2006

Western Water v. Jerry D. Olds : Reply Brief

Utah Supreme Court

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 22 JOINT APPELLEES AND CONSERVATION GROUPS

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

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INTRODUCTION

Appellant (hereafter "Western Water") submits the following Reply Brief to the Brief of the 22 Joint Appellees (hereafter generally referred to as "Joint Appellees") in order to demonstrate certain factual errors contained in Appellee's Brief, and to respond to new issues raised in that Brief. Western Water also submits this Reply Brief to the Brief of Appellees Utah Chapter, Sierra Club; Utah Council, Trout Unlimited; National Audubon Society (hereafter "Audubon"); Utah Wetlands Foundation; and Utah Waters (hereafter generally referred to as "Conservation Groups").[1] The rationale for including both groups are that they primarily argue the fourth, fifth and sixth issues upon which Western Water filed its appeal and the arguments and analysis apply to the Joint Appellees and the Conservation Groups.

The Joint Appellees consist mainly of entities (water districts, water companies, and others) who have primarily controlled and monopolized water rights in the northern part of the state of Utah for decades. The Joint Appellees originally argued the matter and filed joint briefs with the State Entities before the trial court, although they have submitted two briefs for argument before this court, with each joining with and agreeing with the arguments of the other. They ask the Court to use new procedures and set new standards and offer various unpersuasive reasons to deflect the Court's attention from the important issues at hand. Despite the Appellees' attempts to gloss over the facts of the case, there are few factual

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[1]The Motions for Summary Judgment filed by Western Water against the Conservation Groups did not include Audubon; who owned water rights that arguably could have been impacted by Western Water's applications. Western Water disputes that claim, but did not attempt for Summary Judgment against Audubon except for what has been called "the (c)(d) & (e) Motion."

disputes regarding the central 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 original applications and project plan (called "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 Conservation 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 [the "(c)(d)(e) Motion"].

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, the RCP 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 give the protestants a chance to respond to it.

PERTINENT CORRECTIONS TO "FACTS" AS STATED IN JOINT APPELLEES' 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). The request for reconsideration, which revised the Conservation Plan, retained the core conservation portion of the plan, involving the use and reuse of water in Utah, Cedar, and Salt Lake Valleys focusing on Utah and Cedar Valleys. The explanation and description of the RCP is given in greater detail in the Reply Brief to the State Entities, pp. 3-4. Western Water relies on and incorporates those statements herein.

B. Western Water's premise for filing its applications is that there is water available for reappropriation in the Utah Lake-Jordan River basin. Western Water's applications were for water rights that had been abandoned by various means, including change applications granted to many of the Joint Appellees and therefore these rights are legally reverted to the public.[2] Regardless, the issue of forfeiture is immaterial to approval of an application since the application is to be approved if a possible forfeiture appears. *Little Cottonwood Water Co. v. Kimball*, 289 P. 116 (Utah 1930).[3] For now, these issues are clearly not before the Court at this time, but discussed here merely to clarify statements about them by the Joint Appellees and State Entities.

C. The Joint Appellees argue to the Court that Western Water's applications fail to meet any of the statutory criteria for approval (although those issues are clearly not before the Court and were the subject of hotly contested Motions before the trial judge when he

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[2]In fact, the issue as to whether or not there is unappropriated water in the source is the subject of Western Water's Motion for Partial Summary Judgment and a Cross-Motion from the Joint Appellees and the State Entities, which was before the trial judge when he erroneously dismissed Western Water's action. Contrary to Joint Appellees assertions, only a part of the reverted public water re-appropriated under Western Water's applications is forfeited rights. Much has come simply from relinquishment of one source of water for another in change applications and much has come from lapsed applications, which are not forfeitures.

[3]The Joint Appellees also wrongly state that their junior water rights and other prior pending applications (some of which have been "pending" for nearly 70 years) would be entitled to the water first without filing an application after the water has reverted to the public. *Whitmore v. Welch*, 201 P.2d 954 (Utah 1949). Junior rights cannot be expanded without an application. Utah Code Ann. §73-3-2.

dismissed the case).[4]

D. The Joint Appellees make much of the statement made in the Request for Reconsideration that what Western Water had once called the heart of the Conservation Plan, the Cedar Valley aquifer storage and recovery system, does not have to be constructed. The statement, when taken in proper context of the RCP, does not mean that.[5]

F. The Joint Appellees also claim the RCP changes the project purpose from largely domestic supply to largely irrigation.[6]

G. The Conservation Groups claim that they are "interested parties". In doing so, they fail to acknowledge that Western Water used the Conservation Groups' own Affidavits,

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[4]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.

