

2006

Western Water v. Jerry D. Olds : Reply Brief

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Terry L. Hutchinson; Attorney for Appellants.

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

Recommended Citation

Reply Brief, *Western Water v. Olds*, No. 20060527.00 (Utah Supreme Court, 2006).

https://digitalcommons.law.byu.edu/byu_sc2/2637

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

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

2

REPLY BRIEF OF APPELLANT TO STATE ENTITIES

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

Attorney for Appellant:

Terry L. Hutchinson, No. 5092
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:

MARK SHURTLEFF, No. 4666
Utah Attorney General
Norman K. Johnson, No. 3816
Julie I. Valdes, No. 8545
Utah Attorney General's Office
1594 W. North Temple, #300
Salt Lake City, UT 84116
*Attorneys for Defendant Jerry D. Olds,
Utah State Engineer*

FILED
UTAH APPELLATE COURTS

DEC 26 2006

Heather B. Shilton, No. 7819
Assistant Utah Attorney General
UTAH ATTORNEY GENERAL
1594 West North Temple, #300
Salt Lake, UT 84116
*Attorney for Utah Division of Parks &
Recreation*

Stephen G. Schwendiman, No. 2891
Keli Beard, No. 10628
James P. Allen, No. 11195
Assistant Attorney General
P.O. Box 140814
160 E. 300 S., 5th Floor
Salt Lake, UT 84114-08150
*Attorneys for Utah Division of Forestry,
Fire & State Lands*

Martin B. Bushman, No. 5594
Assistant Attorney General
1594 West North Temple, Ste. 2110
Salt Lake, UT 84116
*Attorney for Utah Division of Wildlife
Resources*

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

REPLY BRIEF OF APPELLANT TO STATE ENTITIES

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

Attorney for Appellant:

Terry L. Hutchinson, No. 5092
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:

MARK SHURTLEFF, No. 4666
Utah Attorney General
Norman K. Johnson, No. 3816
Julie I. Valdes, No. 8545
Utah Attorney General's Office
1594 W. North Temple, #300
Salt Lake City, UT 84116
*Attorneys for Defendant Jerry D. Olds,
Utah State Engineer*

Heather B. Shilton, No. 7819
Assistant Utah Attorney General
UTAH ATTORNEY GENERAL
1594 West North Temple, #300
Salt Lake, UT 84116
*Attorney for Utah Division of Parks &
Recreation*

Stephen G. Schwendiman, No. 2891
Keli Beard, No. 10628
James P. Allen, No. 11195
Assistant Attorney General
P.O. Box 140814
160 E. 300 S., 5th Floor
Salt Lake, UT 84114-08150
*Attorneys for Utah Division of Forestry,
Fire & State Lands*

Martin B. Bushman, No. 5594
Assistant Attorney General
1594 West North Temple, Ste. 2110
Salt Lake, UT 84116
*Attorney for Utah Division of Wildlife
Resources*

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

PERTINENT CORRECTIONS TO “FACTS” AS STATED IN STATE ENTITIES’ BRIEF 3

REPLY TO ARGUMENTS IN STATE ENTITIES BRIEF 5

A. Statute and long-standing practice did not require the RCP to be submitted on a “Form Prescribed by the State Engineer”. 5

B. The State Engineer chose not to examine or publish the RCP pursuant to his discretionary authority, which action constitutes a “decision on the RCP”. 9

C. Western Water never got the change to prove its ability to meet the elements required by statute to the proper decision maker at trial de novo. 11

D. Unless a new application is required, there is no need for Western Water to start the administrative process over. 11

E. The State Entities’ arguments that a “new application” was submitted as part of the Request For Reconsideration is a request to abandon the statutory definitions and long-standing enforcement of said statutes. 12

F. By deleting portions of its original applications, Western Water was not violating the “first in time, first in right” principle as claimed by the State Engineer. 14

G. The statutory definition of no action on an administrative request for reconsideration is that such an event constitutes a “denial” and therefore a final order. It would also be inconsistent with the Utah Administrative Procedures Act. 14

