

2006

Western Water v. Jerry D. Olds : Brief of Appellant

Utah Supreme Court

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Terry L. Hutchinson; Attorney for Appellants.

Norman K. Johnson; Mark Shurtleff; Utah Attorney General; Attorneys for Appellee.

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IN THE UTAH SUPREME COURT

**WESTERN WATER, LLC., a Utah
Limited Liability Company**

Plaintiff and Appellant,

vs.

**Jerry D. Olds, Utah State Engineer and
Director of the Division of Water
Rights, et. al.**

**Defendants and
Appellees.**

Appellate Court Case No. 20060527

District Ct. No. 040910869WA

BRIEF OF APPELLANT

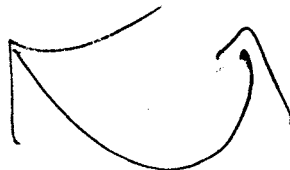
Appeal From the Judgment and Orders
Of The Third Judicial District Court,
The Honorable Robert K. Hilder, Presiding.

Attorney for Appellant:

Terry L. Hutchinson
TERRY L. HUTCHINSON, P.C.
Utah Bar No. 5092
368 E. Riverside Dr., Suite C
St. George, UT 84790
Attorney for Western Water, LLC

Attorney for Appellee:

NORMAN K. JOHNSON
MARK SHURTLEFF
Utah Attorney General's Office
1594 W. North Temple, #300
Salt Lake City, UT 84116
Attorneys for Defendant Jerry D. Olds,
Utah State Engineer



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Attorney for Appellant:

Terry L. Hutchinson
TERRY L. HUTCHINSON, P.C.
Utah Bar No. 5092
368 E. Riverside Dr., Suite C
St. George, UT 84790
Attorney for Western Water, LLC

Attorney for Appellee:

NORMAN K. JOHNSON
MARK SHURTLEFF
Utah Attorney General's Office
1594 W. North Temple, #300
Salt Lake City, UT 84116
Attorneys for Defendant Jerry D. Olds,
Utah State Engineer

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**WESTERN WATER, LLC., a Utah
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Director of the Division of Water
Rights, Alpine City, American Fork
City, W. Glade and 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,
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 User's
Association, Riverton City,**

Appellate Court Case No. 20060527

District Ct. No. 040910869WA

Salt Lake City Corporation, Sandy City
Dept. of Public Utilities, 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
Resources, Paul Taylor, Edward Thomas,
Mary and Edward Thomas, Town of
Cedar Fort, Trout Unlimited, United
States of 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.,
Mitigation & Conservation Commission -
Utah Reclamation, 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, South Jordan Canal
Company, Ron and Mindy Sager, Draper
Irrigation Company, Lower Jordan Water
Users Association, Sandy City Department
of Public Utilities, Marvin Shepherd, Utah
Division of Water Rights
**DOES 1-50, ROE CORPORATIONS,
1-50, MOE MUNICIPALITIES,
AND/OR GOVERNMENTAL
ENTITIES 1-50**

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Attorney for Appellant:

Terry L. Hutchinson
TERRY L. HUTCHINSON, P.C.
Utah Bar No. 5092
368 E. Riverside Dr., Suite C
St. George, UT 84790
tlh@infowest.com
Attorney for Western Water, LLC

Attorney for Appellee:

NORMAN K. JOHNSON
JULIE I. VALDES
MARK SHURTLEFF
Utah Attorney General's Office
1594 W. North Temple, #300
Salt Lake City, UT 84116
normanjohnson@utah.gov
jvaldes@utah.gov
Attorneys for Defendant Jerry D. Olds,
Utah State Engineer

Attorneys for Appelle:

Heather B. Shilton
MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL
1594 West North Temple, #300
Salt Lake, UT 84116
heathershilton@utah.gov
*Attorneys for Defendant State of Utah
Division of Parks and Recreation*

Randy Hunter
MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL
160 East 300 South, 5th Floor
Salt Lake, UT 84114-0857
*Attorneys for Defendant State of Utah
Department of Transportation*

Martin B. Bushman
Assistant Attorney General
1594 West North Temple, Ste. 2110
Salt Lake, UT 84116
Attorney for Def. Div. Wildlife Resources

Stephen G. Schwendiman
Keli Beard
Assistant Attorney General
P.O. Box 140814
160 E. 300 S., 5th Floor
Salt Lake, UT 84114-08150
sschwnd@utah.gov
kelibear@utah.gov
*Attorney for Defendant Utah Division of
Forestry, Fire & State Lands*

Attorneys for Appelle:

Steven E. Clyde
Edwin C. Barnes
CLYDE SNOW SESSIONS & SWENSON

201 S. Main St., Ste. 1300
Salt Lake, UT 84111
sec@clydesnow.com
ecb@clydesnow.com
*Counsel for Defendant Central Utah Water
Conservancy District*

Jody L. Williams
HOLME ROBERTS & OWEN
299 S. Main St., Ste. 1800
Salt Lake, UT 84111-2263
catherine.brabson@hro.com
*Attorneys for Pacificorp, Irvine Ranch and
Petroleum (dba Ambassador Duck Club),
Burnham Duck Club, Lower Jordan River
Water Users Association, and E. Fred
Walters*

M. Dayle Jeffs
JEFFS & JEFFS, P.C.
90 N. 100 E.
P.O. Box 888
Provo, UT 84603
Attorney for Clinger Family Partnership

John P. Ashton
VAN COTT, BAGLEY, CORNWALL &
McCARTHY, P.C.
50 South Main Street, Suite 1600
P.O. Box 45340
Salt Lake, UT 84144-0450
Attorney for New State Inc.

David C. Wright
MABEY & WRIGHT LLC
265 E. 100 S., Ste. 300
Salt Lake, UT 84111
dwright@utahwater.com
*Attorneys for East Jordan Irrigation Co.,
Kennecott Utah Copper Corp., Alpine City,
and Lehi City, Cedar Fort Irrigation Co.,
Lehi Spring Creek Irrigation Co.*

David B. Hartvigsen
SMITH HARTVIGSEN, PLLC
215 S. State St., Ste. 650
Salt Lake, UT 84111
david@smithlawonline.com
*Attorneys for W. Glade Berry, Bart D. Berry,
and Magna Water Company*

Kevin R. Bennett
Police and Courts Building
75 East 80 North
P.O. Box 146
American Fork, UT 84003
Kevin@afccity.net, bennettkevin@usa.net
Attorney for American Fork City

Robert P. Hill
Allan T. Brinkerhoff
RAY, QUINNEY & NEBEKER P.C.
P.O. Box 45385
Salt Lake, UT 84145-0385
rhill@rqn.com
abrinkerhoff@rqn.com
*Attorneys for Jordan Valley Water
Conservancy District*
Reid E. Lewis
8215 South 1300 West
P.O. Box 70
West Jordan, Utah 84088-0070
*Attorneys for Jordan Valley Water
Conservancy District*

Glenn R. Maughan
P.O. Box 3345
Ogden, UT 84409

David L. Church
BLAISDELL & CHURCH, P.C.
5995 South Redwood Road
Salt Lake City, Utah 84123
Attorneys for Riverton City

Richard G. Allen
2975 West Executive Parkway #509
Lehi, Utah 84043
Attorney for Saratoga Springs

Shawn E. Draney
Scott H. Martin
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Ste. 1100
Salt Lake, UT 84145-5000
sed@scmlaw.com
*Attorneys for Defendant Cahoon and
Maxfield Irrigation Company, Utah Lake
Distributing Company, and Metropolitan
Water District of Salt Lake and Sandy, Salt
Lake City Corporation and Sandy City, Provo
River Water Users Association*

Ryan B. Carter
Roger F. Cutler, Jr.
8000 S. Redwood Road
West Jordan, UT 84088
ryanc@wjordan.com
rogerc@wjordan.com
Attorneys for City of West Jordan

John H. Geilmann
1600 West Towne Center Drive
South Jordan, UT 84095
jgeilmann@sjc.utah.gov
Attorney for South Jordan City

Michael M. Quealy
David Bird
PARSONS BEHLE & LATIMER
One Utah Center
201 S. Main Street, Ste. 1800
Salt Lake, UT 84145-0898
mquealy@parsonsbehle.com
*Attorneys for Utah and Salt Lake Canal Co.
and North Jordan Irrigation Co.*

Joro Walker
Sean Phelan
Western Resource Advocates
425 East 100 South
Salt Lake, UT 84111
jwalker@westernresources.org
*Attorneys for Sierra Club, Trout Unlimited,
Utah Waters, Utah Wetlands, & National
Audubon Society*

Mack and Marie Wagstaff
7984 N. 7800 W.
Lehi, UT 84043

Utah Supreme Court
P.O. Box 140210
Salt Lake City, UT 84114-0210
Attn: Clerk

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Attorney for Appellant:

Terry L. Hutchinson
TERRY L. HUTCHINSON, P.C.
Utah Bar No. 5092
368 E. Riverside Dr., Suite C
St. George, UT 84790
Attorney for Western Water, LLC

Attorney for Appellee:

NORMAN K. JOHNSON
MARK SHURTLEFF
Utah Attorney General's Office
1594 W. North Temple, #300
Salt Lake City, UT 84116
Attorneys for Defendant Jerry D. Olds,
Utah State Engineer

JURISDICTION OF THE UTAH SUPREME COURT

This Court has jurisdiction pursuant to Utah Code Ann. §78-2-2(3)(f) & Utah Code Ann. §78-2-2(3)(e)(v).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

ISSUE NO. 1

Does the filing of a Request for Reconsideration to an administrative decision under Utah Code Ann. § 63-46b-13 continue to keep the administrative process open for changes to original applications where permitted by statute and case law?

STANDARD OF REVIEW

The Supreme Court reviews the trial court's grant of summary judgment for correctness and affords no deference to its legal conclusions. *In Re Uintah Basin*, 133 P.3d 410 (Utah 2006); *Green River Canal Company v. Thayn*, 84 P.3d 1134 (Utah 2003); *Bonham v. Morgan*, 788 P.2d 497 (Utah 1989). The Court considers whether the trial court correctly ruled that no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Id.*

PRESERVATION OF ISSUE

This issue was preserved by Opposition (R. 3188) and in oral argument. (R. 3373).

ISSUE NO. 2

Does a timely filed Request for Reconsideration, which includes a modification of an application to appropriate that merely deletes diversion points and parts of the original application project plan, but does not otherwise change or add any areas of service, types

or timing of use, nor add any new diversion points, keep open the administrative process, or does such a request fail to exhaust the applicant's administrative remedies because the applicant filed the modification subsequent to the State Engineer's original decision?

STANDARD OF REVIEW

The Supreme Court reviews the trial court's grant of summary judgment for correctness and affords no deference to its legal conclusions. *In Re Uintah Basin*, 133 P.3d 410 (Utah 2006); *Green River Canal Company v. Thayn*, 84 P.3d 1134 (Utah 2003); *Bonham v. Morgan*, 788 P.2d 497 (Utah 1989). The Court considers whether the trial court correctly ruled that no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Id.*

PRESERVATION OF ISSUE

This issue was preserved by Opposition (R. 3188) and in oral argument. (R. 3373).

ISSUE NO. 3

If the State Engineer does not respond to a request for a smaller project plan, lesser amounts of water, and fewer diversion points during the Request for Reconsideration process, does that constitute a rejection of the newly requested lesser amounts for the application?

STANDARD OF REVIEW

The Supreme Court reviews the trial court's grant of summary judgment for correctness and affords no deference to its legal conclusions. *In Re Uintah Basin*, 133 P.3d 410 (Utah 2006); *Green River Canal Company v. Thayn*, 84 P.3d 1134 (Utah 2003);

Bonham v. Morgan, 788 P.2d 497 (Utah 1989). The Court considers whether the trial court correctly ruled that no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Id.*

PRESERVATION OF ISSUE

This issue was preserved by Opposition (R. 3188) and in oral argument. (R. 3373).

ISSUE NO. 4

Is a late protester an appropriate party to an action challenging a denial of application of the State Engineer to a water right application, when the State Engineer allows the late protester to participate in the hearing anyway?

STANDARD OF REVIEW

The Supreme Court reviews the trial court's grant of summary judgment for correctness and affords no deference to its legal conclusions. *In Re Uintah Basin*, 133 P.3d 410 (Utah 2006); *Green River Canal Company v. Thayn*, 84 P.3d 1134 (Utah 2003); *Bonham v. Morgan*, 788 P.2d 497 (Utah 1989). The Court considers whether the trial court correctly ruled that no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Id.*

PRESERVATION OF ISSUE

This issue was preserved in oral argument (R. 3371).

