

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
Conservancy District, a Utah Water Conservancy District,
Respondents-Appellees.**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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.

**REPLY BRIEF OF
APPELLANTS**

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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I. INTRODUCTION

This appeal concerns the dismissal of a petition seeking judicial review of an order of Appellee Kent L. Jones (the “State Engineer”) approving Appellee Central Iron County Water Conservancy District’s (“CICWCD”) application to appropriate water from the Wah Wah Valley, Beaver County, Utah. Appellants Utah Alunite Corp. (“UAC”) and Utah School and Institutional Trust Lands Administration (“SITLA”) raise two questions on appeal. First, 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? Second, 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)?

II. 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 District Court Had the Opportunity to Rule on, and Did Rule on, the Issue of Whether UAC and SITLA Could Bring This Action as “Person[s] Aggrieved” Under Section 73-3-14(1)(a).

In their opening brief, UAC and SITLA explained that the district court erred as a matter of law finding that they had to be a “party” to obtain judicial review of the CICWCD Order. (UAC/SITLA Br. at 11-16.) Contrary to the district court’s decision, Utah Code Ann. § 73-3-14(1)(a) expressly allows a “*person aggrieved* by an order of the state engineer” to “obtain judicial review in accordance with Title 63G, Chapter 4, Utah

Administrative Procedures Act [“UAPA”], and this section.” (Emphasis added.)

According to CICWCD and the State Engineer, UAC and SITLA did not present that issue to the district court and the district court did not consider it. (CICWCD Br. at 10-14; State Engineer Br. at 14-15.)¹ The record proves otherwise.

Utah courts generally will not consider issues, arguments, or matters raised for the first time on appeal. *Patterson v. Patterson*, 2011 UT 68, ¶ 12, 266 P.3d 828. As explained in *Patterson*, the rule is based on considerations of judicial economy and fairness. 2011 UT 68, ¶ 15. Judicial economy is furthered by giving “the trial court an opportunity to address the claimed error, and if appropriate, correct it.” *Id.* (internal quotation marks and citation omitted). Thus, preservation turns on whether an issue “has been ‘presented to the district court in such a way that the court has an opportunity to rule on [it].’” 2011 UT 68, ¶ 12 (brackets in original; citation omitted).

Here, the issue of UAC and SITLA’s standing under Section 73-3-14(1)(a) was preserved before the district court. In opposition to CICWCD and the State Engineer’s motion to dismiss, UAC and SITLA specifically argued that the statute gave them standing as a “person aggrieved” to maintain their petition for judicial review (R.92), and that, in addition, they had satisfied the underlying purpose of the exhaustion requirement

¹ While the State Engineer contends UAC and SITLA should be unable to raise Section IV.A.2 of their opening brief, CICWCD appears to argue that UAC and SITLA are precluded from raising any issue relating to Section 73-3-14(1)(a).

(R.92-95).² In response to those arguments, CICWCD and the State Engineer argued that under Utah Code Ann. §§ 63G-4-401 and -402, only a “party aggrieved” may obtain judicial review of a final agency action. (R.271-72, 307-08.)

Undoubtedly as a result, the district court perceived the issue as whether UAC and SITLA could bring the action as a “person aggrieved” under Section 73-3-14(1)(a).

(R.356.) As the district court stated, “[t]he 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,’” (*Id.*) Despite that, the district court did not address Section 73-3-14(1)(a) or the interplay with the UAPA. Instead, the district court turned exclusively to what it means to obtain judicial review in accordance with the UAPA and whether the UAPA controls the right to judicial review in this case. In particular, the district court discussed Utah Code Ann. §§ 63G-4-402 (for “the law regarding judicial review of informal adjudicative proceedings”), 63G-4-401 (which “limits judicial review actions to a ‘party’”), and 63G-4-103(1)(f) (which “states the definition of the term ‘party’”). (R.356-57.)