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.

[5]First, the Cedar Valley aquifer storage and recovery system remains an integral part of the RCP and much of the water supply to be developed under the RCP cannot be developed without that system. Second, the statement recognized that numerous water right changes had since increased available water supplies in Utah Lake and Jordan River making the Cedar Valley storage system no longer necessary for developing part of the Utah Valley water supplies. Third, the statement was intended to indicate that the project can be started if needed in Utah Valley without the substantial financial outlay required to construct the Cedar Valley system.

[6]First, domestic and urban supply remains the focus of the applications. Second, merely because reductions in the plan may change the relative proportion of water used for one purpose or another, does not change the purpose of the applications. No enlargement of any purpose is made, but only reductions.

on their face, to demonstrate that they were not "appropriate parties" even though they were named as Defendants.

In fact, the trial court did not make any findings of fact on the Motion from Western Water against the Conservation Groups. They were merely kept in the case pursuant to the Judge's holding that, ". . . . everyone who was sued was an appropriate party, They are defendants." R. 3372, p. 44, lines 5-6.

The trial court also responded to a question from Western Water:

> Mr. Hutchinson: . . . Now, how about the environmental groups?
>
> The Court: They're in too.
>
> Mr. Hutchinson: By virtue solely of their protest in this mater as opposed to the factual issues of being in -
>
> The Court: Their protest, and I think they're representing a very valid position that may not be fully aired without their participation and they will continue to be in. . . . . R. 3372, p. 46, line 22-p. 47, line 4.

REPLY TO ARGUMENTS IN JOINT APPELLEES' BRIEF AND CONSERVATION GROUPS' BRIEF

A. The level of consciousness test requested by the Joint Appellees is not the standard for Requests for Reconsideration.

The Joint Defendants attempt to argue that Western Water did not raise the RCP in a timely manner to the State Engineer because it was not submitted until the Request For Reconsideration, thus not raising the issues of the RCP to the "level of consciousness" allegedly required for the State Engineer to take action. The pertinent question is whether

or not the State Engineer has the administrative authority to consider reductions to applications and whether that authority continues when a Request For Reconsideration is filed.

The State Engineer has a duty to approve water rights in all instances where there is any amount of water in the application. "... applications must be approved if the engineer finds reason to believe **some** rights under such application may be acquired." *East Bench Irrigation Co. v. State*, 300 P.2d 603 (Utah 1956); (**emphasis added**); *United States v. Fourth District Court*, 238 P.2d 1132 (Utah 1951). See also *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...") and *Brady v. McGonagle*, 195 P. 188 (Utah 1921)(holding it is the State Engineer's duty to approve all applications meeting the statutory criteria for approval).

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

Further, because of this duty, the *Badger v. Brooklyn Canal Co.,* 966 P.2d 844, 847 (Utah 1998) level of consciousness test does not even apply to the applicant. *Badger* applies only to protestants and finds no State Engineer duty to sort through his files for them. In

contrast here, as set forth above, the State Engineer does have a duty under Utah Code Ann. §73-3-8(1) to the applicant to investigate the facts pertinent to the application and to approve as much water as can be approved for beneficial use under the applications.

In answer to the pertinent question, an applicant is never precluded from reducing his application. During the application process for water rights, both before and after approval, an applicant can request less water (and also delete other elements of his application). In fact, the Utah statutes provide that if an individual cannot certify the amount of water his application was approved for, his right will only be "perfected" for the amount he certifies. Utah Code Ann. §§73-3-16, 73-3-17(". . . Failure to file proof of appropriation or proof of change of the water on or before the date set therefor shall cause the application to lapse . . ."); See also *Wrathall v Johnson*, 40 P.2d 755 (Utah 1935).

Since the RCP didn't fall under any of the statutorily required elements of a "new application", it was still part of the original applications and the State Engineer had the duty to review them until the appeal process was complete. 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.