ISSUE NO. 5

Are protestants to a water right application appropriate parties to argue and present evidence on all requirements of Utah Code Ann. § 73-3-8(1) considered by the State

Engineer when approving water right applications or are they appropriate parties only for showing the actual harm they may suffer if the application is granted?

STANDARD OF REVIEW

The Supreme Court reviews the trial court's grant of summary judgment for correctness and affords no deference to its legal conclusions. *In Re Uintah Basin*, 133 P.3d 410 (Utah 2006); *Green River Canal Company v. Thayn*, 84 P.3d 1134 (Utah 2003); *Bonham v. Morgan*, 788 P.2d 497 (Utah 1989). The Court considers whether the trial court correctly ruled that no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Id.*

PRESERVATION OF ISSUE

This issue was preserved in oral argument (R. 3372).

ISSUE NO. 6

Are environmental groups which have no water right, no real property affected by a water right application and no real tangible or certifiable injury appropriate parties in a District Court challenge of a State Engineer's decision on a water right application?

STANDARD OF REVIEW

The Supreme Court reviews the trial court's grant of summary judgment for correctness and affords no deference to its legal conclusions. *In Re Uintah Basin*, 133 P.3d 410 (Utah 2006); *Green River Canal Company v. Thayn*, 84 P.3d 1134 (Utah 2003); *Bonham v. Morgan*, 788 P.2d 497 (Utah 1989). The Court considers whether the trial court correctly ruled that no genuine issues of material fact exist and the moving party is

entitled to judgment as a matter of law. *Id.*

PRESERVATION OF ISSUE

This issue was preserved in oral argument (R. 3372).

ISSUE NO. 7

If a court dismisses a case due to lack of jurisdiction, can it award costs pursuant to Utah statute or rules?

STANDARD OF REVIEW

The reason for the trial court's decision with regard to costs is a legal determination which the Court reviews for correctness without deference to the trial court. *State ex rel. R.M.*, 38 P.3d 1006 (Utah 2001).

PRESERVATION OF ISSUE

This issue was preserved in an objection to proposed order (3281).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES,

ORDINANCES AND RULES

Utah Code Ann. § 63-46b-2. Definitions.

(1) As used in this chapter:

(a) "Adjudicative proceeding" means an agency action or proceeding described in Section 63-46b-1.

...
(f) "Party" means the agency or other person commencing an adjudicative proceeding, all respondents, all persons permitted by the presiding officer to intervene in the proceeding, and all persons authorized by statute or agency rule to participate as parties in an adjudicative proceeding.

(g) "Person" means an individual, group of individuals, partnership, corporation, association, political subdivision or its units, governmental subdivision or its units, public or private organization or entity of any

character, or another agency.

...

(i) "Respondent" means a person against whom an adjudicative proceeding is initiated, whether by an agency or any other person.

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.

Utah Code Ann. § 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.

Utah Code Ann. § 63-46b-15 Judicial review -- Informal adjudicative proceedings.

(1) (a) The district courts have jurisdiction to review by trial de novo all final agency actions resulting from informal adjudicative proceedings . . .

...

(2) (a) The petition for judicial review of informal adjudicative proceedings shall be a complaint governed by the Utah Rules of Civil Procedure and shall include:

- (i) the name and mailing address of the party seeking judicial review;
- (ii) the name and mailing address of the respondent agency;
- (iii) the title and date of the final agency action to be reviewed, together with a copy, summary, or brief description of the agency action;
- (iv) identification of the persons who were parties in the informal adjudicative proceedings that led to the agency action;
- (v) a copy of the written agency order from the informal proceeding;
- (vi) facts demonstrating that the party seeking judicial review is entitled to obtain judicial review;
- (vii) a request for relief, specifying the type and extent of relief requested; and
- (viii) a statement of the reasons why the petitioner is entitled to relief.

(b) All additional pleadings and proceedings in the district court are governed by the Utah Rules of Civil Procedure.

(3) (a) The district court, without a jury, shall determine all questions of fact and law and any constitutional issue presented in the pleadings.

(b) The Utah Rules of Evidence apply in judicial proceedings under this section.

Utah Code Ann. § 73-3-3 Permanent or temporary changes in point of diversion, place of use, 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 of use, or purpose of use.

...

(2)(a) Any person entitled to the use of water may make permanent or temporary changes in the

- (i) point of diversion;

(ii) place of use; or

(iii) purpose of use for which the water was originally appropriated.

(3) Both permanent and temporary changes of point of diversion, place of use, 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) A change may not be made unless the change application is approved by the state engineer.

...

(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 of use, or purpose of use shall be the same, as provided in this title for applications to appropriate water.

...

(9) Any person who changes or who attempts to change a point of diversion, place of use, or purpose of use, either permanently or temporarily, without first applying to the state engineer in the manner provided in this section:

(a) obtains not right; . . .

Utah Code Ann. § 73-3-6 Publication of notice of application --
Corrections or amendments of applications.

(1) (a) When an application is filed in compliance with this title, the state engineer shall publish a notice of the application once a week for a period of two successive weeks in a newspaper of general circulation in the county in which the source of supply is located, and where the water is to be used.

(b) The notice shall:

(i) state that an application has been made; and

(ii) specify where the interested party may obtain additional information relating to the application.

(c) Clerical errors, ambiguities, and mistakes that do not prejudice the rights of others may be corrected by order of the state engineer either before or after the publication of notice.

(2) After publication of notice to water users, the state engineer may authorize amendments or corrections that involve a change of point of diversion, place, or purpose of use of water, only after republication of notice to water users.

Utah Code Ann. § 73-3-7 Protests.

- (1) Any person interested may file a protest with the state engineer:
 - (a) within 20 days after the notice is published, if the adjudicative proceeding is informal; and
 - (b) within 30 days after the notice is published, if the adjudicative proceeding is formal.
- (2) The state engineer shall consider the protest and shall approve or reject the application.

Utah Code Ann. § 73-3-8 Approval or rejection of application -- Requirements for approval -- Application for specified period of time -- Filing of royalty contract for removal of salt or minerals.

(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, unless the application is filed by the United States Bureau of Reclamation, 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 believe that 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 unreasonably 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 of the application until he has investigated the matter. If an application does not meet the requirements of this section, it shall be rejected.

...

Utah Code Section § 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 Title 63, Chapter 46b.
 - (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.

Utah Code Ann. § 73-3-16 Proof of appropriation or permanent change --
Notice -- Manner of proof -- Statements -- Maps, profiles, and drawings --
Verification -- Waiver of filing -- Statement in lieu of proof of
appropriation or change.

(1) Sixty days before the date set for the proof of appropriation or proof of change to be made, the state engineer shall notify the applicant by mail when proof of completion of the works and application of the water to a beneficial use will be due.

(2) On or before the date set for completing the proof in accordance with the application, the applicant shall file proof with the state engineer on forms furnished by the state engineer.

(3) Except as provided in Subsection (4), the applicant shall submit the following information:

- (a) a description of the works constructed;
- (b) the quantity of water in acre-feet or the flow in second-feet diverted, or both;
- (c) the method of applying the water to beneficial use; and
- (d) (i) detailed measurements of water put to beneficial use;
(ii) the date the measurements were made; and
(iii) the name of the person making the measurements.

...
(5) The proof on all applications shall be sworn to by the applicant or the applicant's appointed representative and proof engineer.
...

Utah Code Ann. § 73-3-17 Certificate of appropriation -- Evidence.

Upon it being made to appear to the satisfaction of the state engineer that an appropriation or a permanent change of point of diversion, place or nature of use has been perfected in accordance with the application therefor, and that the water appropriated or affected by the change has been put to a beneficial use, as required by Section 73-3-16, he shall issue a certificate, in duplicate, setting forth the name and post-office address of the person by whom the water is used, the quantity of water in acre-feet or the flow in second-feet appropriated, the purpose for which the water is used, the time during which the water is to be used each year, the name of the stream or source of supply from which the water is diverted, the date of the appropriation or change, and such other matter as will fully and completely define the extent and conditions of actual application of the

water to a beneficial use; . . . The certificate shall not extend the rights described in the application. . . . The certificate so issued and filed shall be prima facie evidence of the owner's right to the use of the water in the quantity, for the purpose, at the place, and during the time specified therein, subject to prior rights.

Utah Code Ann. § 78-2-2 Supreme Court Jurisdiction.

. . .
(3) The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals over;

(e) final orders and decrees in formal adjudicative proceedings originating with:

. . .
(v) the state engineer . . .

. . .
(f) final orders and decrees of the district court review of informal adjudicative proceedings of agencies under Subsection (3) e.
. . .

Utah Admin. Code § R655-6-1 Authority and Effective Date.

A. These rules establish and govern the administrative procedures for informal adjudicative proceedings before the Division of Water Rights as required by Section 63-46b-5.

B. These rules govern all informal adjudicative proceedings commenced on or after January 1, 1988. Adjudicative proceedings commenced prior to January 1, 1988, are governed by R655-2.

Utah Admin. Code § R655-6-2 Designation of Informal Proceedings.

All adjudicative proceedings of the Division of Water Rights are hereby designated as informal proceedings and include, but are not limited to, all requests for agency action and notices of agency action concerning applications to appropriate water, change applications, exchange applications, applications to segregate; requests for reinstatement and extension of time; proofs of appropriation and change; applications for extension of time within which to resume use of water and proofs of resumption of use; applications to renovate or replace existing wells; permits and authorizations for dam construction, repair and use; applications and other procedures for utilization of geothermal resources; licenses and other permits for water well drillers; applications for

stream alteration; and other adjudicative proceedings involving water right administration.

Utah Admin. Code § R655-6-3 Definitions.

A. "Adjudicative Proceeding" means a Division action or proceeding that determines the legal rights, duties, privileges, immunities, or other legal interests of one or more identifiable persons, including all Division actions to grant, deny, revoke, suspend, modify, annul, withdraw, or amend the authority, right, or license; and judicial review of all such actions. Those matters not governed by Title 63, Chapter 46b shall not be included within this definition.

B. "Division" means the Division of Water Rights.

C. "State Engineer" is the Director of the Division of Water Rights, which is the agency having general administrative supervision over the waters of the State. The duties of this Division are primarily set forth in Title 73, Chapters 1 through 6.

D. "Staff" means the Division of Water Rights staff.

E. "Person" means an individual, group of individuals, partnership, corporation, association, political subdivision or its units, governmental subdivision or its units, public or private organization or entity of any character, or other agency.

F. "Party" means the Division or other person commencing an adjudicative proceeding, all respondents, all protestants, all persons permitted by the Presiding Officer to intervene in the proceeding, and all persons authorized by statute or agency rule to participate as parties in an adjudicative proceeding.

G. "Presiding Officer" means the State Engineer, or an individual or body of individuals designated by the State Engineer, designated by the agency's rules, or designated by statute to conduct a particular adjudicative proceeding.

H. "Respondent" means any person against whom an adjudicative proceeding is initiated, whether by the Division or any other person.

I. "Application" means any application which has been filed pursuant to Title 73, Chapters 1, 2, 3, 5 and 6, and shall include, but not be limited to, applications enumerated in R655-6-5.B.3. An application is also a request for agency action. The substantive rules governing the filing and perfecting of these documents are specified in the above Chapters and in other Division rules, and R655-6 governs only the administrative procedures for those applications which have been properly filed.

J. "Applicant" is a person applying for an application.

K. "Protestant" means a person who timely protests an application

before the State Engineer pursuant to Section 73-3-7 or who files a protest pursuant to Section 73-3-13.

Utah Admin. Code § R655-6-4 Construction.

A. These rules shall be construed in accordance with Title 63, Chapter 46b, and these rules supersede any conflicting provision of procedural rules promulgated by the Division.

B. These rules shall be liberally construed to secure a just, speedy and economical determination of all issues presented to the Division.

...

D. Any pleading or other document required to be filed with the Division shall be considered to be filed on the date the signed original is actually deposited with the Division and not on the date of postmark.

Utah Admin. Code § R655-6-5 Commencement of Proceedings.

...

B. Proceedings Commenced by Persons Other Than the Division.

1. All informal adjudicative proceedings commenced by persons other than the Division shall be commenced by either completing and submitting prepared forms requesting agency action which are available at the Division . . .

2. For purposes of requests for agency action filed pursuant to Title 73, the adjudicative proceeding commences on the date the request is received by the Division and not on the date of postmark.

