

2006

Western Water, L.L.C. v. Jerry D. Olds : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

WESTERN WATER, L.L.C.,
a Utah limited liability company,

Plaintiff/Appellant,

v.

JERRY D. OLDS, Utah State Engineer
and Director of the Utah Division of
Water Rights, *et al.*,

Defendants/Appellees.

Case No. 20060527

**BRIEF OF STATE DEFENDANTS/APPELLEES,
JERRY D. OLDS, UTAH STATE ENGINEER, DIVISION OF WILDLIFE
RESOURCES, DIVISION OF FORESTRY, FIRE & STATE LANDS, AND
DIVISION OF PARKS AND RECREATION**

ON APPEAL FROM A FINAL ORDER OF THE THIRD JUDICIAL
DISTRICT COURT FOR SALT LAKE COUNTY, STATE OF UTAH.
THE HONORABLE ROBERT K. HILDER, DISTRICT JUDGE, PRESIDING

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Plaintiff/Appellant:

Western Water, LLC., a Utah limited liability company

Defendants/Appellees:

Jerry D. Olds, Utah State Engineer and
Director of Utah Division of
Water Rights

Alpine City

American Fork City

W. Glade and Bart D. Berry

Cahoon & Maxfield Irrigation Co.

Cedar Fort Irrigation Co.

Central Utah Water Conservancy Dist.

City of West Jordan

Morris Clark

Robert and Sherri Cook

George Crawford

Rod Dansie

East Jordan Irrigation Co.

Geneva Steel, LLC

Larry and Linda Hadfield

Irvine Ranch & Petroleum Inc., dba
Ambassador Duck Club

Jordan Valley Water Conservancy Dist.

Kennecott Utah Copper Corp.

Lake Mountain Mutual Water Co.

Lehi City

Magna Water Co.

Glenn R. Maughan

Susan Messersmith

Vernal Messersmith

Metropolitan Water Dist. of Salt Lake
and Sandy

National Audubon Society

New State, Inc.

PacifiCorp

Provo River Water Users Association

Riverton City

Salt Lake City Corp.

Sandy City Dept. of Public Utilities

City of Saratoga Springs

Marvin Shepherd

Sierra Club

South Jordan City

Utah Division of Forestry, Fire & State
Lands

Utah Division of Parks & Recreation

Utah Division of Wildlife Resources

Paul Taylor

Edward Thomas

Mary and Edward Thomas

Town of Cedar Fort

Trout Unlimited

United States of America, Bureau of
Reclamation

United States Fish & Wildlife Service

United States Department of the Interior,
Office of the Secretary

Utah Department of Transportation

Utah Lake Distributing Co.

Utah Lake Landowners, Inc.

Mitigation and Conservation

Commission, Utah Reclamation

Utah Water Company, LLC

Utah Waters

Utah Wetlands Foundation

Utah and Salt Lake Canal Co.

Mack and Marie Wagstaff

Shane and Michelle Wagstaff

E. Fred Walters

Dean and Leatrice Willes

Clinger Family Partnership

John Jacob

Evan Johnson

Burnham Duck Club

Lehi Irrigation Co.
North Jordan Irrigation Co.
South Jordan Canal Co.
Ron and Mindy Sager
Draper Irrigation Co.
Lower Jordan Water Users Association
Marvin Shepherd

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IN THE UTAH SUPREME COURT

WESTERN WATER, L.L.C.,)	
a Utah limited liability company,)	
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Plaintiff/Appellant,)	
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v.)	
)	Case No. 20060527
JERRY D. OLDS, Utah State Engineer)	
and Director of the Division of Water)	
Rights, <i>et al.</i> ,)	
)	
Defendants/Appellees.)	

**BRIEF OF STATE DEFENDANTS/APPELLEES,
JERRY D. OLDS, UTAH STATE ENGINEER, DIVISION OF WILDLIFE
RESOURCES, DIVISION OF FORESTRY, FIRE & STATE LANDS, AND
DIVISION OF PARKS AND RECREATION**

STATEMENT OF JURISDICTION

Western Water appeals the Third Judicial District Court's decision on review of an informal hearing before the State Engineer. (*See* Order Granting Summ. J. Failure Exhaust Administrative Remedies (May 16, 2006), at Addendum 1.) Such appeal is within the original jurisdiction of the Utah Supreme Court, pursuant to Utah Code Ann. § 78-2-2(3)(f) (West 2004).

STATEMENT OF THE ISSUES

1. *Issue:* Did the District Court lack subject matter jurisdiction to review Western

Water's Revised Conservation Plan ("RCP") when: (a) Western Water failed to initiate the administrative process by failing to submit the RCP as an application to appropriate; and (b) the State Engineer never received as an application, published, presented for protest, considered, or made a decision on the RCP?

Standard of Review: Appellate courts review "district courts' dismissal for lack of subject matter jurisdiction for correctness and accord no deference to their legal conclusions." *In re Uinta Basin*, 2006 UT 19, ¶ 7, 133 P.3d 410, 413.

Preservation: The District Court's dismissal for lack of subject matter jurisdiction is preserved at R. 3291-93; R. 3373 at 68:19-70:3; R. 2131; R. 3188. The argument that Western Water never submitted the RCP as an application and the State Engineer never processed the RCP as an application is preserved at R. 3373 at 43:8.

2. **Issue:** Assuming, *arguendo*, that Western Water's RCP had been submitted as an application, did the State Engineer have the authority to take final action on the RCP when it was submitted for the first time as part of a request for reconsideration?

Standard of Review: The State Engineer's authority to take action on an application is a matter of law, reviewed for correctness. *Bonham v. Morgan*, 788 P.2d 497, 499 (Utah 1989).

Preservation: Western Water argued and the District Court suggested at oral argument, R. 3373 at 52:6-56:2, that the State Engineer had discretionary authority to take action on the RCP, even though Western Water filed it as part of the request for

reconsideration.

3. **Issue:** Does the State Engineer have a duty to “accommodate” applicants by accepting changes to an application after a final decision on the application or “maximizing” an application’s chance of approval?

Standard of Review: The State Engineer’s authority and role in deciding applications to appropriate is a question of law, reviewed for correctness. *Bonham*, 788 P.2d at 499.

Preservation: Arguments concerning the lack of such a duty to accommodate were made by the State Engineer’s counsel at oral argument on April 17, 2006.¹ (R. 3373 at 43:8.)

DETERMINATIVE CONSTITUTIONAL PROVISIONS/STATUTES

The entire text of the following determinative constitutional and statutory provisions is contained in Addendum 2:

1. Utah Constitution, article XVII, § 1;
2. Utah Code Ann. § 73-3-1 (West 2004);
3. Utah Code Ann. § 73-3-2(1) (West 2004);
4. Utah Code Ann. § 73-3-14(1) (West 2004); and
5. Utah Code Ann. § 63-46b-14(1)-(2) (West 2004).

¹ Mr. Johnson’s oral argument appears on the hearing transcript, pages 41-49. (R. 3373 at 41:7-49:2.) Except for Mr. Johnson’s initial comment, the hearing transcript mistakenly refers to Mr. Johnson as Mr. Hill, who argued immediately before Mr. Johnson. (*Id.*)

STATEMENT OF THE CASE/STATEMENT OF THE FACTS

The State Engineer joins with the Utah Divisions of Wildlife Resources, Forestry, Fire & State Lands, and Parks and Recreation (collectively referred to as "State Engineer") to address Western Water's issues nos. 1, 2, and 3. The State Engineer supports the responses to Western Water's issues nos. 1 through 3 filed by the group of co-defendants and joins in their responses to Western Water's issues nos. 4, 5 and 7.

I. Introduction.

In 1999 and 2001, Western Water ("Western") submitted three applications to collectively appropriate 288,107 acre-feet of water per year from the Utah and Salt Lake Valleys (together referred to by Western as its "Conservation Plan"). (*See* R. 2056-60.) The State Engineer advertised the applications, received seventy-two protests, held a hearing, analyzed the applications based upon the criteria set forth in Utah Code Ann. § 73-3-8 (West 2004), and, on March 17, 2004, denied all three applications for failure to meet any of the statutory criteria for approval ("Memorandum Decision"). (R. 1580-99 (attached as Addendum 3).)

On April 5, 2004, Western submitted a request for reconsideration of the Memorandum Decision, describing the State Engineer's alleged legal and factual errors. (R. 2219-30, attached as Addendum 4.) Western attached to the reconsideration request a "Revised Conservation Plan" ("RCP"), describing a different water development proposal which it characterizes as a scaled-back version of the Conservation Plan. (R. 2227-30.) The

State Engineer took no action on the reconsideration request, effectively denying it. (R. 2155.) Utah Code Ann. § 63-46b-13(3)(b) (West 2004).

Instead of seeking review of either the Conservation Plan or the State Engineer's decision denying the reconsideration request, Western sought *de novo* review of the RCP. (R. 2233 (Amended Notice of Initial Attorney's Planning Meeting (Feb. 18, 2006)) (attached as Addendum 5).) In so doing, Western attempts to circumvent the statutorily-mandated administrative process by submitting a description of a new application as if it were part of the original applications. By so characterizing the RCP, Western seeks to maintain the priority date of the original applications. On February 22, 2006, Western filed Application No. A-76199, which requests the same amount of water as in the RCP, but includes more diversion points and a larger "service area." (R. 2237-61.) Western's 2006 application incorporates everything in the RCP. (R. 2237-60.) If approved, it would receive a 2006 priority date. Western, however, seeks to have the RCP retain the original applications' priority date.

II. Administrative Process for Acquiring an Appropriation of Water in Utah.

This Court has characterized Utah's water resources as "vital to the public welfare," society's "very life blood," and "the heartbeat of our economy." *Baugh v. Criddle*, 431 P.2d 790, 791 (Utah 1967); *Fairfield Irr. Co. v. White*, 416 P.2d 641, 644 (Utah 1966). It has compared a drop of water to a drop of gold. *Green River Canal Co. v. Thayn*, 2003 UT 50, ¶ 34, 84 P.3d 1134, 1146. Given its high public value, the Utah Constitution, statutes, and

case law grant individuals the right to *use*, but not *own* water, so long as they put it to a beneficial use—beneficial use being “the basis, the measure and the limit of all rights to the use of water in this state.” Utah Code Ann. § 73-1-3 (West 2004); *see* Utah Const. art. XVII, § 1 (recognizing and confirming right to use water); Utah Code Ann. § 73-1-1 (West 2004) (“all waters in this state . . . are hereby declared to be the property of the public, subject to all existing rights to the use thereof”); *In re Uintah Basin*, 2006 UT 19, ¶ 38, 133 P.3d 410, 422. A person who obtains a right to use bears a “continuing obligation to place all of a water right to beneficial use.” Utah Code Ann. § 73-1-4(1) (West 2004). A water right holder who fails to place any portion of a water right to beneficial use for a period of five years forfeits the right or the unused portion of the right and such “water reverts to the public.” *Id.* § 73-1-4(3)(a).

The Legislature created the State Engineer’s Office to “be responsible for the general administrative supervision of [Utah] waters . . . and the measurement, appropriation, apportionment, and distribution of those waters.” Utah Code Ann. § 73-2-1(3)(a) (West Supp. 2006); *see Pool v. Utah County Light & Power*, 105 P. 289, 289 (Utah 1909). The Legislature also mandated that, after 1903, “[r]ights to the use of the unappropriated public waters in this state may be acquired only as provided in [the Water and Irrigation] title [of the Utah Code].” Utah Code Ann. § 73-3-1 (West 2004).

To appropriate water a person files an application “in a form prescribed by the [S]tate [E]ngineer,” containing information required by Utah Code Ann. § 73-3-2(1)(a) (West 2004).

An application is mandatory because “[n]o appropriation of water may be made . . . except application for such appropriation first be made to the state engineer *in the manner hereinafter provided, and not otherwise.*” *Id.* § 73-3-1 (emphasis supplied). Once it is filed the State Engineer “examines” the application to determine “whether any corrections, amendments or changes are required for clarity,” Utah Code Ann. § 73-3-5(2) (West 2004), and then publishes notice “once a week for a period of two successive weeks in a newspaper of general circulation in the county in which the source of supply is located,” Utah Code Ann. § 73-3-6(1)(a) (West 2004). Interested parties may protest the application within twenty days after its publication. Utah Code Ann. § 73-3-7(1)(a) (West 2004).

The State Engineer, taking into consideration the protests, evaluates the applications based on legislatively established criteria, including availability of water in the proposed source, impairment of existing rights, the physical and economic feasibility of the proposed plan, its impact on public welfare, the applicant’s financial ability to carry out the plan, whether the plan was filed in good faith and not for purposes of speculation or monopoly, and whether the plan would unreasonably affect public recreation or the natural stream environment or prove detrimental to the public welfare. Utah Code Ann. § 73-3-8 (West 2004). If the application meets all criteria, the State Engineer approves it; if not, “it shall be rejected.” *Id.*

“Any aggrieved party may file a request for reconsideration” of a decision on an application. Utah Admin. Code R655-6-17(A) (2006). When the State Engineer receives

such a request, he “shall review the request and *may*” deny all or part of it, grant all or part of the relief requested, or set a time for rehearing the matter. *Id.* R655-6-17(B). If he takes no action on the request, it is deemed denied by operation of law. Utah Code Ann. § 63-46b-13(3)(b). If the State Engineer sets the matter for rehearing, the rehearing “shall be limited to the matter specified in the order.” Utah Admin. Code R655-6-17(D). After rehearing, the State Engineer “may affirm his former decision or may abrogate it, or may change or modify the same in any particular.” *Id.*

The State Engineer provides the applicant and protestants notice of his decision on the application. Utah Code Ann. § 73-3-10 (West 2004). Where he approves it he fixes a time frame for the applicant to prove that the water has been diverted and placed to beneficial use. Utah Code Ann. § 73-3-12 (West 2004). The applicant must demonstrate the amount of water being beneficially used without impairment of other rights. Utah Code Ann. § 73-3-16 (West 2004). *See Eardley v. Terry*, 77 P.2d 362, 365 (Utah 1938). Once the State Engineer determines the proof is correct and beneficial use is being made, he issues a certificate of appropriation, which is “prima facie evidence of the owner’s right to the use of the water in the quantity, for the purpose, at the place, and during the time specified therein, subject to prior rights.” Utah Code Ann. § 73-3-17 (West 2004). The vested property right the certificate holder owns is not absolute and may be lost by failure to continue to “place all of [the] water right to beneficial use.” *Id.* § 73-1-4.

Any party “aggrieved” by a State Engineer’s decision on an application may obtain

de novo judicial review in district court. Utah Code Ann. §§ 63-46b-14 through -15, 73-3-14 (West 2004). In this review, the court assumes the State Engineer's decision-making role. *Eardley*, 77 P.2d at 366; *United States v. Dist. Court*, 238 P.2d 1132, 1136 (Utah 1951). If the State Engineer denied the application, the court must determine whether, considering the input from protestants (who appear as co-defendants), the application complies with the section 73-3-8 requirements. If so, the court approves the application; if not, it "shall be rejected." Utah Code Ann. § 73-3-8.

III. Western Water's "Conservation Plan."

On March 24, 1999, Western filed applications A72026 (R. 2010-27) and A72027 (R. 2029-43), and on May 23, 2001 filed application A73473 (R. 2045-63). (*See* Addendum 6 for illustrative map of Conservation Plan.) These gargantuan and complex applications collectively sought appropriation of 288,107 acre-feet of water per year from various surface and groundwater sources throughout Utah and Salt Lake Counties.² (R. 2011, 2030, 2046.) Western listed the following beneficial uses:

- (i) domestic use for 398,000 individuals in unincorporated Utah and Salt Lake Counties and in 19 named municipalities; (R. 2011, 2030, 2046)

² An "acre-foot" is a volumetric measurement defined as the water that covers one acre one foot deep. Utah Code Ann. § 73-1-2 (West 2004). Practically speaking, an acre-foot provides domestic water for two households for one year. Assuming an average household size of four, if all of the water in the three applications were put to domestic use, Western applied for enough water to meet the needs of 2,304,856 individuals for one year. Utah's current population is about 2,470,000. U.S. Census Bur., *State & Metro. Area Data Book: 2006* 3 (6th ed. July 2006).

- (ii) irrigation of 56,750 acres; (*id.*)
- (iii) watering for 13,000 horses and cattle; (*id.*)
- (iv) power development; (R. 2046)
- (v) mining; (R. 2011)
- (vi) wetlands development; (R. 2030, 2052) and
- (vii) other purposes (R. 2011, 2046).

The three applications identified 145 unique diversion points (R. 2010-13, 2031-32, 2047-51) and designated 1,000+ square miles of the Wasatch Front as the asserted place of use (R. 2011-24, 2030-41, 2046-63), which Western calls its “service area” (R. 1979-80). The area stretches some fifty-five miles from Farmington Bay to the south end of Utah Lake, and twenty-four miles from the Provo foothills to the towns of Fairfield and Cedar Fort. (*See* R. 2019-20, 2036-37, 2055-56.)

Among the 335 page “Statement of Facts”³ accompanying its applications, Western included its “Utah Lake and Jordan River Conservation and Storage Plan.” (R. 2056-60.) The plan provided some detail concerning Western’s hope to divert and distribute the vast amount of water it sought to control. Western envisioned that, after it obtained rights to use the water, it would build extensive diversion, storage, and distribution facilities to sell the

³ The entire Statement of Facts was not introduced in District Court and is therefore not part of the appellate record. An Executive Summary of the Statement of Facts was submitted on April 5, 2006 as an Exhibit to certain Defendant’s Memorandum in Support of Summary Judgment Concerning Failure to Exhaust Administrative Remedies, and appears at R. 2189-98.

water to farms, ranches, industries, and municipalities. (R. 2055-56.) These facilities included sixty-five miles of transmission pipelines, ten pumping stations, approximately twenty-seven new or expanded diversion structures, two reservoirs, and 127 recharge wells connected by another thirty-eight miles of piping to facilitate in-ground storage. (R. 2010-63.) In addition to building new facilities, Western hoped to use lands, diversion structures, and conveyance facilities belonging to other water providers. (R. 2012-15, 2031-33, 2047-53, 2263-64.) Western never obtained the right to use or modify such existing facilities and several owners of these facilities were among the seventy-two protestants before the State Engineer. (R. 1582-88.)

While Western expected to become a water broker, when it came to the beneficial use requirement, Western had no contracts or other commitments with any party who would pay for the water. (R. 1988; R. 2006-08.) Western estimated the Conservation Plan would cost \$100 million. (R. 1594; R. 2232.) Before the State Engineer, protestants presented evidence that the cost might be three times that amount. (R. 1594.)

Western described the Conservation Plan in conditional and indefinite terms. For example, excess winter flow in the Jordan River might be pumped to Salt Lake Valley aquifer storage “if feasible.” (R. 2057.) Water withdrawn from planned aquifer storage in Cedar Valley might be used there or conveyed to unspecified cities and “water purveyors” elsewhere. (*Id.*) A reservoir planned for Cedar Valley might be built at one of seven sites. (R. 2036.) Western did not know which entities might purchase water and put it to beneficial

use. (*Id.*) “Actual supplies will be somewhat different than the expected supplies outlined here depending upon the agreements that will be reached with those entities desiring Conservation Plan water.” (*Id.*)

As required by Utah statute, Utah Code Ann. § 73-3-6, the State Engineer advertised the applications in (i) *Deseret News* and *Daily Herald* on June 14 and 21, 2001; (ii) *The New Utah* on June 13 and 20, 2001; and (iii) *Davis County Clipper* on June 12 and 19, 2001. (R. 2201.) The three applications drew seventy-two protests, including from parties Western anticipated would be its customers. (*See, e.g.*, R. 1596–99.) After a hearing, the State Engineer issued a Memorandum Decision on March 17, 2004 denying the applications for failure to meet any of the section 73-3-8 criteria. (R. 1580–1599.)

In response, on April 6, 2004, Western submitted a request for reconsideration (R. 2219-30.) In addition to alleging State Engineer legal errors, the request asked for reconsideration of the applications “in light of the Revised Conservation Plan attached hereto or any smaller part of it.” (R. 2225.)

IV. Western Water’s Revised Conservation Plan (“RCP”).

The RCP started on page 9 of the eleven-page reconsideration request.⁴ (R. 2227.)

⁴ Western intended the RCP as an adaptable “fallback plan” seeking “whatever water supply can be approved by the State Engineer” (R. 2227), “even down to a single well” (R. 2224). Before the State Engineer issued his Memorandum Decision, but after the hearing on the three applications, Western sent the State Engineer a letter explaining “that it would be willing to accept a lesser amount of water.” (R. 3203; *see* Pl.’s Br. at 19.) By the time this case reached District Court, Western had again altered its request by eliminating the shallow groundwater wells in Salt Lake Valley from the RCP. (R. 1990.)

Of the Conservation Plan's 145 points of diversion, the RCP identified twenty-three where water would be diverted, forty-two points where it would not, and remained silent about the others. (Compare R. 2010–2063 with R. 2074–2076.) The RCP eliminated thirty of the sixty-five miles of pipelines, and decreased the capacities of the rest. (*Id.*) It eliminated five pumping stations and decreased the capacities of five others. (*Id.*) It deleted one proposed reservoir and decreased another in size. (*Id.*) The RCP eliminated forty of the 127 recharge wells and left unclear its plans for thirty-six more. (*Id.*) Western estimated the RCP's cost at \$39.8 million. (R. 2229.)

While the Conservation Plan applications contained no specific information on beneficial use, the RCP did not modify any of its proposed uses or places of use, nor did it explain how the amount of water requested would be apportioned among hoped-for domestic, agricultural, and industrial customers. (R. 2227-29.) Like the original applications, the RCP presented a plan couched in conditional and indefinite language. For example:

Irrigation season flow in the conveyance pipeline may be delivered directly for outdoor irrigation use or may be recharged into the aquifer for drinking water supplies. Only those recovery wells necessary to recover the recharged water will be constructed and recovery pipelines will be downsized to collect only that water recovered from the aquifer. (R. 2228.)

