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MEMORANDUM

TO: Board of Directors and Staff - Cache Highline Water Association

FROM: D. Brent Rose

DATE: January 27, 2016

RE: Canal Interference; Penalties

This Memorandum addresses the rights and remedies pertaining to interference by unauthorized parties with the canals and watercourses of Cache Highline Water Association (the "Association"), as follows:

I. EXISTENCE AND SCOPE OF ASSOCIATION CANAL EASEMENTS.

A. The Association owns duly established prescriptive easements and rights-of-way for the LHPS and L&N Canals.

"An easement is a privilege which one person has a right to enjoy over the land of another." *Conatser v. Johnson*, 2008 UT 48, ¶20, 194 P.3d 897. To establish an easement by prescription, a claimant "must prove that his use of another's land was open, continuous, and adverse under a claim of right for a period of twenty years." *Valcarce v. Fitzgerald*, 961 P.2d 305, 311 (Utah 1998); accord Utah Code Ann. § 57-13a-102(1) ("A prescriptive easement may be established if a water user has maintained a water conveyance for a period of 20 years during which the use has been: (a) continuous; (b) open and notorious; and (c) adverse."). The term "water conveyance" is defined to include a "canal, ditch, pipeline or other means of conveying water." Utah Code Ann. § 57-13a-101(1). Adverse use will be presumed after the claimant has shown its use has been open and continuous for a twenty-year period. *Valcarce*, 916 P.2d at 311; Utah Code Ann. § 57-13a-102(2).

It is undisputed and indisputable that the LHPS and L&N Canals have existed and been used to convey water since the 19th century. The presence of these large Canals clearly constitutes an open, continuous and adverse use of the land upon which the Canals are situated. Indeed, a use of land more open and notorious than a large canal is difficult to imagine.

Notices and Amended Notices of Prescriptive Easements have been recorded in Cache County pursuant to Utah Code Ann. § 57-13a-103 to confirm the Association's prescriptive easement rights in the canals.

B. The Association's prescriptive easements include the rights of access, repair, maintenance and replacement, and its easement rights extend past the immediate banks of the Canals.

“[T]he extent of a prescriptive easement is measured and limited by its historic use during the prescriptive period.” *Valcarce*, 961 P.2d at 312. The Utah Supreme Court has held canal ownership includes the inherent right to reasonable access to maintain and repair the canal, including the right to use so much of the land on either side of the canal as may be necessary. See *Holm v. Davis*, 125 P. 403, 407 (Utah 1912) (holding that where a canal owner acquires a right of way for a canal, the owner also has “a right to maintain [the canal], and for that purpose to go upon the land . . . along the [canal] and to use so much thereof on either side of the [canal] as may be necessary to make all necessary repairs and to clean out said ditch at all reasonable times”); see also *Big Cottonwood Tanner Ditch Co. v. Moyle*, 174 P.2d 148 (Utah 1946) (holding that canal easement includes the right to improve ditches on landowner’s property); *Tripp v. Bagley*, 276 P. 912 (Utah 1928) (upholding trial court’s finding that ditch owner’s easement to convey water over landowner’s property included the right to enter the land to repair and maintain the ditch and to use as much of the ditch’s banks as necessary in maintaining the ditch).

In the case *Salt Lake City v. J.B. & R.E. Walker, Inc.*, 253 P.2d 365, 368-69 (Utah 1953), the Utah Supreme Court has indicated that the “extent or width of the easement” for the conveyance of water must be a suitable and convenient way, and afford necessary ingress and egress, and such uses as are reasonably sufficient for accomplishment of the objects of the grant. Specifically, the Supreme Court has stated that:

[It] include[s] the right to maintain and repair the conduit, and the right to go upon the lands reasonably necessary to enable the [easement owner] to construct, repair, maintain and assure . . . the efficient use of the conduit in conducting its water without unnecessary loss thereof by seepage, evaporation or otherwise. . . . ***The easement includes not only the right to construct and maintain the conduit, but also the banks at the sides*** to prevent uncovering of the conduit, pipe, cracking thereof, and erosion of soil that might endanger or put added strains upon the conduit, and to restore any soil beside, along, or upon the conduit, that may have been carried away by storm, wind, snow, slides, etc. This includes the right to go upon the lands with animals, vehicles and machinery that may be reasonably necessary for such purpose, and to use the adjacent soil for this purpose if the repairs cannot be made in any other way. . . . ***The easement carries with it so much of grantor's land on each side of the conduit as may be reasonably necessary for the purposes of maintenance, repair, and enjoyment*** (emphasis added).