H. *The State Engineer cannot deny his duty to maximize the development of water for public purposes.* 17

I. *The failure of the State Engineer to conduct further investigation of the RCP was a final administrative action.* 18

CONCLUSION..... 19

TABLE OF AUTHORITIES

CASES

<i>Bonham v. Morgan</i> , 788 P.2d 497 (Utah 1989)	10, 17, 19
<i>Brady v. McGonagle</i> , 195 P. 188, 191 (Utah 1921)	10
<i>Career Service Review Board v. Utah Dept. of Corrections</i> , 942 P.2d 933 (Utah 1997)	11, 12, 13, 20
<i>Clark v. Hansen</i> , 631 P.2d 914 (Utah 1981)	12, 13
<i>East Bench Irrigation Co. v. State</i> , 300 P.2d 603 (Utah 1956)	17
<i>Maverik Country Stores, Inc. v. The Industrial Commission of Utah</i> , 860 P.2d 944, 951 (Utah Ct. App. 1993)	12
<i>McGarry v. Thompson</i> , 201 P.2d 288, 293 (Utah 1948)	14
<i>Provo Bench Canal and Irrigation Co. v. Linke</i> , 296 P.2d 723 (Utah 1956)	7, 9
<i>Robinson v. Schoenfeld</i> , 218 P. 1041 (Utah 1923)	14
<i>Searle v. Milburn Irr. Co.</i> , 133 P.3d 382, 391 (Utah 2006)	8
<i>State v. Truman Mortensen Family Trust</i> , 8 P.3d 266, 271 (Utah)	13, 15, 18
<i>United States v. Fourth District Court</i> , 238 P.2d 1132 (Utah 1951)	7, 9, 17
<i>Vigos v. Mountainland Builders, Inc.</i> , 993 P.2d 207, (Utah 2000)	8
<i>Whitmore v. Welch</i> , 201 P.2d 954 (Utah 1949)	6, 7, 8, 9, 14, 21
<i>Wrathall v Johnson</i> , 40 P.2d 755 (Utah 1935)	9, 14

STATUTES

Utah Code Ann. §63-46b-1(1)	15
Utah Code Ann. §63-46b-5(1)(i)	17
Utah Code Ann. §63-46b-13(1)	16, 17
Utah Code Ann. §63-46b-13(1)(a)	16
Utah Code Ann. §63-46b-13(3)(b)	10, 15, 17, 19
Utah Code Ann. §63-46b-14	9
Utah Code Ann. §63-46b-14(1)	10
Utah Code Ann. §63-46b-19(3)(b)	16
Utah Code Ann. § 73-3-3(2)(a)	7
Utah Code Ann. § 73-3-5(2)	17
Utah Code Ann. §73-3-5(3)	17
Utah Code Ann. § 73-3-6(2)	18
Utah Code Ann. §73-3-8	11, 17
Utah Code Ann. §73-3-8(1)	18, 19
Utah Code Ann. §73-3-14	10

ADMINISTRATIVE RULES

Utah Admin. Code § R655-6-3(I) 8

Utah Admin. Code § R655-6-4(B) 8

Utah Admin. Code §R655-6-5 8

Utah Admin. Code §R655-6-6 8

Utah Admin. Code § R655-6-6 (A) 8

Utah Admin. Code §R655-6-17 8

Utah Admin. Code R655-6-17(C) 10, 15, 19

INTRODUCTION

Appellant (hereafter “Western Water”) submits the following Reply Brief to the Brief of State Defendants/Appellees, Jerry D. Olds, Utah State Engineer, Division of Wildlife Resources, Division of Forestry, Fire & State Lands, and Division of Parks and Recreation (hereafter “State Entities” unless the Utah State Engineer is specifically named) in order to demonstrate certain factual errors contained in Appellee’s Brief, and to respond to new issues raised in that Brief.

The State Entities argue for new procedures that are not presently in use by the State Engineer, or required by Utah statute or long-standing case law. Despite the State Entities’ attempts to gloss over the facts of the case, particularly the elements, size and description of points of the original applications and project plan (hereafter called the “Conservation Plan”), there are few pertinent factual disputes regarding the issues before the Court on this appeal.

Western Water filed three applications for certain water rights. Its applications listed various amounts of water from the Utah Lake-Jordan River basin, certain diversion points for said water and other engineering details which it claimed would make their plan feasible. Following publication and a public hearing on Western Water’s request, the State Engineer issued a Memorandum Decision denying the applications based upon his interpretation of certain statutory criteria. In a timely manner, Western Water properly requested a Reconsideration of the Decision, and as part of the Request, itemized points of the Conservation Plan that could be deleted and/or reduced, yet which had been part of the Conservation Plan. This reduction and itemization has come to be commonly called the

“RCP”. The State Engineer took no action on Western Water’s Request, thereby denying it under statutory interpretation.

In a timely manner, Western Water sued the various parties. In preparation for trial, Western Water issued a notice to all the parties (for their convenience) that it would be placing evidence on the RCP during the trial, not the original Conservation Plan. R. 2233.

Western Water also filed other Motions requesting partial Summary Judgment on various issues, as did many of the Defendants. The trial court misapplied the law by denying Western Water’s request to exclude parties who filed late protests to the original applications from the judicial process; by denying Western Water’s request to exclude environmental groups which Western Water alleged were not “appropriate parties” from the judicial proceeding and by denying Western Water’s request to prohibit any Defendants but the State Engineer from introducing evidence regarding public policy provisions of the statute.

In its most serious misapplication of the law, the district court held that even though the RCP was a distinct subset of the original Conservation Plan, it should have had a hearing and a public notice. For this reason, the trial court held that Western Water had filed, in essence, a new claim, and that it did not exhaust its administrative remedies in bringing judicial action.