B. Western Water raised the RCP to the State Engineer's consciousness.

Even if the *Badger* level of consciousness test did apply, the State Engineer admitted he was aware that the RCP was a "down-sized" version of the Conservation Plan. The State Engineer was conscious of the "down-sized" plan on Plaintiff's request for reconsideration. In fact, he admitted, "Yes, I knew it was down-sizing, if you want to call it that." " R. 3207, p. 39, lines 17-18. He further admitted that, at the time he was making the decision on the Request for Reconsideration, he knew the Revised Conservation Plan was a "scaled-down version of the original application." R. 3208, p. 41, line 24 through p. 42, line 8. The State Engineer himself used the word, "conscious" when describing his awareness of the Revised Conservation and what it was. R 3208, p. 42, line 8.

Under the Joint Appellees' theory and case law, Plaintiff would be hard-pressed to do

any more to call the State Engineer's attention to the smaller plan. The Joint Appellees' quote language from *Badger v. Brooklyn Canal Co.,* 966 P.2d 844, 847 (Utah 1998) (*Badger*) that allegedly requires Western Water to bring the issue "to the fact finder's attention so that there is at least the possibility that it could be considered." *Id.* at 847. 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.

In other words, by the standards of consciousness proposed by the Joint Appellees, there was a possibility that the RCP could be considered and/or approved. The State Engineer's subsequent testimony relied on by the Joint Appellees demonstrates an almost willful obtuseness to the RCP, where the State Engineer limited himself to only considering certain factors on a Request for Reconsideration.

C. The inaction of the State Engineer on the RCP was a final decision and it included a decision on the RCP.

The Joint Appellees (and the State Entities) wish to argue this case exactly as this Court has previously held they shouldn't. **"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 Utah Administrative Procedures Act (hereafter "UAPA").[7] 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 Joint Appellees and the State Entities argue that because the RCP wasn't "raised" to the State Engineer until the Request For Reconsideration, it is not "reconsidered" pursuant to definition, but is in some kind of administrative limbo, from which no final action has been taken. Western Water relies upon and incorporates the further arguments and case law previously cited regarding the inconsistency of this approach as related to UAPA in its Reply Brief to the State Entities on pp.15-17.

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[7]The water case law is in accord. In *Shields v. Dry Creek Irrigation Company*, 363 P.2d 82 (Utah 1961), the court held that "the 'trial de novo' specified in the statute comprehends a trial of all pertinent issues" including trial "on all the issues which could have been raised under the application." Id. at 84, sic. (quoting *East Bench Irrigation Co. v. State*, 201 P.2d 603 (Utah 1956).

Here, aside from the application reduction issues raised by the RCP, the State Engineer, through statutory denial of the Request for Reconsideration, let stand final decisions of his memorandum decision that there is no unappropriated water and that the applications had been filed for purposes of speculation. Having finally decided these two issues, which have no dependence upon the RCP, Western Water became entitled to a trial *de novo* on all issues that could have been raised before the State Engineer including the application reductions and project downsizing issues of the RCP.

D. The RCP required no new notice or new administrative process.

The Joint Appellees and the State Entities rely heavily on their belief that the changes to the RCP required a new publication and administrative process. Western Water relies upon and incorporates arguments and case law regarding this alleged requirement as cited in its Reply Brief to the State Entities, pp. 5-9.

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.

The size of the reduction doesn't matter, despite the trial court's holding to the contrary. Almost 60 years ago, this Court held that it doesn't matter how large the reduction is, as long as it is merely a reduction.[8] *Whitmore v. Welch*, 201 P.2d 954 (Utah 1949). Further explanation of *Whitmore v. Welch*; *Provo Bench Canal and Irrigation Co. v. Linke*, 296 P.2d 723 (Utah 1956) and *United States v. Fourth District Court*, 238 P.2d 1132 (Utah 1951) regarding this argument can be found at the Reply Brief to the State Entities, pp. 6-8. Western Water incorporates and relies on those explanations here.

An important case describing the required notice complained of by the Joint Appellees is *McGarry v. Thompson*, 201 P.2d 288, 293 (Utah 1948), which held, "Whatever is notice

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[8]The main reason for the 2006 application by Western Water was the *addition* of different diversion points from the Revised Conservation Plan. Such new additions *require* new applications pursuant to Utah Code Ann. § 73-3-3(2)(a).

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."