[T]he Cedar Valley Aquifer Storage and Recovery System is not necessary for the feasibility and reliability of use of much of this 32,290 acre-feet of depletable water supply, and thus will be built only when there is sufficient demand in Cedar Valley to warrant its construction. (R. 2229.)

Western's RCP was more a plea for any available water than any plan to put water to beneficial use.

In the RCP, Western considered the Cedar Valley Storage and Recovery System unnecessary although it originally described that system as “the heart of the Conservation Plan.” (R. 2229; R. 2059.) Rather than detail the amount, place, and type of use for the water it sought, Western indicated its plans could be “adapted to whatever supply can be approved by the State Engineer” and that “most any size of project can . . . be built.” (R. 2227-28.)

The State Engineer took no action on the reconsideration request, which was deemed denied by operation of law. *See* Utah Code Ann. § 63-46b-13(3)(b) (West 2004). Western could have sought *de novo* judicial review of the denial. Instead, Western sought *de novo* review of the RCP. (R. 6 at 2155 (Complaint ¶ 25). *See also* R. 2233.)⁵

On *de novo* judicial review of the State Engineer’s decision, the District Court dismissed Western’s complaint on summary judgment for lack of subject matter jurisdiction because “[n]o hearing was held on the Revised Plan, and the State Engineer took no action on it.” (R. 3292.) Because the State Engineer took no action on the RCP, the District Court found Western “failed to exhaust its administrative remedies.” (*Id.*)

⁵ Subsequent to filing in District Court, but prior to the Court’s summary judgment, Western filed a new application seeking to appropriate 56,880 acre-feet of water from diversion points including, but not limited to, those in the Revised Conservation Plan. (R. 2237–61; *See* R. 1989–90.) This application incorporated ninety-eight of the diversion points from the earlier applications, and added twenty-five new ones. (R. 2239–43.) The new application encompassed up to 1321 square miles as the place of use. (R. 2248.)

SUMMARY OF ARGUMENTS

1. The District Court lacked subject matter jurisdiction to review Western's RCP because Western never filed the RCP as an application and the State Engineer never examined, published, presented for protest, or made a decision on the RCP. Under Title 73, Chapter 13 of the Utah Code, a person who seeks to appropriate water must follow the chapter's substantive and procedural requirements. "No appropriation of water may be made and no rights to the use thereof initiated and no notice of intent to appropriate shall be recognized except application for such appropriation first be made to the [S]tate [E]ngineer in the manner hereinafter provided, and not otherwise." Utah Code Ann. § 73-3-1.

Western never initiated the administrative process for acquiring a water right because Western never filed an application that embodied its RCP. Because the State Engineer never received an RCP application, he never examined, published, presented for protest, considered, or made a decision on it. Only a *final* agency action may be judicially reviewed, *id.* § 63-46b-14 and because the State Engineer never took action on the RCP, the District Court lacked subject matter jurisdiction to review the RCP.

2. Even if Western had presented the RCP as an application, the State Engineer lacked authority to review it when Western presented it for the first time in a reconsideration request. The original three applications, supported by 335 detailed pages, proposed a grandiose and highly speculative water use plan. In three pages, the RCP proposed a different, but still enormous, plan. Even if the RCP were not vague and devoid of detail, the

alterations as compared to the original applications required the State Engineer to treat the RCP as a new application.

One of the basic tenets of Utah water law is first in time, first in right—with priority determined as of an application's filing date. Because of this fundamental water law doctrine and the mandatory nature of the related statutory procedures, the State Engineer lacked authority to review the RCP (if it had been an application) when Western presented it for the first time in a reconsideration request. At the very least, the State Engineer would have been required to treat the RCP as an new application, *with a new priority date*, publish, present for protest, and make a decision on its merits.

Even if the State Engineer could have acted on the RCP without giving it a new priority date, by taking no action on the reconsideration request, only the request was deemed denied. The State Engineer did not act on the RCP. When a decision-maker takes no action on a reconsideration request, he takes no action on the merits of any issue raised for the first time in the request.

3. The State Engineer had no duty to accommodate Western's late attempt to alter its original applications by accepting the RCP as though it slightly altered the applications. Western bore the burden to produce sufficient evidence to show the State Engineer a reason to believe its applications met the section 73-3-8 criteria. "[I]f an application does not meet the requirements of [section 73-3-8], it shall be rejected." Utah Code Ann. § 73-3-8. Western provides no authority or rationale to impose a duty on the State Engineer to help

Western create an application that could be approved or to accept changes to an application after a final decision has been rendered.

ARGUMENT

I. The District Court Lacked Subject Matter Jurisdiction Over Western Water's Claim Because Western Water Failed to Initiate the Administrative Process by Filing the RCP as an Application with the State Engineer's Office. Therefore, the State Engineer Never had an Opportunity to Take Final Agency Action on it.

Western was free to seek *de novo* judicial review of the State Engineer's denial of Western's original applications. Instead, it sought judicial review of the RCP, a significantly different plan, which Western presented to the State Engineer as an appendage to its request for reconsideration of the State Engineer's denial of the original applications.

Western asserts that when the State Engineer took no action on Western's reconsideration request he took final agency action on the RCP,⁶ which the State Engineer saw for the first time in the reconsideration request, because the State Engineer *could have taken action* on the RCP.⁷ (Pl.'s Br. at 24-27, 34-35; R. 3373 at 51:24-58:8.) Because the

⁶ Since the State Engineer took no action on Western's request for reconsideration (R. 2155), the request was deemed denied by operation of law. *See* Utah Code Ann. § 63-46b-13(3)(b) (West 2004).

⁷ Western submitted a letter to the State Engineer on December 18, 2002, before the State Engineer issued his Memorandum Decision. (R. 3199-3203.) The letter said, in part, that "if somehow the State Engineer finds that a part of the water supply appropriated cannot be approved under the statutory criteria, then Western Water is entitled to have approved that part of the water supply that can be appropriated." (R. 3203.) The letter contained none of the RCP's sketchy details and cannot be construed as bringing the RCP to the State Engineer's attention before he issued his decision.

State Engineer *could have taken such action*, Western argues, he took action by effectively denying the request. (*Id.*) The District Court did not address whether the State Engineer *could have acted* on the RCP, holding only that he took no action and, therefore, the Court lacked subject matter jurisdiction to review the RCP. (R. 3373 at 69:16-24.)

The District Court correctly determined it lacked jurisdiction to consider the RCP because the State Engineer took no final agency action on it. (R. 3373 at 69.) He lacked authority to do so because Western never submitted the RCP as an application, as Utah Code Ann. § 73-3-1 requires. The statute provides that, “[n]o appropriation of water may be made . . . *except application for such appropriation first be made to the state engineer in the manner herein after provided, and not otherwise.*” Utah Code Ann. § 73-3-1 (emphasis supplied). Because Western never filed the RCP as an application, the plan was not noticed for hearing, presented for protest, heard by the State Engineer, or otherwise processed, and the State Engineer, therefore, could not have and did not take final agency action on it.

A. A Person Must Comply with the Process Outlined in Title 73, Chapter 3 of the Utah Code to Appropriate Water in Utah.

The only way to appropriate water in Utah is to follow the procedural and substantive requirements of Title 73, Chapter 3 of the Utah Code. Utah Code Ann. § 73-3-1; *Mosby Irr. Co. v. Criddle*, 354 P.2d 848, 852 (Utah 1960) (“Chapter 3 of Title 73, U.C.A. 1953, prescribes the exclusive manner in which [the right to use water] can be initiated, the conditions upon which such right can be acquired, and the procedural requirements which must be complied with.”); *Hanson v. Salt Lake City*, 205 P.2d 255, 260 (Utah 1949) (“[N]o

right to the use of the unappropriated waters of this state can be acquired without complying with the statutory requirements.”). See 3 Wells A. Hutchins, *Water Rights Laws in Nineteen Western States* 542 (U.S. Dept. Agric. 1977) (hereinafter “Hutchins”) (excerpt attached as Addendum 7). Before the State Engineer may approve an application, the appropriation statutes require: (i) the applicant to submit on a State Engineer’s form an application containing substantive information; (ii) the State Engineer to take required procedural steps; and (iii) the applicant to demonstrate a reason to believe the application meets the Utah Code Ann. § 73-3-8 requirements. Only after the applicant and State Engineer follow these steps may the State Engineer take final agency action on the application. Utah Code Ann. § 73-3-1. A person seeking judicial review of the State Engineer’s decision on an application must first obtain final agency action on that application. *Id.* §§ 63-46b-14, 73-3-14.

1. A Person Seeking to Appropriate Water Must “Make an Application in a Form Prescribed by the State Engineer.”

To initiate the administrative process to appropriate water, an applicant must “file”⁸ an application on a “form prescribed by the [S]tate [E]ngineer,” containing the substantive information the statute requires.⁹ Utah Code Ann. § 73-3-2 (West 2004); see Hutchins, at 543 (“Filing the application is an essential preliminary step.”). Utah statutes provide:

⁸ An application is “filed” on the date when it “was acceptably completed in form and substance and filed in” the State Engineer’s office. Utah Code Ann. § 73-3-4 (West 2004).

⁹ An application, along with all of the other requirements, must also show it will put water to a beneficial use. Utah Code Ann. § 73-1-3.

“No appropriation of water may be made . . . except application for such appropriation first be made to the [S]tate [E]ngineer in the manner hereinafter provided, *and not otherwise.*” Utah Code Ann. § 73-3-1 (emphasis supplied).

“The application shall be upon a form to be furnished by the [S]tate [E]ngineer and shall set forth” specific substantive elements. *Id.* § 73-3-2(1)(a).

“On receipt of each application *containing the information required by Section 73-3-2*, . . . it shall be the duty of the [S]tate [E]ngineer . . . to make a record of such receipt for that purpose.” *Id.* § 73-3-5(1) (emphasis supplied).

“When an application is filed *in compliance with this title*, the [S]tate [E]ngineer *shall* publish a notice.” *Id.* § 73-3-6(1)(a) (emphasis supplied).

“After publication of notice to water users, the [S]tate [E]ngineer may authorize amendments or corrections that involve a change of point of diversion, place, or purpose of use of water, *only after republication of notice to water users.*” *Id.* § 73-3-6(2) (emphasis supplied).

These statutes illustrate the mandatory requirement that the appropriation process be initiated by an application “containing the information required by Section 73-3-2,” *id.* § 73-3-5(1), and filed “in compliance with [Title 73].” *id.* § 73-3-6(1)(a).

Substantively, an applicant must set forth information including, but not limited to, the nature of the proposed use, the time when the water will be used, the name of the stream or water source, the dimensions and nature of the diverting channel, and “other facts that *clearly define the full purpose* of the proposed appropriation.” *Id.* § 73-3-2(1)(b)(i)-(viii) (emphasis supplied). If the application is for irrigation, the statute requires more information, such as the character of the soil and the legal subdivisions of the irrigated land. *Id.* § 73-3-2(2). Without a complete application, the State Engineer has no authority to begin the procedural process of making a decision on an application. *See id.* §§ 73-3-1, 73-3-2(1)(a),

73-3-5(1), 73-3-6(1)(a).

2. Both the Applicant and the State Engineer Must Follow the Procedural Requirements of Chapter 3 of Title 73 of the Utah Code.

Once the State Engineer receives a completed application, he follows a statutory process to prepare to make a decision on the application. First, he “make[s] an endorsement” and “a record of . . . receipt.” *Id.* § 73-3-5(1). “All applications which shall comply with the provisions of this chapter and with the regulations of the [S]tate [E]ngineer shall be filed and recorded.” *Id.* § 73-3-5(3). Thereafter, he “shall publish a notice of the application.” *Id.* § 73-3-6(1)(a). After publication, the State Engineer may only correct “clerical errors, ambiguities, and mistakes that do not prejudice the rights of others” without republication. *Id.* § 73-3-6(1)(c). If an applicant wishes to change a “point of diversion, place, or purpose of use of water,” the State Engineer must republish the application. *Id.* § 73-3-6(2). Once the application has been published and/or republished, “[a]ny person interested may file a protest with the [S]tate [E]ngineer” for up to twenty days after publication. *Id.* § 73-3-7(1)(a). “The [S]tate [E]ngineer shall consider the protest[s] and shall approve or reject the application.” *Id.* § 73-3-7(2).

The State Engineer must strictly follow the statute’s step-by-step process. *Id.* § 73-3-1. The State Engineer has no authority to rule on an application otherwise. *Id.*; see *Baugh*, 431 P.2d at 791 (“more and more it becomes quite obvious that development of water must require strict adherence to statutory sanctions, without delay or non-conformance thereto .

..."); *see also Mosby Irr. Co.*, 354 P.2d at 852 (holding State Engineer lacked authority to reinstate original priority date where application lapsed without State Engineer mistake or fraud).

3. Once a Complete Application is Filed, Published, Presented for Protest, and Considered, the State Engineer Analyzes the Application Under Section 73-3-8.

Where an application has been properly submitted and processed, the State Engineer analyzes it under the section 73-3-8 criteria, which provide:

It shall be the duty of the [S]tate [E]ngineer to approve an application if: (a) there is unappropriated water in the proposed source; (b) the proposed use will not impair existing rights or interfere with the more beneficial use of the water; (c) the proposed plan is physically and economically feasible, unless the application is filed by the United States Bureau of Reclamation, and would not prove detrimental to the public welfare; (d) the applicant has the financial ability to complete the proposed works; and (e) the application was filed in good faith and not for purposes of speculation or monopoly. . . . If an application does not meet the requirements of this section, it shall be rejected.

Utah Code Ann. § 73-3-8(1).

An applicant bears the burden to produce evidence to persuade the State Engineer there is reason to believe the application meets all section 73-3-8 requirements. *Searle v. Milburn Irr. Co.*, 2006 UT 16, ¶¶ 49-54, 133 P.3d 382, 394-95. If the applicant fails to meet its burden of persuasion, the application “shall be rejected.” Utah Code Ann. § 73-3-8. *See Searle*, 2006 UT 16, ¶ 53, 133 P.3d at 395.

4. Final Agency Action is a Prerequisite for Judicial Review.

For final agency action to be taken on an application, the State Engineer must make

a decision on the merits of the application. *See Union Pac. R. Co. v. Utah State Tax Comm'n*, 2000 UT 40, ¶ 16, 999 P.2d 17, 21 (holding agency action final if: (a) “judicial review will not disrupt the orderly process of” the administrative decision making process; (b) “rights or obligations [have] been determined” or “legal consequences [will] flow from the agency action;” and (c) “agency action, in whole or in part, [is] not preliminary, preparatory, procedural, or intermediate with regard to subsequent agency action”). Only *after* the State Engineer takes final action on the application may an aggrieved party seek judicial review. *See* Utah Code Ann. § 73-3-14(1)(a) (“Any person aggrieved by an *order of the state engineer* may obtain judicial review”) (emphasis supplied); *id.* § 63-46b-14(1) (“A party aggrieved may obtain judicial review of final agency action”).

A party cannot seek judicial review of a decision on an application to appropriate before the State Engineer takes final agency action. *Id.* § 63-46b-14(2) (“[a] party may seek judicial review only after exhausting all administrative remedies available” unless exhaustion not required by statute, administrative remedies inadequate, or exhaustion would cause irreparable harm). Thus, because the State Engineer may only take final agency action on an application properly filed, published, and presented for protest, the district court only has subject matter jurisdiction to review an application properly filed, published, presented for protest, and either approved or rejected.

B. Western Water Failed to File the RCP as an Application and Therefore, the State Engineer had No Authority to Make a Decision upon the RCP.

Western failed to comply with the procedural and substantive requirements of the

Appropriation Statute, Utah Code Ann. § 73-3, because (i) Western did not submit it on a State Engineer form or provide the substantive information the statute requires; (ii) the State Engineer never took required procedural steps; (iii) if Western had filed the RCP as an application, it would have failed to meet section 73-3-8 requirements; and (iv) because Western never triggered the administrative process and the State Engineer never took action on the RCP, the District Court lacked subject matter jurisdiction to review it.

1. Western Water Failed to File the RCP on a “Form Prescribed by the State Engineer.”

Western never filed the RCP on an appropriate form, or provided the substantive information the statute requires. To acquire a water right in Utah, a person “shall make an application in a form prescribed by the [S]tate [E]ngineer” and provide the substantive information the statute requests. *Id.* § 73-3-2. Western failed to do so.

First, Western submitted the RCP in a three-page narrative in its request for reconsideration (R. 2219, 2227-2230), failing to meet the threshold requirement of submitting an application on “a form prescribed by the [S]tate [E]ngineer.” Utah Code Ann. § 73-3-2(1)(a).

Second, Western included none of the substantive information section 73-3-2 requires. While the RCP states Western will take water from Salt Lake Valley shallow groundwater wells and Utah Lake, it specifies no points of diversion, no diversion amounts, no stream from which the water would be diverted, and no other facts to “*clearly define* the full purpose of the proposed appropriation.” *Id.* § 73-3-2(1)(b)(viii) (emphasis supplied). Instead, the

RCP describes only what Western will not do. Even at that, the RCP is indefinite, indicating Western will only construct “those recovery wells necessary” (R. 2228) and the ground water storage plan “will be built only when there is sufficient demand in Cedar Valley to warrant its construction” (R. 2229). Western’s RCP description fails almost every substantive application requirement.

2. Because Western Water Never Filed an Application, the State Engineer Never Examined, Published, or Made a Decision on the RCP.

Because Western failed to submit the RCP on “a form prescribed by the [S]tate [E]ngineer” containing necessary substantive information, the State Engineer had no authority to proceed as if the RCP were an application. *See* Utah Code Ann. § 73-3-1. The State Engineer never examined, published, received protests with respect to, or held a hearing or made a decision on the RCP. Thus, the RCP failed to meet the requirements of the statute to be properly presented to the State Engineer for decision.

Lack of publication of the RCP prohibited the state entities which join in this brief (other than the State Engineer) from having the opportunity to protest the RCP. Publication allows impacted water users the chance to inform the State Engineer of their concerns about an application and otherwise provide the State Engineer input concerning it. *See Longley v. Leucadia Fin. Corp.*, 2000 UT 69, ¶¶ 19-22, 9 P.3d 762, 766-67.

3. Even If Western Water Had Filed the RCP as an Application, Western Water Failed to Demonstrate that It Would Meet the Elements of Section 73-3-8 Under Any Circumstances.

While the District Court made no finding with respect to Western's compliance, or lack thereof, with section 73-3-8, and while no such finding is needed for this Court to uphold the District Court's dismissal, this Court should understand that even if the RCP had been filed as an application, the possibility of it meeting the section 73-3-8 requirements is especially remote. For example, in his Memorandum Decision (R. 1580-99), the State Engineer found Western failed to demonstrate the first requirement of the statute—there is unappropriated water in the proposed source—finding instead, “that all of the waters within the Utah and Salt Lake Valleys are fully appropriated by prior rights.” (R. 1591.) “[B]eneficial use shall be the basis, the measure and the limit of all rights to the use of water” in Utah. Utah Code Ann. § 73-1-3. But, the State Engineer found that Western had “no beneficial use for the water other than selling it to others.” (R. 2214.) The same is true of the RCP. (R. 2227-30.) Even if the sale of water were a beneficial use, the State Engineer found that Western lacked any contracts or customers to demonstrate such a beneficial use could occur. (R. 2213.) Moreover, because it also lacks lands or any other facilities, Western has yet to demonstrate it could put any water to beneficial use. While Western hoped to sell water to people who might have beneficial uses, Western submitted nothing to indicate such plans could be implemented. (R. 2213-14.) Neither the availability of water nor the lack of a beneficial use for that water could possibly change regardless of the RCP's size.

4. The District Court Lacked Jurisdiction to Review the RCP Because Western Water Failed to Initiate the Administrative Process, Let Alone Exhaust Administrative Remedies, as Required by Utah Code Ann. § 63-46b-14.

Western's attempt to obtain administrative approval of its RCP failed to exhaust administrative remedies, as required by Utah Code Ann. § 63-46b-14(2), and failed to obtain final agency action, as required by section 63-46b-14(1). Both failure to exhaust administrative remedies and failure to obtain final agency action deprive a reviewing court of subject matter jurisdiction. *Kuntz & Co. v. State*, 913 P.2d 765, 771 (Utah 1996) (exhaustion); *Thomas v. Color Country Mgmt.*, 2004 UT 12, ¶¶ 14-15, 84 P.3d 1201, 1206 (finality). Western never commenced the administrative process by filing an application consistent with the RCP's parameters. Thus, the State Engineer lacked authority to consider the RCP, and administrative remedies could not be exhausted. Because the State Engineer never reached a decision on the merits of the RCP, there has been no final agency action and the District Court properly concluded it lacked jurisdiction to consider the RCP. (R. 3291-93.)

II. Even if Western Water's RCP had been Presented in Application Form, the State Engineer Had no Authority to Consider a New or Substantially Modified Application Presented for the First Time in a Request for Reconsideration.

Western argues that "[d]uring the application process for water rights, both before and after approval, an applicant can request less water (and also delete other elements of his application)." (Pl.'s Br. at 29.) It asserts the RCP was merely a "request for a smaller project plan, lesser amounts of water, and fewer diversion points" than requested in the original

applications. (Pl.'s Br. at 34. See Pl.'s Br. at 30 ("differences between the Revised Conservation Plan and the original are *only* differences of deletion and subtraction").) Western then argues "the State Engineer has a duty to approve water rights in all instances where there is any amount of water in the application." (Pl.'s Br. at 30.) While it is unclear, Western appears to assert the State Engineer's supposed duty to approve an application where water is available required him to review the RCP, even when it was submitted in a reconsideration request. By taking no action on the request for reconsideration, Western argues, the State Engineer denied the RCP on the merits, thus taking final agency action on the RCP. (Pl.'s Br. at 33, 34, 35.)

