

2015

**Utah Alunite Corp. and the Utah School and Institutional Trust  
Lands Administration, Petitioners-Appellants, v. Kent T. Jones,  
p.e., Utah State Engineer, and Central Iron County Water  
Convservancy District, a Utah Water Conservancy District,  
Respondents-Appellees.**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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UTAH APPELLATE COURTS

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UTAH ALUNITE CORP. and the UTAH  
SCHOOL AND INSTITUTIONAL TRUST  
LANDS ADMINISTRATION,

Petitioners-Appellants,

v.

KENT T. JONES, P.E., Utah State Engineer,  
and CENTRAL IRON COUNTY WATER  
CONSERVANCY DISTRICT, a Utah water  
conservancy district,

Respondents-Appellees.

**BRIEF OF APPELLANT**

Case No. 20140924-CA

Appeal from the Fifth Judicial District Court, Beaver County, State of Utah  
Honorable Paul D. Lyman, District Court No. 140500015

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**ORAL ARGUMENT REQUESTED**

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SCHOOL AND INSTITUTIONAL TRUST  
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**ORAL ARGUMENT REQUESTED**

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## **I. JURISDICTION**

This Court has jurisdiction under Utah Code Ann. § 78A-3-102(3)(f) and (4).

## **II. STATEMENT OF ISSUES AND STANDARD OF REVIEW**

Appellants Utah Alunite Corp. (“UAC”) and Utah School and Institutional Trust Lands Administration (“SITLA”) appeal the dismissal of their petition seeking judicial review of an order of Appellee Kent L. Jones (the “State Engineer”) approving an application to appropriate water. UAC and SITLA petitioned for judicial review of the State Engineer’s order pursuant to Utah Code Ann. § 73-3-14(1)(a). That statute, which specifically governs the right of judicial review of such orders, allows “[a] person aggrieved by an order of the state engineer” to obtain judicial review in accordance with Title 63G, Chapter 4 of the Utah Administrative Procedures Act (“UAPA”).

Inferring a term into the text of Section 73-3-14(1)(a) that does not exist, the district court found only a “party” to the underlying adjudicative proceeding is allowed to seek judicial review under the statute. As explained below, UAC and SITLA had no opportunity to participate in that proceeding because the State Engineer waited nearly eight years to rule on the application in question. Finding UAC and SITLA were not parties to the proceeding, the district court dismissed the petition for lack of subject matter jurisdiction. But the circumstances of this case are not so simple—UAC and SITLA have a direct and competing interest in the same water. And even though they were unable to maintain party status, the State Engineer issued the order after fully considering UAC and SITLA’s competing interest in the application.

UAC and SITLA appeal and raise the following issues:

**ISSUE NO. 1:** Did the district court err in holding that UAC and SITLA must be “parties” to obtain judicial review of an order of the State Engineer when Utah Code Ann. § 73-3-14(1)(a) allows a “person aggrieved” by the order to seek judicial review?

Standard of Review: The Court reviews questions of statutory interpretation for correctness and affords no deference to the district court’s legal conclusions. *Marion Energy, Inc. v. KFJ Ranch P’ship*, 2011 UT 50, ¶ 12, 267 P.3d 863.

Preservation: This issue was presented to the district court in briefing in support of and in opposition to the State Engineer’s motion to dismiss. (R.55-57, 78-79, 92-95, 271-72, 307-11.) The district court addressed the issue in its order granting the motion to dismiss. (R.356-58.)

**ISSUE NO. 2:** Did the district court err when it failed to consider whether UAC and SITLA satisfied exceptions to the requirement to exhaust administrative remedies under Utah Code Ann. § 63G-4-401(2)(b)?

Standard of Review: When considering a motion to dismiss, the Court must “accept the factual allegations in the complaint as true and draw all reasonable inferences from those facts in a light most favorable to the plaintiff.” *Nebeker v. Utah State Tax Comm’n*, 2001 UT 74, ¶ 2, 34 P.3d 180 (internal quotation marks, citation, and brackets omitted). A district court’s dismissal of a claim for failure to exhaust administrative remedies is reviewed for correctness. *See id.* at ¶ 9. As noted, the district court’s interpretation of a statute is reviewed for correctness. *Marion Energy*, 2011 UT 50, ¶ 12.

Preservation: This issue was presented to the district court in UAC and SITLA’s petition for judicial review (R.9-10), and in briefing in support of and in opposition to the

State Engineer's motion to dismiss (R.95-98, 274-77, 310).

### **III. DETERMINATIVE AUTHORITY**

Utah Code Ann. § 73-3-14(1)(a): "A person aggrieved by an order of the state engineer may obtain judicial review in accordance with Title 63G, Chapter 4, Administrative Procedures Act, and this section."

Utah Code Ann. § 63G-4-401(2): "A party may seek judicial review only after exhausting all administrative remedies available, except that: ... (b) the court may relieve a party seeking judicial review of the requirement to exhaust any or all administrative remedies if: (i) the administrative remedies are inadequate; or (ii) exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion."

### **IV. STATEMENT OF THE CASE**

#### **A. Nature of the Case**

This appeal concerns UAC and SITLA's right to obtain judicial review of an order of the State Engineer pursuant to Utah Code Ann. § 73-3-14 and in accordance with Utah Code Ann. §§ 63G-4-401 and -402. The district court held it lacked subject matter jurisdiction over UAC and SITLA's petition for judicial review because neither was a party to the adjudicative proceeding before the State Engineer. (R.356-58.) The district court also found that UAC and SITLA did not exhaust all available administrative remedies but failed to consider whether they should be relieved of such requirements under the unusual circumstances of this case. (R.358-60.) UAC and SITLA appeal from the district court's final order and respectfully ask this Court to reverse the district court.

**B. Course of Proceedings and Disposition Below**

On October 17, 2006, Appellee Central Iron County Water Conservancy District (“CICWCD”) filed an Application to Appropriate Water Number 69-101 (A76677) with the State Engineer, seeking to appropriate 12,000 acre feet (“af”) of groundwater annually from Wah Wah Valley, Beaver County, Utah. (R.4 at ¶ 12.) Just over a month later, in November 2006, the State Engineer published notice of the application, as required by Utah Code Ann. § 73-3-6. (R.14.) Nearly four years later, in July 2010, the State Engineer conducted hearings on CICWCD’s application. (R.4 at ¶ 16; R.16.)

But it was not until May 13, 2014, that the State Engineer issued the Order for Application to Appropriate Water No. 69-101 (A76677) (the “CICWCD Order”). (R.5 at ¶ 18; R.14-23.) The CICWCD Order approved CICWCD’s appropriation of 6,525 af of water annually from the Wah Wah Valley. (*Id.*) On June 2, 2014, UAC and SITLA and Beaver County filed separate requests for reconsideration of the CICWCD Order. (R.5 at ¶ 21; R.107-18.) The State Engineer took no action on either request, and the requests were effectively denied on June 22, 2014. (*See* R.5 at ¶ 21.)

On July 21, 2014, UAC and SITLA filed a petition for judicial review in the Fifth District Court, Beaver County, seeking de novo review of the CICWCD Order pursuant to Utah Code Ann. § 73-3-14. (R.1-37.) Neither the State Engineer nor CICWCD answered. Instead, the State Engineer moved to dismiss the petition for lack of subject matter jurisdiction pursuant to Utah Rule of Civil Procedure 12(b)(1). (R.50-51.) CICWCD joined in the motion. (R.78-79.) UAC and SITLA opposed the motion with argument and a declaration of counsel. (R.84-251.)

The district court found it lacked subject matter jurisdiction over the petition and granted the motion to dismiss. (R.320-29.) On October 8, 2014, the district court issued a final order and ruling. (R.351-61.) UAC and SITLA filed a notice of appeal on October 1, 2014 (R.331-33), and an amended and renewed notice of appeal on October 10, 2014 (R.377-79).

**C. Statement of Facts**

**1. In 2006, CICWCD Applied for Significant Water Rights Far Outside Its Service Area, in the Desert Valleys of Beaver County.**

CICWCD is a water conservancy district serving certain municipalities and unincorporated areas in and around Iron County, Utah. (R.2 at ¶ 5.) According to its own reports, by 2060, CICWCD will have a maximum water supply need of 11,470 af per year above its current needs. (R.3 at ¶ 11.) To meet that need, on October 17, 2006, CICWCD sought significant water rights in Beaver County. (R.3-4 at ¶¶ 11-15.) In three separate applications filed with the State Engineer, CICWCD applied to appropriate 37,000 af of groundwater from Wah Wah, Pine, and Hamblin Valleys<sup>1</sup>—over three times the water needed to meet its 2060 demands. (R.4 at ¶¶ 12-15.)