Under the current and long-standing 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 the RCP is an exact subset of the Conservation Plan. *Whitmore v. Welch* is fully consistent with this statutory scheme and directly applies here.

The statute clearly specifies when additional water is requested, diversion points are changed, etc. that a new application is required. The RCP by the State Engineer's own admission in its brief does not meet any of those statutory requirements for a "new" application. 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, modification or amending an application [provided there have been no modifications statutorily requiring a new application and/or change application] has been done exactly as Western Water did it; by providing the specific deletions to the State Engineer in writing.

E. A denial of reconsideration is a reviewable agency action.

The State Entities argue that the State Engineer never "considered" or "acted" on the

RCP and that those facts preclude it from being considered on the Request For Reconsideration or from being judicially reviewed as a "final action." This is similar to the State Entities' argument that the State Engineer's silence on the RCP was not a "decision on the merits" of the RCP.

In other words, the Joint Appellees and the State Entities attempt to distinguish between the "denial of the request" (which the statute obviously provides judicial review for) and the "inaction" on the RCP. As with the State Entities' argument, this appears to be a red herring. The inclusion of the RCP in the Request was appropriate and permitted under long-standing precedent (as shown above), as well as the 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). 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).

F. "Standing" for Defendants is procedural, not jurisdictional; and Defendants are limited by their "standing" to only those issues where they are impacted.

The Joint Appellees and the Conservation Groups attempt to use *Washington County Water Conservancy District v. Morgan,* 82 P.3d 1125 (Utah 2003) to claim that they, as Defendants, have no limits on their ability to intervene, to be joined, or present evidence once they are joined in the case. They argue that this is "jurisdictional".

In doing so, they are claiming that Plaintiff's arguments do not translate exactly to how the issue of "standing" affects Defendants. A more clear statement with regard to Defendants is that, in Utah State courts, "standing" is not jurisdictional, but procedural. Utah

courts have repeatedly applied standing requirements to defendant's right to challenge an issue. In *Provo City Corp. v. Thompson*, 86 P.3d 735 (Utah 2004), this court specifically held that defendant standing is limited solely to the issues affecting a defendant's legal rights and that defendants have no standing to assert or defend public issues or third party's rights. See also, *Provo City Corp. v. Willden*, 768 P.2d 355 (Utah 1989)(finding defendant procedural standing for facial challenge of an overbroad ordinance curtailing constitutional rights of free speech); *State v. Mace,* 921 P.2d 1372, 1379 (Utah 1996)(stating: "We first note that standing rules are a matter of state procedural law" and finding lack of defendant standing to challenge the constitutionality of a statute); *State v. Rowe*, 806 P.2d 730 (Utah App. 1991)(holding defendant had right of privacy in the home and thereby had sufficient standing to challenge the validity of the search warrant and resulting search).

As these cases show, "standing" analysis does apply in Utah state courts to defendants and defendants are precluded under *Provo City Corp. v. Thompson* from seeking redress on any issue in which they do not have standing, such as public issues or third party rights. Public issues are specifically what the purpose of Western Water's Motion For Summary Judgment on Utah Code Ann. §73-3-8(1)(c)(d) & (e) were about.[9]

The neighboring jurisdiction of Colorado has applied such analysis to water issues. In *People of the State of Colorado et al. v. Highland Irrigation Company et al.*, 893 P.2d 122

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[9]Western Water specifically limited its Complaint against all named Defendants to issues involving "unappropriated waters" and "impairment" Utah Code Ann. §73-3-8(1)(a) & (b) except for the State Engineer, who is the appropriate party to handle the "public issues" of Utah Code Ann. §73-3-8(1)(c)(d)(e).

(Colo. 1995). There, the Colorado Supreme Court recognized that a defendant may lack standing in a judicial review of government actions. The issue there directly affected the defendant's water rights so the Court found standing for the defendants to defend their legal interests from injury, but only because their legal interests were affected.

In light of the above holdings, Western Water's analysis of *Washington County Conservancy District v. Morgan* is sound. If the Defendants in this case (i.e., the Joint Appellees and the Conservancy Groups) were to be Plaintiffs in the case assuming the State Engineer had approved Western Water's applications, they would only be able to bring the action if they were actually harmed in some fashion by the decision. The Joint Appellees disagree with Western Water's interpretation of *Washington County Conservancy District v. Morgan*, but when considered with defendant standing case law; especially, *Provo City Corp. v. Thompson,* no defendant in this action has the standing to argue any issue that is not directly applicable to their legally cognizable rights.

