

2008

Friends of Great Salt Lake v. Utah Department of Natural Resources : Brief of Respondent

Utah Supreme Court

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IN THE UTAH SUPREME COURT

FRIENDS OF GREAT SALT LAKE, UTAH :
WATERFOWL ASSOC., NAT'L AUDUBON :
SOC'Y, AUDUBON SOC'Y OF UTAH, including :
BRIDGERLAND AUDUBON SOC'Y, GREAT :
SALT LAKE AUDUBON SOC'Y, RED CLIFFS :
AUDUBON SOC'Y, WASATCH AUDUBON :
SOC'Y, UTAH CHAPTER OF THE SIERRA CLUB, :
LEAGUE OF WOMEN VOTERS OF SALT LAKE, :
LEAGUE OF WOMEN VOTERS OF UTAH, UTAH :
AIRBOAT ASSOC. and UTAH RIVERS COUNCIL, :
 :
Petitioners, : Case No. 20080147-SC
 :
v. :
 :
UTAH DEP'T OF NATURAL RES., EXECUTIVE :
DIR. OF THE UTAH DEP'T OF NATURAL RES., :
UTAH DIV. OF FORESTRY, FIRE AND STATE :
LANDS, and DIR. OF THE DIV. OF FORESTRY, :
FIRE AND STATE LANDS, :
 :
Respondents.

BRIEF OF RESPONDENTS

Petition for Judicial Review of the Final Agency Order of the Utah Department
of Natural Resources and the Division of Forestry, Fire and State Lands

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LIST OF ALL PARTIES

To the best of Respondents’ knowledge, all interested parties appear in the caption of this Brief with the exception of the Intervenor, Great Salt Lake Minerals Corporation.

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proceeding was actually formal in nature. This issue was not raised in the administrative proceeding and cannot be raised for the first time on appeal.

ISSUE PRESERVED BELOW. This issue was not raised below and was not considered by the administrative agencies.

STANDARD OF REVIEW: This issue is unique to this Court and does not entail review of the agencies' decision.

2. Petitioners seek judicial review of decisions made by the respondents in an informal administrative proceeding. This Court is without jurisdiction to consider the petitioners' petition. Judicial review of informal administrative proceedings lies with the district courts.

ISSUE PRESERVED BELOW. This issue was not raised below and was not considered by the administrative agencies.

STANDARD OF REVIEW: Because this issue was not raised below, it does not entail review of the agencies' decision.

3. Petitioners seek an extraordinary writ even though they have several plain, speedy, and adequate remedies available to them. This Court is without jurisdiction to hear the petition.

ISSUE PRESERVED BELOW. This issue was not raised below and was not considered by the administrative agencies.

STANDARD OF REVIEW: This issue is unique to this Court and does not entail review of the agencies' decision.

4. Respondents correctly rejected the petitioners' requests for agency action because the respondents were not parties to the underlying lease proceeding. Petitioners' request for a declaratory order was also properly dismissed because it involved disputed questions of fact and would have prejudiced the rights of a nonconsenting party (Great Salt Lake Mineral).

ISSUE PRESERVED BELOW. This issue was raised below decided by the administrative agencies in their final agency action. R. 437-55.

STANDARD OF REVIEW: An agency's decisions of general issues of law are reviewed for correctness. Utah Chapter of Sierra Club v. Utah Air Quality Bd., 2006 UT 74, ¶13, 148 P.3d 960.

DETERMINATIVE STATUTES AND RULES

All such provisions are set forth verbatim in Appendix A to this brief.

STATEMENT OF THE CASE

On July 2, 2007, Utah's Division of Forestry, Fire and State Lands entered its Record of Decision (ROD) agreeing to issue a mineral lease to Great Salt Lake Minerals, Inc. for an area of 23,088 acres adjacent to Clyman Bay in the Great Salt Lake. R. 1-27. The division's proceedings had been designated as informal. Utah Admin. Code R652-8-200.1 ("All requests for agency adjudications are initially designated as informal adjudications.").

