

2006

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

Utah Supreme Court

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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. ~~2006527~~

District Court Case No. 040910869WA

(P)

BRIEF OF APPELLEES  
UTAH CHAPTER, SIERRA CLUB; UTAH COUNCIL,  
TROUT UNLIMITED; NATIONAL AUDUBON SOCIETY;  
UTAH WETLANDS FOUNDATION; & UTAH WATERS.

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

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FILED  
UTAH APPELLATE COURTS

NOV 22 2006

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## LIST OF PARTIES

The parties to this appeal are Appellant Western Water, LLC ("Western Water") and Appellees Jerry D. Olds, Utah State Engineer and Director of the Division of Water Rights ("State Engineer"), 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 & Sherri Cook, George Crawford, Rod Dansie, East Jordan Irrigation Company, Geneva Steel LLC, Larry & 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, New State, Inc., PacifiCorp, Provo River Water User's Association, Riverton City, Salt Lake City Corporation, Sandy City Dept. of Public Utilities, City of Saratoga Springs, Marvin Shepherd, 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, 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 and Conservation Commission – Utah Reclamation, Utah Water Company L.L.C., 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, and Utah Division of Water Rights.

Also parties to the appeal are five organizations identified in this brief as the "Conservation Groups": Utah Chapter, Sierra Club; Utah Council, Trout Unlimited; National Audubon Society; Utah Wetlands Foundation; and Utah Waters.

## TABLE OF CONTENTS

LIST OF PARTIES .....	ii
TABLE OF CONTENTS .....	iii
TABLE OF AUTHORITIES .....	iv
JURISDICTION OF THE UTAH SUPREME COURT.....	1
STATEMENT OF ISSUE PRESENTED FOR REVIEW.....	1
STANDARD OF REVIEW .....	1
DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES.....	2
STATEMENT OF THE CASE .....	4
NATURE OF THE CASE, COURSE OF THE PROCEEDINGS, & DISPOSITION IN THE COURT BELOW.....	4
STATEMENT OF FACTS .....	4
SUMMARY OF ARGUMENT .....	6
ARGUMENT .....	8
The Conservation Groups are Appropriate Parties to the Judicial Review of the State Engineer's Decision Because They are Interested Persons Who Filed Protests of the Water Rights Application in the Administrative Proceedings. ....	8
A. The Conservation Groups are Appropriate Parties to the Court Proceeding Initiated by Western Water by Virtue of Their Protests Lodged with the State Engineer. ....	8
1. Utah Code Ann. § 63-46b-14(3)(b) Does Not Require a Party to Establish Standing in Order to Participate in a Proceeding Already Underway. ....	9
2. An "Appropriate Party" Under Utah Code Ann. § 63-46b-14(3)(b) is a Party that Participated as an Interested Person Who Protested the Water Rights Applications. ....	12
B. The Conservation Groups are Appropriate Parties to the Judicial Review of the State Engineer's Decision Based on Their Interest in the Subject Matter of this Litigation.....	16
1. The Conservation Groups Have an Interest in Participating in the Judicial Review of the State Engineer's Decision.....	17
2. The Conservation Groups, as Interest Persons Who Participated in the Administrative Proceedings, Would Be Entitled to Intervene in the Litigation, and Must be Named as Respondents When the Petition for Review is Filed.....	19
3. To the Extent that Western Water Relies in its Brief on its own Characterization of the Undisputed Facts Found by the District Court, Western Water has Failed to Marshal the Evidence, and the District Court's Decision that	

the Conservation Groups are Appropriate Parties should be Affirmed on that Basis Alone.....	22
CONCLUSION .....	24

## TABLE OF AUTHORITIES

### Cases

<u>Badger v. Brooklyn Canal Co.</u> , 922 P.2d 745 (Utah 1996) .....	11, 16, 19
<u>Berg v. State</u> , 2004 UT App 337, 100 P.3d 261.....	10
<u>Blauer v. Dep't of Workforce Servs.</u> , 2005 UT App 488, 128 P.3d 1204.....	14
<u>Bonham v. Morgan</u> , 788 P.2d 467 (Utah 1989).....	20
<u>Chen v. Stewart</u> , 2004 UT 82, 100 P.3d 1177.....	23
<u>In re E.H.</u> , 2006 UT 36, 137 P.3d 809 .....	19, 20
<u>Nat'l Parks &amp; Conservation Assoc. v. Bd. of State Lands</u> , 869 P.2d 909 (Utah 1994)....	10
<u>Neely v. Bennett</u> , 2002 UT App 189, 51 P.3d 724 .....	23
<u>Soc'y of Prof'l Journalists v. Bullock</u> , 743 P.2d 1166 (Utah 1987) .....	10
<u>Terracor v. Utah Bd. of State Lands &amp; Forestry</u> , 716 P.2d 796 (Utah 1986) .....	10, 20
<u>Utah Chapter of the Sierra Club v. Utah Air Quality Bd.</u> , 2006 UT 74.....	passim
<u>View Condo. Owners Ass'n v. MSICO, L.L.C.</u> , 2005 UT 91, 127 P.3d 697.....	1
<u>Vigos v. Mountainland Builders, Inc.</u> 2000 UT 2, 993 P.2d 207 .....	14
<u>Washington County Water Conservancy Dist. v. Morgan</u> , 2003 UT 58, 82 P.3d 1125 .....	passim