Beaver County lies to the north of Iron County, and the areas CICWCD serves are located considerable distances from Wah Wah, Pine, and Hamblin Valleys. For instance, CICWCD's service area is located in a drainage system completely separate from Wah

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<sup>1</sup> As noted, Wah Wah, Pine, and Hamblin Valleys are located in Beaver County, although a portion of Pine and Hamblin Valleys extends into Iron County. The three valleys neighbor one another, with Pine Valley lying to the west of Wah Wah Valley and Hamblin Valley lying to the west of Pine Valley. (R.3 at ¶ 8.)

Wah Valley's groundwater aquifer, and its high-demand areas are nearly 50 miles from the well sites in Wah Wah Valley. (R.5 at ¶ 22.) Despite the distance, CICWCD filed an Application to Appropriate Water Number 69-101 (A76677), seeking to appropriate 12,000 af of groundwater annually from Wah Wah Valley. (R.4 at ¶ 12.) From Pine Valley, CICWCD applied to appropriate 15,000 af of groundwater annually, and from Hamblin Valley, 10,000 af of groundwater annually. (R.4 at ¶¶ 13-14.)

This appeal concerns CICWCD's application to appropriate groundwater from Wah Wah Valley. It was estimated that approximately 7,250 af of water was available for appropriation per year from Wah Wah Valley's groundwater system (R.3 at ¶ 9), and CICWCD's application sought to appropriate all of that water. In November 2006, just over a month after receiving CICWCD's application, the State Engineer published notice of the application. (R.14.) Publication of the notice triggered a 20-day window for persons interested in the application to file a protest with the State Engineer. *See* Utah Code Ann. § 73-3-7(1)(a). But it was not until July 2010 when the State Engineer conducted hearings on CICWCD's application. (R.4 at ¶ 16; R.16.)

**2. In 2012, UAC and SITLA Applied for Water Rights in Wah Wah Valley for the Blawn Mountain Project.**

UAC and SITLA were not protestants to CICWCD's application and did not participate at the July 2010 hearing. (R.4 at ¶ 17.) They did not for the simple reason that they had no interest in Wah Wah Valley's groundwater in either November 2006 or

July 2010.<sup>2</sup> It was not until April 2011 that UAC entered into a three-year agreement with SITLA to explore a possible mining development to be located on SITLA-owned lands within Wah Wah Valley. (R.6 at ¶ 27.) The development, known as the “Blawn Mountain Project,” is composed of four areas of high-quality alunite ore covering approximately 11,500 acres. (R.6 at ¶ 28.) Alunite is a sulfate mineral ore used in the production of sulphate of potash and alumina. (*Id.*)

Current estimates indicate that the Blawn Mountain Project has a mine life of at least 40 years. (R.6 at ¶ 30.) It requires 6,500 af of water annually. (R.7 at ¶ 35.) Based on the water needed for the Blawn Mountain Project, on August 21, 2012, UAC and SITLA filed an Application to Appropriate Water Number 69-115 (A79462). (R.7 at ¶ 36.) The application sought to appropriate 6,500 af of groundwater annually from Wah Wah Valley. (*Id.*) The State Engineer published notice of the application in September 2012. (R.187.) Based on its competing application for water rights in Wah Wah Valley, CICWCD protested UAC and SITLA’s application. (R.7 at ¶ 37.)

The State Engineer held a hearing on UAC and SITLA’s application in November 2013. (R.7 at ¶ 38; R.187.) At the time of the hearing, CICWCD’s application for water rights in Wah Wah Valley had been pending before the State Engineer for over seven years. Because UAC and SITLA and CICWCD maintained related and competing

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<sup>2</sup> There are no factual allegations in the record regarding what interest UAC or SITLA may have had in Wah Wah Valley’s unappropriated water before November 2006 or July 2010. The factual allegations before the district court were limited to UAC and SITLA’s petition for judicial review (R.1-37) and their opposition to the State Engineer’s motion to dismiss (R.103-251).



applications, the State Engineer's office informed UAC that the State Engineer would consider and decide the applications together and issue an order on UAC and SITLA's application in conjunction with an order on CICWCD's application. (R.105 at ¶ 9.) And as a protestant to the application, CICWCD fully participated in the hearing, asserting support for its application for rights to the same water source. (See R.7 at ¶ 37; R.191.)

In March 2014, SITLA granted UAC a long-term mining lease to develop and operate the Blawn Mountain Project. (R.6 at ¶ 29.) To date, UAC has invested over \$30 million on activities relating to the exploration, permitting, and development of the project. (R.6 at ¶ 31.) Construction of the Blawn Mountain Project is scheduled to begin within three years. (R.7 at ¶ 33.) It is estimated that the project will create over 2,500 jobs during construction and as many as 500 jobs long term, and annually generate over \$50 million in federal, state, and local taxes. (R.7 at ¶¶ 33-34.) In addition to aiding the local economy, the project throughout its life will generate over \$1.1 billion in mineral royalty payments to SITLA for the benefit of Utah's public schools. (R.7 at ¶ 34.)

**3. In Orders Issued a Day Apart, the State Engineer Granted CICWCD Perpetual Water Rights in Wah Wah Valley but Limited UAC and SITLA's Water Rights to a Fixed Term, Subject to CICWCD's Rights.**

The State Engineer issued the CICWCD Order on May 13, 2014—nearly eight years after publishing notice of CICWCD's application and nearly four years after holding a hearing on the application. (See R.5 at ¶ 18.) In a second order issued the same day, the State Engineer approved CICWCD's appropriation of 15,000 af of water annually from Pine Valley. (R.5 at ¶ 19.) A day later, on May 14, 2014, the State

Engineer issued Order for Application to Appropriate Water No. 69-115 (A79462) in the names of UAC and SITLA (the "UAC Order"). (R.7-8 at ¶ 39.)

The UAC Order approved UAC and SITLA's application for 6,500 af of water annually from Wah Wah Valley for a fixed 20-year period, subject to CICWCD's senior water right of 6,525 af annually. (*Id.*) The State Engineer later amended the UAC Order and issued Amended Order for Application to Appropriate Water No. 69-115 (A79462) (the "UAC Amended Order"). (R.8 at ¶ 40; R.187-194.) The UAC Amended Order changed UAC and SITLA's annual water right from a fixed 20-year period to a fixed 30-year period, still subject to CICWCD's senior water right. (*Id.*)

Structuring the two orders in that way, the State Engineer anticipated that UAC and SITLA's and CICWCD's respective water rights in Wah Wah Valley could coexist, but they do not. (*See* R.191-92 (UAC Amended Order: "[I]t is believed that Water Right Numbers 69-101 and 69-115 can reasonably be expected to coexist due to several factors.").) The two orders leave UAC and SITLA without a secure water source for the Blawn Mountain Project. (*See* R.9-11.) The orders also leave them hostage to CICWCD's speculative development of a water right it does not need, as its future needs are already met by its water rights in Pine Valley. (*See id.*)

Despite its senior water right, CICWCD filed a request for reconsideration of the UAC Amended Order. (R.196-99.) The State Engineer took no action on the request, and CICWCD filed a petition for judicial review on the UAC Amended Order. (R.201-30.) UAC and SITLA also filed a petition for judicial review on the UAC Amended Order. (R.232-51.) Those petitions are pending before the district court. To date,

CICWCD has not obtained the required financing to develop its water rights in Wah Wah Valley. (R.6 at ¶ 25.) Without a secure water right for the economic life of the Blawn Mountain Project, UAC will not be able to develop and operate the project. (R.8 at ¶ 42.)

## V. SUMMARY OF ARGUMENT

The district court erred as a matter of law finding UAC and SITLA had to be a “party” to obtain judicial review of the CICWCD Order. The district court ignored the express reference to a “*person* aggrieved by an order of the state engineer” under Utah Code Ann. § 73-3-14(1)(a)—the specific and controlling statute—and the recognized difference between a “person” and a “party.” (Emphasis added.) Based on the plain language of Section 73-3-14, the legislature did not limit judicial review of a State Engineer order to a “party” alone. To find otherwise, the district court improperly rewrote the statute, inferred a substantive term into the text that is not there, and acted contrary to the presumption that the legislature used each word advisedly.

