

2016

**Enervest, Ltd., Appellant, v. Utah State Engineer, and Michael  
Carlson, Appellees**

Utah Court of Appeals

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**IN THE SUPREME COURT OF THE STATE OF UTAH**

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In The Matter Of The General  
Determination Of The Rights To The Use  
Of Water, Both Surface And Underground  
Within The Drainage Area Of  
The Uintah Basin

Nine Mile Creek Division  
Area 90, Code 47

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ENERVEST, LTD.,  
*Appellant,*

v.

UTAH STATE ENGINEER, and  
MICHAEL CARLSON,  
*Appellees.*

**No. 20160394-SC**

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**SUPPLEMENTAL BRIEF OF APPELLEE UTAH STATE ENGINEER**

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On Appeal From The Eighth Judicial District Court,  
Honorable Samuel P. Chiara, No. 560800056

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## LIST OF PARTIES

Parties in *EnerVest v. Utah State Engineer, et al.*  
(Section 24 petition filed February 28, 2012)

1. EnerVest, LTD., successor-in-interest to Bill Barrett Corporation—Appellant (“EnerVest”);
2. Michael Carlson—Appellee (“Mr. Carlson”);
3. Utah State Engineer—Appellee (“State Engineer”);
4. The Willis A. and Wilma Hammerschmid Trust (participated in the district court, and filed an appeal, but their appeal has been dismissed);
5. Gary and Nancy Motte (participated in the district court, but did not file an appeal);
6. Leroy Mead (did not actively participate in the district court or file an appeal);
7. KFJ Partnership (did not actively participate in the district court or file an appeal);
8. Iriart Properties, LLC (did not actively participate in the district court or file an appeal); and
9. Richard Calder (did not actively participate in the district court or file an appeal).

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## STATEMENT OF JURISDICTION

This is an appeal from a summary judgment ruling (“Ruling”), (R(2)-1661-1678),<sup>1</sup> that was certified by the district court as final and appealable under [Utah Rule of Civil Procedure 54\(b\)](#). (R(2)-1897-1898). The Court has jurisdiction over this matter under [Utah Code § 78A-3-102\(3\)\(j\)](#) and [73-4-16](#).

## STATEMENT OF THE ISSUES

1. Whether EnerVest has standing to appeal even though no objector has appealed the district court’s final judgment.

Standing is a question of law reviewed for correctness. [City of Grantsville v. Redevelopment Agency of Tooele City, 2010 UT 38, ¶ 9, 233 P.3d 461](#). Mr. Carlson raises this issue for the first time on appeal.

2. Whether EnerVest may litigate and appeal another’s objection.

Statutory interpretation is a question of law reviewed for correctness. [Marion Energy, Inc. v. KFJ Ranch P’ship, 2011 UT 50, ¶ 12, 267 P.3d 863](#). Mr. Carlson raises this issue for the first time on appeal.

## DETERMINATIVE STATUTES

### [Utah Code § 73-4-13](#):

If any contest or objection on the part of any claimant shall have been filed, as in this chapter provided, the court shall give not less than 15 days' notice to all claimants, stating when and where the matter will be heard.

### [Utah Code § 73-4-16\(1\)](#):

There shall be a right of appeal from a final judgment of the district court to the Supreme Court as provided in [Section 78A-3-102](#).

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<sup>1</sup> References to “R(2)” are to the second volume of the record.

[Utah Code § 73-4-24\(1\)](#):

A claimant to the use of water may petition the court to expedite the hearing of a valid, timely objection to a report and proposed determination prepared in accordance with [Section 73-4-11](#) in which the claimant has a direct interest.

**STATEMENT OF THE CASE<sup>2</sup>**

The State Engineer’s statutorily-defined role in any general adjudication is to:

- (1) ensure all parties receive due process by carrying out statutory notice procedures; and
- (2) evaluate the water rights substantively and to make a recommendation for each water right to the district court in his Proposed Determination. [Utah Code §§ 73-4-3, -4, -11](#).

Consequently, the State Engineer has an interest in ensuring that all affected parties have the opportunity to litigate objections to a proposed determination of water rights.

