

2015

**Utah Alunite Corp. And the Utah School and Institutional Trust  
Lands Administration, Petitioners/Appellants, v. Kent T. Jones,  
p.e., Utah State Enginner, and Central Iron County Water  
Conservancy District, Defendants/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 L. JONES, P.E., Utah State  
Engineer, and CENTRAL IRON COUNTY  
WATER CONSERVANCY DISTRICT,

Defendants/Appellees.

No. 20140924-CA

District Court No. 140500015

BRIEF OF APPELLEE

Appeal from the Fifth Judicial District Court, Beaver County, Utah  
Honorable Paul D. Lyman, Presiding

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UTAH APPELLATE COURTS

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SCHOOL AND INSTITUTIONAL  
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## **JURISDICTION**

The Utah Court of Appeals has jurisdiction pursuant to Utah Code Section 78A-4-103(j) (cases transferred to the Court of Appeals from the Supreme Court).

## **ISSUES ON APPEAL**

Appellants Utah Alunite Corp. (Utah Alunite) and the Utah School and Institutional Trust Lands Administration (SITLA) appeal the dismissal of their Petition seeking judicial review of an order of the State Engineer approving in part an application to appropriate water filed by the Central Iron County Water Conservancy District (the District). Appellants filed a petition for judicial review of the State Engineer's order under Utah Code § 73-3-14(1)(a), which provides, "A person aggrieved by an order of the state engineer may obtain judicial review in accordance with Title 63G, Chapter 4, Administrative Procedures Act."

The State Engineer moved to dismiss Appellants' Petition on the bases that Appellants were not "parties" entitled to seek judicial review and had failed to exhaust their administrative remedies. The District joined in that motion. The district court agreed and dismissed the Petition for lack of subject matter jurisdiction.

I. Was the district court correct in holding that Appellants, as non-parties to the State Engineer's informal adjudication of the District's application to appropriate, could not seek judicial review of the State Engineer's order?

**Not preserved for review:** The State Engineer and the District argued that neither Appellant was a "party" to the informal adjudication of the District's application and thus could not seek judicial review. (R. 55-57, 78-79, 271-72, 307-11.) Appellants

did not address this issue in their Opposition. Rather, they argued that they “clearly are . . . aggrieved part[ies]” (R. 92) and should be allowed “to proceed as aggrieved parties under UAPA” (R. 86). As discussed in Section I(a), this is insufficient to preserve Appellants’ argument that they need only be “persons aggrieved” to seek judicial review of District’s application. (*See* Appellants’ Br. at 11-16.)

Appellants did not provide a statement of grounds for seeking review of this unpreserved issue.

**Standard of Review:** If this issue was preserved for appellate review, courts “review questions of statutory interpretation for correctness, affording 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 (internal quotation marks omitted).

**II.** If Appellants are able to seek judicial review as non-parties, was the district court correct in refusing to excuse them from the requirement that they exhaust administrative remedies? (R. 9-10, 95-98, 274-77, 310.)

**Standard of Review:** Whether the district court properly granted a motion to dismiss for lack of subject matter jurisdiction, including for failure to exhaust administrative remedies, is “a question of law, [courts] review for correctness, giving no deference to the decision of the trial court.” *Gunn v. Utah State Ret. Bd.*, 2007 UT App 4, ¶ 6, 155 P.3d 113 (internal quotation marks omitted).

## **DETERMINATIVE AUTHORITY**

### **I.**

Utah Admin. Code R655-6-18(A): “Any party aggrieved by an order of the State Engineer may obtain judicial review by following the procedures and requirements of Sections 63G-4-401 and -402 and 73-3-14 and -15.” The full text of Rule 655-6-18 is provided as Addendum A.

Utah Code § 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.” The full text of Utah Code § 73-3-14 can be found at Addendum B to Appellants’ Brief.

Utah Code § 63G-4-401(1): “A party aggrieved may obtain judicial review of final agency action, except in actions where judicial review is expressly prohibited by statute.” The full text of Utah Code § 63G-4-401 can be found at Addendum F to Appellants’ Brief.

Utah Admin. Code R655-6-3(F): “‘Party’ means the Division 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 full text of Rule 655-6-3 is provided as Addendum B.

Utah Code § 63G-4-103(f): “‘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 full text of Utah Code § 63G-4-103 is provided as Addendum C.

## II.

Utah Code § 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.” The full text of Utah Code § 63G-4-402 can be found at Addendum F to Appellants’ Brief.

### **STATEMENT OF THE CASE**

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

The District agrees with Appellants’ description of the nature of the case with one exception. The district court held that Appellants had failed to exhaust their administrative remedies. (R. 358-60.) Contrary to Appellants’ contention, in doing so, the district court did consider whether Appellants should be relieved of the exhaustion requirement. (*Id.*) Specifically, it noted that SITLA, despite owning the land now proposed to be part of the Blawn Mountain project at the time of the District’s application, chose not to become involved in the informal adjudicative proceeding. (R. 359.) It further considered the possibility that Appellants could have later sought to change the proceedings from informal to formal adjudicative proceedings so that they could have intervened. (R. 360.)

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

The District agrees with Appellants' description of the course of proceedings and disposition below.

**C. Statement of Facts**

The District is a water conservancy district formed in 1997 to provide water to an area that includes the Cedar Valley, portions of the Beryl/Enterprise area, portions of Parowan Valley, and portions of the Lower Colorado River Basin. (R. 2.) On October 17, 2006, the District filed three applications to appropriate groundwater: one for Wah Wah Valley, one for Pine Valley, and one for Hamblin Valley. (R. 4.) It did so to meet the growing demand for water. While Appellants have repeatedly claimed that the District's maximum water supply need by 2060 will be 11,470 acre feet (AF) of water (R. 87), this "fact" is based on what appears to be reliance on and mischaracterization of outdated planning documents.<sup>1</sup> More current studies reveal a greater need. The District's application to appropriate water from the Wah Wah Valley (Application) is the subject of this appeal. In that Application, the District sought to appropriate 12,000 AF of groundwater annually. (R. 4.)

