

1997

Michael O. Longley v. Leucadia Financial Corporation, dba and fka Terracor; the City of St. George, a municipal corporation; Robert L. Morgan, State Engineer of the State of Utah : Brief of Appellee

Utah Court of Appeals

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CKET NO. 970152-4

IN THE UTAH COURT OF APPEALS

MICHAEL O. LONGLEY,

Plaintiff and Appellant,

vs.

LEUCADIA FINANCIAL CORPORATION,  
dba and fka TERRACOR; the CITY OF ST.  
GEORGE, a municipal corporation; and  
ROBERT L. MORGAN, State Engineer of the  
State of Utah,

Defendants and Appellees.

Case No. 970152-CA

Priority No. 15

**BRIEF OF APPELLEES**

APPEAL FROM SUMMARY JUDGMENT OF THE FIFTH JUDICIAL  
DISTRICT COURT OF WASHINGTON COUNTY, STATE OF UTAH  
HONORABLE JAMES L. SHUMATE, JUDGE.

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ORAL ARGUMENT REQUESTED  
PUBLISHED OPINION REQUESTED

**FILED**

Utah Court of Appeals

SEP 22 1997

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IN THE UTAH COURT OF APPEALS

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MICHAEL O. LONGLEY,	)	
	)	
Plaintiff and Appellant,	)	
	)	
vs.	)	<b>Case No. 970152-CA</b>
	)	
LEUCADIA FINANCIAL CORPORATION,	)	<b>Priority No. 15</b>
dba and fka TERRACOR; the CITY OF ST.	)	
GEORGE, a municipal corporation; and	)	
ROBERT L. MORGAN, State Engineer of the	)	
State of Utah,	)	
	)	
Defendants and Appellees.	)	

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**BRIEF OF APPELLEES**

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**JURISDICTION OF UTAH COURT OF APPEALS**

This appeal is from the Summary Judgment of the Fifth Judicial District Court entered November 8, 1996, in a matter involving the review of a memorandum decision of the State Engineer. The Utah Supreme Court has jurisdiction over this appeal pursuant to Utah Code Ann. §§ 78-2-2(3)(f), - (j) (1996). The Utah Supreme Court transferred this case to the Utah Court of Appeals, which has jurisdiction of this case pursuant to Utah Code Ann. § 78-2-2(4).

**STATEMENT OF ISSUES AND**

**STANDARDS OF APPELLATE REVIEW**

1. Whether the April 1994 published notice of Leucadia's Extension Request was adequate notice in an informal administrative proceeding before the State Engineer, which proceeding did not involve any property interest of Longley, and which, therefore, could not present any risk of adversely



affecting any of Longley's property interests?

**Standard of Appellate Review:** This issue presents questions of law. The Court therefore reviews the trial court's conclusions for correctness. *State v. Pena*, 869 P.2d 932, 936 (Utah 1994). While considering the constitutionality of a statute, the Court resolves doubts in favor of constitutionality. *Society of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 920 (Utah 1993). Moreover, where Longley bases his claims on both the United States and Utah Constitutions, because the Court can decide this case under the Utah Constitution, the Court need not reach questions of federal constitutional law. *Whitmer v. City of Lindon*, 322 Utah Adv. Rptr. 43, 44 (Utah Sup. Ct. 1997).

2. Whether the April 1994 notice of Leucadia's Extension Request complied with the requirements of Section 73-3-12(1) of the Utah Code?

**Standard of Appellate Review:** The adequacy of notice is a question of law, including whether the determination depends upon the interpretation of the written content of the published notice. *Patrick v. Rice*, 814 P.2d 463, 467 (N.M. Ct. App. 1991), *cert. denied*, 815 P.2d 161 (N.M. 1991). Therefore, the Court grants no deference to the district court's conclusions of law and reviews them for correctness. *State v. Pena*, 869 P.2d 932, 936 (Utah 1994); *State v. Larsen*, 865 P.2d 1355, 1357 (Utah 1993) (whether trial court correctly interprets statute is a question of law to be reviewed for correctness).

## DETERMINATIVE STATUTES

The full text is found in the Addendum.

Utah Code Ann. § 63-46b-14 (1995).

Utah Code Ann. § 73-3-3 (1989).

Utah Code Ann. § 73-3-12 (1989). (Section 73-3-12 was amended in 1995 and 1997. However, the

governing statute for this case is found in Utah Code Ann., Vol. 7 C (1989 Replacement)  
Utah Code Ann. § 73-3-14 (1989).

## **STATEMENT OF CASE**

### **Nature of the Case**

Appellant Michael O. Longley (“Longley”) appeals from the district court’s Order Granting Defendants’ Motion for Summary Judgment entered November 8, 1996 (the “District Court’s Order”). (For a copy of the District Court’s Order, see Addendum at A-1.) Longley sought de novo review by the district court of the State Engineer’s June 19, 1995 Memorandum Decision (the “State Engineer’s Decision”) approving Leucadia’s request for extension of time to file its proof of permanent change under a change application approved by the State Engineer in 1971. The district court granted summary judgment dismissing Longley’s Second Amended Complaint on the basis that Longley did not have standing to seek judicial review of the State Engineer’s Decision. The district court found that Longley did not timely protest Leucadia’s extension request, and therefore, failed to exhaust his administrative remedies pursuant to Sections 73-3-14(1)(a) and 63-46b-14(2)(a) of the Utah Code.

### **Course of Proceedings and Disposition Below**

#### **Informal Adjudicative Proceeding Before the State Engineer**

Prior to their sale to the City of St. George in 1995, Leucadia was the owner of certain water rights located in Washington County, Utah. Leucadia also was the applicant on a change application filed in 1970 (Change Application No. 81-670 (a6393), which included water rights under two previously approved applications) (the “1970 Change Application”). The 1970 Change Application was approved by the State Engineer in 1971 and the proof was initially due on November 30, 1973. Between 1973 and 1990, Leucadia filed several Requests for Reinstatement and Extension of Time

with the State Engineer for the 1970 Change Application. All of these extension requests were granted by the State Engineer, including the fifth extension request at issue in this appeal.

In connection with the processing of Leucadia's fifth extension request, the State Engineer published, in accordance with statute, notice of the extension request six times in a local newspaper of Washington County; three times in February 1994 and three times in April 1994. The April notices stated that written protests of Leucadia's extension request had to be filed with the State Engineer on or before May 14, 1994. Longley did not file a written protest on or before May 14, 1994. Longley claims to have filed a protest on or about April 3, 1995, fully ten months after such protests were to be filed in accordance with the published notice.

The State Engineer approved Leucadia's fifth extension request. Longley then filed a request for reconsideration, which the State Engineer denied because only parties to a proceeding before the State Engineer may seek reconsideration of a decision by the State Engineer. Longley was not a party to the proceeding, having filed an untimely protest.

#### Trial De Novo Before the District Court

On August 18, 1995, sixty days after the State Engineer's Decision was issued, Longley filed his complaint with the district court seeking judicial review of the State Engineer's Decision. Appellees herein subsequently filed a motion for summary judgment seeking dismissal of Longley's Second Amended Complaint on the basis that Longley lacked standing to seek de novo review of the State Engineer's Decision because Longley failed to exhaust his administrative remedies as required by law. Longley opposed the motion for summary judgment, in part, on the grounds that the published notice was defective, and therefore, the State Engineer's Decision was void. The district court granted Appellees' motion for summary judgment and found:

1. On April 1, 7 and 14, 1994, the State Engineer published notice of Leucadia's Extension Request in the Daily Spectrum newspaper in Washington County, Utah;

2. The published notice of Leucadia's Extension Request contained information that informed the public of the diligence claimed and the reason for the request;

3. The published notice of Leucadia's Extension request described the water rights at issue with sufficient detail;

4. Plaintiff concedes that he did not file a protest with the State Engineer within thirty (30) days of the published notice of Leucadia's Extension Request.

The district court then concluded:

1. The State Engineer's notice [by] publication of Leucadia's Extension Request was sufficient to comply with Utah law;

....

4. Plaintiff lacks standing to seek judicial review of the State Engineer's decision approving Leucadia's Extension Request because he did not file a timely protest, and therefore, failed to exhaust his administrative remedies as required by Utah Code Ann. § 63-46b-14 (1993).

Following the entry of the District Court's Order, Longley filed his Notice of Appeal with the Utah Supreme Court, which transferred jurisdiction of this appeal to the Utah Court of Appeals.

### **STATEMENT OF FACTS**

1. With respect to Leucadia's 1970 Change Application, on or about September 21, 1990, Leucadia filed with the State Engineer its request to withdraw its proof of permanent change filed on November 30, 1989. (R. 163, 184.) At the same time, Leucadia also filed its fifth Request for Reinstatement and Extension of Time (the "Extension Request") under the 1970 Change Application. (R. 158, 163, 180, 184, 271, 293.)

2. On July 10, 1992, after Leucadia filed the Extension Request, the State Engineer issued a

Memorandum Decision which states:

It is . . . ORDERED and the Proof of Permanent Change submitted under [the 1970 Change Application] 81-670 (a6393) which included certificated Water Right Number 81-669 (A36856 Certificate Number 8627) and Application to Appropriate Number 81-670 (A36857) is hereby REJECTED and [the 1970] Change Application Number 81-670 (a6393) and Application to Appropriate Number 81-670 (A36857) are hereby LAPSED for failure to comply with statutory requirements and place the water to beneficial use.

(R. 49, 163, 184, 272.)

3. On July 30, 1992, Leucadia timely filed a request for reconsideration of the State

Engineer's July 10, 1992 Memorandum Decision. On August 20, 1992, the State Engineer granted Leucadia's request for reconsideration. (R. 54, 164, 185, 272.)

4. On January 31, 1994, the State Engineer issued an Amended Memorandum Decision,

which states:

It is . . . ORDERED and the rejection of the proof for [the 1970] Change Application Number 81-670 (a6393) which included Application to Appropriate Number 81-670 (A36857) and Certificated water right Number 81-669 (A36856) and the lapsing of Change Application Number 81-670 (a6393) and Application to Appropriate Number 81-670 (A36857) according to the July 10, 1992, Memorandum Decision are hereby RESCINDED and the applications are REINSTATED. The priority of the applications has been adjusted to reflect the filing date of the extension of time request filed September 21, 1990, and the extension request will be processed according to statutory requirements.

(R. 58, 165, 186, 272-73.) Pursuant to Utah Code Ann. § 73-3-18 (1989), the State Engineer may reinstate applications upon a showing of reasonable cause.

5. On February 3, 10, and 17, 1994, and again on April 1, 7, and 14, 1994, the State Engineer

published notice of the Extension Request in *The Daily Spectrum* newspaper in Washington County,

Utah. (R. 61, 273, 287, 289, 290.) The April 1994 notices state that protests of the Extension Request

must be filed with the State Engineer on or before May 14, 1994. (R. 273, 287, 290.)

6. Longley did not file a protest to the Extension Request on or before May 14, 1994. (R. 166, 187, 273, 287, 330, 354.)

7. On June 19, 1995, the State Engineer issued a Memorandum Decision granting the Extension Request. (R. 85, 166, 187, 273.)