As “person[s] aggrieved” by an order of the State Engineer, UAC and SITLA have standing to seek judicial review so long as they exhausted available administrative remedies as required by Utah Code Ann. § 63G-4-401. But the statute also provides that exhaustion is not required in every case. Exceptions to exhaustion requirements arise when the administrative remedies were inadequate, would serve no useful purpose, or result in irreparable harm. The district court, however, failed to consider whether UAC and SITLA may be relieved from exhaustion requirements. That was error given the nearly eight-year delay between the filing and decision on CICWCD’s application, the change of circumstances that occurred over that time, UAC and SITLA’s competing

application for rights to the same water, and the fact that the State Engineer considered and decided the competing applications together.

## VI. ARGUMENT

### A. Because UAC and SITLA Are “Person[s] Aggrieved” by the CICWCD Order, They Can Obtain Judicial Review of the Order Pursuant to Utah Code Ann. § 73-3-14(1)(a).

#### 1. The Plain Language of Section 73-3-14(1)(a) Allows a “Person Aggrieved” to Obtain Judicial Review of a State Engineer’s Order and Does Not Limit Judicial Review to a “Party.”

The district court erred as a matter of law when it interpreted Utah Code Ann. § 73-3-14(1)(a) to mean that only a “party” can seek judicial review of an order of the State Engineer. Section 73-3-14(1)(a) grants standing to a certain class of individuals to seek judicial review of a State Engineer order: “[a] *person* aggrieved by an order of the state engineer may obtain judicial review in accordance with Title 63G, Chapter 4 [of the UAPA], and this section.” (Emphasis added.) Yet, according to the district court, Sections 63G-4-401 and -402 of the UAPA limit judicial review of informal adjudicative proceedings before the State Engineer to only “parties.” (R.356-58.) The district court’s interpretation does not conform to well-settled statutory interpretation principles.

A statute must be interpreted according to its plain language. *Marion Energy*, 2011 UT 50, ¶¶ 14-15 (“When the meaning of a statute can be discerned from its language, no other interpretive tools are needed.” (internal quotations marks, brackets, and footnote omitted)). The courts must assume “that the legislature used each term advisedly according to its ordinary and usually accepted meaning” and “presume[ ] that the expression of one [term] should be interpreted as the exclusion of another.” *Id.* at ¶

14 (internal quotation marks and footnotes omitted; brackets original). They cannot “infer substantive terms into the text that are not already there” or “rewrite the statute to conform to an intention not expressed.” *Berrett v. Purser & Edwards*, 876 P.2d 367, 370 (Utah 1994).

The plain language of Section § 73-3-14(1)(a) does not require party status to obtain judicial review of an order of the State Engineer. It allows a “person aggrieved” to challenge an order. While neither Section 73-3-14 nor the remaining provisions of the water appropriation statute defines “person,” the UAPA does: “an individual, group of individuals, partnership, corporation, association, ... governmental subdivision or its units, public or private organization or entity of any character, or another agency.”<sup>3</sup> Utah Code Ann. § 63G-4-103(1)(g). “Party,” however, is defined in more restrictive terms: “the agency or other person commencing an adjudicative proceeding, all respondents, all persons permitted by the presiding officer to intervene in the proceeding, and all persons authorized by statute or agency rule to participate as parties in an adjudicative proceeding.”<sup>4</sup> Utah Code Ann. § 63G-4-103(1)(f).

Thus a “person” and a “party” are not the same. The remaining provisions of Section 73-3-14 confirm this, as the use of the term “person” in context verifies that a “person,” as opposed to a “party,” has standing to obtain judicial review of a State

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<sup>3</sup> The State Engineer’s regulations define “person” the same way. Utah Admin. Code R655-6-3(E).

<sup>4</sup> The definition of “party” under the State Engineer’s regulations also follows the definition provided in the UAPA. Utah Admin. Code R655-6-3(F).

Engineer order. Section 73-3-14(3) addresses what “[a] person who files a petition for judicial review” must do when submitting a petition. In contrast, the following subsection, Section 73-3-14(4), addresses what, “[i]n addition to the requirements of Subsection (3), a *protestant in the adjudicative proceeding* who files a petition for judicial review” must do. (Emphasis added.) If only a “party” can seek judicial review, it makes no sense for the legislature to provide different requirements for “[a] person who files a petition” and “a protestant in the adjudicative proceeding who files a petition.”<sup>5</sup>

**2. Section 73-3-14(1)(a) Controls the Right of Judicial Review of a State Engineer Order, Not the General Provisions of the UAPA.**

Despite the plain language of Section 73-3-14, the district court held that only a “party” to the adjudicatory proceeding has standing to obtain judicial review of a State Engineer order. (R.356-58.) The district court relied on Section 63G-4-401(1) of the UAPA, which provides that “[a] party aggrieved may obtain judicial review of final agency action.” (*Id.*) Sections 63G-4-401(2) and (3) and 63G-4-202 also refer to a “party” seeking judicial review. But the UAPA does not control the right to obtain judicial review of a State Engineer order; Section 73-3-14 does.

“[I]t is assumed that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter.” *Murray City v. Hall*, 663 P.2d 1314, 1318 (Utah 1983) (internal quotation marks and citation omitted). The legislature

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<sup>5</sup> The remaining subsections of Section 73-3-14 also refer to a “person” who seeks judicial review. *See, e.g.*, Utah Code Ann. § 73-3-14(6) (addressing what happens “[i]f a person who files a petition for judicial review fails to provide notice as required by this section”); Utah Code Ann. § 73-3-14(7) (addressing what “[a] person who files a petition for judicial review is not required to” do).

clearly had the UAPA in mind when it enacted Section 73-3-14, as the provision allows a “person aggrieved” by an order of the State Engineer to obtain judicial review in accordance with Chapter 4 of the UAPA.<sup>6</sup> Moreover, to the extent the statutes conflict, “the more specific provision will prevail over the more general provision.” *Williams v. Pub. Serv. Comm’n of Utah*, 754 P.2d 41, 48 (Utah 1988).

*Williams* illustrates that principle. There the Utah Supreme Court considered a petition for review of a rule adopted by the Public Service Commission. *Id.* at 43. The Court found a conflict between the Public Utilities Act and the Utah Administrative Rulemaking Act (the “Rulemaking Act”), as the two statutes contemplated different procedures for review of proceedings before the Public Service Commission. *Id.* at 47-48. On one hand, the Public Utilities Act required a party to file a request for rehearing with the commission before seeking judicial review of any commission order or decision. *Id.* at 46, 47. In contrast, the Rulemaking Act allowed a party to challenge a rule by seeking a declaratory ruling directly from a district court. *Id.*

The Supreme Court found the procedures of the Public Utilities Act governed. *Id.* at 48. As the Court recognized, that statute specifically governed the hearings, proceedings, and methods used by the Public Service Commission to regulate and oversee public utilities and served no other purpose beyond the regulation of public

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<sup>6</sup> Section 73-3-14 was amended in 1987 to provide that a person aggrieved by an order of the State Engineer could obtain judicial review following the UAPA. *See* 1987 Utah Laws ch. 161, § 295. The prior version of the statute contained no reference to the UAPA. *See id.* In 2008, the legislature amended the statute to require a person seeking judicial review give notice to certain parties and made technical changes in reference to the UAPA. *See* 2008 Utah Laws ch. 165, § 1; 2008 Utah Laws ch. 382, § 2143.



utilities. *Id.* On the other hand, the Rulemaking Act governs all Utah administrative agencies and is used in any time of rulemaking. *Id.* The Court concluded the Rulemaking Act is “far more general in nature and is therefore superseded by the specific provisions contained in” the Public Utilities Act. *Id.*

The UAPA’s relation to Section 73-3-14 is no different. Section 73-3-14 establishes the right of judicial review of a State Engineer order, and only addresses judicial review of such orders. Sections 63G-4-401 and -402, on the other hand, are general enactments governing judicial review of final actions taken by every agency of the state. *See* Utah Code Ann. § 63G-4-102(1). Because the specific governs the general, the right of a “person aggrieved” to obtain judicial review under Section 73-3-14 controls the general provisions of the UAPA. *See Williams*, 754 P.2d at 48; *see also S. Utah Wilderness Alliance v. Bd. of State Lands & Forestry of State*, 830 P.2d 233, 235 (Utah 1992) (finding specific statute governing judicial review of actions of Division of State Lands controls general provision of UAPA).