Approximately 300 people or entities filed protests to the District's Application, as provided by Utah Code Section 73-3-7. (R. 4, 14-16, 265.) Neither Utah Alunite nor SITLA was among the protestants. (R. 4.) In July 2010, the State Engineer held a

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<sup>1</sup> Appellants appear to rely on the 2008 Lake Powell Pipeline Study Water Needs Assessment. The 11,470 AF figure Appellants take from that document was an estimate of the amount of water that would be needed from the Lake Powell Pipeline—a project that is no longer in the District's future—to meet projected 2060 needs, not the total projected need, which was estimated to be 29,440 AF.



hearing on the District's Application. (R. 4.) Not having filed a protest, neither Utah Alunite nor SITLA was present at or involved in that hearing.

The following year, in April 2011, Utah Alunite entered into a three-year exploration agreement with SITLA for a proposed mining development to be located on SITLA-owned lands within Wah Wah Valley. (R. 6.) SITLA presumably owned this land long before 2006, when the District filed its Application. (R. 2, 6; *see also* West Desert Land Exchange Act, Pub. Law 106-301 (Oct. 13, 2000).) Notably, neither Utah Alunite nor SITLA have ever claimed otherwise.

The project contemplated in the 2011 exploration agreement is referred to as the Blawn Mountain Project (Project). (R. 6.) The Project proposes to mine approximately 11,500 acres for alunite ore to be used in the production of sulphate of potash and alumina. (*Id.*) According to the most recent public securities filings of Potash Ridge, Utah Alunite's parent company, Utah Alunite has no source of income and has yet to raise sufficient funds (\$25 million) to complete the feasibility study for the Project, without which construction on the Project cannot proceed. (March 5, 2015, Annual Information Form at 10, 12-13, available at [www.sedar.com](http://www.sedar.com).) As of December 31, 2014, Utah Alunite's current liabilities exceeded its cash and cash equivalents, and investors were given going concern warnings. (*Id.* at 12-13.)<sup>2</sup>

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<sup>2</sup> The District recognizes that these facts are not in the Record. However, Appellants' description of the Project, which is based on outdated facts that were presented to the district court, fails to provide an accurate representation of the Project's current status. The District offers these additional facts only to place Appellants' statements in context. The status and merits of the Project are not relevant to the narrow issue before the Court—whether Appellants can seek judicial review of the District's Application.

In connection with that Project, on August 21, 2012, Appellants jointly filed an application to appropriate 6,500 AF of groundwater annually from Wah Wah Valley. (R. 7.) The State Engineer held a hearing on Appellants' application in November 2013. (*Id.*) As a protestant to Appellants' application, the District attended and participated in that hearing. (R. 265.) However, contrary to Appellants' suggestion, the hearing on Appellants' application did not involve questions regarding the District's earlier-filed Application, which had already undergone its own hearing. (R. 265-66.) The District did not bring any of its witnesses or supporting documentation to present in defense of its Application. (*Id.*) And, during the hearing, there was no discussion of the merits of the District's Application. (R. 188, 265-66.)

On May 13, 2014, the State Engineer issued an order approving the District's Application in part, approving diversion of 6,525 AF of groundwater annually from Wah Wah Valley (Order). (R. 5.) The following day, the State Engineer issued an order approving Appellants' application for diversion of 6,500 AF of groundwater annually for a fixed twenty-year period, subject to the District's senior right. (R. 7-8.) Following a request for reconsideration made by Appellants, the State Engineer issued an amended order extending the fixed period from twenty to thirty years. (R. 8.) Appellants claim that the State Engineer's orders on the District's Application and Appellants' application leave Utah Alunite without a secure water source for its project. (R. 9-11.) However, Utah Alunite's parent company, Potash Ridge Corp., has repeatedly represented to the public that Utah Alunite has "secured" water rights that "meet[] the water requirements of the Project." (R. 269, 280; *see also* R. 284.)

On July 21, 2014, Appellants filed a Petition for judicial review, seeking *de novo* review of the District's Application. (R. 1-37.) Upon a Motion to Dismiss filed by the State Engineer, in which the District joined, the district court dismissed Appellants' petition on the bases that Appellants were not parties to the informal adjudication of the District's Application, and thus were not entitled to seek judicial review, and that Appellants had failed to exhaust their administrative remedies.

### **SUMMARY OF ARGUMENT**

#### **I.**

Appellants did not preserve for appellate review the argument they now raise—that “party” status is not required in order to seek judicial review of an order of the State Engineer. Because Appellants undisputedly were not parties to the informal adjudication of the District's Application, they cannot seek judicial review under Utah Code Section 73-3-14 and Utah's Administrative Procedures Act, Title 63G, Chapter 4, Part 4.

Even if Appellants preserved their argument for appellate review, the district court was correct in holding that only parties may seek judicial review of an order of the State Engineer. The Utah Supreme Court has previously interpreted the phrase “person aggrieved” as used in a former version of Section 73-3-14 to require participation in the adjudicative proceedings. When the legislature enacted Utah's Administrative Procedures Act in 1987, that Section was amended to explicitly incorporate the requirements and procedures of Act, which limits the availability of judicial review of administrative proceedings to “parties.” This is reflected in the Administrative Rules governing judicial review of orders of the State Engineer. Because there is no conflict

between Section 73-3-14 and the Administrative Procedures Act, Appellants' statutory interpretation arguments are inapplicable.

## II.

The district court was correct in refusing to excuse Appellants from exhausting their administrative remedies. Despite having an interest in the land that is to be part of the Blawn Mountain Project at the time the District filed its Application, SITLA chose not to participate in the informal adjudicative proceedings on that Application. It has provided no explanation for not having done so. Even setting this initial decision aside, neither Utah Alunite nor SITLA made any effort to convert the informal adjudicative proceedings into formal adjudicative proceedings as provided by Utah Code Section 63G-4-202 so that they could intervene in the proceedings as provided by Section 63G-4-207. They had more than three years to do so after entering into the exploration agreement for the Project. The Utah Court of Appeals has previously held that the availability of this approach constitutes an adequate administrative remedy that must be pursued.

To the extent Appellants argue they should be relieved of the exhaustion requirement because they effectively exhausted their administrative remedies through the proceedings on their own application, the Utah Court of Appeals has rejected a nearly identical "collateral exhaustion" requirement. The proceedings on Appellants' application did not involve substantive challenges to the District's Application, nor did it give the District fair notice and an opportunity to be heard in support of its Application.