### Statutes

Utah Code Ann. § 63-46b-2(1)(f) .....	9, 13, 16
Utah Code Ann. § 63-46b-2(1)(i).....	13
Utah Code Ann. § 63-46b-14(3)(b).....	passim
Utah Code Ann. § 63-46b-15(3)(a) .....	14
Utah Code Ann. § 73-3-7(1) .....	11, 16
Utah Code Ann. § 73-3-14 .....	11
Utah Code Ann. § 78-2-2(3)(e)(v) .....	1
Utah Code Ann. § 78-2-2(3)(f) .....	1

### Regulations

Utah Admin. Code R307-103-1(1) .....	11
Utah Admin. Code R307-103-1(2) .....	11
Utah Admin. Code R307-103-3(1) .....	11
Utah Admin. Code R655-1 to R655-14 .....	11

### Rules

Utah R. Civ. P. 24 .....	19, 20, 21
--------------------------	------------

## **JURISDICTION OF THE UTAH SUPREME COURT**

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

### **STATEMENT OF ISSUE PRESENTED FOR REVIEW**

#### **ISSUE NO. 1 (CORRESPONDS TO APPELLANT'S ISSUES NO. 5 & 6)**

Whether Conservation Groups who were interested persons that protested water rights applications are appropriate parties to judicial review of the State Engineer's decision denying the applications.

### **STANDARD OF REVIEW**

This Court reviews the district court's legal conclusions, as well as its grant of summary judgment as a whole, for correctness. View Condo. Owners Ass'n v. MSICO, L.L.C., 2005 UT 91, ¶ 17, 127 P.3d 697, 701-02. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Id.

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## DETERMINATIVE CONSTITUTIONAL PROVISIONS,

### STATUTES, ORDINANCES AND RULES

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

(1) As used in this chapter:

...

(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. § 64-46b-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.

...

(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. § 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.

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Utah Code Ann. § 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 R. Civ. P. 24. Intervention

(a) Intervention of right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motions shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

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## **STATEMENT OF THE CASE**

### **NATURE OF THE CASE, COURSE OF THE PROCEEDINGS, & DISPOSITION IN THE COURT BELOW**

Utah Chapter, Sierra Club; Utah Council, Trout Unlimited; National Audubon Society; Utah Wetlands Foundation; and Utah Waters ("Conservation Groups") are satisfied with Western Water's statement of the nature of the case, course of the proceedings, and disposition in the court below.

### **STATEMENT OF FACTS**

The Conservation Groups are satisfied with Western Water's statement of facts, except for its omission of the undisputed facts relevant to the Conservation Groups' status as persons interested in the water rights applications and appropriate parties to this litigation. Although Western Water correctly notes that the vast majority of facts have not been disputed, App. Br. at 18, it presents arguments on Issue 6 of its opening brief that are based on its characterization of facts in the record, without providing citations to those facts. App. Br. at 44-46. While the facts discussed below are undisputed, the Conservation Groups do dispute Western Water's characterization of and legal conclusions drawn from these facts.

Western Water's three applications sought to appropriate 288,000 or more acre-feet of water annually from the Utah Lake and the Jordan River watershed. R. 18-19. These watersheds are already fully appropriated, R. 29, and are already experiencing

impairment of the stream environments, public recreation and the public interest due to water pollution and reduced water flows. See, e.g., R. 1400, ¶ 17; R. 1404-13.

The Conservation Groups each timely protested the Western Water applications based on the potentially devastating effect the appropriations would have on aquatic life, wildlife, wetlands, water quality, recreational opportunities of Utah Lake, Jordan River, and Great Salt Lake, and on the public interest. R. 842-46; R. 1402-13. Each of the groups is a membership organization with the mission to advocate for, protect, and restore Utah's aquatic and wetland resources and opportunities for the public to enjoy these resources by fishing, bird-watching, boating, photographing, hiking and studying these natural areas and the ecosystems they support. R. 1377, ¶ 4; R. 1383, ¶¶ 4-5; R. 1390, ¶ 4; R. 1396, ¶ 4. Members join the groups, in part, to support the protection of Utah Lake, the Jordan River, and Great Salt Lake. R. 1377 ¶¶ 5-6; R. 1384, ¶¶ 6-7; R. 1390, ¶ 5; R. 1396, ¶ 5.

Members of the Conservation Groups use and enjoy the areas affected by the proposed diversion for birdwatching, photography, fishing, hunting, canoeing, sight seeing, and other recreational opportunities. See R. 1377-78, ¶¶ 7-10; R. 1384-85, ¶¶ 8-12; R. 1390-91, ¶¶ 7-9; R. 1396-98, ¶¶ 7-10. If approved, the Western Water applications would impair the conservation organizations members' use and enjoyment of Utah Lake, Jordan River, and Great Salt Lake. See R. 1379-81, ¶¶ 14-19; R. 1386-88, ¶¶ 14-19; R. 1392-94, ¶¶ 11-17; R. 1398-1401, ¶¶ 12-19. The proposed massive diversion of water from overappropriated water systems would impair water quality, reduce the size and function of wetlands, diminish birdwatching and fishing experiences, adversely affect

hunting opportunities, and harm the aesthetic quality of the lakes, the Jordan River, and the surrounding area. See R. 1379-81, ¶¶ 14-19; R. 1386-88, ¶¶ 14-19; R. 1392-94, ¶¶ 11-17; R. 1398-1401, ¶¶ 12-19.

