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IN THE THIRD JUDICIAL DISTRICT COURT  
SALT LAKE COUNTY, SALT LAKE CITY DEPARTMENT, STATE OF UTAH

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M&R RODS/GARAGE 94 INC., a Utah  
corporation,

Plaintiff,

v.

SANDY CITY, a municipal corporation; and  
TAMIE N. OGDEN, an individual, and DOE  
Defendants I-X.

Defendants.

**AFFIDAVIT OF JOHN B. STAHL  
IN SUPPORT OF PLAINTIFF'S  
SUPPLEMENTAL BRIEFING ON THE  
STATUTE OF LIMITATIONS**

Case No. 140906817

Judge Su Chon

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STATE OF UTAH            )  
                                      :  
County of Salt Lake        )

JOHN STAHL, being first duly sworn upon oath, deposes and states as follows:

1. I am over the age of eighteen (18) years and I am able to make this affidavit based upon my personal knowledge of the matters contained herein.

**A. QUALIFICATIONS**

2. I am a registered land surveyor duly licensed to practice in the state of Utah and am currently in good standing and I am the owner of Cornerstone Land Surveys, Inc., also d.b.a. Cornerstone Professional Land Consulting, Inc. of Salt Lake City, Utah. I have in excess of 35 years of experience in the surveying industry including over 20 years of specialty work involving land boundary dispute resolution and mediation. I have served as an adjunct instructor of Ethics and Liability, Land Survey Mathematics and Land Boundary Law courses at the Salt Lake Community College Land Survey Associate Degree Program since its inception in 1991. I have also served as adjunct instructor of Surveying Legal Principles since the inception of the Bachelor Degree Program at the Utah Valley University in 2011. (See, Attachment 1 – CV).

3. I have obtained specialized training and education in matters of title research, investigation and interpretation. I have completed numerous projects and assignments that require the research, review and analysis of title matters including fee ownership, easement, and right of way interests. I have performed background research, investigations, review and analysis of title matters concerning the Provo Reservoir Canal, a twenty-six mile long canal through Utah County, the Olmstead Aqueduct, a three mile pipeline located in Provo Canyon, and various projects along and adjoining several canals and pipelines in Salt Lake County including the Jordan and Salt Lake City Canal, the Utah Lake Distributing Canal, the South Jordan Canal and others **including the East Jordan Canal**. I have also taken the lead role for right of way acquisition projects including the survey and title investigations for several pipeline corridors including the 150<sup>th</sup> South pipeline extending from Interstate Highway I-15 to the Jordan Valley Water Treatment Plant on 3200 West Street in Riverton, the Salt Lake Aqueduct and the Central Pipeline Project from Saratoga Springs in Utah County and numerous other right

of way improvement projects for pipelines, street, and storm drainage corridors in Salt Lake, Utah, Davis and Weber Counties.

**B. BACKGROUND/HISTORY OF PROPERTY IN DISPUTE**

4. In July of 1995 I completed an extensive boundary survey encompassing nine parcels of land bordering north of 9400 South Street for the purpose of resolving boundary line discrepancies. The scope of the survey included research and determination of the East Jordan Canal right of way both north and south of 9400 South Street, this includes the property in which the Garage 94 property is located. (See, Attachment 2 – 1995 Survey).

5. On several occasions during the course of my 1995 Survey, I visited the home of Theron and Bonnie Miller located on the property now occupied by the Real Salt Lake Stadium immediately north of the Garage 94 property then owned by J.D. and Janet Tanner. The driveway accessing the Miller residence (Miller Driveway) used during my visits was located immediately west of the East Jordan Canal right of way which crossed the easterly portion of the Garage 94 property.

6. At the time of my 1995 survey and since that time there has existed a chain link enclosure fence following the westerly side of the Miller driveway and continuing along the north, west and south sides of the Garage 94 property. The eastern boundary for the Garage 94 property is adjacent to the center of the East Jordan Canal. The westerly and northerly portions of the chain link fence are called out as marking the **west and north boundaries** of the Garage 94 property description, and are **not** a reference point to any legal description on the **east** side of this parcel.

7. During my preparation of the 1995 survey, I had occasion to obtain and review a copy of the Jan 24, 1990 Survey by Duane M. Peterson for Dave Tanner. The 1990 Survey of the of the Garage 94 property (then owned by Dave Tanner) clearly depicts the Miller driveway fence as well as the northerly and westerly boundary fences which, in conjunction with the Miller Driveway fence, and the eastern boundary adjacent to the center of the East Jordan Canal as the boundary for the Garage 94 property. (See, Attachment 3 – 1990 Survey).