8. On or about July 10, 1995, Longley filed a Request for Reconsideration of the State Engineer's June 19, 1995 Memorandum Decision. (R. 100, 167, 273.) Longley's Request for Reconsideration does not allege defective notice or make reference to the alleged April 3, 1995 protest letter. (R. 100-107, 273-74.)

9. On July 19, 1995, the State Engineer sent a letter to Longley stating that Longley is not entitled to request reconsideration of the June 19, 1995 Memorandum Decision because Longley was not a party to the administrative proceeding. (R. 112, 188, 274.)

10. Leucadia sold and conveyed the subject Water Rights to the City of St. George in July, 1995. (R. 158, 180, 274.)

Solely for the purposes of summary judgment the following facts may be assumed:

11. In or around October or November 1989, Longley contacted the State Engineer's office in an attempt to intervene in the administrative proceedings before the State Engineer regarding Leucadia's water rights. (R. 353.) Longley was informed that intervention is not allowed in informal administrative proceedings. (R. 353. *See also* Utah Code Ann. § 63-46b-5(1)(g)(1995).) Longley also requested to be given notice of any further action on the matter. (R. 353-54.)

12. On or about April 3, 1995, Longley filed the alleged protest letter with the State Engineer. (R. 354.)

## **SUMMARY OF ARGUMENT**

The district court properly granted summary judgment dismissing Longley's complaint because Longley lacked standing to seek judicial review of the State Engineer's Decision. Longley did not file a timely protest to Leucadia's Extension Request, and therefore, Longley was not a party to the administrative proceeding. Under Utah law, only parties who have participated in administrative proceedings are entitled to seek judicial review. By failing to file a protest with the State Engineer in a timely manner, Longley did not comply with the statutes and regulations governing administrative proceedings before the State Engineer. Participation in such proceedings is a condition precedent to seeking judicial review of the State Engineer's orders. By failing to satisfy the statutory condition precedent, Longley lacked standing to seek judicial review of the State Engineer's Decision by the district court.

Longley argues that his due process rights were violated because he requested and was not given actual notice of the Extension Request proceeding and that the published notice was inadequate. Longley's due process arguments are fundamentally flawed. A person is denied due process if a state action deprives that person of a constitutionally protected property interest. None of Longley's property interests, however, were at risk of being deprived or adversely affected in Leucadia's Extension Request proceeding.

Longley asserts that he owns water rights, which are a protected property interest. But in the administrative proceeding at hand, the State Engineer's action on Leucadia's Extension Request did not, and could not, deprive Longley his property interests in those water rights. Only Leucadia's water rights were at issue. Longley's water rights were not within the subject matter of the Extension Request proceeding and could not be adjudicated or adversely affected in any manner. Therefore,

Longley could not be deprived of his property interests by the State Engineer's grant or denial of Leucadia's Extension Request. In addition, Longley was not entitled to "actual notice by request" as a matter of constitutional law, statute, or regulation.

Longley also argues that "his cause of action to defend" his water rights in an extension request proceeding is a protected property interest. But such a "cause of action to defend" does not exist because, again, Longley's rights were not threatened or adjudicated in Leucadia's Extension Request proceeding. There was nothing for Longley to protect or defend against.

Finally, Longley argues that he was denied his "constitutional right to protest" and assert claims against Leucadia's Extension Request because Longley's water rights could be adversely affected. Again, as a matter of law, Longley's water rights could not be adversely affected in Leucadia's Extension Request proceeding. Furthermore, a right to protest an extension request is not a constitutionally protected property interest, but rather an opportunity afforded to the public to provide its concerns and viewpoints to the State Engineer as he determines whether a previously approved water right application or change application should be extended or lapsed.

The April 1994 notice fully complied with Utah law. The notice was published for three successive weeks in an appropriate newspaper. The notice correctly identified the nature of the proceedings and the water rights at issue. The notice informed the public of the diligence claimed and the reason for the request. The notice also correctly described the locations of the proposed additional points of diversion under the 1970 Change Application.

The notice provision in the extension request statute is consistent with the limited jurisdiction of the State Engineer under the statute. The notice provision is designed to provide general public notice of a pending extension request. As the State Engineer is the intended "protected party" under the notice provision, the notice provision is designed to ensure that the State Engineer is fully informed



in an extension request proceeding. Although the April 1994 notice strictly complied with the notice provision requirements, because the notice provision is designed to protect the State Engineer, not Longley, the April 1994 notice would have been adequate had it only substantially complied with the statutory notice provision requirements.

## **ARGUMENT**

### **I. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT DISMISSING LONGLEY'S COMPLAINT BECAUSE LONGLEY LACKED STANDING TO SEEK JUDICIAL REVIEW OF THE STATE ENGINEER'S DECISION.**

The basic issue before this Court is whether the district court properly granted summary judgment dismissing Longley's Second Amended Complaint. The complaint was dismissed because Longley lacked standing to seek judicial review of the State Engineer's decision. (R. 536.) Apparently, Longley has abandoned his standing claims on appeal, because he does not raise the issue in his brief. Except for a single assertion buried in an extended footnote at the end of his brief, Longley has not repeated the arguments regarding his right to seek judicial review based on his status as an "aggrieved person" or "aggrieved party." (*See e.g.*, R. 345-49.) The district court's grant of summary judgment was proper, however, precisely because Longley was neither an aggrieved person nor an aggrieved party.

Longley did not file a timely protest to Leucadia's Extension Request. (R. 166, 187, 273, 287, 330, 354.) Therefore, Longley was not a party to the administrative proceedings. Only parties (or persons) who have participated in administrative proceedings are entitled to seek judicial review. Section 73-3-14(1)(a) of the Utah Code provides:

Any person aggrieved by an order of the state engineer may obtain judicial review by following the procedures and requirements of Chaptr 46b Title 63 [of the Utah Administrative Procedures Act].

Utah Code Ann. § 73-3-14(1)(a) (1989) (emphasis added). Under this statute, judicial review is conditioned on compliance with the procedures and requirements of the Utah Administrative Procedures Act (“UAPA”). Likewise, the rules of the Division of Water Rights (the “Division”) also condition eligibility to seek judicial review of an order of the State Engineer upon complying with the procedures and requirements of UAPA. Those rules provide:

Any party aggrieved by an order of the State Engineer may obtain judicial review by following the procedures and requirements of Section 63-46b-14 and 63-46b-15 [of UAPA] and 73-3-14 and 73-3-15.

Utah Admin Code Rule R655-6-18(A) (1995) (emphasis added). Clearly, judicial review is only available if the “person” (under the statute) or “party” (under the rule) follows the procedures and requirements of UAPA. The procedures and requirements of UAPA, however, further limit eligibility to seek judicial review. Under UAPA, only parties may seek judicial review of the State Engineer’s decisions. The UAPA provides:

A party aggrieved may obtain judicial review of final agency action, except in actions where judicial review is expressly prohibited by statute.

Utah Code Ann. § 63-46b-14(1) (1995) (emphasis added).<sup>1</sup> UAPA further provides that “party” includes “all persons authorized by statute or agency rule to participate as parties in an adjudicative proceeding.” Utah Code Ann. § 63-46b-2(1)(f). There is no statute that unconditionally authorizes Longley to participate as a party in the proceedings before the State Engineer. *See e.g.*, Utah Code Ann. § 73-3-14(1)(a) (conditioning the right to seek judicial review of a State Engineer decision on compliance with the procedures and requirements of UAPA). The Division rules, however, provide that “protestants” are authorized to participate as “parties” in proceedings before the State Engineer.

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<sup>1</sup>Section 63-46b-15 of UAPA governs judicial review of informal adjudicative proceedings. All proceedings before the Division of Water Rights and the State Engineer, including change applications and requests for reinstatement and extension of time, are separate informal adjudicative proceedings. Utah Admin. Code § R655-6-2 (1995).

See Utah Admin. Code § R655-6-3(F). The Division's rules provide that protestants are only those interested persons who file their protest with the State Engineer on a timely basis, *i.e.*, within 30 days after notice of an application or extension request is published. See Utah Code Ann. § 73-3-12(1)(e).

Longley is not authorized under statute or the Division's rules to participate in the State Engineer's proceedings as a "party." Longley is not a "protestant" under the Division's rules because Longley did not timely protest Leucadia's Extension Request. Even if it is assumed *arguendo*, that Longley filed the alleged April 3, 1995 protest letter with the Division, he still is not a "protestant."<sup>2</sup> In that case, Longley still would have been more than 10 months late in protesting the Extension Request. Under Section 73-3-12(1)(f) of the Utah Code, Longley was required to file a written protest of the Extension Request within 30 days after the notice of the Extension Request was published. To be timely, Longley's protest had to be filed by May 14, 1994. (R. 273, 287, 290.) Because Longley concedes that he did not file his protest until April 1995, at the earliest, (R. 166, 187, 273, 287, 350, 354) clearly such a protest was untimely.

By failing to file his protest with the State Engineer in a timely manner, Longley did not comply with the statutes and regulations governing administrative proceedings before the State Engineer. Participation in the administrative proceedings before the State Engineer is a condition precedent to seeking judicial review of the State Engineer's orders. *S&G Inc. v. Morgan*, 797 P.2d 1085, 1088 (Utah 1990). By failing to satisfy the statutory condition precedent, Longley lacked standing to seek judicial review by the district court of the State Engineer's June 19, 1995 Memorandum Decision.

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<sup>2</sup> Assuming for purposes of summary judgment the veracity of Longley's claims regarding the April 3, 1995 protest letter, there are no disputed material facts that are relevant to the district court's conclusion that Longley lacked standing to seek judicial review of the State Engineer's decision.

**II. THE PUBLISHED NOTICE OF LEUCADIA’S EXTENSION REQUEST WAS CONSTITUTIONALLY ADEQUATE IN AN INFORMAL ADMINISTRATIVE PROCEEDING IN WHICH NO PROPERTY INTEREST OF LONGLEY WAS AT RISK OF BEING DEPRIVED OR ADVERSELY AFFECTED.**

The plain meaning of the due process clauses of both the United States and Utah Constitutions is that a person is afforded due process if that person is to be deprived of property. “No person shall . . . be deprived of life, liberty or property, without due process of law. . . .” U.S. Const., amend V. “No person shall be deprived of life, liberty or property, without due process of law.” Utah Const., art. 1, Sec. 7. Longley’s due process argument fails because no substantive interest of Longley was at risk of being deprived or adversely affected in Leucadia’s Extension Request proceeding.<sup>3</sup>

The prerequisites to the application of due process property protections are state action and a constitutionally protected property interest. *Gray v. Department of Employment Security*, 681 P.2d 807, 816 (Utah 1984). As the United States Supreme Court has observed, it must first be “determined that the Due Process Clause applies,” then “the question remains what process is due.” *Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). This appeal involves the State Engineer taking action on Leucadia’s Extension Request. In the Extension Request administrative proceeding, the rights of Leucadia under the previously approved 1970 Change Application were subject to being lapsed and were at risk. None of Longley’s substantive interests were involved or at risk in the administrative proceeding.