Based on the plain language of Section 73-3-14, the district court improperly rewrote the statute to find only a “party” is allowed to seek judicial review of the CICWCD Order and inferred a term that is not included in the text. Because the legislature is presumed to have used the term “person” advisedly in Section 73-3-14, the statute grants a “person aggrieved” standing to obtain judicial review and does not limit standing to a “party.” *See In re Questar Gas Co.*, 2007 UT 79, ¶¶ 44-50, 175 P.3d 545 (interpreting Utah Code Ann. § 54-7-15(1) according to its plain language, and together with Utah Code Ann. § 63-46b-14 (renumbered as Section 63G-4-401), to consider

whether classes of individuals other than parties had appellate standing). The district court's ruling was error and must be reversed as a matter of law.

**B. The District Court Erred When It Failed to Consider Whether UAC and SITLA May Be Relieved from the Requirement to Exhaust Administrative Remedies Pursuant to Section 63G-4-401(2)(b) of the UAPA.**

Finding UAC and SITLA were not parties to CICWCD's application, the district court did not address whether UAC and SITLA were aggrieved by the CICWCD Order (R.351-61)—although they clearly are.<sup>7</sup> The district court did find, however, that UAC and SITLA had not exhausted the available administrative remedies because they chose not to participate in CICWCD's application. (R.358-60.) On that basis too, the district court held UAC and SITLA have no right to judicial review of the CICWCD Order. (*Id.*) But the district court failed to consider or address whether UAC and SITLA should be relieved from the requirement of exhaustion. (R.351-61.) The district court erred when it did not consider that issue.

**1. Because Section 73-3-14 Grants a "Person Aggrieved" a Right to Judicial Review, the District Court Should Have Considered if UAC and SITLA Were Relieved from Exhaustion Requirements.**

As explained, Section 73-3-14(1)(a) grants a "person aggrieved" a right to judicial review in accordance with the UAPA. In turn, Section 63G-4-401(2) provides that "[a]

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<sup>7</sup> In *Washington County Water Conservancy District v. Morgan*, 2003 UT 58, ¶ 14, 82 P.3d 1125, the Utah Supreme Court recognized that the meaning of "aggrieved" within Section 73-3-14 is consistent with traditional standing requirement that a plaintiff show particularized injury. The Supreme Court required the plaintiff to show some connection between its water source and the water use in question. 2003 UT 58, ¶ 21. Because UAC and SITLA demonstrated a competing interest in the same water, they meet that requirement, but it was not an issue addressed to or by the district court. (*See* R.53-59, 78-79, 264-77, 305-11, 351-61.)

party may seek judicial review only after exhausting all administrative remedies available.” The provision also recognizes that exhaustion is not required in every instance: “the court may relieve a party seeking judicial review of the requirement to exhaust any or all administrative remedies if: (i) the administrative remedies are inadequate; or (ii) exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion.” Utah Code Ann. § 63G-4-401(2)(b).

In addition, exceptions to exhaustion requirements “exist in unusual circumstances where it appears that there is a likelihood that some oppression or injustice is occurring such that it would be unconscionable not to review the alleged grievance or where it appears that exhaustion would serve no useful purpose.” *Nebeker*, 2001 UT 74, ¶ 14 (internal quotation marks and citation omitted); *see also Ramsay v. Kane Cnty. Human Res. Special Serv. Dist.*, 2014 UT 5, ¶ 14, 322 P.3d 1163 (explaining exhaustion is not required where “exhaustion would serve no purpose, or is futile” (internal quotation marks and footnote omitted)). When applied, the exceptions should not undermine the rule’s fundamental purpose. *Republic Outdoor Adver., LC v. Utah Dep’t of Transp., Div. II*, 2011 UT App 198, ¶ 33, 258 P.3d 619.

It follows that the exceptions to the exhaustion requirement should not conflict with the “purpose underlying the doctrine of exhaustion of administrative remedies ... to allow an administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies.” *Id.* (internal quotation marks omitted; ellipsis in original)

(quoting *W. Water, LLC v. Olds*, 2008 UT 18, ¶ 18, 184 P.3d 578). In opposition to the State Engineer's motion to dismiss, UAC and SITLA argued exhaustion was not required; the administrative remedies available to them were inadequate, served no purpose, and would result in irreparable harm given the State Engineer decided the CICWCD Order and the UAC Amended Order together. (*See* R.95-98.)

Pursuant to Section 63G-4-401(2)(b) and Utah law, the district court should have considered the adequacy and purpose of the administrative remedies available to UAC and SITLA in light of the nearly eight-year delay between the publication of CICWCD's application and the issuance of the CICWCD Order. That delay prevented UAC and SITLA from protesting CICWCD's application in November 2006. *See* Utah Code Ann. § 73-3-7(1)(a) (allowing persons interested in application to file protest with State Engineer 20 days after publication of notice of application). It also prevented UAC and SITLA from participating in the hearing in July 2010.<sup>8</sup> *See* Utah Admin. Code R655-6-11 (limiting hearings to "all parties"); Utah Admin. Code R655-6-8 ("Intervention is prohibited except where a federal statute or rule requires that a state permit intervention.").

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<sup>8</sup> While the district court believed that UAC and SITLA could have intervened in CICWCD's application, the State Engineer's administrative rules designate that all adjudicative proceedings are informal proceedings, Utah Admin. Code R655-6-2, and prohibit intervention in informal proceedings, Utah Admin. Code R655-6-8. According to the district court, UAC and SITLA could have changed CICWCD's application from an informal proceeding to a formal proceeding and then intervened. (R.360 (citing Utah Code Ann. §§ 63G-4-202, -207).) But the court did not explain how UAC and SITLA, as non-parties, could have converted the proceeding when intervention was expressly prohibited in the first place.

Also relevant is the fact that the State Engineer weighed and decided CICWCD's and UAC and SITLA's competing applications for water rights in Wah Wah Valley together. The State Engineer's regulations require that an order stating his decision "shall be based on the facts appearing in *any of the Division's files or records and on the facts presented in evidence at any hearings.*" Utah Admin. Code R655-6-16(A) (emphasis added). Here one of those files and one of those hearings involved UAC and SITLA's application for rights to the same water source, and CICWCD fully participated in that application to defend its interest in the water. (See R.191-92 (UAC Amended Order, addressing relation between CICWCD's and UAC and SITLA's interests).) Further, the district court should have considered the irreparable harm caused if exhaustion is required. At stake is the beneficial use of water in Wah Wah Valley for the next 50 years, which impacts not only the Blawn Mountain Project but the significant benefits to Utah's public school trust fund and Beaver County.

In sum, the district court failed to consider or address whether UAC and SITLA should be relieved of exhaustion requirements as it should have. (R.351-61.) The circumstances here do not involve a situation where the person aggrieved failed to make known the nature of its rights in the course of the administrative proceedings before the State Engineer. The administrative record before the State Engineer was common to both the CICWCD Order and the UAC Amended Order, and the State Engineer applied its expertise addressing the same legal and factual issues. (Compare R.14-23 with R.187-94.) Indeed, the State Engineer gathered a full record and had every opportunity to

correct any error as he considered CICWCD's and UAC and SITLA's competing applications jointly. (*See id.*)

**2. Because the Circumstances in *S & G, Inc. v. Morgan* Are Far Different from the Unusual Circumstances in This Matter, the District Court Erred in Relying on the Decision.**

Contrary to the district court's ruling, these circumstances lie in stark contrast to those in *S & G, Inc. v. Morgan*, 797 P.2d 1085 (Utah 1990). (*See* R.358-60.) In *S & G*, the evidence showed that the petitioner intentionally failed to participate in a hearing before the State Engineer on a change of use application, despite an existing interest. 797 P.2d at 1086. Given that, the Utah Supreme Court rejected the petitioner's argument that it was a "person aggrieved" under an earlier version of Section 73-3-14. *Id.* at 1087-88. The Court reasoned that the requirement of participation ensures interested parties will bring all relevant facts to the agency's attention when the agency makes its decision and gives the agency notice of the identity and concern of interested parties. *Id.* Because the petitioner knowingly did not participate, it waived its right to judicial review. *Id.*

*S & G* can be distinguished. First, the complete lack of participation that gave rise to the concerns there does not arise in this matter. The State Engineer was not deprived of the opportunity to hear or critically review UAC and SITLA's competing interest in the appropriation of water from Wah Wah Valley; nor was CICWCD. The State Engineer's almost eight-year delay in deciding CICWCD's application allowed him to fully weigh and consider the application together with UAC and SITLA's application. And, as explained, the issues raised to the State Engineer were the same issues raised to the district court. (*See* R.9-11.)