Petitioners filed three administrative actions challenging the ROD. They filed a Petition for Consistency Review with the Executive Director of the Department of

Natural Resources. R. 162-242. They also filed a Petition for Declaratory Order and a Request for Agency Action with the director of the division. R. 243-402. The three actions were consolidated into a single administrative proceeding. Petitioners challenged not only the lease involved in the ROD but also other existing leases held by Great Salt Lake Mineral both in the Clyman Bay area and the Bear River Bay area of the Great Salt Lake. R. 167, 246, 328.

On September 14, 2007, the department and the division sent the petitioners a joint letter seeking further information. R. 412-14. In this letter, the respondents made clear that the administrative proceeding was informal in nature. R. 413.

On January 18, 2008, the Final Agency Action, Decision and Orders was entered in the administrative proceeding. R. 437-56. All three of the petitioners' actions were either denied or dismissed. The decision gave notice to the petitioners that they could file a petition for judicial review with the district court within 30 days after the date of the Order. R. 455.

On February 15, 2008, the petitioners filed their complaint and petition for review of the Final Agency Action in the Third District Court for Salt Lake County. Case No. 080902785. On that same day, the petitioners filed their petition for review with this Court. Finally, on February 19, 2008, the petitioners filed their petition for extraordinary relief with this Court..

STATEMENT OF THE FACTS

The facts of this action are not relevant to the legal issues before the Court.

SUMMARY ARGUMENT

Petitioners ask this Court to review the respondents' decision in an informal administrative proceeding. Judicial review of informal proceedings is done in the district court. This court is without jurisdiction to consider this action. Nor does this Court have jurisdiction to consider petitioners' request for an extraordinary writ. Petitioners have a plain, speedy, and adequate remedy.

Seeking to give this Court jurisdiction, the petitioners argue for the first time on appeal that the administrative proceeding was actually formal in nature. This argument was not made below. It cannot be made for the first time before this Court.

Even if this Court had jurisdiction to consider these consolidated actions, the respondents decision should still be affirmed. The Utah Administrative Procedures Act (UAPA) does not permit third-person actions to challenge decisions concerning the leasing of state lands.

ARGUMENT

I. PETITIONERS CANNOT CLAIM THAT THE RESPONDENTS ERRONEOUSLY TREATED THEIR ADMINISTRATIVE ACTIONS AS INFORMAL FOR THE FIRST TIME ON APPEAL

It is undisputed that the respondents treated the underlying administrative proceedings as being informal. Petitioners did not challenge this treatment in the administrative proceedings. Only before this Court do the petitioners now claim that the proceedings should have been considered formal. At no time did the petitioners argue that the proceedings should be formal before the respondents. If the petitioners believed

the proceedings should have been formal, they could have asked the respondents to convert the administrative actions into formal adjudicative proceedings. Utah Code Ann. § 63G-4-202(3) (West Supp. 2008). Petitioners failed to do so.

In Espinal v. Salt Lake City Bd. of Educ., 797 P.2d 412 (Utah 1990), the plaintiffs raised a constitutional claim for the first time on appeal. In refusing to consider that claim, this Court explained that

Appellants' first claim is that the realignment violated article I, section 7 of the Utah Constitution by denying them the liberty to control their children's education. This claim was raised for the first time on appeal. With limited exceptions, the practice of this Court has been to decline consideration of issues raised for the first time on appeal. We therefore do not address this claim.

Id. at 413 (citations omitted). The limited exceptions to this general rule deal with cases in which the appellant demonstrates that "the trial court committed plain error or exceptional circumstances exist in this case." State v. Sepulveda, 842 P.2d 913, 917-18 (Utah App. 1992) (footnote omitted).

The same rule applies to administrative proceedings. "We have consistently held that issues not raised in proceedings before administrative agencies are not subject to judicial review except in exceptional circumstances." Brown & Root, Indus. Serv. v. Indus. Comm'n, 947 P.2d 671, 677 (Utah 1997).

