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## MEMORANDUM

**TO:** Cache Highline Water Association  
**FROM:** D. Brent Rose and Aaron Lebenta  
**DATE:** December 10, 2014  
**RE:** Description of the Law Regarding Canal Easements

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### SCOPE

This Memorandum is intended to provide a general overview of Utah law with respect to the rights, obligations and requirements of canal easements and canal easement holders. This paper 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.

### ANALYSIS OF CANAL EASEMENTS UNDER UTAH LAW

#### I. Definition and General Characteristics of an Easement.

“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.’”<sup>1</sup> 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.”<sup>2</sup>

There are numerous types of possible easements, including easements for the conveyance of water through canals, ditches, culverts, pipes or other devices. 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. With respect to easements for the Logan & Northern (“L&N”) or Logan Hyde Park Smithfield (“LHPS”) canals, discussed below, Cache Highline is the holder of the dominant estate, as the owner and operator of the canals.

In addition, “[b]ecause there are two parties’ interests involved, ‘[t]he right of the easement owner and the right of the land-owner are not absolute, irrelative, and uncontrolled, but are so limited, each by the other, that there may be a due and reasonable enjoyment of both.’”<sup>3</sup>

As the Utah Supreme Court has explained:

Whenever there is ownership of property subject to an easement there is a dichotomy of interests, both of which must be respected and kept in balance. On the one hand, it is to be realized that the owner of the fee title,

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<sup>1</sup> *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 (“An easement is a privilege which one person has a right to enjoy over the land of another.”)

<sup>2</sup> *Conatser*, 2008 UT 48 at ¶20 (citation omitted).

<sup>3</sup> *Id.* at ¶20 (quoting *Big Cottonwood Tanner Ditch Co. v. Moyle*, 174 P.2d 148, 158 (Utah 1946)).

because of his general ownership, should have the use and enjoyment of his property to the highest degree possible, not inconsistent with the easement. On the other, the owner of the easement should likewise have the right to use and enjoy his easement to the fullest extent possible not inconsistent with the rights of the fee owner.<sup>4</sup>

“The easement holder also enjoys ‘the privilege to do such acts as are necessary to make effective his or her enjoyment of the easement.’”<sup>5</sup> 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.”<sup>6</sup> Additional discussion of the incidental rights of a canal easement holder is contained in Section III, below.

## **II. Creation of Prescriptive Easements for the LHPS and L&N Canals.**

Easements can be created in several ways, including by express grant, implication, necessity or prescription. Because the Logan & Northern (“L&N”) or Logan Hyde Park Smithfield (“LHPS”) canals involve prescriptive easements, this paper discusses only prescriptive easements.

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.”<sup>7</sup> The Utah Code also expressly recognizes that prescriptive easements may arise for the conveyance of water: ‘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)

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<sup>4</sup> *N. Union Canal Co. v. Newell*, 550 P.2d 178, 179 (Utah 1976) (footnotes omitted).

<sup>5</sup> *Conaster*, 2008 UT 48 at ¶21 (citation omitted).

<sup>6</sup> *Id.*

<sup>7</sup> *Valcarce v. Fitzgerald*, 961 P.2d 305, 311 (Utah 1998).

continuous; (b) open and notorious; and (c) adverse.”<sup>8</sup> The term “water conveyance” is defined to include a “canal, ditch, pipeline or other means of conveying water.”<sup>9</sup> Adverse use is presumed where the use has been open and continuous for a twenty-year period.<sup>10</sup>

Whether the “continuous” use element is met is context driven. However, “[a] use need not be ‘regular’ or ‘constant’ in order to be ‘continuous.’ All that is necessary is that the use be as often as required by the nature of the use and the needs of the claimant.”<sup>11</sup> In *Johnson*, the Utah Court of Appeals observed that the easement claimant’s storage and release of water due to “water availability, climactic conditions, and crop needs” was sufficiently continuous to meet the continuous use element of a prescriptive easement.<sup>12</sup> Thus, seasonal use of a canal easement to accommodate the irrigation or other water needs of the easement holder or dominant estate should be held to be sufficiently “continuous” under Utah law to create a prescriptive easement.

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.<sup>13</sup> There is also a significant amount of contemporaneous and historical records and other evidence demonstrating that the LHPS and L&N Canals have existed in their current location and been used to convey water continuously since the 19<sup>th</sup>

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<sup>8</sup> Utah Code Ann. § 57-13a-102(1).