Thus, "standing" does apply to the Defendants and the "standing" analysis of *Washington County Conservancy District v. Morgan* at 1125, as interpreted by Western Water, is directly applicable to the Defendants in this case. The court there stated that a plaintiff [and in this case a defendant], "who has not been granted standing to sue by statute must either show the he has or would suffer a 'distinct and palpable injury that gives rise to a person stake in the outcome' of the case" *Id.* at1131. Here no Defendant has statutory authority except the State Engineer (due to requirement of Utah Code Ann. §73-3-14(2) that

he be a Defendant), and thus each Defendant must show, *on each issue*, a potential distinct and palpable injury giving rise to a personal stake in the outcome of the case.

G. Standing is an issue for defendants

Plaintiff named Defendants in the Complaint only as they are appropriate parties.[10] Western Water, in its Complaint, specifically asked the court to limit the parties' participation to only that which is required to protect the legally cognizable interests of that party by not suing the Defendants[11] under the provisions of Utah Code Ann. §§73-3-8-(1)(c)(d)(e), the so-called "public interest" provisions of the statute, i.e. monopoly, economic feasibility and speculation. In actuality, the Joint Appellees, the State Entities and the Conservation Groups all seek to broaden Plaintiff's claims against them over and above what Plaintiff requested in the Complaint. Western Water named and sued each Defendant solely to the extent of the issues where they can be shown to be a party against whom an adjudicative proceeding must be initiated as a respondent under the statute. Any desire of a particular Defendant to participate further than the Complaint seeking relief against him is immaterial if said Defendant cannot show that he is an appropriate party respondent for that issue.

Any additional review sought by the party must be authorized by statute. *Washington*

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[10]Failure to name all "appropriate parties" could result in the severe remedy of dismissal. Utah Code Ann. §63-46b-14(3). For this reason, Western Water named all protestants, including the late protestants and has attempted to clarify their participation through the Summary Judgment process provided by the Utah Rules of Civil Procedure.

[11]With the exception of the State Engineer.

County Water Conservancy District v. Morgan at 1131. Defendants have not cited and cannot cite any statute that entitles them to any additional judicial review, essentially as private attorneys general, beyond their legally cognizable interests. Both Utah Code Ann. §73-3-14 and §63-46b-14(1) are to no avail. They both plainly require a party who seeks judicial review to be an aggrieved party, or in the case of Defendants, a potentially aggrieved party if the State Engineer's decision on the applications were reversed. *Id.* at 1133. Thus, not only is the standing requirement applicable to defendants, but under *Provo City v. Thompson* and *Washington County Conservancy District v. Morgan* "standing" precludes all Defendants, except the State Engineer from participating in the judicial review of Utah Code Ann. § 73-3-8(1)(c),(d), & (e); public issues, and any other issue in which a Defendant does not have a legally cognizable interest.

H. The State Engineer is the best Defendant to present the evidence on public issues.

The State Engineer, by legislative design, remains as a Defendant in the case. He is statutorily required to be named as a Defendant. Utah Code Ann. §73-3-14(2). He is meant to represent the public interest in these matters because of his responsibility and duty to protect the public interest during the administrative application process.

In contrast, Protestants, as a general rule have their own interests that often conflict with public goals and policies. For example, the Conservation Group's "any interested party" rule [discussed below] would provide a platform for the environmental advocates to protest every application in the hope that it will be rejected. The standard put in place by the trial

court would then open to them an otherwise closed jurisdictional door to further their environmental goals in the courts. Existing water users could use the same process to gang together (even joining forces with the State Engineer and other State Agencies) to prevent any change of the status quo. Cloaking such Defendants with the authority to argue and present the public issues on behalf of the State, while having inherent conflicts of interest and bias, would turn an otherwise liberal policy toward application approval and beneficial use on its head.

On the other hand, there is nothing wrong with the State Engineer and his counsel being the defenders of public issues. If the State Engineer uses private entities to present evidence on certain "public" issues, then it is easier for the decision maker to determine the bias and/or special interests of the witnesses being used. It also makes the State Engineer more accountable in defending his decisions.

I. While the standard for approval of an application is the same in a trial de novo, the judicial procedures are different than the administrative one. The standards of evidence apply, etc.