Based on this, the district court concluded that “UAC and SITLA do not fit the definition of *party* and they did not seek to protest.” (R.358 (emphasis in original).) In doing so, the district court incorrectly interpreted Section 73-3-14(1)(a) together with the

² Alternatively, UAC and SITLA argued that they should be excused from the requirement of exhaustion pursuant to Utah Code Ann. § 63G-4-401(2)(b). (R.95-98.)

UAPA to mean that only a “party” can seek judicial review of an order of the State Engineer and considered the interplay between the statutes. (R.356-57.) The district court thus had an opportunity to, and did in fact, rule on whether UAC and SITLA were aggrieved persons under Section 73-3-14(1)(a). Because the issue of UAC and SITLA’s right to petition for judicial review under Section 73-3-14(1)(a) was presented to the district court and the district court considered and addressed it, the issue was preserved.

2. The Plain Language of Section 73-3-14(1)(a) Allows a “Person Aggrieved” to Obtain Judicial Review of a State Engineer’s Order Under the UAPA and “This Section.”

In this appeal, UAC and SITLA rely on the plain and express language of Section 73-3-14(1)(a) to support their right to seek judicial review of the State Engineer’s order approving CICWCD’s application. (*See* UAC/SITLA Br. at 11-13.) Despite that plain language, CICWCD and the State Engineer contend, just as the district court found, that the UAPA controls UAC and SITLA’s right to judicial review under Section 73-3-14(1)(a). (CICWCD Br. at 15-22; State Engineer Br. at 10-22.) CICWCD and the State Engineer rely primarily on the language of Utah Ann. Code § 63G-4-102(1), which they both maintain trumps Section 73-3-14(1)(a). (*See id.*)

Section 63G-4-102(1) states that “except as otherwise provided by a statute superseding provisions of this chapter by explicit reference to this chapter, the provisions of this chapter apply to every agency of the state and govern: (a) state agency action that determines the legal rights, duties, privileges, [or] immunities ...; and (b) judicial review of the action.” There is little case law interpreting Section 63G-4-102(1) and none

expressly weighing the impact of the provisions to Section 73-3-14. Regardless, CICWCD and the State Engineer misconstrue the effect of the provision as it relates to Section 73-3-14 based on the plain language of the statutes.

By its plain language, Section 63G-4-102(1) allows a statute to supersede the provisions of the UAPA by explicit reference to the UAPA. Section 73-3-14(1)(a) does just that. It specifically provides that “[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.” *Id.* (emphasis added). Thus, under the statute, the right to judicial review is governed by the UAPA *and* Section 73-3-14 itself. By explicitly referring to both the UAPA and itself, Section 73-3-14 allows a “person aggrieved” to obtain judicial review, superseding the UAPA.

That Section 73-3-14 supersedes the UAPA by explicit reference is confirmed by the entirety of the statute, as it dictates what “*a person*” is required to do and not do when filing a petition for judicial review. For example,

- Section 73-3-14(3) states that “[*a*] person who files a petition for judicial review as authorized in this section shall” name the State Engineer as a respondent in the petition and provide written notice of the petition in accordance with Section 73-3-14(5). (Emphasis added.)
- Section 73-3-14(6) states what happens “[i]f 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. (Emphasis added.)

- Section 73-3-14(7) states that “[a] person who files a petition for judicial review is not required to,” notwithstanding the UAPA, “name a respondent that is not required by this section” or “identify all parties to the adjudicative proceeding.” (Emphasis added.)

It follows that by explicitly referencing the UAPA “and this section,” Section 73-3-14 is a statute superseding provisions of the UAPA as contemplated by Section 63G-4-102(1). Specifically, a “person aggrieved” by order of the State Engineer is expressly allowed to obtain judicial review under the UAPA “and this section.”

Sections 63G-4-401 and -402 are thus superseded by Section 73-3-14 and are rendered general enactments governing judicial review of final actions taken by the State Engineer. (*See also* UAC/SITLA Br. at 11-16.) The State Engineer’s administrative rules cannot change that reality. (*See* CICWCD Br. at 15, 17-18, 20.) While Utah Admin. Code R655-6-18(A) provides that “[a]ny party aggrieved” by an order of the State Engineer can seek judicial review, an agency’s rules must be consistent with its governing statute and cannot “abridge, enlarge, extend or modify [a] statute.”