3. Forms Requesting Agency Action

The following forms requesting agency action shall be used by persons requesting a particular agency action and are available from the Division:

a. Application to Appropriate Water

...

4. Upon receipt of a request for agency action, the Presiding Officer shall promptly review the request and shall act in accordance with Subsections 63-46b-3(3)(d) and (e).

5. Protests filed pursuant to Title 73, Chapters 1, 2, 3, 5 and 6 shall be filed in accordance with the governing statutes and these rules.

a. Protests should be filed on letter-sized paper, typewritten and double-spaced, but may be submitted in legible handwritten form. Protests should identify the water right by water right number, state the complete mailing address of the protestant, and should contain a clear, concise statement of the matter relied upon as the basis for the protest, together with

an appropriate request for relief. If the name or address of the protestant is not legible, the Division shall not be obligated to give the protestant notice of any further proceedings.

b. Protests signed by more than one person shall be accepted. However, persons filing a multiple-person protest are encouraged to designate a representative for the group of protestants who shall receive all notices on behalf of all who signed the protest. If no representative is designated, each person signing the protest shall be considered a protestant, and shall receive notice of any further proceedings, if their name, mailing address and phone number are clearly legible.

c. Upon the filing of a protest the Presiding Officer shall mail a copy of the protest to the applicant. The applicant may file with the Division an answer to the protest within the time designated by the Presiding Officer. The Presiding Officer shall mail copies of any answer to the protestant, or attorney or authorized representative, if any. The protestant may file a response to the answer with the Division within the time designated by the Presiding Officer.

The Presiding Officer shall mail a copy of the response to the applicant.

d. Protests filed after the protest period has expired shall be placed on file and become part of the record. Any person filing a late protest is not a party and may receive notice of any further proceeding, hearing or order.

Utah Admin. Code § R655-6-6 Pleadings.

A. Pleadings before the Presiding Officer for administrative hearings may consist of a notice of agency action, a request for agency action, responses, protests, answers to protests, responses to answers, motions together with affidavits, briefs, memoranda of law and fact in support thereof, requests for reconsideration, and other pleadings as allowed by Title 63, Chapter 46b.

B. Motions may be submitted for the Presiding Officer's decision on either written or oral argument, and the filing of affidavits in support or contravention thereof may be permitted. Any written motion may be accompanied by a supporting memorandum of fact and law.

C. Amendments to Pleadings.

The Presiding Officer may allow pleadings to be amended or corrected, and defects which do not affect substantial rights of the parties may be disregarded; provided, however, that applications and other similar documents which are governed by specific statutory provisions shall be amended only as provided by statute.

D. Service of Pleadings.

Except as otherwise specified in R655-6-5.B.5.c., all persons filing pleadings after the request for agency action or the notice of agency action have been filed shall serve copies of the pleadings by regular mail to all parties or their attorney of record or authorized representative on the date of filing the pleadings with the Division. Service upon any attorney or authorized representative constitutes service on the represented party. Service shall be deemed complete on the date of mailing.

E. Post-Hearing Pleadings.

Before or after a hearing is concluded, any party may seek permission from, or may be asked by, the Presiding Officer to file a memorandum or other information. All other parties shall have 20 days, unless shortened or lengthened by the Presiding Officer, from the date of service within which to file responsive pleadings. The filing of any further post-hearing pleadings shall be by permission of the Presiding Officer.

Utah Admin. Code § R655-6-7 Hearings.

A. The Division shall hold a hearing if a hearing is required by statute or rule.

B. The Division shall hold a hearing if a hearing is permitted by rule and is requested by a party in writing within 10 days of when the adjudicative proceeding commences, or within the time prescribed in the notice of agency action or by the Presiding Officer.

C. The Division may hold a hearing if a hearing is requested in a timely filed protest.

D. The Division may at its discretion hold a hearing on any adjudicative proceeding to determine matters within its authority.

E. Notice of the hearing will be served on all parties by regular mail at least ten days prior to the hearing.

F. Hearings shall be held for most adjudicative proceedings in the county where the water source is located or the county where the majority of the parties reside. Hearings may be held outside the county at the discretion of the state engineer.

G. If no hearing is held for a particular adjudicative proceeding, the Division shall within a reasonable time issue a decision pursuant to R655-6-16.

Utah Admin. Code § R655-6-8 Intervention.

Intervention is prohibited except where a federal statute or rule requires that a state permit intervention.

Utah Admin. Code § R655-6-11 Parties to a Hearing.

A. 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.

B. Any person not a party to the adjudicative proceeding may participate at a hearing as a witness for a party or, upon the consent of the Presiding Officer, may participate as part of the Division's investigative and fact finding powers. Such a person is not a party to the adjudicative proceeding and may not seek judicial review.

Utah Admin. Code § R655-6-16 Orders.

A. After the Presiding Officer has reached a final decision upon any adjudicative proceeding, he shall make and enter a signed order in writing that states the decision, the reasons for the decision, a notice of the rights of the parties to request reconsideration or judicial review, as appropriate, and notice of the time limits for filing a request for reconsideration or a court appeal. The order shall be based on the facts appearing in any of the Division's files or records and on the facts presented in evidence at any hearings.

B. The signed order described in this section or an order issued in response to a timely-filed request for reconsideration shall constitute the final agency action.

C. A copy of the Presiding Officer's order shall be promptly mailed by regular mail to each of the parties.

Utah Admin. Code § R655-6-17 Requests for Reconsideration.

A. Who may file.

Any aggrieved party may file a Request for Reconsideration by following the procedures of Section 63-46b-13. A Request for Reconsideration is not a prerequisite for judicial review.

B. Action on the Request.

Upon the filing of a Request for Reconsideration, the Division shall review the Request and may within 20 days do any or all of the following:

1. issue any preliminary order;
2. summarily deny the Request in whole or in part;
3. summarily grant the relief requested in whole or in part; or
4. set a time for a re-hearing.

C. If the Division does not issue an order within 20 days, the

Request shall be considered to be denied.

D. Re-Hearings Limited.

If an order is made granting a rehearing, it shall be limited to the matter specified in the order. Upon rehearing, the Presiding Officer may affirm his former decision or may abrogate it, or may change or modify the same in any particular. That decision shall have the same force and effect as the original decision, but shall not affect any right or the enforcement of any right arising out of or by virtue of the original decision unless so ordered by the Presiding Officer.

Utah Admin. Code § R655-6-18 Judicial Review.

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

B. The Division may grant a stay of its order or other temporary remedy during the pendency of judicial review on its own motion, or upon petition of a party pursuant to the provisions of Section 63-46b-18.

STATEMENT OF THE CASE

1. NATURE OF THE CASE

This case is an appeal from the decision of the trial court granting the dismissal of Plaintiff's action because of a failure to exhaust administrative remedies. Plaintiff is additionally appealing the trial court's decision to permit Defendants who did not timely file protests with the State Engineer to Plaintiff's applications to remain in the suit and the trial court's decision to permit Defendants who apparently do not have tangible or measurable damages or property interests to remain in the suit. Plaintiff has further appealed the trial court's decision to permit all Defendants to participate in and present evidence on areas of the statute having to do with public policy and public issues and in which they do not have tangible or measurable damages or damage to property interests. The trial court also awarded costs pursuant to Utah statute despite holding that it had no

subject matter jurisdiction.

2. COURSE OF THE PROCEEDINGS

Plaintiff filed a Complaint on May 25, 2004. The Court denied Plaintiff's Motions for Summary Judgment on some of the Protestants who filed late protests with the State Engineer on April 7, 2006 and against environmental and other groups on April 10, 2006. On April 10, 2006, the court also denied Plaintiff's Motion for Partial Summary Judgment against all of the Defendants except the State Engineer on grounds (c)(d) and (e) of Utah Code Ann. § 73-3-8(1). On April 17, 2006, the court granted the Defendant's Motion To Dismiss. The Defendants' filed a proposed Order with a provision to award them costs, to which Plaintiff objected. On May 12, 2006, the Court issued a decision awarding costs and signing the Order Dismissing the Case.

3. DISPOSITION IN THE COURT BELOW

The Court entered its Order Dismissing the Case on May 15, 2006. The amounts of those costs has not yet been set, but Plaintiff has indicated it does not object to the amounts claimed by Defendants. The Court also denied Plaintiff's Motions for Summary Judgment and Partial Summary Judgment on April 7, 2006; April 10, 2006 and April 19, 2006.

4. STATEMENT OF FACTS

The vast majority of the facts being argued at this point of the case have not been disputed by the Defendants or the Plaintiff.

The Plaintiff is a Utah limited liability company formed for the purpose of

developing water including filing applications for water rights. (R. 4, ¶10) Plaintiff filed two applications to appropriate on March 5, 1999 and again on March 23, 1999 (R. 4, ¶¶11-12), and filed a third application to appropriate on May 23, 2001 which appropriated for beneficial use formerly appropriated waters that have reverted to the public (R. 5, ¶13). The State Engineer held a hearing on November 20 and 21, 2002 (R. 27) in which those who filed timely protests and also several late protesters were allowed to participate. (R. 5, ¶15). Before the State Engineer issued his Memorandum Decision on Plaintiff's Application, Plaintiff sent the State Engineer a letter indicating that it would be willing to accept a lesser amount of water than had been claimed. (R. 3203) On March 17, 2004, the State Engineer issued his Memorandum Decision denying Plaintiff's applications on five grounds. (R. 17). On April 6, 2004, Plaintiff timely submitted a Request for Reconsideration with a reduced project plan termed the "Revised Conservation Plan". (R. 38). Without any additional response, the State Engineer took no action on the Plaintiff's Request. (R. 6, ¶20). On May 25, 2004, Plaintiff timely filed the Complaint in the Third Judicial District Court requesting review of the State Engineer's decision. (R. 1). The Court permitted the late protesters to remain as Defendants in the action (R. 2926) and also permitted environmental groups and others who had participated in the hearing to remain in the judicial action as Defendants (R. 3261). The Court also refused to limit the Defendants' participation to those statutory issues pled against them by the Plaintiff. (R. 3078). On April 17, 2006, on the day prior to the three week trial setting, the Court dismissed the case on the grounds of Plaintiff's alleged

failure to exhaust its administrative remedies. (R. 3191).

Following its determination of lack of subject-matter jurisdiction, the trial court awarded costs to the Defendants, although Plaintiff did not object to any of the amounts claimed by the Defendants. (R. 3284).

SUMMARY OF ARGUMENTS

ISSUE NO. 1

The District Court erred in dismissing Plaintiff's complaint for lack of subject matter jurisdiction for failure to exhaust administrative remedies because Plaintiff timely filed a request for reconsideration with the State Engineer which kept the administrative process open on all issues, including reductions in the original applications permitted by statute and case law. Because the State Engineer did not respond to Plaintiff's request within 20 days, the request for reconsideration was by statute considered to be denied. Plaintiff had exhausted all administrative remedies available and timely a filed complaint in District Court for review of final agency action.

ISSUE NO. 2

The District Court erred in dismissing Plaintiff's complaint for lack of subject matter jurisdiction for failure to exhaust administrative remedies because Plaintiff timely filed a request for reconsideration that could and did include permitted reductions in the applications. The reductions merely deleted diversion points and parts of the original application project plan, but did not otherwise change or add any areas of service, types

or timing of use, nor add any new diversion points. Because such reductions are permitted by statute and supporting case law, the State Engineer had the power and the duty to reconsider the applications as requested. The request for reconsideration kept open the administrative process on all issues raised including the reductions until considered denied at the expiration of 20 days without order. Having exhausted all available administrative remedies, Plaintiff's timely and properly filed complaint in District Court for review of final agency action.

ISSUE NO. 3

The State Engineer's failure to respond to Plaintiff's request for a smaller project plan, lesser amounts of water, and fewer diversion points in Plaintiff's Request for Reconsideration constituted a rejection of the newly requested reductions to the applications because the State Engineer had the power and duty to reconsider, but did not do so. After 20 days without order, pursuant to statute the request for reconsideration of the smaller project was considered denied. That denial cut off all available administrative remedies and forced Plaintiff to file in District Court for review. The District Court thus erred in dismissing Plaintiff's complaint for failure to exhaust administrative remedies.

ISSUE NO. 4

Contrary to the District Court's holding, the late protesters are not appropriate parties to this action challenging the State Engineer rejection of the applications to appropriate even though the State Engineer allowed the late protesters to participate in the hearing. Pursuant to Utah Code Ann. § 73-3-7 and the State Engineer's administrative

rules only those who file timely protests are parties to the adjudicative proceeding. Participation in the hearing does not make a late protester a party. Plaintiff named all Defendants solely to ensure all appropriate parties had been named within the 30-day statutory time limit. Late protesters are not appropriate parties to the judicial review because they have failed to become a party to the adjudicative proceeding and thereby failed to exhaust their administrative remedies.