In his decision denying Western Water's applications, the State Engineer specifically mentioned the adverse effects described by the Conservation Groups in their protests, affidavits, and testimony:

[p]ublic recreation and the natural stream environment would also be adversely affected if these applications were to be approved as they are now filed, not only by influencing water quality, but also by changing the natural stream-flow regime by diverting winter and high spring flows. Therefore, the State Engineer believes approval of these applications would prove detrimental to the public welfare.

R. at 33.

### **SUMMARY OF ARGUMENT**

The district court's decision to allow Conservation Groups to participate as parties in the Western Water matter is proper based on a plain reading of Utah Code Ann. § 63-46b-14(3)(b), this Court's holdings regarding the Utah Administrative Procedures Act ("UAPA"), and the policies that underpin those holdings. First, examination of "appropriate parties" in context shows that "appropriate" and "interested" parties are analogous, or nearly so. As a result, a good faith protest before the State Engineer qualifies a party as "appropriate" and entitles that party to full participation in any subsequent court proceeding. This is because the party's role in both instances is to provide its concerns and position to the trier of fact and its participation is intended to ensure examination of all viewpoints and facts relevant to a water rights proposal. At the

same time, Western Water's assertion that "appropriate parties" be equated with "aggrieved parties" is without basis. Aggrieved parties are required to verify standing to invoke the jurisdiction of the Court, while appropriate parties are participating in a proceeding where another party has already properly established jurisdiction.

The Conservation Groups here have easily demonstrated that they have sufficient interest in the Western Water applications to qualify as "interested," and thus as appropriate parties in the judicial review of the State Engineer's decision. Indeed, the Conservation Groups could also easily satisfy the heightened standard for outsiders seeking to intervene in a pending case. Because parties that have protested and participated in the underlying administrative adjudication are not outsiders, it follows that the level of interest required to show they are appropriate parties is lower than that required for intervention. And as intervention would be readily available to parties such as the Conservation Groups, having them meet a standard as rigorous as intervention would make the "appropriate party" provision redundant and superfluous.

Finally, Western Water bases much of its argument that the Conservation Groups are not proper parties to its case on its characterization of undisputed facts. Because it cannot dispute facts without marshaling its evidence, and because it did not undertake this marshaling, the company's appeal must fail. Western Water cannot now contest the district court's finding that the views of the Conservation Groups might not be fully aired in the absence of their participation in the district court case.

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For these reasons, the district court's decision to allow the Conservation Groups full party status in the Western Water litigation based on their participation in the adjudication before the State Engineer should be affirmed.

### **ARGUMENT**

#### **ISSUE NO. 1 (CORRESPONDS TO APPELLANT'S ISSUES NO. 5 & 6)**

**The Conservation Groups are Appropriate Parties to the Judicial Review of the State Engineer's Decision Because They are Interested Persons Who Filed Protests of the Water Rights Application in the Administrative Proceedings.**

**A. The Conservation Groups are Appropriate Parties to the Court Proceeding Initiated by Western Water by Virtue of Their Protests Lodged with the State Engineer.**

The district court was correct to conclude as a matter of law that the Conservation Groups were entitled to participate in the proceeding initiated by Western Water. The district court properly reasoned that, based on their protests, the Conservation Groups are "appropriate parties" under Utah Code Ann. § 63-46b-14(3)(b), and therefore qualify as full parties to the Western Water matter. R. 3372 at p. 47. What is more, because they "represent[] a very valid position that may not be fully aired without their participation," the Conservation Groups were properly before the district court. *Id.* As explained below, this interpretation of the phrase "appropriate party" is best in keeping with the plain reading of the text as well as with case law and policy considerations outlined by this Court.

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**1. Utah Code Ann. § 63-46b-14(3)(b) Does Not Require a Party to Establish Standing in Order to Participate in a Proceeding Already Underway.**

Western Water bases its objection to the district court ruling on one argument – that “appropriate” must be read to restrict the universe of “parties” to those parties with standing to sue.<sup>1</sup> In other words, the word “appropriate” must add an additional requirement to “party” as defined by Utah Code Ann. § 63-46b-2(1)(f), and therefore “appropriate” must require the party to show it has standing. For several reasons, this argument is unpersuasive.

Initially, issues of standing are jurisdictional. Utah Chapter of the Sierra Club v. Utah Air Quality Bd., 2006 UT 74, ¶ 13 (“standing triggers the court’s ... subject matter jurisdiction”).<sup>2</sup> As a consequence, standing is not relevant to participation in a proceeding in which another party has properly invoked the court’s jurisdiction. The Court has explained that

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<sup>1</sup> Western Water apparently contemplated urging a standard that only parties with “tangible or measurable damages or damage to property interests” could participate in judicial review, App. Br. at 17, but did not advance this position in its argument. App. Br. at 39-46. No part of this formulation has any basis in the relevant statutes or case law.

