

2006

# Western Water v. Jerry D. Olds : Brief of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

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WESTERN WATER, LLC, a Utah  
Limited Liability Company,

Appellant,

vs.

JERRY D. OLDS, Utah State Engineer  
and Director of the Division of Water  
Rights, et al.,

Appellees.

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ON APPEAL FROM THE THIRD DISTRICT COURT OF SALT LAKE COUNTY  
STATE OF UTAH, The Honorable Robert K. Hilder, Presiding  
(Trial Court Case No. 040910869WA)

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Pat Bartholomew, Clerk of the Court  
UTAH SUPREME COURT  
450 South State Street  
Salt Lake City, UT 84114

**Re: Western Water L.L.C. v. Jerry D. Olds, et al.  
Appeal No. 20060527**

Dear Ms. Bartholomew:

In reviewing the joint brief of 22 appellees in the above-referenced case, filed with the Court on or about November 22, 2006, I have notice an error which I wanted to bring to your immediate attention.

In Section II of that brief, the parties in the court proceedings below are listed. The 22 appellees joining in the brief are designated by an asterisk following their respective names. I represent appellee Utah and Salt Lake Canal Company which is listed in Section II of the brief. However, through inadvertence, an asterisk was not placed after Utah and Salt Lake Canal Company. Utah and Salt Lake Canal Company has always intended to join the brief and in speaking with lead counsel for appellees, the lack of an asterisk was inadvertent. Therefore, I would request it be noted that appellee Utah and Salt Lake Canal Company was intended to be included as a party to that brief and fully adopts and concurs in the same.

If there are any problems with this or if you have any questions in this regard, please do not hesitate to contact me. I thank you in advance for your consideration of this matter.

Very truly yours,

PARSONS BEHLE & LATIMER

Michael M. Quealy

MMQ/pct

cc: All counsel of record

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IN THE UTAH SUPREME COURT

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WESTERN WATER, LLC, a Utah  
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vs.

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and Lower Jordan River Water Users Association*

## **I. ORAL ARGUMENT REQUESTED**

Appellees<sup>1</sup> request oral argument because of the important issues on appeal.

## **II. LIST OF PARTIES IN THE COURT BELOW**

Plaintiff/Appellant: Western Water, LLC.

Defendants/Appellees: Jerry D. Olds, State Engineer of the State of Utah; Alpine City\*; American Fork City\*; W. Glade Berry; Bart D. Berry; Cahoon & Maxfield Irrigation Company\*; Cedar Fort Irrigation Company\*; Central Utah Water Conservancy District\*; City of West Jordan; Morris Clark; Robert and Sherri Cook; George Crawford; Rod Dansie; East Jordan Irrigation Company\*; Geneva Steel LLC; Larry and Linda Hadfield; Irvine Ranch & Petroleum Inc. dba Ambassador Duck Club\*; Jordan Valley Water Conservancy District\*; Kennecott Utah Copper Corporation\*; Lake Mountain Mutual Water Company; Lehi City\*; Lehi Spring Creek Irrigation Company\*; Magna Water Company\*; Glenn R. Maughan; Susan Messersmith; Vernal Messersmith; Metropolitan Water District of Salt Lake & Sandy\*; National Audubon Society; New State Inc.; PacifiCorp\*; Provo River Water Users Association\*; Riverton City; Salt Lake City Corporation\*; Sandy City\*; City of Saratoga Springs; Marvin Shepherd; Sierra Club; South Jordan City; State of Utah Division of Forestry, Fire and State Lands; State of Utah Division of Parks and Recreation; State of Utah Division of Wildlife and Recreation; State of Utah Division of Wildlife Resources; Paul Taylor; Edward Thomas; Mary and Edward Thomas; Town of Cedar Fort\*; Trout Unlimited; United States of

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<sup>1</sup> The 22 Appellees who join in this brief are identified by asterisk in Section II, and are referred to herein as Appellees.

America - Bureau of Reclamation; United States Fish & Wildlife Service; United States Department of the Interior - Office of the Secretary; Utah Department of Transportation; Utah Lake Distributing Company\*; Utah Lake Landowners Inc.; Utah Reclamation Mitigation & Conservation Commission; Utah Water Company L.L.C.; Utah Waters; Utah Wetlands Foundation; Utah and Salt Lake Canal Company; Mack and Marie Wagstaff; Shane and Michelle Wagstaff; E. Fred Walters; Dean and Leatrice Willes; Clinger Family Partnership; John Jacob; Evan Johnson; Burnham Duck Club\*; Lehi Irrigation Company\*; North Jordan Irrigation Company; South Jordan Canal Company; Ron and Mindy Sager; Draper Irrigation Company; Lower Jordan Water Users Association\*; Marvin Shepherd; Utah Division of Water Rights; Does 1-50; Roe Corporations 1-50; Moe Municipalities; and/or Governmental Entities 1-50.



### III. TABLE OF CONTENTS

	<u>Page</u>
I. ORAL ARGUMENT REQUESTED .....	i
II. LIST OF PARTIES IN THE COURT BELOW .....	i
III. TABLE OF CONTENTS .....	iii
IV. TABLE OF AUTHORITIES .....	iv
V. STATEMENT OF JURISDICTION .....	1
VI. ISSUES AND STANDARDS OF REVIEW .....	1
VII. CONSTITUTIONAL AND STATUTORY PROVISIONS .....	2
VIII. STATEMENT OF THE CASE .....	3
A. Nature of the Case. ....	3
B. Course of Proceedings .....	5
C. Disposition in the Lower Court. ....	6
IX. STATEMENT OF THE FACTS .....	8
X. SUMMARY OF THE ARGUMENT .....	10
XI. ARGUMENT .....	13
A. The Trial Court Lacked Subject Matter Jurisdiction After Western\ Failed To Exhaust Its Administrative Remedies Concerning Its Amended Applications. ....	13
1. <u>The trial court could not proceed without subject matter jurisdiction.</u> .....	13
2. <u>A plaintiff must exhaust administrative remedies before invoking district court subject matter jurisdiction to review a State Engineer decision.</u> .....	14
3. <u>The State Engineer must advertise and consider an application and any protests.</u> .....	14

4. <u>Western failed to preserve a claim on the Revised Plan.</u>	15
5. <u>Western misunderstands reconsideration because it misapplies Utah Code Ann. § 63-46b-13.</u>	17
a. <u>Reconsideration permits a review of only a final decision.</u>	18
b. <u>Reconsideration means what it says, and the State Engineer correctly addressed Western's request.</u>	19
c. <u>Because finality is a prerequisite to reconsideration under -13, Western could not expect action on its Revised Plan.</u>	20
6. <u>Western conceded that the State Engineer did not consider the Revised Plan.</u>	23
7. <u>The State Engineer could not have considered the Revised Plan without republished notice and a new administrative process.</u>	25
8. <u>The act of denying reconsideration under Utah Code Ann. § 63-46b-13 is not itself a reviewable agency action.</u>	28
<b>B. All Parties Are Entitled To Present Relevant, Admissible Evidence On All Material Issues.</b>	30
1. <u>Substantive Water Law Requires the Full-Fledged Participation of All Defendants in a <i>De Novo</i> Review of the State Engineer's Decision.</u>	31
2. <u>There is No Standing Requirement to Be a Respondent/Defendant.</u>	33
3. <u>Western Misapprehends this Court's Holding in <i>Washington County</i>.</u>	34
4. <u>The Question of Who has Standing to Initiate an Appeal has no Bearing on What Evidence the Court Should Consider Once an Appeal has been Properly Initiated.</u>	36
<b>C. The District Court Had Jurisdiction To Award Costs To The Parties That Prevailed Through A Dismissal On Jurisdictional Grounds.</b>	39
<b>XII. CONCLUSION</b>	41

## IV. TABLE OF AUTHORITIES

	<u>Page</u>
 <b>Cases</b>	
<i>Archer v. Board of State Lands and Forestry</i> , 907 P.2d 1142 (Utah 1995) .....	32
<i>Badger v. Brooklyn Canal Co.</i> , 966 P.2d 844 (Utah 1998) .....	16
<i>Badger v. Brooklyn Canal</i> , 922 P.2d 745 (Utah 1996) .....	16, 32, 33
<i>BAM Development v. Salt Lake County</i> , 2004 UT App 34, 87 P.3d 710.....	16
<i>Beaver County v. Qwest, Inc.</i> , 2001 UT 81, 31 P.3d 1147 .....	1
<i>Blauer v. Department of Workforce Services</i> , 2005 Utah App. 488, 2005 Utah App. LEXIS 473 .....	39
<i>Brady v. McGonagle</i> , 195 P. 188 (Utah 1921).....	29
<i>Burns v. Boyden</i> , 2006 UT 14, 133 P.3d 370 .....	40
<i>C.T. v. Johnson</i> , 977 P.2d 479 (Utah 1999) .....	17
<i>Career Serv. Rev. Bd. v. Dept. of Corrections</i> , 942 P.2d 933 (Utah 1997) .....	20
<i>Chen v. Stewart</i> , 2004 UT 82, 100 P.3d 1177 .....	13
<i>Citizens for a Better Env't v. Steel Co.</i> , 230 F.3d 923 (7th Cir. 2000) .....	40
<i>Clark v. Hansen</i> , 631 P.2d 914 (Utah 1981) .....	13
<i>Crafts v. Hansen</i> , 667 P.2d 1068 (Utah 1983) .....	31
<i>Crump v. Crump</i> , 821 P.2d 1172 (Utah App. 1991) .....	13
<i>Department of Social Servs. v. Vijil</i> , 784 P.2d 1130 (Utah 1989) .....	13
<i>Drury v. Lanceford</i> , 415 P.2d 662 (1966) .....	30
<i>Eardley v. Terry</i> , 77 P.2d 362 (Utah 1938) .....	32