ISSUE NO. 5

Contrary to the District Court's holding, Protestants to Plaintiff's applications to appropriate are not appropriate parties to argue and present evidence on any approval requirements of Utah Code Ann. § 73-3-8(1) in which they do not have a cognizable legal interest or potential harm or injury. Plaintiff named all Defendants solely to ensure all appropriate parties had been named within the 30-day statutory time limit. No statute authorizes protestants to act as "private attorneys general" for representing, arguing, and presenting evidence on general issues of potential public harm. Application approval requirements (c), (d), and (e) of § 73-3-8(1) involve strictly public issues which are the sole jurisdiction of the State Engineer, as a statutorily authorized administrative officer of the State, to decide and to defend with the help of the statutorily authorized Attorney General's office.

ISSUE NO. 6

Environmental group protestants which have no water right, no real property affected by a water right application, and no real tangible or certifiable injury are not

appropriate parties to the District Court review of the State Engineer's rejection of Plaintiff's applications. Plaintiff named environmental groups who filed timely protests as defendants solely to ensure all appropriate parties had been named within the 30-day statutory time limit. No statute authorizes environmental protestants to act as "private attorneys general" for representing, arguing, and presenting evidence on general issues of potential public harm or harm to others. Lacking any particularized interest or potential injury not shared by the general public, environmental groups have no cognizable legal interest to protect and the District Court erred in holding that they are appropriate parties to this action.

ISSUE NO. 7

The District Court erred when it awarded costs to Defendants. The Court dismissed the case due to lack of subject matter jurisdiction. If that be the case, then the District Court lacks jurisdiction other than to dismiss the case and cannot award costs as a matter of course. If as Plaintiff contends, the court had subject matter jurisdiction, then Plaintiff is entitled to costs as a matter of course.

ARGUMENT

ISSUE NO. 1

A REQUEST FOR RECONSIDERATION FILED PURSUANT TO UTAH CODE ANN. §63-46b-13 CONTINUES THE ADMINISTRATIVE PROCESS.

When the State Engineer considers an application for water rights or a change application, he has a "duty" to approve it as long as five elements are met:

(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 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. Utah Code Ann. §73-3-8(1) .

“Proceedings on applications to appropriate are informal proceedings,” according to Utah Admin. Code §R655-6-2.

Once a decision has been issued by the State Engineer, the Petitioner or other affected party may request a reconsideration of the decision pursuant to Utah Code Ann. §63-46b-13 and Utah Admin. Code § R655-6-17. This request must be filed within 20 days of the decision. Utah Code Ann. § 63-46b-13(1)(a). Upon receipt of the request, the Utah Code and the Utah Administrative Code both state that, “If the Division does not issue an order within 20 days, the Request shall be considered to be denied”. Utah Admin. Code §R655-6-17(C); see also Utah Code Ann. §63-46b-13(3)(b). This Court has upheld the statute and rule by holding that the deadline to file a judicial appeal from an action of an administrative agency does not begin until a request for reconsideration was denied or if “the agency does not respond within twenty days, the reconsideration is deemed denied.”. *Union Pacific Railroad Company v. Utah State Tax Commission*, 999 P.2d 17, 20 (Utah 2000).

Final agency action had been taken on the Revised Conservation Plan. *Union Pacific R.R.* at 21-22 gives a three-prong test for determining agency action as follows:

(1) Has administrative decision-making reached a stage where judicial review will not

disrupt the orderly process of adjudication?; (2) Have rights or obligations been determined or will legal consequences flow from the agency action?; and (3) Is the agency action, in whole or in part, not preliminary, preparatory, procedural, or intermediate with regard to subsequent agency action?

The denial of the Appellant's request answered all three requirements. First, by denying reconsideration, the State Engineer reached the end of his decision making process. Second, judicial review would not have interfered with State Engineer proceedings, since the State Engineer had refused to reconsider his order. Third, the State Engineer's lack of response to Western Water's request for reconsideration denied the request and ended the decision making process leaving no issues unresolved because no further administrative appeal was possible. Therefore, final agency action had been taken.

The timeline of events is not disputed. The Revised Conservation Plan was submitted to the State Engineer in the Plaintiff's Request for Reconsideration. The trial court specifically found that the appellant's Request was timely pursuant to the statute (R. 3373 at pp. 69-70) and that the judicial review challenge was filed within the time permitted by the statute (R. 3373 at page 70). The parties agreed that the State Engineer did not take any action on the Request; he did not did not advertise the Revised Conservation Plan, entertain any protests on it nor did he conduct a hearing on it. (Multiple places in the record, but most noticeably at (R. 3373 at pp. 51-52).

The trial court ruled that Appellant had failed to, "present its Revised

Conservation Plan to the State Engineer for consideration before he ruled on the Conservation Plan that was the subject of Plaintiff's applications and of the notice and hearing of the State Engineer." (R. 3292) Another reason was that the State Engineer had reviewed the Revised Conservation Plan, "only to consider whether it gave rise to reconsider the Conservation Plan" (R. 3292) and because, "the protestants had no opportunity to consider or offer evidence with regard to the impact of the Revised Plan, which was a significant reformulation of the Conservation Plan." (R. 3292.)

The issue of whether or not the State Engineer's handling of the Revised Conservation Plan constituted a denial shall be handled below. The first issue raised by the trial court's actions is whether or not the Appellant's Request for Reconsideration caused the administrative process to remain open. A Request for Reconsideration keeps alive the administrative process and prevents a "final administrative action." The option of judicial review becomes unavailable when a Request for Reconsideration is filed until after the disposition of the Request. *Maverik Country Stores, Inc. v. The Industrial Commission of Utah*, 860 P.2d 944, 951 (Utah Ct. App. 1993). In other words, there can be no final agency action when a Request for Reconsideration is filed because a judicial review is barred. In this instance, the Appellant could not have filed for judicial review on the denial of the original Conservation Plan while its Request was pending. Therefore, there was no actual administrative remedy for the Appellant to follow once the Request was filed until the Engineer acted on the Request one way or the other.

The State Engineer chose to not advertise the Revised Conservation Plan or

conduct hearings on it. He was certainly aware that it was a “down-sized” version of the original Conservation Plan; that it contained no additional requests for water, no new diversion points, and no other changes that would have required new notices to the public under Utah Code Ann. §73-3-6(2). If the State Engineer had felt that a new hearing was necessary and appropriate, he had the statutory authority and duty to grant the request for reconsideration and conduct the same. *Clark v. Hansen*, 631 P.2d 914 (Utah 1981); Utah Admin. Code §R655-6-17(B) and (D); see also *Prince v. Collection Division*, 974 P.2d 284 (Utah 1999) which says that an agency has and retains jurisdiction and power to act on a request for reconsideration at any time after it is received; however, the time for such action terminates when a party appeals to the courts, *Career Service Review Board v. Utah Dept. of Corrections*, 942 P.2d 933 (Utah 1997).

The State Engineer elected not to take action. He admitted that he knew he had the power to do so. (R. 3208 Page 41, Line 24 through Page 42, Line 8.) This inaction is a final agency action, in and of itself, reviewable by the Court, since the statute provides that no action constitutes a denial. Utah Code Ann. §63-46b-13(3)(b); Utah Admin. Code R655-6-17(C). “The rejection of the application [and the Request] was an injury to the plaintiff, and [Plaintiff], as such injured or aggrieved party, under [73-3-14] would have the right to petition the district court for redress. . . . The objection that the engineer is not a proper party defendant [because the district court lacked jurisdiction to review his rejection of a request for reconsideration] cannot be sustained. . . . It was the duty of the engineer, upon proper showing, to grant the application and [Request]. No

other official is authorized to receive, consider , approve, or reject an application [or Request] for the appropriation of water. Manifestly there was no other party against whom the plaintiff could seek relief.” *Brady v. McGonagle*, 195 P. 188, 191 (Utah 1921).

A party is excepted from exhausting administrative remedies if further administrative proceedings would be inadequate or would serve no useful purpose. Utah Code Ann. § 63-46b-14(2)(b); *Brumley v. Utah State Tax Commission*, 868 P.2d 796 (Utah 1993). Similar to *Brumley*, Western Water’s applications have raised conflicting legal issues which the State Engineer cannot finally determine in an administrative proceeding. These legal issues include: (1) the proper application of first-in-time, first-in-right water law doctrine within the application process including who can claim water that reverts to the public and whether Western Water could make application for it; (2) whether appropriation applications can be kept open without action for decades as the State Engineer has attempted to do or whether the applications must be acted upon in a timely manner; (3) what is the proper statutory meaning of speculation which is prohibited by Utah Code. Ann. §73-3-8(1)(e) and whether or not the State Engineer can require water delivery contracts to actual end users prior to application approval to defeat his findings regarding both speculation and feasibility.

Since Western Water’s applications must be rejected if they run afoul of any one of the five criteria for application approval under Utah Code Ann. §73-3-8(1), and the State Engineer rejected the application on all five criteria including his erroneous

application of law on each of the above three questions, further attempts to exhaust administrative remedies, even if such were possible, which it was not, would have been inadequate and future.

ISSUE NO. 2

A TIMELY FILED REQUEST FOR RECONSIDERATION MAY INCLUDE A MODIFICATION OF AN APPLICATION FOR A WATER RIGHT THAT DOES NOT INCLUDE MODIFICATIONS WHICH REQUIRE A NEW APPLICATION WHETHER IT IS SUBSEQUENT TO THE MEMORANDUM DECISION RESULTING IN THE REQUEST OR NOT.

During the application process for water rights, both before and after approval, an applicant can request less water (and also delete other elements of his application). In fact, the Utah statutes provide that if an individual cannot certify the amount of water his application was approved for, his right will only be “perfected” for the amount he certifies. Utah Code Ann. §§73-3-16, 73-3-17.

When someone seeks to expand a right or change a diversion point for use of water (other than a deletion) then the statutes require a new application process through the State Engineer’s office. Changes and amendments are permitted and republication is necessary only in cases that involve a change of point of diversion, place, or purpose of use. Utah Code Ann. §§ 73-3-3, 73-3-6, 73-3-17. This court has held that the State Engineer’s authority is not limited to either approval or rejection of an application; in fact, changes are permitted as to the point of return of water without requiring a new application, a change application, or even republication. *Whitmore v. Welch*, 201 P.2d 954 (Utah 1949). The law is designed for experimentation to determine, whether and

how, much water can be appropriated. *Bullock v. Hanks*, 452 P.2d 866 (Utah 1969).

The trial court erroneously held that the Revised Conservation Plan was “substantially different” than the original Conservation Plan for the applications (R. 3392) and therefore it should have been re-noticed and re-evaluated by the State Engineer even though all of the points of the Revised Conservation Plan had been included in the original Conservation Plan (R. 3373 at pp.65-66). In other words, the trial court limited the appellant’s Request for Reconsideration to the State Engineer’s decision on the Conservation Plan itself. (R. 3373 at p. 64).

A republication was not necessary here. It was not disputed by the parties that the differences between the Revised Conservation Plan and the original are *only* differences of deletion and subtraction, despite the Defendants’ attempts to obfuscate that. It was clear to the trial court (and freely admitted by the parties) that the State Engineer, under his own statutory authority could have approved the Revised Conservation Plan at any time in his approval process. The State Engineer admitted that he could have approved a, “down-sizing of the plan” and, “determined to scale the project down and approved it.” (R. 3207-3208, 3210; page 39, lines 13-24 and page 40, line 20 through page 41, line 13. Also page 49, lines 14-23.)

In fact, the State Engineer has a duty to approve water rights in all instances where there is any amount of water in the application. “. . . applications must be approved if the engineer finds reason to believe **some** rights under such application may be acquired.” *East Bench Irrigation Co. v. State*, 300 P.2d 603 (Utah 1956); (**emphasis added**); *United*

States v. Fourth District Court, 238 P.2d 1132 (Utah 1951).

The reason for this duty is that applications to appropriate are favored. Doubts are to be resolved in favor of approval in order to meet the public's interest to have the state's water applied to beneficial use. See *Rocky Ford Irr. Co. v. Kents Lake Irr. Co.*, 104 Utah 202, 135 P.2d 108 (1943); *Little Cottonwood Water Co. v. Kimball*, 76 Utah 243, 289 P. 116 (1930); *Bullock v. Hanks*, 22 Utah 2d 309, 452 P.2d 866 (1969).