8. The Jan 24, 1990, survey includes a recital of the original Garage 94 parcel description and a “Fence Line Description” prepared “at the request of the property owner so that the Title Company can straighten out the deeds.” The “Fence Line Description” was used as the basis for a July 15, 1991, summary judgment ruling in case number 900904052 determining the boundaries and quieting title to the Garage 94 property. The easterly boundary of the Garage 94 property described in the 1991 ruling is consistent with the boundary depicted on the 1990 survey. (See, Attachment 4 – 1991 Judgment).

9. The East Jordan Canal was constructed beginning in 1878 from the Jordan Narrows to Little Cottonwood Creek at Union Avenue near 7000 South Street. (See, Attachment 5 – 1904 Irrigation Report). The lands in the southeast corner of Section 1 at the time of canal construction were part of the federally owned public domain lands having not been conveyed by the federal government until the Heber Goff patent issued April 30, 1880. The 1880 Patent was made subject to “any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws, and decisions of courts ....” (See, Attachment 6 – 1880 Patent).

10. Section 15 of the February 20, 1880, Water Rights Act approved by the Utah Territorial Legislature provided that “All persons shall have the right of way across and upon public, private and corporate lands or other right of way, for the construction and repair of all necessary ... canals ....” (See, Attachment 7 – 1880 Water Rights Act). **The East Jordan Canal right of way is, therefore, comprised as a statutorily granted easement with the underlying fee title, subsequently granted by patent to Heber Goff, being made subject to the easement rights of the East Jordan Canal.**

11. No formal deed of conveyance was required nor has one been discovered during a thorough search of the title record. **There is, therefore, no deed of record which defines the location, width or limits of the East Jordan Canal right of way easement onto the eastern portion of the Garage 94 property.** The easement limits can only be determined by survey of the physical canal construction including the channel, embankments and structures such as the perimeter ditches and the access and maintenance road located on the westerly side of the canal embankment. The surveyor must consider the common construction techniques of the East Jordan Canal and other canals being concurrently constructed. Thorough review of the construction and evidence of adjoining deeds and surveys clearly discloses the canal easement limits within a 49.5-foot (3 rods) wide right of way with the centerline of the canal channel being located with 16.5 feet (1 rod) extending to the easterly side and 33 feet (2 rods) to the westerly side. The extra width on the westerly side of the canal provides for the operation of a maintenance road for the East Jordan Irrigation Company along the top of the westerly canal embankment. The 49.5-foot wide right of way is typical of other canals constructed in similar size and fashion and acquired during the same time period.

12. On April 21, 1995, the Garage 94 property was conveyed by Warranty Deed from J.D. and Janet Tanner to Mike and Tammie Ogden reciting the 1991 Judgment description with the addition of a qualifying clause “subject to easements, restrictions and rights-of-way **currently of record** ....” (See, Attachment 8 – 1995 Warranty Deed). This type of clause is typically inserted by the title industry to limit the grantor’s warranty for recorded easements and encumbrances not specifically recited in the warranty deed. This clause would not account for the **unrecorded** East Jordan Canal right of way easement which pre-dated the title record.

### **C. FACTS RELATIVE TO THE PROPERTY CONVEYED**

13. On September 21, 2007 M & R Rods/Garage 94 Inc. executed a Deed of Trust in favor of Mountain America Credit Union, and subsequently closed its portion of the transaction based upon the legal description then in existence (and is consistent with the legal description from the 1991 Judgment description and 1995 legal description) which is recorded as entry 10238143 in the Salt Lake County Recorder’s Office. (See, Attachment 9 – 2007 Trust Deed).

14. On October 1, 2007, Mike and Tammie Ogden conveyed by Warranty Deed to M & R Rods/Garage 94 Inc., the Garage 94 property, which was recorded on October 2, 2007, as entry number 10238037. (See, Attachment 10 - 2007 Warranty Deed). The recited property description again mirrors the 1991 Judgment description and 1995 legal description with the addition of an exclusion from the conveyance which stated, “LESS AND EXCEPTING therefrom any portion lying within the East Jordan Canal and the East Jordan Canal Company Right of Way.” The qualifying clause “less and excepting” is a term of art presumed to exclude a portion of the property being conveyed by the deed which would otherwise be included. This new qualifying clause was apparently added to the 1991 Judgment description and 1995 legal

description by the Ogden's title company, Integrated Title Service. In this case, the "East Jordan Canal Company Right of Way" was never a fee interest in any property, but was an easement right held by the East Jordan Canal Company over properties adjoining the canal since the 1878 construction of the canal. The result of the 2007 Warranty Deed was to "less and except" an easement right, *not the fee title ownership of an undetermined parcel of land.*

#### **D. ANALYSIS AND OPINIONS**

15. This use of the term "less and excepting" in the 2007 Warranty Deed creates an ambiguity in the title record, and appears more appropriately interpreted as an exception to the covenant of guarantee made by the grantor. This interpretation is consistent with Utah Code Ann. § 57-1-12 (1990) which specifies that "[a] warranty deed, when executed as required by law, shall have the effect of a conveyance in fee simple ... with covenants from the grantor ... that the premises are free from all encumbrances. ... Any exceptions to these covenants may be briefly inserted in such deed following the description of the land." An "encumbrance," as used in this section, is any right that a third party holds in land which constitutes a burden or limitation upon the rights of the fee title holder. The most likely interpretation of the 2007 Warranty Deed, in light of the statute in place at the time of the conveyance, is the intent of the grantor was to "except" from the grant to M & R Rods/Garage 94, Inc, the third party *easement* held by the East Jordan Irrigation Company. (See, Attachment 11 – SB25 2007).