The trial court based its erroneous holding on the belief that the RCP had to be submitted to the State Engineer prior to his issuance of his Memorandum Decision on the applications. The trial court further erred when he ruled that no action on the RCP was taken because the State Engineer didn’t hold a hearing on it, nor did he [the State Engineer] give

the protestants a chance to respond to it.

PERTINENT CORRECTIONS TO “FACTS” AS STATED IN STATE ENTITIES’

BRIEF

A. The size of the original Conservation Plan was much smaller than the State Entities would lead the Court to believe (less than 1/5 the alleged size). Both the State Entities and the Joint Defendants argue that the Conservation Plan was a “grandiose” “gargantuan”, “complex” creature that would consume almost as much water as the entire population of the state of Utah would require. In reality, the applications entailed a medium-sized project (R. 3203, ¶5) which, through exchange, diversion to storage, and conservation entailing second and third reuses of return flows, would have nearly doubled 51,768 acre-feet of annual initial beneficial uses to 86,000 acre-feet¹ of total beneficial use. R 1066-73; especially R. 1072.

A careful reading of the Plan shows that much of the water requested involved exchanges and return flows (return flows being a major element of the Revised Conservation Plan as well) or involved water that would not be used cumulatively, but alternatively. R. 1066-73; especially R. 1072. In other words, if Source A is used, then Source B would not

¹The applications originally envisioned 92,000 acre-feet of beneficial use (R. 1072), which amount after more detailed study, was subsequently reduced to 86,000 acre-feet as set forth in Western Water’s Statement of Facts. R. 53, ¶1. Western Water clearly testified in the State Engineer’s hearing that the three applications were for 86,000 acre-feet of beneficial uses. R. 3370 at 321, lines 14-22. and that the applications have never appropriated 288,000 acre-feet of water, being alternative, not cumulative. *Id.*

be used or vice versa.² The Entities and Joint Defendants incorrectly added or cumulated the application requests, which are alternative and not cumulative, and include exchanges and reuse of return flows. Together the applications appropriated no more than 86,000 acre-feet to beneficial use rather than the 288,107 acre-feet alleged by the Defendants. R. 53, ¶1, R. 3370 at 321, lines 14-22.

The request for reconsideration, which revised the Conservation Plan, retained the core conservation portion of the plan, which involved use and reuse of water in Utah, Cedar, and Salt Lake Valleys focusing on Utah and Cedar Valleys (R 54, ¶¶2-3, 1066-67), in a scaled down exact subset of the applications that will initially beneficially use 32,290 acre-feet of Utah Valley water and will achieve through reuse a total 56,880 acre-feet of beneficial uses. R 1072, line 14, R 44, item 3, R 48, ¶4, R 49.

B. Western Water requested its trial de novo on the denial of its request for reconsideration (of which the RCP was a part), not a complete trial de novo on the RCP (which was not mentioned until a preliminary attorney's planning meeting to be held shortly before the trial date, which was being scheduled in order to comply with a statutory two year requirement for a final order and a three year requirement if an appeal was taken). R. 2233

C. The RCP as included in the Request For Reconsideration described what Western Water "would not do" in the sense that it listed elements of the original Conservation Plan in its original application that would be dropped. R 46-47.

²However, an application to appropriate would be required for the water in both Source A and Source B, regardless of exclusivity of use.

D. The State Entities wish to have the Court “know” that the State Engineer felt that none of the statutory elements required for approval of an application were met by Western Water in its application.³ Those statements by the State Entities (and similar statements by the Joint Appellees) are irrelevant and not before the Court.

E. Contrary to the representations by the State Entities, the District Court held that the State Engineer *could have* taken action on the RCP by holding a new hearing and re-publishing the RCP; but found that he elected not to. R. 3373, p. 52, lines 1-7; p. 64, lines 6-9).

F. Contrary to representations by the State Entities, Western’s Statement of Facts, though 340 pages in total length, devoted only two pages of text in the main body and 10 pages of exhibits to describing the Conservation Plan. R 58, ¶(1). The remaining 328 pages (96 percent) are devoted to showing the applications meet the statutory criteria for approval with extensive discussion of the availability of unappropriated water for the applications. R 58-60, ¶¶ (2) to (20) .

REPLY TO ARGUMENTS IN STATE ENTITIES’ BRIEF

A. Statute and long-standing practice did not require the RCP to be submitted on a “Form Prescribed by the State Engineer”.

The State Entities argue that the RCP, with its deletions from the original

³Western Water vehemently disagrees with the State Engineer’s findings (and interpretations) on every one of the statutory elements for approval. As stated elsewhere, Western Water has legally and factually sound rebuttals to each and every point of the Joint Appellees’ and State Entities’ claims regarding the so-called statutory deficiencies. Western Water believes that proper application of the law entitles its applications to be approved.

Conservation Plan, constituted a “substantial change” which necessitated a new application. To hold thus (as the trial court did) would be to make new law with no statutory or administrative rules basis for doing so. The State Entities go to great length to explain and identify the water right application process.⁴ Following this, the State Entities begin to argue for a new application and interpretation of the law, contrary to long-held rulings of this Court and the long-time procedures of the State Engineer.