<sup>9</sup> Utah Code Ann. § 57-13a-101(1).

<sup>10</sup> *Valcarce*, 916 P.2d at 311; Utah Code Ann. § 57-13a-102(2).

<sup>11</sup> *Johnson v. Higley*, 1999 UT App 278, ¶20 989 P.2d 61 (citation omitted). This is the commonly accepted rule. See 1 Restatement (Third), Property--Servitudes § 2.17 *cmt. i* (observing that the continuous use requirement “does not require that actual physical use be made constantly, or even frequently. If the use continues to be open or notorious, the fact that no physical use of the inchoate servitude is made for some period of time does not stop the prescriptive period from running. Seasonal uses, intermittent uses, and changing uses all may meet the continuity requirement so long as they are open or notorious.”).

<sup>12</sup> *Johnson v. Higley*, 1999 UT App 278 at ¶20.

<sup>13</sup> 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*”).

century.<sup>14</sup> It is also difficult to imagine a use of land more open and notorious than a large canal.

With respect to easements for the L&N and LHPS canals, Cache Highline, as the successor to the L&N and LHSP Canal Companies, 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.

### **III. Scope of Prescriptive Canal Easements.**

“Determining the scope of an easement is a question of law” for a court to determine.<sup>15</sup> In general, “the extent of a prescriptive easement is measured and limited by its historic use during the prescriptive period.”<sup>16</sup>

As with other types of easements, however, ownership of a 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, the holder of a canal easement has an inherent 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.<sup>17</sup> As the Utah Supreme Court has

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<sup>14</sup> The evidence includes (a) witness accounts and statements; (b) published historical analyses and studies, such as the study conducted by Samuel Fortier, *The Agricultural College BULLETIN NO. 50, The Water Supply of Cache Valley*, 1897; (c) surveyor general maps; (d) an Environmental Impact Statement prepared in connection with the Cache Water Restoration Project (the “Project”); and (e) published decision issued by the Utah Supreme Court, including *Logan, Hyde Park & Smithfield Canal Co. v. Utah Power & Light Co.*, 45 Utah 491, 146 P. 560, 561 (1915); *Smithfield West Bench Irr. Co. v. Union Central Life Ins. Co.*, 105 Utah 468, 142 P.3d 866, 866-67 (1943).

<sup>15</sup> *Conatser*, 2008 UT 48 at ¶10

<sup>16</sup> *Valcarce*, 961 P.2d at 312.

<sup>17</sup> *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); {00686437-1 }

recognized, 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. . . . [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 . . .***<sup>18</sup>

As a general rule, “[w]estern water and easements law,” has typically “allowed a right-of-way for 50 feet on both sides of a ditch.”<sup>19</sup> Similarly, in the federal Canal Act of 1891, Congress expressly granted a fifty-foot easement on each side of every canal that was built under the 1891 Act’s provisions.<sup>20</sup>

Notably, the First District Court affirmed the foregoing principles with respect to the

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*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).

<sup>18</sup> *Salt Lake City v. J.B. & R.E. Walker, Inc.*, 253 P.2d 365, 368-69 (Utah 1953) (emphasis added)

<sup>19</sup> *Hage v. United States*, 51 Fed. Cl. 570, 581 (2002).

<sup>20</sup> *See* 43 U.S.C. § 946; *but see J.B. & R.E. Walker*, 253 P.2d at 369 (affirming the determination that the width of the easement necessary for full enjoyment thereof was thirty-three (33) feet on each side of the conduit, under the facts of that case)

scope of the prescriptive easements for the LHPS and L&N canals in the *Wegener* matter.<sup>21</sup>

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.<sup>22</sup> 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.”<sup>23</sup>

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.”<sup>24</sup> “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.”<sup>25</sup> This rule has been discussed and applied on numerous occasions in the context of canals and ditches,<sup>26</sup> and has been held to specifically

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<sup>21</sup> *Wegener* Decision, pp. 15-16.

<sup>22</sup> *See id.*

<sup>23</sup> *See id.* at 16 (internal quotations omitted).

<sup>24</sup> *Stern v. Metropolitan Water Dist. of Salt Lake & Sandy*, 2012 UT 16, ¶69, 274 P.3d 935.