This is not the unusual case that would warrant an exception to the well established rule that parties must exhaust administrative remedies before seeking judicial review.

### **ARGUMENT**

#### **I. THE DISTRICT COURT WAS CORRECT IN HOLDING THAT APPELLANTS, AS NON-PARTIES, COULD NOT SEEK JUDICIAL REVIEW.**

##### **A. Appellants Did Not Preserve the Issue of Whether Only “Parties” May Seek Judicial Review of an Order of the State Engineer.**

Appellants argue for the first time on appeal that “party” status is not required in order to be eligible to seek judicial review of an order of the State Engineer. In its Motion to Dismiss, the State Engineer pointed to Appellants’ lack of party status as the first reason supporting dismissal. Appellants ignored this argument in their Response, focusing instead on their argument that they had effectively exhausted administrative remedies. As a result, they have failed to preserve for appellate review the issue of whether “party” status is required in order to seek judicial review of an order of the State Engineer under Utah Code Sections 73-3-14, 63G-4-401, and 63G-4-402.

“Utah law requires parties to preserve arguments for appellate review by raising them first in the forum below . . . .” *Columbia HCA v. Labor Comm’n*, 2011 UT App 210, ¶ 6, 258 P.3d 640. Accordingly, Utah appellate courts “normally will not consider arguments on appeal which were not raised before the trial court.” *Olson v. Park-Craig-Olson, Inc.*, 815 P.2d 1356, 1358 (Utah Ct. App. 1991); *see also Jacob v. Bezzant*, 2009 UT 37, ¶ 34, 212 P.3d 535 (“[W]e do not address arguments brought for the first time on appeal unless the [district] court committed plain error or exceptional circumstances



exist.” (internal quotation marks omitted, second alteration in original)); *Busch Corp. v. State Farm Fire & Cas. Co.*, 743 P.2d 1217, 1219 (Utah 1987) (“Generally, when an argument has not been made in the trial court, we will not allow it to be raised on appeal.”).

In order to preserve an issue for appeal, a party must make a timely and specific objection. *Groberg v. Hous. Opportunities, Inc.*, 2003 UT App 67, ¶ 19, 68 P.3d 1015. “The mere mention of an issue without introducing supporting evidence or relevant legal authority does not preserve that issue for appeal.” *Id.* (internal quotation marks omitted). “For an issue to be sufficiently raised, even if indirectly, it must at least be raised to a level of consciousness such that the trial judge can consider it.” *Id.* (quotations and citations omitted). These standards are not met here.

Rather than arguing, as they now do, that “party” status is not required, in their Opposition, Appellants acknowledged that they “were not specifically identified as parties” (R. 92), but asserted that they should be allowed “to proceed as aggrieved parties under UAPA” (R. 86) in light of their participation in the hearing on their own competing application. In this way, Appellants avoided the “party” issue. The entirety of their argument even touching on this issue is found in a footnote:

As set forth herein, the State Engineer and CICWCD argue that neither UAC nor SITLA was a “party aggrieved” under Utah Code Ann. § 63G-4-401(1)(a) because neither was a “party” to CICWCD’s application. *See* State Engineer’s Memo. at 3. They do not, however, challenge Petitioners’ status as aggrieved parties on the basis that Petitioners fail to meet traditional standing requirements. *See id.* at 2-5; *see also Wash. Cnty. Water Conservancy Dist. v. Morgan*, 2003 UT 58, ¶ 14, 82 P.3d 1125 (holding party to adjudicative proceeding failed to show particularized injury and did not have standing). To the contrary, Petitioners are clearly an

aggrieved party because the CICWCD Order prevents Petitioners from obtaining the secure water rights necessary to proceed with the Blawn Mountain Project.

(R. 92.)

Even within this argument, Appellants appear to accept the proposition that “party” status is required. They argued that they “are clearly . . . aggrieved part[ies]” (*id.*), not that “party” status is not required. Appellants simply did not argue, as they now do, that because Utah Code Section 73-3-14(1)(a) allows a “person aggrieved” to seek judicial review of an order of the State Engineer, the “party” requirement found in Sections 63-4-401 and -402 and Administrative Rule 655-6-18 does not apply.

Allowing Appellants to challenge for the first time on appeal that “party” status is required for judicial review would undermine the “two primary considerations underlying the [preservation] rule” identified by the Utah Supreme Court: judicial economy and fairness. *Patterson v. Patterson*, 2011 UT 68, ¶ 15, 266 P.3d 828. The requirement that “a party . . . raise an issue or argument in the trial court” promotes judicial economy by “giv[ing] the trial court an opportunity to address the claimed error, and if appropriate, correct it,” “avoiding unnecessary appeals and retrials.” *Id.* (internal quotation marks omitted). Because Appellants did not address the State Engineer’s argument that only parties can seek judicial review, the district court did not have an opportunity to consider the statutory interpretation Appellants now advance on appeal.

The lack of opportunity for the district court to consider Appellants’ arguments is closely tied to the second consideration underlying the preservation rule—fairness. As the Utah Supreme Court has explained, “[i]t generally would be unfair to reverse a

district court for a reason presented first on appeal.” *Id.* “Under our adversary system, the responsibility for detecting error is on the party asserting it, not on the court.” *Id.* “Notions of fairness therefore dictate that a party should be given an opportunity to address the alleged error in the trial court.” *Id.* “Having been given such a chance, the party opposing a claim of error might have countered the argument, potentially avoiding the time and expense of appeal.” *Id.*

It would be unfair both to the district court and the District and the State Engineer to allow Appellants to advance their arguments that “party” status is not required for the first time on appeal. Had Appellants raised these arguments in their Opposition, the District and the State Engineer would have had an opportunity to address them in their Replies. The district court thus would have had the opportunity to decide the issue in light of competing interpretations. Notably, the District pointed out in its Reply that Appellants had “ignore[d] the argument contained in the State Engineer’s Memorandum in Support that because [Appellants] were not parties to the informal adjudication of [the District’s] application, they are not entitled to seek judicial review.” (R. 271.) The State Engineer similarly noted Appellants’ lack of argument on the issue. (R. 307 (describing Appellants’ focus on “a factually-based theory of [their] own creation” as “an effort to air-brush out of the picture their lack of party status”).) Despite this, Appellants did not seek leave to file a sur-reply to address the issue.