The State Entities (and the Joint Appellees) have admitted that the Revised Conservation Plan is a subset of the original Conservation Plan. R.3373, p. 14, lines 7-13; p. 40, lines 6-9 & 12-15. Despite this, they now argue that the way the RCP is put together somehow makes it “substantially different” enough from the Conservation Plan to require a new application.

This is not the case. Utah Code Ann. § 73-3-3 (2)(a) states the requirements for a “new application”:

- (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.

Almost 60 years ago, this Court held that it doesn’t matter how large a reduction is, as long as it is merely a reduction.⁵ *Whitmore v. Welch*, 201 P.2d 954 (Utah 1949).

⁴Western Water agrees with those descriptions to a point, particularly as they are described in Sections I.A.1-4 on pages 18-23 of the State Entities’ Brief.

⁵The main reason for the new application by Western Water in 2006 was the *addition* of different diversion points from the Revised Conservation Plan. Such new

Whitmore v. Welch involved a large reduction in a hydropower application made by the State Engineer. This court held that **any reduction** of an application after advertisement which had been encompassed in the whole, **however large**, need not be re-noticed or re-advertised. *Id.* at 959-60. This court subsequently has approved as much as 82 percent to 76 percent reductions in applications made after a hearing without requiring notice or rehearing. See *Provo Bench Canal and Irrigation Co. v. Linke*, 296 P.2d 723 (Utah 1956)(approving an 82 percent application reduction from 52.492 cfs down to 9.33 cfs or 22,281 acre-feet irrigation season supply down to a 3,960 acre-foot supply); *United States v. Fourth District Court*, 238 P.2d 1132 (Utah 1951)(approving a 76 percent application reduction from 43.292 cfs down to 10.30 cfs, or a 18,376 acre-feet irrigation season supply down to a 4,372 acre-foot supply).

Both *Provo Bench Canal and Irrigation Co.* and *United States v. Fourth District Court*, involved the same water project, Deer Creek Reservoir, which supplies water for irrigation and municipal use in both Utah and Salt Lake Valleys, and together approved applicant-made reductions of 32,325 acre-feet in the applications. Whereas, Western Water's application reduction is no more than 34 percent -- a reduction from 86,000 acre-feet of beneficial use down to 56,880 acre-feet or 29,120 acre-feet total. Thus, this court has approved applicant reduced applications for the same types of uses in two of the same valleys involved in Western Water's applications, for more than twice the percentage reduction and 3,205 acre-feet more total water reduction than that made by Western Water on its applications. That is because "any" reduction is encompassed and included in the whole of

additions *require* new applications pursuant to Utah Code Ann. § 73-3-3(2)(a).

the original applications noticed and heard. *Whitmore v. Welch* at 959-960.

The statute clearly specifies that when additional water is requested, diversion points are changed, etc., a new application is required. The RCP, by the State Engineer's own admission in its brief, does not fall within any of those statutory requirements for a "new" application. Despite this, the State Engineer attempts to argue that the RCP wasn't on the "correct form". In fact, there is no form prescribed for "amending" or "modifying" an application. Utah Admin. Code R655-6-5, R655-6-6, R655-6-17. Historically, it has been done exactly as Western Water did it, by providing the specific deletions to the State Engineer in writing.

The State Engineer's jurisdiction had been established by filing the applications to appropriate which by administrative rule are requests for agency action. Utah Admin. Code § R655-6-3(I). A request for reconsideration is a pleading pursuant to Utah Admin. Code § R655-6-6 (A) and is not a new request for agency action pursuant to the administrative rules. As in *Vigos v. Mountainland Builders, Inc.*, 993 P.2d 207, (Utah 2000), both the statutes and the administrative rules are to be liberally construed in favor of the applicant. *Searle v. Milburn Irr. Co.*, 133 P.3d 382, 391 (Utah 2006); Utah Admin. Code § R655-6-4(B). Western Water's request for reconsideration met the statutory and administrative requirements for amending the applications and requesting reconsideration of the applications as so amended.

Under the statutory scheme and procedure, had the three applications been approved for the full Conservation Plan, Western Water could have downsized its project to that of the

RCP, *without notice to anyone*, submitted proof on the water put to beneficial use, and obtained a certificate of appropriation on the reduced plan and beneficial use because it is an exact subset of the applications as described by the Conservation Plan. The appropriation is consummated only by putting water to beneficial use and any amount of water not so beneficial used at the time proof is due is automatically lost from the application. *Wrathall v Johnson*, 40 P.2d 755 (Utah 1935). Thus, the application becomes automatically reduced and all approved diversion points and facilities not constructed or used are automatically deleted from the application. Under this procedure, a continuum exists from full appropriation down to nothing if no water is put to beneficial use.