Draughon v. Dep’t of Fin. Institutions, State of Utah, 1999 UT App 42, ¶ 5, 975 P.2d 935 (brackets in original; internal quotation marks and citation omitted).

The Utah Supreme Court’s holdings in *S & G, Inc. v. Morgan*, 797 P.2d 1085 (Utah 1990), and *Taylor-West Weber Water Improvement District v. Olds*, 2009 UT 86, 224 P.3d 709, also cannot rewrite Section 73-3-14. As explained in UAC and SITLA’s opening brief, *S & G* addressed a prior version of Section 73-3-14 that did not expressly

incorporate the UAPA, as the current statute does. (UAC/SITLA Br. at 20-21.) The issue in *Taylor-West Weber* was whether a nonparty can intervene in the de novo review of the State Engineer's order in the district court pursuant to the Utah Rule of Civil Procedure 24. 2009 UT 86, ¶ 1. The nonparty did not seek to initiate judicial review under Section 73-3-14 and the UAPA.³ As the Court noted in *Taylor-West Weber*, "an intervenor is not the same as a party seeking judicial review." 2009 UT 86, ¶ 8.

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 Utah Code Ann. § 63G-4-401(2)(b).

UAC and SITLA also explained in their opening brief that there are exceptions to the UAPA's exhaustion requirements. (See UAC/SITLA Br. at 16-17.) Specifically, Utah Code Ann. § 63G-4-401(2)(b) allows the district court to "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." Because UAC and SITLA were entitled to seek judicial review under Utah Code Ann. § 73-3-14 in accordance with the UAPA and that section, the district court erred when it did not consider whether they should be relieved from exhaustion requirements. (*Id.* at 18-20.)

³ In addition, *Taylor-West Weber* concerned a petitioner who intentionally failed to participate in a hearing before the State Engineer, despite an existing interest. 2009 UT 86, ¶ 1. As explained further below, that is not the case here.

CICWCD and the State Engineer do not address this issue directly but instead contend that the exceptions do not apply because UAC and SITLA could have, but did not, participate to the adjudication of CICWCD's application.⁴ (See CICWCD Br. at 22-30; State Engineer Br. at 26-32.) CICWCD and the State Engineer's contentions are addressed in turn.

1. Because the State Engineer Waited Nearly Eight Years to Rule on CICWCD's Application, UAC and SITLA Had No Opportunity to Participate in That Administrative Proceeding.

According to CICWCD, UAC and SITLA had a right to participate in the adjudication of CICWCD's application but chose not to and thus waived their right to pursue this appeal. (CICWCD Br. at 24-30.) In particular, CICWCD contends that UAC and SITLA could have changed the proceeding from an informal to a formal adjudication and then intervened to protest the application under the UAPA. If that argument had merit, one would expect the State Engineer to raise it as well. But the State Engineer does not, undoubtedly because—as the State Engineer knows—his administrative rules do not allow intervention.

The State Engineer's rules designate that all adjudicative proceedings are informal proceedings. Utah Admin. Code R655-6-2. "Intervention is *prohibited* except where a

⁴ CICWCD does contend that the district court considered the exhaustion exceptions and refused to apply them. (See CICWCD Br. at 23 (citing R.358-60).) Nothing in the district court's decision, however, supports that contention. The district court simply considered this question: if UAC and SITLA could overcome their lack of "party" status, have they exhausted their administrative remedies? (R.358.) The district court did not cite or consider the exceptions under Section 63G-4-401(2)(b)(i) or (ii). (See R.358-60.)

federal statute or rule requires that a state permit intervention.” Utah Admin. Code R655-6-8 (emphasis added); *see also* Utah Code Ann. § 63G-4-203(1)(g). Despite those limitations, CICWCD argues that UAC and SITLA could have changed the application from an informal proceeding to a formal proceeding pursuant to Utah Code Ann. § 63G-4-202(3) and *then* intervened pursuant to Utah Code Ann. § 63G-4-207. CICWCD is incorrect. As nonparties, UAC and SITLA could not have converted the proceeding when intervention was expressly prohibited in the first place. *See Butler v. Wilkinson*, 740 P.2d 1244, 1263 (Utah 1987) (“A court may not grant relief to a nonparty.”).