The State Engineer, however, took no action on the RCP and could not have done so. Assuming, *arguendo*, the RCP could be construed as an application or subpart of Western's original applications, the State Engineer lacked authority to rule on the plan because (A) the RCP represented a new appropriation plan (itself a gigantic and complicated proposal seeking water for every purpose and by any means possible); and (B) the State Engineer cannot rule on a new or altered application on a request for reconsideration.

A. Western Water's RCP, Which was Extracted From an Enormous Appropriation Plan, Constituted a New Proposal.

While the District Court held otherwise (R. 3292; R. 3373 at 62:22), Western argues the RCP is merely a down-sized version of the original applications (Pl.'s Br. at 34, 30).¹⁰

¹⁰ To the extent that this assertion presents a question of fact, Western Water has failed to marshal the evidence to show the District Court erred in finding the RCP was

The State Engineer does not dispute that the RCP, if it were reduced to the form of an application, might fall generally within the expansive parameters of the original applications, but only because the colossal scope of those applications could encompass a limitless number of proposals. Western submitted 335 pages in an effort to describe the complex relationship between the applications and how diversion and redirection would not injure other water users. (R. 2189–98.) The RCP, while vague and devoid of information, still sought 56,800 acre-feet of water, with at least twenty-three points of diversion, thirty-five miles of pipelines, a proposed reservoir, and at least eighty-seven recharge wells.¹¹ (R. 2227-29.) The RCP, on its own, presents an enormously complex, theoretical plan to “provide” water somewhere in a 1,000+ square mile “service area” for every imaginable beneficial use, but no use for which Western had binding agreements with others.¹² (R. 2011-13, 2030-32, 2046-51.)

Western argues the RCP is not a “new” application because it did not add points of diversion or seek more water than the Conservation Plan. (Pl.’s Br. at 30, 32.) Western’s original plan included numerous points of diversion in Salt Lake and Utah Valleys, diversion by almost any means, and for every theoretical beneficial use, and sought more water than

“substantially different.” See *Elks Lodges No. 719 (Ogden) & No. 2021 (Moab) v. Dep’t Alcoholic Beverage Control*, 905 P.2d 1189, 1193 (Utah 1995).

¹¹ By the time this case reached District Court, Western Water had altered the RCP by eliminating the shallow groundwater wells in Salt Lake Valley. (R. 1990.)

¹² Western Water’s RCP, like its Conservation Plan, failed to identify a beneficial use. (See R. 2227–30.)

imaginable. Any proposal for diversion in the Utah and Salt Lake Valleys could in one sense be labeled a part of the original Conservation Plan. Merely because the RCP does not propose new points of diversion or seek more water does not mean the RCP is the same plan or any meaningful revision of that plan.

B. The State Engineer Cannot Take Action on a New Application on a Request for Reconsideration.

Western argues the State Engineer *could have* approved or readvertised the RCP submitted in a request for reconsideration (Pl.'s Br. at 27) and because he *could have*, he acted upon the RCP by taking no action on the reconsideration request (Pl.'s Br. at 27, 34). Contrary to these assertions, the State Engineer did not act on the RCP because: (i) he lacked authority to rule on the RCP when Western submitted it with a request for reconsideration; and (ii) assuming the State Engineer had discretionary authority to act on the RCP, taking no action on a reconsideration request does not constitute action on the merits of the RCP.

1. The State Engineer Lacked Authority to Take Action on a New Application Submitted as Part of a Request for Reconsideration.

Western asserts the State Engineer *could have* taken action on the RCP. (Pl.'s Br. at 27.) The Utah Administrative Procedures Act allows any party to request an agency to reconsider "an order" that "would otherwise constitute final agency action," by stating "the specific grounds upon which relief is requested." Utah Code Ann. § 63-46b-13(1)(a) (West 2004); *see* Utah Admin. Code R655-6-17. A request for reconsideration is generally granted when:

- (1) the matter is presented in a “different light” or under “different circumstances;”
- (2) there has been a change in the governing law; (3) a party offers new evidence;
- (4) “manifest injustice” will result if the court does not reconsider the prior ruling;
- (5) a court needs to correct its own errors; or (6) an issue was inadequately briefed when first contemplated by the court.

Trembly v. Mrs. Fields Cookies, 884 P.2d 1306, 1311 (Utah Ct. App. 1994) (discussing reconsideration of prior ruling, pursuant to Utah R. Civ. P. 54(b)).¹³ A party may not use a reconsideration request to raise new issues or arguments. *See Save our Springs Alliance, Inc. v. Lazy Nine Mun. Utility Dist.*, 198 S.W.3d 300, 326 (Tex. App. 2006) (“Rehearing is not an opportunity to test alternative arguments after finding other arguments unsuccessful”) (internal citations omitted); 5 C.J.S. *Appeal and Error* § 684 (updated 2006) (reconsideration generally may not “permit the raising of new questions or issues”).

Because a party seeking reconsideration may not raise new issues, courts will not address issues raised for the first time in a request for reconsideration, for failure to properly raise the issues with the agency. *See Bedford Downs Mgmt. Corp. v. State Harness Racing Comm’n*, 901 A.2d 1063, 1071 (Pa. Commw. Ct. 2006) (“[W]hen issues are raised for the first time in a reconsideration request, after the agency has issued its adjudication, it cannot be regarded as raising the issues while the matter was before the agency.”); *see also Hi-Country Homeowners Ass’n v. Public Serv. Comm’n of Utah*, 779 P.2d 682, 684 (Utah 1989)

¹³ “Motions for reconsideration” are no longer recognized by Utah courts in civil litigation. *Gillett v. Price*, 2006 UT 24, ¶ 7, 135 P.3d 861, 863. Nevertheless, the Utah Administrative Procedures Act recognizes such motions as proper before an administrative decision-maker. Utah Code Ann. § 63-46b-13.

(holding court lacked subject matter jurisdiction to review argument, raised first in motion for rehearing before commission, because “Commission was not properly afforded the opportunity to address issue”).

The State Engineer lacks discretionary authority to take action on an application submitted for the first time as part of a request for reconsideration as though it were part of the applicant’s previously filed applications. Otherwise, the State Engineer would violate a fundamental tenet of Utah water law—*first in time, first in right*. “Utah is a prior appropriation state, where the appropriator first in time is first in right.” *Salt Lake City v. Silver Fork Pipeline Corp.*, 2000 UT 3, ¶ 34, 5 P.3d 1206, 1218; *see* Utah Code Ann. §§ 73-3-1 and -21 (West 2004). Under the prior appropriation doctrine, the priority of a right is determined based on the date of filing. Utah Code Ann. § 73-3-18 (West 2004); *McGarry v. Thompson*, 201 P.2d 288, 292 (Utah 1948); *see also Dist. Court*, 238 P.2d at 1136. The priority of a water right is crucial because “[a] senior appropriator is guaranteed the full measure of his or her appropriation before any junior appropriator may be satisfied.” *Silver Fork Pipeline Corp.*, 2000 UT 3, ¶ 34, 5 P.3d at 1218. The priority date relates back to the filing date. *McGarry*, 201 P.2d at 292. Western seeks to undo this priority system by insisting that it may present to the State Engineer on reconsideration a new and different application and retain the priority of its original filing. If the State Engineer took discretionary action on the RCP without giving it a new priority date, he would disrupt the priority system, violate the *first in time, first in right* doctrine, and ignore the appropriation

statutes.

The single thought that appears to keep Western's request from being ridiculous is Western's contention that the RCP is simply a slightly modified, down sized version of the original applications. The monumental differences between the original applications and the RCP belie this argument. But even if the amount of water the RCP requested really had changed only slightly *or* even if the points of diversion really were only modestly different *or* even if the RCP had been requested of the State Engineer prior to his decision on the original application, a new application with a new priority date and a new application process, providing for the participation of all interested parties, would have been necessary. While the State Engineer lacked authority to act on the RCP, if he had attempted to exercise discretionary authority to do so, he would have had to require the RCP be filed in the form of an application, and publish the RCP to alert potentially injured parties. "[T]he [S]tate [E]ngineer *may* authorize amendments or corrections that involve a change of point of diversion, place, or purpose of use of water, *only after republication of notice to water users.*" Utah Code Ann. § 73-3-6(2) (emphasis supplied). Only "[clerical errors, ambiguities, and mistakes that do not prejudice the rights of others]" may be corrected without republication. *Id.* § 73-3-6(1)(c). Western's argument that such processing was unnecessary (Pl.'s Br. at 29-33) because the RCP is a scaled-down version of its original applications is simply incorrect. Regardless, even if the State Engineer had considered the RCP (which he did not) *he took no action*, leaving the District Court without subject matter jurisdiction to

consider it.

2. The State Engineer's Silence on Western Water's Request for Request for Reconsideration of the State Engineer's Decision on Western Water's Conservation Plan Applications did Not Amount to Action on the RCP.

Western argues that when the State Engineer took no action on its request for reconsideration, he denied the RCP on its merits. (Pl.'s Br. at 26, 34-35.) Remaining silent on a reconsideration request, however, does not constitute a decision on the merits of the arguments the request raised. *See Alpha/Omega Ins. Servs., Inc. v. Prudential Ins. Co. of Am.*, 272 F.3d 276, 281 (5th Cir. 2001) (rejecting plaintiff's argument that issues raised first time in rehearing motion could not be raised on remand because "denial of a motion for panel rehearing does not amount to a decision on the merits of the arguments the motion presented"); *See also Carroll v. Barbara Brennan, Inc.*, 785 N.Y.S.2d 752, 753 (N.Y. App. Div. 2004) (refusing to allow claimant to challenge Board's underlying decision because claimant appealed from Board's denial of reconsideration request "does not bring up for review the merits of the underlying decision"); *Shen Guang Hu v. U.S. Dept. Justice*, No. 04-1344-ag, 2005 WL 3475739, at *1 (2nd Cir. Dec. 19, 2005) ("A petition for review of the denial of a motion to reconsider calls up for review only the merits of the denial of that motion, not the merits of the decision as to which reconsideration is sought.").

By taking no action on Western's reconsideration request, the State Engineer's actions were deemed to have *denied the request*, and no more. He took no other action on Western's

original Conservation Plan and no action on the merits of the RCP.¹⁴

III. The State Engineer Had No Duty to “Accommodate” Western Water’s Efforts to Appropriate and Maximize the Possibility that the Application Could be Granted in Accordance with Utah Code Ann. § 73-3-8.

Western argues the State Engineer has a “duty to accommodate the applicant’s efforts to appropriate water” (Pl.’s Br. at 34) by accepting changes to an application before or after the State Engineer’s final decision on the application (Pl.’s Br. at 35). Western asserts this type of “give and take between the applicant and the State Engineer” (Pl.’s Br. at 33) is required by statute and case law that encourages experimentation and the “liberal policy toward application approval” (Pl.’s Br. at 34).

While the State Engineer has a duty to approve an application if it meets *all* section 73-3-8 requirements, the applicant bears the burden to produce evidence to persuade the State Engineer there is reason to believe the application meets the statutory requirements, *Searle*, 2006 UT 16, ¶ 53, 133 P.3d at 395, or the State Engineer “shall” reject it. Utah Code Ann. § 73-3-8(1). Conditional approval may occur where all statutory requirements are met and some water is available, neither of which is true here.

¹⁴ The State Engineer has discretionary authority to deny or grant a reconsideration and such discretionary action is reviewed for abuse. *See Miner v. Indus. Comm’n*, 202 P.2d 557, 559 (Utah 1949); *Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶ 25, 82 P.3d 1064, 1070. Western could have challenged the State Engineer’s discretionary decision to take no action on the request for reconsideration, arguing abuse of discretion. Or Western could have challenged the State Engineer’s denial of the original Conservation Plan. Instead, Western inappropriately sought *do novo* review of the RCP.

A. The Applicant Has a Burden of Filing an Application that Meets the Requirements of Utah Code Ann. § 73-3-8.

An applicant bears the burden of producing evidence to persuade the State Engineer there is reason to believe an application meets section 73-3-8 requirements. *Searle*, 2006 UT 16, ¶¶ 49-54, 133 P.3d at 394-95. This burden remains with the applicant, not the protestants, and certainly not the State Engineer. *Id.* ¶¶ 49-54, 133 P.3d at 394-95.

Western argues Utah's "liberal policy toward application approval" means the State Engineer must "accommodate the applicant's effort to appropriate water" (Pl.'s Br. at 34) by accepting application changes after he makes a final decision (Pl.'s Br. at 35). This "liberal policy," however, refers simply to the "reason to believe" standard. *Searle*, 2006 UT 16, ¶ 38, 133 P.3d at 392. It does not allow approval of an application that meets no approval requirements in an area long closed to appropriation. Nor does it mean the State Engineer has a duty to accept application changes after a final decision. No statutory or judicial authority imposes such a duty.

B. The State Engineer Must Reject an Application if it Fails to Meet Any of the Requirements of Utah Code Ann. § 73-3-8.

Western asserts "the State Engineer has a duty to approve water rights in all instances where there is any amount of water in the application." (Pl.'s Br. at 30.) Unappropriated water in the proposed source, however, is but *one* of the section 73-3-8 criteria. The State Engineer could not shirk his duty by granting an application that meets none of the other criteria because someone alleges unappropriated water exists in a particular source. Utah

Code Ann. § 73-3-8. Where an applicant meets all approval criteria the State Engineer may grant conditional approval, including approving a smaller amount of water where it is available. But, where an application “does not meet the requirements of [section 73-3-8], it shall be rejected.” *Id.*

CONCLUSION

This Court should uphold the District Court’s summary judgment that it lacked subject matter jurisdiction to review Western’s RCP because Western never initiated, let alone exhausted, administrative remedies on the RCP since Western never filed the RCP as an application with the State Engineer. Even if the RCP could be construed as an application, the State Engineer lacked authority to process it as if it were part of the original three applications because the RCP, if reduced to application form, would have constituted a new application requiring a new priority date. Even if the State Engineer *could have* acted upon the RCP at the reconsideration stage, he took no such action. The State Engineer’s silence on the reconsideration request did not deny the RCP on its merits. Western inappropriately sought *de novo* judicial review of the RCP before Western ever presented it to the State Engineer as an application and before the State Engineer took final action on the RCP. Therefore, the District Court correctly determined it lacked subject matter review over the RCP. This Court should uphold the District Court’s decision.

MARK SHURTLEFF
UTAH ATTORNEY GENERAL



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signing on behalf of all State Defendants

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Keli Jo Beard

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ADDENDUM

1. Order Granting Summary Judgment for Failure to Exhaust Administrative Remedies (May 16, 2006).
2. Determinative Constitutional and Statutory Provisions.
 - A. Utah Constitution, article XVII, § 1
 - B. Utah Code Ann. § 73-3-1 (West 2004)
 - C. Utah Code Ann. § 73-3-2(1) (West 2004)
 - D. Utah Code Ann. § 73-3-14(1) (West 2004)
 - E. Utah Code Ann. § 63-46b-14(1)-(2) (West 2004)
3. Utah State Engineer, Reissued Memorandum Decision In the Matter of Application Numbers 55-9399 (a72027), 57-10282 (a73473) and 59-5606 (a72026) (Mar. 17, 2004).
4. Western Water, Request for Reconsideration of decision on Applications to Appropriate Nos. 55-9399 (a72027), 55-5606 [sic] (a72026), and 57-10282 (a73473) (April 6, 2004).
5. Illustrative Conservation Plan Application Map.
6. Amended Notice of Initial Attorney's Planning Meeting (Feb. 18, 2006).
7. 3 Wells A. Hutchins, *Water Rights Laws in Nineteen Western States* 542-48 (U.S. Dept. Agric. 1977).

ADDENDUM 1

Order Granting Summary Judgment for Failure to Exhaust Administrative Remedies (May 16, 2006)

FILED DISTRICT COURT
Third Judicial District

MAY 16 2006

SALT LAKE COUNTY

By _____ Deputy Clerk

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

WESTERN WATER, LLC, a Utah Limited Liability Company,

Plaintiff,

v.

Jerry D. Olds, Utah State Engineer, et al.,

Defendants.

ORDER GRANTING SUMMARY JUDGMENT
FOR FAILURE TO EXHAUST
ADMINISTRATIVE REMEDIES

Civil No. 040910869 WA

Judge Robert K. Hilder

Defendants' Motion for Summary Judgment Concerning Failure to Exhaust Administrative Remedies was heard on April 17, 2006. Plaintiff was represented by Terry L. Hutchinson. David C. Wright, of Mabey & Wright, briefed the motion for the defendants' group identified above and was joined by Robert P. Hill and Assistant Attorney General Norman K. Johnson in arguing the motion.

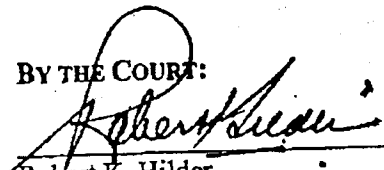
Having considered the supporting and opposing memoranda, with their respective exhibits, and the Affidavit of Ronald K. Christensen which accompanied plaintiff's opposition memorandum, and having considered the arguments of counsel, it is hereby

ORDERED that the motion is granted and summary judgment is hereby entered for the reasons presented in written and oral argument, and as explained by the Court in announcing its ruling. These reasons include plaintiff's failure to present its Revised Conservation Plan to the State Engineer for consideration before he ruled on the Conservation Plan that was the subject of plaintiff's applications and of the notice and hearing conducted by the State Engineer. As the State Engineer himself acknowledged, the Revised Plan submitted with plaintiff's Request for Reconsideration was reviewed only to determine whether it gave reason to reconsider the decision on the Conservation Plan. The protestants had no opportunity to consider or offer evidence regarding the impacts of the Revised Plan, which was a significant reformulation of the Conservation Plan. No hearing was held on the Revised Plan, and the State Engineer took no action on it. Accordingly, as there was no final agency action on the Revised Plan plaintiff brings to this Court, plaintiff failed to exhaust its administrative remedies. Such failure deprives the Court of subject matter jurisdiction. It is further

ORDERED that, as prevailing parties under rule 54(d)(1) of the Utah Rules of Civil Procedure, defendants are entitled to their costs, to be established by verified memoranda.

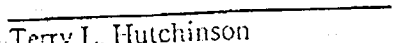
May 12th, 2006.

BY THE COURT:


Robert K. Hilder
District Court Judge



Approved as to form:

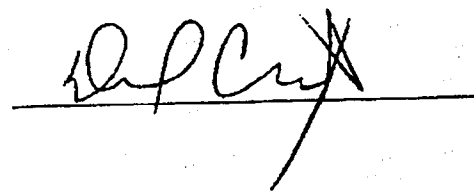

Terry L. Hutchinson
Attorney for plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2006, a true and correct copy of the foregoing Order Granting Summary Judgment for Failure to Exhaust Administrative Remedies was served electronically to the following:

Terry L. Hutchinson
368 East Riverside Drive, Suite C
St. George, Utah 84790
(and by mail, postage prepaid)

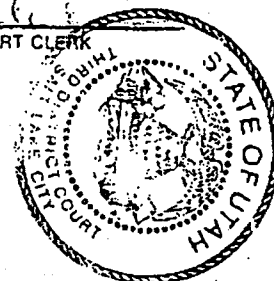
(tlh@infowest.com)



I CERTIFY THAT THIS IS A TRUE COPY OF THE ORIGINAL DOCUMENT ON FILE IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH.

DATE: May 12, 2006


DEPUTY COURT CLERK



ADDENDUM 2

Determination Constitutional and Statutory Provisions

DETERMINATIVE CONSTITUTIONAL/STATUTORY PROVISIONS

A. Utah Const. art. XVII, § 1. *Existing Rights Confirmed*

All existing rights to the use of any of the waters in this State for any useful or beneficial purpose, are hereby recognized and confirmed.

B. Utah Code Ann. § 73-3-1 (West 2004). *Appropriation—Manner of acquiring water rights*

Rights to the use of the unappropriated public waters in this state may be acquired only as provided in this title. No appropriation of water may be made and no rights to the use thereof initiated and no notice of intent to appropriate shall be recognized except application for such appropriation first be made to the state engineer in the manner hereinafter provided, and not otherwise. The appropriation must be for some useful and beneficial purpose, and, as between appropriators, the one first in time shall be first in rights; provided, that when a use designated by an application to appropriate any of the unappropriated waters of the state would materially interfere with a more beneficial use of such water, the application shall be dealt with as provided in Section 73-3-8. No right to the use of water either appropriated or unappropriated can be acquired by adverse use or adverse possession.

C. Utah Code Ann. § 73-3-2(1) (West 2004). *Application for right to use unappropriated public water—Necessity—Form—Contents—Validation of prior applications by state or United States or officer or agency thereof*

(1)(a) In order to acquire the right to use any unappropriated public water in this state, any person who is a citizen of the United States, or who has filed his declaration of intention to become a citizen as required by the naturalization laws, or any association of citizens or declarants, or any corporation, or the state of Utah by the directors of the divisions of travel development, business and economic development, wildlife resources, and state lands and forestry, or the executive director of the Department of Transportation for the use and benefit of the public, or the United States of America shall make an application in a form prescribed by the state engineer before commencing the construction, enlargement, extension, or structural alteration of any ditch, canal, well, tunnel, or other distributing works, or performing similar work tending to acquire such rights or appropriation, or enlargement of an existing right or appropriation.