<sup>2</sup> Throughout its decision in Utah Chapter of the Sierra Club, this Court uses the term “appropriate party” to refer to a party with the requisite interest to have standing to sue under the “alternative test” for standing. 2006 UT 74 at ¶¶ 35-36, 38-43. In that context, the Court used the term as an adjective, without additional legal significance, to identify whether a plaintiff satisfies the standards of the alternative standing test – clarifying earlier precedent that appeared to suggest that only the “most appropriate party” would have standing to initiate a lawsuit. Id. at ¶ 36. By contrast, this case involves the construction of the statutory term “appropriate party” in a very different context: whom must a petitioner name as a respondent when taking the review of a multiparty administrative action from the agency into the courts. Thus, the discussion in Utah Chapter of the Sierra Club is inapplicable to the question presented in this appeal.

the doctrine of standing operates as gatekeeper to the courthouse, allowing in only those cases that are fit for judicial resolution. Important jurisprudential considerations dictate that courts confine themselves to resolution of those disputes most effectively resolved through the judicial process, i.e., crystallized disputes concerning specific factual situations.

Terracor v. Utah Bd. of State Lands & Forestry, 716 P.2d 796, 799 (Utah 1986) (citations omitted).<sup>3</sup> Here, the case is already inside the gate – the district court has assumed, and no party has contested, that based on Western Water’s particularized interest in its water rights applications, this matter is sufficiently specific and crystallized to be properly entertained by the district court. Rather, what is at issue here is whether the Conservation Groups are entitled to participate in a proceeding in which the petitioner has already invoked the district court’s jurisdiction. To this inquiry, standing is not relevant. As a result, for Western Water to argue baldly that “appropriate parties” must have standing lacks basis.

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<sup>3</sup> Utah cases confirm that showing standing is the obligation of the **plaintiff** in a case, and no cases even suggest that standing must be demonstrated by a defendant with an interest in the matter. See Washington County Water Conservancy Dist. v. Morgan, 2003 UT 58, ¶ 14-15, 82 P.3d 1125, 1130 (“the term ‘aggrieved’ is consistent with our traditional standing requirement that a **plaintiff** show a particularized injury.”) (emphasis added); Nat’l Parks & Conservation Assoc. v. Bd. of State Lands, 869 P.2d 909, 913 (Utah 1994) (“A **plaintiff** may establish standing under one of three general rules.”); Soc’y of Prof’l Journalists v. Bullock, 743 P.2d 1166, 1170 (Utah 1987) (“Our generally stated standing rule is that a **plaintiff** must have suffered some distinct and palpable injury . . . .”) (emphasis added); Berg v. State, 2004 UT App 337, ¶ 8, 100 P.3d 261, 265 (“If a **plaintiff** qualifies under any one of the three rules, the court grants standing.”) (emphasis added). Not surprisingly, Western Water fails to cite a single case that requires a defendant to demonstrate standing to invoke the jurisdiction of a court.



Examination of Washington County bears this out.<sup>4</sup> There, this Court refused to equate “interested” for the purposes of the right to protest under section 73-3-7(1) with “aggrieved” for the purposes of the right to appeal an adverse state engineer decision in court under section 73-3-14. Washington County Water Conservancy Dist. v. Morgan, 2003 UT 58, ¶¶ 14-15, 82 P.3d 1125, 1130. Section 73-3-7(1) allows any “interested” persons “who have a genuine concern about proposed changes in water rights to voice those concerns before the State Engineer and, as an important corollary, to provide[] the State Engineer with all viewpoints relevant to any proposal.” Id. at ¶ 15, 82 P.3d at 1130 (quoting Badger v. Brooklyn Canal Co., 922 P.2d 745, 750 n.9 (Utah 1996)).<sup>5</sup> On the other hand, section 73-3-14 establishes that a person must be aggrieved – that is, must meet the tests for standing to sue – to seek judicial review of an adverse decision by the State Engineer. Id. at ¶ 14, 82 P.3d at 1130. The plaintiff in Washington County could

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<sup>4</sup> Western Water by-and-large characterizes Washington County correctly. App. Br. at 41-42. As the company admits, Washington County is a standing case. The issue there was whether the Washington County Water Conservancy District had standing to sue – that is, to **initiate** a proceeding in district court – for review of an adverse decision by the State Engineer. Washington County, 2003 UT 58 at ¶ 1, 82 P.3d at 1127 (“In this case, we address the circumstances under which a water conservancy district has **standing to bring an action** for forfeiture of private water rights.”) (emphasis added). However, what does **not** follow from that case is that a **respondent** must show standing to be a proper party to a case where the court has already accepted jurisdiction.

<sup>5</sup> The Utah Administrative Code sections governing proceedings before the Division of Water Rights do not require that a party demonstrate “standing” to participate in the administrative process. Utah Admin. Code R655-1 to R655-14. The section of the Utah Administrative Code specifying a formal, judicially-determined standing requirement for participation in an agency proceeding that this Court referenced in Utah Chapter of the Sierra Club, 2006 UT 74 at ¶ 12, applies narrowly to proceedings before the Utah Air Quality Board. Utah Admin. Code R307-103-1(1), R307-103-1(2), R307-103-3(1).

not reach the higher threshold required to invoke the jurisdiction of the court in the first instance. Id. at ¶¶ 17-28, 82 P.3d at 1131-33.

By seeking to define “appropriate” parties as “aggrieved” parties, Western Water is making a comparison no more logical than the Washington County Water Conservancy District’s unfounded effort to equate “interested” with “aggrieved” parties. Of course, the Conservation Groups are not aggrieved by the State Engineer’s decision in this case, as they support it. As a result, they should not be compelled to meet a standard established for those seeking to appeal an agency decision. Moreover, had the legislature meant to define “appropriate” parties as “aggrieved” parties or liken the two, it would have, as it plainly knows how.