When a party ignores an issue in this fashion in the district court, Utah appellate courts have routinely refused to consider arguments addressing the issue raised for the first time on appeal. *See, e.g., Busch Corp.*, 743 P.2d at 1219 (refusing to consider

arguments in opposition to a motion for summary judgment on appeal where the plaintiffs “apparently chose below not to oppose [the] motion for summary judgment”); *Fowler v. Teynor*, 2014 UT App 66, ¶ 22, 323 P.3d 594, 599, *reh’g denied* (May 8, 2014), *cert. denied*, 333 P.3d 365 (Utah 2014) (“This theory was not asserted in either the Second Amended Complaint or in [the plaintiff’s] memorandum in opposition to the summary judgment motion. Because this theory was not raised below, we do not consider it here.”); *Jensen v. Skypark Landowners Ass’n*, 2013 UT App 48, ¶ 5, 299 P.3d 609 (refusing to consider the appellant’s argument that “the motion for summary judgment did not comply with rule 56 of the Utah Rules of Civil Procedure” because that argument was not raised in response to the motion). The Court should do the same here.<sup>3</sup>

Because Appellants did not preserve their argument that “party” status is not required in order to seek judicial review, and Appellants undisputedly were not parties to the informal adjudication of the District’s Application, the district court properly dismissed Appellants’ petition. The Court need not reach the issue of whether the district court was correct in refusing to excuse Appellants from the exhaustion requirement.

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<sup>3</sup> Appellants claim that the issue was preserved. (Appellants’ Br. at 2.) They thus did not argue that exceptional circumstances warrant consideration of their unpreserved argument or that the district court committed plain error. *See Patterson*, 2001 UT 68, ¶ 13 (identifying these as two exceptions to the rule that the Court will not consider unpreserved arguments). Appellants cannot now do so in their Reply. *Allen v. Friel*, 2008 UT 56, ¶ 8, 194 P.3d 903 (“If new issues could be raised in a reply brief, the appellee would have no opportunity to respond to those arguments. It is well settled that issues raised by an appellant in the reply brief that were not presented in the opening brief are considered waived and will not be considered by the appellate court.” (internal quotation marks omitted)).

**B. As Non-Parties, Appellants Are Not Entitled to Seek Judicial Review.**

Even if the Court is willing to consider Appellants' newly-raised argument that "party" status is not required, the district court correctly held that only parties can seek judicial review of an order of the State Engineer.

Utah Code Section 73-3-14(1) authorizes a "person aggrieved by an order of the state engineer" to "obtain judicial review *in accordance with Title 63G, Chapter 4, Administrative Procedures Act.*" Utah Code Ann. § 73-3-14(1)(a) (emphasis added). Section 63G-4-401, in turn, provides, "A *party* aggrieved may obtain judicial review of final agency action." Utah Code Ann. § 63G-4-401(1) (emphasis added). Consistent with the party requirement contained in Section 63G-4-401, Administrative Rule 655-6-18, which governs judicial review of informal proceedings before the Division of Water Rights, provides, "Any *party* aggrieved by an order of the State Engineer may obtain judicial review by following the procedures and requirements of Sections 63G-4-401 and -402 and 73-3-14 and -15." Admin. Code R655-6-18(A) (emphasis added). Thus, under the plain language of the governing statutes and rules, party status is required in order to seek judicial review of an order of the State Engineer.

Indeed, the Utah Supreme Court has previously rejected an argument nearly identical to the one that Appellants now raise: that the use of the phrase "person aggrieved" in Section 73-1-14(1) does not require prior participation in the administrative process—in other words, "party" status. *S&G, Inc. v. Morgan*, 797 P.2d 1085, 1087 (Utah 1990). There, the plaintiff sought judicial review of an order of the State Engineer approving a change application, although it had not participated in the administrative



proceedings before the State Engineer. The plaintiff argued “that substantial economic rights were affected by the administrative decision, making [it] a ‘person aggrieved’ and entitled to judicial review under Utah Code Ann. § 73-1-14 (1980).” *Id.* at 1086. It further claimed that “section 73-3-14 did not impose a requirement of prior participation in the administrative process” as “[t]he statute authorizes judicial review for ‘any person aggrieved by [the state engineer’s] decision.’” *Id.* (first set of internal quotation marks omitted). The Utah Supreme Court flatly rejected this interpretation:

This interpretation ignores policy considerations which apply to all administrative decision making. 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 the other participants notice of the identity and concern of interested parties. These observations, although made in the context of a statutory requirement of party status, are applicable to any administrative decision 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.*

*Id.* at 1087 (internal quotation marks and citations omitted, emphasis added).

Although the version of Section 73-3-14(1) at issue in *S&G* contained no “party” requirement, the Utah Supreme Court nevertheless interpreted “person aggrieved” to require participation in the administrative proceeding—*i.e.* “party” status. Notably, the version of Section 73-3-14(1) at issue in *S&G* made no mention of or cross-reference to Utah’s Administrative Procedure Act (UAPA), as that Act had not yet been enacted. When the legislature enacted UAPA in 1987, it amended, as part of that enactment,

Section 73-3-14(1)(a) to provide, “Any person aggrieved by an order of the state engineer may obtain judicial review by following the procedures *and requirements* of Chapter 46b, Title 63.”<sup>4</sup> 1987 Utah Laws 971, ch. 160, § 295 (emphasis added). In doing so, the legislature incorporated the “party” status and exhaustion requirements found in UAPA into Section 73-3-14(1).<sup>5</sup> Consistent with this amendment, the Administrative Rule governing judicial review of orders of the State Engineer was amended, changing those entitled to seek judicial review from a “person aggrieved” to a “party aggrieved,” and requiring compliance with the procedures and requirements of UAPA. *Compare* Utah Admin. Code R655-2-9.3 (governing proceedings commenced prior to January 1, 1988) (“Any person aggrieved by a decision of the State Engineer may, within 60 days after notice thereof, bring a civil action in the district court for a plenary review thereof in accordance with Sections 73-3-14 and -15.”) *with* R655-6-18(A) (governing informal adjudicative proceedings commenced on or after January 1, 1988) (“Any party aggrieved by an order of the State Engineer may obtain judicial review by following the procedures and requirements of Sections 63G-4-401 and -402 and 73-3-14 and -15.”). Under the Utah Supreme Court’s holding in *S&G*, however, the statutory incorporation of UAPA’s requirements and the amendment to the Administrative Code were unnecessary because

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<sup>4</sup> In 2008, additional amendments were made to Section 73-3-14. As part of the “technical changes” to that Section, the phrase “by following the procedures and requirements of” in Subsection (1)(a) was replaced with “in accordance with,” referring to UAPA.