Petitioners should have raised this issue below. Having failed to do so, they cannot do so now. This is especially true where petitioners have not briefed the question of whether plain error or other exceptional circumstances might exist that could lead this

Court to consider this issue for the first time on appeal. Where the petitioners did not analyze an issue in their opening brief, this Court will not review that issue. State v. Brown, 853 P.2d 851, 854 n.1 (Utah 1992).

II. THIS COURT IS WITHOUT JURISDICTION TO CONSIDER THE PETITION FOR JUDICIAL REVIEW

Petitioners brought three administrative actions seeking review of decisions made by the Division of Forestry, Fire and State Lands. The current petition (Case No. 20080147-SC) seeks judicial review of the Executive Director of the Department of Natural Resources' Final Agency Action that upheld the division and denied the petitioner's sought-for relief. Because the division designated its adjudicative proceedings to be informal in nature, this Court is without jurisdiction to hear this petition.

UAPA permits agencies to designate whether their adjudicative proceedings will be formal or informal in nature. Utah Code Ann. § 63G-4-202(1) (West Supp. 2008). Pursuant to this statute the division designated its proceedings as informal. Utah Admin. Code R652-8-200.1 ("All requests for agency adjudications are initially designated as informal adjudications.").

The district court has "jurisdiction to review by trial de novo all final agency actions resulting from informal adjudicative proceedings[,]” not this Court. Utah Code Ann. § 63G-4-402(1)(a) (West Supp. 2008). The division properly designated the underlying proceedings as informal. That the executive director of the department

reviewed the division's decisions does not alter the nature of the proceedings. The procedure for conducting the administrative review of an agency's decision is the same for both formal and informal proceedings. Utah Code Ann. 63G-4-301 (West Supp. 2008) sets out the procedure for an administrative review of an order "by the agency or by a superior agency." Nothing in the statute indicates that a new adjudicative proceeding is being initiated. Rather it is only a review of the proceeding begun in the original agency. The proceedings in question did not change their nature from informal to formal simply because the executive director was called upon to review them.

The division's administrative rules governing lease transactions for sovereign land provide that "any party aggrieved by such a division action may petition the director to review the division action for consistency with statutes, rules, and policy." Utah Admin. Code R652-9-200(1) (2008). Upon receiving a petition, the division director must determine whether it provides sufficient information to conduct a review, and if so, suspend any further action on the contested matter and submit the petition to the executive director of the department for review. Utah Admin. Code R652-9-400(2) & (4). The executive director may: 1) schedule a hearing, 2) conduct a review on the record without a hearing, or 3) decline to review the petition. Utah Admin. Code R652-9-500(1)-(3). If the executive director determines that the contested action was "not reasonably consistent with applicable statutes and rules" he may "cause an order to be drafted" either rescinding the action or modifying it to achieve consistency. Id. at subsection 4. Although the department's executive director makes the decision, the

consistency review proceeding is a division adjudicative action because it is authorized by the division's enabling statute and governed by the division's rules.¹ Utah Code Ann. § 65A-1-4(6) (West Supp. 2008). All of the division's adjudications are designated by rule as informal proceedings. Utah Admin. Code R652-8-200(1). Intervention in informal adjudications is prohibited. Utah Code Ann. § 63G-4-203(1)(g) (West Supp. 2008).

Petitioners mistakenly rely upon this Court's jurisdiction over "final orders and decrees in formal adjudicative proceedings originating with: . . . the executive director of the Department of Natural Resources reviewing actions of the Division of Forestry, Fire and State Lands." Utah Code Ann. § 78A-3-102(3)(e)(vi) (West Supp. 2008). But the current petition for review is not from a formal adjudicative proceeding. It is from an informal proceeding. For this reason the statute does not apply.