Despite the lack of a substantive property interest at risk in the proceeding, Longley erroneously contends that due process required the State Engineer to provide him actual notice of

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<sup>3</sup> In analyzing a due process challenge based on both the United States and Utah Constitutions, this Court may decide the case under the Utah Constitution and need not reach questions of federal constitutional law. *Whitmer v. City of London*, 322 Utah Adv. Rep 43, 44 (Utah Sup. Ct. 1997). See also *West v. Thomson Newspapers*, 872 P.2d 999, 1004-07 (Utah 1994). Since this Court can decide this case under the Utah Constitution, this brief principally addresses Utah law.

Leucadia's Extension Request. Longley's contention totally fails under the analysis recently adopted by the Utah Supreme Court. To determine the procedural requirements of due process in any given context, three factors are balanced:

[F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the functions involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*V-1 Oil Company v. Dept. Of Environmental Quality*, 317 Utah Adv. Rpt. 11, 13 (Utah Sup. Ct. 1997) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). Also of significance is whether the nature of the proceeding is administrative or judicial. *Id.*

In this case we clearly have an administrative proceeding involving Leucadia's Extension Request; the private interest that will be affected is Leucadia's. No property interest of Longley will be affected or is even at "risk of an erroneous deprivation." The State Engineer's required determination in Leucadia's Extension Request proceeding does not adjudicate and could not adversely affect Longley's water rights. Furthermore, the "notice by request" procedural requirement promoted by Longley would be detrimental to a stable water rights system and unreasonably burdensome for the State Engineer who administers approximately 120,000 water rights in the State of Utah. (R. 390.)

**A. Longley's Water Rights Were Not At Risk of Being Deprived, Nor Were They Adversely Affected by the State Engineer in Leucadia's Extension Request Proceeding.**

Longley contends his vested water rights are protected property interests. As a matter of law, however, other water rights such as Longley's water rights, are not at risk of being deprived or adversely affected in an extension request proceeding. Accordingly, Longley is fundamentally unable to demonstrate how his rights are at risk or adversely affected by the State Engineer's action in

Leucadia's Extension Request proceeding.

**1. Utah's Water Administration Statutes and Policies Demonstrate that Other Water Rights Are Not at Risk of Being Deprived or Adversely Affected in an Extension Request Proceeding.**

The statutes and policies of this State, which are based on the prior appropriation doctrine, demonstrate that the water rights of other persons are not at risk or adversely affected in an extension request proceeding. The purpose of an extension request proceeding is to carry out state water policy, not to determine the water rights of the parties.

Beginning in 1903 for surface waters and 1935 for groundwater, an application to appropriate water is first filed with the State Engineer to obtain a water right. Utah Code Ann. § 73-3-1 (1989). However, the mere filing of the application does not give the applicant the right to use water. Among other procedures required by statute, notice of the application must be published in an appropriate newspaper. The State Engineer may then take action on the application pursuant to the criteria of Section 73-3-8 of the Utah Code. State Engineer approval of the application, however, is only a preliminary step and simply gives the applicant the authority to proceed and perfect, if possible, the proposed appropriation by actually diverting the water and applying it to a beneficial use. *Rocky Ford Irrigation Co. v. Kents Lake Reservoir Co.*, 135 P.2d 108, 113 (Utah 1943).

Under the prior appropriation doctrine, all applications are approved subject to the water rights of prior appropriators. The rights of prior appropriators are not harmed or affected in any way. As explained by the Utah Supreme Court in 1938:

Any application that is filed is subject to all prior rights which have accrued prior to such filing. Filing the application does not give the applicant the right or license to proceed to the injury of prior rights. He can proceed only upon an absence of injury to such rights if he hopes to perfect a right and be immune from liability. Legally, no one can be hurt by the procedure established by the Legislature. At the same time, however, it permits the development of our water resources to the utmost.

*Eardley v. Terry*, 77 P.2d 362, 366 (Utah 1938). Thus, the applicant may proceed to divert and use water under the applicant's approved application, but such use is always subject to the rights of prior appropriators. The water rights of prior appropriators are not harmed, affected, or deprived by the State Engineer approving a new application--they still maintain the same rights they previously enjoyed. *Rocky Ford*, 135 P.2d at 113. If the actual diversion and use of water under an approved application interferes with prior rights, the prior appropriator has a cause of action against the junior appropriator. *Id.* at 114.

If owners of approved applications or perfected water rights wish to change their approved point of diversion, place of use, or nature of use, they must file a change application with the State Engineer. Utah Code Ann. § 73-3-3(2)(a). Notices of change applications are also published in an appropriate newspaper. Before the applicant has the right to use water under the change application, the State Engineer must approve the application after determining, among the other criteria of Section 73-3-3 and Section 73-3-8, whether there is a reason to believe the change can be approved without impairing other water rights. *Crafts v. Hansen*, 667 P.2d 1068, 1070 (Utah 1983); *Bonham v. Morgan*, 788 P.2d 497, 502 (Utah 1989).

At the time of approval of either an application to appropriate or a change application, the State Engineer gives the applicant a certain time period within which to construct its works, place the water to beneficial use, and file proof of appropriation or permanent change. Utah Code Ann. §§ 73-3-10, 16. Sixty days prior to the date the proof of appropriation or permanent change is due, the State Engineer notifies the applicant by certified mail that such proof is due, and informs the applicant of its right to file a request for an extension of time within which to place the water to beneficial use. Utah Code Ann §§ 73-3-12, -16. Applicants then either file proof or an extension request with the State Engineer.

Upon receiving an extension request, the State Engineer takes action on the application without publishing notice if the application was approved less than 14 years prior to the filing of the extension request. If more than 14 years have elapsed, the State Engineer publishes notice in an appropriate newspaper to inform the public of the request. Utah Code Ann. § 73-3-12(1)(e). Any interested person may file a protest with the State Engineer within 30 days after the publication of the notice. Utah Code Ann. § 73-3-12 (1)(f).

After the 30-day protest period terminates, the State Engineer determines whether to approve or deny the applicant's extension request. Pursuant to Section 73-3-12, the State Engineer is limited to considering whether the applicant "affirmatively shows" due diligence in placing the water to beneficial use or a reasonable cause for delay. If the State Engineer finds due diligence or reasonable cause for delay the extension request is granted. Utah Code Ann. § 73-3-12(1)(b). Otherwise, the previously approved application is lapsed. Utah Code Ann. §73-3-12(1)(g). Once lapsed, the applicant may request the State Engineer to reinstate the application. Utah Code Ann. § 73-3-18. But no further extension requests or reinstatements may be granted if the water works are not constructed within 50 years of the date the application was approved. Utah Code Ann. § 73-3-12(2).

The extension request statute codifies an important concept and purpose of the western prior appropriation doctrine: "the overriding purpose of our water law [is] seeing that all available water is put to beneficial use." *Wayman v. Murray City Corp.*, 458 P.2d 861, 864 (Utah 1969). Utah's appropriation system "permits the development of our water resources to the utmost." *Eardley*, 77 P.2d at 366. An extension request is one statutory mechanism the State Engineer uses to ensure that water rights are diligently developed so that the state's limited water resources are optimized. Thus, the principal purpose of extension request proceedings is to carry out state water policy.



In an extension request proceeding, the State Engineer takes action only on the applicant's request to extend the time within which to place water to beneficial use under a previously approved application. The State Engineer's action is directed only against the applicant's approved but unperfected application and not against the water rights of any other person. Other water rights are not threatened or at risk in an extension request proceeding.

If an extension request is approved, other water rights are not thereby adversely affected. In the same manner as when the State Engineer approves applications to appropriate, when the State Engineer approves an extension request, all other water rights continue as originally approved; the same quantity of water may be diverted under the same priority date, from the same point of diversion, at the same place of use, and for the same nature of use. If an extension request is denied, other water rights also continue as originally approved. They are not adversely affected in any way.

When the State Engineer decides that due diligence or reasonable cause for delay has not been shown and that an application must lapse, the State Engineer's decision may indirectly benefit other appropriators. However, because the affect is an indirect benefit to other appropriators, the decision does not adversely affect their water rights. The indirect benefit to other appropriators may occur if the rights under a lapsed application are from the same source of supply. If the State Engineer decides to lapse the application, the applicant has lost the right to perfect the application and divert water from the common source, thus decreasing the future competition for water in that source. But decreasing the future competition for water does not diminish or adversely affect in any way the water rights of other appropriators.

Other water rights are not diminished or adversely affected in any way by the approval or denial of an extension request. Therefore, there is zero "risk of an erroneous deprivation." *V-1 Oil*, 317 *Utah Adv. Rpt.*, at 13. Longley's water rights were not at risk of being deprived or adversely

affected in Leucadia's Extension Request proceeding.

**2. Utah Case Law Demonstrates that Other Water Rights Are Not at Risk of Being Deprived or Adversely Affected in an Extension Request Proceeding.**

In the Utah cases which have applied the requirements of due process to a property interest, the property interest was significantly threatened or at risk of being deprived by the state action.<sup>4</sup> In contrast, Longley's water rights are not at risk of being deprived or adversely affected in Leucadia's Extension Request proceeding. Significantly, in a water rights case with facts similar to the case at hand, the Utah Supreme Court held that notice by publication was adequate because the State Engineer does not adjudicate or affect the water rights of the parties in his administrative proceedings. *Whitmore v. Murray City*, 154 P.2d 748 (Utah 1944).

In *Whitmore*, the plaintiff Whitmore attempted to challenge on due process grounds a change application that had been approved by the State Engineer several years prior to his challenge. Murray City's change application was filed in 1933. Notice of the application was subsequently given by publication in the newspaper as required by statute. The State Engineer approved the application at least four years prior to Whitmore bringing his lawsuit. *Id.* at 749-50. Even though more than four years had passed since the decision on the change application became final, Whitmore challenged the State Engineer's approval on the grounds that he was denied due process. Whitmore contended he was entitled to actual notice of the application by personal service rather than by publication. He argued

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<sup>4</sup> See e.g., *Whitmer v. City of Lindon*, 322 Utah Adv. Rep. 43 (Utah Sup. Ct. 1997) (resident's connection to secondary water service terminated by city); *Anderson v. Public Service Comm'n*, 839 P.2d 822 (Utah 1992) (limousine operator's certificate of convenience and necessity revoked); *Gray v. Dept. of Employment Security*, 681 P.2d 807 (Utah 1984) (unemployment compensation and benefits subject to being suspended); *Celebrity Club, Inc. v. Utah Liquor Control Comm'n*, 657 P.2d 1293 (Utah 1982) (liquor store's lease revoked by commission); *Worrall v. Ogden City Fire Dept.*, 616 P.2d 598 (Utah 1980) (fireman's right to continued employment deprived upon discharge); *Rupp v. Grantsville City*, 610 P.2d 338 (Utah 1980) (resident's municipal water service discontinued); *Horton v. Utah State Retirement Board*, 842 P.2d 928 (Utah Ct. App. 1992) (public employee's membership in contributory retirement system denied).

the State Engineer's office had personal knowledge that Whitmore claimed a prior right which might be affected by the proposed change. *Id.* at 750.

The Utah Supreme Court rejected Whitmore's due process arguments. The Court concluded that the water rights of the parties were not adjudicated by the State Engineer in Murray City's change application proceeding and, therefore, can not be affected by the State Engineer's administrative action.