<i>Gillett v. Price</i> , 2006 UT 24, 135 P.3d 861.....	30
<i>Harper Invs., Inc. v. Auditing Div.</i> , 868 P.2d 813 (Utah 1994) .....	17, 21, 22
<i>Housing Authority v. Snyder</i> , 2002 UT 38, 44 P.3d 724.....	14
<i>Jackson v. Mateus</i> , 2003 UT 18, 70 P.3d 78.....	17
<i>Maverik Country Stores, Inc. v. Industrial Comm’n.</i> , 860 P.2d 944 (Utah App. 1993).....	20, 30
<i>Nebeker v. Utah State Tax Comm’n.</i> , 2001 UT 74, 34 P.3d 180 .....	14
<i>Ong Int’l (U.S.A.), Inc. v. 11th Ave. Corp.</i> , 850 P.2d 447 (Utah 1993).....	2
<i>Perrine v. Kennecott Mining Corp.</i> , 911 P.2d 1290 (Utah 1996) .....	17
<i>S&amp;G, Inc. v. Morgan</i> , 797 P.2d 1085 (Utah 1990) .....	15
<i>Salt Lake City v. Ohms</i> , 881 P.2d 844 (Utah 1994) .....	13
<i>Salt Lake City v. Silver Fork Pipeline</i> , 2000 UT 3, 5 P.3d 1206 .....	39
<i>Savage v. Utah Youth Village</i> , 2004 UT 102, 104 P.3d 1242 .....	17
<i>Searle v. Milburn Irrigation Co.</i> , 2006 UT 16, 133 P.3d 382.....	15
<i>Shields v. Dry Creek Irrig. Co.</i> , 363 P.2d 82 (Utah 1961).....	31
<i>State ex rel. B.B. v. Scott</i> , 2004 UT 39, 94 P.3d 252.....	40
<i>State v. Holm</i> , 2006 UT 31, ¶ 10, 137 P.3d 726.....	2
<i>State v. One Lot of Pers. Prop.</i> , 2004 UT 36, 90 P.3d 639 .....	1, 2
<i>Stephens v. Bonneville Travel, Inc.</i> , 935 P.2d 518 (Utah 1997) .....	17
<i>U.S. v. Standefer</i> , 610 F.2d 1076 (3 <sup>rd</sup> Cir. 1979).....	22
<i>Union Pac. R. Co. v. Tax Comm’n.</i> , 2000 UT 40, 999 P.2d 17 .....	21, 28, 29
<i>United States Fuel Co. v. Huntington-Cleveland Irr. Co.</i> , 2003 UT 49, 79 P.3d 945.....	14

<i>United States v. Praxair, Inc.</i> , 389 F.3d 1038 (10th Cir. 2004).....	40
<i>Utah Sign, Inc. v. Dept. of Transp.</i> , 896 P.2d 632 (Utah 1995).....	13
<i>Wall v. Dodge</i> , 2 P. 206 (Utah Territory 1883).....	39, 40
<i>Washington County Water Conservancy Dist. v. Morgan</i> , 2003 UT 58, 82 P.3d 1125 .....	33, 34, 35
<i>Watkiss &amp; Campbell v. FOA &amp; Sons</i> , 808 P.2d 1061 (Utah 1991).....	30
<i>Wayment v. Clear Channel Broadcasting, Inc.</i> , 2005 UT 25, 116 P.3d 271 .....	1, 2
<i>Whitmore v. Welch</i> , 201 P.2d 954 (Utah 1949).....	15

## Statutes

Utah Admin. Code § R655-2-8.8 .....	14
Utah Admin. Code § R655-6-11(A).....	38
Utah Admin. Code § R655-6-17(D).....	27
Utah Admin. Code § R655-6-3 .....	37
Utah Code Ann. § 63-46b-13(1)(a) .....	18, 21
Utah Code Ann. § 63-46b-13(2)(b) .....	18
Utah Code Ann. § 63-46b-13(3)(a) .....	18
Utah Code Ann. § 63-46b-14(3)(b).....	33
Utah Code Ann. § 63-46b-15(2)(a) .....	34
Utah Code Ann. § 63-46b-15(3)(b).....	37
Utah Code Ann. § 63-46b-2 .....	37
Utah Code Ann. § 73-1-4 .....	34, 35, 36
Utah Code Ann. § 73-3-14 .....	36, 37

Utah Code Ann. § 73-3-3 .....	34
Utah Code Ann. § 73-3-6 .....	26, 27
Utah Code Ann. § 35-1-78 .....	29
Utah Code Ann. § 63-46b, et seq. ....	14
Utah Code Ann. § 63-46b-12 (1989) .....	3, 20
Utah Code Ann. § 63-46b-13 .....	3, 9, 17, 18, 19, 20, 21, 23, 28, 29, 30
Utah Code Ann. § 63-46b-13(3)(b).....	9, 23, 29
Utah Code Ann. § 63-46b-14 .....	6, 36, 37
Utah Code Ann. § 63-46b-14(1) .....	25
Utah Code Ann. § 63-46b-14(2) .....	14
Utah Code Ann. § 63-46b-14(3)(a) .....	22, 29
Utah Code Ann. § 63-46b-15 .....	6, 37
Utah Code Ann. § 63-46b-15(1)(a) .....	14
Utah Code Ann. § 63-56b-14 .....	23
Utah Code Ann. § 73-3-1 .....	5
Utah Code Ann. § 73-3-14 .....	14, 32
Utah Code Ann. § 73-3-6 .....	15, 31
Utah Code Ann. § 73-3-6(1)(c) .....	15, 25
Utah Code Ann. § 73-3-6(2) .....	15, 25, 27
Utah Code Ann. § 73-3-7 .....	15, 33, 38
Utah Code Ann. § 73-3-7(1) .....	31
Utah Code Ann. § 73-3-7(2) .....	31

Utah Code Ann. § 73-3-8 .....	5, 12, 15, 31, 32, 37
Utah Code Ann. § 78-2-2(e)(v) .....	1
Utah Code Ann. § 78-2-2(f) .....	1

## **Rules**

Utah R. Civ. P. 54(d) .....	13, 39, 40, 41
Utah R. Civ. P. 54(d)(1) .....	7, 39
Utah R. Civ. P. 56(c) .....	1, 2

## **Other Authorities**

Article VIII, Section 4 of the Utah Constitution .....	40
Article VIII, Section 5 of the Utah Constitution .....	41
Black's Law Dictionary (6 <sup>th</sup> ed. 1990) .....	19
Oxford American Dictionary (1999) .....	19
Roget's Thesaurus (4 <sup>th</sup> ed. 1977) .....	19

## V. STATEMENT OF JURISDICTION

Appellees agree with the assertion by Appellant (“Western”) that this Court has jurisdiction over this appeal under the authority of Utah Code Ann. § 78-2-2(f), as it is an appeal from a final order of the district court sitting in review of an informal agency action. Appellees disagree with Western’s suggestion of jurisdiction under Utah Code Ann. § 78-2-2(e)(v), as the adjudicative proceeding held by the State Engineer was not a formal proceeding.

## VI. ISSUES AND STANDARDS OF REVIEW

A. Did the trial court err in granting summary judgment for lack of subject matter jurisdiction on the basis that Western’s amended applications were not the subject of a final order and had not otherwise been considered, and therefore were not properly the subject of reconsideration.

**Standard of Review:** Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c). This Court reviews summary judgment for “correctness, granting no deference to the [district] court’s legal conclusions.” *Wayment v. Clear Channel Broadcasting, Inc.*, 2005 UT 25, ¶ 15, 116 P.3d 271 (quotations and citation omitted). Subject matter jurisdiction is a question of law reviewed for correctness. *Beaver County v. Qwest, Inc.*, 2001 UT 81, ¶ 8, 31 P.3d 1147. The trial court’s statutory interpretation is also reviewed for correctness. *State v. One Lot of Pers. Prop.*, 2004 UT 36, ¶ 8, 90 P.3d 639 (quotations and citations omitted).



B. Did the trial court err in denying Western's motion for summary judgment that no party other than the State Engineer should be allowed to present relevant, admissible evidence on certain material issues?

**Standard of Review:** Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c). This Court reviews summary judgment for "correctness, granting no deference to the [district] court's legal conclusions." *Wayment*, 2005 UT 25, ¶15. The trial court's statutory interpretation is also reviewed for correctness. *One Lot of Pers. Prop.*, 2004 UT 36, ¶ 8.

C. Did the trial court have jurisdiction to award costs to Appellees where it dismissed Western's administrative appeal for lack of subject matter jurisdiction?

**Standard of Review:** "The determination to award taxable costs is within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion." *Ong Int'l (U.S.A.), Inc. v. 11th Ave. Corp.*, 850 P.2d 447, 460 (Utah 1993) (citations omitted). The scope of a district court's jurisdiction is a question of law and is therefore reviewed for correctness. *State v. Holm*, 2006 UT 31, ¶ 10, 137 P.3d 726.

## VII. CONSTITUTIONAL AND STATUTORY PROVISIONS

Western quotes in full many constitutional and statutory provisions relevant to this appeal. Accordingly, Appellees have not reproduced each of these provisions. For purposes of this brief, the most salient provision is the following:

## Utah Code Ann. § 63-46b-13

Agency review -- Reconsideration.

(1) (a) Within 20 days after the date that an order is issued for which review by the agency or by a superior agency under Section 63-46b-12 is unavailable, and if the order would otherwise constitute final agency action, any party may file a written request for reconsideration with the agency, stating the specific grounds upon which relief is requested.

(b) Unless otherwise provided by statute, the filing of the request is not a prerequisite for seeking judicial review of the order.

(2) The request for reconsideration shall be filed with the agency and one copy shall be mailed to each party by the person making the request.

(3) (a) The agency head, or a person designated for that purpose, shall issue a written order granting the request or denying the request.