In National Parks Conserv. Assoc. v. Bd. of State Lands, 869 P.2d 909 (Utah 1993), overruled on other grounds, Utah Chapter of the Sierra Club v. Utah Air Quality Bd., 2006 UT 74, ¶40, 48 P.3d 960, this Court considered the effect of this statute, before it was renumbered. This Court agreed that the statute limited its jurisdiction to review of

¹ Petitioners mistakenly focus on the identity of the presiding officer, rather than the identity of the agency taking the action, to conclude that consistency review was an action of the department. UAPA permits an agency to designate, by rule, the name or title of a presiding officer for its adjudications. Utah Code Ann. § 63G-4-103(2) (West Supp. 2008).

those administrative proceedings that were formal in nature.² Nat'l Parks, 869 P.2d at 912.

Petitioners claim that the administrative appeal to the department's executive director was a separate, formal, administrative proceeding. They argue that the department's proceeding was formal because it was not specifically made informal by rule. In making this argument they rely on Utah Code Ann. § 63G-4-202(2) (West Supp. 2008):

(2) Subject to the provisions of Subsection (3), all agency adjudicative proceedings not specifically designated as informal proceedings by the agency's rules shall be conducted formally in accordance with the requirements of this chapter.

Petitioners' reliance is misplaced for two reasons. First, the proceeding was specifically identified as informal by the division's rules. Nothing in the statute requires that the administrative appellate procedure be separately designated as informal as well. Second, subsection 2 is expressly made subject to the provisions of subsection 3.

(3) Any time before a final order is issued in any adjudicative proceeding, the presiding officer may convert a formal adjudicative proceeding to an informal adjudicative proceeding, or an informal adjudicative proceeding to a formal adjudicative proceeding if:

- (a) conversion of the proceeding is in the public interest; and
- (b) conversion of the proceeding does not unfairly prejudice the rights of any party.

Utah Code Ann. § 63G-4-202(3) (West Supp. 2008).

² The Court then ruled that the statute was not applicable because the proceeding had been commenced before the effective date of the statute.

The respondents clearly considered the proceeding to be informal in nature. Their letter seeking further information from the petitioners expressly stated that the proceeding was informal. R. 413. The final agency action stated that the proceeding was informal in nature and alerted the petitioners to their right to seek judicial review in the district court. R. 455.

The challenged administrative proceedings were informal in nature. The final agency action correctly informed the petitioners that they could obtain judicial review in the district court. This Court should dismiss this petition for lack of jurisdiction and leave the petitioners free to proceed with their complaint and petition for judicial review that they have filed in the district court.

III. THE PETITION FOR AN EXTRAORDINARY WRIT SHOULD BE DENIED BECAUSE THE PETITIONERS HAVE A PLAIN, SPEEDY, AND ADEQUATE REMEDY

Unlike a party filing a direct appeal, the petitioners have no right to receive a remedy. Whether to grant relief by means of an extraordinary writ is within the discretion of the court, even if a lower tribunal has erred. State v. Barrett, 2005 UT 88, ¶23, 127 P.3d 682.³ Where this Court has jurisdiction to consider such a petition, the challenged conduct is reviewed for abuse of discretion. Id. at ¶14.

³ While Barrett addressed an extraordinary writ brought under Utah R. Civ. P. 65B, the standards are the same. Rule 19 refers to Rule 65B in describing the extraordinary writs that can be brought under it and in requiring that petitions comply with both the requirements of Rule 19 and Rule 65B. Utah R. App. P. 19(a), (d).

A petition under Utah R. App. P. 19 is permitted only where “no other plain, speedy, or adequate remedy exists.” Utah R. App. P. 19(b)(4). Petitioners are unable to make this necessary showing. They have filed two petitions for review of the respondents’ administrative decision. The petition and complaint filed in the Third District Court was timely filed to obtain judicial review of the challenged informal administrative decision. Petitioners also filed a petition for judicial review in this Court, mistakenly treating the administrative proceeding as formal. But petitioners themselves acknowledge that they do have the ability to appeal the challenged administrative decision. Petition for Extraordinary Writ at 5-6.