*Id.* The Court's reasoning is instructive:

*The office of state engineer was not created to adjudicate vested rights between parties, but to administer and supervise the appropriation of the waters of the state. In Eardley v. Terry, 94 Utah 367, 77 P.2d 362, this court considered the rights and duties of the state engineer in approving or denying an application for appropriation of water rights and we there held that in fulfilling his duties he acts in an administrative capacity only and has no authority to determine rights of parties. The same reasoning applies to the extent of the state engineer's authority when he determines to grant or deny an application for change of diversion, use or place. It follows that in granting Murray City the right to change its point of diversion and return, the state engineer did not adjudicate the priority to the use of the water at that point of diversion, but merely determined that it could use the water at that point as long as it did not interfere with the prior rights of others. The determination of the priority of rights is a judicial function and not among the powers of the state engineer. Since any action by the state engineer under this section cannot affect any vested right, it follows the court did not err in finding that notice by publication as provided therein, does not violate the due process clause of our constitution.*

*Whitmore*, 154 P.2d at 750 (emphasis added). *See also Daniels Irrigation Co. v. Daniel Summit Co.*, 571 P.2d 1323, 1324 (Utah 1977).

The administrative proceedings of the State Engineer do not affect the vested water rights of the parties because the State Engineer has no authority to formally adjudicate those vested rights. The State Engineer acts only in his administrative capacity as he determines whether to approve or deny a particular water right application; no adjudication of the water rights occurs. The *Whitmore* Court said this is true even in proceedings involving change applications, where part of the criteria for approval includes determining whether the proposed change would impair other vested rights. Utah Code Ann.

§ 73-3-3(2)(b) (1989). This principle is even more applicable in extension request proceedings, where there is no statutorily required determination whether other vested rights might be affected by granting or denying an extension request.<sup>5</sup>

The *Whitmore* case is dispositive. As a matter of law, other water rights, such as Longley's, are not adjudicated or affected, or even at any risk of being erroneously deprived, by the State Engineer's administrative action in extension request proceedings.

### **3. The Notice by Publication of Leucadia's Extension Request Was Constitutionally Adequate.**

Because Longley's water rights are not at risk of being deprived or adversely affected in Leucadia's Extension Request proceeding, the statutorily required notice by publication of Leucadia's Extension Request was adequate. *Whitmore*, 154 P.2d at 750. Accordingly, the State Engineer was not required as a constitutional matter to give actual notice to Longley of Leucadia's Extension Request simply because Longley requested "notice of any further action on the matter." (R. 353-54).

### **B. Longley's Desire to Protect and Defend His Water Rights in Leucadia's Extension Request Proceeding Is Not A Protected Property Interest.**

Longley's assertions that he has a cause of action to protect and defend his water rights and a right to demonstrate how his rights will be adversely affected are not protected property interests. First, a cause of action to protect and defend water rights which are not at issue in an extension request proceeding does not exist. Second, the issue of whether the approval of Leucadia's Extension Request

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<sup>5</sup>The conclusion that the State Engineer's actions in change application and extension request proceedings do not adjudicate or affect other persons water rights applies to all administrative actions of the State Engineer. In fulfilling his duties, the State Engineer is acting only in an administrative capacity and has no authority to adjudicate a person's vested rights. *Eardley v Terry*, 77 P.2d 362, 365 (Utah 1938) In any action the State Engineer is administratively determining whether a particular application or request should be approved or denied. *Id.* Whatever action the State Engineer took regarding Leucadia's water rights could not have adjudicated or adversely affected Longley's water rights. Therefore, Longley's due process argument fails under any scenario advanced.

may affect other water rights is not within the State Engineer's jurisdiction to determine in an extension request proceeding. Longley's assertions are essentially an unlawful collateral attack on Leucadia's approved 1970 Change Application.<sup>6</sup>

**1. A Cause of Action to Protect and Defend Water Rights Does Not Exist in an Extension Request Proceeding.**

Longley purports to have a right and cause of action to "protect" (Longley Brief at 11) and "defend" (Longley Brief at 15) his water rights in Leucadia's Extension Request proceeding. But such a right or cause of action does not exist. Asserting or manufacturing a cause of action does not in and of itself create a protected property interest.

Not just any cause of action is a protected property interest. In order to be a protected property interest, the cause of action must be the means by which a claim for a protected property interest is asserted or otherwise protected from deprivation. *See e.g., Tulsa Professional Collection Service, Inc. v. Pope*, 485 U.S. 478 (1988) (creditor's cause of action against decedent's estate was seeking to protect an unpaid bill from being extinguished); *Matter of Estate v. Anderson*, 821 P.2d 1169 (Utah 1991) (creditor's claim against decedent's estate was seeking to protect secured and unsecured claims against the estate from being extinguished). The cause of action itself does not create a protected property interest where there is no property interest needing protection; the property interest sought to be asserted or protected from deprivation invokes the due process protection.

Longley incorrectly alleges he has the right to protect and defend his water rights in an extension request proceeding. But, as conclusively demonstrated in Section II. A., above, other water

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<sup>6</sup> It should be noted that Longley is not without a remedy to protect his water rights should the need arise. If the actual diversion and use of water by a junior appropriator interferes with Longley's water rights, Longley would be entitled to seek relief from the district court. *See e.g., Whitmore v. Murray City*, 154 P.2d 748, 751 (Utah 1944). (plaintiff's cause of action could only arise when defendant's act in changing point of diversion would deprive him of any water). Longley has not been deprived in any manner whatsoever of any opportunity to protect his water rights.

rights are not adjudicated or adversely affected in extension request proceedings. Furthermore, the State Engineer lacks subject matter jurisdiction over other water rights in extension request proceedings. Section III, *infra*. Because there is no threat or risk posed to other water rights, there is no cause of action to protect and defend those water rights in an extension request proceeding. Longley's alleged cause of action "to protect and defend" is not founded upon Utah law, does not exist and therefore, is not a protected property interest.

**2. The Determination of Whether the Approval of an Extension Request Will Adversely Affect Other Water Rights is Not an Issue in an Extension Request Proceeding and the State Engineer and the District Court on De Novo Review Has No Authority to Consider the Issue.**

Longley further wishes to demonstrate how the "approval of the subject Extension Requests can or will adversely affect Mr. Longley's water rights." (Longley Brief at 18). However, as previously discussed, the approval of Leucadia's Extension Request does not adversely affect Longley's water rights as a matter of law. Nevertheless, Longley claims to have the right to show how his water rights will be adversely affected by approval of the Extension Request. But such a right does not exist and is nothing more than a fabrication and a collateral attack on Leucadia's approved 1970 Change Application.

When the State Engineer acts on a particular water right application his jurisdiction is limited by the statutory criteria that governs that application. For example, the Utah Supreme Court recently addressed whether the State Engineer has authority in a change application proceeding to resolve water distribution disputes between mutual water companies and their shareholders. *Badger v. Brooklyn Canal Co.*, 922 P.2d 745, 751 (Utah 1996). The Court concluded the State Engineer had no such authority because "the jurisdiction of the State Engineer's office is . . . circumscribed by the criteria

upon which the statute permits it to base its decisions.” *Id.* at 750.

Likewise, in extension request proceedings the State Engineer, and the district court on de novo review,<sup>7</sup> are limited by the criteria of Utah Code Ann. § 73-3-12 (Utah 1989). Section 73-3-12 provides, in relevant part:

(1)(b) Extensions of time, not exceeding 50 years from the date of approval of the application, may be granted by the state engineer on proper showing of diligence or reasonable cause for delay.

....

(g) In considering an application to extend the time in which to place water to beneficial use under an approved application, the state engineer shall deny the extension and declare the application lapsed, unless the applicant affirmatively shows that he has exercised or is exercising reasonable and due diligence in working toward completion of the appropriation.

....

(h)(i) If reasonable and due diligence is shown by the applicant, the state engineer shall approve the extension.

....

(j) The state engineer, in acting upon requests for extension of time, may, if he finds unjustified delay or lack of diligence in prosecuting the works to completion, deny the extension or may grant the request in part or upon conditions, including a reduction of the priority of all or part of the application.

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<sup>7</sup>This action was filed for judicial review of the State Engineer’s decision approving Leucadia’s fifth extension request pursuant to Utah Code Ann. § 73-3-14 (1989) (R 168). As such, the district court has jurisdiction to review by trial de novo whether the Extension Request should be approved or denied. Utah Code Ann. § 63-46b-15(1)(a) (Supp 1995). In doing so, the district court stands in the same position as the State Engineer. For example, the Utah Supreme Court explained the role of the trial court in an appeal from an application to appropriate proceeding as follows:

When an appeal is taken from the decision of the State Engineer in such a case, the trial court is required to determine the same questions de novo. It determines whether the application should be approved or rejected and does not fix the rights of the parties beyond the determination of that matter. The issues remain the same upon an appeal to this court. All that the district court, or this court on appeal from the district court, is called upon to do is to determine whether the application should be rejected or approved.

It should simply determine whether the application was rightly rejected. In determining that question, the court stands in the same position as the state engineer did.

*Eardley v. Terry*, 77 P 2d 362, 365, 366 (Utah 1938). For a further refinement of the trial de novo principle, see *Badger*, 922 P 2d at 751.

Utah Code Ann. §§ 73-3-12(1)(b), -(g), -(h)(i), -(j) (1989) (emphasis added).

Nowhere in Section 73-3-12 is the State Engineer authorized to determine whether the approval of an extension request will “adversely affect” other water rights. The State Engineer and the district court on de novo review do not examine and have no authority to determine whether the previously approved application or the extension request itself adversely affects any other water rights. The only issues before the State Engineer on an extension request is whether the applicant made a proper showing of diligence or reasonable cause for delay. Thus, protestants may only properly address those issues.<sup>8</sup>

Longley’s desire to demonstrate how Leucadia’s water rights may affect his rights should have been acted on in 1970 when Leucadia applied for the 1970 Change Application involving new points of diversion in the Sand Mountain area. The State Engineer examines impairment of existing water rights in change application proceedings: “No change may be made if it impairs any vested right without just compensation.” Utah Code Ann. § 73-3-3(2)(b). Thus, the State Engineer may approve a change application if “there is reason to believe that the proposed change can be made without impairing vested rights.” *Salt Lake City v Boundary Springs Water Users Ass’n.*, 270 P.2d 453, 455 (Utah 1954).

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<sup>8</sup>Furthermore, the mere fact that § 73-3-12 allows protests to be filed does not expand the inquiry beyond the statutory criteria for approval. The Utah Supreme Court stated with regard to protests filed against applications to appropriate

Under the statute, section 100-3-8, R S Utah 1933, when an application is filed, the state engineer is required to determine whether there is unappropriated water in the proposed source of supply and whether the water sought to be appropriated can be put to a beneficial use and can be diverted from the source of supply without doing material injury to the prior rights of others. While the statute, R S 1933, 100-3-7, provides for the filing of protests to any application to appropriate water, this does not enlarge the scope of the proceedings before the state engineer beyond the determination of the question above stated

*Eardley*, 77 P 2d at 365 (emphasis added)



Leucadia's groundwater rights in the Sand Mountain area were approved in 1971 under the 1970 Change Application. Longley may not at this late date assert that his water rights are adversely affected by the rights Leucadia enjoys under the approved 1970 Change Application. Such an attempt is nothing more than an unlawful collateral attack on the final agency decision that approved Leucadia's 1970 Change Application.