<sup>5</sup> Section 54-7-15, at issue in *In re Questar Gas Co.*, 2007 UT 79, 175 P.3d 545, which Appellants’ cite in support of their argument (Appellants’ Br. at 15), contains no such incorporation of the requirements of UAPA.

even without them, only those who had participated in the administrative proceedings could seek judicial review as a “person aggrieved.”

Given that the Utah Supreme Court effectively required “party” status even before the requirements of UAPA were incorporated into Section 73-3-14(1) and the pertinent Administrative Rule was amended to explicitly require “party” status, there is nothing to support a contrary interpretation with those provisions now in place. Indeed, the Utah Supreme Court has continued to recognize that UAPA’s party status and exhaustion requirements apply to judicial review actions brought under Section 73-3-14(1). In *Taylor-West Weber Water Improvement District v. Olds*, 2009 UT 86, 224 P.3d 709, the Utah Supreme Court distinguished between those who initiate judicial review proceedings from an order of the State Engineer and must “satisfy the requirements for party status under UAPA,” and those who merely seek to intervene in such proceedings and need not, as a condition to intervention, satisfy those requirements. *Id.* ¶¶ 7-8. The Court would have had no need to address whether someone seeking to intervene in a judicial review proceeding of an order of the State Engineer must be a “party” and have exhausted administrative remedies if there was no such requirement under Section 73-3-14(1) in the first place.

In addition to being unpreserved, Appellants’ statutory interpretation argument in support of a contrary view lacks merit. Section 63G-4-102(1) forecloses the possibility that Section 73-3-14(1)(a) could alter UAPA’s requirement of party status. That section provides that the provisions of UAPA “apply to every agency of the state and govern . . . judicial review of [state agency] action” unless “otherwise provided by a statute

superseding provisions of [Title 63G, Chapter 4] by explicit reference to this chapter.” Nothing in Section 73-3-14(1)(a) purports to supersede UAPA or its requirement of party status. To the contrary, Section 73-3-14(1)(a) explicitly *incorporates* the procedures and requirements of UAPA. This stands in contrast to Section 73-3-14(7), which supersedes Sections 63G-4-401(3)(b) and -402(2)(a)(iv) by making “explicit reference” to those Sections. Utah Code Ann. § 73-3-14(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.”). Where the legislature wanted to supersede portions of UAPA for judicial review of orders of the State Engineer, it clearly knew how to do so. It did not do so in connection with UAPA’s requirement that a person seeking judicial review must have been a party to the administrative adjudication.

Despite the clear pronouncement that UAPA applies to judicial review of state agency action unless a separate statute supersedes provisions of UAPA by explicit reference, Appellants rely on the general principle that when 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). This principle ignores the mandate of Section 63G-4-102(1). Even setting that issue aside, the principle is further inapplicable here, as there is no conflict between Section 73-3-14 and Section 63G-4-401. As discussed above, the legislature amended Section 73-3-14(1)(a) to require that any “person aggrieved” seeking judicial review of an order of the State Engineer satisfy the

requirements and procedures of UAPA. This includes party status. And, even in the absence of the specific reference to and incorporation of UAPA's requirement, the Utah Supreme Court has interpreted "person aggrieved," as used in Section 73-3-14(1), to require participation in the adjudicative proceeding before the State Engineer. There is, therefore, no conflict between Sections 73-3-14 and 63G-4-401. The absence of such conflict is highlighted by Administrative Rule 655-6-18(A), enacted after the 1987 enactment of UAPA and accompanying amendment to Section 73-3-14(1), which mirrors the language of Section 63G-4-401(1).

This stands in contrast to the two cases Appellants rely on. They first contend that "UAPA's relation to Section 73-3-14 is no different" from Utah's Administrative Rulemaking Act's relation to Utah Code Section 54-7-15, which governs judicial review of the Public Service Commission's rulemaking proceedings. In *Williams*, the Utah Supreme Court held that the more specific provision in the Public Utilities Act governed over the more general provision in the Administrative Rulemaking Act. There, however, the two provisions at issue "contemplate[d] different procedures for review": the Public Utilities Act requires that a party seeking review of a Commission order or decision to file a petition for rehearing prior to seeking judicial review, while the Administrative Rulemaking Act provides that a declaratory judgment action may be brought to determine the validity of a rule promulgated by a state agency. *Williams*, 754 P.3d at 48. The provisions were in direct conflict with one another. As a result, the Court held that the more specific provision contained in Title 54 superseded the provision of the Administrative Rulemaking Act. Notably, the only reference to the Administrative



Rulemaking Act found in the Public Service Commission Act did “*not* mandate use of the Administrative Rulemaking Act for purposes of reviewing rules.” *Id.* (emphasis added). This is vastly different from Section 73-3-14(1), which incorporates UAPA’s requirements and procedures for judicial review of an order of the State Engineer.

Appellants additionally rely on *Southern Utah Wilderness Alliance v. Board of State Lands & Forestry of State*, 830 P.2d 233 (Utah 1992). That case, however, involved statutes that conflicted to an even greater degree than in *Williams*. Two provisions were at issue. The first, Section 63-46b-1(2)(g), provided that UAPA does not apply to state agency actions relating to contracts for the purchase or sale of real property or judicial review of such actions. The second, a provision in the title governing actions of the Board and Division of State Lands and Forestry, provided that judicial review of final Board action shall be governed by Chapter 46b, Title 63, the then-current version of UAPA. Relying on the principle that where statutes conflict, the specific governs the general, the Utah Supreme Court held that despite the exclusion in Section 63-46b-1, UAPA governed the judicial review of agency proceedings of the Board or Division of State Lands and Forestry involving the purchase or sale of real property. Again, the type of direct conflict at issue in *SUWA* is not present here.