(b) The application shall be upon a form to be furnished by the state engineer and shall set forth:

- (i) the name and post office address of the person, corporation, or association making the application;
- (ii) the nature of the proposed use for which the appropriation is intended;
- (iii) the quantity of water in acre-feet or the flow of water in second-feet to be appropriated;
- (iv) the time during which it is to be used each year;
- (v) the name of the stream or other source from which the water is to be diverted;
- (vi) the place on the stream or source where the water is to be diverted and the nature of the diverting works;
- (vii) the dimensions, grade, shape, and nature of the proposed diverting channel; and
- (viii) other facts that clearly define the full purpose of the proposed appropriation.

D. Utah Code Ann. § 73-3-14(1) (West 2004). *Judicial Review—State engineer as defendant*

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

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

E. Utah Code Ann. § 63-46b-14(1)-(2) (West 2004). *Judicial Review—Exhaustion of Administrative Remedies*

(1) A party aggrieved may obtain judicial review of final agency action, except in actions where judicial review is expressly prohibited by statute.

(2) A party may seek judicial review only after exhausting all administrative remedies available, except that:

(a) a party seeking judicial review need not exhaust administrative remedies

if this chapter or any other statute states that exhaustion is not required;

(b) the court may relieve a party seeking judicial review of the requirement to exhaust any or all administrative remedies if:

(i) the administrative remedies are inadequate; or

(ii) exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion.

ADDENDUM 3

**Utah State Engineer
Reissue Memorandum Decision in
Matter of Application Numbers
55-9399 (a72027), 57-10282 (a73473)
and 59-5606 (a72026)
(March 17, 2004)**

BEFORE THE STATE ENGINEER OF THE STATE OF UTAH

IN THE MATTER OF APPLICATION NUMBERS) REISSUED
55-9399 (A72027), 57-10282 (A73473)) MEMORANDUM DECISION
AND 59-5606 (A72026))

Application Numbers 55-9399 (A72027), 57-10282 (A73473), and 59-5606 (A72026), in the name of Western Water LLC, were filed on March 24, 1999, May 23, 2001, and March 24, 1999, respectively. Western Water LLC is a Utah Limited Liability Company owned and managed by three professionals: Harvey L. Hutchinson, P.E., General Manager; Ronald K. Christensen, Ph.D., P.E., Chief Engineer/Environmental Coordinator; and Mike Gottfredsen, Counsel/Attorney. They are referred to collectively in this decision as "the applicants."

Application Number 55-9399 (A72027) was filed to appropriate 69,210.0 acre-feet of water from sources tributary to the Jordan River and Utah Lake located at the following points: (1) South 1030 feet and East 2440 feet from the NW Corner of Section 17, T4S, R2E (Grove Spring); (2) North 240 feet and West 360 feet from the E $\frac{1}{4}$ Corner of Section 8, T5S, R1E (Dry Creek at Splitter Ditch diversion); (3) South 20 feet and West 450 feet from the NE Corner of Section 10, T5S, R1E (Mitchell Hollow); (4) North 500 feet and West 250 feet from the SE Corner of Section 16, T5S, R1E (Mill Pond/Spring Creek); (5) North 2125 feet and West 1650 feet from the SE Corner of Section 21, T5S, R1E (Mill Pond/Spring Creek); (6) North 2400 feet and West 1300 feet from the SW Corner of Section 22, T5S, R1E (Miscellaneous Spring); (7) North 2350 feet and West 500 feet from the SW Corner of Section 22, T5S, R1E (Miscellaneous Spring); (8) North 2350 feet and West 475 feet from the SE Corner of Section 22, T5S, R1E (Miscellaneous Spring); (9) North 1300 feet and East 1000 feet from the SW Corner of Section 23, T5S, R1E (Miscellaneous Spring); (10) North 1200 feet and East 1250 feet from the SW Corner of Section 23, T5S, R1E (Miscellaneous Spring); (11) North 450 feet and East 2400 feet from the SW Corner of Section 23, T5S, R1E (Miscellaneous Spring); (12) North 625 feet and East 750 feet from the SW Corner of Section 24, T5S, R1E (Miscellaneous Spring); (13) North 2500 feet and West 375 feet from the SW Corner of Section 24, T5S, R1E (Miscellaneous Spring); (14) North 680 feet and West 3450 feet from the SE Corner of Section 12, T5S, R1W (Dry Creek Waste Ditch Pumping Plant); (15) North 1750 feet and West 1625 feet from the SE Corner of Section 19, T5S, R2E (Unknown Stream); (16) North 2500 feet and West 1725 feet from the SE Corner of Section 32, T5S, R2E (Unknown Streams). Once diverted the water may be stored in Utah Lake and an unnamed reservoir site or in deep underground aquifers in Northern Utah Valley and Cedar Valley. Points of re-diversion include the existing municipal wells of Alpine City and lines of recharge/recovery wells along the base of Traverse Ridge, along the western base of Lake Mountain, along the northern alluvial fan of Cedar Valley, and along the base of the Wasatch Mountains. The water is to be used for the supplemental irrigation of 16,250.00 acres from April 1 to October 31; stockwatering of 2,000 cattle or equivalent; domestic purposes of 8,000 persons; municipal purposes within the service areas of Lehi, Alpine, American Fork, Highland, Saratoga Springs, Cedar Hills, Pleasant Grove, Eagle Mountain, Cedar Fort, and Fairfield; and for the development of wetlands in Cedar and Rush Valleys.

Application Number 57-10282 (A73473) was filed to appropriate 143,758.00 acre-feet of water (supplemental to 55-9399 and 59-5606) from 19 shallow aquifer wells in the Salt Lake Valley; 23

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diversion points on surface sources within the Salt Lake Valley described as a pumping plant at 6400 South, Big and Little Cottonwood Creeks, Millcreek, Decker Lake and Drain, Brighton Canal, Turner Dam, North Jordan Canal, South Jordan Canal, Surplus Canal, Mill Race, and various dike outlets into Farmington Bay and the Great Salt Lake; and 82 diversion points in North Utah Valley described as Grove Spring, recharge/recovery wells along the base of the Wasatch Mountains east of Alpine, recharge-recovery wells along the base of Traverse Ridge, Highland Water Company well, Dry Creek Waste Ditch and Splitter Ditch, flowing wells at Willow Park, Mill Pond, Spring Creek, miscellaneous springs, drains and irrigation wells, unnamed streams and Utah Lake Outlet. A detailed description of the location for each of these points of diversion can be found on the written application. Once diverted the water may be stored in underground aquifers in Northern Utah Valley and Cedar Valley. Points of re-diversion include the diversion points listed above plus the existing municipal wells of Alpine City and lines of recharge/recovery wells along the base of Traverse Ridge, in the Cedar Valley, and along the base of the Wasatch Mountains east of Alpine. The water is to be used for the supplemental irrigation of 23,000.00 acres from April 1 to October 31; stockwatering of 7,000 cattle or equivalent; domestic purposes of 90,000 families; municipal purposes within the service areas of Cedar Hills, Pleasant Grove, Highland, Alpine, American Fork, Lehi, Saratoga Springs, Eagle Mountain, Cedar Fort, Fairfield, Herriman, Bluffdale, Riverton, Draper, Sandy, West Valley, South Jordan, Kearns, and Granger; and light industrial or natural gas fired electrical power plants.

Application Number 59-5606 (A72026) was filed to appropriate 75,139.00 acre-feet of water from sources tributary to the Jordan River and Utah Lake at the following points: (1) the SE Corner of Section 20, T1S, R1W (wasteway); (2) North 900 feet and East 1400 feet from the SW Corner of Section 23, T1S, R1W; (3) South 550 feet and East 1625 feet from the NW Corner of Section 26, T1S, R1W; (4) South 50 feet and East 1000 feet from the NW Corner of Section 27, T1S, R1W; (5) North 600 feet and West 1250 feet from the SE Corner of Section 17, T1S, R2W (Drain); (6) South 575 feet and West 375 feet from the NE Corner of Section 2, T2S, R1W; (7) South 550 feet and East 625 feet from the NW Corner of Section 12, T2S, R1W; (8) South 3250 feet and East 1625 feet from the NW Corner of Section 23, T2S, R1W (Lower Jordan Pumping Plant); (9) South 1450 feet and East 1800 feet from the NW Corner of Section 31, T3S, R1E (Pond Outlet); (10) South 380 feet and West 100 feet from the SE Corner of Section 36, T3S, R1W (Corner Canyon Stream); (11) South 1030 feet and East 2440 feet from the NW Corner of Section 17, T4S, R2E (Grove Spring); (12) North 240 feet and West 360 feet from the E $\frac{1}{4}$ Corner of Section 8, T5S, R1E (Dry Creek); (13) South 20 feet and West 450 feet from the NE Corner of Section 10, T5S, R1E (Mitchell Hollow); (14) North 500 feet and West 250 feet from the SE Corner of Section 16, T5S, R1E (Mill Pond); (15) North 2125 feet and West 1650 feet from the SE Corner of Section 21, T5S, R1E (Mill Pond/Spring Creek); (16) North 2400 feet and West 1300 feet from the SW Corner of Section 22, T5S, R1E (spring); (17) North 2350 feet and West 500 feet from the SE Corner of Section 22, T5S, R1E (spring); (18) North 2350 feet and West 475 feet from the SE Corner of Section 22, T5S, R1E (spring); (19) North 1300 feet and East 1000 feet from SW Corner of Section 23, T5S, R1E (spring); (20) North 1200 feet and East 1250 feet from SW Corner of Section 23, T5S, R1E (spring); (21) North 450 feet and East 2400 feet from the SW

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Corner of Section 23, T5S, R1E (spring); (22) North 625 feet and East 750 feet from the SW Corner of Section 24, T5S, R1E (spring); (23) North 2500 feet and West 375 feet from the SW Corner of Section 24, T5S, R1E (spring); (24) South 1250 feet and East 1250 feet from the NW Corner of Section 28, T5S, R1E (Spring Creek); (25) North 680 feet and West 3450 feet from the SE Corner of Section 12, T5S, R1W (Dry Creek); (26) South 950 feet and West 2700 feet from the SE Corner of Section 24, T5S, R1W (Utah Lake); (27) North 1750 feet and West 1625 feet from the SE Corner of Section 19, T5S, R2E (Unnamed stream); (28) North 2500 feet and West 1725 feet from the SE Corner of Section 32, T5S, R2E (Unnamed stream). Once diverted the water may be stored in one or more surface reservoirs, or in groundwater aquifer systems of North Utah Valley and Cedar Valley. Points of re-diversion include existing municipal wells of Alpine and lines of recharge/recovery wells on the west side of the Salt Lake Valley, along the base of Traverse Ridge, along the western base of Lake Mountain, along the northern alluvial fan of Cedar Valley, and along the base of the Wasatch Mountains. The water is to be used for the supplemental irrigation of 17,500.00 acres from April 1 to October 31; stockwatering of 4,000 cattle or equivalent; domestic purposes of 30,000 families; municipal purposes within the service areas of Alpine, Highland, Pleasant Grove, Cedar Hills, American Fork, Lehi, Saratoga Springs, Eagle Mountain, Cedar Fort, Fairfield, Bluffdale, Riverton, West Valley, South Jordan, Kearns, Granger; mining operations within the Kennecott Mining District; and for the conveyance of saline water to the Great Salt Lake.

In essence, under the three described applications to appropriate water, it is the applicant's intent to develop a conservation and storage plan that will allow for water that "spills" into the Great Salt Lake to be salvaged and stored for new and more efficient water uses in Utah and Salt Lake Counties. The water project will be implemented as a privatization project pursuant to Section 73-10d of Utah Code.

The applications were advertised in the Deseret News and The Daily Herald on June 14 and 21, 2001; in the New Utah on June 13 and 20, 2001; and in the Davis County Clipper on June 12 and 19, 2001. Protests to the applications were submitted. They are listed in alphabetical order as follows:

Alpine City protests these applications because there is no unappropriated water available in the basin and impairment would occur to existing rights. Further, the applicant does not have rights to access or use of the facilities described in the application. Thus, the ability to complete the proposed project has not been demonstrated.

American Fork City is concerned that these applications are filed to appropriate water in a basin that is considered fully appropriated. Further concern is expressed that the city is listed as a potential participant in the proposed project; however, no contact has been made regarding its participation. There is also no right by the applicant to use the facilities listed in the application.

W. Glade and Bart D. Berry list their rights in the Cedar Valley area that may be impacted by these

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applications and state that these applications do not meet the statutory requirements for approval of applications to appropriate water.

Burnham Duck Club expresses concern that these applications would negatively impact its existing rights at the end of the Jordan River. The water claimed to be flowing into the Great Salt Lake is not wasted. This water supplies users' existing rights.

Cahoon and Maxfield Irrigation Company states that it has rights to divert waters of Little Cottonwood Creek and that these applications do not meet the requirements of Utah Code and would impair its existing rights if approved.

Cedar Fort Irrigation Company protests that these applications are incomplete, ambiguous, not properly filed, and do not comply with all the requirements of Utah Code.

Central Utah Water Conservancy District is concerned that these applications are applying for waters in a fully appropriated basin which would impair existing rights. These applications to appropriate water do not meet the requirements for approval of applications under Utah Code, nor do they comply with the water management plans for these basins. There may also be adverse environmental effects as a result of these applications.

City of West Jordan expresses apprehension that any reductions in volume of Utah Lake waters would adversely affect water quality in canal systems that rely on releases from Utah Lake. This could be detrimental to the city's secondary water project which utilizes water from Utah Lake and the Jordan River.

Clinger Family Partnership states that the Jordan River and Utah Lake are fully allocated and any additional wells to be drilled will threaten existing water rights.

Robert and Sherri Cook express concern about the negative impact these applications will have on the existing smaller flowing wells and springs in this area. The protestant relies on water supplied from a well and spring for their domestic and irrigation uses.

George Crawford expresses concern about the negative impact these applications will have on the existing smaller flowing wells and springs in this area. The protestant relies on water supplied from a well and spring for his domestic and irrigation uses.

Rod Dansie is concerned that these applications may negatively impact his prior rights.

Draper Irrigation Company is concerned that these applications will impair its existing rights and create harm to water quality and that the project is not financially or physically feasible and not in the

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best interest of the public welfare.

East Jordan Irrigation Company expresses concern that these applications will impair existing rights in a fully appropriated basin. The project does not appear financially or physically feasible because the applicant has no right to the use of the protestant's real or personal property for the diversion of water. The project may also impact water quality and prove detrimental to the public welfare.

Geneva Steel LLC is concerned that these applications are filed to divert water in an already over-appropriated area and would impair existing rights. Concern is also expressed regarding the privatization act and the applicant's use of this act as a basis for these applications.

Larry and Linda Hadfield express concern about the negative impact these applications will have on the existing smaller flowing wells and springs in this area. The protestant relies on a well and spring water to provide for their domestic and irrigation uses.

Irvine Ranch and Petroleum Inc. dba Ambassador Duck Club expresses concern that these applications will impact its existing diligence rights from the Jordan River (Surplus Canal).

John Jacob is concerned that his existing rights on the main stem of the Jordan River will be impaired and that these applications would be detrimental to the public interest.

Jordan Valley Water Conservancy District expresses concern as to the priority dates of these applications and that the proposed project would impact its existing rights. Further, the applications do not comply with the provision of Section 73, Utah Code.

Kennecott Utah Copper Corporation expresses concern that these applications would impair existing rights in a fully appropriated basin and that the applicant has not demonstrated that the proposed project is physically and economically feasible nor that the applicant has any right to utilize the facilities proposed under the project.

Lake Mountain Mutual Water Company lists its existing rights that would be impaired by these applications and states that they do not meet the statutory requirements for approval of applications to appropriate.

Lehi City expresses concern that these applications propose to divert water in a fully appropriated basin and would negatively impact existing rights. The applicant does not have the right to use or access the facilities described in the applications, nor does the proposed project appear to be physically or economically feasible.

Lehi Spring Creek Irrigation Company state that all of the waters in the Mill Pond and Spring Creek

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are used by all the company stockholders. There is no additional water available in these sources.

Lehi Irrigation Company is concerned that these applications will have a negative impact on its existing rights during the irrigation season and winter months.

Lower Jordan River Water Users Association submitted a protest to the applications stating that they will impair their existing rights and negatively impact the Great Salt Lake ecosystem.

Magna Water Company states that these applications do not meet the statutory requirements for approval of applications to appropriate.

Glenn R. Maughan protests these applications and states that the applications will interfere with and impair his existing rights to waters flowing into the Great Salt Lake.

Susan Messersmith and Vernal Messersmith express concern about the negative impact these applications will have on the existing smaller flowing wells and springs in this area. The protestants rely on well water and spring water for their domestic and irrigation uses.

Metropolitan Water District of Salt Lake and Sandy is concerned that these applications are filed to appropriate water in a fully appropriated basin and would impair existing rights. Further, the applications should be rejected because they do not meet all requirements of Utah State Code.

National Audubon Society states that the Great Salt Lake ecosystem is of international importance for wetland habitat and waterbirds. There is great concern that these applications are speculative, monopolistic and ambiguous. If approved, the applications will impair this system and existing rights.

New State Inc. states that it relies on the flows of the Jordan River to satisfy its existing rights. The Jordan River basin is fully appropriated.

North Jordan Irrigation Company expresses apprehension that these applications propose to use the company's facilities and states that since there is no right to access these facilities, the applications are based on speculation. Concern is expressed that the waters of the Jordan River/Utah Lake and tributaries are fully appropriated and any approval of these applications could impair existing rights.

PacifiCorp states that it has water rights in the Jordan River and a contract for water supply on the Provo River which is dependent, in part, on the levels in Utah Lake. If these applications are approved, these rights would be impaired. Concern is also expressed in the written protest that none of the political subdivisions mentioned in the application intend to participate. The applications appear to be speculative and will adversely affect the natural stream environment.

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Provo River Water User's Association expresses concern that these applications are filed to appropriate water in a fully appropriated basin and would impair existing rights. Further, the applications should be rejected because they do not meet all requirements of Utah State Code.

Riverton City states that it is listed as one of the municipalities that could be served by this project; however, it has not been contacted regarding participation in the project, nor has permission been given for its sources to be utilized in any way. It is expressed that these applications do not comply with Utah Code and are filed in a basin that is fully appropriated.

Ron and Mindy Sager state that they own rights to Spring Creek. If these applications were approved, they could adversely affect their rights in the creek.

Salt Lake City Corporation is concerned that these applications are speculative and were filed for the purpose of monopolizing waters for development. Concern is also expressed that these applications do not comply with the requirements under state law nor the existing water management plans. Water quality is also of great concern.

Sandy City Department of Public Utilities expresses concern that these new appropriations would have an adverse effect on the water rights held by Sandy City.

Saratoga Springs expresses concern that these applications do not meet the requirements of Utah Code. The applications are filed in an area that is fully appropriated and would cause impairment to the city's existing rights if approved.

Sierra Club requests that a hearing be held to "fully explore" the impacts that the proposed project would have on various environmental factors. Because the project proposes diversion of water in an already appropriated basin, serious impacts could occur to the water quality of the watershed.

South Jordan Canal Company expresses concern that these applications indicate the use of canal facilities not owned by the applicant. The applicant has no right to use the facilities. The canal company protests these applications because they do not meet the requirements of state law.

South Jordan City protests these applications because it does not comply with Utah Code. Further, the applicant has no right to use the facilities listed in the applications and has made no arrangement to use those facilities.

State of Utah Division of Forestry, Fire and State Lands state that it has not authorized any use of sovereign lands for the project described in the applications and objects to the inference that the water entering the Great Salt Lake is lost. The legislative policy for the Great Salt Lake is to "maintain the lake and the marshes as important to the waterfowl flyway system" and to "maintain and protect

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state, federal, and private marshlands, rookeries, and wildlife refuges”.

State of Utah Division of Parks and Recreation protest these applications because of the negative impacts that would occur to the Provo-Jordan River Parkway, Utah Lake State Park, Great Salt Lake State Park and Antelope Island State Park and the associated ecosystems.

State of Utah Division of Wildlife Resources is concerned about the impacts the applications will have on the flow of water at the Farmington Bay Waterfowl Management Area. The Division holds existing rights to allow for the waters flowing into the management area to be beneficially used to provide for suitable conditions for waterfowl production.

Mary and Edward Thomas protest these applications because their wells are going dry and are at the lowest levels that they have ever been.

Town of Cedar Fort is concerned about impacts the applications will have on water quality and impairment to existing right holders in the Cedar Valley area.

Trout Unlimited requests that the impacts to the natural stream environment, public recreation and general public welfare be thoroughly investigated to ensure that these applications comply with state law.

United States Fish and Wildlife Service is concerned about the impacts the applications may have on endangered species, migratory birds, wildlife and wetland mitigation investments, and water quality.

United States Office of the Secretary CUP Completion Act Office and the USA Bureau of Reclamation believes that these applications do not comply with state law and must be denied. They will adversely impact existing rights in an already fully appropriated basin.

Utah and Salt Lake Canal Company states that these applications propose to use facilities and works owned by the company without permission. The applications appear to be incomplete when filed and do not comply with the provisions of state law.

Utah Department of Transportation is apprehensive that the applications will impact existing rights used at the Legacy Nature Preserve for mitigation. These applications are filed in a fully appropriated basin, and there is not sufficient water.

Utah Lake Distributing Company is concerned that these applications are filed to appropriate water in a fully appropriated basin and would impair existing rights. Further, the applications should be rejected because they do not meet all requirements of Utah Code.

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Utah Lake Landowners, Inc., state that the applicant has no right to store water in Utah Lake as proposed under these applications. In addition the distribution plan for the Utah Lake Drainage Basin makes no provision for the storage of additional appropriated water.

Utah Reclamation Mitigation and Conservation Commission expresses apprehension that the applications are not financially feasible. The project appears to be detrimental to the public welfare and is requested in a fully appropriated basin.

Utah Water Company L.L.C. expresses concern that the applications do not meet the minimum requirements of Utah Code and are filed in an area that does not have enough unappropriated water. The applications appear to be filed for purposes of speculation and monopoly.