**2. An “Appropriate Party” Under Utah Code Ann. § 63-46b-14(3)(b) is a Party that Participated as an Interested Person Who Protested the Water Rights Applications.**

In any case, based on the analysis of Washington County, “appropriate” party must be much closer in meaning to “interested” party than “aggrieved” party. After all, at issue here is not a plaintiff seeking to “insert its foot into an otherwise closed jurisdictional door.” Washington County, 2003 UT 58 at ¶ 16, 82 P.3d at 1130 (requiring aggrieved parties to show standing ensures consistency by guaranteeing that only those with particularized injury can secure the jurisdiction of the court). Rather, the Conservation Groups are seeking to provide the district court with the concerns and viewpoints that were the basis for the State Engineer decision. R. 33 (“[p]ublic recreation and the natural stream environment would also be adversely affected if these applications were to be approved”). Indeed, this is exact role envisioned by the district court when it determined

that, by virtue of their being interested parties – that is, parties that protested the applications – Conservation Groups were entitled to ensure the full airing of their support for the State Engineer’s decision. R. 3372 at p. 47. Thus, the role of an appropriate party is analogous to the role of an interested party and the two terms should be equated.<sup>6</sup>

Close review of the Utah Code Ann. § 63-46b-14(3)(b) underscores this point – that “appropriate” adds little, if anything to the meaning of “parties.” The section requires a petitioner seeking judicial review of an agency to decision to “name the agency **and all other appropriate parties** as respondents . . . .” (emphasis added). When “other” is used in this way, it indicates that whatever modifies the second concept also modifies the first – meaning that “appropriate” also modifies agency.<sup>7</sup> The use of the word “appropriate” then simply carries the connotation of “right” or “proper” – referring

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<sup>6</sup> The term “appropriate” in the phrase “other appropriate parties” in Utah Code Ann. § 63-46b-14(3)(b) could add meaning to the definition of “party” found in Utah Code Ann. § 63-46b-2(1)(f). Whether a party is an “other appropriate party” that must be named as a respondent will depend upon which parties benefit from, and which parties are aggrieved by, the decision of the State Engineer. For example, if the State Engineer had approved Western Water’s applications, protestors who were aggrieved by that decision would have to name only Western Water as a respondent, in addition to naming the State Engineer. It would make no sense for parties such as the Conservation Groups filing suit to challenge an approval of an application to name other protestors as “respondents,” because the other protestors’ interests coincide with theirs. In that situation, Conservation Groups would **not** in any sense be initiating a proceeding **against** their follow like-minded protestors. See Utah Code Ann. § 63-46b-2(1)(i) (defining respondent as “a person against whom an adjudicative proceeding is initiated”). By contrast, as actually happened in this case, where the water rights applicant is aggrieved by the State Engineer’s denial, then the applicant must name all interested persons who protested the application as respondents in the judicial review proceedings.

<sup>7</sup> Thus, in the phrase “globs and other green things,” the idea portrayed is that the globs are green. Likewise, in saying “the agency and all other appropriate parties” indicates that a petitioner must name the appropriate agency. Looked at this way, “appropriate” cannot mean that the agency has to have standing.

to the agency or parties which were involved in the adjudication. The decision in Utah Chapter of the Sierra Club used the word “appropriate” in similar fashion to indicate a party which met the standing requirements at issue in that case, and thus would be a “proper” party to bring a lawsuit – without adding any additional legal significance to the word “appropriate” itself. 2006 UT 74 at ¶¶ 35-36, 38-43.

However, as the Court of Appeals held in Blauer v. Department of Workforce Services,<sup>8</sup> should this Court determine there “is ambiguity [in] the language of the [Utah Administrative Procedures Act], we look to legislative history, case law of other jurisdictions, and policy considerations.” 2005 UT App 488, ¶ 22, 128 P.3d 1204, 1208 (citing Vigos v. Mountainland Builders, Inc. 2000 UT 2, ¶ 13, 993 P.2d 207 (“[O]nly if there is ambiguity [in the statute] do we look beyond the plain language to legislative history or policy considerations.”)). Here, the policy considerations favor the district court’s reasoning that Conservation Groups qualify as “appropriate” parties by virtue of their protests below.

As the UAPA specifies, the district court must “determine all questions of fact and law” raised by Western Water’s challenge to the State Engineer decision. Utah Code Ann. § 63-46b-15(3)(a) (“The district court, without a jury, shall determine all questions

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<sup>8</sup> Western Water cites Blauer for two propositions the case does not support. Blauer answered the narrow question of which of two State agencies was the appropriate party respondent in a petition for judicial review. Blauer v. Dep’t of Workforce Servs., 2005 UT App 488, ¶ 15-16, 128 P.3d at 1207. Blauer decided only that the agency which issued the initial decision was the “appropriate respondent agency,” rather than the administrative appeals board. Id. at ¶ 21, 128 P.3d at 1208. Contrary to Western Water’s suggestion in its brief, App. Br. at 41, the Court of Appeals provided no guidance regarding the definition of the term “appropriate” in its opinion.

of fact and law and any constitutional issue presented in the pleadings”). The district court must essentially take the place of the State Engineer, hearing for itself all evidence and argument originally presented by both the protestors and applicant in the proceeding below which served as the basis for the State Engineer’s decision. The district court below recognized this obligation, noting that it has “to consider everything [the State Engineer] considered.” R. 3372 p. 46. To best facilitate this process, all those who protested should be entitled to participate in “retrial” of the water rights application.