**C. Longley Did Not Have a "Constitutional Right to Protest."**

Contrary to Longley's conclusion that he had a "constitutional right to protest state action that would affect his vested property rights," (Longley Brief at 18), the right to protest an extension request is simply an opportunity afforded the public by statute to voice concerns and viewpoints.

In the context of the State Engineer's administrative proceedings, the right to protest is not a due process requirement of the Utah Constitution. The procedures provided, such as an opportunity to protest, are not "property" protected by due process. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985).

The State Engineer, upon receiving an extension request, is required by statute to publish in an appropriate newspaper notice of the extension request. As with the approximately 3,000 various water right applications which are advertised by the State Engineer each year,<sup>9</sup> notice is given to the public so that any interested person may file a protest to voice concerns and provide viewpoints to the State

Engineer. *Badger*, 922 P.2d at 750, n. 9.<sup>10</sup> The concerns and viewpoints presented assist the State Engineer in determining whether the various water right applications should be approved or denied. Section 73-3-12 creates no vested or constitutional right to protest. *Id.* Rather, Section 73-3-12 provides an opportunity for those with genuine concerns to present them to the State Engineer for his consideration.<sup>11</sup>

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<sup>9</sup> The type and number of applications processed and advertised for the past four fiscal years is as follows:

<u>Applications</u>	<u>1993-94</u>	<u>1994-95</u>	<u>1995-96</u>	<u>1996-97</u>
Appropriation	876	1023	975	739
Change	685	860	1035	<b>1070</b>
Extension	863	878	1078	<b>1025</b>
Exchange	126	111	144	<b>128</b>
Non-Use	<u>106</u>	<u>55</u>	<u>87</u>	<u><b>54</b></u>
TOTAL	2656	2927	3319	3016

*Utah Division of Water Rights Annual Reports* on file at the Division of Water Rights.

<sup>10</sup> In a recent explanation by the Utah Supreme Court regarding the purposes of protests and publishing notice of water right applications, the Court stated:

Although this provision does appear to acknowledge the wide range of interests and impacts relating to allocation and adjustment of water rights, it does not create in any “interested” person a vested right to protest and subsequent entitlement to appeal. Rather it simply allows those persons who have a genuine concern about proposed changes in water rights to voice those concerns before the State Engineer and, as an important corollary, provides the State Engineer with all viewpoints relevant to any proposal.

*Badger*, 922 P.2d at 750, n. 9.

<sup>11</sup> Neither is the opportunity to protest in order to decrease the future competition for water a “constitutional right.” Decreasing the future competition for water is an incidental benefit of the State Engineer’s decision to lapse an application. Obviously, if an extension request is denied, no other appropriator’s rights are adversely affected. No other appropriator’s rights are automatically increased by the lapsing of a water right. If another appropriator wishes to play a role in the State Engineer’s decision, ample opportunity exists by filing a timely protest pursuant to § 73-3-12. Also, other appropriators have the opportunity to challenge directly another appropriator’s due diligence by filing a request for agency action with the State Engineer pursuant to § 73-3-13.

**D. Simply Because Longley Raised Various Claims and Requested “Notice of Any Further Action” Did Not Entitle Longley to Actual Notice.**

Longley contends he was entitled to more notice than the statutory-mandated notice by publication because of the circumstances surrounding a 1992 State Engineer decision.<sup>12</sup> (Longley Brief at 23, 24.) Longley also contends he was entitled to actual notice because in 1989 he requested “notice of any further action.” (R. 353-54). (Longley Brief at 24-28.) But such contentions fail.

A person does not acquire a constitutional right to actual notice by simply raising various claims or by contacting the State Engineer and requesting notice. Persons are entitled to due process protection when their protected property interests are at risk of being deprived by state action. As previously discussed, Longley had no protected property interest at risk of being deprived or adversely affected in Leucadia’s Extension Request proceeding. The notice by publication was adequate under the circumstances of this case. Longley was not entitled to actual notice in the proceeding simply because he requested it and thereby became “reasonably ascertainable.”

Longley attempts to convince this Court that its ruling will only be limited to Longley and have no broader implications. (Longley Brief at 27.) But, the impacts could be devastating to the State’s

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<sup>12</sup> Longley contends that the denial of Leucadia’s Request for Reconsideration of the State Engineer’s July 10, 1992 Memorandum Decision was automatic by operation of law. (See e.g., Longley Brief at 43.) Longley’s contentions, however, are contrary to well-established Utah law. Both of Utah’s appellate courts have addressed the nature of the 20-day “deemed denied” period in § 63-46b-13(3)(b) of UAPA. See e.g. *Harper Investments, Inc. v. Auditing Div.*, 868 P.2d 813, 815-16 (Utah 1994); *49th Street Galleria v. Tax Comm’n*, 860 P.2d 996, 999 (Utah Ct. App. 1993), *cert. denied* 878 P.2d 1154 (Utah 1994). Both courts have held that state agencies may act on requests for reconsideration beyond the 20-day period. *Id.* If an agency acts on a request after the 20-day period expires, it merely resets the 30-day period to seek judicial review under § 63-46b-14. The same result follows under the Division Rule R655-6-17 (1992), which essentially replicates the statutory language in § 63-46b-13, and which must be harmonized with Rule R655-6-18. Rule R655-6-18 conditions judicial review on following § 63-46b-14, the same statute the *Harper* and *49th Street Galleria* Courts relied upon to reach their holdings. Rule R655-6-17 is directory only and does not act to deny the Division from acting upon a request for reconsideration after the 20-day period has expired. See *Beaver County v. Utah State Tax Comm’n*, 916 P.2d 344, 351 (Utah 1996). In addition, the State Engineer’s grant of Leucadia’s Request for Reconsideration was filed in the records in the State Engineer’s office. (R. 54.) Longley, like all persons, is charged with constructive notice of those records. Contrary to Longley’s allegations, the grant of the request for reconsideration did not trigger a “greater duty on the part of the State Engineer to countermand . . . the practical effect of [his] decision.” (Longley Brief at 22.)

interest in maintaining secure and stable water rights and could create impossible administrative burdens for the State Engineer.

The facts, as stated by Longley, are:

In late October or early November 1989, I contacted the State Engineer's Office to see if I could intervene at that time in any way and requested that I be given notice of any further action on the matter.

(R. 353-54).<sup>13</sup> The State Engineer is responsible for administering approximately 120,000 water rights.

The State Engineer has no statutory or regulatory duty to keep track of all persons who may "contact" his office over the years and request notice of any further action on particular water rights. If such a duty were found to exist by reason of due process, as urged by Longley, thousands of persons, including water users and other members of the public, could contact the State Engineer's office and simply ask for "notice of any further action" on any number of water right matters. The State Engineer would then be obligated to prepare and mail annually potentially thousands of notices whenever any of the multiple types of water right applications are filed or action is taken on those applications. Such a task is overwhelmingly burdensome on the State Engineer and contrary to the reasonable procedures outlined by the Legislature.

Not only would the procedural requirement suggested by Longley be unduly burdensome and impossible to administer, it would also put at risk the stability of water rights in this State. For example, should the State Engineer fail to provide actual notice to persons who "contacted" the State Engineer's office, then any action taken on those potentially thousands of water right proceedings

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<sup>13</sup> Another salient fact is that an extension request proceeding is an administrative proceeding, unlike general adjudications of water rights that adjudicate all water rights within a certain drainage area in a judicial proceeding. The case at hand is thereby clearly distinguishable from cases cited by Longley which involve general adjudication proceedings. See *e.g.*, *Department of Ecology v. Acquavella*, 674 P.2d 160 (Wash. 1983).

could be put in jeopardy and subject to litigation. The water rights administration process would thereby become unduly burdensome for water users and the security of their water rights would become uncertain and subject to unnecessary risk.

The notice-by-publication procedure for water right applications has been followed and relied upon by the water user community and the public for over 90 years. *See* Laws of Utah 1903, ch. 100, § 37. The Legislatively created procedure has served this State well and is adequate for due process purposes. *Whitmore*, 154 P.2d at 750. The notice by publication of Leucadia's Extension Request was constitutionally adequate and Longley was not entitled to actual notice simply because he requested it.

### **III. THE APRIL 1994 PUBLISHED NOTICE COMPLIED WITH UTAH LAW.**

The April 1994 Notice of Leucadia's Extension Request fully complied with Utah law. The district court found that the notice "contained information that informed the public of the diligence claimed and the reason for the request . . . [and] described the water rights at issue with sufficient detail[.]" (R. 535.) The district court also properly concluded that "[t]he State Engineer's notice [by] publication of Leucadia's Extension Request was sufficient to comply with Utah law." (R. 536.) Longley challenges the district court's findings and conclusions, and hence, the validity of the State Engineer's approval of the Extension Request, on the basis that the published notice did not strictly comply with state law. (Longley Brief at 33-42.) Both of Longley's arguments--that the notice did not strictly comply with the statute and that strict compliance with the statute is necessary--are without merit.

**A. The Published Notice Strictly Complied with the Statutory Requirements.**

Before they may be approved by the State Engineer, notices of requests for extensions of time must be published in compliance with Section 73-3-12(1) of the Utah Code, which provides, in relevant part:

(e)(i) The state engineer shall publish notice once each week for three successive weeks in a newspaper of general circulation in the county in which the source of supply is located.

(ii) The notice shall contain information that will inform the public of the diligence claimed and the reason for the request.

Utah Code Ann. § 73-3-12(1)(e)(i), -(ii) (1989). The published notice of Leucadia's Extension Request satisfied these requirements. Notice was published for three successive weeks, on April 1, April 7, and April 14, 1994, in the *Daily Spectrum* newspaper in Washington County, the county in which the Water Rights are located. (R. 287, 290, 535.) The notice clearly described the nature of the proceedings and correctly identified the water rights at issue. The published notice informed the public of the diligence claimed; the notice stated that Leucadia was proposing to add six points of diversion to the Water Rights, including six 16-inch underground water wells up to 800-feet deep. (R. 290, 535.) The notice also indicated that the reason for the extension request was that more time was needed to place the water to beneficial use in Washington County. (R. 290, 535.) The notice also contained the correct legal descriptions of the six proposed points of diversion. The April 1994 notice clearly provided Longley and the public with adequate and proper notice of Leucadia's Extension Request proceeding.

Longley contends that the notice provision in the extension request statute should be strictly construed to avoid constitutional difficulties. Longley argues that such difficulties can be avoided only if adequate notice is provided to parties, such as Longley, with affected property interests. (Longley Brief at 33.) Appellees have demonstrated, however, that Longley's water rights were not at issue in the

Extension Request proceeding and could not have been adversely affected. Therefore, there are no “constitutional difficulties” with the statute. *See* Section II, *supra*. An analysis of the notice provision and the State Engineer’s jurisdiction under the extension request statute further demonstrates that only Leucadia’s Water Rights were at issue in the proceedings before the State Engineer.