(b) If the agency head or the person designated for that purpose does not issue an order within 20 days after the filing of the request, the request for reconsideration shall be considered to be denied.

## VIII. STATEMENT OF THE CASE

### A. Nature of the Case.

The waters in the Utah Lake - Jordan River Basin (comprising much of Salt Lake and Utah Counties) are fully appropriated. Indeed, the State Engineer has closed the basin to new appropriations of surface and ground water. Nevertheless, individuals and entities continue filing applications to appropriate water, hoping to remain in line under Utah's "first in time, first in right" system of appropriation against the possibility that water might become available for appropriation in the future.

Challenging the State Engineer's opinion that waters in the most populated basin in this desert state were already fully appropriated, Western filed three applications to appropriate water. Western asserts that its applications have priority for the water it

seeks to appropriate over all other previously filed and pending applications to appropriate because it contends this water has only newly become available for appropriation due to the unadjudicated forfeiture of other water rights. Western wrongly asserts that somehow its applications “leapfrog” ahead of the priorities of all other pending applications.

In fact, no water has been adjudicated as forfeited in the basin, and even if there were forfeited water in the system, it would by law first go to satisfy all other junior water rights and pending applications. Western’s applications are the most junior in the basin. Nevertheless, Western, through these applications, which it termed the “Conservation Plan,” sought authority to divert some 288,107 acre-feet of new water in Salt Lake and Utah Counties and to convey, store and ultimately sell it to end-users for a variety of so-called beneficial uses.

Under the Conservation Plan, Western proposed to appropriate and divert as much water as it could find (all of which was already the subject of other water rights), from diversion points located on land it did not own, pump it through wells and pipelines it would later design and locate on lands to which it did not have title (or through existing facilities owned by others in which Western had no rights), store it in unowned and unpermitted surface and subsurface facilities, all in hopes of selling it to undetermined users at a price and for uses and on locations to be determined somehow in the future. Western did not (and does not) own rights to any of the land on which its proposed facilities would be located nor, does it own any land on which the water could be put to beneficial use; neither does it have any contracts in place for the purchase or use of any

of the water it seeks to appropriate. The Conservation Plan, in short, is a bold attempt by Western to speculate on Utah water rights.

Appellees (except for the State Engineer, who was named as a Defendant below because of his administrative responsibilities) protested Western's applications because, variously: they already own the water rights and sources Western proposed to utilize; Western's proposed uses would impair or interfere with existing uses; Western's plans are not feasible; Western lacks the financial ability to complete the massive project it proposed; and because Western's applications and proposed uses are patently speculative. This matter arises from Western's appeal of the State Engineer's denial of its applications.

### **B. Course of Proceedings**

The State Engineer advertised Western's applications, received protests, and held an informal administrative hearing. Following the hearing, the State Engineer entered a Reissued Memorandum Decision (the "Memorandum Decision") rejecting the Conservation Plan on all five statutory bases. Specifically, the State Engineer concluded that Western had failed to meet its burden of demonstrating that there was unappropriated water in the sources it proposed to utilize, that its proposed use would not impair existing rights or interfere with more beneficial uses, that its plan was physically and economically feasible, that it had the financial ability to complete the project and that the application was not filed for purposes of monopoly.<sup>2</sup>

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<sup>2</sup> These are the statutory criteria set forth in Utah Code Ann. §§ 73-3-1 and -8, all of which must be satisfied for an application to be approved.

Western then asked the State Engineer to reconsider his ruling under Utah Code Ann. § 63-46b-14 . In doing so, Western submitted the outline of what it called the Revised Conservation Plan (the “Revised Plan” or, sometimes, the “amended applications”), a radically altered version of the Conservation Plan. Details regarding the Revised Plan were not then provided by Western, but it clearly would have impacted the protesting parties in ways that were materially different from Western’s original plan. The State Engineer took no action on the Request for Reconsideration and, after 20 days, the Request was deemed denied. Western then filed an action in Third District Court, timely seeking review of the State Engineer’s decision by trial *de novo*, in accordance with Utah Code Ann. § 63-46b-15.

**C. Disposition in the Lower Court.**

After an extended period of inactivity, Western’s appeal was assigned to Judge Robert Hilder, who set it for trial. Though Western’s Complaint read as if Western still desired to pursue the original Conservation Plan, Western subsequently confirmed that it intended only to challenge on appeal Western’s claim that the State Engineer implicitly rejected the Revised Plan when he declined to grant reconsideration.

Several motions were filed by the parties shortly before the trial date. In its motions, Western sought to preclude from participating at all in the trial the “environmental” protestants of Western’s applications and those who had filed late protests (but had been allowed by the State Engineer to participate at the informal hearing). Western also sought an order limiting the issues on which other, admittedly

interested, parties could be heard. Western was unsuccessful in these efforts and attempts to include the denial of its motions in this appeal.

Appellees' pre-trial motions included a Motion for Summary Judgment primarily based on the fact that Western had abandoned its appeal of the rejection of the Conservation Plan and had not exhausted its administrative remedies with regard to the Revised Plan. Therefore, there were no issues properly before the district court. In particular, Appellees demonstrated that the Revised Plan had not been the subject of a proper filing with the State Engineer, had not been advertised and was not addressed in the informal hearing, and the State Engineer only looked at the Revised Plan to see if it provided reason for him to reconsider his rejection of the Conservation Plan. In deposition testimony offered in support of the Motion for Summary Judgment, the State Engineer confirmed that the Revised Plan was not before him when he issued his Memorandum Decision and that he had never considered the merits of the Revised Plan.

Judge Hilder agreed with Appellees and found that Western had failed to exhaust its administrative remedies with regard to the Revised Plan. On that basis, he granted Appellees' Motion for Summary Judgment. He found that such failure deprived the court of jurisdiction further to consider the merits of Western's appeal and awarded the Appellees their costs as prevailing parties under Utah R. Civ. P. 54(d)(1). Western appeals these rulings.

## IX. STATEMENT OF THE FACTS

Western filed three applications to appropriate with the Utah State Engineer, the first two on March 5, 1999 and a third on May 23, 2001. (R. 2133 ¶ 1; R. 3189 ¶ 1; R. 4-5, ¶¶ 12-13.) The State Engineer advertised the applications, drawing many protests. (R. 2133 ¶ 3; R. 3189 ¶ 2.) Western presented a lengthy, detailed Statement of Facts in support of its applications, which was distributed to the State Engineer and the protestants. (R. 2133 ¶ 4; R. 3189 ¶ 2; R. 5 ¶ 15.)<sup>3</sup> The proposal on which the applications were based was called by Western its “Conservation Plan.” (R. 2133 ¶ 4; R. 3189 ¶ 2; R. 2189 at 2<sup>nd</sup> ¶.) The Conservation Plan is defined in the Statement of Facts. (R. 2194.)

The State Engineer held an informal hearing on the three applications and the associated Conservation Plan in November 2002. That hearing was recorded and a transcript prepared. (R. 2267-2655; R. 2133 ¶ 6; R. 3189 ¶ 2.) A month later, before a decision had been issued, Western advised the State Engineer by letter that a “much smaller project is feasible” and that Western was “entitled to as much water as can be appropriated under its applications . . . .” (R. 3189; R. 3203.)

The State Engineer denied the applications, explaining his reasons in a Memorandum Decision. (R. 2133 ¶ 7; R. 3189 ¶ 2; R. 2199-2215.) Western timely

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<sup>3</sup> The Statement of Facts presented in support of the applications consists of 86 pages of narrative discussion concerning Western’s “Conservation Plan.” (R. 52 at 2<sup>nd</sup> ¶.) It also includes another 254 pages of exhibits. Because of that bulk, only relevant excerpts from the Statement of Facts were included below, including the Executive Summary, the Introduction, the Definitions and the “Brief Statement of the Facts.” (R. 2133, n.1; R. 2189-2198.)

requested reconsideration under Utah Code Ann. § 63-46b-13, which included a request that the State Engineer approve a substantially reduced or scaled back plan that amended the three applications to appropriate. (R. 2233; R. 5 ¶ 18; R. 2133-34 ¶ 18; R. 3189 ¶ 2.)

The amendments contained in the Revised Plan deleted points of diversion, facilities and other features “not needed for the function of the core portion and function of the plan.” (R. 3190.) The amendments also changed the purpose of the proposed water use, from mostly municipal to mostly agricultural. (R. 2185-86, 2187.) Other changes were also proposed. (R. 2198, 2171, 2187-88, 2165.) Western explained on reconsideration that its amended applications were designed to respond to the denial of the original Conservation Plan:

After consideration of the concerns of the State Engineer and the protestants, Western Water has modified its Conservation Plan to meet those concerns. The State Engineer is requested to reconsider the applications under the revised and reduced plan attached hereto.

(R. 2220.)

The State Engineer reviewed the reconsideration request to determine whether he had erred or otherwise needed to revise his decision, concluding that he did not. (R. 3028.) He was “conscious” that the Revised Plan was a scaled-down version of the Conservation Plan. (R. 3028.) He took no further action, meaning that the request was considered to be denied pursuant to Utah Code Ann. § 63-46b-13(3)(b). (R. 2133 ¶ 10; R. 3189-3190 ¶ 4; R. 6 ¶ 20.)

The Revised Plan is neither mentioned nor described in the Statement of Facts and is not included in the “Definitions” portion of the Statement of Facts presented in support



of the applications. (R. 2134 ¶ 11; R. 3190 ¶ 5; R. 2189-98.) Neither is it mentioned in the Memorandum Decision. (R. 2199-2214.) It is not mentioned in the hearing transcript. (R. 2267-2655; R. 2134 ¶ 11; R. 3190 ¶ 5.) It is not mentioned in Western's letter to the State Engineer. (R. 3189.)