Accordingly, the Association’s prescriptive easements for its Canals include the Canals, the new canal pipelines, and any rights necessary for full enjoyment thereof, including the rights to use the banks and such other lands as is reasonably necessary to repair, maintain or replace any or all of the canals and pipelines.

C. Water Managers appointed by the Company’s board of directors are duly authorized under the Bylaws and Rules and Regulations of the Company, among other things, to calculate and apportion the available water supply, distribute the available water supply to the shareholders, and enforce the Associations easement rights and water rights.

II. PERTINENT STATUTES.

A. 73-1-14. Interfering with waterworks or with apportioning official -- Penalty and liability.

(1) Any person, who in any way unlawfully interferes with, injures, destroys or removes any dam, head gate, weir, casing, valve, cap or other appliance for the diversion, apportionment, measurement or regulation of water, or who interferes with any person authorized to apportion water while in the discharge of his duties, is guilty of a crime punishable under Section 73-2-27 [See below].

(2) Any person who commits an act defined as a crime under this section is also liable in a civil action for damages or other relief to any person injured by that act.

(3) (a) A civil action under this section may be brought independent of a criminal action.

(b) Proof of the elements of a civil action under this section need only be made by a preponderance of the evidence.

73-1-15. Obstructing canals or other watercourses -- Penalties.

(1) Whenever any person has a right-of-way of any established type or title for any canal or other watercourse it shall be unlawful for any person to place or maintain in place any obstruction, or change of the water flow by fence or otherwise, along or across or in such canal or watercourse, except as where said watercourse inflicts damage to private property, without first receiving written permission for the change and providing gates sufficient for the passage of the owner or owners of such canal or watercourse. That the vested rights in the established canals and watercourse shall be protected against all encroachments. That indemnifying agreements may be entered as may be just and proper by governmental agencies.

(2) Any person violating this section is guilty of a crime punishable under Section 73-2-27 [See below].

(3) Any person who commits an act defined as a crime under this section is also liable for damages or other relief and costs in a civil action to any person injured by that act.

(4) (a) A civil action under this section may be brought independent of a criminal action.

(b) Proof of the elements of a civil action under this section need only be made by a preponderance of the evidence.

76-10-202. Taking water out of turn or excess amount -- Damaging facilities.

(1) No person may, in violation of any right of any other person knowingly or intentionally:

(a) turn or use the water, or any part thereof, of any canal, ditch, pipeline, or reservoir, except at a time when the use of the water has been duly distributed to the person;

(b) use any greater quantity of the water than has been duly distributed to him;

(c) in any way change the flow of water when lawfully distributed for irrigation or other useful purposes, except when duly authorized to make the change; or

(d) break or injure any dam, canal, pipeline, watergate, ditch, or other means of diverting or conveying water for irrigation or other useful purposes.

(2) Subsection (1) applies to violations of any right to the use of water, including:

(a) a water right; or

(b) authorization of a person's use of water by:

(i) a water company, as defined in Subsection 73-3-3.5(1)(b); or

(ii) an entity having a valid water right under Utah law.

(3) Any person who violates this section is guilty of a crime punishable under Section 73-2-27 [See below].

76-10-203. Obstruction of Watergates.

(1) Every person who rafts or floats logs, timber, or wood down any river or stream and allows the logs, timber, or wood to accumulate at or obstruct the watergates owned by any person or irrigation company taking or diverting the water of the river or stream for irrigation or manufacturing purposes is guilty of a crime punishable under Section 73-2-27 [See below].

73-2-27. Criminal penalties.

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- (1) This section applies to offenses committed under:
 - (a) Section 73-1-14;
 - (b) Section 73-1-15; ...
 - (i) Section 76-10-202; and
 - (j) Section 76-10-203.
- (2) Under circumstances not amounting to an offense with a greater penalty under Subsection 76-6-106(2)(b)(ii) or Section 76-6-404, violation of a provision listed in Subsection (1) is punishable:
 - (a) as a felony of the third degree if:
 - (i) the value of the water diverted or property damaged or taken is \$2,500 or greater; and
 - (ii) the person violating the provision has previously been convicted of violating the same provision;
 - (b) as a class A misdemeanor if:
 - (i) the value of the water diverted or property damaged or taken is \$2,500 or greater; or
 - (ii) the person violating the provision has previously been convicted of violating the same provision; or
 - (c) as a class B misdemeanor if Subsection (2)(a) or (b) does not apply.