<sup>25</sup> *Id.*

<sup>26</sup> *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.”); *Big Cottonwood Tanner Ditch Co. v. Moyle*, 109 Utah 213, 174 P.2d 148, 160 (1946) (“Plaintiff would not be exceeding its easement in improving its ditches provided the improvements are, under all the circumstances, made in a reasonable manner and they do not cause unnecessary injury to the servient owners.”); *see also Parris Props., L.L.C. v. Nichols* 305 Ga.App. 734, 700 S.E.2d 848, 854 (2010) (“[A] change in the manner, frequency, and intensity of use of the easement within the physical boundaries of the existing easement is permitted without the consent of the other party, so long as the change is not so substantial as to cause unreasonable damage to the servient estate or

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allow for the conversion of formerly open canals into closed pipes.

The Supreme Court’s decision in *Valcarce v. Fitzgerald*, 961 P.2d 305 (Utah 1998) is instructive. In *Valcarce*, the plaintiff argued that because “no plastic pipe had ever been used to transport water during the prescriptive period, [the defendant’s] installation of the pipe increases the burden on the servient property and goes beyond the scope of the easement.”<sup>27</sup> In rejecting this argument, the Supreme Court observed:

Utah law assumes that at the time the prescriptive right arose, the parties concerned knew of the arid nature of our state and contemplated that in the future the water owner would need to prevent waste and accommodate a more efficient use of limited available water. Thus, water users must have contemplated that a ditch might later need to be improved to save water. We therefore held that further reasonable efforts to conserve water could be made by an easement owner so long as they did not unnecessarily burden the servient estate. To this end, an easement owner may install reasonable and necessary improved structures (not taking more or different land) in order to conserve the water.<sup>28</sup>

Following this rationale, the Supreme Court 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

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unreasonably interfere with its enjoyment.” (internal quotation marks and emphasis omitted)); Restatement (Third) of Property: Servitudes § 4.10 (2000) (“The manner, frequency, and intensity of the use may change over time to take advantage of developments in technology and to accommodate normal development of the dominant estate or enterprise benefited by the servitude.”); 25 Am.Jur.2d *Easements and Licenses* 84 (2004) (“[I]f the change is not in the kind of use, but merely one of degree imposing no greater burden on the servient estate, the right to use the easement is not affected.”); 4 Powell, *supra* note 15, § 34.12, at 34–142, 34–144 (noting that courts presume that easements may be expanded to permit “technological innovations” so long as the use is “reasonably foreseeable at the time of establishment of the easement”).

<sup>27</sup> *Valcarce v. Fitzgerald*, 961 P.2d 305, 312 (Utah 1998).

<sup>28</sup> *Id.* at 312-13 (internal citations omitted).



estate.<sup>29</sup>

The Supreme Court relied on similar principles to affirm the irrigation company's actions in cementing and waterproofing its ditches *Big Cottonwood Tanner Ditch Co. v. Moyle*, 174 P.2d 148, 160-61 (1946).<sup>30</sup> Specifically, in *Moyle*, the Supreme Court held that the irrigation company's actions to avert water loss from seepage or evaporation by cementing and waterproofing its ditches, and narrowing the channel to course water through in a swifter current, did not materially change or add additional burden to the servient estate even though the improvements resulted in both a loss of seepage water that had supported flora on the servient estate and in an increased danger to children.<sup>31</sup>

## CONCLUSION

Following these principles, it is reasonable to assume that Utah law permits the Cache Highline, as the easement or dominant estate holder, to make technical improvements to the L&N and LHPS canals, such as enclosing all or portions of the formerly open canals, and to use of so much of the canal banks and surrounding land as is reasonably necessary to make such improvements or to maintain or repair the canals, provided (1) the improvements, maintenance or repairs are performed reasonably, and (2) they do not materially alter the burden on the servient estate.<sup>32</sup> As noted, in granting summary judgment for Cache Highline, L&N Canal Company, LHPS Canal Company, and other defendants in the *Wegener* case, the First District

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<sup>29</sup> *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”).

<sup>30</sup> *Big Cottonwood Tanner Ditch Co. v. Moyle*, 174 P.2d 148, 160-61 (1946).

<sup>31</sup> *Id.*

<sup>32</sup> *See Stern*, 2012 UT 16 at ¶72; *Valcarce*, 961 P.2d at 312-13; *J.B. & R.E. Walker*, 253 P.2d at 368-69.

Court determined there was no evidence that the defendants acted in violation of these principles with respect to the actions taken in connection with the portions of the Cache Water Restoration Project at issue in that case.<sup>33</sup>

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<sup>33</sup> See *Wegener* Decision, pp.13-16.