations that the State Engineer failed "to comply with statutory duties[,]" Opposition Memo at 12, validly serve as a basis for public interest standing. *See also, id.* at 10 ("Mr. Jones had a duty to ... investigate permanent change applications"). Yet ECHO's Opposition Memo offers no legal support for its assertion that the State Engineer must conduct an investigation. Contrary to ECHO's allegations, the relevant State Engineer statute says "[i]t shall be the duty of the state engineer to approve an application if there is reason to believe that" the application meets the relevant criteria. Utah Code § 73-3-8(1)(a). Only *if* the State Engineer "has reason to believe that an application *will* interfere with the water's more beneficial use [among a hierarchy of uses]... or *will* unreasonably affect public recreation or the natural stream environment, or *will* prove detrimental to the public welfare ... shall [he] *withhold* approval or rejection of the application *until*" he "has investigated the matter." Utah Code § 73-3-8(1)(b). Here, because the State Engineer did not find he had "reason to believe" any of the necessary conditions, he need not withhold his approval and conduct an investigation. In the context of his informal adjudicative proceedings, the State Engineer has considerable leeway in how he conducts those proceedings. Utah

Administrative Code R655-6-4(B) (the State Engineer's rules "shall be liberally construed to secure a just, speedy and economical determination of all issues presented").

And the Utah Administrative Procedures Act (UAPA), in Chapter 4 of Title 63G is explicit. In decisions regarding State Engineer applications, which are conducted informally pursuant to Utah Administrative Code R655-6-2 where "[a]ll adjudicative proceedings" for the State Engineer are "designated as informal proceedings[, including] ... change applications[,]" the State Engineer need only issue a signed order in writing that states "the decision; ... the reasons for the decision; ... a notice of any right of ... review...; and ... the time limits for ... requesting a review." Utah Code § 63G-4-203(1)(i). Further, his order "shall be based on the facts appearing in the agency's *files* and on the facts presented in evidence at *any hearings*." Utah Code § 63G-4-203(1)(j) (emphasis supplied) (no mention of the need for an independent investigation as basis for the decision). Thus, the fairly routine orders on the EID change applications, which request only the alteration of existing points of diversion, were issued appropriately and fail to rise to the level of "great public importance" which may "justify departure from traditional standing requirements." *Washington County*, 2003 UT 58, ¶ 27.

Additionally, even if *arguendo*, EID's applications involved an issue of great public importance, ECHO would need to show it is the appropriate party to

bring the matter to this Court. But, ECHO's own Opposition Memo demonstrates it is not an appropriate party. ECHO asserts a party's appropriateness is a question of interest and competency. Opposition Memo at 12. Yet ECHO's Opposition Memo bases its qualifications on irrelevant information. Opposition Memo at 13 (ECHO asserts it is an appropriate party because it has "thousands of pages of documents related to the Canyon and its water-related issues, spanning over a period of one-hundred and forty-five (145) years"). Making an argument that it is competent to bring suit due to its extensive historic knowledge illustrates ECHO's ignorance of the issues involved in a de novo review proceeding for EID's two very limited change applications. The only questions before this court on de novo review are the questions the State Engineer could address, namely whether EID's applications to change the points of diversion for its existing water rights meets the criteria for approval under Utah Code §73-3-8(1)(a)(ii) through (vi). All issues brought to the State Engineer must focus on those criteria for only the addition or alteration of some points of diversion for EID's water rights.

Because the State Engineer cannot adjudicate water rights, neither his orders, nor a reviewing Court on de novo review, may alter the underlying rights or EID's ability to withdraw water as it has done historically.

Because ECHO's allegations and arguments are jurisdictionally limited to the change applications themselves, and because Utah Code § 73-3-14 requires it

be "aggrieved" to seek redress (arguably rendering alternate standing unavailable), it is difficult to imagine how ECHO, a party uninjured by the applications, can seek the de novo review of applications based on a significant public interest in a case that, by law, must be confined to the limited scope of alterations to existing points of diversion in Emigration Canyon.

CONCLUSION

For the foregoing reasons, the Motions to Dismiss filed by the State Engineer and EID should be granted.

DATED this 13th day of May, 2019.

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FILING CERTIFICATE

I hereby certify that I caused a true and correct copy of the foregoing **REPLY MEMORANDUM SUPPORTING STATE ENGINEER'S MOTION TO DISMISS AND JOINDER IN EMIGRATION IMPROVEMENT DISTRICT'S MOTION TO DISMISS** to be filed with the Court *via* the ECF system this 13th day of May, 2019. The following attorneys who have appeared in this case have been appropriately notified by the ECF.

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