In *Searle v. Milburn Irr. Co.*, 133 P.3d 382, 391-92 (Utah 2006), the Utah Supreme Court explained that approval of applications is favored, and that a liberal policy toward approval will promote the full development of water resources:

[T]he legislature gave practical effect to its determination that the possible benefits to be derived from a liberal policy toward application approval outweigh the potential of possible temporary harm if a use proposed in an application results in an impairment of vested rights. The value of allowing experimentation cannot be understated. As we stated in *District Court*, 238 P.2d at 1137,

[i]f we were to finally adjudicate applicant's right to change or to appropriate water at the time that such application was rejected or approved, he would get only such rights as he could establish by a preponderance of the evidence that he could use beneficially without interfering with the rights of others and in such hearing he would not have the benefit of any opportunity to experiment and demonstrate what he could do. Such a system would cut off the possibility of establishing many valuable rights without a chance to demonstrate what could be done.

Here, republication of notice and re-hearing is not required because the changes in the applications do not enlarge the rights appropriated, but merely reduce them as an exact subset of the applications. This court discussed such a subset when it stated:

“Appellants’ argument . . . would be persuasive if applied to an amendment which would have the effect of applying for to a larger use But is not persuasive when [the change] was to reduce the applicant’s claim. Publication of the claim as filed would give notice to water users or claimants of the total quantum of water or extent of the stream channel applied for. It consequently would give notice as to any amount or distance included in the total. Under such circumstance the claimed analogy between a change in point of use and point of return loses its force.”

Whitmore v. Welch, 201 P.2d 954, 959-960 (Utah 1949). The State Engineer’s own administrative regulations permit, “[t]he Division . . . at its discretion [to] hold a hearing on any adjudicative proceeding to determine matters within its authority”, Utah Admin. Code §§R655-6-7(D), R655-6-17(D), and also to allow changes to applications to be made in accordance with statute. Utah Admin. Code §R655-6-6(C) provides: “The Presiding Officer may allow pleadings to be amended or corrected, and defects which do not affect substantial rights of the parties may be disregarded; provided, however, that applications and other similar documents which are governed by specific statutory provisions shall be amended only as provided by statute”.

Appellant’s Revised Conservation Plan submitted with its request for reconsideration embodies an exact subset of the original Conservation Plan presented with for its applications. All facilities, points of diversion, types and places of use, and amounts of water to be diverted and beneficially used are part of the original project plan. The only thing that has varied is a reduction and downsizing of the plan and a change in just how Western Water plans to go about constructing and operating facilities in putting water to beneficial uses, which is the very embodiment of experimentation.

The trial court set aside the long-standing case law cited above which permitted

and encouraged experimentation for achieving beneficial use and replaced it with a rigid rule which can be misused by those motivated by a desire to kill an application and/or project and prevent future applicants from putting the water to beneficial use. Rulings such as that issued by the trial court in this case would cut off experimentation and put the applicant in the untenable position of having to read the State Engineer's mind prior to his issuing a decision and put before the State Engineer just exactly the project plan he will approve. Another option for future applicants would be to submit a variety of project plan variations before the State Engineer prior to decision so that at least something may be approved while waiting to litigate at judicial review what should have been approved. Even then, the court would be ham-strung by rigid rules that would only grant the court jurisdiction to consider the exact set of plans placed before the State Engineer before his decision with no jurisdiction to fashion any accommodations or changes that would better achieve beneficial use under the statutory criteria. In contrast, the current system provides for give and take between the applicant and the State Engineer, or the courts, to approve as much beneficial use as possible while imposing reasonable conditions upon the applicant to protect existing rights and public issues.

The procedures or requirements for applications to appropriate water are codified in Utah Code Ann. § 73-3-8(1). The statute affirmatively states, "It *shall be the duty* of the State Engineer to approve the change application if the subsequently listed criteria are met." (Emphasis added.) The statute grants the applicant a right of approval upon meeting the criteria. Utah Code Ann. §73-3-8(1). The State Engineer has no authority to

ignore or obstruct that right, but has the affirmative duty to accommodate the applicant's efforts to appropriate water for beneficial use. Further, the statute grants a right to the applicant to seek redress in the courts for non-action in his duties. Utah Code Ann. §63-46b-14. Plaintiff exhausted its administrative remedies and the dismissal of Plaintiff's action by the District Court for lack of exhaustion of administrative remedies was in error.

ISSUE NO. 3

THE STATE ENGINEER'S FAILURE TO CONSIDER PLAINTIFF'S REQUEST FOR A SMALLER PROJECT CONSTITUTED A REJECTION OF THE SMALLER PROJECT FOR PLAINTIFF'S APPLICATIONS WHICH EXHAUSTED PLAINTIFF'S ADMINISTRATIVE REMEDIES

The State Engineer's failure to respond to Plaintiff's request for a smaller project plan, lesser amounts of water, and fewer diversion points in Plaintiff's Request for Reconsideration constituted a rejection of the newly requested reductions to the applications because the State Engineer had the power and duty to reconsider under the liberal policy of encouraging application approval, but did not do so. In *Vigos v. Mountainland Builders, Inc.*, 993 P.2d 207 (Utah 2000), this court promoted a liberal policy toward an applicant to request and make changes after an administrative decision. Likewise, for many years this court has held that Utah statutes are to be liberally construed under a liberal policy toward application approval. That liberal policy is to achieve maximum beneficial use of the waters of the State of Utah through encouragement of experimentation. If changes in the application can be made to

accomplish that goal, the applicant has the right to make them and have them considered whether before or after the State Engineer's original decision. *Whitmore v. Welch*, 201 P.2d 954 (Utah 1949); *Searle v. Milburn Irr. Co.*, 133 P.3d 382, 392 (Utah 2006), which hold that applicants must be given the opportunity to establish a reason to believe beneficial use can be accomplished by experimenting under, "a liberal policy toward application approval [which] outweigh[s] the potential of possible temporary harm".

The issue of a smaller project was presented to the State Engineer. That he did not act upon the request to reconsider is not fault of the Plaintiff, but of the State Engineer who had the power and duty to reconsider. *Clark v. Hansen, supra. East Bench Irrigation Co. v. State, supra; United States v. Fourth District Court, supra.* Doubts are to be resolved in favor of approval. *Rocky Ford Irr. Co. v. Kents Lake Irr. Co, supra.; Little Cottonwood Water Co. v. Kimball, supra.; Bullock v. Hanks, supra.* After 20 days without order, pursuant to statute the request for reconsideration which included the smaller project was considered denied. That denial cut off all available administrative remedies and forced Plaintiff to file in District Court for review. The District Court thus erred in dismissing Plaintiff's complaint for failure to exhaust administrative remedies.

ISSUE NO. 4

A LATE PROTESTER IS NOT AN APPROPRIATE PARTY TO A JUDICIAL REVIEW CHALLENGING AN ACTION BY THE STATE ENGINEER.

Utah Code Ann. §73-3-7(a) requires a protest to an application or change application to be filed with the State Engineer, "within 20 days after the notice is

published, if the adjudicative proceeding is informal.” The proceeding before the State Engineer was an informal proceeding. Utah Admin. Code §R655-6-2. There is no doubt that the named Appellees’ protest filings were late. Pursuant to statute, the protests must have been filed in the State Engineer’s office by end of day July 11, 2001. The Appellees’ protests were received in the State Engineer’s office later than July 11, 2001. In fact, the late filing Appellees admitted their tardiness and the trial court included such in his Order. (R.2926). Parties originally named as having filed late protests were released from Appellant’s Motion For Summary Judgment upon a showing that they had, in fact, filed in a timely manner.

The trial court’s ruling permitted Defendants who had filed late protests (i.e., Lower Jordan Water Users Association and Burnham Duck Club) with the State Engineer to remain as parties in the action. (R. 2926). The reasoning behind the ruling was that the late filers were permitted by the State Engineer to participate in the public hearing and had participated in a “joint presentation” with others who had filed on time and that they were not “seeking standing” but were simply attempting to ensure a full hearing. (R, 2927).

In *Prisbey v. Bloomington Water Co.*, 82 P.3d 1119 (Utah 2003) this court specifically ruled out the exact reasoning of the trial court here. The court upheld the dismissal of Mr. Prisbey’s action challenging a State Engineer approval of a change application holding that Mr. Prisbey’s “protest . . . was not timely filed, and therefore not properly before the state engineer” and that Mr. Prisbey did not exhaust his

administrative remedies by filing a timely protest with the state engineer, as required by statute.” *Id.* at 1124-25. In a similar instance, those wishing to challenge a change application, “lost their right to suggest or contest what the owner of the right to use water had done by way of user, what he was required to show before any tribunal having jurisdiction, including State Engineer and courts, or how he should employ it presently, by their **failure to register a protest at the time and place required** by controlling legislation. . . .” *Provo River Water Users Association v. Lambert*, 642 P.2d 1219, 1224 (Utah 1982), [emphasis added].

In other words, these named Defendants lost their right before any tribunal having jurisdiction, “including State Engineer and courts” their “right to . . . contest” what the Appellant wishes to do with his application. Therefore, those who filed late protests forfeited any such interest by being late in filing the protest, despite the State Engineer’s permission for them to participate in the public hearings on Appellant’s applications.

The reasoning behind this argument is that judicial review is included in the definition of “Adjudicative Proceeding” under the Utah Administrative Code. The Code defines “Adjudicative Proceeding” as, “a Division action or proceeding that determines the legal rights, duties, privileges, immunities, or other legal interests of one or more identifiable persons, including all Division actions to grant, deny, . . . the authority, right, or license; and judicial review of all such actions. Those matters not governed by Title 63, Chapter 46b shall not be included within this definition.” Utah Admin. Code §R655-6-3(A). As is shown below, under this definition, late protesters, such as the named

Appellees, are not parties to the adjudicative proceeding and are therefore not “appropriate parties.”

The Code also states that a “Party” means, “. . . person commencing an adjudicative proceeding, all respondents, all protestants, all persons permitted by the Presiding Officer to intervene in the proceeding, and all persons authorized by statute or agency rule to participate as parties in an adjudicative proceeding.” Utah Admin. Code §R655-6-3(F). Pursuant to Utah Code Ann. §73-3-7 and the holdings in cases such as *Prisbey v. Bloomington Water Co.* and *Provo River Water Users v. Lambert*, the Appellees who filed late protests with the State Engineer to Appellant’s applications are not respondents, they are not permitted to intervene and are not authorized by statute or agency rule to participate. A “Respondent” under the Code is defined as, “any person against whom an adjudicative proceeding is initiated, whether by the Division or any other person. Utah Admin. Code §R655-6-3(H). In this case, the only reason such entities were named as Defendants was to avoid the severe administrative sanction for a failure to name all “appropriate parties”.

“Protestant” means a person who timely protests an application before the State Engineer pursuant to Utah Code Ann. §Section 73-3-7 or who files a protest pursuant to Utah Code Ann. §73-3-13; Utah Admin. Code §R655-6-3(K). “Protests filed pursuant to Title 73, Chapters 1, 2, 3, 5 and 6 shall be filed in accordance with the governing statutes and these rules.” Utah Admin. Code §R655-6-5(B)(5). The Code is clear that the late protesting parties are not considered parties for judicial review.

Once again, the Utah Administrative Code is instructive:

“Parties to a hearing. . . . B. Any person not a party to the adjudicative proceeding may participate at a hearing as a witness for a party or, upon the consent of the Presiding Officer, may participate as part of the Division's investigative and fact finding powers. Such a person is not a party to the adjudicative proceeding and may not seek judicial review.” Utah Admin. Code §R655-6-11.

“Protests filed after the protest period has expired shall be placed on file and become part of the record. Any person filing a late protest is not a party and may receive notice of any further proceeding, hearing or order.” Utah Admin. Code §R655-6-5(B)(5)(d). In sum, the District Court erred in not dismissing the late protesters from the judicial review proceeding because late protesters are not parties to the adjudicative proceeding and are not appropriate parties to judicial review for failure to exhaust their administrative remedies.

ISSUE NO. 5

PROTESTANTS TO A WATER RIGHT APPLICATION ARE APPROPRIATE PARTIES ONLY TO THE EXTENT OF THE POTENTIAL HARM THEY MAY SUFFER BY THE GRANTING OF A WATER RIGHT APPLICATION AND ARE NOT APPROPRIATE PARTIES IN JUDICIAL REVIEW FOR ALL REQUIREMENTS OF UTAH CODE ANN. § 73-3-8(1) TO BE CONSIDERED BY THE STATE ENGINEER WHEN APPROVING SUCH APPLICATIONS

As previously stated, when the State Engineer considers an application for water rights or a change application, he has a “duty” to approve it as long as five elements are met:

(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 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. Utah Code Ann. §73-3-8(1) .