Beyond that, the State Engineer’s prohibition on intervention undermines CICWCD’s reliance on *Republic Outdoor Advertising, LC v. Utah Department of Transportation*, 2011 UT App 198, ¶¶ 21, 34, 258 P.3d 619 (holding plaintiff could have requested informal administrative proceeding on challenged billboard permits be converted to formal proceedings to allow intervention). In that decision, this Court considered a nonparty’s right to intervene in a formal adjudication overseen by the Utah Department of Transportation. 2011 UT App 198, ¶¶ 19, 20. Unlike the State Engineer’s rules here, the Department of Transportation’s rules did not contain a prohibition on intervention. *See* Utah Admin. Code R907-1. Thus, in *Republic Outdoor Advertising*, the nonparty had a right to and could intervene. *See id.* That is not the case here.

Next, CICWCD relies on *Republic Outdoor Advertising* to argue that UAC and SITLA cannot satisfy the exceptions to the exhaustion requirement under Section 63G-4-401(2)(b). (CICWCD Br. at 26-29.) There, however, the district court considered and

ultimately found that the exhaustion exceptions did not apply, and this Court affirmed that determination. 2011 UT App 198, ¶¶ 34-37. Here, as already noted, the district court did not consider the exhaustion exceptions; it only found that UAC and SITLA, if parties, failed to exhaust their available administrative remedies. (R.358-60.)

And, even if the district court had considered the exceptions, as already noted, the facts and administrative procedure at issue in *Republic Outdoor Advertising* are far different from the facts and procedure here. Here, the State Engineer waited nearly eight years to issue the CICWCD Order, a delay that prevented UAC and SITLA from participating in those proceedings. (See R.4 ¶ 12; R.5 ¶ 18.) Nevertheless, throughout that period, the State Engineer had a statutory duty to investigate and determine whether CICWCD's application would "interfere with the more beneficial use of the water" or "prove detrimental to the public welfare." Utah Code Ann. § 73-3-8(1)(a)(ii), (b)(i). Further, its own rules 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) (emphases added).

Here, the State Engineer held a hearing on UAC and SITLA's application for water rights in Wah Wah Valley in November 2013. (R.7 ¶ 38; R.187.) At that time, CICWCD's application had been pending for over seven years, having been filed in October 2006 and heard in July 2010. (R.4 at ¶¶ 12, 16; R. 16.) The extreme delay in ruling on CICWCD's application required the State Engineer to investigate whether there was a more beneficial use for the Wah Wah Valley's water and consider facts in any of

its records or presented at any hearings. *See* Utah Code Ann. § 73-3-8(1)(a)(ii), (b)(i); Utah Admin. Code R655-6-16(A).

Accordingly, the State Engineer did not rule on CICWCD's application until after he held a hearing on UAC and SITLA's application. (*See* R.7-8 at ¶ 39.) In addition, CICWCD participated as a protestant in that hearing. (*See* R.7 at ¶ 37; R.187, 191-92.) Six months later, in May 2014, the State Engineer ruled on CICWCD's application and UAC and SITLA's application a day apart. (R.7-8 at ¶ 39.) By doing so, he considered the applications as competing interests for the same water and ultimately determined that CICWCD's interest and UAC and SITLA's interest "can reasonably be expected to coexist." (R.105 at ¶ 9; R.191-92.)

The basic purpose of the exhaustion requirement was thus satisfied. *See Republic Outdoor Adver.*, 2011 UT App 198, ¶ 33 (explaining purpose of doctrine of exhaustion of administrative remedies: to allow agency to make factual record, apply its expertise, and correct errors). The State Engineer made a factual record on both applications for water rights in Wah Wah Valley and addressed the applications together. Exhaustion was thus not required, as the administrative remedies available to UAC and SITLA were inadequate, served no purpose, and would result in irreparable harm given the nearly eight-year delay it took the State Engineer to rule on CICWCD's application. Because the district court failed to consider the exceptions under Section 63G-4-401(2)(b), its decision should be vacated and remanded for consideration of the exceptions.