Western filed this action seeking approval of the Revised Plan. (R. 6 ¶¶ 25, 26; R. 7 ¶ 28.) Consistent with those claims, Western confirmed "that the trial [of this action] will be based on [Western's] Applications *as amended by the Revised Conservation Plan.*" (R. 2233 [emphasis in original]; *see also* R. 2161, ll. 5-8.)

Western conceded during discovery, however, that its applications as amended by the Revised Plan were not presented to the State Engineer at or before the informal hearing. (R. 2162.) The Memorandum Decision does not address the amended applications. (R. 2183-84.) The State Engineer has not issued a decision on the Revised Plan. (R. 2184.) Rather, it was undisputed that the applications as amended by the Revised Plan were submitted after the Memorandum Decision was issued, as part of Western's Request for Reconsideration. (R. 2134 ¶ 9; R. 3189 ¶ 3; R. 5 ¶ 18; R. 7 ¶ 26; R. 2183-84; R. 2162.)

## **X. SUMMARY OF THE ARGUMENT**

A. Western filed its action in the district court seeking *de novo* review of the rejection of its three applications to appropriate water. The State Engineer had reviewed, advertised, conducted a hearing, and issued an opinion with regard to Western's Conservation Plan. Western requested reconsideration and, in connection with that

request, submitted a summary of what it termed the Revised Plan, a proposal that was dramatically different from the Conservation Plan, both in its scope and its potential impacts on the rights of others. The Revised Plan was never the subject of formal application, was never advertised, was not addressed at the hearing, and was not ruled on by the State Engineer. Indeed, the State Engineer confirmed that he had taken no action with regard to the Revised Plan other than to consider whether it gave him a basis to reconsider his decision rejecting the Conservation Plan.

In the district court action, Western abandoned all claims relating to the Conservation Plan and elected to pursue only claims relating to the State Engineer's treatment of the Revised Plan. The trial court properly found that Western had not exhausted its administrative remedies in that regard and accordingly dismissed Western's Complaint for lack of jurisdiction. In particular, the trial court found that Western had failed to follow the procedures required to obtain review of the Revised Plan and that it was not sufficient for Western to raise the plan for the first time in connection with a request for reconsideration of its prior, rejected plan.

The court's determination that Western failed to exhaust its administrative remedies with regard to the Revised Plan, and the State Engineer's testimony that he had in fact not acted upon that plan, amply support the trial court's conclusion that it was without jurisdiction to address the merits of Western's appeal.

B. Prior to entry of summary judgment dismissing Western's Complaint for lack of jurisdiction, Western filed motions asking the court to limit the involvement of the various parties in the *de novo* trial. In particular, Western sought a declaration that

only the State Engineer would be entitled to present evidence on certain trial issues, including Western's statutory burden of demonstrating the feasibility of its plan, its financial ability, and that its application was not filed for purposes of a monopoly. Even though numerous parties had objected to the Conservation Plan, and had submitted evidence and argument to the State Engineer on these very points, Western asked the trial court anticipatorily to bar their participation at trial because they were not "appropriate parties" to comment on matters of public interest. Western ignores the fact that each of these protesting parties is entitled to be heard on all of the ways Western's applications would affect them and to hold Western to its statutory burdens. Western also ignores the fact that the parties Western tried to bar from participation on these "public" issues include all of the major public water agencies that operate publicly funded systems and provide public water supplies in the very areas Western proposed to serve.

The protesting parties submitted evidence to the State Engineer relating to all five criteria set forth in Utah Code Ann. § 73-3-8. It was their obligation to do so in order to preserve such issues for appeal. Having preserved those issues, the protesting parties are clearly "interested persons" entitled to present at trial evidence and argument on the impact of Western's proposals, including those aspects which relate to the public interest. The trial court correctly rejected Western's argument.

C. Even though the trial court determined that it lacked jurisdiction to address the merits of the case because of Western's failure to exhaust its administrative remedies, the court retained jurisdiction to award costs to the prevailing parties under Utah R. Civ.

P. 54(d). The nature and amount of the costs incurred by the parties were not challenged by Western. The award of these costs should be affirmed.

## **XI. ARGUMENT**

### **A. The Trial Court Lacked Subject Matter Jurisdiction After Western Failed To Exhaust Its Administrative Remedies Concerning Its Amended Applications.**

#### **1. The trial court could not proceed without subject matter jurisdiction.**

Subject matter jurisdiction is “the authority and competency of the court to decide the case.” *Salt Lake City v. Ohms*, 881 P.2d 844, 852 (Utah 1994), *quoting Department of Social Servs. v. Vijil*, 784 P.2d 1130, 1132 (Utah 1989). That power, or its limit, is strictly observed and is subject neither to waiver nor stipulation. *Id.* “[W]hen subject matter jurisdiction does not exist, neither the parties nor the court can do anything to fill that void.” *Crump v. Crump*, 821 P.2d 1172, 1174 (Utah App. 1991); *see also Chen v. Stewart*, 2004 UT 82, ¶¶ 34-36, 100 P.3d 1177.

A court must dismiss an action it lacks the power to hear. *Clark v. Hansen*, 631 P.2d 914 (Utah 1981) (affirming dismissal on subject matter jurisdiction grounds because matter still pending before State Engineer); *Utah Sign, Inc. v. Dept. of Transp.*, 896 P.2d 632 (Utah 1995) (affirming dismissal on subject matter jurisdiction grounds for failure to comply with Utah’s Administrative Procedures Act (“UAPA”)).

2. A plaintiff must exhaust administrative remedies before invoking district court subject matter jurisdiction to review a State Engineer decision.

The district court has subject matter jurisdiction “to review by trial *de novo* all final agency actions resulting from informal adjudicative proceedings.” Utah Code Ann. § 63-46b-15(1)(a). A proceeding before the State Engineer is informal. Utah Admin. Code § R655-2-8.8. A party “aggrieved” by a State Engineer decision “may obtain judicial review” by complying with UAPA, Utah Code Ann. § 63-46b, et seq. *See* Utah Code Ann. § 73-3-14.

Jurisdiction may be invoked, however, “only after” the plaintiff exhausts “all administrative remedies available.” Utah Code Ann. § 63-46b-14(2); *see also Nebeker v. Utah State Tax Comm’n.*, 2001 UT 74, ¶ 14, 34 P.3d 180 (“parties must exhaust applicable administrative remedies as a prerequisite to seeking judicial review”). Unless this condition is satisfied, “courts lack subject matter jurisdiction.” *Housing Authority v. Snyder*, 2002 UT 38, ¶ 11, 44 P.3d 724.

3. The State Engineer must advertise and consider an application and any protests.

The State Engineer is “entrusted [with] the responsibility of sorting out competing claims to Utah’s scarce water resources.” *United States Fuel Co. v. Huntington-Cleveland Irr. Co.*, 2003 UT 49, ¶ 14, 79 P.3d 945. To accomplish this sweeping task, the statutes governing appropriation contemplate broad, public participation:

A requirement of participation at agency level “ensures that those who have an interest will bring to the agency’s attention all relevant facts and considerations at the time the agency makes its decision. Moreover, the requirement of [participation] gives the agency and

the other participants notice of the identity and concern of interested parties.”

*S&G, Inc. v. Morgan*, 797 P.2d 1085, 1087 (Utah 1990) (citation omitted).

Upon receiving an application, the State Engineer publishes notice describing the application. *See* Utah Code Ann. § 73-3-6.<sup>4</sup> At that early stage, the State Engineer may correct, “before or after” publication, non-prejudicial “[c]lerical errors, ambiguities, and mistakes . . . .” Utah Code Ann. § 73-3-6(1)(c). After publication, however, substantive changes, specifically “amendments or corrections” involving “a change of point of diversion, place, or purpose of use of water” require that notice be republished. Utah Code Ann. § 73-3-6(2); *see also Whitmore v. Welch*, 201 P.2d 954, 959 (Utah 1949) (substantially similar version of 73-3-6 “require[d] republication where amendments involve a change of point of diversion, place, or purpose of use of water”).

Following publication, “interested” parties may protest. Utah Code Ann. § 73-3-7. The State Engineer then evaluates the application, applying the several factors listed in Utah Code Ann. § 73-3-8. *See Searle v. Milburn Irrigation Co.*, 2006 UT 16, ¶ 23, 133 P.3d 382. All of these procedures were followed in connection with Western’s original applications resulting in the Memorandum Decision. (R. 2199-2214.)

4. Western failed to preserve a claim on the Revised Plan.

To preserve a claim on its Revised Plan, Western was required to “raise [that] issue before [the State Engineer] to preserve the issue for further review.” *Badger v.*

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<sup>4</sup> Various sections of the appropriation statutes have been amended as recently as 2003, including Utah Code Ann. § 73-3-6. Where required, therefore, the version in effect at the time Western filed its first applications—March, 1999 (R. 4, ¶¶ 11-12)—are cited.

*Brooklyn Canal Co.*, 966 P.2d 844, 847 (Utah 1998) (“*Badger II*”) (affirming summary judgment against certain plaintiffs who had failed to raise water right claims before State Engineer). A complaining party may not “by-pass” the State Engineer “by refusing or neglecting” to submit an issue “and then call upon the courts to determine [such] matters” for the first time. *Badger v. Brooklyn Canal*, 922 P.2d 745, 751 (Utah 1996) (“*Badger I*”).

Preserving an issue in an informal proceeding is not particularly difficult. Western must meet only a “level of consciousness” test by bringing the issue “to the fact finder’s attention so that there is at least the possibility that it could be considered.” *Badger II*, 966 P.2d at 847; *see also BAM Development v. Salt Lake County*, 2004 UT App 34, ¶ 48, 87 P.3d 710.<sup>5</sup>

Western’s principal conceded that its Revised Plan was not presented until after agency action on the original applications:

Q. The reissued memorandum decision does not concern the revised conservation plan . . . is that correct?

A. Yes.

Q. The revised conservation plan only came up on your request for reconsideration.

A. Yes.

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<sup>5</sup> The “level of consciousness” standard is “less exacting” than is applied at trial to preserve an issue for appeal. To preserve a trial issue, “(1) the issue must be raised in a timely fashion; (2) the issue must be specifically raised; and (3) [the] party must introduce supporting evidence or relevant legal authority.” *Badger II*, 966 P.2d at 847 (citation and internal quote marks omitted).