Whitmore v. Welch, Provo Bench Canal and Irrigation Co. and *United States v. Fourth District Court* are fully consistent with this statutory scheme and directly apply here. Western Water's request for reconsideration and applications as reduced under the revised Conservation Plan were properly presented to the State Engineer and were entitled to approval. The failure of the State Engineer to reconsider the applications resulted in a statutory denial of the request and constituted a final decision entitling Western Water to judicial review under Utah Code Ann. §63-46b-14.

B. The State Engineer chose not to examine or publish the RCP pursuant to his discretionary authority, which action constitutes a "decision on the RCP".

The State Entities argue that because the RCP wasn't on the "form prescribed by the State Engineer", he had no authority. This is a false premise. As seen above, there is no form prescribed when the changes to an application do not fall within the statutory

requirements. By wrongfully assuming that the application wasn't on the prescribed form, the State Engineer exercised his discretionary authority in whether or not to respond to the Request by taking no action.⁶ That constituted a decision on the Request for Reconsideration, including the RCP, pursuant to statute.

The State Engineer elected not to take action. He admitted that he knew he had the power to do so. R. 3208, p. 41, line 24 through p. 42, line 8. This inaction is a final agency action 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). That denial is an injury to Western Water and makes Western Water aggrieved under Utah Code Ann. §73-3-14 and §63-46b-14(1) entitling Western Water to judicial review of that denial. "The rejection of the application was an injury to the plaintiff, and [Plaintiff], as such injured or aggrieved party, under [Utah Code Ann. §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 cannot be sustained. . . . It was the duty of the engineer, upon proper showing, to grant the application. No other official is authorized to receive, consider, approve, or reject an application 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). The State Engineer had the power and the duty to reconsider the applications based on the new facts brought forward in the request for reconsideration. *Id.*; *Bonham v. Morgan*, 788 P.2d

⁶This discretionary authority is distinguished from the State Engineer's duty to investigate whether or not an application will beneficially develop water from a previously unclaimed source. That duty is not discretionary, as shown below.

497 (Utah 1989); *Career Service Review Board v. Utah Dept. of Corrections*, 942 P.2d 933 (Utah 1997). Western Water was injured by the State Engineer's denial of the request for reconsideration and has the right of judicial review of that denial.

C. Western Water never got the chance to prove its ability to meet the elements required by statute to the proper decision maker at the trial de novo.

Because of the trial court's finding, Western Water never had the opportunity to present its case to an unbiased decision maker at a *trial de novo*. All claims made by the State Engineer about Western Water's applications and his beliefs about them, particularly with regard to the statutory provisions of Utah Code Ann. §73-3-8, are irrelevant and should not be considered by this Court.⁷ As stated above, there were hotly contested Motions concerning every one of the five elements he opined on. Those Motions were never argued to the trial court and no decision was ever rendered.

D. Unless a new application is required, there is no need for Western Water to start the administrative process over.

The State Engineer's claim that Western Water needed to "commence" the administrative process on the RCP is based upon his fallacious assumption that the deletions to the Conservation Plan made by the RCP were "substantial" enough to require an application on a "prescribed form". Since Western Water's RCP did not fall under the statutory umbrella requiring new applications, this assumption by the State Engineer was

⁷As mentioned previously, all statements by the State Entities and the Joint Appellees regarding the Conservation Plan (and RCP) meeting the statutory criteria of Utah Code Ann. §73-3-8 are irrelevant and not properly before the Court at this time. Western Water responds to ensure the pertinent issues before the Court are not colored by such statements.

wrong.

E. The State Entities' arguments that a "new application" was submitted as part of the Request For Reconsideration is a request to abandon the statutory definitions and long-standing enforcement of said statutes.

It is in Section II of their brief where the State Entities move from defending the State Engineer's assumptions about the requirement for the RCP to be on a "prescribed form" to requesting this court to redefine the statute and overturn almost 60 years of precedence and procedure. The State Entities argue that the RCP could not be presented in a Request for Reconsideration, but were barred from introducing additional material (i.e., the permitted reductions described by the RCP as part of the Request.

The filing of a Request for Reconsideration clearly continues the administrative process. In fact, it is impossible to seek judicial review of a decision while an administrative body is considering a Request for Reconsideration. *Maverik Country Stores, Inc. v. The Industrial Commission of Utah*, 860 P.2d 944, 951 (Utah Ct. App. 1993).

The case of *Career Service Review Board v. Utah Dept. of Corrections*, 942 P.2d 933 (Utah 1997) is instructive. In that case, this court employed the reasoning of *Clark v. Hansen*, 631 P.2d 914 (Utah 1981) to recognize that an administrative agency or officer, such as the State Engineer, "have the power to reconsider their actions in the absence of statutory provisions to the contrary." *Career Service Review Board* at 945. In this case, a Mr. Parker had asked the Career Service Review Board to consider facts subsequent to the issuance of the Board's final order. The Board granted his request, reconsidered its final order and issued a new order based on the subsequent facts. This Court upheld the new order stating,

“the Board retained jurisdiction and had the inherent authority to reconsider and modify its 1993 Order in light of subsequently discovered facts.” *Id.* at 946.