Utah Waters expresses its understanding that the drainage basin in which the applications are filed is considered fully appropriated and cannot support additional diversions. There is apprehension as to the impacts the applications would cause on water quality and quantity in a number of important water bodies in the basin, as well as, the impact to hydrologically connected wetlands and riparian areas.

Utah Wetlands Foundation states that the water upon which the applications are filed is critical for the health of the Great Salt Lake ecosystem.

Mack and Marie Wagstaff state that they rely on their wells to supply their home and yard with water. Water levels have changed and any further development could cause the wells to completely dry up.

Shane and Michelle Wagstaff state they have seen a decrease in water pressure and irrigation water over the last few years. They rely on their well for household uses.

E. Fred Walters expresses concern about the impact these applications will have on his existing rights in a stream known as Curry Slough.

Dean and Leatrice Willes state that they have existing rights to several sources included in the applications. They are concerned about the further impacts the applications would have on these sources. The sources have shown a reduction in current water flow compared to historical flows.

A pre-hearing conference was held November 15, 2001, to gather additional information about the applications that would fully clarify the proposed project and substantiate the received applications. During the conference, the applicants submitted a "Statement of Facts" in support of the applications which explained that the plan would be implemented by salvaging "Jordan River water that currently spills to the Great Salt Lake...through (1) upstream diversion of new return flow water now available in Utah Lake or the Jordan River as a result of change applications, (2) upstream diversion of Utah

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Lake and other Jordan River spills to the Great Salt Lake, (3) supply of lower Jordan water rights during critical low flow periods from shallow aquifer wells north of 21st South in the Salt Lake Valley, and (4) pumping of spring runoff and other excess lower Jordan River flows to supply west side Salt Lake Valley canals that currently are supplied from Utah Lake." Principally, this "Conservation Plan salvages and conserves water now spilling from the Jordan River to the Great Salt Lake due to lack of storage and other impediments to sound water management." Further, under Utah Code Section 73-10d, the applicant would implement development of this water supply as a privatization project. Based on receipt of this additional information these applications were considered filed as acceptably complete.

A hearing was held November 20 and 21, 2002, in Salt Lake City, Utah. The applicants reiterated much of the information submitted in the Statement of Facts previously submitted to substantiate the applications. In addition, excerpts from various water studies were used to assert the quantity of water available for appropriation from Utah Lake, Jordan River and tributaries. Beyond the photographs submitted in the Statement of Facts, additional measurements and photographs were supplied at the hearing to tally the water flowing into the Great Salt Lake from several locations along the southeastern shore.

During the hearing, many of the protestants repeated the concerns outlined in their written protests. Several protestants joined together for a coordinated presentation. Mr. David E. Hansen, Ph.D., P.E., addressed water quality issues on behalf of the coordinated group. He explained potential impacts to the water quality of the Jordan River basin as a result of this proposed project. In summary, his review showed a 5% increase of total dissolved solids (TDS) if the 6400 South pumping project were to occur. If pumping of Big Cottonwood, Little Cottonwood, and Millcreek were to occur, a 19% increase would result. Plus, TDS levels in Utah Lake will continue to increase over time as a result of pumping the tributary inflows. Mr. Richard P. Bay, P.E., Jordan Valley Water Conservancy District (JVWCD), stated that these applications claim use of water conveyance facilities such as the Jordan Aqueduct, Jordan Valley Water Treatment Plant, the transmission system of JVWCD, and many other publicly and privately owned water conveyance systems. He affirmed that there is no surplus capacity in these transmission facilities; therefore, the project can not be physically feasible. Mr. Bay further demonstrated that economically the financing costs of this project would be very high.

At the conclusion of the hearing, the participants were granted 30 days to submit additional comments to be considered under these three applications. Comments were submitted by the applicants, Utah Rivers Council, Salt Lake City Corporation, Jordan Valley Water Conservancy District (with joinder by Provo River Water User's Association, Metropolitan Water District of Salt Lake and Sandy, Utah Lake Distributing Company, Sandy City, Kennecott Utah Copper Corporation, and OM Enterprises Company), Great Salt Lake Audubon Society, Trout Unlimited, Utah Waters, Utah Rivers Council, Friends of Great Salt Lake, National Audubon Society, and Utah Chapter of the Sierra Club. The submitted comments, in most instances, summarize and retort the testimonies and exhibits

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presented during the hearing.

The State Engineer has reviewed the applications to appropriate water, the Statements of Facts, protests, basin management plans for Utah, Salt Lake and Cedar Valleys, the Utah Lake Distribution Plan, Utah State Code, technical publications, and other pertinent information. In accordance with Utah Code Section 73-3-8, "it [is] the duty of the state engineer to approve an application if" the application meets the criteria listed in Subsections a, b, c, d, and e. If the "application does not meet the requirements of this section, it shall be rejected." These applications have been reviewed to determine their compliance with the listed subsections. The following discussions address each of the criteria and gives a compliance assessment for these applications.

Subsection (a): "there is unappropriated water in the proposed source:"

Under these applications, the applicants wish to file on water they believe is available for appropriation. In summarizing the applications, the water intended for appropriation appears to come from various sources within the Utah and Salt Lake Valleys and can be grouped into four general categories.

First, the applicants claim that during wetter cycles Utah Lake spills water down the Jordan River that enters the Great Salt Lake unused. Suggestion is also made that there is unappropriated water in tributaries and ground water sources above Utah Lake during the non-irrigation season. The applicants also discuss stream-flow measurements on Big Cottonwood, Little Cottonwood, and Mill Creeks at diversion locations in Salt Lake City just above where the creeks discharge into the Jordan River. Thus, applicants claim this water because they state there are no other rights below the city's diversions and these creeks gain water at these locations. — *in excess of rights below*

Second, claim is made to the return flow waters entering Utah Lake as a result of approved change applications moving water rights from the Salt Lake Valley into Utah Valley.

Third, the applicants claim these applications seek to appropriate once appropriated water that has now reverted to the public or otherwise become available from lapsed and changed water rights in the lower Jordan River or salvaged Utah Lake evaporation water. The theory behind this claim is that once a water right lapses, terminates, or expires, an application to appropriate water can be filed to appropriate that specific water. Such an application cannot be filed prior to the lapsing, termination, or expiration of the right. Therefore, according to the applicants, no prior applications to appropriate water could make claim to this specific water. In regard to the salvaging of water evaporated from Utah Lake, the applicants claim no water appropriated under this application would be stored in Utah Lake; therefore, there would be no loss from evaporation and water would be saved.

Fourth, the applicants state that a study completed by the Division of Water Rights and the US

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Geological Survey in 1971 shows there are large amounts of unused water discharging from the Salt Lake Valley into the Great Salt Lake.

In response to these claims by the applicants, it is the position of the State Engineer that all of the waters within the Utah and Salt Lake Valleys are fully appropriated by prior rights. This is supported by the numerous decrees and policies covering the various surface sources and ground water in the Utah and Salt Lake Valleys. Many of these decrees were issued in the early 1900s. In 1901 the Morse Decree defined direct flow rights on the Jordan River and water rights in Utah Lake. In 1909 the Booth Decree allowed for additional water to be appropriated from Utah Lake and set maximum diversion limits on those storage rights identified in the Morse decree. The Provo River was decreed in 1921. Several subsequent decrees distributed rights to the waters comprising the Utah and Salt Lake Valley basins. On November 1, 1992, the Utah Lake Interim Water Distribution Plan became effective and was implemented to manage as one system in the Utah Lake Basin the Provo River, Spanish Fork River, Utah Lake, Jordan River and other tributary sources of water. This plan incorporates many prior water rights, applications and exchanges to use water in this basin and ensure that the prior storage rights in Utah Lake are satisfied. The canyon waters in Salt Lake Valley, including Big Cottonwood, Little Cottonwood, Mill Creek and tributaries were distributed by decrees issued in 1914, 1910, and 1913, respectively. These decrees distributed the canyon water by flow to the various named ditches and did not list specific places of use or nature of use. These decreed flows are at many times in excess of the average flows available in the creeks. Even in years where flows may be in excess of these decreed amounts, prior rights and earlier unapproved applications claim these excess flows. Review of the records of the State Engineer shows numerous prior unapproved applications requesting the appropriation of over a total of 2,000 cfs and 350,000 acre-feet of surface and shallow aquifer water. Even if some water were available for appropriation, the State Engineer disagrees with the applicant's theory that such water would be available specifically to them. In Utah Valley the number of prior unapproved applications for surface water is a total of nearly 4,000 cfs and 400,000 acre-feet, and an additional 630 cfs and 390,000 acre-feet of ground water is covered by applications that are pending unapproved.

The State Engineer also believes the basis of an application to appropriate water, especially in the case of these applications that include a municipal supply, cannot be flows that may be available only in years of extremely high flows that have an excessive improbability of occurrence. For example, the flows seen in the 1983 and 1984 water years, which were a result of heavier than normal snowfall followed by a warm spring, involved approximately a 100-year probability of occurrence. If water were available to be appropriated during those years, especially for municipal supply, projects would seem to be speculative, risky, and unreliable by utilizing water that would only be available every 100 years.

Concerning ground water sources, the Utah Valley ground water policy was implemented in 1995; the Salt Lake Valley interim ground water management policy was implemented in 1991. These policies were implemented because there is no water available for appropriation in these areas, and

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management guidelines were needed to ensure no impairment of existing rights would occur.

When Utah Lake reaches compromise level as defined in the Utah Lake Interim Water Distribution Plan (the "maximum legal storage elevation in Utah Lake") "the control gates are required to be fully opened." The water above this compromise level, which flows into the Jordan River, appears to be what the applicant refers to as "spilled water." However, even when water is flowing past the control gates, and all the rights to store water are satisfied, this water goes to the next downstream appropriator. Many of the users already on and around the Great Salt Lake with existing prior rights rely on this water. Many of the lower Jordan River users have year round rights, with some rights that may have beneficial use to a "flow-thru" component necessary to maintain waterfowl habitats. Thus, the State Engineer believes the water flowing from the control gates of Utah Lake is not wasted to the Jordan River or the Great Salt Lake. The applicants have given no assessment of the existing rights in these areas that are being held by those who have priority ahead of the applicants and are currently holding non-use applications. Nor, did applicants consider prior approved applications that have not been perfected because the projects have not been completed. Review of the number of applications held by non-use applications in the Salt Lake Valley shows that these rights comprise just under 50 cfs and 70,000 acre-feet of water. In Utah Valley, the amount held by non-use applications for surface waters is approximately 100 cfs and 3,000 acre-feet and 45 cfs and 6,500 acre-feet for ground water rights. In addition, there are filings addressing approximately 1,500 cfs and 150,000 acre-feet of water appropriated under currently approved applications to appropriate surface water where the projects have not been completed and the rights perfected. In Utah Valley, the unperfected surface applications cover just under 750 cfs and 500,000 acre-feet. For ground water these numbers reach over 55 cfs and 2,500 acre-feet. The State Engineer believes the water flowing into the Great Salt Lake would diminish if the rights held under non-use applications were to resume use and all the pending projects were to be completed and that water for both pending unapproved and approved but undeveloped applications must be satisfied before any calculation is made of water available for appropriation.

Further, the users of the Utah Lake water rely on the water flowing into the lake during non-irrigation seasons to satisfy their existing rights. The sources of this flow are the Utah Lake tributaries. Many holders of existing rights store water in the lake on a year-round basis. These winter flows help make up the storage portion of their prior rights. Thus, the State Engineer believes there is no water in the tributaries available for appropriation.

Regarding evaporation losses from Utah Lake, it has been the policy of the State Engineer that all users of this water share in the evaporation losses. This means all Utah Lake right users are assessed their appropriate share of the evaporation losses and there is no "salvaged" water evaporated from Utah Lake that might be available to the applicants.

Sections of Salt Lake Valley tributaries of the Jordan River may gain water flow. Looking at the prior

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rights to this water, however, the entire drainage basin must be considered as a whole. There are downstream rights that rely on this stream-flow to satisfy their existing rights, not only with the quantity of water available but also water quality. In addition, Salt Lake City may be one of the larger users on these creeks, but the smaller right holders have prior rights that need to be satisfied.

In response to the issue of availability of return flows under recent changes, there have been many approved change applications proposing to move the use of water upstream from the Salt Lake Valley to areas above Utah Lake. The majority of these applications, however, have not been perfected. As a result, the impact, if any, from potential return flows under these proposals cannot presently be measured. Because this theoretical quantity of water has not been and cannot be physically measured, it cannot be claimed for appropriation.

The applicants also claim they are applying for water specifically apart from any prior pending application to appropriate. They assert their applications were filed after previous rights were terminated, lapsed, or changed. Therefore, their filings address the water resulting from these actions which would only now be available for appropriation and would not have been available at the time other prior unapproved applications were made. There is no provision given in Utah Code that would substantiate this theory of separation of available water. Further, Utah Code Section 73-3-1 states "the one first in time shall be first in rights." The State Engineer believes the applicant's theory is contrary to Utah Code and the fundamental principle of the Doctrine of Prior Appropriation.

In summary, it is the responsibility of an applicant to show there is reason to believe there is unappropriated water available for the applications. Utah and Salt Lake Valleys have experienced much growth and development since 1971. Population has greatly increased, and many water projects and facilities have been built to accommodate this growth. There is no doubt future water projects and conservation efforts will need to be implemented to handle even further growth, but the claims made in these applications to appropriate water do not present adequate evidence or reason to believe there is unappropriated water available for these applications.

Subsection (b): "the proposed use will not impair existing rights or interfere with the more beneficial use of the water:"

Because these applications are asking to allow a new appropriation of water in basins that are considered fully appropriated; impairment would occur if the project proposed under these applications were implemented. With several rights being held under non-use filings and other prior applications not yet approved or projects completed, the applicant's demonstration of water flowing into the Great Salt Lake does not show there is water available for the applications or that use of such water will not impair existing water rights. It also cannot be inferred that because existing water right holders do not protest a new application, they acknowledge that their prior rights are abandoned. The State Engineer believes approval of these applications would impair existing rights or interfere with

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the more beneficial use of water.

Subsection (c): "the proposed plan is physically and economically feasible...and would not prove detrimental to the public welfare:"

The applicants' ability to physically and economically complete and implement the project must be explored to determine if a proposed project is physically and economically feasible. Public welfare considerations are raised and, in this case, are discussed under Section (e) below. The applicants explained this project would be implemented as a privatization project in accordance with Utah law and would involve the assistance of Tetra Tech, Inc. This project would also require the use of many existing water facilities, and the physical components of the project would need to be built upon lands owned or controlled by other parties within the project's vast proposed area.

In this regard, applicants have no existing contracts, permission, or support for gaining access to existing facilities. Nor do they have any agreements with any political subdivision for participation in a privatization project. The applicants have not provided evidence that a signed and executed contract exists with the engineering firm to complete the project. The applicant owns no lands, no industrial facilities, and has no customers with supply water contracts. This raises question as to how the applicants could physically or economically complete the proposed project, the cost of which is very large. Based on the information provided to him, the State Engineer has no reason to believe the project as proposed is physically or economically feasible.

Subsection (d): "the applicant has the financial ability to complete the proposed works:"

Within all the submitted information, the applicants have supplied no direct evidence that they have the financial ability to complete such an enormous project as the applications envision. Cost estimates submitted by applicants indicate that this project would cost under \$100 Million to complete. In contrast, cost estimates submitted by protestants suggests that three times that amount would be needed to complete such a project. No statements of the financial ability of applicants have been submitted to give reason that the applicants themselves can finance such amounts. However, it may be within the financial ability of Tetra Tech, Inc., to finance such a project. But even in Tetra Tech's report for the conceptual design of the Cedar Valley project, it is stated that while the basin could store large amounts of water it would be "extremely difficult, and possibly cost prohibitive, to store this amount of water using percolation basins only." The report also estimates that the cost of the Cedar Valley project, alone, would cost \$88.3 Million. The applicants state Tetra Tech, Inc. is co-owner of the project. However, no contracts or agreements have been submitted to substantiate this and Tetra Tech, Inc., is not an owner of record for these three applications to appropriate water. Therefore, the State Engineer does not have sufficient reason to believe the applicants have the financial ability to complete the proposed project.

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Subsection (e): "the application was filed in good faith and not for purposes of speculation or monopoly."

Although the applicants argue these applications were filed in good faith, the applicants appear to have no beneficial use for the water other than selling it to others. Utah Code Section 73-3-1 requires "the application must be for some useful and beneficial purpose." It is not clear that sale of water to others, as opposed to use of water to irrigate or for an industrial or mining purpose, is the type of beneficial purpose that will qualify under Section 73-3-1. If such a use does qualify, executed (but contingent) contracts with legitimate buyers would be necessary to show the applicants were not speculating. The applicants have no lands, facilities, customers, or contracts. No such contracts have been submitted to the State Engineer in this case. Without such contracts, it appears that these applications were filed based on conjecture and that the applicants were indeed speculating when they filed the applications. The State Engineer has no reason to believe the applications were not filed for purposes of speculation or monopoly.

Remainder of Subsection (e): "If the state engineer...has reason to believe that an application...will interfere with its more beneficial use...unreasonably affect public recreation or the natural stream environment, or prove detrimental to the public welfare..."

The State Engineer believes available information gives reason to believe that these applications will interfere with the beneficial use of prior appropriations for irrigation, domestic or culinary, stock watering, power or mining development and manufacturing in the Salt Lake and Utah Lake basins under existing rights. Public recreation and the natural stream environment would also be adversely affected if these applications were to be approved as they are now filed, not only by influencing water quality, but also by changing the natural stream-flow regime by diverting winter and high spring flows. Therefore, the State Engineer believes approval of these applications would prove detrimental to the public welfare.

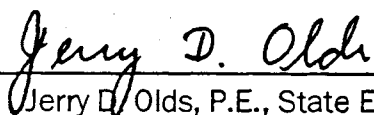
In conclusion, if an application to appropriate does not meet the requirements of Section 73-3-8 of the Utah Code, the application "shall be rejected." In review of all the information submitted during this application process and presented during and after the hearings on these applications, there is no reason to believe these applications comply with Section 73-3-8 and Section 73-3-1 of the Utah Code.

It is, therefore, **ORDERED** and Application Numbers 55-9399 (A72027), 57-10282 (A73473), and 59-5606 (A72026) are hereby **REJECTED** because the applications do not meet applicable legal criteria.

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This Decision is subject to the provisions of Rule R655-6-17 of the Division of Water Rights and to Sections 63-46b-13 and 73-3-14 of the Utah Code Annotated, 1953, which provide for filing either a Request for Reconsideration with the State Engineer or an appeal with the appropriate District Court. A Request for Reconsideration must be filed with the State Engineer within 20 days of the date of this Decision. However, a Request for Reconsideration is not a prerequisite to filing a court appeal. A court appeal must be filed within 30 days after the date of this Decision, or if a Request for Reconsideration has been filed, within 30 days after the date the Request for Reconsideration is denied. A Request for Reconsideration is considered denied when no action is taken 20 days after the Request is filed.

Dated this 17th day of March, 2004.