Petitioners admit that this proceeding is “contingent upon review of [their] Petition for Review and Complaint and Petition for Review. That review will determine which, if any ‘ordinary’ avenues for relief are available for Friends and which, if any claims for relief Friends must pursue through extraordinary means.” *Id.* at 24.

The opportunity to appeal an administrative decision to the district court constitutes a plain, speedy and adequate remedy. Likewise, “[a]n extraordinary writ is not a proceeding for general review, and cannot be used as such.”

Utah County v. Alexanderson, 2005 UT 67, ¶6, 123 P.3d 414 (citations omitted) (county could not use extraordinary writ in lieu of available appeal process). See also Commercial Sec. Bank v. Phillips, 655 P.2d 678, 680 (Utah 1982) (extraordinary writ petition could not be used as a substitute for the plain, speedy and adequate remedy of an appeal).

Nor is an appeal the only plain, speedy, and adequate remedy available to the petitioners. The final agency action explained that the petitioners could file a request for agency action asking the agency to amend the underlying comprehensive management and resource plans that they sought to challenge. This request, different in nature from the one the petitioners did file, would be an appropriate method to seek agency action. R. 451-52. Petitioners have availed themselves of this separate remedy. R. 457-69 (request for agency action to amend the Great Salt Lake Minera Leasing Plan and the Great Salt Lake Comprehensive Management Plan). An available administrative remedy is another plain, speedy, and adequate remedy. This is especially so where judicial review would be available from the administrative decision. R. 452.

In Ogden City Corp. v. Adam, 635 P.2d 70, 71-72 (Utah 1981), an extraordinary writ petition was denied where no appeal was available. This Court held that the plaintiffs had a plain, speedy, and adequate remedy because they could bring a declaratory judgment action to receive the relief they sought. Respondents informed petitioners of an alternative administrative proceeding that, like the declaratory judgment act, would have provided a plain, speedy, and adequate remedy. See Merrihew v. Salt Lake County Planning and Zoning Comm'n, 659 P.2d 1065, 1067 (Utah 1983).

Petitioners have appropriately sought judicial review in the district court of the challenged order. Even if an appeal had not been available, they still had an administrative remedy which would include the right to judicial review. Petitioners'

Petition for Extraordinary Relief should be denied because they have a plain, speedy, and adequate remedy available.

IV. RESPONDENTS CORRECTLY REJECTED THE PETITIONERS' REQUESTS FOR AGENCY ACTION

Even if this Court had jurisdiction to consider the consolidated petition for judicial review and petition for an extraordinary writ, the respondents' decision should be affirmed. The petitioners were not parties to the underlying administrative proceeding and their actions were properly denied.

In a case arising under very similar circumstances to the present matter, this Court determined that “[t]hird part[ies] asserting a private interest” are not permitted to “initiate adjudicative proceedings” or otherwise participate as a party in transactions for sale, lease, or exchange of real property, including trust lands, belonging to the state. Nat'l Parks, 869 P.2d at 914. Such transactions, under UAPA and applicable agency rules, are “executive decisions” beyond the reach of a “Request for Agency Action” generally available under UAPA. Utah Code Ann. § 63G-4-102(2)(g) (West Supp. 2008) (placing “contracts for the purchase or sale of products, real property, supplies, goods, or services by or for the state” outside the scope of UAPA); Utah Admin. Code R652-8-100 (2008) (implementing UAPA’s exception by providing that adjudication of “management and administrative actions concerning specific leases, sales or exchanges” is not available through a request for agency action submitted to the division).

In Nat'l Parks, this Court held that a conservation advocacy group could not intervene in the "executive decision" to exchange certain state school trust lands for lands held by Garfield County. The Court explained:

The reason for allowing the state to deal with leasing, selling, and exchanging property as an executive decision is not difficult to ascertain. The state, through its various agencies, engages in innumerable transactions for the purchase, sale, exchange, and lease of real and personal property. If these transactions were subject to the delay inherent in adjudicative procedures at the demand of third parties asserting a private interest, government programs dealing with the acquisition and disposition of property could be paralyzed.