“Proceedings on applications to appropriate are informal proceedings.” Utah Admin. Code R655-6-2.

A party may request a judicial review in the district court once the final agency action is entered on an informal proceeding. Utah Code Ann. §63-46b-14. Utah Code Ann. §63-46b-14(3) requires that all appropriate parties be named as respondents in a review of an informal administrative proceeding such as that before the State Engineer in this case.

A “Party” means, “. . . person commencing an adjudicative proceeding, all respondents, all protestants, all persons permitted by the Presiding Officer to intervene in the proceeding, and all persons authorized by statute or agency rule to participate as parties in an adjudicative proceeding.” Utah Admin. Code §R655-6-3(F). The key here is to determine what is an “appropriate party” since Utah Code Ann. §63-46b-14(3) requires that all appropriate parties be named as respondents in a review of an informal administrative proceeding such as that before the State Engineer in this case.

The trial court’s interpretation of the term is at the heart of its error here. The trial court held that all named Defendants were “appropriate parties” for all elements of the statute [specifically 73-3-8(c),(d) and (e)], on the grounds that they participated in the public hearing held by the State Engineer, “by virtue solely of their protest.” (R. 3372 at p. 46). The court confirmed that they [the Defendants] are, “representing a very valid

position that may not be fully aired without their participation . . .” (R. 3372 at p. 47).

This ruling also included the environmental groups named by Appellant in its Motion for Summary Judgment. (R. 3261).

An “appropriate party” must be a party having a cognizable legal interest in the outcome of the proceeding and the word “appropriate” must be given meaning and cannot be treated as superfluous. *Blauer v. Dept. of Workforce Services*, 128 P.3d 1204 (Utah App. 2005). An appropriate party is necessarily a subset of the parties to the proceeding or the statute would have required the naming of all parties. Appropriate parties are to be named as respondents. A “Respondent” under the Code is defined as, “any person against whom an adjudicative proceeding is initiated, whether by the Division or any other person.” Utah Admin. Code §R655-6-3(H). See also Utah Code Ann. §63-46b-2(i) for same definition. Without a cognizable interest, a party cannot be harmed and thus cannot be an “appropriate party” respondent because no adjudicative proceeding can be initiated against a party if the party has no cognizable interest. *Blauer* at 1208 (“Section 63-46b-2 defines ‘respondent’ as ‘a person against whom an adjudicative proceeding is initiated’”). This conclusion is supported by *Salt Lake City v. Silver Fork Pipeline*, 5 P.3d 1206, 1219 (Utah 2000) where this court refused to enforce application requirements against Plaintiff when Defendant could show no injury.

This court has also held that merely the status of being a protestant in the case does not grant automatic standing for judicial review, contrary to the holding of the trial court in this case. The case of *Washington County Water District v. Morgan*, 82 P.3d

1125 (Utah 2003) is particularly instructive. In that case, the Washington County Water District (WCWCD) protested a change application for water by the Presiding Bishop of the LDS Church (CPB). The trial court (which was upheld) found that the WCWCD “would not be affected in some way by the approval of the CPB’s change application . . .” *Id.* at 1128. The WCWCD claimed that it “acquired standing by virtue of its participation in administrative proceedings before the state engineer.” *Id.* at 1130. The Court specifically distinguished the “grant of a protest right” and stated that it “does not carry with it an automatic right to appeal the state engineer’s decision in court.” *Id.* at 1130. (See also *Badger v. Brooklyn Canal Co.*, 922 P.2d 745, 750 n.9 (Utah 1998). The Court went even further by stating:

“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.

Another way to look at this analysis would be to identify what standing each Defendant would have to challenge the Plaintiff’s application if it had been approved. According to *Washington County*, each Defendant would have to show a “particularized injury”. *Id.* at 1131. The subject Defendants here (with the exception of the State Engineer) could only sue on the grounds of Utah Code Ann. §78-3-8(b) [and possibly (a)]. Those are the only issues where they can demonstrate a “particularized injury”. Defendants (the State Engineer excepted) have no particularized cognizable interest to defend or promote. These criteria deal with issues of public policy (i.e. financial ability

of the Applicant to put the project together, the practical and scientific possibility of the project and the lack of a “bad motive” for the claim) as to whether the applicant is entitled to appropriate the water. These are issues of “public policy” similar to those for which WCWCD was denied. See *Id.* at 1125. While *Washington County* recognized that there might be specific instances where one could acquire standing to litigate an important public issue, those criteria are not met here since the State Engineer remains in the case. *Id.* at 1133.

Plaintiff can only, (and did not include parties other than the State Engineer) sue the State Engineer on these public issues because no one else is an “appropriate party” respondent on these issues. The State Engineer is the only party granted the statutory authorization to defend these issues under Utah Code Ann. §73-3-8(1). Private defendants have no statutory authority to act as “private attorneys general” to argue these public issues. Of the public defendants, only the State Engineer has the statutory authority. As noted in *Blauer v. Dept. of Workforce Services*, statutory authorization is required to either appeal or defend a decision on public issues.

Thus, under *Salt Lake City v. Silver Fork Pipeline*, *Blauer v. Dept. of Workforce Services*, and *Washington County Water District v. Morgan*, the Defendants’ right to participate as an “appropriate party” is limited to where each particular Defendant has a potential particular and cognizable harm under each of the five elements of Utah Code Ann. §73-3-8(1). Under this analysis, each Defendant (with the notable exception of the State Engineer) only has standing to participate in the consideration of elements (a) [to

the extent that a finding of unappropriated water in the source would specifically harm them] and (b) [to the extent of showing no reasonable basis exists to believe that the application can be approved without specifically harming them]. This is a far cry from the trial court's position that the named parties are "appropriate" solely by virtue of their having filed a protest. The trial court erred in not limiting all Defendants, except the State Engineer, to defense of issues of their own potential particularized injury or harm.

ISSUE NO. 6

ENVIRONMENTAL GROUPS AND OTHERS WHO HAVE NO WATER RIGHT, NO REAL PROPERTY AFFECTED BY A WATER RIGHT APPLICATION AND NO REAL, TANGIBLE OR CERTIFIABLE INJURY ARE NOT APPROPRIATE PARTIES TO PARTICIPATE IN A JUDICIAL REVIEW OF AN INFORMAL ACTION OF THE STATE ENGINEER ON A WATER RIGHT APPLICATION.

This issue and some of the supporting arguments are similar to those discussed in Issue 5. In this instance, the trial court held that the named Defendants (i.e. Sierra Club, Trout Unlimited, Utah Wetlands Foundation and Utah Waters, Inc.) are "appropriate parties" on the grounds that they participated in the public hearing held by the State Engineer, "by virtue solely of their protest." (R. 3372 at p. 46). The court confirmed that they [the Defendants] are, "representing a very valid position that may not be fully aired without their participation . . ." (R. 3372 at p. 47).

This holding was a distinct error of law on the part of the trial court. Defendants own no water rights and have made no applications of their own to water that the Plaintiff's have requested, nor do they own any land or will any of Appellant's proposed actions under its Revised Conservation Plan specifically injure them in a tangible and

cognizable way. Their supporting Affidavits in opposition to Appellant's Motion For Summary Judgment made it abundantly clear that this was the case. (R. 1376-1401). Even though the trial court did not rule on Appellant's Motion to Strike these Affidavits as non-responsive, the Affidavits specifically identify the types of injuries "suffered" by these protestants. Upon reviewing their claims, it is obvious that they can show no specific injury to themselves caused by the Plaintiff's request. For this reason, the named Defendants are not appropriate parties in this action.

As explained previously, this court has held that there are instances where, even when a party doesn't have a "'distinct and palpable' injury", they can:

... nevertheless acquire standing to litigate an 'important public issue if no one else has a greater interest in the outcome [,] the issues are unlikely to be raised at all unless that particular plaintiff has standing to raise the issues,' and the legal issues are sufficiently crystallized to be subject to judicial resolution." *Washington County Water Conservancy District v. Morgan*, 82 P.3d 1125, 1132-33 (Utah 2003), quoting *Nat'l Parks & Conservation Ass'n*, 869 P.2d at 913 (quoting *Terracor*, 716 P.2d at 799).

The court in *WCWCD* goes on to say that if the party, "is unable to meet these requirements, it may nevertheless be afforded standing 'in those limited circumstances in which a case raises issues that are so unique and of such great importance that they ought to be decided in furtherance of the public interest.'" *Id.*

In another case, *Jenkins v. Swan*, 675 P.2d 1145, 1148-1152 (Utah 1983), the court held that:

It is generally insufficient for a plaintiff to assert only a general interest he shares in common with members of the public at large. . . . We will not

entertain generalized grievances that are more appropriately directed to the . executive branches of the state government (1148-1149). The requirement that a plaintiff have a personal stake in the outcome of a dispute is intended to confine the courts to a role consistent with the separation of powers, and to limit the jurisdiction of the courts to those disputes which are most efficiently and effectively resolve through the judicial process. (1149). The appropriate parties to initiate any action concerning violations of this statute are in the executive . . . branches. [Defendant's] position in this situation is identical to that of the citizenry at large, and therefore he lacks standing to pursue this cause of action. (1152).

Here, there are certainly no “unique” and “important” circumstances that would justify permitting the named Defendants to continue in the action. There just isn't the “public issue” that the case law anticipates that would permit an exception to the general rule which would exclude them from further participation.

Appellant was therefore entitled to summary judgment against the named defendants because they were not “appropriate parties” to this proceeding based on the arguments given in support of this Issue and also that of Issue 5.

ISSUE NO. 7

WHEN A COURT DISMISSES A CASE DUE TO LACK OF JURISDICTION, IT ALSO LACKS JURISDICTION TO AWARD COSTS

When the Court finds it does not have subject matter jurisdiction, it lacks the power to award costs or fees to either party. Two cases appear to address this issue, and despite the age of the first, “old law is good law”. The first is *Wall v. Dodge*, 3 Utah 168, 169 2 P. 206, 207 (1883). In that case, the Utah Supreme Court held that when a case was dismissed for want of jurisdiction, the court, “could not properly render

judgment for costs, there being no statute authorizing it.” The court further went on to indicate that, “the awarding of costs incurred by the defendant in the course of the litigation, . . . , would not be within the province of such relief. . . . The order could not properly have been made, even if the [Supreme] court had remanded the case for further proceedings.” In other words, when the court lacks subject matter jurisdiction, it has no authority to award costs or fees to either party, unless a statute provides for it.

One hundred and twenty one years later, the Supreme Court continued this line of reasoning in a case dealing with attorney’s fees (not costs). The court held in a matter that the juvenile court, “lacked subject matter jurisdiction to hear the order to show cause, the court also lacked jurisdiction to award attorney’s fees . . .”. *State of Utah in the interest of B.B.*, 94 P.3d 252, 257 (Utah 2004). This case follows the reasoning in *Wall* and takes it a step further, since there was a statute permitting the award of fees, but the court could not award attorney’s fees for the lack of jurisdiction. Likewise, the District Court lacks jurisdiction to award costs as a matter of course. No statute authorizes such jurisdiction and the court “retains only the authority to dismiss the action.” *Maverik Country Stores, Inc. v. Industrial Commission*, 860 P.2d 944, 947 (Utah App. 1993). The District Court erred in awarding costs.

CONCLUSION

The statutes regarding administrative procedures permit a request for reconsideration to keep the administrative process “open”. This precludes “final agency action” and precludes parties from applying for judicial review of agency actions until

the request for reconsideration is acted upon one way or another. In water law applications, an applicant can reduce the water he is seeking as well as delete or reduce other provisions of his application provided he is not expanding a claimed amount or significantly changing a point of diversion, or type or place of use. This deletion or reduction can take place before, during and after the application is approved in order to further the liberal policies of the State of Utah in developing and maximizing its precious water resources. By refusing to take the action of reconsidering or even responding to the Appellant's Revised Conservation Plan submitted with its Request for Reconsideration, the State Engineer, by statute, denied the Request. As a result of this choice by the State Engineer, the Appellant exhausted its administrative remedies and properly filed for a judicial review. Based upon this decision, the trial court's Order dismissing the case should be overturned and the case remanded for further proceedings.

