

ClydeSnow

ATTORNEYS AT LAW
CLYDE SNOW SESSIONS & SWENSON
A PROFESSIONAL CORPORATION

ONE UTAH CENTER · THIRTEENTH FLOOR
201 S. MAIN STREET
SALT LAKE CITY, UTAH 84111-2216
TEL (801) 322-2516 · FAX (801) 521-6280
www.ClydeSnow.com

D. BRENT ROSE

(801) 322-2516
dbr@clydesnow.com

MEMORANDUM

TO: Cache Highline Water Association
FROM: D. Brent Rose
DATE: January 23, 2015
RE: Summary Analysis of Canal Easements Under Utah Law

This Summary is not intended to, and does not, constitute a legal opinion with respect to any specific act or occurrence. In addition, the discussion herein is intended solely for the use and benefit of Cache Highline Water Association (“Cache Highline”), and is not intended to, and does not, convey legal advice to any other person or entity.

“An easement is a ‘nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement.’”¹ An easement “gives rise to two distinct property interests: a ‘dominant estate,’ that has [the] right to use land of another, and a ‘servient estate,’ that permits the exercise of that use.”² Where an easement for the conveyance of water (“canal easement”) is concerned, the servient estate refers to the property through which the canal or pipe runs or that is burdened by the canal easement, while the dominant estate refers to the person which holds the right to convey water through the canal easement or the property that enjoys the benefits of the canal easement. Cache Highline is the holder of the dominant estate, as the owner and operator of the canals. The owner of the easement has the right to use and enjoy his easement to the fullest extent possible not inconsistent with the rights of the fee owner.³ “The easement holder also enjoys ‘the privilege to do such acts as are necessary to make effective his or her enjoyment of the easement.’”⁴ This includes easement holder’s rights “to make incidental uses beyond the express easement and does not exceed the easement’s scope if those uses are made in a reasonable manner and they do not cause unnecessary injury to the servient owners.”⁵

Cache Highline owns a prescriptive easement, expressly recognized under Utah law, which arises out of Cache Highline and its predecessors-in-interest maintaining open use of the Logan & Northern (L&N) and Logan, Hyde Park and Smithfield (LHPS) Canals for the conveyance of water for well over 100 years. In *Wegner, et. al v. Cache County Corporation, et al.*, the First Judicial District Court of and for Cache County held, on the evidence presented, that the L&N and LHPS Canals meet the prescriptive-easement requirements.⁶ Cache Highline is the holder of the “dominant estate.” The “servient estates,” include all properties through which the LHPS and L&N Canals run, and which are burdened by the canals.

Cache Highline’s canal easement incorporates all rights necessary to enjoy the benefit of the easement. Thus, in addition to the right to use the canal to convey water, Cache Highline, as the holder of a canal easement, has an inherent

¹ *Wellberg Investments, LLC v. Greener Hills Subdivision*, 2014 UT App 222, ¶ 3, 336 P.3d 61 (quoting *Marvin M. Brandt Revocable Trust v. United States*, 134 S.Ct. 1257, 1265 (2014); accord *Conatser v. Johnson*, 2008 UT 48, ¶20, 194 P.3d 897

² *Conatser*, 2008 UT 48 at ¶20 (citation omitted).

³ *N. Union Canal Co. v. Newell*, 550 P.2d 178, 179 (Utah 1976) (footnotes omitted).

⁴ *Conaster*, 2008 UT 48 at ¶21 (citation omitted).

⁵ *Id.*

⁶ See *Wegner, et al. v. Cache County Corp., et al.*, Case No. 120100433, Memorandum Decision and Order, May 1, 2014, pp.14-16 (“Wegener Decision”).

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right to reasonable access to maintain and repair the canal, and to use so much of the land on either side of the canal as may be reasonably necessary for these tasks or to enjoy the canal.⁷ The Utah Supreme Court has stated that with respect to canal easements:

. . . [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**⁸ (Emphasis added.)

In the *Wegener* case, the First District Court affirmed the foregoing principles with respect to the scope of the prescriptive easements for the LHPS and L&N canals in the *Wegener* matter.⁹ Thus, the First District Court has determined that the prescriptive easements for the LHPS and L&N canals provide the rights to both convey water and the right to use so much of the banks and surrounding land as is reasonably necessary, and whenever necessary, to maintain, repair and improve the canals.¹⁰ The First District Court has also determined that the evidence presented in that case established that “all construction [at issue in the litigation] for the [Cache Water Restoration] Project occurred within the prescriptive right-of-way for maintenance, access, repair, replacement and other activities necessary to use and enjoy the easements.”¹¹

Finally, in addition to the right to use the banks of the canal as reasonably necessary to enjoy the easement, there is a long recognized “common law presumption that parties to an easement anticipate increased future use and reasonable technological improvements.”¹² “Thus, absent express evidence of contrary intent, there is a firmly established background rule that an easement holder may make technological upgrades to its property, so long as they are not unreasonably burdensome to the servient estate.”¹³ This rule has been discussed and applied on numerous occasions in the context of canals and ditches,¹⁴ and has been held to specifically allow for the conversion of formerly open canals into closed pipes. The Supreme Court has expressly held that enclosing an open canal into a pipe was a reasonable improvement that “enhance[d] both the conveyance and the conservation of water without materially changing the burden or adding any additional burdens” to the servient estate.¹⁵

⁷ 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); *Tripp v. Bagley*, 276 P. 912 (Utah 1928).

⁸ *Salt Lake City v. J.B. & R.E. Walker, Inc.*, 253 P.2d 365, 368-69 (Utah 1953) (emphasis added)

⁹ *Wegener* Decision, pp. 15-16.

¹⁰ See *id.*

¹¹ See *id.* at 16 (internal quotations omitted).

¹² *Stern v. Metropolitan Water Dist. of Salt Lake & Sandy*, 2012 UT 16, ¶69, 274 P.3d 935.

¹³ *Id.*

¹⁴ See *id.*; see also *Hubble v. Cache Cnty. Drainage Dist. No. 3*, 123 Utah 405, 259 P.2d 893, 896 (1953) (“[T]he law favor[s] changes and improvements for the benefit of the dominant estate so long as the manifest intent of the parties does not disallow the changes and the burden to the servient tenement is not increased.”); see also *Big Cottonwood Tanner Ditch Co. v. Moyle*, 109 Utah 213, 174 P.2d 148, 160 (1946); *Parris Props., L.L.C. v. Nichols* 305 Ga.App. 734, 700 S.E.2d 848, 854 (2010); Restatement (Third) of Property: Servitudes § 4.10 (2000); 25 Am.Jur.2d *Easements and Licenses* 84 (2004); 4 Powell, *supra* note 15, § 34.12, at 34–142, 34–144.

¹⁵ *Id.* at 313; accord *Stern*, 2012 UT 16 at ¶70 (recognizing this holding in *Valcarce*, and observing that it remains “the presumption” in Utah for both prescriptive and express easements, that “the parties to a Utah property conveyance for a canal understand and intend that an open canal could eventually be enclosed”).

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