Jerry D. Olds, P.E., State Engineer

JDO:TDW:kkh

Mailed a copy of the foregoing Memorandum Decision this 17th day of March, 2004, to:

Western Water LLC
194 East Paradise Lane
Alpine, UT 84004

Alpine City
c/o John H. Mabey
265 East 100 South, Suite 300
Salt Lake City, UT 84111

American Fork City
c/o Ted Burton Barratt
31 North Church Street
American Fork, UT 84003

W. Glade and Bart D. Berry
c/o David B. Hartvigsen
102 North 100 East
Cedar Fork, UT 84013

Burnham Duck Club
c/o Jody L. Williams (late protest)
299 South Main Street, Suite
1800
Salt Lake City, UT 84111

Burnham Duck Club
c/o David Quinney (late protest)
423 East Broadway
Salt Lake City, UT 84111

Cahoon and Maxfield Irrigation
Company
c/o Jeff Niermeyer, P.E.
1530 South West Temple
Salt Lake City, UT 84115

Cedar Fort Irrigation Company
c/o Douglas Hales, Director
PO Box 404
Cedar Fort, UT 84013

Central Utah Water Conservancy
District
c/o Steven E. Clyde
One Utah Center
Salt Lake City, UT 84111

City of West Jordan
c/o Gary Luebbers, City Manager
8000 South Redwood Road
West Jordan, UT 84088

Morris Clark
308 West Main
Lehi, UT 84043

Clinger Family Partnership
1493 South Geneva Road
Orem, UT 84058

Robert and Sherri Cook
7834 North 7800 West
Lehi, UT 84043

George Crawford
1088 East 390 South
American Fork, UT 84003-3336

Rod Dansie
7198 West 13090 South
Herriman, UT 84065

Draper Irrigation Company
c/o Bruce C. Cuppett and Dave
A. Gardner (late protest)
PO Box 156
Draper, UT 84020-0156

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East Jordan Irrigation Company
c/o Marc Wangsgard
257 East 200 South, Suite 500
Salt Lake City, UT 84145-5678

Geneva Steel LLC
c/o Daniel A. Jensen
185 South State Street, Suite
1300
Salt Lake City, UT 84111

Larry and Linda Hadfield
7755 North 8730 West
Lehi, UT 84043

Irvine Ranch and Petroleum Inc.
dba Ambassador Duck Club
c/o Richard N. Gilbert
4071 Minuet Court
West Valley City, UT 84119

John Jacob
1500 Wells Fargo Plaza 170
South Main Street
Salt Lake City, UT 84145-0444

Evan Johnson
327 North 200 East #2
American Fork, UT 84003

Jordan Valley Water Conservancy
District
c/o Robert P. Hill
PO Box 45385
Salt Lake City, UT 84145-0385

Jordan Valley Water Conservancy
District
c/o Reid Lewis
PO Box 70
West Jordan, UT 84088

Jordan Valley Water Conservancy
District
c/o Richard Bay
PO Box 70
West Jordan, UT 84088

Kennecott Utah Copper
Corporation
c/o William N. White
265 East 100 South, Suite 300
Salt Lake City, UT 84111

Lake Mountain Mutual Water
Company
c/o David B. Hartvigsen
60 East South Temple, Suite
1100
Salt Lake City, UT 84111

Lehi City
c/o John H. Mabey
265 East 100 South, Suite 300
Salt Lake City, UT 84111

Lehi Irrigation Company
c/o John K. Bushman (late
protest)
PO Box 316
Lehi, UT 84043

Lower Jordan River Water Users
Association
c/o Jody L. Williams (late protest)
299 South Main Street, Ste
1800
Salt Lake City, UT 84111

Magna Water Company
c/o David B. Hartvigsen
60 East South Temple, Suite
1100
Salt Lake City, UT 84111

Glenn R. Maughan
PO Box 3345 Gorder Sta.
Ogden, UT 84403

Susan Messersmith
7550 North 7480 West
American Fork, UT 84003

Vernal Messersmith
6968 West 7750 North
American Fork, UT 84003

Metropolitan Water District of
Salt Lake and Sandy
c/o Scott H. Martin
10 Exchange Place, 11th Floor
Salt Lake City, UT 84145

National Audubon Society
c/o Wayne Martinson
549 Cortez Street
Salt Lake City, UT 84103

New State Inc.
c/o Owen Kent Covey
PO Box 58483
Salt Lake City, UT 84158-8483

North Jordan Irrigation Company
c/o Keith L. Hansen (late
protest)
4788 Hidden Cove
Taylorsville, UT 84123

PacifiCorp
c/o Jody L. Williams
299 South Main Street, Ste.
1800
Salt Lake City, UT 84111

PacifiCorp
c/o Roger Rigby, Water Rights
Administrator
1407 West North Temple, Suite
110
Salt Lake City, UT 84140

Provo River Water User's
Association
1788 North State Street
Orem, UT 84057

Provo River Water User's
Association
c/o Scott H. Martin
10 Exchange Place, 11th Floor
Salt Lake City, UT 84145-5000

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Riverton City
c/o Larry R. Gilson
12401 South 450 East, Building
C Unit 2
Draper, UT 84020

Riverton City
c/o M. Leon Berrett (late protest)
PO Box 429
Lehi, UT 84065

Ron and Mindy Sager (late
protest)
7230 West 7500 North
American Fork, UT 84003

Salt Lake City Corporation
c/o LeRoy W. Hooton
1530 South West Temple
Salt Lake City, UT 84115

Salt Lake Tribune
c/o Brent Israelsen (interested
party)
143 South Main
Salt Lake City, UT 84111

Sandy City Department of Public
Utilities
c/o Mike Wilson
10000 Centennial Parkway
Sandy, UT 84070

Saratoga Springs
c/o Richard G. Allen (late
protest)
PO Box 254
Lehi, UT 84043

Marvin Shepherd
PO Box 181
Wallsburg, UT 84082

Sierra Club
c/o Ann Wechsler
2475 Emerson Avenue
Salt Lake City, UT 84108-2408

South Jordan Canal Company
Larry Jacobson (late protest)
11515 South 1300 West
South Jordan, UT 84095

South Jordan Canal Company
c/o Dale Bateman (late protest)
6785 South 1300 West
West Jordan, UT 84084

South Jordan City
c/o Ricky Horst
11175 South Redwood Road
South Jordan, UT 84095

State of Utah Division of Forestry
Fire and State Lands
c/o Ed Storey
PO Box 145703
Salt Lake City, UT 84114-5703

State of Utah Division of Parks
and Recreation
c/o Therold E. Green
PO Box 146001
Salt Lake City, UT 84114-6001

State of Utah Division of Wildlife
Resources
c/o Kevin Conway
PO Box 146301
Salt Lake City, UT 84114-6301

Paul Taylor
7550 North 8350 West
Lehi, UT 84043

Edward Thomas
PO Box 233
Lehi, UT 84043

Mary and Edward Thomas
PO Box 233
Lehi, UT 84043-0233

Town of Cedar Fort
c/o Jennine Cook
PO Box 389
Cedar Fort, UT 84013

Trout Unlimited
c/o Paul F. Dremann
2348 Lynwood Drive
Salt Lake City, UT 84109

United States Fish and Wildlife
Service
c/o Cheryl C. Williss
PO Box 25486
Denver, CO 80225-0486

United States Office of the
Secretary
c/o Ronald Johnston
302 East 1860 South
Provo, UT 84606-7317

USA Bureau of Reclamation
ATTN: Jonathan Jones
302 East 1860 South
Provo, UT 84606-7317

Utah and Salt Lake Canal
Company
c/o David R. Bird One Utah
Center
Salt Lake City, UT 84145-0898

Utah Department of
Transportation
c/o Jody L. Williams
299 South Main Street, Ste
1800
Salt Lake City, UT 84111

Utah Lake Distributing Company
c/o Scott H. Martin
10 Exchange Place, 11th Floor
Salt Lake City, UT 84145

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Utah Lake Landowners Inc.
c/o Robert C. Fillerup
1107 South Orem Blvd.
Orem, UT 84058

Mitigation and Conservation
Commission Utah Reclamation
c/o Michael C. Weland
102 West 500 South #315
Salt Lake City, UT 84101-2328

Utah Water Company L.L.C.
c/o Jeffrey W. Appel
36 South State Street, Ste. 1400
Salt Lake City, UT 84111

Utah Waters
c/o Darrell H. Mensel
2480 East Fisher Lane
Salt Lake City, UT 84109

Utah Wetlands Foundation
c/o Maunsel B. Pearce
136 South Main Street, Suite
418
Salt Lake City, UT 84101

Mack and Marie Wagstaff
7984 North 7800 West
Lehi, UT 84043

Shane and Michelle Wagstaff
7954 North 7800 West
Lehi, UT 84043

E. Fred Walters
1100 West Main Street
American Fork, UT 84003

Dean and Leatrice Willes
681 South 5th West
Lehi, UT 84043

BY:

Kelly K. Horne

ADDENDUM 4

**Western Water Request for Reconsideration of
Decision on Application to Appropriate Nos. 55-9399
(a72027), 59-5606 [sic](a72026)
and 57-10282 (a73473)
(April 6, 2004).**

WW

Western Water, LLC

194 E. Paradise Ln.
Alpine, Utah, 84004
westernh2o@msn.com

April 5, 2004

Jerry Olds
State Engineer
Utah State Division of Water Rights
1594 West North Temple, Suite 220
Box 146300
Salt Lake City, Utah 84114-6300

RECEIVED

APR 06 2004

WATER RIGHTS
SALT LAKE

Re: **Request** for Reconsideration of decision on Applications to Appropriate Nos. 55-9399(a72027), 55-5606(a72026), and 57-10282(a73473)

Dear Mr. Olds:

Western Water, LC hereby requests reconsideration of your decision on Applications to Appropriate Nos. 55-9399(a72027), 55-5606(a72026), and 57-10282(a73473). After review of the State Engineer's Memorandum Decision on these applications dated March 17, 2004, state law, and protestant's contentions and concerns, Western Water has found that the State Engineer has made very important errors in law and facts. Further, the State Engineer has rejected the subject applications without adequate consideration that some water can be appropriated within the statutory criteria. These errors in law and facts are as follows:

1. The shallow groundwater system of the Salt Lake Valley was and remained open for appropriation when Western Water filed Application to Appropriate No. 57-10282(a73473) appropriating Salt Lake Valley shallow groundwater. See the State Engineer's 1991 Interim groundwater policy.

2. The Supreme Court has held "a right to use water . . . can only be initiated by making a new appropriation after the water is available for appropriation." Whitmore v. Welch, 201 P.2d 954, 960 (1949)(emphasis added). Thus, no one can appropriate the unappropriated waters of the State except by filing application with the State Engineer after the water reverts to the public. This is not theory. It is law that has stood for over 50 years.

3. The Supreme Court has also held that no one can appropriate new water except by filing an application with the State Engineer after the new water is available in a source. Lehi Irrigation Company v. Jones, 202 P.2d 892, 895 (Utah 1949)(a prior appropriator's rights "are limited to the flow preceding the increase"); see also, Fairfield Irrigation Company v. Carson, 247 P.2d 1004 (Utah 1952); Adams v. Portage Irrigation Reservoir & Power Co., 72 P.2d 648, 654 (Utah 1937).

4. Western Water's applications are the first to seek re-appropriation of part of the large

quantities of reverted public and new water now available in the Utah Lake and Jordan River System. No other prior applications whether approved or unapproved, or for non-use can claim this water.

5. The State Engineer did not consider a smaller project. Attached to this letter is a description of a revised and reduced project that is well within a reason to believe that it has economic and physical feasibility.

6. Western Water has stated Tetra Tech, Inc. is an owner in Western Water and thus the applicant, Western Water, has shown "a reason to believe" that it has the financial ability to complete the proposed works. The State Engineer cannot reject the application because actual proof was not supplied. Bullock v. Hanks, 452 P.2d 866 (1969); United States v. Fourth District Court, 238 P.2d 1132 (Utah 1951).

7. Someone other than the ultimate beneficial user can appropriate water so long as the water is put to beneficial use. The law has long held that water can be appropriated by someone other than the actual user so long as the water is placed to beneficial use. Manning v. Fife, 17 Utah 232, 237, 54 P. 111 (1898)(waters may be developed "to be used or sold for any useful purpose."). Further, Western Water need not have lands, facilities, customers, or contracts. Bullock v. Hanks, 452 P.2d 866 (1969); United States v. Fourth District Court, 238 P.2d 1132 (Utah 1951).

8. The revised and reduced project attached hereto protects water quality and avoids substantially and unreasonably changing the natural stream regime or the historic level of Utah Lake and thus does not interfere with the more beneficial use of water, unreasonably affect public recreation or the natural stream environment, or prove detrimental to the public welfare.

Each of the above points is discussed in more detail below in the context of the statutory criteria for approving the applications. When these errors of law and facts are corrected, the statutory criteria are met and the State Engineer has the affirmative duty to approve the applications because at least some water can be appropriated under the subject applications as is shown below. East Bench Irrigation Co. v. State, 300 P.2d 603 (Utah 1956); United States v. Fourth District Court, 238 P.2d 1132 (Utah 1951).

Either the applicant or the State Engineer may pare down and place conditions on the applications to prevent the applications from impairing prior existing rights, unreasonably affecting public recreation or the natural stream environment, or proving detrimental to the public welfare. United States v. Fourth District Court, 238 P.2d 1132 (Utah 1951); Whitmore v. Welch, 201 P.2d 954 (1949). After, consideration of the concerns of the State Engineer and the protestants, Western Water has modified its Conservation Plan to meet those concerns. The State Engineer is requested to reconsider the applications under the revised and reduced plan attached hereto. Western Water is entitled to approval of its applications for appropriation of all of the water that may be appropriated within the statutory criteria under the revised plan and approval conditions requested herein. Id.

- (a) There is reason to believe there is unappropriated water in the proposed source.

The shallow groundwater of the Salt Lake Valley remained open to appropriations when Western Water filed Application to Appropriate No. 57-10282(a73473). Western Water is thus entitled to appropriate 4,700 acre-feet of shallow groundwater for use or exchange upstream on the Jordan River or in Utah Lake.

Further, Western Water's Statement of Facts showed that large water rights on the lower Jordan River totaling over 176,000 acre-feet have reverted to the public. Also shown in the Statement of Facts and Hearing Exhibits that over 32,000 acre-feet of this water is now available in Utah Lake as a result of change applications. Also, shown in the Statement of Facts is that over 22,000 acre-feet in addition to the 176,000 acre-feet is new water in the Jordan River and Utah Lake resulting from new return flows introduced back into the system.

"[A] right to use water . . . can only be initiated by making a new appropriation after the water is available for appropriation." Whitmore v. Welch, 201 P.2d 954, 960 (1949)(emphasis added). This is law, not theory. It is the holding of the case. It applies to both once appropriated water that has reverted to the public and to new water that has become available in a source.

Western Water's applications are the first to re-appropriate a portion of this reverted and new public water. No other prior applications may claim this public water because the applications are prior to the time it was public water and available for appropriation. Thus, the State Engineer's memorandum decision is mistaken and should be reconsidered.

- (b) The proposed use will not impair existing rights or interfere with the more beneficial use of water.

The proposed use cannot impair existing rights in terms of water quantity, because no existing rights have claim upon the reverted public water and new water now available in the Jordan River and Utah Lake. The proposed use cannot impair water quality for existing rights and uses because the State Engineer has already decided that Utah Lake rights may be retired in favor of upstream diversions and already holds and retains the resulting change application storage water in Utah Lake where it largely evaporates and builds up salt in the lake.

Western Water's diversions will reduce and reverse this salt build up by diverting water upstream and preventing this water from discharging its salt into the lake. Thus, water quality will not be impaired, but will be improved by Western Water's upstream diversions. The State Engineer's memorandum decision should therefore be reconsidered.

- (c) The proposed plan is physically and economically feasible . . . and would not prove detrimental to the public welfare.

The revised Conservation Plan attached hereto is physically and economically feasible. Large portions of the original plan have been deleted and will not be constructed. The Conservation Plan does not depend on use of the facilities of others, but facilities can be

constructed independently and serve as trunk pipeline systems. Western Water is not required to have contracts. Green River Canal Company v. Thayne, 486 Utah Adv. Rep. 34 (Utah 2003). Nor is it required to have customers, lands, or facilities. Items that remain of a speculative nature at the application stage must be dealt with as provided in Bullock v. Hanks, 452 P.2d 866 (1969). The application is to be approved and the applicant allowed to show what he can do. United States v. Fourth District Court, 238 P.2d 1132 (Utah 1951). The State Engineer's memorandum decision should therefore be reconsidered.

(d) The applicant has the financial ability to complete the proposed works.

The revised Conservation Plan attached hereto deletes large portions of the original project and can be constructed in financially manageable phases. Tetra Tech, Inc. provided to the State Engineer a letter dated August 13, 2001. A copy of the letter is enclosed with this request for reconsideration.

In the letter, Tetra Tech states that it "entered into an agreement with Western Water, LLC regarding the three Applications to Appropriate" (emphasis added)

Tetra Tech prepared and Western Water provided the State Engineer with a Cedar Valley Basin water study and a Cedar Valley cost study.

Tetra Tech states in its letter:

"Tetra Tech will support, with capital and our own engineering services, the following phases of the Plan, subject to the continued viability of the Plan as shown in each succeeding phase." (emphasis added)

Tetra Tech then estimates the capital required for the successive phases of the plan. The estimate for the first three phases total over \$10 million.

Western Water has shown "a reason to believe" that it has the financial ability to complete the proposed works. Proof of financial ability has been supplied. However, if the State Engineer does not deem the financial proof sufficient, the State Engineer cannot reject the application because actual proof was not supplied. Eardley v. Terry, 77 P.2d 362, 366 (Utah 1938) ("We do not think that the Legislature intended that he must prove to the state engineer, when his application is up for approval or rejection, by the same kind and quantum of proof that would be required were he making final proof that he can make an appropriation."); see also Bullock v. Hanks, 452 P.2d 866 (1969); United States v. Fourth District Court, 238 P.2d 1132 (Utah 1951). The test is "reason to believe" rather than proof. Tetra Tech has provided that "reason to believe" evidence in its letter. Any possible doubts are to be resolved in favor of the applicant. Little Cottonwood Water Co. v. Kimball, 289 P. 116. (Utah 1930). The application should be approved and Western Water should be allowed to show what it can do. The State Engineer's memorandum decision should therefore be reconsidered.

(e) Part 1. The applications were filed in good faith and not for purposes of speculation or monopoly.

Western Water's applications were filed in good faith and not for purposes of speculation or monopoly. The test is the intent of the applicant. "As stated in *Sowards v. Meagher* ... 'The three principal elements to constitute a valid appropriation of water ... are ... (1) An intent to apply it to some beneficial use ...' *Tanner v. Provo Reservoir Co.*, 98 P.2d 695, 699 (Utah 1940); see also *Elliot v. Whitmore*, 65 P. 70, 73 (Utah 1901)('The extent of an appropriation of water is determined by ... the intention of the appropriator, followed by a reasonable diligence in executing such intent, and by the beneficial purpose. ...'). Western Water filed the applications in good faith to put into beneficial use water supplies that currently cannot be claimed or used by any prior applicant or water user.

Further, it is clear that the sale of water to others is beneficial use. The Supreme Court has so stated and held for over 100 years. *Estate of Steed v. New Escalante Irrigation Co.*, 846 P.2d 1223 (Utah 1992); *Lasson v. Seely*, 120 Utah 679, 688, 238 P. 418 (1951)('the appropriator may lease or sell the right to use water under his control'); *Manning v. Fife*, 17 Utah 232, 237, 54 P. 111 (1898)(waters may be developed "to be used or sold for any useful purpose."); *McNaughton v. Eaton*, 121 Utah 394, 403-404, 242 P.2d 570 (1952).

Western Water is not required to have actual contracts with customers. Contracts with customers cannot create water rights and cannot be used as criteria by the State Engineer for blocking the creation of water rights. *Green River Canal Company v. Thavn*, 486 Utah Adv. Rep. 34 (Utah 2003). Items that remain of a speculative nature at the application stage are to be dealt with as provided in *Bullock v. Hanks*, 452 P.2d 866 (1969). The applications are to be approved and the applicant allowed to show what he can do. The State Engineer's memorandum decision should therefore be reconsidered.

(e) Part 2. "The applications will not interfere with the more beneficial use of the water unreasonably affect public recreation or the natural stream environment, or prove detrimental to the public welfare.

1. The applications will not interfere with the more beneficial use of the water. The Supreme Court just recently stated: "Our obligation is to ensure that water is put to the most beneficial use. '[I]t is essential that putting water to the highest and best beneficial use should not only be encouraged, but carefully safeguarded.'" *Green River Canal Company v. Thavn*, 486 Utah Adv. Rep. 34 (Utah 2003). Western Water's revised plan will not interfere with or impair any prior existing water rights. Thus, the more beneficial use of water by others is safeguarded. Accordingly, the highest and best beneficial use should be encouraged. Western Water's applications and revised Conservation Plan propose to deliver water for domestic, irrigation, and municipal uses, which are the highest and best beneficial uses of the available water supply. Therefore, the State Engineer should reconsider the applications and approve them.

2. The applications will not unreasonably affect public recreation or the natural stream environment. Western Water's revised and reduced Conservation Plan attached hereto solves the

alleged problems of influencing water quality and changing the natural stream-flow regime by diverting winter and high spring flows. Water development is to be highly favored. Green River Canal Company v. Thayne, 486 Utah Adv. Rep. 34 (Utah 2003). The effects on public recreation and the natural stream environment must therefore be substantial and unreasonable in comparison to other concurrent or planned projects for providing water.

Under the revised Conservation Plan attached hereto, operations of the Jordan River will not be unreasonably affected. There will be no winter or high spring flow diversions on the Jordan River. The operation of the Jordan River will remain much as it is now is. Operations of Utah Lake will also not be unreasonably affected. The applications seek only to put back into use water that has been in use in the past. The past uses of the reverted and now re-appropriated water have not unreasonably affected public recreation or the natural stream environment. Upstream surface tributary streams above Utah Lake will also not be unreasonably affected. Winter stock watering rights on Spring Creek and other small Utah Lake tributaries below Mill Pond will prevent any potential drying of these streams.

Thus, affects on public recreation and the natural stream environment will not be substantial and unreasonable when compared to other concurrent or planned projects and when compared to the public good that will come from putting the water back into beneficial use. Western Water's applications should be approved pursuant to this revised plan.

3. The applications will not prove detrimental to the public welfare. Because Western Water's diversions can be made under the revised plan without impairing existing water rights, without impairing water quality, and without unreasonably affecting public recreation and the natural stream environment, the applications will not be detrimental to the public welfare. Rather, the applications under the revised Conservation Plan will be beneficial to the public welfare in that the applications will put a substantial quantity of water back into beneficial use. "We must encourage greater efficiency through water-saving techniques. . . . 'Because of the vital importance of water . . . both our statutory and decisional law have been fashioned in recognition of the desirability and of the necessity of insuring the highest possible development and of the most continuous beneficial use of all available water with as little waste as possible.'" Estate of Steed v. New Escalante Irrigation Co., 846 P.2d 1223, 1229 (Utah 1992); see also Eskelsen v. Town of Perry, 819 P.2d 770, 775-76 (Utah 1991).

Summary

In summary, Western Water's applications and revised Conservation Plan attached hereto meet all of the statutory criteria for approval. The State Engineer has made errors in law and facts and has not considered whether "some" water can be developed under the applications. The revised Conservation Plan attached hereto or any smaller project down to a single well can develop "some" water within the statutory criteria. The State Engineer should reconsider his decision in light of the revised Conservation Plan attached hereto or any part thereof and approve the applications.

REQUEST

Western Water requests reconsideration of Applications to Appropriate Nos. 55-9399(a72027), 55-5606(a72026), and 57-10282(a73473) in light of the revised Conservation Plan attached hereto or any smaller part of it. These applications have met the statutory criteria and are entitled to approval. Therefore, Western Water requests that Applications to Appropriate Nos. 55-9399(a72027), 55-5606(a72026), and 57-10282(a73473) be approved contingent upon the following conditions and stipulations designed to ensure that implementation of the applications and the Conservation Plan will be pursuant to the statutory criteria:

1. A maximum of 4,700 acre-feet of Salt Lake Valley shallow well water may be withdrawn for use or discharge to the Surplus Canal or Brighton and North Point Canal in exchange for up to 4,700 acre-feet of allowable depletion upstream on the Jordan River or above Utah Lake as available and subject to non-impairment of prior existing rights.