Section 73-3-14(1) incorporates the party status requirement found in Section 63G-4-401(1). This requirement is reiterated in the Administrative Rule governing judicial review of an order of the State Engineer. Utah Admin. Code R655-6-18(A). “Party” is defined in those Rules as “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.” Utah Admin. Code R655-6-3(F). This definition of “party” is similar to that found in UAPA: “‘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.” Utah Code Ann. § 63G-4-103(f). Appellants undisputedly do not meet either definition. The district court was accordingly correct in holding that Appellants, as non-parties, were not entitled to seek judicial review of the State Engineer’s order on the District’s Application.

**II. IF APPELLANTS, AS NON-PARTIES, ARE ENTITLED TO SEEK JUDICIAL REVIEW, THE DISTRICT COURT PROPERLY REFUSED TO EXCUSE APPELLANTS FROM THE REQUIREMENT THAT THEY EXHAUST ADMINISTRATIVE REMEDIES.**

“A party may seek judicial review only after exhausting all administrative remedies available.” Utah Code Ann. § 63G-4-401. “The basic purpose underlying the doctrine of exhaustion of administrative remedies is 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.” *Republic Outdoor Adver., LC v. Utah Dep’t of Transp.*, 2011 UT App 198, ¶ 15, 258 P.3d 619 (internal quotation marks omitted). “And so, as a general rule, parties must exhaust applicable administrative remedies as a prerequisite to seeking judicial review.” *Id.* (internal quotation marks omitted). “Thus, a district court has jurisdiction to review an

administrative decision only if the parties have exhausted all available administrative remedies.” *Id.*

On appeal, Appellants appear to concede that they did not exhaust their administrative remedies, as they did not participate in the informal adjudication of the District’s Application. (*See* Appellants’ Br. at 16.) They instead argue that the district court erred by not considering whether they should be excused from the exhaustion requirement. The district court did, however, consider Appellants’ arguments on this issue. (R. 358-60.) It properly refused to excuse Appellants from the exhaustion requirement.

Under UAPA, a “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 (emphasis added). “However, exceptions to the exhaustion requirement only 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.” *Republic Outdoor Adver., LC v. Utah Dep’t of Transp.*, 2011 UT App 198, ¶ 33, 258 P.3d 619.

As an initial matter, it is questionable whether non-parties such as Appellants can rely on the exceptions to the exhaustion requirement found in Section 63G-4-401, which refers to a “party seeking judicial review.” Appellants have not identified, nor has the

District been able to find, a single case in which Utah Courts have allowed a non-party to seek judicial review despite the failure to exhaust administrative remedies. Even if the exceptions in Section 63G-4-401 can be considered to apply to non-parties, the district court properly refused to apply those exceptions to relieve Appellants of their exhaustion requirement.

Appellants contend that the relevant administrative remedies are inadequate. “[T]he guiding inquiry for adequacy of the remedy is whether the party can be made whole by the administrative remedies available.” *Ramsay v. Kane Cnty. Human Res. Special Serv. Dist.*, 2014 UT 5, ¶ 15, 322 P.3d 1163. Appellants do not challenge the adequacy of the available administrative remedies generally, but rather argue that they are inadequate because of the timing of the District’s Application and the State Engineer’s Order on that Application. They claim that the “delay prevented UAC and SITLA from protesting CICWCD’s application in 2006” and “prevented UAC and SITLA from participating in the hearing in July 2010.” (Appellants’ Br. at 18.) Appellants should not be heard to complain that they have been prejudiced by a “delay” in the State Engineer’s approval of the District’s Application. Had the State Engineer acted timely on the District’s Application, Appellants would have had *no* recourse to challenge that order.

Further, as the district court concluded, the relevant administrative remedies are adequate—Appellants simply failed to take advantage of them. With respect to SITLA, there was nothing to prevent it from filing a protest to the District’s Application and participating in the July 2010 hearing. Having chosen not to participate in the

adjudicative proceedings, SITLA should not now be relieved of the exhaustion requirement and allowed to seek judicial review.<sup>6</sup> *See S&G*, 797 P.2d at 1088 (holding “S&G lacks standing to appeal because it waived its right to participate at the appellate level by its intentional inaction at the administrative level”). And, as the district court explained, because Utah Alunite “gets its ability to appropriate water through its lease with SITLA,” “it is stuck with the land owner’s actions.” (R. 359.)

Even setting aside SITLA’s initial decision to not participate in the adjudicative proceedings on the District’s Application, Appellants could have later attempted to intervene in those proceedings by seeking to change the proceedings from informal to formal. Utah Code Ann. §§ 63G-4-202(3), -207. Utah Code Section 63G-4-202(3) allows this conversion to take place any time before a final order is issued. It places no restrictions on who may request the conversion. Once the proceedings are converted to formal proceedings, Section 63G-4-207 establishes a procedure by which any non-party may seek to intervene in the proceedings. This approach was available to Appellants.

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<sup>6</sup> Appellants do not directly address the fact that nothing prevented SITLA from participating in the informal adjudication of the District’s Application from the beginning. Rather, they point to the absence of any “factual allegations in the record regarding what interest UAC or SITLA may have had in the Wah Wah Valley’s unappropriated water before November 2006 or July 2010.” (Appellants’ Br. at 7 n.2; *see also id.* at 21.) To the extent this statement is intended to question the district court’s reliance on the fact that SITLA owned the land to be used for the Blawn Mountain Project at the time of the District’s Application (*see* R. 359), any such effort is disingenuous. Any land that is proposed to be part of the Blawn Mountain Project that SITLA did not already own was acquired in 2001 through the West Desert Land Exchange. West Desert Land Exchange Act, Pub. Law 106-301 (Oct. 13, 2000). Notably, SITLA has never claimed they did not own the land that is proposed to be part of the Blawn Mountain Project in 2006.