**1. The State Engineer’s Jurisdiction is Limited under the Extension Request Statute and the Notice Provision is Consistent with that Limited Jurisdiction.**

As an administrative agency, the Division of Water Rights, including the State Engineer as its director, receives its authority as a matter of statutory grant. *See e.g., Harmon v. Ogden City Civil Service Comm’n*, 917 P.2d 1083, 1084 (Utah 1996); *Piercey v. Civil Service Comm’n*, 208 P.2d 1123, 1126 (Utah 1949). Such authority is limited by the legislative grant. *Harmon*, 917 P.2d 1084. The Utah Supreme Court has recently held that the State Engineer’s jurisdiction, and therefore, his authority may be “circumscribed by the criteria upon which the statute permits [him] to base [his] decision.” *Badger v. Brooklyn Canal Co.*, 922 P.2d 745, 750-51 (Utah 1996). Under Section 73-3-12, the scope of the State Engineer’s deliberations regarding extension requests is limited to determining whether the applicant affirmatively shows that diligence has been pursued in constructing the required waterworks or whether the applicant can show a reasonable cause for delay. *See* Utah Code Ann. § 73-3-12(1)(g) (1989). The State Engineer is not authorized to reopen the change application proceeding to reconsider any of the criteria associated with the approval of the change application. *See e.g.,* Utah Code Ann. §§ 73-3-3, -8 (1989). The determination in change application proceedings regarding whether existing rights may be impaired by the approval of the requested change is not within the State Engineer’s jurisdiction in an extension request proceeding. Thus, the only subject matter over which the State Engineer has jurisdiction in an extension request proceeding is whether to approve or deny the extension request. The

extension request statute is not designed to grant the State Engineer jurisdiction or authority over Longley's water rights, or any other non-applicant's water rights. The plain language of the notice provision is consistent with the limited jurisdictional grant.

The notice provision in Section 73-3-12 is a "public notice" provision intended to provide notice of the pending extension request to the general public. It clearly is not designed to secure personal jurisdiction over other water users or "persons interested." Indeed, under the statutory grant, the State Engineer can approve an extension request for fourteen years after a change application is approved without even giving notice of the request.<sup>14</sup> This demonstrates that the Legislature did not intend to grant the State Engineer jurisdiction over any substantive rights other than the applicant's rights associated with the request. Statutes must be construed as a whole, giving effect to all of their provisions, and those provisions must be reconciled and harmonized. *Magnesium Corp. of America v. Air Quality Bd.*, 941 P.2d 653, 659 (Utah Ct. App. 1997). The obvious conclusion upon reading Section 73-3-12(1)(d) together with Section 73-3-12(1)(e) is that the notice provision is a public notice provision, not a jurisdictional notice provision.

Furthermore, the State Engineer, not Longley, is the party that is protected by the public notice provision in Section 73-3-12(1). The notice provision is designed to provide notice to the public of a pending extension request and to invite an interested public to participate in the proceedings. Participation by an interested public ensures that the State Engineer receives all of the possible viewpoints relevant to the request and ensures that the State Engineer is fully informed. *Badger*, 922 P.2d at 750 n.9. The notice provision is not intended to protect water users, or other "persons interested," whose rights are

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<sup>14</sup> Utah Code Ann. § 73-3-12(1)(d) (1989) provides:  
Extensions not exceeding 14 years after the date of approval may be granted by affidavit and shall be filed in the office of the State Engineer on or before the date fixed for filing proof of appropriation.



not within the statutory jurisdiction of the State Engineer. Neither does the notice provision create “a vested right to protest and subsequent entitlement to appeal.” *Id.* Longley’s assertion that the notice provision “was designed to protect the public and other water users from unwarranted and unnotified deprivations of their property interests” demonstrates a fundamental misunderstanding about the nature of extension request proceedings. (Longley Brief at 34.)

**2. The April 1994 Notice Contained All of the Elements Required by the Extension Request Statute.**

Longley contends that the published notice did not contain certain elements required by the statute, and therefore, failed to comply with the statutory requirements. (Longley Brief at 29-32, 35-41.) Longley complains that the notice did not contain “evidence” of the diligence claimed, the reason for the delay/request, and adequate legal descriptions for the locations of the proposed wells. (Longley Brief at 36-37, 37-40, and 29-32, 40-41, respectively.) Longley is wrong.

The notice provision provides, in pertinent part:

The notice shall contain information that will inform the public of the diligence claimed and the reason for the request.

Utah Code Ann. § 73-3-12(1)(e)(ii)(1989). The plain language of the statute does not require that the notice contain an express declaratory statement regarding the diligence claimed or the reason for the extension request. It also does not require, as Longley seems to assert, that “evidence” be provided of the diligence claimed, nor does it require that the notice contain such information that the public can ascertain whether the applicant will be able to make an affirmative showing before the State Engineer of the diligence claimed. (*See* Longley Brief at 36-37.) Instead, the plain language of the statute only requires that information be given of the diligence claimed. If no diligence is claimed, such as where the

construction of the required waterworks is reasonably delayed, the notice of an extension request is not deficient or inadequate if it does not contain information regarding diligence that is not claimed. The notice provision only requires that information be given of the diligence claimed, if there is diligence claimed.

**a. The April 1994 notice provided information that informed the public of the diligence claimed.**

In the case of the April 1994 notice, however, information was provided that informed the public of the diligence claimed, or in other words, of the status of the construction of the required waterworks.

The published notice stated:

Terracor (Leucadia Financial Corp.) proposes to change the POD [points of diversion] of water as evidenced by [the Water Rights] . . . [by] adding the following . . . wells.

(R. 290.) Thus, the notice apprised the public regarding the status of the construction of the waterworks required by the Change Application.

The scope and detail of the information that must be included in the notice to the public under the notice provision is determined in large part by considering the purpose of the extension request statute. The purpose of the statute is to ensure that water rights are diligently developed. As previously discussed, the principal purposes of the notice provision are: (1) to ensure the State Engineer is fully informed regarding the pending extension request; and (2) to give interested members of the public an opportunity to participate in the proceedings. Because the published notice is not jurisdictional, it does not require that all water users in the water basin be fully informed so that they can prepare to defend their individual substantive rights. Those rights are not at risk. The detail required to be published need only be sufficient to inform the public of the diligence claimed or, that is to say, the status of the effort to

construct the required waterworks.

The April 1994 notice states that Leucadia was proposing to add six new wells as additional points of diversion. Because Leucadia was proposing to add the wells, obviously, the wells had not been constructed. This information indicates the status of the construction of the required waterworks, and therefore, informed the public of the diligence (or effort) claimed. The public was informed that the required works had not been constructed, and that no well had been completed as originally proposed. This certainly is sufficient information to inform an interested or concerned public about the diligence claimed, and to permit the public to decide whether to participate in Leucadia's Extension Request proceedings.

Longley's apparent assertions that the information published in the notice regarding the diligence claimed must be proffered as evidence of the construction of the works and application of water to beneficial use (Longley Brief at 36), and must be "statements of actions that [would be] adequate to constitute diligence" (Longley Brief at 37) are misleading and are not based on existing law. Clearly, there is no "evidentiary standard" in the plain language of the notice provision, nor is there a statutory requirement that the notice spell out the diligence claimed (or reason for the request) in detail sufficient to make the affirmative showing before the State Engineer.

**b. The April 1994 notice provided the reason for the Extension Request.**

Longley states that "Utah law . . . requires that the notice published for an Extension Request inform the public of the reason for the delay." (Longley Brief at 37 (emphasis added).) Longley grossly misstates the plain language of the notice provision. The statute provides that information must be given to inform the public of "the reason for the request." Utah Code Ann. § 73-3-12(1)(e)(ii)(1989) (emphasis

added). The statute requires that the reason for the request be given, not the reason for delay.<sup>15</sup>

Furthermore, the plain language of the statute also does not require that the notice contain a brief declarative statement or justification for delay. (*See e.g.*, Longley Brief at 38.) Nevertheless, Longley's contentions aside, the April 1994 notice complied with the statutory requirement because it provided the reason for Leucadia's Extension Request. The notice stated:

It is represented that additional time is needed to place the water to beneficial use in Washington County.

(R. 290 (emphasis added).) Thus, the published notice stated that the reason for the request was "that additional time [was] needed to place the water to beneficial use in Washington County."

Longley mistakenly refers to the statement in the published notice as part of the "boiler-plate introductory language" at the top of the notice. (Longley Brief at 38.) However, the statement providing the reason is not "boiler-plate introductory language;" it is an independent sentence that clearly indicates the reason for the request. In fact, it uses the exact prefatory phrase that was used in Leucadia's earlier extension requests: "It is represented that." (*See e.g.*, R. 369-70, 372.) It is hard to understand why Longley accepts that such language is sufficient when used in the earlier requests, but is unwilling to accept it as sufficient in the April 1994 notice. (*See e.g.* Longley's Brief at 39; R. 341.) Again, Longley is requiring that the notice contain information that will satisfy the "affirmative showing" requirement regarding justified or unjustified delay. Longley misreads the notice provision because there is no such requirement in the law.

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<sup>15</sup> In fact, an extension request may not even involve any delay. The construction of the required waterworks may have just taken longer than expected.

**c. The April 1994 notice correctly located each of the proposed wells.**

Longley also complains that the legal descriptions for the proposed wells in the published notice were inaccurate, inadequate, uncertain, and confusing. Therefore, Longley argues, he failed to receive adequate notice of Leucadia's Extension Request. (Longley Brief at 30, 40.) Again, Longley is simply wrong. Each new point of diversion was referenced to a corner, section number, and township and range. Examining the legal descriptions for the wells as published<sup>16</sup> and comparing them with the legal descriptions listed in the 1970 Change Application demonstrates that the published legal descriptions were accurate and complete.

The April 1994 notice legal descriptions were published as follows:

POD: Same as Heretofore, but adding the following 16 in. wells 0 to 800 ft. deep: (1) S 50 E 2531, (2) S 2343 E 253 from NW Cor, Sec 25, (3) S 50 E 50 from NW Cor, (4) S 50 W 66, (5) S 2343 W 50 from NE Cor, (6) S 2343 E 2970 from NW Cor, Sec 26, T42S, R14W.

(R. 290.) The well locations were published in a sentence form, which relied upon commas as punctuation for several important and sometimes multiple purposes. The commas were used to separate the references to the individual wells, which are indicated by serial numbers enclosed within parentheses. This is a very common style of usage. *See e.g., The Chicago Manual of Style* 173 (14th ed. 1993). The commas were also used to indicate the omission of words that are understood by the context of the sentence. This is known as an elliptical construction and also is often used. *Id.* at 176. In addition, the commas were used to separate elements that grammatically belonged to two or more wells, but were

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<sup>16</sup> In his brief, Longley lists the proposed new points of diversion in a form that is misleading. (See Longley Brief at 9, 29 n.16.) The points of diversion as published were not listed in a table, they were listed in the form of a sentence that used punctuation very purposefully. Longley's tabular listing misleadingly isolates the courses and distances for the individual diversion points and de-emphasizes the punctuation used. While a tabular listing is convenient for comparison purposes, Longley's tabular listing is inaccurate because it distorts the actual published notice.

expressed only after the last well. This also is an accepted usage of commas.<sup>17</sup> *See e.g. New York Public Library Writer's Guide to Style and Usage* 255 (1994).