Similarly, Western Water brought new facts before the State Engineer in a request for reconsideration that reduced the applications and presented a downsized project plan. Under *Clark v. Hansen* and *Career Services Review Board*, the State Engineer had full authority to reconsider the applications under the subsequent facts of the reduced applications and the downsized project plan.

The State Entities now wish to question that analysis. They are precluded from doing so. **“When an order has become final, defendant cannot assert section 63-46b-19(3) defenses or argue that issues surrounding the finalized order are still in dispute.”** *State v. Truman Mortensen Family Trust*, 8 P.3d 266, 271 (Utah 2000)(summarizing the holding of *Career Service Review Board v. Utah Dep’t of Corrections*)(**emphasis added**). Because the reduced applications and the downsized project would have been issues foreclosed by the final order if not for the request for reconsideration, they were “issues surrounding the finalized order” and are reviewable under the UAPA. Pursuant to *State v. Truman Mortensen Family Trust* and *Career Service Review Board v. Utah Dep’t of Corrections*, the defendants cannot now argue that those issues are still in dispute in the administrative process and thus circumvent the final order judicial review process on Western Water’s applications. The State Engineer’s action was final.

F. By deleting portions of its original applications, Western Water was not violating the “first in time, first in right” principle as claimed by the State Engineer.

The argument that Western Water’s request for reconsideration reducing the applications would violate the “first in time, first in right” principle is faulty. The application, and the public notice it gives, determines the priority the appropriation will have when such appropriation is completed. *Robinson v. Schoenfeld*, 218 P. 1041 (Utah 1923); *Wrathall v Johnson*, 40 P.2d 755 (Utah 1935). The application is not the appropriation, but the notice of intent to appropriate. *Id.* As set forth above, *Whitmore v. Welch* is fully consistent with the statutory appropriation scheme and holds that notice of potential reductions is encompassed in the original notice for the applications. See also, *McGarry v. Thompson*, 201 P.2d 288, 293 (Utah 1948), which held, “Whatever is notice enough to excite attention and put the party on his guard and call for inquiry is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it.”

Because, as shown above, the RCP did not fall within the statutory elements requiring a “new application” to be filed and a new notice, the State Engineer exercised his power based upon a mistaken premise. He elected not to respond to the Request for Reconsideration, making his Order final.

G. The statutory definition of no action on an administrative request for reconsideration is that such an event constitutes a “denial” and therefore a final order. It would also be inconsistent with the Utah Administrative Procedures Act.

The State Entities argue that the State Engineer’s silence on the RCP was not a

“decision on the merits” of the RCP. In other words, they attempt to distinguish between the “denial of the request” (which the statute obviously provides judicial review for) and a request by Western Water to review the State Engineer’s decision for “abuse of discretion” in taking no action on the request. This is irrelevant. The inclusion of the RCP in the Request was appropriate and permitted under long-standing precedent, as well as the statute. The State Engineer statutorily “denied” the Request by taking no action on it. Utah Code Ann. §63-46b-13(3)(b); Utah Admin. Code R655-6-17(C).

To hold as the State Entities request on this issue would be inconsistent with the Utah Administrative Procedures Act (hereafter “UAPA”). The State Engineer’s Memorandum Decision and Order specifically stated that a request for reconsideration could be submitted or alternatively that judicial proceedings could be initiated. This language gave notice that the decision was final unless either of these avenues for further review was initiated. R. 34. It also activated the provisions of UAPA upon which either reconsideration or judicial review could be obtained. *State v. Truman Mortensen Family Trust*, 8 P.3d 266 (Utah 2000). Once activated all provisions of UAPA must apply. Utah Code Ann. §63-46b-1(1).

UAPA could not be activated if the State Engineer’s order was not final. The State Engineer’s Memorandum Decision to Western Water specifically gave notice that it was “final”. Even the State Entities admit that the Order on the applications as presented prior to the request for reconsideration was final. It is here where the State Entities’ analysis becomes inconsistent. They claim that by including the RCP as part of its Request For

Reconsideration, Western Water somehow removed the action from UAPA so that there was no “final agency action” from which to receive judicial review.

Once the UAPA activates by virtue of the State Engineer’s order, UAPA controls all further proceedings. Utah Code Ann. §63-46b-13(1)(a) provides the right to request reconsideration and places no restrictions upon the “specific grounds” upon which relief may be requested. Basically, any “specific grounds” may be submitted. *Id.* Western Water’s request qualifies under this “any specific grounds” test.

The State Entities claim that somehow a request for reconsideration can, at times, remove the action from the procedures specified by the UAPA, the very legislative act that authorized the request. Utah Code Ann. §63-46b-13(1). They fail to explain; however, how exercising the only requirement on the use of the request for reconsideration (by submitting “any specific grounds” for the request) can remove the request from the procedures of UAPA. The only explanation provided by the State Entities is inconsistent—a party can raise any issue on a request for reconsideration, but only if its not a certain issue which would terminate the application of the UAPA.