Nat'l Parks, 869 P.2d at 914. Persons or entities not parties to the transaction who are aggrieved by its effects must look to other statutes and rules to identify available procedures, remedies, and opportunities for non-party participation. Id.

The executive director properly determined that petitioners were not entitled to consistency review of the lease transaction because they were not parties to the transaction, no party to the transaction had sought review, and even if they had, petitioners' intervention was prohibited because the proceeding was designated by rule as informal. R. 444-50.

Although petitioners were not permitted to participate as parties in the lease transaction, they were active and vocal participants in the public process, and their extensive comments on the merits of the lease were considered by the division and addressed in the Record of Decision awarding the lease to Great Salt Lake Mineral. R. 77-98.

UAPA provides that “where the law applicable to the agency permits persons other than the agency to initiate adjudicative proceedings,” they must do so according to the procedural requirements of UAPA. Utah Code Ann. § 63G-4-201(3)(a) (West Supp. 2008). UAPA itself provides no substantive right to agency action, but governs the procedure for those agency actions that are adjudicative in nature. Utah Code Ann. § 63G-4-102(1)(a) (West Supp. 2008); see Nat’l Parks, 809 P.2d at 914 (looking to statutes specifically governing the agency, and not merely to UAPA, in determining the right to participate in agency adjudications). A person is not entitled to request a particular action merely because the requested action lies within the agency’s statutory power; the statute must also enumerate substantive grounds upon which initiating an action is appropriate, not just establish a procedural right to initiate an action.

The same is true of the petitioners’ efforts to obtain a declaratory ruling under UAPA. Both UAPA and the division’s rules permit a request for agency action for a declaratory ruling determining the applicability of the law the agency administers to a given situation. Utah Code Ann. § 63G-4-503(1) (West Supp. 2008). The agency may define sets of circumstances where it will not issue declaratory orders but cannot issue a declaratory order if the rights of a nonconsenting necessary party would be prejudiced. Utah Code Ann. § 63G-4-503(3) (West Supp. 2008). The division’s rules do not permit declaratory orders if the issues or circumstances to be addressed involve disputed facts. Utah Admin. Code R652-7-500(1)(a) (2008).

UAPA does not apply to property transactions, including administrative or management decisions on existing leases. Nor does the statutes' declaratory order provision apply to leases. Petitioners erroneously sought a declaratory order, under UAPA's declaratory orders provision, concerning the just-approved Clyman Bay leases and the longstanding Bear River Bay leases. With respect to the issues raised regarding threats to "Public Trust values" under the existing management plans, the Director determined that these threats were based on disputed facts such that a declaratory order was prohibited. R. 446-47. Because petitioners sought a determination that the Clyman Bay and Bear River Bay leases should be cancelled, and the holders of the leases had not consented to a declaratory order proceeding, no order could issue because the rights of the lessees would be substantially prejudiced by a cancellation.

The challenged administrative decision did not reach the merits of the petitioners' claims. If this Court were to determine that any of petitioners' requests for agency action were erroneously dismissed, the remedy would be to remand that request to be considered on the merits by the respondents. Indeed, the petitioners acknowledge that they have not fully briefed the merits in their opening brief. Brief of Petitioners at 43. Nor is there an adequate record to determine the merits of petitioners' claims. R. 447 (acknowledging that the petitioners' declaratory order request is based on facts that are disputed and have not been agreed to or accepted as accurate by the division). If the merits are to be addressed, an adequate record needs to be made on remand.

CONCLUSION

For the above stated reasons, respondents ask this Court to dismiss these consolidated proceedings for lack of jurisdiction. Even if this Court had jurisdiction, the respondents properly dismissed the petitioners' requests for agency action and that decision should be affirmed.