It is apparent from the published legal descriptions for the proposed points of diversion that the comma following the course and distance for wells (1) and (4) replaces the phrase “from NW Cor, Sec 25” for well (1) and “from NE Cor,” for well (4). This usage style follows the pattern in the “HERETOFORE” section of the published notice, where the course and distance are followed by the relevant corner reference. (*See e.g. R. 290.*) Also apparent is that the commas following the indicated corners in the descriptions for wells (3), (4), and (5) replace “Sec 26,” which follows the corner indicator for well (6). Also consistent with the pattern in the HERETOFORE section of the notice is that the township and range for each point is placed at the end of the “sentence,” and therefore, follows the preceding section number(s). This is the third type of usage described above.

The legal descriptions of the proposed wells, when read as a sentence consistent with the form in which they were actually published, were properly punctuated (no semi-colon necessary (Longley Brief at 29)), used conventional usage styles, and properly attributed each course and distance for the individual wells to a corner, section, township, and range. Moreover, comparing the descriptions in the April 1994 notice and the legal descriptions listed in the approved 1970 Change Application demonstrates that the April 1994 legal descriptions are accurate and complete.

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<sup>17</sup> A further example of this style of usage is: “We approve of, and are willing to participate in, the new 4-day work week.” The element “the new 4-day work week” belongs to both of the proceeding phrases. *New York Public Library Writer's Guide to Style and Usage* 255 (1994).

Wells as Listed in April 1994 Notice

- (1) S 50 E 2531,
- (2) S 2343 E 253 from NW Cor, Sec 25,
- (3) S 50 E 50 from NW Cor,
- (4) S 50 W 66,
- (5) S 2343 W 50 from NE Cor,
- (6) S 2343 E 2970 from NW Cor, Sec 26,  
T42S, R14W

Equivalent Wells as Listed in Change Application

- S 49.5 feet and E 2531 from NW cor. Sec. 25,  
T42S, R14W,
- S 2343 feet and E 253 feet from NW cor. Sec. 25,  
T42S, R14W,
- S 49.5 feet and E 49.5 [feet] from NW cor. Sec. 26, T42S,  
R14W,
- S 49.5 feet and W 66 feet from NE cor. Sec. 26,  
T42S, R14W,
- S 2343 feet and W 49.5 feet from NE cor.  
Sec. 26, T42S, R14W,
- S 2343 feet and E 2970 feet from NW cor. Sec. 26,  
T42S, R14W,

All SLB&M.

Examining the descriptions in the April 1994 notice, locations of wells (1) and (2) are measured from the NW corner of Section 25, well (3) is measured from the NW corner of Section 26, wells (4) and (5) are measured from the NE corner of Section 26, and well (6) is measured from the NW corner of Section 26. All of the wells are located in Township 42 South, Range 14 West. Based on the township and range, it is obvious that the descriptions are based on the Salt Lake Base and Meridian; there is no other official base and meridian in Washington County. The only difference between the legal descriptions in the April 1994 notice and the 1970 Change Application involves the removal of redundant information from the April 1994 notice. The legal descriptions correctly state the locations of the proposed wells. The notice fully complied with the statutory requirements.

Longley's reliance on *Eldorado at Santa Fe, Inc. v. Cook*, 822 P.2d 672 (N.M. Ct. App. 1991) is misplaced. In *Eldorado*, the published notice contained a significant error, it located the land affected by the pending change application in the wrong land grant. *Id.* at 673. The *Eldorado* Court remanded the matter based on a procedural error, the publication of an inaccurate legal description.<sup>18</sup>

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<sup>18</sup> It is worth noting that the Eldorado Court did not remand the matter based on the lack of actual notice or personal service, as Longley urges here. Obviously, notice by publication of the change application is sufficient to meet due process concerns in New Mexico, as it is in Utah. *Whitmore v. Murray City*, 154 P.2d 748, 750 (Utah 1944).

*Id.* at 675. Leucadia's Extension Request proceeding clearly is distinguishable from the *Eldorado* case because the April 1994 notice does not contain inaccurate legal descriptions for the proposed wells. The *Eldorado* decision is further distinguishable because the *Eldorado* matter concerned a proceeding involving a change application, whereas, the present matter involves Leucadia's Extension Request proceeding. The difference is significant because the extension request proceeding only involves Leucadia's water rights, no other rights can be adversely affected by the State Engineer's Decision.

**B. Strict Compliance with the Notice Provision is not Required.**

Longley argues that due process concerns require that the State Engineer must strictly comply with the statutory notice requirements in Section 73-3-12(1)(e). (Longley Brief at 33-35.) Longley relies on Utah cases that have held that strict compliance is required whenever a party's substantive rights may be affected. (Longley Brief at 33, citing *Badger v. Madsen*, 896 P.2d 20, 33 (Utah Ct. App. 1995); *W. & G. Co. v. Redevelopment Agency*, 802 P.2d 755, 760-61 (Utah Ct. App. 1990)).) However, Longley's concerns are misplaced and his arguments must fail because Longley's substantive rights cannot be affected in the Extension Request proceeding. Under Section 73-3-12, the State Engineer has not been granted jurisdiction over the public and other water users' substantive rights, either with or without published notice. Accordingly, Longley's substantive rights are not at risk in Leucadia's Extension Request proceedings.

Although the April 1994 notice did strictly comply with Section 73-3-12(1)(e), assuming *arguendo* that the published notice was technically deficient in some respect, nevertheless, the published notice substantially complied with the statutory requirements. In the absence of statutory language requiring strict adherence or establishing a prohibition as a consequence of noncompliance with the



statutory requirement, substantial compliance with a notice statute is sufficient. *Stahl v. Utah Transit Authority*, 618 P.2d 480, 482-83 (Utah 1980); *accord Felida Neighborhood Assoc. v. Clark County*, 913 P.2d 823, 826 (Wash. Ct. App. 1996) (“Failure to satisfy the notice requirements of the statute is excused where substantial compliance resulted in full and adequate notice.”), *review denied*, 922 P.2d 98 (Wash.). Moreover, as this Court recognized in *Badger v. Madsen*, 896 P.2d 20 (Utah Ct. App. 1995):

When determining whether substantial statutory compliance as opposed to strict statutory compliance should be permitted, we must be ascertain [sic] whether full protection under the statute would be enjoyed by the party the statute seeks to protect. If “substantial . . . compliance satisfies the policy of the statute[,]” then strict compliance is not in order. . . . Furthermore, “[c]ourts in evaluating the necessity for strict compliance . . . focus upon the nature of the statutory requirements and the likelihood of prejudice. If failure to adhere to the requirements will affect a substantive right of one of the parties and possibly prejudice that party, then courts require strict compliance. On the other hand, if the requirements are merely procedural and will not prejudice one of the parties, substantial compliance is sufficient.”

*Id.* at 23 (citations omitted). Longley’s substantive rights were not at risk in Leucadia’s Extension Request proceeding, and therefore, Longley’s rights could not be adversely affected. The State Engineer, not Longley, is the protected party under the notice provision. The publication of the notice of Leucadia’s Extension Request was merely procedural and intended to ensure that the State Engineer was fully informed in the proceeding. Therefore, substantial compliance with the notice provision was sufficient. Under either a strict or substantial compliance analysis, the April 1994 notice complied with Utah law.

## CONCLUSION

In this case it was not state action which deprived Longley of a protected property interest. Rather, it was Longley’s inaction which deprived Longley of an opportunity to protest Leucadia’s Extension Request. The district court’s “Order Granting Defendants’ Motion for Summary Judgment” should be affirmed.

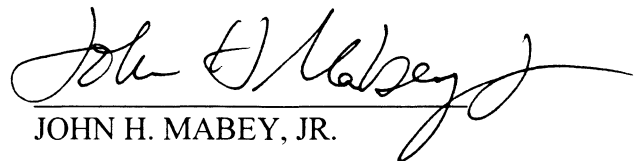
**REQUEST FOR ORAL ARGUMENT  
AND PUBLISHED OPINION**

The Appellees request both oral argument and a published opinion from the Utah Court of Appeals. A fully reasoned opinion after oral argument should be issued because this case involves the fundamental procedures by which the State Engineer administers the 120,000 water rights of the State and provides notice of the approximately 3,000 various water right applications filed each year.

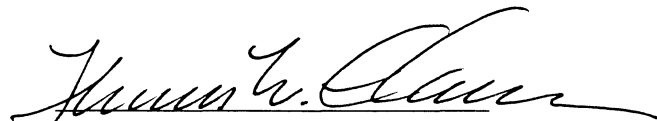
RESPECTFULLY submitted this 22nd day of September, 1997.

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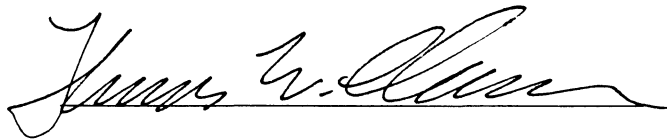
Attorneys for Defendant-Appellee  
Leucadia Financial Corporation

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September, 1997, two true and correct copies of the BRIEF OF APPELLEES were served by mailing the same, first-class postage prepaid, addressed as follows:

J. Craig Smith  
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A handwritten signature in black ink, appearing to read "Gary G. Kuhlmann", written over a horizontal line.

## **ADDENDUM**

FIFTH JUDICIAL DISTRICT COURT  
96 NOV 8 AM 8 47  
WASHINGTON COUNTY  
BY                     

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IN THE FIFTH JUDICIAL DISTRICT COURT FOR WASHINGTON COUNTY  
STATE OF UTAH

MICHAEL O. LONGLEY,  
  
Plaintiff,  
  
v.  
  
LEUCADIA FINANCIAL  
CORPORATION, TERRACOR, INC.,  
THE CITY OF ST. GEORGE, a municipal  
corporation, and ROBERT L. MORGAN,  
State Engineer of the State of Utah,  
  
Defendants.

ORDER GRANTING DEFENDANTS'  
MOTION FOR SUMMARY  
JUDGMENT

Civil No. 95-0501270 CV

Hon. James L. Shumate

CITY OF ST. GEORGE, a Utah municipal  
corporation,  
  
Cross-Claimant,  
  
vs.  
  
LEUCADIA FINANCIAL  
CORPORATION, TERRACOR, INC.,  
  
Cross-Defendant.

Defendants' Motions for Summary Judgment came before this Court for hearing on October 23, 1996. The Honorable James L. Shumate presided. Plaintiff was present and represented by his counsel, J. Craig Smith. Defendant, Leucadia Financial Corporation ("Leucadia"), was represented by Bryon J. Benevento. Defendant, Robert L. Morgan, was represented by John H. Mabey, Jr. Defendant, the City of St. George, was represented by Gary G. Kuhlmann. Based upon the Motions for Summary Judgment, Memoranda in Support of the Motions for Summary Judgment, Memorandum in Opposition to Motion for Summary Judgment, Reply Memoranda in Support of Motion for Summary Judgment, affidavits submitted in support and in opposition to the Motions for Summary Judgment, oral argument of counsel, and for other good cause appearing thereon;

THE COURT HEREBY FINDS as follows:

1. On April 1, 7 and 14, 1994, the State Engineer published notice of Leucadia's Extension Request in the Daily Spectrum newspaper in Washington County, Utah;
2. The published notice of Leucadia's Extension Request contained information that informed the public of the diligence claimed and the reason for the request;
3. The published notice of Leucadia's Extension Request described the water rights at issue with sufficient detail;
4. Plaintiff concedes that he did not file a protest with the State Engineer within thirty (30) days of the published notice of Leucadia's Extension Request.