Another problem with the State Entities’ analysis arises if one assumes that the request for reconsideration and its subsequent statutory denial were held to have destroyed the finality of the State Engineer’s decision. If so, then under Utah Code Ann. §63-46b-19(3)(b) the State Engineer’s Memorandum Decision and Order would not be enforceable against the applications and become a nullity. The applications would therefore remain intact. This

could empower an aggrieved party to nullify an agency order merely by filing a request for reconsideration containing changes to the original agency action request decided upon. It would eviscerate the administrative decisional and review processes for any decision made under §63-46b-5(1)(i), nullify the very authority for the request for reconsideration under §§63-46b-13(1), 63-46b-13(3)(b), and nullify all other provisions of UAPA. The State Engineer's refusal to reconsider was a final action on the request and the RCP and clearly fell within the permitted parameters of the UAPA for judicial review.

H. The State Engineer cannot deny his duty to maximize the development of water for public purposes.

The State Engineer's duty requires him to conduct further investigation as needed in order to determine whether an application meets the criteria of the statute. Utah Code Ann. §73-3-8. 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. “[A]pplications 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).

This duty upon the State Engineer is to investigate all facts surrounding an application. *Bonham v. Morgan*, 788 P.2d 497 (Utah 1989). Further, Utah Code Ann. § 73-3-5(2) requires: “It shall be the duty of the state engineer to examine the application . . .”, and §73-3-5(3) further requires: “All applications which shall comply with the provisions of this chapter and with the regulations of the state engineer shall be filed and recorded.” This

duty does not end at initial filing and recording, but continues throughout the application consideration process as evidenced by the duties placed upon him in § 73-3-6(2) to examine amendments to determine whether republication is necessary. Together these statutes imposed a pro-active duty upon the State Engineer to examine the applications in light of the reductions made in the request for reconsideration and approve the reduced applications because they met the statutory criteria of § 73-3-8(1).

In this instance, the State Engineer admitted, upon questioning, that he could have approved a, “down-sizing of the plan” and could have on his own, “determined to scale the project down and approved it.” R. 3207-3208, p. 39, lines 13-24; p. 40, line 20 through p. 41, line 13; R. 3210, p. 49, line 14 through p. 50, line 2. By not taking the action within his power, the State Engineer failed to act on the Request For Reconsideration and statutorily denied it, making a final order.

I. The failure of the State Engineer to conduct further investigation of the RCP was a final administrative action.

The State Entities claim that, “Even if the State Engineer could have acted upon the RCP at the reconsideration stage, he took no such action. The State Engineer’s silence on the RCP on the reconsideration request did not deny the RCP on its merits.” They then argue that the silence was not a cause for a *de novo* review. This is obviously not true. *State v. Truman Mortensen Family Trust*, 8 P.3d 266, 271 (Utah 2000). Such a finding by this Court would mean that claimant’s in Western Water’s position would be left in an administrative limbo with no hope of forcing the administrative decision-maker to rule “on the merits” and

no way to trigger a judicial review. It would twist the clear meaning of the statute and stand the intent of the legislature on its head.

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). Utah Code Ann. 73-3-8(1) mandates that the State Engineer investigate the facts to properly execute his duty to approve an application. *Bonham v. Morgan*, 788 P.2d 497, 502 (Utah 1989)(“We hold that the state engineer is required to undertake the same investigation in permanent change applications that the statute mandates in applications for water appropriations . . .”). The State Engineer’s refusal to perform that duty on the request for reconsideration was a final administrative action subject to judicial review.

CONCLUSION

Western Water’s appeal should be granted. There is no dispute over the chronology of Western Water’s filings. The trial court’s dismissal of the case for lack of subject matter jurisdiction is based upon incorrect assumptions that are not in accordance with the Utah Administrative Procedures Act (UAPA); other applicable statutes, and decades-long precedent of this Court. In addition, the trial court erroneously permitted various parties to remain in the suit and to argue claims they were not sued for in the Complaint.

Western Water met the requirements of the UAPA in this matter. Its Request for Reconsideration was timely. Its Complaint beginning the judicial review of the State

Engineer's decision was timely and Western Water met all of the other procedural requirements of UAPA. Western Water named numerous Defendants and then filed procedurally appropriate Motions For Summary Judgment against those Defendants who, for various reasons, should not have been permitted to continue in the case and also filed a procedurally appropriate Motion For Partial Summary Judgment against all the Defendants except the State Engineer, attempting to prevent various Defendants from acting as "private attorney's general".