This is particularly true because, in this case, as well as more generally, protestors possess an expertise and familiarity with their own arguments and evidence that the State Engineer cannot readily match. Thus, the reviewing court benefits from having those with first-hand knowledge appear at trial to offer facts and argument as they did before the agency. Indeed, depriving the court of this opportunity would be contrary to the interests of the court in a full airing of the relevant facts and law from those in the best position to present them. Moreover, it would be advisable, where, as here, other parties have stepped into the process, to lessen the burden on the State Engineer by letting those who appeared before him present relevant evidence and argument to the district court. As a result of their participation, the courts benefit from a full and complete hearing of the issues relating to the Western Water applications, including those raised by Conservation Groups showing the detrimental impacts of the appropriations proposal on aquatic life, wildlife, wetlands, water quality, recreational opportunities and the public interest.

Thus, according to the statute itself, as well as this Court's interpretation of some of the provisions at issue here, "appropriate" party is analogous or closely analogous to the UAPA's definition of "party." Utah Code Ann. § 63-46b-2(1)(f). This definition includes "all persons authorized by statute or agency rule to participate in an adjudicative proceeding," *id.*, which in turn includes "person[s] interested" who have filed protests pursuant to Utah Code Ann. § 73-3-7(1). For purposes of review of the State Engineer's decision, "appropriate parties" who must be named as respondents include those interested persons who protested the applications before the State Engineer.

**B. The Conservation Groups are Appropriate Parties to the Judicial Review of the State Engineer's Decision Based on Their Interest in the Subject Matter of this Litigation.**

To be an "appropriate party," a protestor must file a non-frivolous protest: the term "interested" in Utah Code Ann. § 73-3-7(1) reflects a person's obligation to have a legitimate interest in the decision on the pending application. See Washington County, 2003 UT 58 at ¶ 15, 82 P.3d at 1130 (interested persons for the purposes of section 73-3-7(1) are "those who have a genuine concern about proposed changes in water rights to voice those concerns before the State Engineer . . . .") (quoting Badger v. Brooklyn Canal Co., 922 P.2d at 750 n.9). For example, a person protesting solely for the purpose of harassing the applicant or causing delay would not qualify. In this case, in ruling that the Conservation Groups are appropriate parties to these judicial proceedings, the district court found that these groups are "representing a very valid position that may not be fully aired without their participation . . . ." R. 3372, p. 47. This second aspect of the district court's ruling is a determination, based on the evidence presented, that the Conservation

Groups easily satisfied the standard for being interested persons, and consequently are appropriate parties who must be named as respondents in the litigation. Because the Conservation Groups have demonstrated their interest in the administrative proceedings and their viewpoints may not otherwise be presented, they are appropriate parties to the litigation.

**1. The Conservation Groups Have an Interest in Participating in the Judicial Review of the State Engineer's Decision.**

The district court held that the Conservation Groups are appropriate parties to Western Water's lawsuit because of their protests and their advocacy of positions that the State Engineer might otherwise not have considered. The factual underpinnings of this legal conclusion are undisputed in this case. The Conservation Groups filed protests, a supplemental protest, and testified during the hearing before the State Engineer. R. 24-28; R. 1402-13. As illustrated by the affidavits of their members, the groups have aesthetic, educational, recreational, and environmental interests in Utah Lake, the Jordan River, Great Salt Lake, and their associated ecosystems. R. 1376-1401.

These affidavits show that members have a distinct and personal interest in Utah Lake, the Jordan River and Great Salt Lake and that they will be harmed if the Western Water applications are approved. The members are regular users of the water bodies and their associated ecosystems for fishing, bird-watching, boating, and other recreational activities. See, e.g., R. 1378, ¶¶ 8-10; R. 1384-85, ¶¶ 8, 10-11; R.1391, ¶ 9, R. 1396-97, ¶¶ 7-10. The decrease in water quantity and water quality that will result if the proposal is permitted will adversely impact the aquatic life, wildlife, habitat and scenic qualities



they enjoy. R. 1379-81, ¶¶14-18; R. 1386-88, ¶¶ 14-18; R.1392-94, ¶¶ 12-17; R. 1398-1401, ¶¶ 12-19. These harms will occur unless the State Engineer's decision is affirmed on judicial review, requiring the participation of the Conservation Groups in the court process to protect their members' interests.

The Conservation Groups have a unique interest in this matter which is not represented by any other party. The groups seek to protect the ecological integrity of Utah Lake, Jordan River, and Great Salt Lake. Unlike governmental entities, which operate under strict statutory and regulatory mandates that often require a balancing of interests, the Conservation Groups assert unqualified interests in aquatic life, wildlife, wetlands, water quality, and recreational opportunities of the affected areas. Their members are themselves recreational users of these water resources, allowing them to present direct testimony regarding the existing uses and values of these waterbodies as well as descriptions of the likely effects on their uses in the event Western Water's applications were approved.