Q. To your knowledge, has the State engineer issued a memorandum decision on the revised conservation plan?

A. They've not.

(Depo. of Ronald Christensen, R. 2183-84.) The State Engineer concurred. (R. 3028.)

5. Western misunderstands reconsideration because it misapplies Utah Code Ann. § 63-46b-13.

The next step in the application process is based on the statutory premise that the State Engineer has issued a final decision within the meaning of UAPA. That is, a party aggrieved by the decision may choose between a request for reconsideration of that decision, or a *de novo* appeal in the district court. *See* Utah Code Ann. § 63-46b-13; *see also Harper Invs., Inc. v. Auditing Div.*, 868 P.2d 813, 815 (Utah 1994) (“The Code allows a petitioner to seek reconsideration of an agency decision within twenty days or to seek immediate judicial review within thirty days of a final decision and forego any further agency action.”)

This Court has explained repeatedly that a statute’s plain language is the first authority in determining its meaning. *See, e.g., Savage v. Utah Youth Village*, 2004 UT 102, ¶ 18, 104 P.3d 1242. Presumed to have been used “advisedly,” the words are applied according to their “ordinary and accepted meaning.” *C.T. v. Johnson*, 977 P.2d 479, 481 (Utah 1999) (internal quotation marks omitted). Contradictory or unworkable interpretations are rejected. *Jackson v. Mateus*, 2003 UT 18, ¶ 21, 70 P.3d 78. In short, a court’s task is “to implement the law as it reads unless it results in an absurd outcome.” *Stephens v. Bonneville Travel, Inc.*, 935 P.2d 518, 522 (Utah 1997); *see also Perrine v. Kennecott Mining Corp.*, 911 P.2d 1290, 1292 (Utah 1996) (the plain language rule



applies “unless such a reading is unreasonably confused, inoperable, or in blatant contravention of the express purpose of the statute.”).

a. Reconsideration permits a review of only a final decision.

Western’s entire argument rests on a misapplication of Utah Code Ann. § 63-46b-13 of UAPA (“-13”). That section (quoted in full above) provides that an agency may reconsider a given decision. If the order in question is unreviewable by either the agency that issued it or a “superior agency,” “*and if the order would otherwise constitute final agency action,*” a party may seek “reconsideration.” Utah Code Ann. § 63-46b-13(1)(a) (emphasis added). That request must “state the specific grounds upon which relief is requested.” *Id.*

The agency may expressly grant or deny the request in writing. *See* Utah Code Ann. § 63-46b-13(3)(a). If it does not act either way within 20 days, however, “the request for reconsideration shall be considered to be denied.” Utah Code Ann. § 63-46b-13(2)(b). In other words, the agency is not required to act at all; it may elect to deny the request simply by waiting 20 days.

Western’s appeal is based on a fundamentally incorrect reading of -13. Western argues that the request for reconsideration keeps the administrative process “alive,” preventing “a ‘final administrative action.’” (App. Brf. at 26.) Accordingly, argues Western, because the State Engineer was aware that the Revised Plan was submitted with the reconsideration request (R. 3027-28), denial of that request constituted denial—and therefore final agency action on—the Revised Plan. (App. Brf. at 26-27.)

- b. Reconsideration means what it says, and the State Engineer correctly addressed Western's request.

"Reconsider" means to "consider again, esp[ecially] for a possible change of decision." Oxford American Dictionary, 667 (1999). It means to reexamine an existing decision or result. See Black's Law Dictionary at 1272 (6<sup>th</sup> ed. 1990). Its synonyms include "reappraise, reevaluate," "rethink," "review," "go back over," or "take a second look." Roget's Thesaurus, 485.26 (4<sup>th</sup> ed. 1977). Plainly, then, reconsideration means only that the agency may "rethink" a "previous decision." It just as plainly does not mean or contemplate a new, revised, modified or even—using Western's term—"reduced [or "smaller"] project plan." (App. Brf. at 19, 21.)

This is precisely how the State Engineer addressed Western's request. He explained in his deposition how he treats reconsideration requests:

Q. And I believe you testified earlier that when you receive a Request for Reconsideration what you look for is in the information given to you is there any reason for you to go back and revisit your original decision?

A. Yes. Did we miss something? Did we make an error?

Q. Okay. Did the information in the Revised Conservation Plan and the Request for Reconsideration, so far as you recall them, give you reason to reconsider your decision on the original Conservation Plan?

A. No.

(R. 3028.)

The State Engineer's treatment of Western's request was consistent with the plain meaning of the term "reconsideration." The trial court applied -13 the same way,

observing that “the Revised Plan submitted with [Western’s] Request for Reconsideration was reviewed only to determine whether it gave reason to reconsider . . . .” (R. 2292.) That interpretation was also consistent with prior judicial gloss on the meaning of reconsideration. “Under UAPA, a request for reconsideration asks the highest level of administrative decision maker to reassess a claim they have previously examined.” *Maverik Country Stores, Inc. v. Industrial Comm’n.*, 860 P.2d 944, 951 n. 11 (Utah App. 1993);<sup>6</sup> *see also Career Serv. Rev. Bd. v. Dept. of Corrections*, 942 P.2d 933, 945 (Utah 1997) (“Until an appeal was perfected, the Board retained jurisdiction and had the inherent authority to reconsider and modify its . . . Order in light of subsequently discovered facts.”). The State Engineer had not “previously examined” the Revised Plan.

c. Because finality is a prerequisite to reconsideration under -13, Western could not expect action on its Revised Plan.

Despite Western’s determination to read more into “reconsideration” than its common meaning suggests is even possible, the rest of -13 demonstrates Western’s error. The only way reconsideration can mean that an amended proposal is appropriate at that stage is if the agency has not already produced a final order. If there is more remaining for the agency to do, in other words, then perhaps it may consider an amended version of what it is already considering.

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<sup>6</sup> “A request for review, on the other hand, asks a higher level decision maker to evaluate the claim. *Compare* Utah Code Ann. § 63-46b-12 (1989) (agency review procedures) Utah Code Ann. § 63-46b-13 (requests for reconsideration).” *Maverik*, 860 P.2d at 951, n.11.

But -13 permits “reconsideration” only “if the order would otherwise constitute final agency action.” Utah Code Ann. § 63-46b-13(1)(a). There must be a final order to reappraise. This court has already read -13 to mean that it “allows a party to file a request for reconsideration from a *final agency action* within twenty days of the final action’s issuance.” *Union Pac. R. Co. v. Tax Comm’n.*, 2000 UT 40, ¶ 11 n.4, 999 P.2d 17 (emphasis added). Finality thus deprives a party of any right to agency action on an amended proposal.

Accordingly, a party may not amend a proposal already acted on in a final order. Further, reconsideration is not an invitation to respond to the final decision by amending an application that has already been denied. The district court applied the meaning of reconsideration correctly, ruling that Western’s failure to present the Revised Plan “for consideration” before final decision on the original plan prevented final agency action on the Revised Plan. (R. 3292.)

If any doubt remains, the fact that reconsideration is optional demonstrates that it does not contemplate further or additional agency action beyond a second look at a “final” decision. That is, because it is optional, reconsideration is not required before seeking judicial review, is not an extension of the agency’s consideration process, and thus is not required to exhaust administrative remedies. *See Harper Invs.*, 868 P.2d at 815 (a petitioner may either seek reconsideration of a final decision or “immediate judicial review . . . and forego any further agency action.”) (emphasis added).

Western contends that denial of reconsideration (in this case by allowing the 20 days to pass without action) was tantamount to agency consideration and denial of the

amended applications, because that plan was submitted with the reconsideration request. (App. Brf. at 24-25.) As support, Western relies on its statement to the State Engineer that “a smaller project is feasible.” (R. 3203; App. Brf. at 19), and argues that the Revised Plan is “an exact subset of the original Conservation Plan.” (App. Brf. at 32.)

This is the structure of Western’s argument that reconsideration kept the administrative process “alive” or “open.” This, in Western’s view, amounted to active consideration of the Revised Plan (beyond reconsideration of the original proposal) simply because the State Engineer was aware that the applications had been amended. (R. 3027-28.)

The argument is infected with the fallacy of division—that what is true of the whole must also be true of its component parts. *See, e.g., U.S. v. Standefer*, 610 F.2d 1076, 1106 (3<sup>rd</sup> Cir. 1979). Even assuming that the Revised Plan were merely a smaller version of the original proposal, State Engineer review and denial of the Conservation Plan does not also mean review and denial of every potential smaller, altered or amended permutation of that plan.

Western argues that “there can be no final agency action when a Request for Reconsideration is filed because a judicial review is barred.” (App. Brf. at 26.) This much is true, almost, but not in the way Western intends. A reconsideration request does not render the order in question any less final. On the contrary, finality is its prerequisite. The request merely delays the time when the aggrieved party must seek judicial review. *See, e.g., Harper Inv.*, 868 P.2d at 816; Utah Code Ann. § 63-46b-14(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).”).

In other words, Western’s request for reconsideration stayed *appealability* for at least the amount of time it took for the request to be denied, but not finality. Only after the time for reconsideration ran and the request was considered denied under -13 could Western appeal to the district court. But the final decision had not changed. Western was limited to an appeal of the only final decision made to date—the Memorandum Decision, (R. 2199-2215), which considered only the original Conservation Plan, not its unadvertised, unconsidered, unprotested and undecided amendments. (R. 3028; App. Brf. at 25; R. 3292.)