Second, *S & G* addressed a prior version of Section 73-3-14 that did not expressly incorporate the UAPA, as the current statute does. 797 P.2d at 1086 n.1 (citing 1987 Utah Laws ch. 161, § 295 (“Our decision reaches only the prior statute.”)). Based on the current version of Section 73-3-14, the requirement of participation is colored by Section 63G-4-401(2) and the exceptions to the exhaustion requirement—an issue not addressed in *S & G*. Third, there was no evidence before the district court that UAC and SITLA intentionally chose not to protest CICWCD’s application after the State Engineer published notice in November 2006 or during the July 2010 hearing. As noted earlier (in footnote 2), nothing in the record shows what interest UAC and SITLA may have had in Wah Wah Valley’s unappropriated water at those times. Nor could UAC and SITLA participate in the July 2010 hearing under the State Engineer’s rules. *See supra* n.8.

Thus, unlike in *S & G*, the purpose of exhaustion was fully satisfied before the State Engineer in this matter and any further requirement would serve no useful purpose here. The district court should have considered the exceptions to exhaustion under Section 63G-4-401(2) and erred as a matter of law when it refused to do so.

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## VII. CONCLUSION

For the reasons above, UAC and SITLA respectfully request that the Court reverse the district court's dismissal of their petition for judicial review and remand this case to the district court for further proceedings.

Respectfully submitted,

DATED: February 11, 2015.

STOEL RIVES LLP



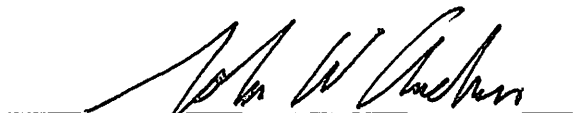
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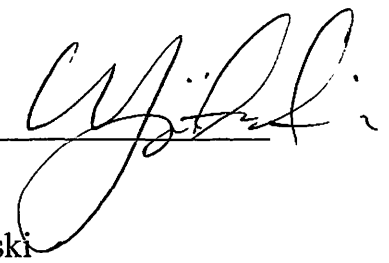
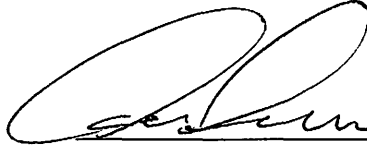
## CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 6,008 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).
2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Windows 7 in 13-point Times New Roman.

DATED this 11th day of February, 2015.

STOEL RIVES LLP



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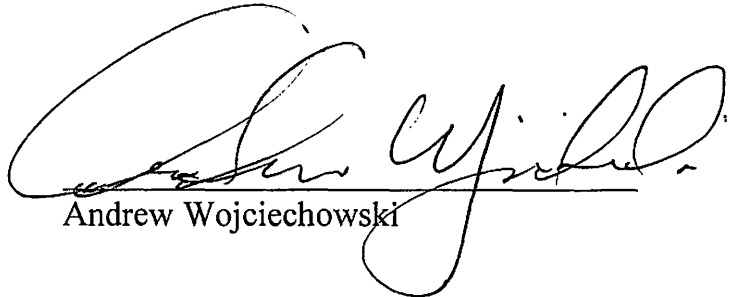
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## CERTIFICATE OF SERVICE

I hereby certify that I caused to be served two true and correct copies of the foregoing **BRIEF OF APPELLANT** on the following by first-class mail, postage pre-paid on the 11th day of February, 2015.

|   |   |
|---|---|
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|---|---|

An original and seven copies were also filed with the Clerk of the Utah Court of Appeals.

  
Andrew Wojciechowski

## **ADDENDUM**

- A. Final Order and Ruling on State Engineer's Motion to Dismiss for Lack of Subject Matter Jurisdiction (R.351-62).
- B. Utah Code Ann. § 73-3-14.
- C. 1987 Utah Laws ch. 161, § 295.
- D. 2008 Utah Laws ch. 165, § 1.
- E. 2008 Utah Laws ch. 382, § 2143.
- F. Utah Code Ann. § 63G-4-401 & 402.

# Addendum A

The Order of Court is stated below:

Dated: October 08, 2014  
03:00:00 PM

/s/ Paul D. Lyman  
District Court Judge



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BEAVER COUNTY  
DEPUTY CLERK

*Attorneys for Defendant, Kent L. Jones, P.E., Utah State Engineer*

**IN THE FIFTH JUDICIAL DISTRICT  
IN AND FOR BEAVER COUNTY, STATE OF UTAH**

UTAH ALUNITE CORP. and the UTAH  
SCHOOL AND INSTITUTIONAL TRUST  
LANDS ADMINISTRATION,

Plaintiffs,

vs.

KENT L. JONES, in his official capacity as  
the State Engineer, and CENTAL IRON  
COUNTY WATER CONSERVANCY  
DISTRICT,

Defendants.

**FINAL ORDER AND RULING ON  
STATE ENGINEER'S MOTION TO  
DISMISS FOR LACK OF SUBJECT  
MATTER JURISDICTION**

Civil No. 140500015

Judge Paul D. Lyman

The Respondent, Kent L. Jones, Utah State Engineer (hereafter "State Engineer",  
has filed the State Engineer's Motion to Dismiss For Lack of Subject Matter Jurisdiction,  
with an accompanying memorandum. The Petitioners, Utah Alunite Corp. (hereafter

“UAC”) and Utah School and Institutional Trust Lands Administration (hereafter “SITLA”) have jointly filed an opposing memorandum. The State Engineer has filed a reply memorandum. The State Engineer has filed a Request to Submit. No party has filed a request for oral argument.<sup>1</sup>

### FACTS

For purposes of this Rule 12(b)(1) motion the factual allegations of the Petitioners’ Petition for Judicial Review are accepted as true. Hurst v. Highway Department, 397 P.2d 71 (Utah 1964). The following facts, accepted as true, are cited as being relevant to this Ruling.

1. Petitioners Utah Alunite Corp. and the Utah School and Institutional Trust Lands Administration have petitioned for judicial review of the Order for Application to Appropriate Water No. 69-101(A76677), issued by Respondent Kent L. Jones, the State Engineer for the State of Utah on May 13, 2014.
2. Petitioner Utah Alunite Corp. is a Delaware corporation registered to do business in Utah and is in good standing.
3. Petitioner Utah School and Institutional Trust lands Administration is an agency of the State of Utah.
4. Respondent Kent L. Jones is the State Engineer for the State of Utah,

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<sup>1</sup> The Court entered its Ruling on State Engineer’s Motion to Dismiss for Lack of Subject Matter Jurisdiction on September 18, 2014. This Final Order reiterates, with a few minor typographical and punctuation corrections, the Court’s ruling.

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Division of Water Rights.

5. Respondent Central Iron County Water Conservancy District (hereafter "CICWCD") is a water conservancy district serving certain municipalities and unincorporated areas in and around Iron County, Utah.
6. The District Court has original jurisdiction over this action pursuant to Utah Code Ann. § 78-3-14 (1)(a) and § 63G-4-402 (1)(a).
7. Venue lies in this Court pursuant to Utah Code Ann. § 73-3-14 (1)(b) and § 63G-4-402 (1)(b) because the water source at issue or a portion of the water source is located in Beaver County, Utah.
8. The Wah Wah Valley, Pine Valley, and Hamblin Valley are located in Beaver County, Utah. Pine Valley is located directly to the west of the Wah Wah Valley, and Hamblin Valley is located directly west of Pine Valley, along the Utah/Nevada border.
9. On October 17, 2006, CICWCD filed an Application to Appropriate Water Number 69-101 (A76677) with the State Engineer, to appropriate 12,000 acre feet (hereafter "af") of water annually from groundwater in the Wah Wah Valley for municipal uses, along with applications to appropriate water in the two other neighboring valleys.
10. Beaver County was a protestant of CICWCD's application for an appropriation of groundwater from the Wah Wah Valley, along with the Bureau of Land Management and hundreds of other protestants.