The trial court held that those who filed late protests to Appellant's application were "appropriate parties" and should remain as Defendants in the case because of their participation in the public hearings (with permission of the State Engineer) and because of what they can "add to" the analysis of Appellant's application. This is a clear contravention of this court's holdings in prior cases, which say that those who file late protests, lose their legal standing to participate further in either the judicial or the administrative process. For this reason, the trial court's denial of Appellant's Summary Judgment Motion against such late protestants should be overturned and the requested Judgment granted.

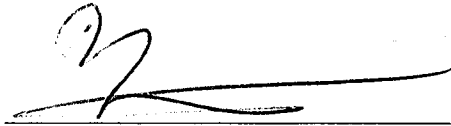
Appellant sued only the State Engineer on his decision under each of the five statutory elements required to be considered for water applications by statute. None of the other Defendants were sued by Appellant under elements (c) (d) and (e) of Utah Code Ann. §73-3-8(1), due to their public policy implications unless the other defendants were required as appropriate parties. The trial court held that Appellant could not limit its causes of action against these Defendants and denied the Motion For Partial Summary Judgment. Because none of the Defendants other than the State Engineer can participate in issues involving public policy (especially since the State official responsible for such is also a Defendant in the lawsuit) and since they have no cognizable harm from the public policy portions of the statute, the trial court's decision denying Partial Summary Judgment under Utah Code Ann. §73-3-8(1)(c)(d) & (e) should be overturned and the Partial Summary Judgment granted.

On a similar basis, the claims of the environmental groups who own no land affected by Applicant's application and who suffer no tangible and cognizable issue from the application should also be negated on summary judgment. The Appellant's Motion For Summary Judgment should be granted.

The trial court also erred in holding that, despite a lack of subject-matter jurisdiction, it had the authority to order costs against Appellant. Recent case law has shown that subject-matter jurisdiction even negates statutory authority to award such costs and attorney's fees to a party. The trial court's finding should be reversed and the costs of this appeal should be awarded to the Appellant.

DATED this 18th day of September, 2006.

TERRY L. HUTCHINSON, P.C.

A handwritten signature in black ink, consisting of a stylized 'T' and 'H' followed by a long horizontal flourish.

Terry L. Hutchinson,
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that on this 19th day of September, 2006, pursuant to the Utah Rules of Appellate Procedure, I did mail true and correct copies of the Appellant's Brief, first class mail, postage prepaid, to the following listed at Exhibit A.:



NEW PAGE

EXHIBIT A

NORMAN K. JOHNSON

JULIE I. VALDES

MARK SHURTLEFF

Utah Attorney General's Office

1594 W. North Temple, #300

Salt Lake City, UT 84116

normanjohnson@utah.gov

jvaldes@utah.gov

Attorneys for Defendant Jerry D. Olds, Utah State Engineer

Heather B. Shilton

MARK L. SHURTLEFF

UTAH ATTORNEY GENERAL

1594 West North Temple, #300

Salt Lake, UT 84116

heathershilton@utah.gov

Attorneys for Defendant State of Utah

Division of Parks and Recreation

Randy Hunter

MARK L. SHURTLEFF

UTAH ATTORNEY GENERAL

160 East 300 South, 5th Floor

Salt Lake, UT 84114-0857

Attorneys for Defendant State of Utah

Department of Transportation

Martin B. Bushman
Assistant Attorney General
1594 West North Temple, Ste. 2110
Salt Lake, UT 84116
Attorney for Def. Div. Wildlife Resources

Stephen G. Schwendiman
Keli Beard
Assistant Attorney General
P.O. Box 140814
160 E. 300 S., 5th Floor
Salt Lake, UT 84114-08150
sschwnd@utah.gov
kelibear@utah.gov
Attorney for Defendant Utah Division of Forestry, Fire & State Lands

Attorneys for Appelle:

Steven E. Clyde
Edwin C. Barnes
CLYDE SNOW SESSIONS & SWENSON
201 S. Main St., Ste. 1300
Salt Lake, UT 84111
sec@clydesnow.com
ecb@clydesnow.com
Counsel for Defendant Central Utah Water Conservancy District

Jody L. Williams
HOLME ROBERTS & OWEN
299 S. Main St., Ste. 1800
Salt Lake, UT 84111-2263
catherine.brahson@hro.com
*Attorneys for Pacificorp, Irvine Ranch and Petroleum (dba Ambassador Duck Club),
Burnham Duck Club, Lower Jordan River Water Users Association, and E. Fred Walters*

M. Dayle Jeffs
JEFFS & JEFFS, P.C.
90 N. 100 E.
P.O. Box 888
Provo, UT 84603
Attorney for Clinger Family Partnership

John P. Ashton
VAN COTT, BAGLEY, CORNWALL & McCARTHY, P.C.
50 South Main Street, Suite 1600
P.O. Box 45340
Salt Lake, UT 84144-0450
Attorney for New State Inc.

David C. Wright
MABEY & WRIGHT LLC
265 E. 100 S., Ste. 300
Salt Lake, UT 84111
dwright@utahwater.com
*Attorneys for East Jordan Irrigation Co., Kennecott Utah Copper Corp., Alpine City, and
Lehi City, Cedar Fort Irrigation Co., Lehi Spring Creek Irrigation Co.*

David B. Hartvigsen
SMITH HARTVIGSEN, PLLC
215 S. State St., Ste. 650
Salt Lake, UT 84111
david@smithlawonline.com
Attorneys for W. Glade Berry, Bart D. Berry, and Magna Water Company

Kevin R. Bennett
Police and Courts Building
75 East 80 North
P.O. Box 146
American Fork, UT 84003
Kevin@afcity.net, bennettkevin@usa.net
Attorney for American Fork City

Robert P. Hill
Allan T. Brinkerhoff
RAY, QUINNEY & NEBEKER P.C.
P.O. Box 45385

Salt Lake, UT 84145-0385

rhill@rqn.com

abrinkerhoff@rqn.com

Attorneys for Jordan Valley Water

Conservancy District

Reid E. Lewis

8215 South 1300 West

P.O. Box 70

West Jordan, Utah 84088-0070

Attorneys for Jordan Valley Water Conservancy District

Glenn R. Maughan

P.O. Box 3345

Ogden, UT 84409

David L. Church

BLAISDELL & CHURCH, P.C.

5995 South Redwood Road

Salt Lake City, Utah 84123

Attorneys for Riverton City

Richard G. Allen

2975 West Executive Parkway #509

Lehi, Utah 84043

Attorney for Saratoga Springs

Shawn E. Draney

Scott H. Martin

SNOW, CHRISTENSEN & MARTINEAU

10 Exchange Place, Ste. 1100

Salt Lake, UT 84145-5000

sed@scmlaw.com

Attorneys for Defendant Cahoon and Maxfield Irrigation Company, Utah Lake Distributing Company, and Metropolitan Water District of Salt Lake and Sandy, Salt Lake City Corporation and Sandy City, Provo River Water Users Association

Ryan B. Carter

Roger F. Cutler, Jr.

8000 S. Redwood Road

West Jordan, UT 84088

ryanc@wjordan.com

rogerc@wjordan.com

Attorneys for City of West Jordan

John H. Geilmann
1600 West Towne Center Drive
South Jordan, UT 84095
jgeilmann@sjc.utah.gov
Attorney for South Jordan City

Michael M. Quealy
David Bird
PARSONS BEHLE & LATIMER
One Utah Center
201 S. Main Street, Ste. 1800
Salt Lake, UT 84145-0898
mquealy@parsonsbehle.com
Attorneys for Utah and Salt Lake Canal Co. and North Jordan Irrigation Co.

Joro Walker
Sean Phelan
Western Resource Advocates
425 East 100 South
Salt Lake, UT 84111
jwalker@westernresources.org
Attorneys for Sierra Club, Trout Unlimited, Utah Waters, Utah Wetlands, & National Audubon Society
Mack and Marie Wagstaff
7984 N. 7800 W.
Lehi, UT 84043

Utah Supreme Court
P.O. Box 140210
Salt Lake City, UT 84114-0210
Attn: Clerk

MAY 16 2006

SALT LAKE COUNTY

By

Norman K. Johnson (3816)
Julie Valdes (8545)
Assistant Attorneys General
UTAH ATTORNEY GENERAL'S OFFICE
1594 W. North Temple, #300
Salt Lake City, Utah 84116
Telephone: (801) 538-7227
Attorneys for Defendant Utah State Engineer

Steven E. Clyde (0686)
Edwin Barnes (0217)
Wendy B. Crowther (8842)
CLYDE SNOW SESSIONS & SWENSON, P.C.
201 South Main, #1300
Salt Lake City, Utah 84111
Telephone: (801) 322-2516
Attorneys for Central Utah Water Conservancy District

Robert P. Hill (1492)
Allan T. Brinkerhoff (0439)
RAY QUINNEY & NEBEKER P.C.
36 South State Street, #1400
Salt Lake City, Utah 84111
Telephone: (801) 532-1500
Attorneys for Defendant Jordan Valley Water Conservancy District

David B. Hartvigsen (5390)
SMITH HARTVIGSEN, PLLC
215 South State Street, #650
Salt Lake City, Utah 84111
Telephone: (801) 413-1600
Attorneys for Magna Water Company, an Improvement District, W. Glade Berry, and Bart D. Berry

Shawn E. Draney (4026) Deputy Clerk

Scott H. Martin (7750)
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, #1100
P. O. Box 45000
Salt Lake City, Utah 84145-5000
Telephone: (801) 521-9000

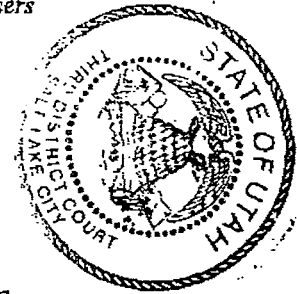
Attorneys for Defendants Metropolitan Water District of Salt Lake & Sandy, Utah Lake Distributing Company, Cahoon & Maxfield Irrigation Company, Utah Lake Distributing Company, Provo River Water Users Association, Salt Lake City, and Sandy City

John H. Mabey, Jr. (4625)
David C. Wright (5566)
MABEY & WRIGHT, LLC
265 East 100 South, #300
Salt Lake City, Utah 84111
Telephone: (801) 359-3663

Attorneys for Defendants Kennecott Utah Copper Corporation, Lehi City, Alpine City, Cedar Fort Irrigation Company, East Jordan Irrigation Company, Town of Cedar Fort, Lehi Irrigation Company, Lehi Spring Creek Irrigation Company

Jody L. Williams (3491)
Catherine L. Brabson (6500)
Steven I. Vuyovich (9192)
HOLME ROBERTS & OWEN LLP
299 South Main Street, #1800
Salt Lake City, Utah 84111-2263
Telephone: (801) 521-5800

Attorneys for Pacificorp, Irvine Ranch and Petroleum (dba Ambassador Duck Club), Burnham Duck Club, and Lower Jordan River Water Users Association



**IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH**

<p>WESTERN WATER, LLC, a Utah Limited Liability Company,</p> <p>Plaintiff,</p> <p>v.</p> <p>Jerry D. Olds, Utah State Engineer, et al.,</p> <p>Defendants.</p>	<p>ORDER GRANTING SUMMARY JUDGMENT FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES</p> <p>Civil No. 040910869 WA</p> <p>Judge Robert K. Hilder</p>
--	--

Defendants' Motion for Summary Judgment Concerning Failure to Exhaust Administrative Remedies was heard on April 17, 2006. Plaintiff was represented by Terry L. Hutchinson. David C. Wright, of Mabey & Wright, briefed the motion for the defendants' group identified above and was joined by Robert P. Hill and Assistant Attorney General Norman K. Johnson in arguing the motion.

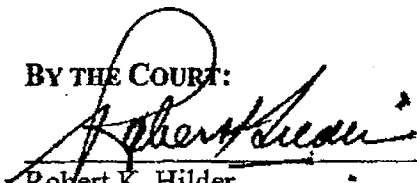
Having considered the supporting and opposing memoranda, with their respective exhibits, and the Affidavit of Ronald K. Christensen which accompanied plaintiff's opposition memorandum, and having considered the arguments of counsel, it is hereby

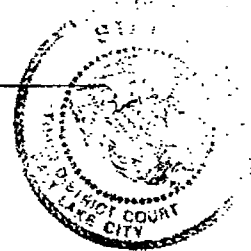
ORDERED that the motion is granted and summary judgment is hereby entered for the reasons presented in written and oral argument, and as explained by the Court in announcing its ruling. These reasons include plaintiff's failure to present its Revised Conservation Plan to the State Engineer for consideration before he ruled on the Conservation Plan that was the subject of plaintiff's applications and of the notice and hearing conducted by the State Engineer. As the State Engineer himself acknowledged, the Revised Plan submitted with plaintiff's Request for Reconsideration was reviewed only to determine whether it gave reason to reconsider the decision on the Conservation Plan. The protestants had no opportunity to consider or offer evidence regarding the impacts of the Revised Plan, which was a significant reformulation of the Conservation Plan. No hearing was held on the Revised Plan, and the State Engineer took no action on it. Accordingly, as there was no final agency action on the Revised Plan plaintiff brings to this Court, plaintiff failed to exhaust its administrative remedies. Such failure deprives the Court of subject matter jurisdiction. It is further

ORDERED that, as prevailing parties under rule 54(d)(1) of the Utah Rules of Civil Procedure, defendants are entitled to their costs, to be established by verified memoranda.