The Joint Appellees (and the trial judge) believe that the judge sits in place of the State Engineer at the *trial de novo* once an administrative decision is appealed. That is only true in the sense that the judge is becomes the decision-maker on the application. The trial is *de novo* on the issues surrounding the application, but the rules and procedures are far different. The judicial proceeding is governed by the Rules of Civil Procedure, the Rules of Evidence, the applicable statutes, as well as other rules and legal precedents. The Plaintiff

has the burden of proof as in the administrative proceeding (whether appealing a denial or approval by the State Engineer) but the statutory duties of the judicial officer and his standard of approval of the application is the same as that of the State Engineer.

Footnote 2 of *Washington County Conservancy District v. Morgan* is instructive. The Washington County Water Conservancy District (hereafter "WCWCD") tried to argue that because review of a change application is a *de novo* review, the burden is on the applicant to establish compliance with each requirement for approval under Utah Code Ann. § 73-3-8, i.e., that because it [the court action] is a *de novo* review, all issues and evidence are heard anew and the applicant has the burden to refute all evidence presented including that of the WCWCD. The court rejected this argument stating: "The Conservancy District cannot avoid standing requirements by recasting the issue in terms of which party bears the burden of proof once the court's jurisdiction has been established."[12]

J. The "interested party" test is not the law and is totally unworkable.

The interested party test espoused by the Joint Appellees and the Conservation Groups would require over-ruling both *Washington County Conservancy District v. Morgan* and *Provo City Corp. v. Thompson* or finding an exception to them. Such an action would not

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[12]This is distinguished from Western Water's having all issues it could have presented heard at the *trial de novo*. Western Water clearly has "standing" to pursue its claims on all issues, whereas, WCWCD was limited to only those issues where its "standing" permitted it to appear before the court.

The court's jurisdiction in this case is established by Western Water's complaint as an "aggrieved" party. A *de novo* review does not automatically grant standing to assert non-compliance. Defendant standing must be established under the criteria explained above.

be justified.

The State Engineer now posts notice of applications on the internet in addition to the local newspapers. Thus, virtually anyone in the world can monitor new applications, file protests, and thereby become entitled to be named as defendants as claimed "interested parties." The Conservation Groups in this case are only one example of parties with no specific or identifiable harm that could enter a case because of their "interest". The burden on the applicant should not be unduly onerous. *Searle v. Milburn Irrigation Co.*, 133 P.3d 382 (Utah 2006). The interested party test requested by the Conservation Groups and the Joint Appellees is not the law for good reason.

K. The Conservation Groups would not be able to intervene in the action without a cognizable injury.

Without the "interested party test" the four Conservation Groups challenged by Western Water do not have a defense against Western Water's Motion For Summary Judgment. The trial judge did not make factual findings on Western Water's Motion To Strike, or on the Motion For Summary Judgment, but the Conservation Groups, in their response brief, failed to counter the factual statements of Western Water that they, "do not own any water rights and have filed no competing applications to appropriate the water appropriated under the three applications." R. 1511, ¶3. Their Affidavits, which were the subject of Western Water's Motion To Strike R. 1469-1477, 1511, even taken on their face value, made general statements such as, ". . . the places I visit will be less green and attractive, and therefore less aesthetically appealing, . . ." R. 1380, ¶17. Even if the trial

court had not wrongfully denied the Motion to Strike, the ability of the Environmental Groups to state specific and cognizable injuries was non-existent.

The Conservation Groups argue that they would be able to intervene in the case, even if the "interested party" standard followed by the trial court were not upheld. They would not. Rule 24 (a) and (b) of the Utah Rules of Civil Procedure have several requirements for intervention. In this instance, subparagraph (a) requires that there be a "statute" which "confers an unconditional right to intervene;" or that the intervenor must claim, "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."

Here there is no specific statute for intervention for environmental issues. Many federal environmental laws provide for such "private attorneys general", but Utah state water law does not [a similar argument was earlier made for the (c)(d)(e) provisions of Utah Code Ann. §73-3-8]. The Conservation Groups are in a weaker position than the Washington County Water Conservancy District, who at least had some statutory mandate from the legislature to deal with water matters in the area. The Environmental Groups are also adequately protected by the participation of the State Engineer, who has the public obligation to protect the environment. In addition, the approval of Western Water's applications will not, as a practical matter, impair or impede the Defendants' ability to later protect their interests if they should somehow be injured.