The State Engineer's decision echoes the concerns which the Conservation Groups presented in their protests, and which those groups were in a unique position to present. R. 33 ("Public recreation and the natural stream environment would also be adversely affected if these applications were to be approved as they are now filed."). The State Engineer agreed with the Conservation Groups that the proposed appropriations would adversely affect the very interests the groups asserted in the administrative process, as well as prove detrimental to the public welfare. *Id.* Without the participation of the Conservation Groups, the State Engineer would not have had the benefit of all relevant



viewpoints. Badger, 922 P.2d at 750 n.9. As described above, the judicial review provision in Utah Code Ann. § 63-46b-14(3)(b) contemplates that the district court reviewing the State Engineer's decision should also have the benefit of the views of all of the participants in the administrative process.

**2. The Conservation Groups, as Interest Persons Who Participated in the Administrative Proceedings, Would Be Entitled to Intervene in the Litigation, and Must be Named as Respondents When the Petition for Review is Filed.**

The district court's determination that the Conservation Groups are appropriate parties is also correct because the Conservation Groups would have had a right to intervene in the court proceedings under Utah Rule of Civil Procedure 24(a), if they had not been named as respondents. Rather than requiring protestors to move to intervene in piecemeal fashion, Utah Code Ann. § 63-46b-14(3)(b) requires the petitioner to join the respondents at the outset of judicial proceedings to review administrative decisions. The term "appropriate parties" in that section must therefore mean something distinct from "standing to sue" or "standing to intervene," as this Court has defined those terms, which represent alternative methods of becoming parties to a lawsuit. See In re E.H., 2006 UT 36, ¶¶ 49-51, 137 P.3d 809, 819-20 (describing and distinguishing the tests applicable to persons seeking "standing to sue" and "standing to intervene"). Because protestors before the State Engineer have already participated in an administrative proceeding involving the party which files the petition for review, the threshold for being an "appropriate party" must necessarily be lower than that of intervention by a party which has not been involved in an underlying adjudicatory process. And, because the Conservation Groups would satisfy the intervention standard, they certainly more than

satisfy the showing of interest required to be named as respondents by virtue of having been interested persons below.

There are several ways that a person may become a party to a judicial proceeding. As described above, a person may invoke the jurisdiction of the court, in which case that person must meet the tests for standing to sue. See, e.g., Washington County, 2003 UT 58 at ¶ 14, 82 P.3d at 1130, Terracor, 716 P.2d at 799. Alternatively, if the person is not among the plaintiffs and defendants in the original complaint, that person may intervene by meeting the less-rigorous standards in Utah Rule of Civil Procedure 24. Intervention is “a method by which an outsider with an interest in an action may enter and participate as a party.” In re E.H., 2006 UT 36, ¶ 51, 137 P.3d at 820. Such outsiders must demonstrate a direct interest in the subject matter of the litigation, that the outcome would affect the outsider’s interest, and that the outsider’s interest is not adequately represented by a party to the litigation. Id.<sup>9</sup>

Being named as a respondent by virtue of being an “appropriate party” under Utah Code Ann. § 63-46b-14(3)(b) provides a third method of becoming a party to litigation, an avenue which is specific to the judicial review of administrative agency action. Unlike parties seeking intervention, such appropriate parties are not outsiders to the action, because they have already participated in the underlying administrative

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<sup>9</sup> An “interest” sufficient for intervention does not need to be a property interest. See, e.g., In re E.H., 2006 UT 36 at ¶ 51, 137 P.3d at 820; cf. Utah Chapter of the Sierra Club, 2006 UT 74 at ¶ 30 (“Standing was not designed to provide remedies solely for potential threats to health, but for all legally cognizable interests.”); Washington County, 2003 UT 58 at ¶ 13, 82 P.3d at 1130 (“plaintiffs did not need to be holders of water rights in order to be “aggrieved” within the meaning of Utah Code section 73-3-14”) (citing Bonham v. Morgan, 788 P.2d 467, 502 (Utah 1989)).

proceeding. Such parties should not be required to submit motions and supporting pleadings in piecemeal fashion under Utah R. Civ. P. 24(c), burdening the district court with deciding multiple intervention motions, when the UAPA expressly requires a party filing a petition for review to name appropriate parties as respondents. Instead, orderly and efficient judicial review of the State Engineer's decision requires that parties which demonstrated their interest in the subject matter of the administrative proceeding by filing protests be named as respondents when the action is brought up for judicial review.

In this case, the undisputed facts show that the Conservation Groups would easily satisfy the requirements for intervention. They have demonstrated their direct and substantial interest in the decision which the district court reviewed, and, as the district court recognized, their views are not represented fully by any other party to the litigation.

R. 3372, ¶ 47.<sup>10</sup> Because the Conservation Groups protested and participated as

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<sup>10</sup> Although the issue is not before this Court because the Conservation Groups are not seeking to invoke the Court's jurisdiction as plaintiffs, the uncontested facts of the Conservation Groups' interests in Western Water's applications also would suffice to give the groups standing under the two test described in Utah Chapter of the Sierra Club, 2006 UT 74 at ¶¶ 18, 40-41. Satisfying either of the tests is sufficient to establish standing to sue. *Id.* at ¶¶ 18, 41. Had the State Engineer approved Western Water's application, the Conservation Groups would have had standing to challenge such decision because they satisfy both tests. Under the traditional test, the affidavits of the Conservation Groups' members show that each has the personal stake in, and would be adversely affected by, a decision to grant Western Water's applications. *Id.* at ¶ 19. Under the alternative test, the proposed appropriation of huge quantities of water from already overappropriated water systems is an issue of significant public importance, and the concerns particular to persons and groups which routinely use these waters are "unlikely to be raised" unless the Conservation Groups had standing to raise these issues. *Id.* at ¶¶ 35-36. The wetlands and ecosystems of these waters are of international significance as habitat for millions of migratory and resident birds. They are of great national and regional importance as well, providing recreational and educational

interested persons in the administrative process, and would qualify to intervene in the judicial process, were properly named as respondents when Western Water filed its petition for review.