WHEREFORE, THE COURT CONCLUDES as follows:

1. The State Engineer's notice of publication of Leucadia's Extension Request was sufficient to comply with Utah law.

2. Plaintiff's protest of Leucadia's Extension Request, if any, was untimely pursuant to Utah Code Ann. § 73-3-12 (1989) and the Utah Administrative Code § R655-6-3(F) (1994);

3. Interested persons must file protests with the State Engineer within 30 days after the notice of an extension request is published in order to participate in the administrative proceedings as a party. Plaintiff did not participate in the administrative proceedings as a party, and therefore, failed to exhaust his administrative remedies as required by Utah Code Ann. § 73-3-14 (1989) and §§ 63-46b-1, 14 (1993); and

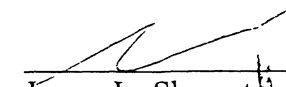
4. Plaintiff lacks standing to seek judicial review of the State Engineer's decision approving Leucadia's Extension Request because he did not file a timely protest, and therefore, failed to exhaust his administrative remedies as required by Utah Code Ann. § 63-46b-14 (1993).

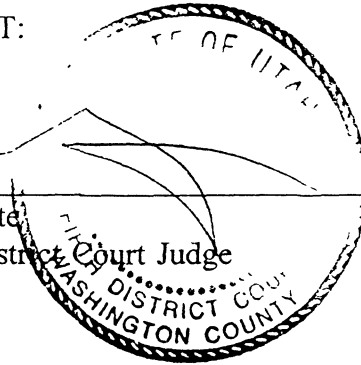
IT IS HEREBY ORDERED that defendants' Motions for Summary Judgment are granted, and plaintiff's Complaint is hereby dismissed.

IT IS FURTHER ORDERED that the Cross-Claim filed by the City of St. George against Leucadia is moot since it is premised upon plaintiff prevailing against defendants in the underlying action. Accordingly, the Cross-Claim is dismissed without prejudice.

DATED this 7 day of November, 1996.

BY THE COURT:

  
James L. Shumate  
Fifth Judicial District Court Judge



Approved as to form:

NIELSEN & SENIOR

By: 

J. Craig Smith  
Attorneys for Plaintiff

\date 11/1/96

UTAH ATTORNEY GENERAL

By: 

John H. Mabey, Jr.  
Attorney for Robert L. Morgan

\date Nov. 1, 1996

ST. GEORGE CITY ATTORNEY

By: 

Gary G. Kuhlmann  
Attorney for City of St. George

\date 11-6-96



VAN COTT, BAGLEY, CORNWALL & McCARTHY

By: Thomas W. Clawson \date 11-1-96  
Thomas W. Clawson  
Attorneys for Leucadia Financial Corporation

**63-46b-14. Judicial review — Exhaustion of administrative remedies.**

(1) A party aggrieved may obtain judicial review of final agency action, except in actions where judicial review is expressly prohibited by statute.

(2) A party may seek judicial review only after exhausting all administrative remedies available, except that:

(a) a party seeking judicial review need not exhaust administrative remedies if this chapter or any other statute states that exhaustion is not required;

(b) the court may relieve a party seeking judicial review of the requirement to exhaust any or all administrative remedies if:

(i) the administrative remedies are inadequate; or

(ii) exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion.

(3) (a) A party shall file a petition for judicial review of final agency action within 30 days after the date that the order constituting the final agency action is issued or is considered to have been issued under Subsection 63-46b-13(3)(b).

(b) The petition shall name the agency and all other appropriate parties as respondents and shall meet the form requirements specified in this chapter.

**73-3-14. Judicial review — State engineer as defendant.**

(1) (a) Any person aggrieved by an order of the state engineer may obtain judicial review by following the procedures and requirements of Chapter 46b, Title 63.

(b) Venue for judicial review of informal adjudicative proceedings shall be in the county in which the stream or water source, or some part of it, is located.

(2) The state engineer shall be joined as a defendant in all suits to review his decisions, but no judgment for costs or expenses of the litigation may be rendered against him.

**73-3-12. Time limit on construction and application — Extensions — Approval — Decisions of engineer — Appeal — Application without proof.**

- (1) (a) The construction of the works and the application of water to beneficial use shall be diligently prosecuted to completion within the time fixed by the state engineer.
  - (b) Extensions of time, not exceeding 50 years from the date of approval of the application, may be granted by the state engineer on proper showing of diligence or reasonable cause for delay.
  - (c) All requests for extension of time shall be made by affidavit and shall be filed in the office of the state engineer on or before the date fixed for filing proof of appropriation.
  - (d) Extensions not exceeding 14 years after the date of approval may be granted by the state engineer upon a sufficient showing by affidavit, but

extensions beyond 14 years shall be granted only after application and publication of notice.

- (e) (i) The state engineer shall publish notice once each week for three successive weeks in a newspaper of general circulation in the county in which the source of supply is located.
    - (ii) The notice shall contain information that will inform the public of the diligence claimed and the reason for the request.
  - (f) Any person interested may, at any time within (30) days after the notice is published, file a protest with the state engineer.
  - (g) In considering an application to extend the time in which to place water to beneficial use under an approved application, the state engineer shall deny the extension and declare the application lapsed, unless the applicant affirmatively shows that he has exercised or is exercising reasonable and due diligence in working toward completion of the appropriation.
  - (h) (i) If reasonable and due diligence is shown by the applicant, the state engineer shall approve the extension.
    - (ii) The approved extension is effective so long as the applicant continues to exercise reasonable diligence in completing the appropriation.
  - (i) The state engineer shall consider the holding of an approved application by any municipality, metropolitan water district, or other public agency to meet the reasonable future requirements of the public to be reasonable and due diligence within the meaning of this act.
  - (j) The state engineer, in acting upon requests for extension of time, may, if he finds unjustified delay or lack of diligence in prosecuting the works to completion, deny the extension or may grant the request in part or upon conditions, including a reduction of the priority of all or part of the application.
- (2) (a) An application upon which proof has not been submitted shall lapse and have no further force or effect after the expiration of 50 years from the date of its approval.
    - (b) If the works are constructed with which to make beneficial use of the water applied for, the state engineer may, upon showing of that fact, grant additional time beyond the 50-year period in which to make proof.

**73-3-3. Permanent or temporary changes in point of diversion or purpose of use.**

- (1) For purposes of this section:
  - (a) "Permanent changes" means changes for an indefinite length of time with an intent to relinquish the original point of diversion, place, or purpose of use.
  - (b) "Temporary changes" means all changes for definitely fixed periods not exceeding one year.
- (2) (a) Any person entitled to the use of water may make:
  - (i) permanent or temporary changes in the place of diversion;
  - (ii) permanent or temporary changes in the place of use; and
  - (iii) permanent or temporary changes in the purpose of use for which the water was originally appropriated.

(b) No change may be made if it impairs any vested right without just compensation.
- (3) Both permanent and temporary changes of point of diversion, place, or purpose of use of water, including water involved in general adjudication or other suits, shall be made in the manner provided in this section.
- (4) (a) No change may be made unless the change application is approved by the state engineer.
- (b) Applications shall be made upon forms furnished by the state engineer and shall set forth:

  - (i) the name of the applicant;
  - (ii) a description of the water right;
  - (iii) the quantity of water;
  - (iv) the stream or source;
  - (v) the point on the stream or source where the water is diverted;
  - (vi) the point to which it is proposed to change the diversion of the water;
  - (vii) the place, purpose, and extent of the present use;
  - (viii) the place, purpose, and extent of the proposed use; and
  - (ix) any other information that the state engineer requires.
- (5) (a) The state engineer shall follow the same procedures, and the rights and duties of the applicants with respect to applications for permanent changes of point of diversion, place, or purpose of use shall be the same, as provided in this title for applications to appropriate water.
- (b) The state engineer may, in connection with applications for permanent change involving only a change in point of diversion of 660 feet or less, waive the necessity for publishing a notice of application.
- (6) (a) The state engineer shall investigate all temporary change applications.
- (b) If the state engineer finds that the temporary change will not impair any vested rights of others, he shall issue an order authorizing the change.

(c) If the state engineer finds that the change sought might impair vested rights, before authorizing the change, he shall give notice of the application to all persons whose rights might be affected by the change.

(d) Before making an investigation or giving notice, the state engineer may require the applicant to deposit a sum of money sufficient to pay the expenses of the investigation and publication of notice.
- (7) (a) The state engineer may not reject applications for either permanent or temporary changes for the sole reason that the change would impair the vested rights of others.
- (b) If otherwise proper, permanent or temporary changes may be approved as to part of the water involved or upon the condition that conflicting rights are acquired.

- (8) (a) Any person holding an approved application for the appropriation of water may either permanently or temporarily change the point of diversion, place, or purpose of use.
  - (b) No change of an approved application affects the priority of the original application, except that no change of point of diversion, place, or nature of use set forth in an approved application will enlarge the time within which the construction of work is to begin or be completed.
- (9) Any person who changes or who attempts to change a point of diversion, place, or purpose of use, either permanently or temporarily, without first applying to the state engineer in the manner provided in this section:
  - (a) obtains no right; and
  - (b) is guilty of a misdemeanor, each day of the unlawful change constituting a separate offense, separately punishable.
- (10) (a) The provisions of this section do not apply to the replacement of an existing well by a new well drilled within a radius of 150 feet from the point of diversion from the existing well.
  - (b) No replacement well may be drilled except after complying with the requirements of Section 73-3-28.
- (11) (a) The Division of Wildlife Resources may file applications for permanent or temporary changes according to the requirements of this section on:
  - (i) perfected water rights presently owned by the Division of Wildlife Resources;
  - (ii) perfected water rights purchased by that division through funding provided for that purpose by legislative appropriation, or acquired by lease, agreement, gift, exchange, contribution; or
  - (iii) appurtenant water rights acquired with the acquisition of real property for other wildlife purposes.
- (b) (i) Subsection (a) allows changes only be for the limited purpose of providing water for instream flows in natural channels necessary for the preservation or propagation of fish within a designated section of a natural stream channel.
  - (ii) Subsection (11) does not allow enlargement of the water right sought to be changed nor may the change impair any vested water right.
- (c) In addition to the other requirements of this section, an application filed by the Division of Wildlife Resources shall:
  - (i) set forth the points on the natural stream between which the necessary instream flows will be provided by the change; and
  - (ii) include appropriate studies, reports, or other information required by the state engineer that demonstrate the necessity for the instream flows in the specified section of the natural stream, and the projected benefits to the public fishery that will result from the change.
- (d) (i) The Division of Wildlife Resources may not acquire title or a long-term interest in a water right for the purposes provided in Subsection (11)(b) without prior legislative approval.
  - (ii) After obtaining that approval, the Division of Wildlife Resources may file a request for a permanent change as provided in Subsection (11)(a).
- (e) Subsection (11) does not authorize the Division of Wildlife Resources to:
  - (i) appropriate unappropriated water under Section 73-3-2 for the purpose of providing instream flows; or
  - (ii) acquire water rights by eminent domain for instream flows or for any other purpose.
- (f) Subsection (11) applies only to applications filed on or after April 28, 1986.