The Conservation Groups believe that they could intervene under provisions of Utah Rule of Civil Procedure 24(b). They would not be able to do so, because the questions of law and fact in these proceedings would have nothing in common with their claims or defenses (since they own no rights or land that would be affected by Western Water's Applications).

The trial court's ruling on permitting the Conservation Groups to remain and participate in the judicial review should be overturned. Should this Court find, however, that the trial court did not make sufficient factual findings to justify overruling its decision against Western Water, it should remand the case to the trial court for further findings based upon the appropriate legal standard for standing as discussed above.

L. The late-filed protestants have no legal standing.

It is interesting that the Joint Appellees merely mention the trial judge's ruling on the "late protestants" in a footnote. They cite no case law, nor any statute or precedent that would support the trial judge's erroneous decision, nor counter the arguments made by Western Water in its oral arguments before the trial court or in its Brief. The trial court's ruling on permitting the "late protestants" to remain and participate in the judicial review should be overturned.

CONCLUSION

Western Water's appeal should be granted. Its filings were timely. The trial court's dismissal of the case for lack of subject matter jurisdiction is not in accordance with the Utah Administrative Procedures Act (UAPA); other applicable statutes, and decades-long

precedent of this Court, as more fully stated above and in Western Water's Reply Brief to the State Entities.

Western Water met the requirements of the UAPA in this matter. The administrative process was kept open. *Career Service Review Board v. Utah Dep't of Corrections*, clearly demonstrates that Western Water could submit new facts (the deletions and reductions of the RCP) as part of its Request For Reconsideration, during the period of administrative jurisdiction mandated by UAPA. The deletions and reductions of the RCP were permitted under the decades-long procedures used by the State Engineer as upheld by *Whitmore v. Welch* and other cases. Because submission of the RCP was permitted during the normal administrative process, and the Request For Reconsideration kept that process open; the State Engineer's failure to respond to the Request For Reconsideration, no matter what the reason, statutorily constituted a final action, triggering the judicial review process and granting the district court subject matter jurisdiction. The dismissal should be reversed.

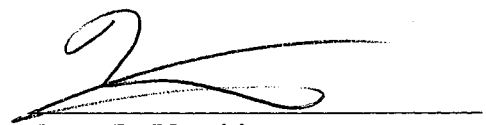
The trial court also erroneously permitted various parties to remain in the suit and argue for relief not requested in the Complaint. The standing analysis of *Provo City v. Thompson,* when combined with the holding in *Washington County Conservancy District v. Morgan*, and other analysis cited by Western Water, are particularly devastating to the Joint Appellees' and the Conservation Groups' positions. Based upon the definitions of "procedural" standing, each Defendant is limited to only participate in those matters which affect them directly and to which they have "standing". This affects all of the Defendants

except the State Engineer, who has a statutory duty to protect the public interest when considering approval of applications. All other Defendants should not be permitted to act as "private attorneys general" by granting themselves relief that the Plaintiff did not seek against them. The State Engineer, who is named by statute, should be the gatekeeper of any such participation by private entities on public issues.

For the same reasons, the Environmental Groups who, by their own admission, own no competing water rights, own no land which would be impacted by Western Water's applications and would not be harmed in any cognizable way by approval of the applications; should not be permitted to remain in the action; nor should those who filed late protests. Therefore, the trial court's rulings on the Partial Motion for Summary Judgment on Utah Code Ann. §73-3-8(1)(c)(d)(e) and on the Motions for Summary Judgment on the Environmental Groups and those who filed late protests should be overturned, and the requested relief granted.

The trial court also erred in holding that, despite a lack of subject-matter jurisdiction, it had the authority to order costs against Appellant. The trial court's finding should be reversed and the costs of this appeal should be awarded to the Appellant.

Respectfully submitted this 23rd day of December, 2006.



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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 22 JOINT APPELLEES AND CONSERVATION GROUPS were mailed to by first-class mail, postage prepaid, to the following:

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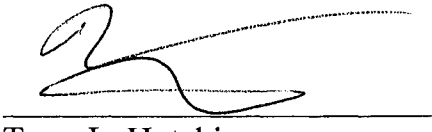

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