**3. To the Extent that Western Water Relies in its Brief on its own Characterization of the Undisputed Facts Found by the District Court, Western Water has Failed to Marshal the Evidence, and the District Court's Decision that the Conservation Groups are Appropriate Parties should be Affirmed on that Basis Alone.**

Western Water's argument that the Conservation Groups are not "appropriate parties" turns in part on its characterization of the facts that establish the groups' interest in the administrative proceeding and this litigation. App. Br. 44-46. Although the question of whether the groups are "appropriate parties" is a question of law, the district court underscored the validity of the Conservation Groups' participation in the judicial proceedings by noting that they represented "a very valid position" which might not be fully aired unless they were parties. R. 3372, p. 47.

Western Water challenges the trial court's conclusion with conclusory statements regarding the underlying facts, such as "it is obvious that [the groups] can show no specific injuries to themselves caused by the Plaintiff's request," App. Br. at 45, and "there are certainly no 'unique' and 'important' circumstances that would justify permitting the named Defendants to continue in this action." App. Br. at 46. Yet Western Water has failed to include any description whatsoever of the Conservation Groups' interests in its Statement of Facts or in its argument. This failure implicates the

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opportunities to millions of people living along the Wasatch Front, as well as elsewhere in Utah and the United States.

obligation to marshal evidence when challenging a legal standard that is fact-sensitive.

Chen v. Stewart, 2004 UT 82, ¶¶ 20, 76, 100 P.3d 1177, 1184-85, 1195 (“Even where the defendants purport to challenge only the legal ruling, as here, if a determination of the correctness of a court’s application of a legal standard is extremely fact-sensitive, the defendants also have a duty to marshal the evidence.”).

Where a legal standard depends on its application to the underlying facts, an appellant ““must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists.”” Id. at ¶ 77, 100 P.3d at 1195 (quoting Neely v. Bennett, 2002 UT App 189, ¶ 11, 51 P.3d 724). Western Water, by contrast, has included no evidence at all in its brief. This failure alone justifies this Court affirming the district court’s holding that the Conservation Groups are appropriate parties based on their valid position and the fact that their views might not be fully aired in the absence of their participation. Id. at ¶ 80, 100 P.3d at 1196. Because Western Water has not marshaled the evidence, this Court must disregard Western Water’s characterizations in its brief and assume that the evidence supports the District Court’s holding. Id.

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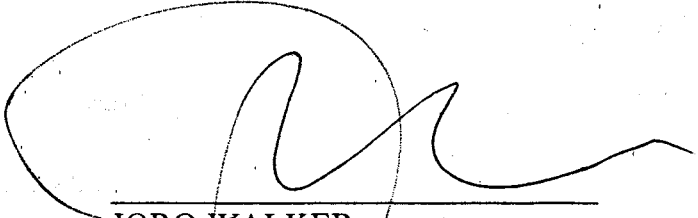
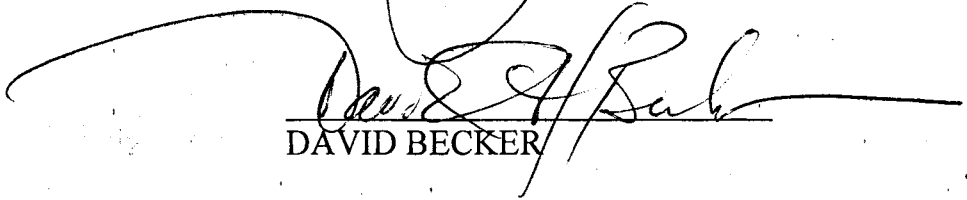
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## CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated this 22<sup>nd</sup> day of November, 2006.

  
\_\_\_\_\_  
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\_\_\_\_\_  
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## CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2006, true and correct copies of the foregoing **BRIEF OF APPELLEES UTAH CHAPTER, SIERRA CLUB; UTAH COUNCIL, TROUT UNLIMITED; NATIONAL AUDUBON SOCIETY; UTAH WETLANDS FOUNDATION; & UTAH WATERS** were mailed by first-class mail, postage prepaid, to the following:

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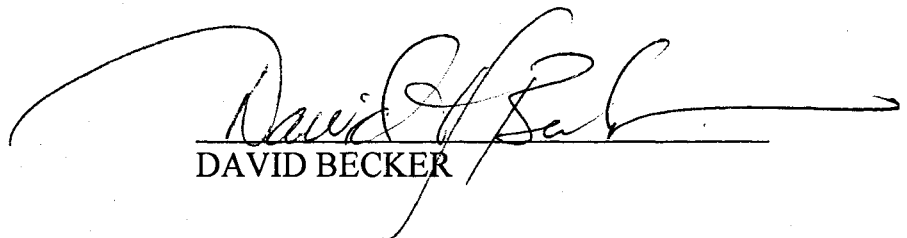
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