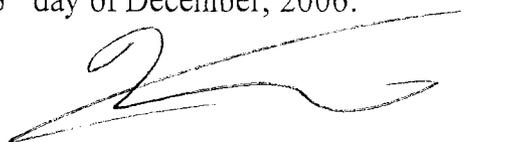
As demonstrated above, a request for reconsideration keeps the administrative process "open". This precludes "final agency action" and precludes parties from applying for judicial review of agency actions until the request for reconsideration is acted upon one way or another. *Career Service Review Board v. Utah Dep't of Corrections* clearly holds that an administrative body has continuing jurisdiction to receive new facts, even after its initial decision. That is exactly what happened in this instance. Western Water submitted new facts (the deletions and reductions of the RCP) as part of its Request For Reconsideration, during the period of administrative jurisdiction described by *Career Service Review Board v. Utah Dep't of Corrections* and mandated by UAPA.

Because the administrative process remained open, it was permissible for Western Water to submit the modifications and reductions of the RCP as part of the Request for Reconsideration process. These modifications and reductions are permitted under decades-long procedures used by the State Engineer and the State Engineer had the duty to

reconsider the applications in light of them. For almost 60 years, since *Whitmore v. Welch*, this Court and Utah statute have permitted an applicant for water rights to reduce the amount of water he is seeking and 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.

The State Engineer's failure to respond to the Request For Reconsideration in any manner, no matter what the reason, statutorily constituted a final action. The issue is not what the State Engineer assumed or thought about his duties and responsibilities. By not acting upon the Request within the time required by statute, the State Engineer denied Western Water's Request for Reconsideration, triggering the judicial review process and granting the district court subject matter jurisdiction. As a result of this choice by the State Engineer (whatever the reason), Western Water exhausted its administrative remedies and properly filed for a judicial review. Based upon these arguments, the trial court's Order dismissing the case should be overturned and the case remanded for further proceedings. The costs of appeal should be awarded to Western Water.

Respectfully submitted this 23rd day of December, 2006.



Terry L. Hutchinson,
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of December, 2006, two (2) true and correct copies of the foregoing REPLY BRIEF OF APPELLANT TO STATE ENTITIES were mailed to by first-class mail, postage prepaid, to the following:

NORMAN K. JOHNSON
JULIE I. VALDES
MARK SHURTLEFF
Utah Attorney General's Office
1594 W. North Temple, #300
Salt Lake City, UT 84116

Heather B. Shilton
1594 West North Temple, #300
Salt Lake, UT 84116

Randy Hunter
160 East 300 South, 5th Floor
Salt Lake, UT 84114-0857

Martin B. Bushman
1594 West North Temple, Ste. 2110
Salt Lake, UT 84116

Stephen G. Schwendiman
Keli Beard
P.O. Box 140814
160 E. 300 S., 5th Floor
Salt Lake, UT 84114-08150

Steven E. Clyde
Edwin C. Barnes
CLYDE SNOW SESSIONS &
SWENSON
201 S. Main St., Ste. 1300
Salt Lake, UT 84111

Jody L. Williams
HOLME ROBERTS & OWEN
299 S. Main St., Ste. 1800
Salt Lake, UT 84111-2263

M. Dayle Jeffs
JEFFS & JEFFS, P.C.
90 N. 100 E.
P.O. Box 888
Provo, UT 84603

John P. Ashton
VAN COTT, BAGLEY, CORNWALL &
McCARTHY, P.C.
50 South Main St, Ste 1600
Salt Lake, UT 84144-0450

David C. Wright
MABEY & WRIGHT LLC
265 E. 100 S., Ste. 300
Salt Lake, UT 84111

David B. Hartvigsen
SMITH HARTVIGSEN, PLLC
215 S. State St., Ste. 650
Salt Lake, UT 84111

Kevin R. Bennett
Police and Courts Building
75 East 80 North
P.O. Box 146
American Fork, UT 84003

Robert P. Hill
Allan T. Brinkerhoff
RAY, QUINNEY & NEBEKER P.C.
P.O. Box 45385
Salt Lake, UT 84145-0385

Reid E. Lewis
8215 South 1300 West
P.O. Box 70
West Jordan, UT 84088-0070

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
Richard G. Allen
2975 West Executive Parkway #509
Lehi, Utah 84043

Shawn E. Draney
Scott H. Martin
SNOW, CHRISTENSEN &
MARTINEAU
10 Exchange Place, Ste. 1100
Salt Lake, UT 84145-5000

Ryan B. Carter
Roger F. Cutler, Jr.
8000 S. Redwood Road
West Jordan, UT 84088

John H. Geilmann
1600 West Towne Center Drive
South Jordan, UT 84095

Michael M. Quealy
PARSONS BEHLE & LATIMER
One Utah Center
201 S. Main Street, Ste. 1800
Salt Lake, UT 84145-0898

Joro Walker
Sean Phelan
Western Resource Advocates
425 East 100 South
Salt Lake, UT 84111

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

Utah Supreme Court (10 copies)
P.O. Box 140210
Salt Lake City, UT 84114-0210
Attn: Clerk



Terry L. Hutchinson