16. The 2007 Warranty Deed fails to describe any particular piece or portion of the property which is excepted from the conveyance. The location of the referenced "East Jordan Canal Company Right of Way" is not defined within the deed or anywhere in the entire title record; its width is not stated and its boundary locations are unspecified. Nowhere in the 2007

Warranty Deed is any particular parcel of land fully described, and nowhere in the title record is there found a description of a parcel of land or a specific easement which could be excluded in fee from the Ogden's conveyance. Construing the 2007 Warranty Deed as excepting *a fee titled portion of the property* creates an ambiguity in the conveyance because it fails to sufficiently describe the portion of the fee title property which was to be excluded.

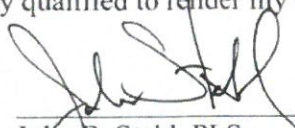
17. On July 3, 2012, Tamie Ogden purported to convey by Quitclaim Deed to Sandy City "a parcel of land ... which is described by Warranty Deed recorded October 2, 2007 ... as: "LESS AND EXCEPTING therefrom any portion lying within the East Jordan Canal and the East Jordan Canal Company Right of Way." (See, Attachment 12 – 2012 Quitclaim Deed). The 2012 Quitclaim Deed makes a further attempt to describe the "excepted portion" for the *first time* in a metes and bounds description.

18. An examination of the public title record for the period of time after execution and recording of the 2007 Warranty Deed, until the time of the execution and recording of the 2012 Quitclaim Deed, reveals no specific property excluded from the 2007 Warranty Deed conveyance. There is no record of a subdivision or survey recorded which could have been used to divide the Garage 94 property into two parcels. The title record reflects Garage 94's ownership of the entire 2007 Warranty Deed property described consistent with the 1991 Judgment quieting title to the entire property. The 2007 Warranty Deed and the subsequent tax records provided no public notice to Garage 94 that they were owners of anything less than the entire parcel described in the deed. The Salt Lake County property assessment maps consistently depict the Garage 94 property as a single parcel until the July 31, 2012 update reflecting a new parcel of land first appearing in the title record. (See, Attachment 13a-13d – Assessor Maps).

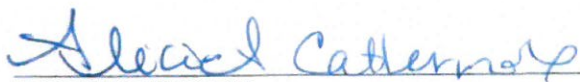


19. The 2012 Quitclaim Deed description prepared by Sandy City purports to define the “East Jordan Canal and the East Jordan Canal Company Right of Way” as consisting of a fee titled parcel extending from the east boundary of the Garage 94 property westward to “the location of an old chain link fence line which has for many years defined the westerly line of the East Jordan Canal right-of-way.” The “old chain link fence line” is located from 15.5 feet to 8.5 feet westerly of the actual location of the westerly right of way limit of the East Jordan Canal as historically located 33 feet westerly from the Canal centerline. The 2012 Quitclaim Deed announcement that the chain link fence “for many years defined the westerly line of the East Jordan Canal right-of-way” *is a complete fabrication unsupported by any evidence and is inconsistent with the survey* of the Real Salt Lake Stadium (which boundary follows the westerly East Jordan Canal right of way line) immediately north of the described property. (See, Attachment 14 – 2005 Real Survey). The old chain link fence line, in fact, was historically located along the westerly side of a private driveway which, prior to the construction of the Real Salt Lake Stadium, was used as an alternate access from 9400 South Street to the Theron and Bonnie Miller residence located north of the Garage 94 property. Destruction of the Miller residence terminated the need for the continued use of the driveway across the westerly portion of the Garage 94 property. **At no time did the driveway or the chain link fence define the westerly line of the East Jordan Canal right of way.** The only evidence of use of the driveway area by persons associated with the East Jordan Canal Company was during the construction of the Concrete Interconnect Turnout Structure depicted on the attached Property Sketch Plan. (See, Attachment 15 – Property Sketch Plan).

20. Based upon my professional experience, prior experience with this property and the East Jordan Canal in this area, and my research of documents applicable to this issue, I am highly qualified to render my opinion as to the issues involved in this matter.

  
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John B. Stahl, PLS

SUBSCRIBED AND SWORN TO before me this 27<sup>th</sup> day of Jan, 2015.

  
\_\_\_\_\_  
NOTARY PUBLIC  
My Commission Expires: 1/17/2018

