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In the Utah Court of Appeals

Mark Tracy, dba as Emigration Canyon
Home Owners Association,

Plaintiff and Appellant,

v.

Kent L. Jones, Utah State Engineer,
and Emigration Improvement District,
a special service district of the State of
Utah,

Defendants and Appellees.

Memorandum in Response to the
Court's Sua Sponte Motion for
Summary Disposition

Case No. 20200295-CA

The Utah State Engineer¹ responds to the Court's Sua Sponte Motion for
Summary Disposition.

¹ Teresa Wilhelmsen has since succeeded Kent Jones as the Utah State Engineer. The case name remains as it appeared in the trial court for purposes of docketing an appeal. Utah R. App. P. 3(g).

Background

The Utah State Engineer issued an order and final agency action dated January 16, 2019, granting two change applications for the Emigration Improvement District (EID). Appellant Mark Tracy, dba Emigration Canyon Home Owners Association (ECHO), protested the applications in the administrative process, but did not own a water right at the time of his protest. Almost a month after the State Engineer issued his final order on the applications, on February 11, 2019, Mr. Nelson Mather signed a deed conveying his water right, 57-8947, to ECHO. Under the Utah Supreme Court's ruling in *Wiggill v. Cheney*, 597 P.2d 1351, 1351 (Utah 1979), delivery of the deed and thus conveyance of Mr. Mather's water right to ECHO was effective only on or after February 11. Exhibit A.1. to EID's Motion to Dismiss (April 3, 2019). Mr. Tracy, as ECHO, initiated the case below, a *de novo* review action, on February 25, 2019. Thus, when Mr. Tracy protested the applications and the State Engineer issued his order, Mr. Tracy could not have suffered injury *via* Water Right 57-8947, which provided his sole basis for injury and thus standing to seek *de novo* review of the State Engineer's decision. Because Mr. Tracy did not own a water right and could not have suffered injury by it prior to the deed's delivery, the trial court ruled he lacked standing to seek *de novo* review – he was not a “person aggrieved” by the State Engineer's order. Utah Code § 73-3-14(1)(a).

Because “ECHO [did] not have standing to challenge the change applications” the trial court’s Memorandum Decision and Order (Order) granted Defendants’ motions to dismiss Mr. Tracy’s Complaint on August 29, 2019. Order, at 5. The Order was purportedly final on the matter, Order, at 5 (“[n]o further order is needed”), but neither the trial court nor the parties filed a separate judgment. *See* Utah R. Civ. P. 58A(a) (judgment must be “set out in a separate document”). Mr. Tracy sought to appeal on January 24, 2020, nearly five months (approximately 148 days) after the trial court’s Order.²

Argument

A party must file a Notice of Appeal “within 30 days after the date of entry of the judgment or order appealed from.” Utah R. App. P. 4(a). Because no separate judgment was entered, the Order became final only after 150 days – two days after Mr. Tracy filed his Notice of Appeal. Utah R. Civ. P. 58A(e) and (e)(2)(B) (in the absence of a separate document, judgment is effectively entered 150 days after an order is recorded); *see also* Utah R. App. P. 4(c) (a notice of appeal filed after an order, but before judgment, is treated as having been filed the day judgment is entered). Based on the lack of a separately-filed Judgment, Mr. Tracy’s appeal appears to be timely.

² Mr. Tracy’s Docketing Statement indicates he filed the Notice of Appeal January 21, 2020, and that is the date for his signature and postmark. But the Court’s date stamp indicates the Notice was not filed until the 24th of January. Utah R. App. P. 21(a)(1) (receipt determines filing date).

Conclusion

Based on the foregoing, the appeal appears to have been timely filed.

Respectfully submitted this 13th day of May, 2020.

Sean D. Reyes
Utah Attorney General

/s/ Julie I. Valdes .
Julie I. Valdes
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*Attorneys for Defendant and
Appellee Utah State Engineer*

Certificate of Service

I hereby certify that on this 13th day of May, 2020, I caused to be delivered the foregoing Memorandum in Response to the Court's Sua Sponte Motion for Summary Disposition by electronic mail to the following:

Mark Tracy

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Plaintiff and Appellant

(email provided on Notice of Appeal and used for service under Utah R. App. P. 21(c)).

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/s/ Julie I. Valdes _____.