6. Western conceded that the State Engineer did not consider the Revised Plan.

District court subject matter jurisdiction is based on a final decision. *See* Utah Code Ann. § 63-56b-14. Western’s Revised Plan was by its own admission an amendment to the three denied applications. (See R. 6 ¶ 19; R. 2233.) The Complaint is based on those amendments (R. 6 ¶ 25; R. 7 ¶¶ 28, 1), and Western confirmed “that the trial [of this action] will be based on [Western’s] Applications *as amended by the Revised Conservation Plan*.” (R. 2233) [emphasis in original].)

Western concedes that this claim—the only claim pursued by Western—was not presented to the State Engineer at or before the hearing:

Q. And is it your feeling that the original proposal was, in fact, amended by the revised conservation plan?

A. Yes.

Q. You attended the hearing--the State engineer hearing.

A. Yes.

Q. You took a major role in that, in the presentation.

A. Yes.

Q. Were the applications as amended by the revised conservation plan submitted to the State engineer at or before the hearing that you attended?

A. The applications?

Q. As amended by the revised conservation plan.

A. Before the hearing?

Q. At or before the hearing.

A. No.

(Depo. of Ron Christensen, R. 2162; R. 2138.)

The Revised Plan is neither mentioned nor described in the Statement of Facts presented to the State Engineer to support the applications. (R. 2189-92, 2193, 2194, 2195-98.) Neither was it mentioned or described at the informal hearing. (R. 2267-2655.) It is not mentioned in the State Engineer's Memorandum Decision. (R. 2199-2215.) Neither is it included in Western's letter to the State Engineer sent before issuance of the Memorandum Decision. (R. 3189; R. 3203.) The State Engineer considered the applications only as they related to the original Conservation Plan. (R. 2199-2215; R. 3027-29.)

Accordingly, the claim Western used to invoke subject matter jurisdiction—its “amended” applications—was never considered by the State Engineer. (R. 3027-28.) The many protestants—approximately 75 in all—never had an “opportunity to consider or offer evidence regarding the impacts of the Revised Plan . . . .” (R. 3292.) Therefore, as the district court concluded, there has been no “final agency action” on that claim capable of conferring subject matter jurisdiction on that court. (R. 3292.) *See* Utah Code Ann. § 63-46b-14(1).

7. The State Engineer could not have considered the Revised Plan without republished notice and a new administrative process.

Even if Western is extended the benefit of any doubt and we assume that the State Engineer could have considered the amended applications on reconsideration, he could not have acted without first publishing notice. Recall that when an application is filed, the State Engineer may *sua sponte* correct non-prejudicial “[c]lerical errors, ambiguities, and mistakes . . . .” Utah Code Ann. § 73-3-6(1)(c).

Should any “amendments or corrections” involve changes in diversion points or the “place or purpose” of water use, however, the State Engineer must republish the amended application. Utah Code Ann. § 73-3-6(2). Accordingly, because the Revised Plan—which Western conceded “amended” its original applications (R. 2233)—called for different diversion points and a change in the purpose for the water (R. 2185-86, 2187, 2198, 2171, 2187-88, 2165), republished notice was required before the State Engineer could act. The State Engineer testified:



Q. Now, you were asked a couple of questions earlier about whether you have the authority to approve less than the total amount of water requested in an application; do you remember that?

A. Yes.

Q. I think you used the words you--you--you could have approved an application for a down-sized application.

A. Yes.

Q. Now, if on--on a reconsideration the request is not just for down-sized in terms of the amount of water, say, from ten second-feet to five second-feet, but there's an attempt to revise the application and scope, the location of diversions, the nature of diversion facilities, perhaps the nature of the storage mechanism, is--is that the type of down-sizing or limiting of an application that you would handle administratively after a hearing?

A. No.

Q. Why not?

A. Again, the elements of if you want to call it the application have changed, and if those type of changes are made then there would need to be public notice and, again, the process started on the modified application, if you want to call it that.

Q. In other words, i[f] those types of features which are necessary attributes of water rights are changed you would want to readvertise that so that people were on notice of it and had an opportunity to be heard?

A. Yes.

(R. 3027.)

The trial court concurred in the State Engineer's implicit interpretation of Utah Code Ann. § 73-3-6. He testified that amendments as substantive as these require notice. The district court concurred, ruling that there had been no notice, no opportunity for

protest, no hearing and no agency action at all on the Revised Plan, which the trial court determined was a “significant reformulation” of the original proposal. (R. 3292.)

Moreover, Western downplays the nature of the amendments contained in the Revised Plan. They did more than merely delete diversion points. According to Western, “[t]he heart of the Conservation Plan [was] the Cedar Valley Storage and Recovery System.” (R. 2198.) This “system” was to include “recharge basins or injection wells” to store water underground. *Id.* Under the Revised Plan, injection wells were no longer planned, and there may not be any recharge basins. (R. 2171, 2187-88.)

The original applications called for a “municipal quality supply pipeline.” (R. 2190.) Under the Revised Plan, none of the original diversions are for domestic or municipal use. (R. 2185-86.) The primary use will be irrigation. (R. 2187.) The Revised Plan abandoned significant diversion, transport and use facilities in the Salt Lake Valley. (R. 2164; R. 2227.) Storage in Utah Lake—plainly a “purpose and nature of use” of water—was also deleted. (R. 2228.) To be acted on, these substantive amendments changing the place and purpose of use required republished notice. *See* Utah Code Ann. § 73-3-6(2).

Furthermore, the State Engineer was constrained by his own rule concerning reconsideration. If he grants reconsideration, and under -13 he needs a final decision to do it, he “may affirm his former decision or may abrogate it, or may change or modify the same in any particular.” Utah Admin. Code § R655-6-17(D). Neither this rule nor -13 contemplate agency review of amendments to an application that is already denied pursuant to a final decision.

8. The act of denying reconsideration under Utah Code Ann. § 63-46b-13 is not itself a reviewable agency action.

*Union Pacific* contains this Court's three-part test to determine agency finality. The first element is whether judicial review will "disrupt the orderly process of [administrative] adjudication." The second is whether the administrative decision created rights, obligations or "legal consequences." The third asks whether the agency decision "in whole or in part" is merely "preliminary" or otherwise a precursor to further agency action. *Union Pac.*, 2004 UT 40, ¶ 16.

As a preliminary matter, no one disputes that the Memorandum Decision was final. (R. 2195-2215; R. 5, ¶ 17.) Western theorizes that the State Engineer's *inaction* on the request for reconsideration is somehow a secondary or additional final agency action such that Western's claims on the amended applications are preserved. (R. 6 ¶ 25; R. 7 ¶ 28.)

Western's theory cannot get past *Union Pacific*. First, judicial review would disrupt the administrative process because it is undisputed that the Revised Plan has not been advertised, protested, or considered. There was no agency action whatsoever. (R. 3027-28.) Specifically, the State Engineer testified:

Q. "[H]as the State Engineer's office ever acted on the Revised . . . Plan?

A. No.

(R. 3028.) Western concedes this critical point: "The parties agreed that the State Engineer did not take any action on the Request [for Reconsideration]; he did not

advertise the [Revised Plan], entertain any protests on it nor did he conduct a hearing on it.” (App. Brf. at 25;<sup>7</sup> *see also* R. 3373 at 51.)

The second prong of *Union Pacific* also barred district court action on the Revised Plan; action on reconsideration was limited to determining whether the Memorandum Decision was in error. (R. 3028.) The State Engineer’s inaction did not, because it could not, create any rights, obligations or even “legal consequences” beyond the right to appeal the final decision.

Nothing is triggered by inaction on *any* request under -13 except for the right to *de novo* review of the already final order in question. *See* Utah Code Ann. § 63-46b-14(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)”). *Union Pacific’s*

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<sup>7</sup> Western cites *Brady v. McGonagle*, 195 P. 188 (Utah 1921), as support for the theory that “inaction” on the reconsideration request “is a final agency action, in and of itself, reviewable by the Court.” (App. Brf. at 27.) *Brady* says nothing about reconsideration. Undeterred, however, Western cures that problem by inserting its preferred language, in brackets, into a quote from page 191 of that opinion, utterly changing the meaning of the quoted text, attempting to manufacture authority for a proposition that has none.

Western attempts a somewhat less egregious misuse of authority when it cites *Vigos v. Mountainland Builders, Inc.*, 2000 UT 2, 993 P.2d 207, for the proposition that “this court promoted a liberal policy toward an applicant to request and make changes after an administrative decision.” (App. Brf. at 34.) *Vigos* was a workers compensation case in which this Court recognized the Industrial Commission’s “continuing jurisdiction” over a claim based on Utah Code Ann. § 35-1-78 (“The powers and jurisdiction of the commission over each case shall be continuing. The commission, after notice and hearing, may from time to time modify or change its former findings and orders.”)

third prong does not apply because the only “decision” on reconsideration was to deny it. (R. 3028.) The amended applications were not considered, then or at any other time.

Were the Court to road-test Western’s theory, we can surmise the result based on experience with the long questioned and recently outlawed motion for reconsideration. *See Gillett v. Price*, 2006 UT 24, ¶ 8, 135 P.3d 861. If, as Western proposes, reconsideration under -13 means something more than a second look at a final decision, and is instead an invitation to amend a denied proposal, finality itself is at risk.

What is to prevent re-reconsideration based on yet another permutation of a denied proposal? *See, e.g., Watkiss & Campbell v. FOA & Sons*, 808 P.2d 1061, 1064 (Utah 1991), *quoting Drury v. Lanceford*, 415 P.2d 662, 663 (1966). Under Western’s theory, the “indefatigable die-hard” could keep the administrative process “alive” indefinitely, seeking either attrition or surrender while honing its proposal, clogging the State Engineer’s office, consuming resources and delaying indefinitely district court review and a final judgment. Western’s theory defies more than just the logical and accepted meaning of “reconsideration.” It also defies the sound rule that a party gets only one shot at administrative reconsideration. *See Maverik Country Stores*, 860 P.2d at 951 & nn. 9-11.