11. Petitioners were not protestants to these applications.
12. In July 2010, the State Engineer conducted hearings on CICWCD's applications in the Wah Wah and Pine Valleys. To date, no hearings has been held on CICWCD's application in Hamblin Valley.
13. In April 2011, UAC entered into a three-year exploration agreement with SITLA for a mining development to be located on SITLA-owned lands within the Wah Wah Valley (known as the "Blawn Mountain Project").
14. On August 21, 2012, Petitioners filed an Application to Appropriate Water Number 69-115 (A79462) to appropriate 6,500 af of water annually from the groundwater in the Wah Wah Valley for the Blawn Mountain Project.
15. CICWCD was a protestant to Petitioners' application. Beaver County expressed support for the application.
16. The State Engineer heard petitioner's application Number 69-115 (A79462) in November 2013.
17. In March 2014, SITLA granted UAC a long-term mining lease to develop and operate the Blawn Mountain Project.
18. On May 13, 2014, the State Engineer issued Order for Application to Appropriate Water No. 69-101 (A76677) in the name of CICWCD. By the order, the State Engineer approved CICWCD's appropriation of 6,525 af of water annually from the Wah Wah Valley for municipal use.
19. On May 14, 2014, the State Engineer issued Order for Application to

Appropriate Water No. 69-115 (A79462) in the names of Petitioners. By the order, the State Engineer approved Petitioners' application of 6,500 af of water from the Wah Wah Valley for a fixed 20-year period, subject to CICWCD's senior water right of 6,525 af annually.

20. On June 2, 2014, Beaver County and Petitioners filed separate requests for reconsideration of the CICWCD Order. The State Engineer denied both requests.
21. On June 19, 2014, the State Engineer issued an Amended Order for Application to Appropriate Water no. 69-115 (A79462) in the names of Petitioners. By this order, the State Engineer approved Petitioners' application for 6,500 af of water annually from Wah Wah Valley for a fixed 30-year period, which was a 10 year period increase, subject to CICWCD's senior water right of 6,525 af annually.

## RULING

### Are UAC and SITLA "*parties*" entitled to judicial review?

The Petitioners assert the right to bring this action pursuant to Section 73-3-14 (1) (a), Utah Code, wherein "A person aggrieved by an order of the state engineer may obtain judicial review in accordance with Title 63G, Chapter 4, Administrative Procedures Act,..."

Section 63G-4-402, Utah Code, details the law regarding judicial review of informal adjudicative proceedings. The complained of Order for Application to Appropriate Water No. 14-118 (A76676), the CICWCD Order is the product of an informal adjudicative proceeding. Section 63G-4-402 (2)(a)(i) requires the name "of the *party* seeking judicial review." Sections 63G 4-4-2 (2)(a)(iv) and (vi) likewise refer to "*parties*" and "*party*" involved in the informal adjudicative proceeding.

Similarly, Sections 63G-4-401, Utah Code Annotated limits judicial review actions to a "*party*". (Note: all three subsections specifically reference a "*party*" having certain rights.) Subsection 63G-4-103(l)(f) states the definition of the term "*party*" as follows:

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

The Utah Rules of Administrative Code also restrict judicial review to "*any party* aggrieved." Rule 655-6-18.A. Rule 655-6-3.F defines the term "*party*" with slight

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variations as follows:

“Party” means the Division (of Water Rights) or other person commencing an adjudicative proceeding, all respondents, all protestants, all persons permitted by the Presiding Officer to intervene in the proceeding, and all persons authorized by statute or agency rule to participate as parties in an adjudicative proceeding.

The problem UAC and SITLA have is that they simply do not fit under either definition of a “party”. They are not protestants, but SITLA could have been a protestant. UAC argues that it did not exist on October 17, 2006, when the subject application was filed. That is right, but its co-petitioner SITLA did exist and surely had land that would be impacted by the application. SITLA could have easily filed a protest, which would have enabled it to be a “party,” SITLA would then be authorized to proceed in this action.

UAC still did not exist in July 2010, when the hearings on the CICWCD application were held. SITLA did exist and could have belatedly sought to protest in that proceeding, if it had so desired. In addition, UAC did exist as of August 21, 2012, when it filed its own application with SITLA, based upon land SITLA owned. As the lessor and leasee UAC and SITLA could have belatedly together sought to protest in the subject CICWCD application.

The petitioners did not appear motivated to act until the State Engineer issued his ruling converting their application to a fixed period, subordinate to the CICWCD

application.

The fact of the matter is UAC and SITLA do not fit the definition of a *party* and they did not seek to protest and as such this Court lacks subject matter jurisdiction. The motion of the State Engineer should be granted. The petitioners are not entitled to judicial review of the CICWCD application.

II. If somehow UAC and SITLA are "*parties*" entitled to judicial review, have they exhausted their administrative remedies?

Assuming that the Petitioners can somehow overcome their lack of "*party*" status, they then have to establish that they have exhausted their administrative remedies, before they can seek judicial review. Section 63G-4-401(2). They claim that the State Engineer considered both the CICWCD application and the Petitioners' application together, because CICWCD was a protestant of the Petitioners' application and participated in the November 2013 hearing on the Petitioners' application. Therefore, they have exhausted their remedies and should be allowed to proceed with this judicial review action.

This case is very similar to the S&G, Inc. v. Morgan, 797 P.2d 1085 (Utah 1990) case. In S&G the Intermountain Power Agency (hereafter IPA) filed a change application for some water rights it was purchasing from S&G. Rather than participate in the change application action, S&G chose to do nothing. IPA proceeded to the required hearing and the State Engineer took evidence and issued a ruling that S&G did not like. By contract IPA was to seek judicial review of that ruling but did not. S&G then belatedly tried to obtain a judicial review. The Court ruled that S&G lacked standing to

appeal because it had waived its right to participate at the appellate level through its intentional inaction at the administrative level. It had not exhausted its administrative remedies.

SITLA is an owner of some of the land subject to the CICWCD water application. For some reason, SITLA did not protest or otherwise become involved in the 2006, CICWCD application. UAC gets its ability to appropriate water through its lease with SITLA. Thus, it is stuck with the land owner's actions. The hearing for the CICWCD claim was in July 2010. SITLA appears to have intentionally not participated in the CICWCD action before 2010 and it has made no attempt to become involved in it since 2010. SITLA and UAC relied solely on their own application.

As in S&G the intentional choice to not participate in or even attempt to intervene in another application waives the right to later participate.

A claim that the Petitioners exhausted their administrative remedies in the CICWCD application by taking action in only their own application, defeats the purpose of exhausting remedies in the CICWCD application. A party's judicial review right arises only in applications where the party fully participates.

The Petitioners also argue that as proof of their exhaustion of their remedies, the court should note the decisions were issued on back to back days, March 13, 2014, and March 14, 2014. It might also be noteworthy that the Petitioner's water right is made junior to the CICWCD right. All of this is interesting, but not persuasive. The Supreme Court in S&G addressed the need for parties to participate at the administrative level as

follows:

A requirement of participation at agency level "ensures that those who have an interest will bring to the agency's attention all relevant facts and considerations at the time the agency makes its decision. Moreover, the requirement of [participation] gives the agency and other participants notice of the identity and concern of interested parties." (citation omitted) These observations, although made in the context of a statutory requirement of party status, are applicable to any administrative decisions in which interested parties have the right to participate. The requirement of participation as a prerequisite to standing to appeal is a corollary of the doctrine of exhaustion of administrative remedies. It is well settled under this doctrine that persons aggrieved by decisions of administrative agencies "may not, by refusing or neglecting to submit issues of fact to such agencies, by-pass them, and call upon the courts to determine...matters properly determinable originally by such agencies." (citations omitted)

S&G, Inc. v. Morgan, 797P.2d at 1087.

The administrative remedy of intervention is accomplished by seeking to change the application from an informal to a formal adjudicative proceeding. Section 63G-4-202 (3) allows that to happen at anytime before a final order is issued. Converting CICWCD's application to a formal proceeding would have been a way for the Petitioners to intervene. Section 63G-4-207. Thus, protecting their interest by fully participating in the CICWCD action. One can only guess at the outcome, but in theory the State Engineer may well have allowed intervention so as to deal with these competing claims simultaneously. However, the Petitioners chose not to seek to intervene in the CICWCD application.

## CONCLUSION

The Petitioners are not *parties* to the CICWCD application. Without being

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*parties*, this court lacks subject matter jurisdiction. The Petitioners, even if the non-party barrier is overcome, chose not to participate in the CICWCD application and to not fully exhaust their administrative remedies. Consequently the State Engineers Motion to Dismiss is granted.

**Court signature appears at the top of the first page.**

Approved as to form:

SNOW, CHRISTENSEN & MARTINEAU

/s/ Dani Cepernich with permission \_\_\_\_\_.

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TRUST LANDS ADMIN.

/s/ John Andrews with permission \_\_\_\_\_.