May 12^{*}, 2006.

BY THE COURT:


Robert K. Hilder
District Court Judge



Approved as to form:

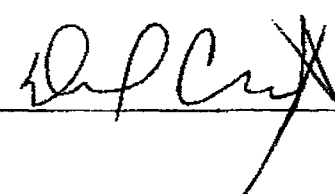
Terry L. Hutchinson
Attorney for plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2006, a true and correct copy of the foregoing Order Granting Summary Judgment for Failure to Exhaust Administrative Remedies was served electronically to the following:

Terry L. Hutchinson
368 East Riverside Drive, Suite C
St. George, Utah 84790
(and by mail, postage prepaid)

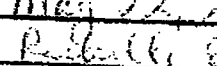
(tlh@infowest.com)



DEPUTY COURT CLERK

I CERTIFY THAT THIS IS A TRUE COPY OF AN ORIGINAL DOCUMENT ON FILE IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH.

DATE: May 22, 2006



DEPUTY COURT CLERK



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

**WESTERN WATER, LLC., a Utah
limited liability company,**

Plaintiff,

vs.

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

**MINUTE ENTRY AND ORDER
(LATE FILING ISSUE)**

Civil No. 040910869

Judge Robert K. Hilder

On April 5, 2006, the court heard argument on plaintiff's Motion for Summary Judgment (late filing of protests issue) as to Lower Jordan Water Users' Ass'n and Burnham Duck Club only. I promised a ruling on the narrow issue of the indisputably late-filed protests (and the effect, if any, of those late filings, on these defendants' participation as defendants in the court's review of the State Engineer's decision denying appropriation. I specifically deferred argument and ruling on defendants' alternative argument that they may have a right to intervene in this action. Intervention arguments may be addressed by others at the scheduled April 10, 2006, hearing, and these defendants may address the issue at that time if they wish.

The arguments were focused and helpful. I have since re-read all memoranda and the case law discussed with counsel, and now determine that my initial reading of *Prisbey v. Bloomington Water Co.*, 82 P.3d 1119, 1124-25 (Utah 2003), did not give adequate consideration to the factual difference. That is, in *Prisbey*, plaintiff was a property owner who (1) did not file a timely protest to a change application, (2) who was not heard by the State Engineer in connection with the application, and (3) which application resulted in approval, not rejection, of the application.

In this case, these defendants filed late (as protestants), but they participated with the State Engineer's agreement, and they were part of a joint presentation with others similarly situated, who filed on time, and the Engineer, in fact, denied the application. Thus, these defendants "prevailed," they seek no review, but urge that plaintiff not prevail in this court, and they argue that, sitting as "State Engineer," this court should have benefit of the information the State Engineer employed in reaching his decision.

I find the distinction persuasive. These defendants do not seek "standing" to challenge an administrative decision, as Prisbey did. They merely seek to ensure a full airing, in district court, of the arguments that the Engineer heard. Plaintiff is not prejudiced, they have heard the arguments, and will be well-prepared to respond. Plaintiffs do have a valid concern that the trial in this matter should be conducted efficiently, and that cumulative evidence should be avoided. I share that concern, and all parties are on notice that I am grateful for Rule 611(a), URCP, and will use it as necessary, but at least in the consideration of priorities, one protestant's concerns may not adequately represent another party's concerns. Any decision to limit testimony must await the context of trial itself.

For the foregoing reasons, the Motion is **DENIED** as to Lower Jordan and Burnham on the sole ground that late filing of the protest does not preclude participation in this action as defendants. Defendants may assert their alternative basis (intervention) on April 10, 2006, if they think there is a need, and plaintiff shall, of course, oppose that argument. This Minute Entry shall be the **ORDER** of the court on this one issue.

DATED this 7th day of April, 2006.

By the court:

Robert K. Hilder, District Court Judge

Robert P. Hill (1492)
Allan T. Brinkerhoff (0439)
RAY QUINNEY & NEBEKER P.C.
36 South State Street, #1400
Salt Lake City, Utah 84111
Telephone: (801) 532-1500
*Attorneys for Defendant Jordan Valley
Water Conservancy District*

**IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH**

<p>WESTERN WATER, LLC, a Utah Limited Liability Company,</p> <p>Plaintiff,</p> <p>v.</p> <p>Jerry D. Olds, Utah State Engineer, et al.,</p> <p>Defendants.</p>	<p>ORDER DENYING</p> <p>(1) PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE: IN- APPROPRIATE PARTIES TO § 73-3-8 (c), (d), AND (e) ISSUES, AND</p> <p>(2) PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST DEFEN- DANT GLENN R. MAUGHAN</p> <p>Civil No. 040910869 WA</p> <p>Judge Robert K. Hilder</p>
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Plaintiff's Motion for Partial Summary Judgment Re: Inappropriate Parties to § 73-3-8 (c), (d) and (e) Issues and Plaintiff's Motion for Summary Judgment against Defendant Glenn R. Maughan came on for hearing on April 10, 2006 before the Honorable Robert K. Hilder, District Court Judge. Appearing for the Plaintiff was Terry L. Hutchinson; appearing for Defendants were over 20 attorneys whose appearances were recorded on the record. Oral argument was presented on behalf of Defendants by Robert P. Hill, Ray Quinney & Nebeker P.C., and Norman K. Johnson, Assistant Attorney General.

The Court, having read the memoranda submitted by counsel in support of and in opposition to the motion, and having heard oral argument of counsel, and deeming itself fully advised of the relevant facts and legal principles,

IT IS ORDERED that the Plaintiff's referenced Motion for Partial Summary Judgment and Motion for Summary Judgment are denied based on the statements of counsel during oral argument and for the reasons set forth in Defendants' Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment Re: Inappropriate Parties to § 73-3-8 (c), (d) and (e) Issues.

DATED this ____ day of April, 2006.

BY THE COURT

Robert K. Hilder
District Court Judge

APPROVED AS TO FORM:

[approved via email, 4/14/06]
Terry L. Hutchinson,
Attorney for Plaintiff

Joro Walker, USB # 6676
Sean Phelan, USB # 10028
Western Resource Advocates
425 East 100 South Street
Salt Lake City, Utah 84111
Telephone: 801.487.9911
Fax: 801.486.4233
Attorneys for the Sierra Club, Utah Council
Of Trout Unlimited, National Audubon Society,
Utah Wetlands Foundation, and Utah Waters

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

Western Water, LLC, a Utah limited Liability company,

Plaintiff,

VS.

**ORDER DENYING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT
AGAINST SIERRA CLUB, ETC.**

**Jerry Olds, Utah State Engineer and
Director of the Utah Division of Water
Rights, *et al.***

Civil No. 040910869WA

Judge Robert K. Hilder

Defendants.

On March 20, 2006, Plaintiff Western Water, LLC (Western Water) filed with this Court a Memorandum and Motion for Summary Judgment Against Defendants Sierra Club, Trout Unlimited, Utah Waters and Utah Wetlands Foundation. Western Waters argued that the Conservation Organizations should be dismissed from this proceeding as defendants because they are not appropriate parties to this action and lacked a cognizable legal interest in this proceeding. On March 27, 2006, Western Water filed a motion to

strike affidavits the Conservation Organizations submitted to support its opposition to Western Water's motion.

A hearing was held on, *inter alia*, Western Water's motion on April 10, 2006. Appearing for Western Water was Terry L. Hutchinson, and for the Conservation Organizations, Joro Walker and Sean Phelan.

The Court, having read the memoranda submitted by counsel in support of and in opposition to the motion, and having heard oral argument of counsel, and deeming itself fully advised of the relevant facts and law, orders as follows:

For the reasons set forth in the memorandum opposing the motion and based on statements of counsel at oral argument, Western Water's Motion for Summary Judgment Against Sierra Club, Trout Unlimited, Utah Waters and Utah Wetlands Foundation is hereby **denied**. The Conservation Organizations are appropriate defendants for the purposes of this matter. Moreover, there is no need to rule on Western Water's Motion to Strike affidavits submitted by the Conservation Organizations.

Dated this ____ day of April, 2006

Hon. Robert K. Hilder
Third District Court Judge

APPROVED AS TO FORM:

[approved via email, 4/14/06]
Terry L. Hutchinson,
Attorney for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT

MAY 16 2008

SALT LAKE COUNTY, STATE OF UTAH

SALT LAKE COUNTY

Deputy Clerk

WESTERN WATER, LLC., a Utah
limited liability company,

Plaintiff,

MINUTE ENTRY AND ORDER
(Objection to Order)

vs.

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

Civil No. 040910869

Judge Robert K. Hilder

Defendants have filed a proposed Order based on my bench ruling of April 17, 2006, granting defendants' Motion for Summary Judgment: Failure to Exhaust Administrative Remedies. Plaintiff has filed an objection to the second paragraph, which establishes entitlement to an award for costs, pursuant to Rule 54(d)(1), Utah Rules of Civil Procedure. Both sides have briefed the issue, and I have considered the briefing and conducted some additional research.

The essence of plaintiff's sole objection is that a dismissal for lack of subject matter jurisdiction is not a decision on the merits; therefore, either the court lacks jurisdiction to impose costs, or alternatively, defendants are not the prevailing party as required by the Rule. Plaintiff relies primarily on two cases, which I will discuss.

First, *Wall v. Dodge*, 2 P. 206 (Utah 1883), states the principle plaintiff urges, but it relies on the fact that there was not a statute authorizing costs when a case was dismissed for lack of subject matter jurisdiction. If that is, in fact, the only impediment to a costs award, then it was remedied by promulgation of the Rules of Civil Procedure some decades later. The current Rule, 54(d)(1), is at issue in this matter, and the focus now shifts to the definition of "prevailing" in the context of the Rule.¹

¹ I note that as it has been interpreted, Rule 54(d)(1) includes an element of discretion, but it is my view that the discretion should generally be directed to the type and amount of costs, and not to the issue of legal entitlement under the Rule.

As the Tenth Circuit noted in choosing to adopt the Seventh Circuit approach: "The [Seventh Circuit] court applied the 'prevailing party' standard imposed on the plaintiffs in *Texas State Teachers Ass'n v. Garland Ind. School Dist.*, 489 U.S. 782, 792-93, 109 S.Ct. 1486 (1989) . . . '[A] plaintiff prevails for purposes of 42 U.S.C. Sec. 1988 only if, "at a minimum the plaintiff [can] point to a resolution of the dispute which [materially] changes the legal relationship between itself and defendant."'" *Id.*

Praxair, like this case, presents the flipside of the *Texas State Teachers Ass'n* conclusion. That is, in both cases, the defendant(s) obtained a dismissal, but the rationale is no less apt. As the *Praxair* court noted, the jurisdictional victory "equaled or exceeded a victory on the merits because it secured 'a decision foreclosing any private plaintiff from suing about this delay or another.'" 389 F.3d at 1057 (quoting *Citizens for a Better Environment*, 230 F.3d at 929).

Similarly, plaintiff in this case, which was denied its requested water appropriation by the State Engineer, is precluded from seeking that approval at this time from the district court, and the doors to the courthouse will remain closed unless plaintiff presents its modified application to the State Engineer and goes through the entire process. This outcome suffices to determine that defendants have prevailed under the Seventh and Tenth Circuit approaches, which I find persuasive.

For the foregoing reasons, plaintiff's objection is **OVERRULED** and I have this date signed the Order submitted by defendants. Defendants are advised that I view costs bills conservatively, and generally limited claims to actual costs of court, such as filing and service fees, and some deposition costs if the moving party can show the necessity of the deposition to the proceeding at issue, in this case the specific Motion on which defendants prevailed.

DATED this 12th day of May, 2006.

By the court.


Robert K. Hilder, District Court Judge