Respectfully submitted this _____ day of August, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that I mailed two true and exact copies of the foregoing BRIEF OF RESPONDENTS, postage prepaid, to the following on this the _____ day of August, 2008:

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ADDENDUM “A”

DETERMINATIVE STATUTES AND RULES

63G-4-202. Designation of adjudicative proceedings as informal -- Standards -- Undesignated proceedings formal.

(1) The agency may, by rule, designate categories of adjudicative proceedings to be conducted informally according to the procedures set forth in rules enacted under the authority of this chapter if:

- (a) the use of the informal procedures does not violate any procedural requirement imposed by a statute other than this chapter;
- (b) in the view of the agency, the rights of the parties to the proceedings will be reasonably protected by the informal procedures;
- (c) in the view of the agency, the agency's administrative efficiency will be enhanced by categorizations; and
- (d) the cost of formal adjudicative proceedings outweighs the potential benefits to the public of a formal adjudicative proceeding.

(2) Subject to the provisions of Subsection (3), all agency adjudicative proceedings not specifically designated as informal proceedings by the agency's rules shall be conducted formally in accordance with the requirements of this chapter.

(3) Any time before a final order is issued in any adjudicative proceeding, the presiding officer may convert a formal adjudicative proceeding to an informal adjudicative proceeding, or an informal adjudicative proceeding to a formal adjudicative proceeding if:

- (a) conversion of the proceeding is in the public interest; and
- (b) conversion of the proceeding does not unfairly prejudice the rights of any party.

63G-4-503. Declaratory orders.

(1) Any person may file a request for agency action, requesting that the agency issue a declaratory order determining the applicability of a statute, rule, or order within the primary jurisdiction of the agency to specified circumstances.

(2) Each agency shall issue rules that:

- (a) provide for the form, contents, and filing of petitions for declaratory orders;
- (b) provide for the disposition of the petitions;
- (c) define the classes of circumstances in which the agency will not issue a declaratory order;
- (d) are consistent with the public interest and with the general policy of this chapter; and
- (e) facilitate and encourage agency issuance of reliable advice.

(3) (a) An agency may not issue a declaratory order if:

- (i) the request is one of a class of circumstances that the agency has by rule defined as being exempt from declaratory orders; or
- (ii) the person requesting the declaratory order participated in an adjudicative proceeding concerning the same issue within 12 months of the date of the present request.

(b) An agency may issue a declaratory order that would substantially prejudice the rights of a person who would be a necessary party, only if that person consents in writing to the determination of the matter by a declaratory proceeding.

- (4) Persons may intervene in declaratory proceedings if:
 - (a) they meet the requirements of Section 63G-4-207; and
 - (b) they file timely petitions for intervention according to agency rules.
- (5) An agency may provide, by rule or order, that other provisions of Sections 63G-4-202 through 63G-4-302 apply to declaratory proceedings.
- (6) (a) After receipt of a petition for a declaratory order, the agency may issue a written order:
 - (i) declaring the applicability of the statute, rule, or order in question to the specified circumstances;
 - (ii) setting the matter for adjudicative proceedings;
 - (iii) agreeing to issue a declaratory order within a specified time; or
 - (iv) declining to issue a declaratory order and stating the reasons for its action.
- (b) A declaratory order shall contain:
 - (i) the names of all parties to the proceeding on which it is based;
 - (ii) the particular facts on which it is based; and
 - (iii) the reasons for its conclusion.
- (c) A copy of all orders issued in response to a request for a declaratory proceeding shall be mailed promptly to the petitioner and any other parties.
- (d) A declaratory order has the same status and binding effect as any other order issued in an adjudicative proceeding.
- (7) Unless the petitioner and the agency agree in writing to an extension, if an agency has not issued a declaratory order within 60 days after receipt of the petition for a declaratory order, the petition is denied.

65A-1-4. Division of Forestry, Fire and State Lands -- Creation -- Power and authority.