Indeed, the Utah Court of Appeals has recognized this approach and held that it constitutes an adequate administrative remedy. *Republic Outdoor Adver.*, 2011 UT App 198, ¶¶ 18, 23-24. This is true even if Appellants' efforts might have been unsuccessful.<sup>7</sup> As the Court of Appeals explained in *Republic Outdoor Advertising*, the fact that a request to convert proceedings from informal to formal "is within the discretion of the presiding officer" and may be denied, does not excuse a person seeking judicial review from requesting conversion: "The requirement that administrative remedies be exhausted . . . is not so easily defeated. If an avenue of administrative relief is available, it cannot be ignored simply because it might ultimately be unsuccessful." *Id.* ¶ 20 n.9. Appellants here simply made no effort to intervene in the adjudicative proceedings on the District's Application. Their failure to do so does not make an adequate administrative remedy inadequate. Nor should it allow them to avoid the exhaustion requirement of Section 63G-4-401.

Appellants alternatively argue that they should be relieved of the exhaustion requirement because they effectively exhausted administrative remedies given that "the

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<sup>7</sup> In a footnote, Appellants appear to argue that the conversion and intervention approach was not a possibility in this case, and thus the district court should not have considered it. (Appellants' Br. at 18 n.8.) Their arguments on this point are misplaced. First, although Administrative Rule 655-6-8 prohibits intervention in informal proceedings before the State Engineer, no Administrative Rule precludes the State Engineer from converting informal proceedings to formal proceedings as provided by Section 63G-4-202. Second, as mentioned above, nothing in Section 63G-4-202 limits who may request that proceedings be converted from informal to formal. Indeed, the Court of Appeals explained in *Republic Outdoor Advertising* that the petitioner—a non-party to the administrative proceedings—"could have requested that the . . . permit proceeding be converted into a formal proceeding to allow intervention." 2011 UT App. 198, ¶ 20.

State Engineer weighed and decided CICWCD's and UAC and SITLA's competing applications for water rights in Wah Wah Valley together." (Appellants' Br. at 19.) The Utah Court of Appeals rejected a nearly identical argument in *Republic Outdoor Advertising*. There, the district court had granted summary judgment to the respondent on the basis that the petitioner failed to exhaust its administrative remedies with regard to its challenge to the approval of a competing billboard permit. The petitioner argued, among other things, that by "specifically challeng[ing] the validity of [the competing] permit" in its administrative appeal of the denial of its own permit, it had satisfied its exhaustion requirement. *Id.* ¶ 21. The Utah Court of Appeals rejected this "collateral exhaustion" argument, explaining, "While [the petitioner's] challenge to [the competing] permit was an integral part of its challenge to UDOT's denial of its . . . permit, throughout the underlying administrative proceeding, [the plaintiff] attempted to accomplish these interrelated goals of obtaining its own permit and defeating [the competing permit] in a proceeding to which [the competing permit holder] was not a party." *Id.* ¶ 22. "Such a collateral attack on the [competing] permit did not give [the competing permit holder] the opportunity to protect its interests or defend against allegations of wrong-doing and, thus, contravenes due process requirements for administrative proceedings." *Id.* ¶ 23.

While unlike in *Republic Outdoor Advertising*, the District was a party to the informal adjudication of Appellants' application, the same concerns that led the Utah Court of Appeals to reject the "collateral exhaustion" argument apply equally in the present case. Appellants never put the District on notice that they intended to challenge

the merits of the District's Application during the hearing on their application. Nor is there anything in the record to suggest that the hearing on Appellants' application involved such a challenge. And, like in *Republic Outdoor Advertising*, the District did not have an opportunity during the hearing on Appellants' application to fully protect its interests. The District (rightfully) was not given the opportunity to present evidence in support of its Application and, accordingly, did not have experts present to defend its Application. Appellants' challenge to the District's Application was limited to the issue of the relative priority of their application and their argument that their application represents a more immediate need. This limited, collateral attack on the District's Application does not satisfy Appellants' exhaustion requirement, nor should it relieve them of that requirement.

To the extent Appellants' "collateral exhaustion" argument is intended to address the second statutory exception to the exhaustion requirement, Appellants have failed to establish that exception applies. While they argue that "the district court should have considered the irreparable harm caused if exhaustion is required," they offer next to no explanation of that alleged harm. (Appellants' Br. at 19.) Their only discussion on appeal of irreparable harm is found in the following sentence: "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." (*Id.*) Not only does this fail to identify the irreparable harm Appellants maintain would be caused by the requirement that they exhaust their administrative remedies—as opposed to the merits decision on the District's Application—but it fails to



take into consideration that Appellants are fully capable of seeking judicial review of their own application. They have done precisely that. Thus, Appellants have a forum in which they can raise their argument that their application should be given senior priority over the District's Application under *Tanner v. Bacon*, 136 P.2d 957 (Utah 1943).

Appellants further have failed to explain how any irreparable harm to them is disproportionate to the public interest in requiring exhaustion of administrative remedies. Again, their argument appears to be that exhaustion would have no benefit in this case because the State Engineer was able to "fully weigh and consider the application together with UAC and SITLA's application." (Appellants' Br. at 20.) The Utah Court of Appeals rejected the nearly identical argument raised in *Republic Outdoor Advertising*, explaining that to hold otherwise and "allow [the petitioner] to proceed directly to the district court . . . would permit it to leap-frog over the entire administrative process and circumvent [the agency's and the opposing party's] opportunities to correct any error they may have made, a problem compounded by the fact that such a result would countenance [the petitioner's] attempt to collaterally attack [the other party's] billboard permits without appropriate notice and opportunity to be heard." *Republic Outdoor Adver.*, 2011 UT App 198, ¶ 34 (internal quotation marks and alterations omitted). The same would be true here.

The district court properly refused to excuse Appellants from the requirement that they exhaust administrative remedies. This case simply does not present the "unusual circumstances" that would warrant application of one of the exceptions to that requirement. Rather, like in *S&G*, this case involves a situation in which the party

seeking judicial review made no effort to exhaust administrative remedies—either through SITLA’s initial participation in the adjudicative proceedings or through any effort by Appellants to intervene in the proceedings after Utah Alunite entered into the exploration agreement with SITLA in 2011, which occurred more than three years before the State Engineer issued his order on the District’s Application.

### CONCLUSION

For the reasons set forth above, the District respectfully requests that the Court affirm the district court’s order dismissing Appellant’s Petition seeking judicial review of the State Engineer’s Order on the District’s Application.