John Andrews

Michelle McConkie

Attorneys for Utah School and Institutional Trust Lands Admin.

## CERTIFICATE OF SERVICE

I hereby certify that I caused to be sent a true and correct copy of this **PROPOSED FINAL ORDER AND RULING ON STATE ENGINEER'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION**, via the ECF this 3rd day of October, 2014, to the following:

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## Addendum B

**73-3-14 Judicial review of state engineer order.**

- (1)
  - (a) A person aggrieved by an order of the state engineer may obtain judicial review in accordance with Title 63G, Chapter 4, Administrative Procedures Act, and this section.
  - (b) Venue for judicial review of an informal adjudicative proceeding is in the county in which the water source or a portion of the water source is located.
- (2) The state engineer shall be joined as a respondent in a petition to review the state engineer's decision, but no judgment for costs or expenses of the litigation may be rendered against the state engineer.
- (3) A person who files a petition for judicial review as authorized in this section shall:
  - (a) name the state engineer as a respondent; and
  - (b) provide written notice in accordance with Subsection (5) to each person who filed a protest in accordance with Section 73-3-7 of:
    - (i) the filing of the petition for judicial review; and
    - (ii) the opportunity to intervene in accordance with Utah Rules of Civil Procedure, Rule 24.
- (4) In addition to the requirements of Subsection (3), a protestant in the adjudicative proceeding who files a petition for judicial review shall also name as a respondent the person:
  - (a) who requested the adjudicative proceeding; or
  - (b) against whom the state engineer brought the adjudicative proceeding.
- (5) The written notice required by this section shall:
  - (a) be mailed:
    - (i) within the time provided for by Utah Rules of Civil Procedure, Rule 4(b); and
    - (ii) to the address on record with the state engineer's office at the time the order is issued; and
  - (b) include:
    - (i) a copy of the petition; and
    - (ii) the address of the court in which the petition is pending.
- (6) If a person who files a petition for judicial review fails to provide notice as required by this section, the court shall dismiss the petition without prejudice upon:
  - (a) the motion of a party;
  - (b) the special appearance of a person who:
    - (i) participated in the adjudicative proceeding; and
    - (ii) is not a party; or
  - (c) the court's own motion.
- (7) A person who files a petition for judicial review is not required to:
  - (a) notwithstanding Subsection 63G-4-401(3)(b), name a respondent that is not required by this section; and
  - (b) notwithstanding Subsection 63G-4-402(2)(a)(iv), identify all parties to the adjudicative proceeding.

Amended by Chapter 165, 2008 General Session

Amended by Chapter 382, 2008 General Session

## Addendum C

(e) (i) [Such] The state engineer shall publish notice [shall be published] once each week for three successive weeks in a newspaper of general circulation in the county in which the source of supply is located.

(ii) The notice shall contain [such] information [as shall apprise] that will inform the public of the diligence claimed and the reason for the request.

(f) Any person interested may, at any time within [30] 20 days after [completion of publication of such notice,] the notice is published, file a protest with the state engineer [a written protest against the granting of such extension of time, stating the reasons which shall be considered by the state engineer].

(g) In [the consideration of] considering an application to extend the time in which to place water to beneficial use under an approved application, [whether such application was approved before or after the effective date of this act,] the state engineer shall deny [such] the extension and declare the application lapsed, unless the applicant affirmatively shows that he has exercised or is exercising reasonable and due diligence in working toward completion of the appropriation.

(h) (i) If reasonable and due diligence is shown by the applicant, the state engineer shall approve the extension [which shall be].

(ii) The approved extension is effective so long as the applicant [shall continue] continues to exercise reasonable diligence in completing the appropriation [provided, however, that].

(i) The state engineer shall consider the holding of an approved application by any municipality, metropolitan water district, or other public agency to meet the reasonable future requirements of the public, shall be considered by the state engineer to be reasonable and due diligence within the meaning of this act.

(j) The state engineer, in acting upon requests for extension of time, may, if he finds unjustified delay or lack of diligence in prosecuting the works to completion, deny the [same] extension or may grant the request in part or upon conditions, including a reduction of the priority of all or part of the application. [The decision of the state engineer with respect to such requests for extension of time shall be final unless an action to review such decision is filed in the district court as provided by section 73-3-14.]

(2) (a) An application upon which proof has not been submitted shall lapse and have no further force or effect after the expiration of 50 years from the date of its approval [but if].

(b) If the works are constructed with which to make beneficial use of the water applied for, the state engineer may, upon showing of [such] that fact, grant additional time beyond the 50-year period in which to make proof.

#### Section 294. Section Amended.

Section 73-3-13, Utah Code Annotated 1953, is amended to read:

#### 73-3-13. Protests - Procedure.

(1) Any other applicant, or any user of water from any river system or water source may [protest to] file a request for agency action with the state engineer alleging that such work is not being diligently prosecuted to completion [whereupon].

(2) Upon receipt of the request for agency action, the state engineer shall give the applicant [doing such work or his assigns sixty days' notice by registered mail to his last recorded address to appear on a date to be designated and show cause, if any he has, why his application shall not be declared forfeited in whole or in part, and on such date such applicant or his assigns shall be permitted to produce any lawful evidence tending to show compliance on his part with the law. At such hearing the state engineer may hear and consider any and all competent evidence tending to show whether or not the applicant or his assigns have complied with the law] notice and hold an adjudicative proceeding.

(3) If diligence is not shown by the applicant, the state engineer may declare the application and all rights [thereunder] under it forfeited. [The decision of forfeiture shall be final unless an action to review it is filed as provided by section 73-3-14.]

#### Section 295. Section Amended.

Section 73-3-14, Utah Code Annotated 1953, as last amended by Chapter 47, Laws of Utah 1986, is amended to read:

#### 73-3-14. Venue for judicial review - State engineer as defendant.

(1) (a) Any [In any case where a decision of the state engineer is involved any] person aggrieved by [the decision may within 60 days after notice bring a civil action in the district court for a plenary review. The state engineer shall give notice of his decision by mailing a copy by regular mail to the applicant and to each protestant. Notice is considered to have been given on the date of mailing. The place of trial, subject to the power of the court to change it as provided by law,] an order of the state engineer may obtain judicial review by following the procedures and requirements of Chapter 46b, Title 63.

(b) Venue for judicial review of informal adjudicative proceedings shall be in the county in which the stream or water source, or some part of it, is located.

(2) The state engineer shall be joined as a defendant in all suits to review his decisions, but no judgment for costs or expenses of the litigation may be rendered against him. [Parties shall be served with process as in other cases and notice of the pendency of the action shall be filed by the clerk of the district court with the state engineer within 20 days after it is commenced, which operates to stay all further proceedings pending the decision of the district court. Review of the decision of the district court shall be by the Supreme Court.]

#### Section 296. Section Amended.

Section 73-3-15, Utah Code Annotated 1953, as last amended by Chapter 160, Laws of Utah 1955, is amended to read:

## Addendum D

**CHAPTER 165****H. B. 203**

Passed March 5, 2008

Approved March 17, 2008

Effective May 5, 2008

**JUDICIAL REVIEW OF STATE  
ENGINEER'S DECISION**

Chief Sponsor: Patrick Painter

Senate Sponsor: Kevin T. VanTassell

**LONG TITLE****General Description:**

This bill amends provisions relating to the judicial review of a state engineer decision.

**Highlighted Provisions:**

This bill:

- requires a person seeking judicial review to:
  - name the state engineer, and in some cases the person who is the subject of the proceeding, as a respondent; and
  - give notice to a person who protested during the adjudicative proceeding; and
- makes technical changes.

**Monies Appropriated in this Bill:**

None

**Other Special Clauses:**

None

**Utah Code Sections Affected:****AMENDS:**

73-3-14, as last amended by Laws of Utah 1987, Chapter 161

*Be it enacted by the Legislature of the state of Utah:*

**Section 1. Section 73-3-14 is amended to read:**

**73-3-14. Judicial review of state engineer order.**

(1) (a) ~~[Any]~~ A person aggrieved by an order of the state engineer may obtain judicial review ~~[by following the procedures and requirements of]~~ in accordance with Title 63, Chapter 46b, Administrative Procedures Act, and this section.

(b) Venue for judicial review of an informal adjudicative ~~[proceedings shall be]~~ proceeding is in the county in which the ~~[stream or]~~ water source ~~[or some part of it,]~~ or a portion of the water source is located.