In 1964, the State Engineer issued a Proposed Determination for the ongoing Uintah Basin General Adjudication. Neither EnerVest’s nor Mr. Carlson’s predecessors-in-interest filed objections. (R(2)- 262-265). But several other interested parties did: the Louis Motte Objection, the Amber Keel Objection, the Iriart-Thayn-Dause Objection, and the Sprouse-Hammerschmid Objection (collectively the “Objections” with the parties filing the Objections and their successors denoted “Objectors”). (R(2)-1052-1066).

Almost 50 years after the Objections were filed, EnerVest’s predecessor, Bill Barrett Corporation, filed a petition with the district court seeking an expedited

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<sup>2</sup> Per [Rule 24\(i\)](#), the State Engineer joins in and adopts Mr. Carlson’s Statement of the Case except for the subsections entitled “Incorporation of Minnie Maud in 1902” and “The Davis v. Christensen Lawsuit in 1957.” Those two subsections characterize matters in dispute between EnerVest and Mr. Carlson where the State Engineer takes no position. The State Engineer writes separately to identify his interest in this appeal.

proceeding on the Objections and asserted a direct interest in them. (R-4085-4154). In 2014, EnerVest, Mr. Carlson, the State Engineer, and the Willis A. and Wilma Hammerschmid Trust<sup>3</sup> stipulated that a Section 24 proceeding (an expedited hearing to resolve objections) was the appropriate method for bringing the Objections to a conclusion. (R(2)-262-265). All parties agreed that EnerVest and Mr. Carlson “ha[d] standing to participate in this Section 24 proceeding because they are claimants to the use of water and have a direct interest in the issues raised in the pending Objections.” (R(2)-262-265).

During the Section 24 proceeding, the parties focused on an issue of little importance to the State Engineer—whether Minnie Maud Irrigation Company (“Minnie Maud”) was properly incorporated and capable of holding water rights despite certain conditions in its articles of incorporation. In dueling Motions for Summary Judgment, Mr. Carlson and EnerVest argued opposing positions on that issue; the State Engineer took no position. (R(2)-881-988; R(2)-997-1068). Ultimately, the district court entered a ruling in favor of Mr. Carlson’s position—that Minnie Maud was properly incorporated and capable of holding water rights—and certified the judgment as final under [Utah Rule of Civil Procedure 54\(b\)](#). (R(2)-1661-1678; R(2)-1897-1898).

EnerVest appealed the district court’s decision and filed its opening brief focused on the Minnie Maud issue. The State Engineer did not file a response brief given his continued non-interest on that issue. Mr. Carlson did respond, however, and raised for

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<sup>3</sup> The Willis A. and Wilma Hammerschmid Trust was a party to the proceeding at the district court and filed an appeal. The Court of Appeals dismissed the Trust’s appeal on voluntary motion.

the first time the argument that EnerVest lacks standing to appeal an adverse decision to which it was a party. Appellee’s Brief at 15, 18-22. The State Engineer has an interest in the standing argument and submits this supplemental brief solely to address that issue.

### **SUMMARY OF THE ARGUMENT**

EnerVest has statutory standing to appeal from the district court’s decision in this Section 24 proceeding. The Utah Code expressly grants a right of appeal from a final judgment in a general adjudication. [Utah Code § 73-4-16\(1\)](#). The district court entered a final judgment under [Rule 54\(b\)](#). As a party aggrieved by the district court’s decision, EnerVest has standing to appeal under the statute and generally applicable rules of appellate standing.

At bottom, Mr. Carlson argues that claimants like Enervest may only proceed as far as an Objector will take them. But that view misunderstands the governing statutes. After an objector objects to the Proposed Determination, claimants with a direct interest in the objection may seek an expedited hearing on the objection and claimants affected by the objection are entitled to notice of the objection proceeding. [Utah Code § 73-4-24](#). This expedited process is a “Section 24 proceeding.” If the process is not expedited under Section 24, it is generally referred to as an “objection proceeding.”