2. In exchange for 4,700 acre-feet of shallow well discharge to the Surplus Canal or the Brighton and North Point Canal:

(a) up to 4,700 acre-feet of diversions may be made at diversion points on the Jordan River; or

(b) up to 4,700 acre-feet of water may be diverted to recharge in Cedar Valley and up to 9,210 acre-feet of additional diversions, re-diversions, and exchanges may be made from application diversion or re-diversion points for delivery and use of water in Cedar, Utah, and Salt Lake Valleys constrained to a total maximum depletion of 4,700 acre-feet from all such diversions.

3. Up to an additional 27,590 acre-feet of depletions for a total of 32,290 acre-feet depletion ($27,590 + 4,700$) may be made from north Utah Valley through diversions at Utah Lake or the Jordan River, or at upstream tributaries and groundwater at application diversion and re-diversion points subject to available water, subject to prior existing rights, and subject to non-impairment of the water quality for the current uses of the water under existing rights.

4. To achieve such additional 27,590 acre-feet of depletions, diversions to Cedar Valley of up to 14,500 acre-feet may be made either to use or to aquifer storage and diversions to use of up to 47,670 acre-feet may be made wherever original diversions or return flows may be diverted or exchanged to application diversion and re-diversion points, subject to available water, subject to prior existing rights, and subject to non-impairment of the water quality for the current uses of the water under existing rights.

5. Diverted waters may be used directly or conveyed to Cedar Valley for recharge into the Cedar Valley aquifer and subsequent recovery from the aquifer subject to prior existing rights, subject to non-impairment of the water quality for the current uses of the water, and subject to obtaining the proper permits and approvals required under Utah Code § 73-3b.

6. Totalizing measuring devices shall be installed at all diversion and re-diversion points and at least monthly diversion records shall be kept and when requested provided to the State

Engineer.

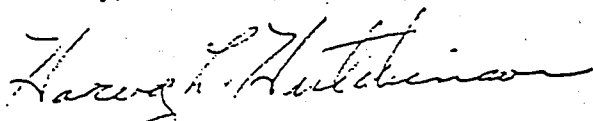
7. Total depletions from Utah Lake shall not exceed 32,290 acre-feet, and depletions in any valley shall not exceed the depletable supply available to the valley.

8. Any wells in Utah Valley that are south or west of Interstate 15 and are east of the Jordan River that may be used to discharge water into the Utah Valley Collection System pipeline or otherwise shall be flowing at the surface and only that amount of water which flows to the surface may be diverted at each well into the collection pipeline. Only those existing wells can be used for which permission is obtained from the owners thereof for such diversions.

9. At the time of proof of appropriation, the actual amounts of depletion and return flows resulting from water use under the applications shall be determined to the satisfaction of the State Engineer and diversions and depletions shall not exceed that authorized.

Under the above conditions, Western Water's applications are entitled to approval. Western Water therefore requests that Applications to Appropriate Nos. 55-9399(a72027), 55-5606(a72026), and 57-10282(a73473) be reconsidered and approved.

Sincerely,



Western Water, LLC.

by

Harvey L. Hutchinson, P.E., Manager

Enc.

REVISED CONSERVATION PLAN

Applications to Appropriate Nos. 55-9399(a72027), 55-5606(a72026), and 57-10282(a73473)

Western Water herewith proposes a revised Conservation Plan for approval under Western Water's Applications to Appropriate Nos. 55-9399(a72027), 55-5606(a72026), and 57-10282(a73473). The plan deletes many facilities while at the same time maintaining the feasibility of economically and physically developing significant water supplies for beneficial use. If the water supplies envisioned in the plan described below somehow cannot be approved, the plan can be feasibly adapted to developing whatever water supply can be approved by the State Engineer.

Salt Lake Valley Facilities

Sufficient shallow groundwater wells in the north end of the Salt Lake Valley along Surplus Canal and the Brighton North Point Canal will be constructed in the Salt Lake Valley to develop 12 cfs or 4,700 acre-feet of shallow groundwater diversions. All other facilities proposed in the applications to be constructed in the Salt Lake Valley are hereby deleted from the applications.

The shallow groundwater developed by the north Salt Lake Valley shallow groundwater wells would either be put to direct use or discharged into the Surplus Canal or Brighton North Point Canal in exchange for diversions of water upstream on the Jordan River and above or from Utah Lake.

No other diversion facilities would be constructed in the Salt Lake Valley. The formerly proposed 6400 South Pumping Plant formerly intended for discharge into west side Salt Lake Valley canals and all of its associated collection system is hereby deleted including all pumping stations and pipelines to the north from 6400 South along the Jordan River and including all diversion facilities on Decker Lake, Decker Lake Drain and at the mouths of Mill Creek and Big and Little Cottonwood Creeks. Thus, all exchange pumping to west side Salt Lake Valley canals is hereby deleted from the plan.

Thus, the only water supply that is now proposed to be developed in the Salt Lake Valley under the applications will be 12 cfs or 4,700 acre-feet of fully depletable shallow groundwater well diversions. By exchange, these diversions will make possible upstream diversions in the Jordan River or from or above Utah Lake sufficient to accomplish upstream depletion of 4,700 acre-feet so long as water quality is not impaired for the current uses of existing rights

Utah and Cedar Valley Facilities

Facilities hereby deleted from the applications in Utah Valley include diversions from Grove Spring and Alpine City wells and associated recharge/recovery wells and connecting pipelines along the base of the Wasatch Mountains and Traverse Ridge specifically described as well nos. 1 through 7 under section 4. Points of Rediversion of Application to Appropriate 57-10282(A73473).

Storage of water in Utah Lake is not part of the revised plan, but available Utah Lake change application storage water may be diverted above or directly from the lake or from the Jordan River.

The collection pipeline in north Utah Valley extending from the Geneva Drain to Mill Pond and to the west side of Utah Valley will be downsized to 40 cfs capacity. The conveyance pipeline from Utah Valley to Cedar Valley will be downsized to 20 cfs and the Cedar Valley recharge and recovery system will be downsized to 20 cfs year around recharge capacity. Irrigation season flow in the conveyance pipeline may be delivered directly for outdoor irrigation use or may be recharged into the aquifer for conversion to drinking water supplies. Only those recovery wells necessary to recover the recharged water in Cedar Valley will be constructed and recovery pipelines will be downsized to collect only that water recovered from the aquifer.

Discussion/Water Supplies Developed/Feasibility

This reduced plan focuses on providing water supplies in Utah and Cedar Valleys. A pipeline extending from the system to Bluffdale and Herriman in Salt Lake Valley will be constructed only if past interest expressed by Herriman and others in the Herriman area ripens into a contract to do so. No connection of the pipeline to Jordan Valley Water Conservancy District facilities is needed or planned. Return flows to Utah Lake and the Jordan River will be used first to mitigate any possible impacts on these water sources and second as secondary supplies in Utah and Salt Lake Valleys where practical without impairment.

It should be noted that Western Water, with the concurrence of Tetra Tech, Inc., can physically and economically develop with the reduced facilities proposed here 32,290 acre-feet of fully depletable supply in Utah Valley for supply to Utah, Cedar, and Salt Lake Valleys of 56,880 acre-feet of diversions. But most any size of project can also be built.

Irrigation season flow in the conveyance pipeline may be delivered directly for outdoor irrigation use or may be recharged into the aquifer for conversion to drinking water supplies. Only those recovery wells necessary to recover the recharged water will be constructed and recovery pipelines will be downsized to collect only that water recovered from the aquifer.

With the 4,700 acre-feet of north Salt Lake Valley exchange supply, at least 4,700 acre-feet of the 32,290+ acre-feet of water now held in Utah Lake as a result of change applications can be provided as a firm depletable supply in Utah Valley without construction of the Cedar Valley Recharge and Recovery System.

The shallow wells will ensure that no impairment occurs from diversion and beneficial use of 4,700 acre-feet of this 32,290+ acre-feet of change application storage water above Utah Lake. As described in Fact 7 of Western Water's Statement of Facts approximately 22,930 acre-feet of new water is now in the Jordan River system as a result of changes in place of use of water. Approximately 11,180 acre-feet or about one half of this water is in Utah Lake. The other half is in the Jordan River and acts to offset and prevent lower Jordan River water right call on the remaining change application storage water in Utah. In addition high spring runoff flows in the

lower Jordan River act to prevent any possible lower Jordan River right impairment call on the change application storage water held in Utah Lake. Thus, most of the remaining, 27,590+ acre-feet of the change application storage held in Utah Lake is reliably available for diversion to new uses. That which is not can be made reliable with the Cedar Valley Aquifer Storage and Recovery System.

This revised plan requests approval of diversion and depletion of 32,290 acre-feet of the 32,290+ acre-feet available in Utah Lake which is made sufficiently reliable by the 4,700 acre-feet of north Salt Lake Valley shallow well exchange pumping and by the Cedar Valley Aquifer Storage and Recovery system. Of course, the change application storage water that is not new water in Utah Lake will be subject to call by prior lower Jordan Rights, but the 4,700 acre-feet of shallow well pumping and the storage capacity provided by the Cedar Valley Aquifer Storage and Recovery system should make most, if not all of this supply sufficiently reliable for domestic, municipal, and irrigation use. However, the Cedar Valley Aquifer Storage and Recharge System is not necessary for the feasibility and reliability of use of much of this 32,290 acre-feet of depletable water supply, and thus will be built only when there is sufficient demand in Cedar Valley to warrant its construction.

The reduced project would divert 25,400 acre-feet to use above Utah Lake with the remaining 6,890 acre-feet diverted from Utah Lake or released to and diverted from the Jordan River. The attached Figure 1 shows that a total of 56,880 acre-feet of diversions can be made from this 32,290 acre-feet of depletable water supply assuming 60 percent return flows from diversions. Total diversions in Utah Valley will be approximately 26,490 acre-feet. Return flows of 15,890 acre-feet will return to Utah Lake.

This reduced system will provide new supplies in Cedar and Utah Valleys with return flows in Cedar Valley either directly diverted back to use or exchanged to well diversions in Cedar Valley for supply back to Utah Valley or the Herriman/Bluffdale area of the Salt Lake Valley. Up to 40,990 acre-feet of firm water supplies will be provided in Cedar and Utah Valleys and 15,890 acre-feet of Jordan River water supplies released from Utah Lake down the Jordan River for use in Salt Lake Valley for a total 56,880 acre-feet of diversions to use. Return flows to the Jordan River from Conservation Plan use in the Salt Lake Valley will be approximately an additional 9,540 acre-feet (13.18 cfs year around flow) than what is currently in the Jordan River. This return flow will offset the 12 cfs shallow well pumping exchange water so that Jordan River flows will remain essentially the same as they would have been without the exchange.

The cost of this revised and downsized system is estimated to be approximately \$39.8 million using the same unit costs and estimates provided in Western Water's Statement of Facts Exhibit 1a. Based on the cost of obtaining and developing water in Utah and Cedar Valleys, this cost is well within the economic feasibility of completing the project. As an extreme minimum, Western Water is entitled to develop 4,700 acre-feet of fully depletable shallow groundwater supply and up to 9,210 acre-feet of associated exchange diversions diverted and used wherever it can physically and economically be diverted to use without impairment of existing rights.

CONSERVATION PLAN DELIVERIES

April 3, 2004

Total Supply = 14,500 A.F. + 26,490 A.F. + 15,890 A.F.
= 56,880 A.F.

SL Valley

4,700 A.F. Shallow groundwater
deliveries to Surplus Canal

Use: 15,890 A.F.
Return Flow: 9,540 A.F.

Cedar Valley

Aquifer Storage 100,000 A.F.

Recharge 14,500 A.F.

Use 14,500 A.F.

Return Flows 8,700 A.F.

Utah Valley

32,290 A.F. Available
Utah Lake Supply

8,400 A.F. Collection System

9,390 A.F. Other Diversions

15,890 A.F. Jordan River Supply
to use from Return Flows

0 to 8,700 A.F.

14,500 A.F.

Up to 8,700 A.F.

26,490 A.F. Use (Max.)

15,890 A.F. Return Flow

ADDENDUM 5

Amended Notice of Initial Attorney's Planning Meeting (February 18, 2006)

COPY

TERRY L. HUTCHINSON #5092
TERRY L. HUTCHINSON, P.C.
368 E. Riverside Dr., Suite C
St. George, Utah 84790
Telephone: (435) 652-1115
Facsimile: (435) 652-0355
Counsel for Plaintiff Western Water LLC

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY
STATE OF UTAH

WESTERN WATER, LLC., a Utah Limited
Liability Company

Plaintiff,

vs.

Jerry D. Olds, Utah State Engineer and
Director of the Division of Water Rights, *et*
al.

Defendants.

AMENDED NOTICE OF INITIAL
ATTORNEYS' PLANNING MEETING

Civil No. 040910869WA

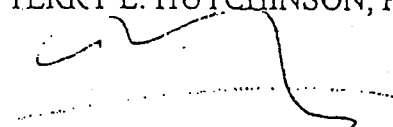
Judge Fuchs

Pursuant to Judge Fuchs' Order from January 20, 2006, an Initial Attorneys' Planning Meeting will be held **Tuesday, February 28, 2006** at 10:00 a.m. at the offices of Snow, Christensen & Martineau, 10 Exchange Place, Suite 1100, Salt Lake City, UT 84145. We will be discussing potential witnesses and exhibits, depositions, discovery, motion cutoffs, trial dates, length of trial and other issues. **Defendants are placed on notice that the trial will be based on the Plaintiff's Applications as amended by the Revised Conservation Plan.** If you are unable to attend, or have matters to discuss with Plaintiff's counsel prior to the Meeting, contact Plaintiff's attorney at the

above contact information. Plaintiff's counsel may be contacted electronically at tlh@infowest.com. Those who have electronic information are encouraged to provide it to Plaintiff's counsel as soon as possible so that Motions and pleadings may be sent electronically as well as through the mail.

DATED this 18 day of February, 2006.

TERRY L. HUTCHINSON, P.C.



Terry L. Hutchinson,
Attorney for Western Water, LLC

NOTICE OF MAILING

You are hereby notified that on the _____ day of February, 2006, a true and correct copy of the foregoing Amended Notice of Initial Attorneys' Planning Meeting was mailed, first class, postage prepaid to the following:

NORMAN K. JOHNSON
UTAH ATTORNEY GENERAL
1594 West North Temple, #300
Salt Lake, UT 84116

Heather B. Shilton
UTAH ATTORNEY GENERAL
1594 West North Temple, #300
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Steven E. Clyde
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Steve Schwendiman
Assistant Attorney General
PO Box 140814
160 E. 300 S., 5th Floor
Salt Lake, UT 84114-08150

ADDENDUM 6

Illustrative Conservation Plan Application Map

Application Map

HEARING SUBMITTAL TO
DIVISION OF WATER RIGHTS

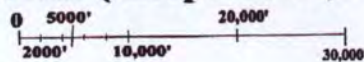
Right No.: 55-9349, 58-9606, 57-10282

Date: 11/20/03

Submittee: Applicant

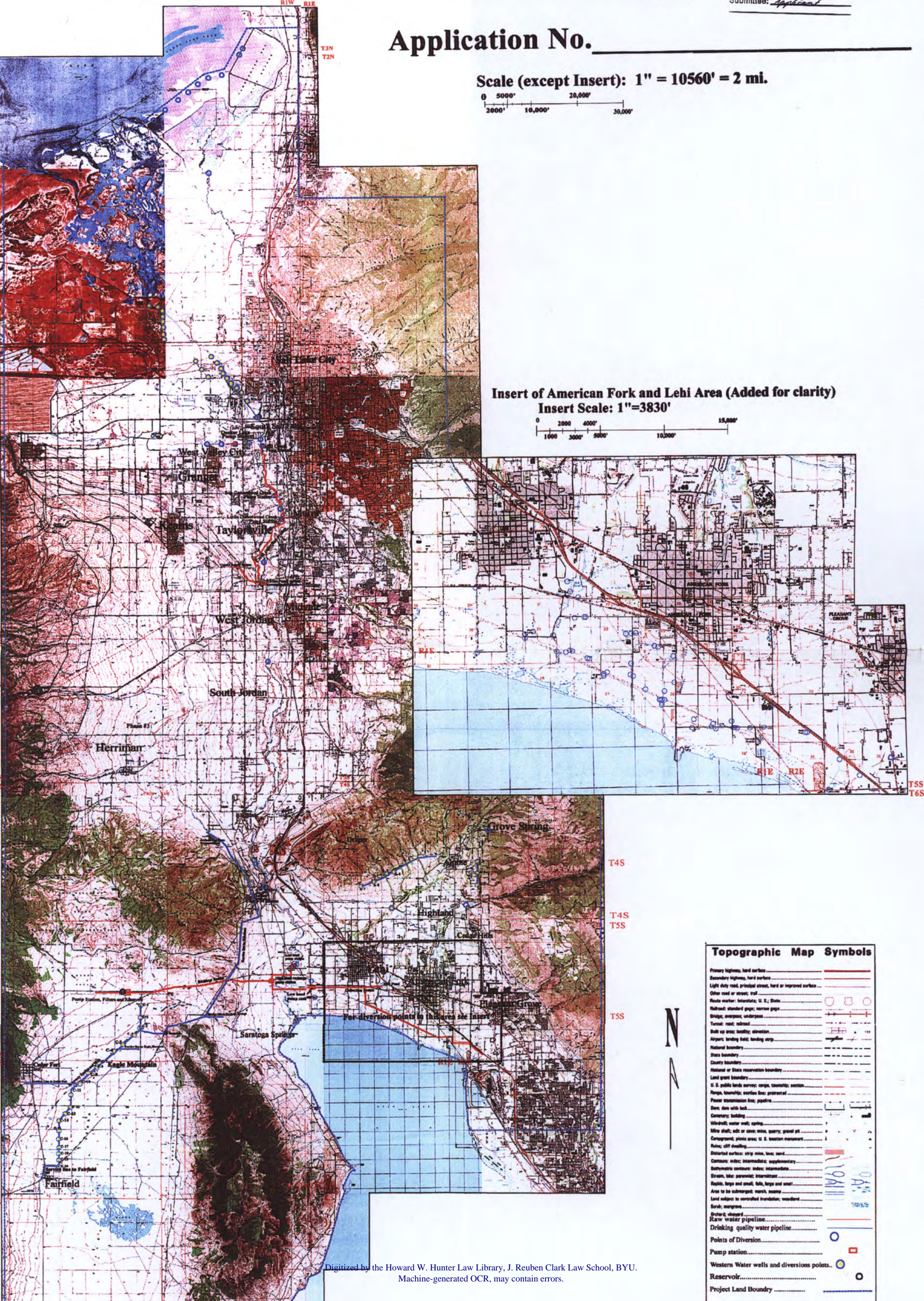
Application No. _____

Scale (except Insert): 1" = 10560' = 2 mi.



Insert of American Fork and Lehi Area (Added for clarity)

Insert Scale: 1"=3830'



ADDENDUM 7

3 Wells A. Hutchins, *Water Rights Laws
in Nineteen Western States* 542-48
(U.S. Dept. Agric. 1977).

WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES

By

Wells A. Hutchins, J.D.



Completed by

Harold H. Ellis, B.S., M.S., J.D.

and

J. Peter DeBraal, B.A., LL.B., M.S.

Volume III

Miscellaneous Publication No. 1206
Natural Resource Economics Division
Economic Research Service
United States Department of Agriculture

(3) Exclusiveness of procedure. The current statutory procedure is the exclusive method of appropriating water of watercourses in Utah. For a time there was some question as to this;⁴¹ but in 1935 the legislature so amended the appropriation statute as to provide explicitly that no appropriation of water could be made and no right to the use thereof initiated otherwise than in the manner provided in the statute.⁴² In 1949, the Utah Supreme Court stated that the 1935 amendment, "enacted immediately after the Wrathall decision and undoubtedly with this holding in mind, leaves no doubt that thereafter no right to the use of the unappropriated public waters of this state can be acquired without complying with the statutory requirements."⁴³

(4) Waters. The Utah appropriation statute declares, "All waters in this state, whether above or under the ground are hereby declared to be the property of the public, subject to all existing rights to the use thereof."⁴⁴ "Rights to the use of the unappropriated public waters in this state may be acquired only as provided in this title."⁴⁵

(5) Appropriators. The procedure that must be followed in acquiring a water right applies to any person who is a citizen of the United States, or who has filed his declaration of intention to become such; any association of such citizens or declarants; any corporation; the State of Utah by the directors of the divisions of Travel Development, Industrial Promotion, Fish and Game, and

(Continued)

Engineer with quasi-judicial powers similar to those vested in the water administrative officers of Wyoming, Nebraska, Colorado, and Oregon. *Spanish Fork Westfield Irr. Co. v. District Ct.*, 99 Utah 527, 536, 104 Pac. (2d) 353 (1940).

⁴¹The Utah Supreme Court held in 1925 that the statutory method was the only method by which rights to appropriate water were to be acquired after enactment of the act of 1903. *Deseret Live Stock Co. v. Hooppiana*, 66 Utah 25, 34-37, 239 Pac. 479 (1925). And in the following year the court said, "In order to acquire a legal right to the use of the water, the plaintiff would be required to show that the same was public water, subject to appropriation, and that she had appropriated the same as provided by our statute." [Emphasis supplied.] *Torsak v. Rukavina*, 67 Utah 166, 170, 246 Pac. 367 (1926). However, 10 years later in its prevailing opinion in the *Wrathall* case, the court purported to overrule the *Hooppiana* case in this respect, although the statement appears to have been dictum. *Wrathall v. Johnson*, 86 Utah 50, 120, 40 Pac. (2d) 755 (1935).

⁴²Utah Laws 1935, ch. 105, Code Ann. § 73-3-1 (1968).