(2) The state engineer shall be joined as a ~~[defendant]~~ respondent in ~~[all suits]~~ a petition to review ~~[his decisions]~~ the state engineer's decision, but no judgment for costs or expenses of the litigation may be rendered against ~~[him]~~ the state engineer.

(3) A person who files a petition for judicial review as authorized in this section shall:

- (a) name the state engineer as a respondent; and
- (b) provide written notice in accordance with Subsection (5) to each person who filed a protest in accordance with Section 73-3-7 of:

(i) the filing of the petition for judicial review; and

(ii) the opportunity to intervene in accordance with Utah Rules of Civil Procedure, Rule 24.

(4) In addition to the requirements of Subsection (3), a protestant in the adjudicative proceeding who files a petition for judicial review shall also name as a respondent the person:

(a) who requested the adjudicative proceeding; or

(b) against whom the state engineer brought the adjudicative proceeding.

(5) The written notice required by this section shall:

(a) be mailed:

(i) within the time provided for by Utah Rules of Civil Procedure, Rule 4(b); and

(ii) to the address on record with the state engineer's office at the time the order is issued; and

(b) include:

(i) a copy of the petition; and

(ii) the address of the court in which the petition is pending.

(6) If a person who files a petition for judicial review fails to provide notice as required by this section, the court shall dismiss the petition without prejudice upon:

(a) the motion of a party;

(b) the special appearance of a person who:

(i) participated in the adjudicative proceeding; and

(ii) is not a party; or

(c) the court's own motion.

(7) A person who files a petition for judicial review is not required to:

(a) notwithstanding Subsection 63-46b-14(3)(b), name a respondent that is not required by this section; and

(b) notwithstanding Subsection 63-46b-15(2)(a)(iv), identify all parties to the adjudicative proceeding.



## Addendum E

(4) A person may not intervene in an enforcement action commenced under this section.

(5) After issuance of a final order under rules made pursuant to Subsection (3)(c), the state engineer shall serve a copy of the final order on the person against whom the order is issued by:

(a) personal service under Utah Rules of Civil Procedure 5; or

(b) certified mail.

(6) (a) The state engineer's final order may be reviewed by trial de novo by the district court in:

(i) Salt Lake County; or

(ii) the county where the violation occurred.

(b) A person shall file a petition for judicial review of the state engineer's final order issued under this section within 20 days from the day on which the final order was served on that person.

(7) The state engineer may bring suit in a court of competent jurisdiction to enforce a final order issued under this section.

(8) If the state engineer prevails in an action brought under Subsection (6)(b) or (7), the state may recover all court costs and a reasonable attorney fee.

**Section 2143. Section 73-3-14 is amended to read:**

**73-3-14. Judicial review -- State engineer as defendant.**

(1) (a) Any person aggrieved by an order of the state engineer may obtain judicial review by following the procedures and requirements of [Title 63, Chapter 46b] Title 63G, Chapter 4, Administrative Procedures Act.

(b) Venue for judicial review of informal adjudicative proceedings shall be in the county in which the stream or water source, or some part of it, is located.

(2) The state engineer shall be joined as a defendant in all suits to review [his] the state engineer's decisions, but no judgment for costs or expenses of the litigation may be rendered against [him] the state engineer.

**Section 2144. Section 73-3-25 is amended to read:**

**73-3-25. Well driller's license -- Bond -- Revocation or suspension for noncompliance.**

(1) (a) Every person that constructs a well in the state shall obtain a license from the state engineer.

(b) The state engineer shall enact rules defining the form, the expiration date, and the renewal cycle of the application for a license.

(c) Well drillers' licenses are not transferable. The state engineer shall enact rules for well construction according to the procedures and

requirements of [Title 63, Chapter 46a] Title 63G, Chapter 3, Utah Administrative Rulemaking Act.

(2) (a) (i) A person who constructs a well in this state must first obtain a license as provided in this section.

(ii) Before a well driller's license will be issued, the applicant must file a well driller bond with the state engineer.

(iii) The bond shall be made payable to the Office of the State Engineer.

(iv) In accordance with [Title 63, Chapter 46a] Title 63G, Chapter 3, Utah Administrative Rulemaking Act, the state engineer may make rules to set the amount, form, and general administrative requirements of a well driller bond. Proper compliance with the provisions of this section and the rules enacted under the authority of this section are required to obtain or renew a license.

(b) (i) Well drillers shall comply with the rules enacted by the state engineer under this chapter.

(ii) If the state engineer determines, following an investigation, that the licensee has failed to comply with these rules, the state engineer may revoke or suspend the license, and exact the bond and deposit the money as a nonlapsing dedicated credit.

(iii) The state engineer may expend the funds to investigate or correct any deficiencies which could adversely affect the public interest resulting from noncompliance with the rules promulgated under this chapter by any well driller.

(iv) The state engineer may refuse to issue a license to a well driller if it appears that there has been a violation of the rules or a failure to comply with Section 73-3-22.

**Section 2145. Section 73-3-29 is amended to read:**

**73-3-29. Relocation of natural streams -- Written permit required -- Emergency work -- Violations.**

(1) Except as provided in Subsection (2), a state agency, county, city, corporation, or person may not relocate any natural stream channel or alter the beds and banks of any natural stream without first obtaining the written approval of the state engineer.

(2) (a) The state engineer may issue an emergency permit or order to relocate a natural stream channel or alter the beds and banks of a natural stream as provided by this Subsection (2) and Section [63-46b-20] 63G-4-502.

(b) If an emergency situation arises which involves immediate or actual flooding and threatens injury or damage to persons or property, steps reasonably necessary to alleviate or mitigate the threat may be taken before a written permit is issued subject to the requirements of this section.

(c) (i) If the threat occurs during normal working hours, the state engineer or [his] the state engineer's representative must be notified immediately of the threat. After receiving

## Addendum F

**63G-4-401 Judicial review -- Exhaustion of administrative remedies.**

- (1) A party aggrieved may obtain judicial review of final agency action, except in actions where judicial review is expressly prohibited by statute.
- (2) A party may seek judicial review only after exhausting all administrative remedies available, except that:
  - (a) a party seeking judicial review need not exhaust administrative remedies if this chapter or any other statute states that exhaustion is not required;
  - (b) the court may relieve a party seeking judicial review of the requirement to exhaust any or all administrative remedies if:
    - (i) the administrative remedies are inadequate; or
    - (ii) exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion.
- (3)
  - (a) A party shall file a petition for judicial review of final agency action within 30 days after the date that the order constituting the final agency action is issued or is considered to have been issued under Subsection 63G-4-302(3)(b).
  - (b) The petition shall name the agency and all other appropriate parties as respondents and shall meet the form requirements specified in this chapter.

Renumbered and Amended by Chapter 382, 2008 General Session

**63G-4-402 Judicial review -- Informal adjudicative proceedings.**

(1)

- (a) The district courts have jurisdiction to review by trial de novo all final agency actions resulting from informal adjudicative proceedings, except that the juvenile courts have jurisdiction over all state agency actions relating to:
  - (i) the removal or placement of children in state custody;
  - (ii) the support of children under Subsection (1)(a)(i) as determined administratively under Section 78A-6-1106; and
  - (iii) substantiated findings of abuse or neglect made by the Division of Child and Family Services, after an evidentiary hearing.
- (b) Venue for judicial review of informal adjudicative proceedings shall be as provided in the statute governing the agency or, in the absence of such a venue provision, in the county where the petitioner resides or maintains the petitioner's principal place of business.

(2)

- (a) The petition for judicial review of informal adjudicative proceedings shall be a complaint governed by the Utah Rules of Civil Procedure and shall include:
  - (i) the name and mailing address of the party seeking judicial review;
  - (ii) the name and mailing address of the respondent agency;
  - (iii) the title and date of the final agency action to be reviewed, together with a copy, summary, or brief description of the agency action;
  - (iv) identification of the persons who were parties in the informal adjudicative proceedings that led to the agency action;
  - (v) a copy of the written agency order from the informal proceeding;
  - (vi) facts demonstrating that the party seeking judicial review is entitled to obtain judicial review;
  - (vii) a request for relief, specifying the type and extent of relief requested; and
  - (viii) a statement of the reasons why the petitioner is entitled to relief.
- (b) All additional pleadings and proceedings in the district court are governed by the Utah Rules of Civil Procedure.

(3)

- (a) The court, without a jury, shall determine all questions of fact and law and any constitutional issue presented in the pleadings.
- (b) The Utah Rules of Evidence apply in judicial proceedings under this section.

Amended by Chapter 208, 2011 General Session