Parties may participate in objection proceedings as a claimant with a direct interest in an objection, a claimant affected by the objection, or as the objector.<sup>4</sup> [Utah Code §§ 73-4-11, -13, -24](#). EnerVest and Mr. Carlson each participated, as parties and claimants with a direct interest in the Objections, in this Section 24 proceeding before the district

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<sup>4</sup> A reference in this brief to a claimant or objector includes a successor-in-interest.

court. EnerVest is aggrieved by the district court's decision because it is entitled to less of a proportionate interest in the disputed water rights than it would receive if the district court had ruled in the Objectors' and EnerVest's favor. Therefore, EnerVest has standing to appeal an adverse decision from the district court because it participated in the proceeding below and is aggrieved by the district court's decision, just as Mr. Carlson would have standing to appeal if the district court had ruled in EnerVest's and the Objectors' favor.

Even though EnerVest's predecessor-in-interest never filed its own objection, the statutes make clear that EnerVest may litigate another's Objection because EnerVest has a direct interest in the Objections or is an affected claimant entitled to notice of an objection proceeding.

## **ARGUMENT**

Mr. Carlson argues that EnerVest lacks statutory standing to appeal an adverse judgment because EnerVest's right to participate depends on the Objectors' continued participation, and none of them appealed. But that ignores the controlling statutory language and basic appellate standing principles.

### **I. EnerVest Has Statutory Standing to Appeal.**

Statutory standing involves a different analysis than constitutional standing. [\*Rupp v. Moffo\*, 2015 UT 71, ¶ 9 n.7, 358 P.3d 1060](#). “Statutory standing springs from an affirmative grant of authority by the Legislative and Executive branches for the courts to hear a case. In contrast, constitutional standing arises from the courts' inherent constitutional power to hear a case.” *Id.*

In construing the relevant statute for standing purposes, the Court’s “primary goal is to evince the true intent and purpose of the Legislature” and “[t]he best evidence of the legislature’s intent is the plain language of the statute itself,” [Marion Energy, Inc., 2011 UT 50, ¶ 14](#) (citations and internal quotation marks omitted), “read in context of the whole statute and related sections of the Code,” [Rupp, 2015 UT 71, ¶ 8](#); *see also* [Miller v. Weaver, 2003 UT 12, ¶ 17, 66 P.3d 592](#). The Code provisions governing water rights determinations state that “[t]here shall be a right of appeal from a final judgment of the district court to the Supreme Court as provided in Section [78A-3-102](#).” [Utah Code § 73-4-16\(1\)](#). The plain language permits an appeal from a “final judgment of the district court.” Here, the district court certified its Section 24 ruling as a final judgment under [Utah Rule of Civil Procedure 54\(b\)](#). (R(2)-1897-1898). The statute therefore expressly authorizes an appeal from the district court ruling.

To be sure, Section 16 does not specify *who* has standing to appeal the final judgment. But that silence cannot be construed as somehow limiting appeals to only Objectors as Mr. Carlson argues. Courts do not “add language or meaning to the Act where no hint of it exists in the text.” [Penunuri v. Sundance Partners, Ltd., 2013 UT 22, ¶ 33, 301 P.3d 984](#) (internal quotation marks omitted). Rather, the Legislature’s omission of defined appellants is presumed to be purposeful, [Marion Energy, Inc., 2011 UT 50, ¶ 14](#), and indicates, if anything, that normal standing rules apply to would-be appellants.<sup>5</sup>

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<sup>5</sup> Further confirming that appeals in such proceedings follow general appellate norms, the Utah General Adjudication statutes provide that appeals “shall be upon the record made in the district court, and may as in equity cases be on questions of both law and fact.” [Utah Code § 73-4-16\(2\)](#).

Those rules are well-settled. To establish standing to appeal, ““an appellant generally must show both that he or she was a party or privy to the action below and that he or she is aggrieved by that court's judgment.”” [Chen v. Stewart, 2005 UT 68, ¶ 50, 123 P.3d 416](#) (quoting [Soc’y of Prof’l Journalists, Utah Chapter v. Bullock, 743 P.2d 1166, 1171 \(Utah 1987\)](#)). EnerVest satisfies this test. First, EnerVest was a party to the Section 24 proceeding below. And Mr. Carlson stipulated that EnerVest had standing as a claimant. (R(2)-262-265); [In re E.H., 2006 UT 36, ¶ 52, 137 P.3d 809](#) (“in Utah standing acquired by stipulation is enforceable”).