- (1) (a) The Division of Forestry, Fire and State Lands is created within the Department of Natural Resources under the administration and general supervision of the executive director of the department.
- (b) The division is the executive authority for the management of sovereign lands, and the state's mineral estates on lands other than school and institutional trust lands, and shall provide for forestry and fire control activities as required in Section 65A-8-101.
- (2) The division shall adopt rules under Title 63G, Chapter 3, Utah Administrative Rulemaking Act, necessary to fulfill the purposes of this title.
- (3) The director of the Division of Forestry, Fire and State Lands is the executive and administrative head of the division and shall be a person experienced in administration and management of natural resources.
- (4) The director shall inform the council:
 - (a) in an annual meeting of the division's plans, policies, and budget; and
 - (b) of policy changes and developing conflicts.
- (5) The director shall give the council an opportunity to advise on the changes and conflicts.
- (6) (a) An aggrieved party to a final action by the director may appeal that action to the executive director of the Department of Natural Resources within 20 days after the action.
- (b) The executive director shall rule on the director's action within 20 days after receipt of the appeal.

R652-7-500. Petition Review and Disposition.

1. Upon receipt of a petition, the director or his designee shall review the petition for compliance with R652-7-400. The petition shall be denied if:
 - (a) the specified facts, issue, situation, or circumstance is based on disputed facts;
 - (b) the petition raises policy questions which have not been addressed by the agency; and
 - (c) the petition requests a ruling on any order other than an executed contract.
2. Incomplete, or unclear, petitions shall be returned to the petitioner with an explanation of the additional information required.
3. When a petition is complete, the director shall, in compliance with 63-46b-21(6), issue a written order:
 - (a) stating the applicability or nonapplicability of the statute, rule, or order at issue; the reasons for the applicability or nonapplicability of the statute, rule, or order; and any requirements imposed on the agency, the petitioner, or any other person having intervened in or consented to the applicability determination process.
 - (b) setting an informal hearing for the petitioner and any intervenor to examine questions not related to factual disputes;
 - (c) documenting an agreement to issue a declaratory order by a specified time; or
 - (d) denying the petition for a declaratory order.
4. Unless otherwise agreed to by the director or his designee and the petitioner, any petition for which an order is not issued pursuant to (2) above is deemed denied.

R652-8-100. Authority.

This rule implements Sections 63-46b-1(5), 63-46b-4, 63-46b-5 which authorizes the Division of Forestry, Fire and State Lands to designate adjudicative proceedings as informal and provides procedures for informal adjudicative proceedings. Leases, sales and exchanges are treated as contracts for purchase or sale of interests in real property. Therefore, management and administrative actions concerning specific leases, sales or exchanges are not governed by the procedural requirements of this rule pursuant to 63-46b-1(2)(g).

R652-8-200. Initial Designation of All Adjudicative Proceedings as Informal.

1. All requests for agency adjudications are initially designated as informal adjudications. Requests for action include applications for leases, permits, easements, sale of sovereign lands, exchange of sovereign lands, sale of forest products and any other disposition of resources under the authority of the agency or other matter where the law applicable to the agency permits parties to initiate adjudicative proceedings.
2. All adjudications commenced by the agency shall be initially designated as informal adjudications. Agency adjudications include actions relating to leases, permits, easements, sales contracts and other agreements and contracts under the authority of the agency.

R652-9-100. Authority.

This rule establishes the procedure through which any party aggrieved by a division action directly determining the rights, obligations, or legal interests of specific persons may petition the executive director of the Department of Natural Resources to review the action for consistency with statutes, rules, and division policy pursuant to Subsection 65A-1-4(6).

R652-9-200. Consistency Review.

1. For all division actions directly determining the rights, obligations, or legal interests of specific persons outside of the division, any party aggrieved by such a division action may petition the director to review the division action for consistency with statutes, rules, and policy.
2. All division actions directly determining the rights, obligations, or legal interests of a party shall be accompanied by a written record of decision which states the division actions and the findings of fact, legal authority, and conclusions of law for the decision.
3. The record of decision shall state the rights of any aggrieved party to consistency review pursuant to this rule.