**B. All Parties Are Entitled To Present Relevant, Admissible Evidence On All Material Issues.**

In its Issue No. 5, Western argues that certain parties before the district court were “appropriate parties” only as to some of the issues, and were therefore not entitled to present evidence on all of the issues before the trial court. Specifically, Western claims

that only the State Engineer is entitled to offer certain categories of evidence in the *de novo* proceeding. The district court correctly denied Western's motion and held that all parties may introduce evidence to the extent it is relevant, admissible, and not cumulative.<sup>8</sup> (Transcript of Motion Hearing, April 10, 2006, at 44, R. 3372.)

1. Substantive Water Law Requires the Full-Fledged Participation of All Defendants in a *De Novo* Review of the State Engineer's Decision.

Before approving an application to appropriate water, the State Engineer advertises the application. *See* Utah Code Ann. § 73-3-6. Any interested person may then file a protest with the State Engineer. *See* Utah Code Ann. § 73-3-7(1). The State Engineer is required to "consider the protests and shall approve or reject the application." Utah Code Ann. § 73-3-7(2).

Utah Code Ann. § 73-3-8 contains the criteria to be considered in approving or rejecting an application to appropriate water.<sup>9</sup> In relevant part, that section provides:

(1) It shall be the duty of the state engineer to approve an application if: (a) there is unappropriated water in the proposed source; (b) the proposed use will not impair existing rights or interfere with the more beneficial use of the water; (c) the proposed plan is physically and economically feasible, ... and would not prove detrimental to the public welfare; (d) the applicant has the financial ability to complete the proposed works; and (e) the application was filed in good faith and not for purposes of speculation or monopoly. If the state engineer, because of information in his possession obtained either by his own investigation or otherwise, has reason to

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<sup>8</sup> No evidence was presented because no *de novo* proceeding was held.

<sup>9</sup> This statute applies whether the application is being reviewed by the State Engineer (in an administrative proceeding) or by a trial court (on *de novo* review of the State Engineer's decision). *See Shields v. Dry Creek Irrig. Co.*, 363 P.2d 82, 84 (Utah 1961); *Crafts v. Hansen*, 667 P.2d 1068, 1070 (Utah 1983).

believe...an application to appropriate water will interfere with its more beneficial use for irrigation, domestic or culinary, stock watering, power or mining development or manufacturing, or will unreasonable affect public recreation or the natural stream environment, or will prove detrimental to the public welfare, it is his duty to withhold his approval or rejection...until he has investigated the matter. If an application does not meet the requirements of this section, it shall be rejected.

Utah Code Ann. § 73-3-8.

A person aggrieved by an order from the State Engineer may obtain review in the district court. *See* Utah Code Ann. § 73-3-14. As a district court re-examines the State Engineer's decision, it does not act as an appellate body, but conducts a *de novo* review "by holding a new trial." *Archer v. Board of State Lands and Forestry*, 907 P.2d 1142, 1144 (Utah 1995). A district court owes no formal deference to the state agency. *Id.* "[T]he applicant must proceed under and be governed by the same statutory provisions as would have been applicable had his application been approved by the state engineer." *Eardley v. Terry*, 77 P.2d 362, 365 (Utah 1938). In addition, an applicant must raise issues in the administrative proceeding in order to preserve them for review by the district court. This Court has noted:

[A] party seeking review of agency action must raise an issue before that agency to preserve the issue for further review. It is well settled that "persons aggrieved by decisions of administrative agencies 'may not, by refusing or neglecting to submit issues of fact to such agencies, by-pass them, and call upon the courts to determine . . . matters properly determinable originally by such agencies.'"

*Badger II*, 966 P.2d at 847 (citations omitted).

Western's assertion that Appellees who appeared and participated as protestants in the proceeding before the State Engineer should not be allowed to participate fully or

present evidence in the *de novo* review not only flies in the face of Utah Code Ann. § 73-3-7 (any “person interested” may appear as a protestant), it conflicts with this Court’s logic in *Badger II*. In *Badger II*, the Court was concerned that a petitioner in a *de novo* review could circumvent the administrative process by failing to submit issues of fact during the administrative hearing, only to assert them for the first time during the district court’s *de novo* review. This case presents the opposite side of the same coin: Western here seeks to circumvent the administrative process, not by presenting new issues of fact but by attempting to exclude issues and evidence properly presented at the administrative hearing and which should be considered by the district court on a *de novo* review. The district court’s understanding of the issues and development of facts requires all parties’ full participation. The district court correctly held that the various parties who had to be joined were entitled to fully participate on each of the issues.

2. There is No Standing Requirement to Be a Respondent/Defendant.

Standing in a *de novo* review is a jurisdictional requirement that must be satisfied by a *petitioner* to invoke the jurisdiction of a court to review a decision of the State Engineer. *Washington County Water Conservancy Dist. v. Morgan*, 2003 UT 58, ¶ 6 n. 2, 82 P.3d 1125. However, the concept of “standing” has no bearing on the question of what parties must be joined or what evidence the court may consider, once a respondent is joined in the case.

When an “aggrieved” party files a petition for *de novo* review of an informal State Engineer decision, Utah Code Ann. § 63-46b-14(3)(b) of UAPA requires: “The petition shall name the agency and *all other appropriate* parties as respondents . . . .” (Emphasis



added.) There is thus a difference between the standard for determining who is entitled to seek *de novo* review of a State Engineer's decision and the standard for determining who must be joined when a Petitioner seeks such review. To have standing to initiate an appeal, the petitioner must be an "aggrieved" person. However, the petitioner is not required merely to name other "aggrieved" persons as respondents, but must name the agency and "all other appropriate parties." The distinction is not, as Western asserts, between "appropriate" parties and "interested" parties, but between "aggrieved" parties (i.e., persons who have standing to initiate an appeal as plaintiff), and "appropriate" parties (i.e., persons who have a right to participate once an appeal has been properly initiated). Utah Code Ann. § 63-46b-15(2)(a) gives direction as to who at least some of those "appropriate" parties are by requiring the petitioner to identify all persons who were parties in the informal adjudicative proceedings that led to the agency action.

3. Western Misapprehends this Court's Holding in *Washington County*.

Western relies on *Washington County*; however, its reliance is misplaced. In *Washington County*, this Court considered whether an ostensible appeal of a decision approving an application to change the point of diversion and place and nature of use of an existing water right under Utah Code Ann. § 73-3-3 could be used to assert forfeiture of the underlying water rights under Utah Code Ann. § 73-1-4. This Court held that the plaintiff did not have standing to initiate an independent action for forfeiture under Utah Code Ann. § 73-1-4, and that the plaintiff could not, therefore, use a purported *de novo* review of a decision approving a change application to assert forfeiture of the underlying

water rights. The issue of who might be “appropriate” respondents in a *de novo* review of a decision of the State Engineer was not even raised.

The Court framed the “standing” issue as follows:

This argument raises the question of whether every “interested” person who protests a change application is also an “aggrieved” person entitled to judicial review of the state engineer’s decision on that application.

*Id.* at ¶ 11. It was in this context—a determination of whether the plaintiff in *Washington County* had standing to use an appeal of the State Engineer’s decision as a vehicle to assert forfeiture under a separate chapter of Title 73—that the Court stated:

Were we to interpret the phrase “*any person aggrieved*” to include all interested persons who protest a change application, the filing of a change application would expose the *underlying water rights* to otherwise unavailable *forfeiture* challenges, because an uninjured protestant would be able to insert its foot into an otherwise closed jurisdictional door.

*Id.* at ¶ 16 (emphasis added).

In its brief, Western significantly changes the court’s language by deleting certain words and substituting other words in brackets as follows:

Were we to interpret the phrase [“appropriate party”] to include all interested persons who protest a[n] . . . application, the filing of [the] . . . application would expose the [application] to otherwise unavailable . . . challenges, because an uninjured protestant would be able to insert its foot into an otherwise closed jurisdictional door. *Id.* at 1130.

(App. Brf. at 42.)

The issue the Court addressed in the quoted passage in *Washington County* was not “who is an ‘appropriate party’ defendant in an appeal under the Utah Code Ann. § 63-

46b-14 of the UAPA,” but rather whether a plaintiff, merely by protesting a change application on an otherwise valid water right, has standing to bring an independent claim of forfeiture against the underlying water right. By changing “any aggrieved person” to “appropriate party,” “a change application” to “an application,” “underlying water rights” to “application,” and “unavailable forfeiture challenges” to “unavailable challenges,” Western significantly changes the Court’s holding, and implies that the Court was addressing issues completely different from those actually before the Court. Western’s language was never issued by this Court. In fact, the Court did not consider which parties are “appropriate” defendants under Utah Code Ann. § 63-46b-14, but rather who has standing to be a plaintiff under Utah Code Ann. §§ 73-1-4 and 73-3-14—completely different standards from completely different titles of the Utah Code.

4. The Question of Who has Standing to Initiate an Appeal has no Bearing on What Evidence the Court Should Consider Once an Appeal has been Properly Initiated.

Standing is not an issue in this case because no one questions whether Western was “aggrieved” by the State Engineer’s decision. Similarly, there can be no serious question about whether Appellees are “appropriate” parties to this action: each participated in the State Engineer’s administrative proceeding; each would be adversely affected if Western’s applications were granted; each was named by Western itself as a respondent in the *de novo* proceeding;<sup>10</sup> each appeared and answered Western’s

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<sup>10</sup> Appellees include certain parties that were allowed by the State Engineer to participate in person at the informal administrative proceedings held before the State Engineer even though their written protests were not timely filed. Western challenges the district court’s April 7, 2006 Minute Entry and Order which would have allowed

Complaint. The requirements of both Utah Code § 73-3-14 of the substantive water law (“aggrieved” person) and Utah Code §§ 63-46b-14 and -15 of UAPA (“appropriate” parties respondent) have been met.