Second, EnerVest is aggrieved by the district court’s ruling. EnerVest traces its proportionate title and claim to the water rights either through Minnie Maud or EnerVest’s predecessors. If the district court’s decision stands, EnerVest is limited to an amount of water proportional to its shares in Minnie Maud. “Stock in a mutual [irrigation] company entails the right to demand such stockholder's aliquot share of the water in proportion as his stock holding bears to all the stock.” [Genola Town v. Santaquin City, 80 P.2d 930, 936 \(Utah 1938\)](#). Conversely, if Minnie Maud never existed as the Objections allege, EnerVest’s interest in the water is defined by the beneficial use of surface water by EnerVest’s predecessors prior to 1903. [Bishop v. Duck Creek Irrigation Co., 241 P.2d 162, 164 \(Utah 1952\)](#) (holding that where no application to appropriate was filed with the State Engineer, a right to the water “must necessarily rest upon appropriation by beneficial use before 1903. Prior to that time the law allowed appropriation by such use, and statutes enacted that year preserve such appropriations.”). Here, the State Engineer, Mr. Carlson, EnerVest, and the Willis A. and Wilma

Hammerschmid Trust, recognizing EnerVest's clear and direct interest in the objections, stipulated that EnerVest and Mr. Carlson had standing to participate in the Section 24 proceeding. (R(2)-262-265).

Mr. Carlson's argument that EnerVest can appeal only if an Objector appeals lacks any textual support in Title 73 Chapter 4. Instead, Section 16 grants a broad right to appeal final judgments consistent with the general rights of aggrieved parties in litigation to appeal a final judgment. EnerVest has standing to appeal because it was a party to the district court objection proceeding and is aggrieved by the district court's decision.

## **II. EnerVest May Litigate And Appeal Another's Objection Because It Has an Interest in the Objections.**

At its core, Mr. Carlson's standing argument hinges on the notion that EnerVest, as a mere claimant in an objection proceeding, cannot litigate or appeal the Objections independent of any actual Objector because neither EnerVest nor its predecessors-in-interest filed their own objections. This preclusion-type argument warrants special attention because it fundamentally misunderstands a claimant's role and rights in the objection proceeding process. In short, EnerVest (and Mr. Carlson) may litigate another's objection because they have a direct interest in the Objections and are claimants affected by the Objections. The Objections here were heard on an expedited basis under [Utah Code § 73-4-24](#), which allows a claimant with a direct interest in an objection to expedite an objection proceeding rather than wait for its statutorily required notice of an objection proceeding under [Utah Code § 73-4-13](#). In other words, Section 24 allows an affected claimant to proactively address an objection that impacts his water rights rather

than react to a notice that he is entitled to receive at some point in the future. Here the Objections implicate both EnerVest and Mr. Carlson's water rights that they derived through Minnie Maud. Therefore, EnerVest and Mr. Carlson may litigate the Objections as parties with a direct interest in the Objections under [Utah Code § 73-4-24](#), and as claimants affected by the Objections under [Utah Code § 73-4-13](#).

**a. EnerVest has a direct interest in the Objections under [Utah Code § 73-4-24](#).**

EnerVest may litigate another's objection because it has a direct interest in the Objections. Section 24 allows a claimant with a direct interest in an objection to participate in the objection proceeding. [Utah Code § 73-4-24\(1\)](#) ("A claimant to the use of water may petition the court to expedite the hearing of a valid, timely objection to a report and proposed determination prepared in accordance with Section [73-4-11](#) in which the claimant has a direct interest."). EnerVest has a direct interest in the Objections because they directly impact EnerVest's proportionate ownership interest of the water rights which the Proposed Determination awarded to Minnie Maud.