2. Because the State Engineer Waited Nearly Eight Years to Rule on CICWCD's Application, UAC and SITLA Did Not Delay Asserting an Interest in CICWCD's Application and Should Not be Precluded from Seeking Judicial Review.

The State Engineer takes a different tack than CICWCD with respect UAC and SITLA's inability to participate in the administrative proceedings on CICWCD's application. Specifically, for the first time on appeal, the State Engineer contends UAC and SITLA are not entitled to judicial review because they "slumbered" and "sat on their hands" in asserting their interest in the application. (*See* State Engineer Br. at 26-28.) The State Engineer also contends that public policy justifies the dismissal of UAC and SITLA's petition. (*See id.* at 28-32.)

In support of these contentions, the State Engineer speculates, as did the district court (R.357), that SITLA had an interest in water rights from Wah Wah Valley in October 2006, when CICWCD filed its application.⁵ (State Engineer Br. at 27-28.) There is nothing in the record that shows that SITLA had any interest at that time. (*See* UAC/SITLA Br. at 7 n.2.) But even if SITLA did have an interest, it still had no opportunity to meaningfully protest the application. The State Engineer held the evidentiary hearing in July 2010—almost a year before UAC entered into an agreement with SITLA to explore a possible mining development (R.6 at ¶ 27)—and then waited over three more years to issue an order on CICWCD's application.

⁵ CICWCD makes a similar argument at pages 24-25 of its brief.

The State Engineer cannot flip the inequities and burden of the almost eight years—from October 2006 to May 2014—it took to investigate and rule on CICWCD’s application. The situation here was created by the State Engineer. Further, the information surrounding CICWCD’s application changed in the intervening eight years, leaving the State Engineer with no choice but to investigate and consider whether there was a more beneficial use of that water and the true impact to the public welfare. *See* Utah Code Ann. § 73-3-8(1)(a)(ii), (b)(i); Utah Admin. Code R655-6-16(A). The years of delay thus allowed the State Engineer to consider and weigh the competing applications for water rights in Wah Wah Valley.

* * *

In sum, the district court should have considered whether UAC and SITLA satisfied exceptions to the requirement to exhaust administrative remedies under Utah Code Ann. § 63G-4-401(2)(b). UAC and SITLA were not “strangers” to the State Engineer’s actions. (State Engineer Br. at 30.) The State Engineer failed to act on CICWCD’s application for nearly eight years, and that delay created circumstances where it appears exhaustion would serve no useful purpose or where it appears there is a likelihood of some oppression or injustice that would be unconscionable.

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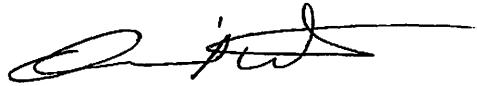
III. CONCLUSION

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: June 17, 2015.

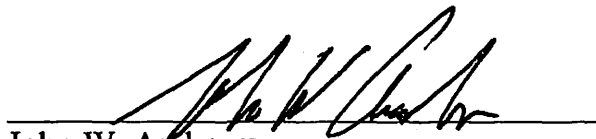
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CERTIFICATE OF COMPLIANCE

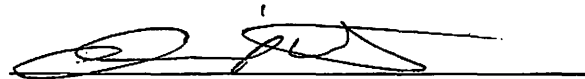
I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 3,454 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 17th day of June, 2015.

STOEL RIVES LLP



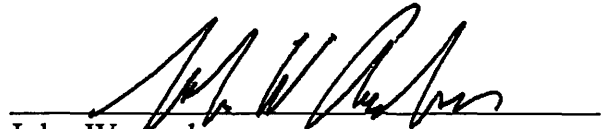
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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANTS** on the following by first-class mail, postage pre-paid on the 17th day of June, 2015.

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



David L. Mortensen