The real question that Western’s summary judgment motion raised was not who has “standing” to bring the action or whether Appellees were “appropriate” respondents in this case, but rather what evidence certain respondents should be allowed to present to the district court. Indeed, Western did not seek the outright dismissal of any defendants, but only to prevent them from presenting evidence on selected statutory elements. As the district court correctly observed in denying Western’s motion,

[Western is] not even seeking to dismiss all [Defendants] as appropriate parties at this time, only seeking to limit participation . . . , essentially using this argument to limit testimony and that is more properly the role of the Rules of Evidence and the Rules of Procedure. So my inclination is very strongly to deny the motion and to allow all those who are currently before the Court, who came here by the road of being protestants but are now defendants to take part fully on all elements of 73-3-8 to the extent the evidence is relevant, admissible and not cumulative.

(Transcript of Motion Hearing, April 10, 2006, at 44, R. 3372.)

The admissibility of evidence is governed by the Utah Rules of Evidence (pursuant to Utah Code Ann. § 63-46b-15(3)(b) of the UAPA). The real question is not

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participation of these parties at trial. Though the question is likely moot because a trial was not necessary to resolve this action, the district court’s decision was correct. Allowing participation by such parties in the informal hearing was discretionary with the State Engineer and, having been allowed to so participate, they were clearly “appropriate parties” to the appeal of the State Engineer’s decision. Indeed, Western recognized them as such by naming them with the other respondents as parties to this action, consistent with the definitions and requirements set forth in Utah Code Ann. §§ 63-46b-2 and -14, and Utah Admin. Code § R655-6-3, and serving them with legal process.

which party happens to present the evidence, but whether the evidence is relevant and admissible. As shown below, *all* parties are entitled to present evidence.

First, Utah Admin. Code § R655-6-11(A) (which governs proceedings before the State Engineer) provides: “All hearings shall be open to all parties and *all parties shall be entitled to introduce evidence*, examine and cross-examine witnesses, make arguments, and fully participate in the proceeding.” (Emphasis added.) Nothing in the Rules of Evidence or the Administrative Code imposes issue-by-issue “standing” requirements on the testimony or evidence that a respondent may offer. Quite the contrary, both the policies of the Administrative Code and the formal requirements of the Rules of Evidence facilitate a full, fair, and efficient adjudication of the merits of the case before the district court.

Second, Utah Code Ann. § 73-3-7 requires the State Engineer (and, therefore, the district court on a *de novo* review) to hear all “interested” persons when considering an application to appropriate water. Certainly the Appellees are “interested” persons. They include all of the major public water agencies that operate the public water systems and provide public water supplies in the very areas Western proposes to serve with the water it seeks. They include the municipalities whose residents Western proposes to serve. Those named also include various agencies of the State of Utah (other than the State Engineer) responsible for wildlife and water resources, state parks, and public recreation. Yet Western urges the Court to hold that these entities should not be allowed to present evidence or argument on the impact of Western’s proposed projects on the public interest. The district court correctly rejected this argument.

There is no legal basis for preventing any Appellee from presenting relevant, admissible evidence that disproves Western's claims, or that demonstrates why the State Engineer acted properly in rejecting Western's applications.<sup>11</sup>

**C. The District Court Had Jurisdiction To Award Costs To The Parties That Prevailed Through A Dismissal On Jurisdictional Grounds.**

Appellees prevailed below on jurisdictional grounds and are therefore entitled to costs under Utah R. Civ. P. 54(d). Rule 54(d)(1) states that "[e]xcept when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs." Western does not argue that an order of dismissal for lack of subject matter jurisdiction does not confer prevailing party status under the rule. Rather, Western argues that because the district court dismissed Western's administrative appeal for lack of subject matter jurisdiction, the district court likewise lacked jurisdiction to award costs pursuant to Rule 54(d). Western relies primarily on *Wall v. Dodge*, 2 P. 206, 207 (Utah Territory 1883),

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<sup>11</sup> The two cases Western cites to support its argument that Appellees were not entitled to present evidence on all material issues, do not hold that a defendant should be excluded from fully participating in a case such as this one. See Western's Brief at 41. In *Blauer v. Department of Workforce Services*, 2005 Utah App. 488, 2005 Utah App. LEXIS 473, the court simply held that a quasi-judicial administrative board should not be named as respondent in an appeal of its own decision" in the absence of "a positive legislative grant of authority to the board to defend its decisions." *Id.* ¶¶ 25–27 (citation omitted). In *Salt Lake City v. Silver Fork Pipeline*, 2000 UT 3, 5 P.3d 1206, the court simply held that a party cannot claim an injury as a result of another's change in the diversion point of water if the party has no legal interest in the water intercepted. See *id.* ¶ 38.

and *State ex rel. B.B. v. Scott*, 2004 UT 39, ¶ 19, 94 P.3d 252, to support its argument. But neither of these cases supports Western’s position.

In *Wall*, the Supreme Court of the Territory of Utah stated that “the judgment of the court being upon the ground of a want of jurisdiction in the lower court, that court could not properly render judgment for costs, *there being no statute authorizing it.*” 2 P. at 207 (emphasis added). The court’s concern in *Wall*—that there was no statute authorizing an award of costs—is alleviated by Rule 54(d), which provides for payment of the prevailing party’s costs as a matter of course. In the procedural realm, Rule 54(d) carries the same weight as a statute because Article VIII, Section 4 of the Utah Constitution gives the Court “primary constitutional authority to promulgate procedural and evidentiary rules.” *Burns v. Boyden*, 2006 UT 14, ¶ 11, 133 P.3d 370.

Western argues, however, that *State ex rel. B.B.* extends the holding of *Wall* such that, regardless of whether there is a statute or rule, if a court lacks jurisdiction to consider the merits of the underlying dispute, it also lacks jurisdiction to award costs. But Western’s reading of *State ex rel. B.B.* ignores the truth that “[c]ourts that lack jurisdiction with respect to one kind of decision may have it with respect to another.” *United States v. Praxair, Inc.*, 389 F.3d 1038, 1056 (10th Cir. 2004) (quoting *Citizens for a Better Env’t v. Steel Co.*, 230 F.3d 923, 926 (7th Cir. 2000)). It is true that this Court stated in *State ex rel. B.B.* that “[g]iven that the juvenile court lacked subject matter jurisdiction to hear the order to show cause, the court also lacked jurisdiction to award attorney fees.” 2004 UT 39, ¶ 19. But the Court prefaced this statement by noting that “[b]ecause the juvenile courts are creatures of statute, they are courts of limited

jurisdiction.” *Id.* Thus, the juvenile court’s inability to award attorney fees resulted not solely from its lack of jurisdiction on the underlying dispute, but also from its nature as a court of limited jurisdiction. In essence, with the underlying contempt claim dismissed for lack of jurisdiction, the juvenile court had no source of jurisdiction to enable its consideration of the ancillary question of fees.

No similar limitation exists in this case. Under Article VIII, Section 5 of the Utah Constitution, district courts “have original jurisdiction in all matters except as limited by [the] constitution or by statute.” There are no statutes or constitutional provisions that limited the district court’s jurisdiction to award costs in this case. Thus, even where it lacked jurisdiction to consider the underlying claim, the district court could rely on its original jurisdiction to award costs.

In sum, under Utah R. Civ. P. 54(d), a district court always has jurisdiction to award costs to the prevailing party. Appellees therefore request that the Court affirm the district court’s order awarding costs.

## **XII. CONCLUSION**

Judge Hilder correctly determined that Western had not exhausted its administrative remedies with regard to the Revised Plan. That plan had not been the subject of any formal application to appropriate water, was not advertised, and no hearing was held to consider it. It was first sent in summary form to the State Engineer in connection with Western’s request for reconsideration of the State Engineer’s rejection of Western’s applications and was reviewed by the State Engineer only to see if it gave him reason to reconsider his rejection of those applications.

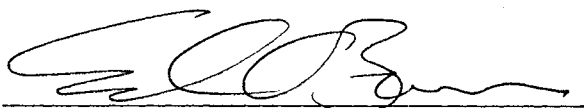


Western did not pursue an appeal of the original Conservation Plan but focused instead on the Revised Plan. Since Western had failed properly to put that plan before the State Engineer and exhaust its remedies before that agency, Judge Hilder properly found that he lacked jurisdiction to consider the merits of Western's judicial review action and dismissed it.

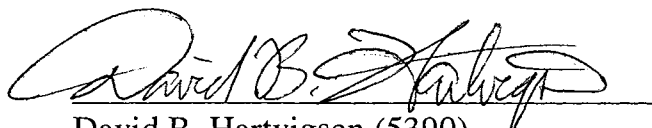
Judge Hilder also properly found that all parties could rightfully submit evidence on this *de novo* review. Finally, Judge Hilder found the Appellees to be the prevailing parties herein and, as allowed by rule, properly awarded their costs. Each of these rulings should be affirmed.

DATED this 22d day of November, 2006.

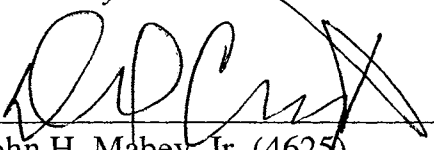
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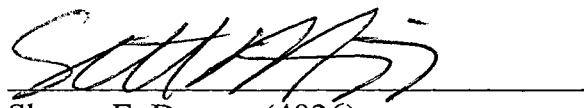
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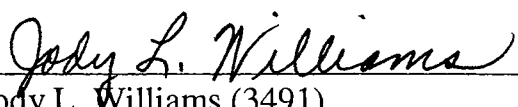
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I hereby certify that on the 22<sup>d</sup> day of November, 2006, I caused two true and correct copies of Brief of Appellee to be served via U.S. First Class Mail, postage prepaid, upon the following:

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