Despite the fact EnerVest's predecessor-in-interest did not file an objection, EnerVest's ability to participate in the objection proceedings and this appeal was preserved by the filed Objections, which contest Minnie Maud's existence. Mr. Carlson correctly states that when no claimant files an objection, the court renders a judgment in accordance with the Proposed Determination. [Utah Code § 73-4-12](#); [United States Fuel Co. v. Huntington-Cleveland Irrigation Co., 2003 UT 49, ¶ 13, 79 P.3d 945](#) ("[Section 73-4-12 of the Utah Code](#) describes the consequences of failing to lodge a timely objection,

stating: If no contest on the part of any claimant shall have been filed, the court shall render a judgment in accordance with such proposed determination, which shall determine and establish the rights of the several claimants to the use of the water”). Accordingly, EnerVest’s predecessor’s decision not to file its own objection created a risk that, if no other claimants filed an objection contesting Minnie Maud’s existence, the Court would enter a decree confirming the Proposed Determination by holding that Minnie Maud is the owner of the disputed water rights. But in this case, other claimants objected and raised the issue of whether the Proposed Determination correctly listed Minnie Maud as the owner of the disputed water rights. Therefore, the Objectors properly and timely raised the issue before the district court. These Objections preserved EnerVest’s ability to participate in the objection proceedings and this appeal. Because EnerVest has a direct interest in the disposition of the Objections, Section 24 allowed EnerVest to litigate another’s objection in the district court and on appeal.

**b. EnerVest is a claimant affected by the Objections under Utah Code § 73-4-13.**

EnerVest also may litigate another’s objection because it is a claimant affected by the Objections. Even absent the specific language in Section 24, EnerVest is an affected claimant and [Utah Code § 73-4-13](#) requires that claimants receive notice of an objection proceeding.

The Court has long held that “[w]henver one’s rights are or may be affected or drawn into question, the owner or claimant of such right is entitled to notice and has the right to be heard before he may be bound by a judgment affecting his rights.” [Plain City](#)

[\*Irrigation Co. v. Hooper Irrigation Co.\*, 51 P.2d 1069, 1072 \(Utah 1935\)](#). Basic due process principles—notice and an opportunity to be heard—are afforded at three stages of General Adjudication proceedings. First, water users are given notice of the opportunity to be heard by submitting their claims. [Utah Code §§ 73-4-3, -5](#). Second, when the State Engineer prepares and files the Proposed Determination with the Court, he is required to serve all the claimants with instructions informing them of their opportunity to be heard by filing an objection. [Utah Code § 73-4-11](#). Third, and critical here, following the filing of an objection, the Court is required to give affected claimants notice of when and where the matter will be heard. [Utah Code § 73-4-13](#).

After an objection is filed, the Court is required to “give not less than 15 days’ notice to *all claimants*, stating when and where the matter will be heard.” [Utah Code § 73-4-13](#) (emphasis added). The Court has interpreted *all claimants* to mean affected claimants: “[T]he intent of the statute is to require notice to all adverse claimants, or all claimants whose rights would be affected or drawn in question.” [Plain City Irrigation Co., 51 P.2d at 1072](#). Therefore, even absent the Section 24 proceeding, as a claimant affected by the Objections, EnerVest would have been entitled to notice and an opportunity to be heard, enabling it to litigate another’s objection in the district court and on appeal.

## CONCLUSION

For the foregoing reasons, the State Engineer requests that this Court recognize that claimant EnerVest has standing to appeal an adverse decision because EnerVest

participated in the district court's objection proceeding and is aggrieved by the district court's decision.

Respectfully submitted,

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**CERTIFICATE OF COMPLAINE WITH RULE 24(f)(1)**

1. This brief complies with the type-volume limitation of [Utah R. App. P. 24\(f\)\(1\)](#) because this brief contains 3,930 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 Microsoft Word 10 in 13-point Times New Roman.

*/s/ Benjamin J. Jensen*

**CERTIFICATE OF SERVICE**

I hereby certify that two true and correct copies of the foregoing BRIEF OF APPELLEE UTAH STATE ENGINEER were mailed by United States mail, first class postage prepaid, this 4th day of April, 2017 to each of the following:

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