⁴³*Hanson v. Salt Lake City*, 115 Utah 404, 415, 205 Pac. (2d) 255 (1949), referring to *Wrathall v. Johnson*, 86 Utah 50, 40 Pac. (2d) 755 (1935). See *Bullock v. Tracy*, 4 Utah (2d) 370, 373-374, 294 Pac. (2d) 707 (1956); *Fairfield Irr. Co. v. Carson*, 122 Utah 225, 231-232, 247 Pac. (2d) 1004 (1952); *Smith v. Sanders*, 112 Utah 517, 520, 189 Pac. (2d) 701 (1948). See also *Mosby Irr. Co. v. Criddle*, 11 Utah (2d) 41, 46, 354 Pac. (2d) 848 (1960).

⁴⁴Utah Code Ann. § 73-1-1 (1968).

⁴⁵*Id.* § 73-3-1.

Waters once appropriated but allowed to drain into a natural watercourse beyond control of the original appropriator are public waters subject to appropriation and to reasonable regulation and control by the State in the interest of saving water. *McNaughton v. Eaton*, 121 Utah 394, 404-405, 242 Pac. (2d) 570 (1952).

nt statutory procedure is the atercourses in Utah. For a time 935 the legislature so amended citly that no appropriation of ereof initiated otherwise than in the Utah Supreme Court stated tely after the Wrathall decision ives no doubt that thereafter no ic waters of this state can be requirements."⁴³

declares, "All waters in this state, declared to be the property of use thereof."⁴⁴ "Rights to the state may be acquired only as

be followed in acquiring a water of the United States, or who has such; any association of such ate of Utah by the directors of Promotion, Fish and Game, and

e vested in the water administrative gon. *Spanish Fork Westfield Irr. Co.* (1940).

tutory method was the only method quired after enactment of the act of tah 25, 34-37, 239 Pac. 479 (1925). to acquire a legal right to the use of w that the same was public water, riated the same as provided by our a, 67 Utah 166, 170, 246 Pac. 367 inion in the *Wrathall* case, the court is respect, although the statement 86 Utah 50, 120, 40 Pac. (2d) 755

3). Pac. (2d) 255 (1949), referring to 1935). See *Bullock v. Tracy*, 4 Utah *irfield Irr. Co. v. Carson*, 122 Utah *. Sanders*, 112 Utah 517, 520, 189 *ddle*, 11 Utah (2d) 41, 46, 354 Pac.

into a natural watercourse beyond ers subject to appropriation and to in the interest of saving water. Pac. (2d) 570 (1952).

State Lands; the Chairman of the State Road Commission for the use and benefit of the public; the United States of America; and the Director of the Division of Water Resources.⁴⁶

(6) Procedural steps. Before commencing construction, enlargement, extension, or structural alteration of any distributing works, or performing similar work toward acquiring an appropriation right or enlarging an existing one, a written application must be made to the State Engineer. Notice of the application is published; and protests that are filed must be considered by the State Engineer before he approves or rejects the application. Reasons for approval or rejection are noted later under "Restrictions and preferences in appropriation of water." If approved, the applicant is authorized to proceed with construction of the necessary works and to take all steps required to perfect his proposed appropriation. The times within which construction of works shall be completed and the water applied to beneficial use are fixed by the State Engineer, subject to extensions under prescribed circumstances. Proof of completion of works and application of water to beneficial use must be made; and if the appropriation is perfected in accordance with all requirements, the State Engineer issues a certificate of appropriation which is *prima facie* evidence of the holder's rights of use, subject to prior rights.⁴⁷ The Utah Supreme Court has indicated that in appropriating water in Utah, the statutory steps must be substantially complied with.⁴⁸

Filing the application is an essential preliminary step. It confers upon the applicant no vested right to use the water,⁴⁹ but merely gives him a right to complete his proposed appropriation in compliance with all requirements of the act.⁵⁰ It is a valuable inchoate right,⁵¹ which may be defended in court.⁵² But it has been held that between the times of filing the application and of consummating the appropriation, others may acquire rights to use the water, subject to eventual adjudication of relative priorities; that the first applicant's cause of action against these intervenors does not accrue until his appropriation has been perfected; but that in the interim he is entitled to have an action entertained against the intervenors for declaratory judgment establishing relative priorities of water filings.⁵³

⁴⁶ Utah Code Ann. § 73-3-2 and 73-10-19(3) (Supp. 1975).

⁴⁷ Utah Code Ann. § 73-3-2 to 73-3-17 (1968), as amended.

⁴⁸ *Torsak v. Rukavina*, 67 Utah 166, 170, 246 Pac. 367 (1926); *Little Cottonwood Water Co. v. Kimball*, 76 Utah 243, 289 Pac. 116 (1930). For a case dealing with a minor irregularity, see the discussion at note 61 *infra*.

⁴⁹ *Lehi Irr. Co. v. Jones*, 115 Utah 136, 145, 202 Pac. (2d) 892 (1949).

⁵⁰ *Duchesne County v. Humpherys*, 106 Utah 332, 335, 148 Pac. (2d) 338 (1944); *Little Cottonwood Water Co. v. Kimball*, 76 Utah 243, 247-248, 289 Pac. 116 (1930).

⁵¹ *McGarry v. Thompson*, 114 Utah 442, 448, 201 Pac. (2d) 288 (1948).

⁵² *Tanner v. Provo Res. Co.*, 78 Utah 158, 169-170, 2 Pac. (2d) 107 (1931).

⁵³ *Whitmore v. Murray City*, 107 Utah 445, 451-453, 154 Pac. (2d) 748 (1944). See also *Salt Lake City v. Salt Lake City Water & Elec. Power Co.*, 24 Utah 249, 267, 67 Pac. 672 (1902).

The appropriative right to the use of water completed under the current legislation is expressed quantitatively, in acre-feet of storage or in second-feet of flow.⁵⁴ The statutes of 1880 and 1897 provided that a right to the use of water might be measured by fractional parts of the whole supply, or by fractional parts with a limitation as to periods of time of use; and the 1880 law also authorized measurements by cubic inches of flow with prescribed limitations.⁵⁵ Prorata divisions of streamflow measured either by fractional parts or by percentages of the flow were commonly made in Utah in the early days.⁵⁶ The old determinations and stipulated decrees based on proportion of available flow caused considerable trouble in water administration, but most of them apparently were superseded by modern determinations under the special statutory procedure or in private litigation.⁵⁷

Statutory provisions for prorating streamflows at low water stages, regardless of relative priorities, which were in effect for a time (see "Restrictions and preferences in appropriation of water" and "Early classification of primary and secondary water rights," below), were finally eliminated in the 1919 reenactment.⁵⁸

The principle of gradual development of a water use project according to the circumstances of the particular case—that is, that the appropriator is not necessarily required to complete his appropriation in the first year or even longer—was approved in early cases by the Utah Supreme Court.⁵⁹ Under the current statute, the permissible times for completing construction and application of water to beneficial use are fixed by the State Engineer, subject to extensions (not to exceed 50 years from the date of the approval of the application) under prescribed conditions on proper showing of diligence or reasonable cause for delay.⁶⁰ In passing on an action of the State Engineer in granting an extension of time to file proof of appropriation, and action of the court on appeal therefrom, the Utah Supreme Court stated that the real criterion appears to be the good faith of the attempt to appropriate which must be pursued with all the expedition and constant effort to accomplish the undertaking that is usual with "men engaged in like enterprises, and who desire a speedy accomplishment of their designs."⁶¹

⁵⁴ Utah Code Ann. § 73-3-17 and 73-4-12 (1968).

⁵⁵ Utah Laws 1880, ch. 20, § 8, Laws 1897, ch. 52, § 24.

⁵⁶ Thomas, *supra* note 5, at 143-144.

⁵⁷ But see *Ordville Irr. Co. v. Glendale Irr. Co.*, 17 Utah (2d) 282, 409 Pac. (2d) 616, 620 (1965), upholding prorata sharing provisions in a 1900 decree, as not changed by later 1925 and 1931 decrees.

In these regards, and for examples of early decrees and controlling agreements, see the discussion in chapter 7 at notes 378-382 and in chapter 8 at notes 267-268.

⁵⁸ Utah Laws 1919, ch. 67, § 10.

⁵⁹ *Elliot v. Whitmore*, 23 Utah 342, 352-353, 65 Pac. 70 (1901); *Salt Lake City v. Gardner*, 39 Utah 30, 40, 114 Pac. 147 (1911).

⁶⁰ Utah Code Ann. § 73-3-12 (1968).

⁶¹ *Carbon Canal Co. v. Sanpete Water Users Assn.*, 10 Utah (2d) 376, 380, 353 Pac. (2d)

water completed under the current acre-feet of storage or in second-feet 7 provided that a right to the use of parts of the whole supply, or by periods of time of use; and the 1880 law 6 inches of flow with prescribed inflow measured either by fractional commonly made in Utah in the early late decrees based on proportion of in water administration, but most of later determinations under the special⁵⁷

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17 Utah (2d) 282, 409 Pac. (2d) 616, 620 in a 1900 decree, as not changed by later

y decrees and controlling agreements, see and in chapter 8 at notes 267-268.

1, 65 Pac. 70 (1901); *Salt Lake City v.*).

sn., 10 Utah (2d) 376, 380, 353 Pac. (2d)

The supreme court held in 1954 that Salt Lake City may acquire, develop, and manage such surplus water above its present requirements as is incident to needs reasonably anticipated in the future; that it may construct and operate facilities necessary therefor; and that it may sell and distribute the surplus outside its corporate limits pending the time the water is needed by the city, without regulation by the Public Service Commission.⁶²

With respect to an application by an *individual* to appropriate water for a beneficial purpose contemplated in the future, in an *early* case the Utah Supreme Court confessed that the question was open to debate and not free from doubt, but "with some hesitancy" it reached the conclusion that the application might be properly made in good faith and not for mere speculation or monopoly.⁶³ Under present practice and procedure, the State Engineer has authority to consider such aspects—along with all others—of a proposed application (see "Restrictions and preferences in appropriation of water," below) and to fix such time limits upon gradual development of a project as are reasonable under the circumstances.

(7) Purpose of use. The statute declares, "The appropriation must be for some useful and beneficial purpose;"⁶⁴ and the Utah Supreme Court has subscribed to the rule that not only must the use of water be beneficial to the lands of the appropriator, it must also be reasonable in relation to the reasonable requirements of subsequent appropriators.⁶⁵ This theme of essential beneficial use has been reiterated over and over again in the many water rights decisions of the Utah Supreme Court. The following purposes of use of appropriated water have all appeared in the supreme court opinions: domestic, stockwatering, irrigation, municipal, power, manufacturing, mining, fish

916 (1960). See also *Carbon Canal Co. v. Sanpete Water Users Assn.*, 19 Utah (2d) 6, 425 Pac. (2d) 405 (1967).

In a quiet title action, where the appropriators had spent about 15 years of diligent effort in perfecting their rights with no apparent neglect, refusal to cooperate, or *mala fides*, and 30 years thereafter beneficially using the water, the supreme court refused to invalidate the priority as of date of application on the asserted ground of minor informalities in making final proof. *Huber v. Deep Creek Irr. Co.*, 6 Utah (2d) 15, 17-18, 305 Pac. (2d) 478 (1956). "Perfecting water rights in Utah at best is not easy," said the supreme court.

⁶²*County Water System v. Salt Lake City*, 3 Utah (2d) 46, 53-54, 278 Pac. (2d) 285 (1954).

⁶³*Sowards v. Meagher*, 37 Utah 212, 221-222, 108 Pac. 1112 (1910). Compare *Goodwin v. Tracy*, 6 Utah (2d) 1, 3-4, 304 Pac. (2d) 964 (1956).

⁶⁴Utah Code Ann. § 73-3-1 (1968).

⁶⁵*In re Water Rights of Escalante Valley Drainage Area*, 10 Utah (2d) 77, 82, 348 Pac. (2d) 679 (1960). The court added that it has the power to order improved methods of diverting, conveying, and measuring water so as to assure the greatest possible use of this natural resource, but without thereby limiting or modifying established water rights. See also *Big Cottonwood Tanner Ditch Co. v. Shurtliff*, 49 Utah 569, 579, 164 Pac. 856 (1917).

culture.⁶⁶ Uncultivated land is included in the list where the purpose of watering it is to provide grazing and hay.⁶⁷ But appropriation of water for irrigation of unenclosed and unoccupied public domain of the United States for the sole purpose of propagating wild waterfowl was not approved.⁶⁸

(8) Quantity and time limitations. "It is elementary that an appropriation of water is limited by time as well as by amount; in other words, that an appropriator's right is limited by the quantity of water which he has beneficially used and the seasonal period during which he has used the same."⁶⁹ If an appropriator's right relates to a part of the year only, he cannot prevent others from acquiring equally valid rights in the same water supply at other seasons.⁷⁰

(9) Priority. As between appropriators, the one first in time is first in right, with priority as among them according to the dates of their respective appropriations—subject, however, to certain statutory exceptions.⁷¹ An application to appropriate water, in proper form, takes priority as of the date of its original receipt in the State Engineer's office, subject to compliance with further requirements of the law and regulations thereunder. The priority of a lapsed application that is reinstated is changed to the date of reinstatement.⁷² When an application to appropriate water lapses, by neither the fraud nor the

⁶⁶ In an early case the supreme court listed the following: "domestic purposes, irrigating lands, propelling machinery, and the like; that is, the water may be applied to any useful purpose." *Hague v. Nephi Irr. Co.*, 16 Utah 421, 429, 52 Pac. 765 (1898). Use of navigable water for recovery of salts and other minerals is recognized by the statute and by the supreme court. Utah Code Ann. § 73-3-8 (Supp. 1975); *Deseret Livestock Co. v. State*, 110 Utah 239, 171 Pac. (2d) 401 (1946).

⁶⁷ *Jensen v. Birch Creek Ranch Co.*, 76 Utah 356, 361-362, 289 Pac. 1097 (1930). "The use of water for the irrigation of pasture land, as counsel agree, constitutes a beneficial use of water." *In re Escalante Valley Drainage Area*, 11 Utah (2d) 77, 80, 355 Pac. (2d) 64 (1960).

⁶⁸ *Lake Shore Duck Club v. Lake View Duck Club*, 50 Utah 76, 80-81, 166 Pac. 309 (1917), also discussed at note 117 *infra*. "To our minds it is utterly inconceivable that a valid appropriation of water can be made under the laws of this state, when the beneficial use of which, after the appropriation is made, will belong equally to every human being who seeks to enjoy it." This general statement was made before provision for recreational facilities had become an important part of large water project development.

⁶⁹ *Hardy v. Beaver County Irr. Co.*, 65 Utah 28, 40, 234 Pac. 524 (1924). In 1960, the Utah Supreme Court repeated that one of the basic elements of a water right is the time, period, or season when the right to the use exists, which must be unequivocally determined and set out in a decree of adjudication; and it added, to supplement such element, that a water right is based upon annual use during the water use period of each year, or the entire year. *In re Water Rights of Escalante Valley Drainage Area*, 10 Utah (2d) 77, 82-83, 348 Pac. (2d) 679 (1960).

⁷⁰ *Cleary v. Daniels*, 50 Utah 494, 500, 167 Pac. 820 (1917).

⁷¹ Utah Code Ann. §§ 73-3-1 and 73-3-21 (1968). See "Restrictions and preferences in appropriation of water," *infra*.

⁷² *Id.* §§ 73-3-5 and 73-3-18.

the list where the purpose of But appropriation of water for public domain of the United States fowl was not approved.⁶⁸

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, 50 Utah 76, 80-81, 166 Pac. 309 inds it is utterly inconceivable that a r the laws of this state, when the s made, will belong equally to every statement was made before provision ortant part of large water project

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(1917).

See "Restrictions and preferences in

mistake of the State Engineer, he is without authority to reinstate the original priority date.⁷³

Priority of appropriators as among themselves is provided by the water appropriation statute "so that each appropriator shall be entitled to receive his whole supply before any subsequent appropriator shall have any right."⁷⁴ In one of its earliest water rights decisions, the Utah Supreme Court "spelled out" the principle of priority of the appropriative right by saying, "And the prior appropriator of water has the prior right to its use to the extent, in amount and time, of his first appropriation, and possibly to the extent to which he was at that time preparing to appropriate it."⁷⁵

The priority thus represents the right to divert and to use beneficially the quantity of water required, not exceeding the quantity fixed in the certificate of appropriation or in a decree, in preference to all appropriations having later priorities.⁷⁶ Relative locations of diversion points on a stream have no bearing upon relative priorities of right. Where appropriations are made at different points of diversion on a stream and by means of different ditches, the diversion made by each ditch is of necessity an independent appropriation.⁷⁷

(10) Relation back. The doctrine of relation—a legal device by means of which the priority of a completed appropriation is fixed as of the time of taking the first step in the process, provided reasonable diligence is used in consummating it—was recognized by the Utah courts before appropriative procedures had become formalized.⁷⁸ Failure to post and record a notice under the 1897 statute prior to 1903 deprived the claimant of the right to rely upon any work done or effort made in initiating or completing the appropriation antedating its completion.⁷⁹

As noted immediately above in discussing priority, the current statute for appropriation of water embodies the principle of relation back to the date of filing the application in the office of the State Engineer, provided all statutory requirements are fulfilled. The Utah Supreme Court, according to one of its opinions, "has repeatedly indicated that an approved application only fixes a

⁷³ *Mosby Irr. Co. v. Criddle*, 11 Utah (2d) 41, 46, 354 Pac. (2d) 848 (1960).

⁷⁴ Utah Code Ann. §73-3-21 (1968).

⁷⁵ *Lehi Irr. Co. v. Moyle* 4 Utah 327, 340, 9 Pac. 867 (1886).

George Thomas wrote that in the gradual settlement of the Lehi community, the irrigation canals were looked upon as community enterprises and for more than 25 years the question of priority did not arise; but that when eventually the water supply became insufficient for the area of land to be irrigated, some of the older settlers advanced priority claims to the use of the water. This resulted in the supreme court decision just cited. Thomas, G., "The Development of Institutions Under Irrigation With Special Reference to Early Utah Conditions" 170 (1920).

⁷⁶ *Adams v. Portage Irr., Res. & Power Co.*, 95 Utah 1, 13-14, 72 Pac. (2d) 648 (1937).

⁷⁷ *Spring Creek Irr. Co. v. Zollinger*, 58 Utah 90, 98, 197 Pac. 737 (1921).

⁷⁸ *Elliott v. Whitmore*, 7 Utah 49, 24 Pac. 673 (1890); *Salt Lake City v. Salt Lake City Water & Elec. Power Co.*, 24 Utah 249, 264, 67 Pac. 672 (1902).

⁷⁹ *Robinson v. Schoenfeld*, 62 Utah 233, 238-239, 218 Pac. 1041 (1923).

priority date for the applicant in the event applicant can perfect his appropriation."⁸⁰

The water rights statute provides procedure for entrance upon private property in order to acquire information needed in initiating an appropriation. In the event that this is accomplished, and application to appropriate the water is filed, the priority dates from the filing of petition with the district court for the right of entrance.⁸¹

(11) Storage of water. In making an application to appropriate water, storage by means of an onchannel reservoir is regarded as diversion, the point of diversion being the point at which the longitudinal axis of the dam crosses the center of the streambed.⁸²

Authority to "commingle" water with other waters includes its discharge into a reservoir constructed across the bed of a natural stream. See "Some other aspects of the Utah appropriative right," below. "Any person having stored his appropriated water in a reservoir for a beneficial purpose shall be permitted to withdraw the same at such times and in such quantities as his necessities may require; provided, such withdrawal does not interfere with the rights of others."⁸³

(12) Judicial review of administrative action. Any person aggrieved by a decision of the State Engineer may, within 60 days after notice of the decision, bring a civil action in the district court for a plenary review thereof under the procedure applicable to other equity cases. The hearing proceeds as a trial *de novo*. Appeal to the supreme court may be taken.⁸⁴

Restrictions and preferences in appropriation of water.—(1) Acquisition of rights. Section 73-3-8 of the statute governing appropriation of water makes it the duty of the State Engineer to approve an application that meets the filing requirements if (a) there is unappropriated water in the proposed source; (b) the proposed use will not impair existing rights or interfere with more beneficial use of the water; (c) the proposed plan is physically and economically feasible (unless the applicant is the United States Bureau of Reclamation) and not detrimental to the public welfare; and (d) the applicant has the financial ability to complete the proposed works and has applied for the appropriation in good faith and not for speculation or monopoly. However, if the State Engineer has reason to believe that the proposed use will interfere with more beneficial use of the water for irrigation, domestic or culinary, stockwatering, power, mining, or manufacturing purposes, or public recreation or the natural stream environment will be unreasonably affected, or the public

⁸⁰ *Lehi Irr. Co. v. Jones*, 115 Utah 136, 145, 202 Pac. (2d) 892 (1949). See *McGarry v. Thompson*, 114 Utah 442, 448, 201 Pac. (2d) 288 (1948).

⁸¹ Utah Code Ann. § 73-3-19 (1968).

⁸² Utah Code Ann. § 73-3-2 (Supp. 1975).

⁸³ Utah Code Ann. § 73-3-20 (1968).

⁸⁴ *Id.* §§ 73-3-14 and 73-3-15. The nature of such judicial review, as construed by the Utah Supreme Court in several cases, has been discussed in chapter 7 at notes 497-499.

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IN THE UTAH SUPREME COURT

WESTERN WATER, L.L.C.,
a Utah limited liability company,

Plaintiff/Appellant,

v.

JERRY D. OLDS, Utah State Engineer
and Director of the Utah Division of
Water Rights, *et al.*,

Defendants/Appellees.

CERTIFICATE OF SERVICE

Case No. 20060527

I hereby certify that on the 21st day of November, 2006, copies of the BRIEF OF
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