DATED this 15<sup>th</sup> day of April, 2015.

SNOW, CHRISTENSEN & MARTINEAU

By

  
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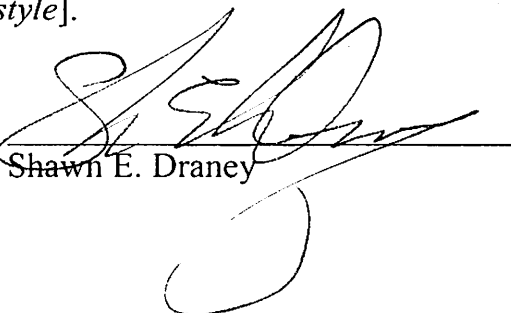
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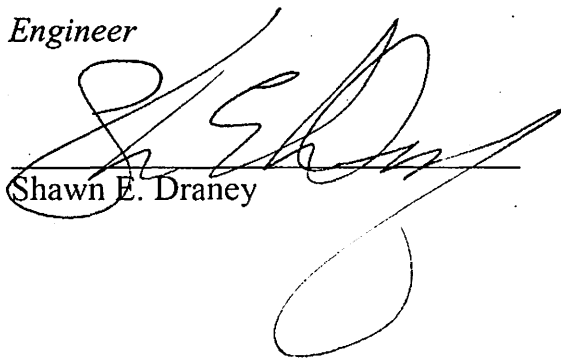
**CERTIFICATE OF SERVICE**

I hereby certify that two true and correct copies of the foregoing **BRIEF OF APPELLEE** were served by U.S. Mail on April 16, 2015 as follows:

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### ADDENDUM

- A. Utah Administrative Code Rule 655-6-18.
- B. Utah Administrative Code Rule 655-6-3.
- C. Utah Code § 63G-4-103.



**R655-6-18. Judicial Review.**

A. Any party aggrieved by an order of the State Engineer may obtain judicial review by following the procedures and requirements of Sections 63G-4-401 and -402 and 73-3-14 and -15.

B. The Division may grant a stay of its order or other temporary remedy during the pendency of judicial review on its own motion, or upon petition of a party pursuant to the provisions of Section 63G-4-405.





### **R655-6-3. Definitions.**

A. "Adjudicative Proceeding" means a Division action or proceeding that determines the legal rights, duties, privileges, immunities, or other legal interests of one or more identifiable persons, including all Division actions to grant, deny, revoke, suspend, modify, annul, withdraw, or amend the authority, right, or license; and judicial review of all such actions. Those matters not governed by Title 63G, Chapter 4 shall not be included within this definition.

B. "Division" means the Division of Water Rights.

C. "State Engineer" is the Director of the Division of Water Rights, which is the agency having general administrative supervision over the waters of the State. The duties of this Division are primarily set forth in Title 73, Chapters 1 through 6.

D. "Staff" means the Division of Water Rights staff.

E. "Person" means an individual, group of individuals, partnership, corporation, association, political subdivision or its units, governmental subdivision or its units, public or private organization or entity of any character, or other agency.

F. "Party" means the Division 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.

G. "Presiding Officer" means the State Engineer, or an individual or body of individuals designated by the State Engineer, designated by the agency's rules, or designated by statute to conduct a particular adjudicative proceeding.

H. "Respondent" means any person against whom an adjudicative proceeding is initiated, whether by the Division or any other person.

I. "Application" means any application which has been filed pursuant to Title 73, Chapters 1, 2, 3, 5 and 6, and shall include, but not be limited to, applications enumerated in R655-6-5.B.3. An application is also a request for agency action. The substantive rules governing the filing and perfecting of these documents are specified in the above Chapters and in other Division rules, and R655-6 governs only the administrative procedures for those applications which have been properly filed.

J. "Applicant" is a person applying for an application.

K. "Protestant" means a person who timely protests an application before the State Engineer pursuant to Section 73-3-7 or who files a protest pursuant to Section 73-3-13.



West's Utah Code Annotated

Title 63g. General Government

Chapter 4. Administrative Procedures Act (Refs & Annos)

Part 1. General Provisions

U.C.A. 1953 § 63G-4-103  
Formerly cited as UT ST § 63-46b-2

§ 63G-4-103. Definitions

Currentness

(1) As used in this chapter:

- (a) "Adjudicative proceeding" means an agency action or proceeding described in Section 63G-4-102.
- (b) "Agency" means a board, commission, department, division, officer, council, office, committee, bureau, or other administrative unit of this state, including the agency head, agency employees, or other persons acting on behalf of or under the authority of the agency head, but does not mean the Legislature, the courts, the governor, any political subdivision of the state, or any administrative unit of a political subdivision of the state.
- (c) "Agency head" means an individual or body of individuals in whom the ultimate legal authority of the agency is vested by statute.
- (d) "Declaratory proceeding" means a proceeding authorized and governed by Section 63G-4-503.
- (e) "License" means a franchise, permit, certification, approval, registration, charter, or similar form of authorization required by statute.
- (f) "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.
- (g) "Person" means an individual, group of individuals, partnership, corporation, association, political subdivision or its units, governmental subdivision or its units, public or private organization or entity of any character, or another agency.
- (h)(i) "Presiding officer" means an agency head, or an individual or body of individuals designated by the agency head, by the agency's rules, or by statute to conduct an adjudicative proceeding.
- (ii) If fairness to the parties is not compromised, an agency may substitute one presiding officer for another during any proceeding.

(iii) A person who acts as a presiding officer at one phase of a proceeding need not continue as presiding officer through all phases of a proceeding.

(i) "Respondent" means a person against whom an adjudicative proceeding is initiated, whether by an agency or any other person.

(j) "Superior agency" means an agency required or authorized by law to review the orders of another agency.

(2) This section does not prohibit an agency from designating by rule the names or titles of the agency head or the presiding officers with responsibility for adjudicative proceedings before the agency.

#### Credits

Laws 2008, c. 382, § 1377, eff. May 5, 2008.

#### Notes of Decisions (2)

U.C.A. 1953 § 63G-4-103, UT ST § 63G-4-103

Current through 2014 General Session.

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