

Lee

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

FILED
DISTRICT CLERK
04 MAY 25 PM 3:42
SALT LAKE DEPARTMENT
CLERK

J. Michael Gottfredson #1225
1989 Browning Avenue
Salt Lake City, Utah 84108
Telephone: (801) 582-8438
FAX: (801) 582-7576

Co-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, Alpine City,)
American Fork City, W. Glade and Bart D. Berry,)
Cahoon & Maxfield Irrigation Company, Cedar Fort)
Irrigation Company, Central Utah Water)
Conservancy District, City of West Jordan, Morris)
Clark, Robert and Sherri Cook, George Crawford,)
Rod Dansie, East Jordan Irrigation Company,)
Geneva Steel LLC, Larry and Linda Hadfield,)
Irvine Ranch & Petroleum Inc. dba Ambassador)
Duck Club, Jordan Valley Water Conservancy)
District, Kennecott Utah Copper Corporation, Lake)
Mountain Mutual Water Company, Lehi City,)
Magna Water Company, Glenn R. Maughan,)
Susan Messersmith, Vernal Messersmith,)
Metropolitan Water District of Salt Lake & Sandy,)
National Audubon Society, New State Inc.,)

COMPLAINT

Civil No.: 040910869 WA

Judge Fuchs

155

liability company, organized under the laws of the State of Utah with its principal place of business in Utah County, State of Utah.

2. Plaintiff has it upon knowledge and belief that Defendant Jerry D. Olds is the duly appointed Utah State Engineer, who is also the director of the Utah State Division of Water Rights, which is joined as a defendant in this action pursuant to Utah statute.

3. Plaintiff has it upon knowledge and belief that the other named Defendants in this action (with the exception of the Defendants described below in paragraph 4) were all timely filed Protestants in an proceeding before the State Engineer for approval of three (3) Western Water applications to appropriate public water pursuant to Utah Code Ann. § 73-3-8. The names and addresses of the Protestants, as well as whether or not the claims were timely filed are on the certified list obtained from the Utah State Engineer. A copy of said list is attached as Exhibit A to this complaint and incorporated herein by reference.

4. Plaintiff has it upon knowledge and belief that the named Defendants, Burnham Duck Club, Lehi Irrigation Company, North Jordan Irrigation Company, South Jordan Canal Company, Ron and Mindy Sager, Draper Irrigation Company, Lower Jordan Water Users Association, Sandy City Department of Public Utilities, and Marvin Shepherd did not timely file protests in the administrative hearing conducted by the State Engineer in this matter. Therefore, these named Defendants lack standing to challenge or oppose the Plaintiff's Complaint. They have been listed pursuant to statutory requirement and Plaintiff shall seek Summary Judgment against them should they attempt to oppose Plaintiff's Complaint.

5. Does 1-50 are individuals, Roe Corporations 1-50 are corporate or partnership entities and Moe Municipalities and/or Governmental Entities 1-50 are currently unknown to the Plaintiff but

may be required at some future point to be named in this action. Should such individuals or entities become known to the Plaintiff, Plaintiff shall seek leave of the Court to Amend the Complaint to include them.

6. This action is taken pursuant to statutory and administrative rules and regulations of the State of Utah seeking review by trial de novo of the State Engineer's decision rejecting Applications to Appropriate Nos. 55-9399(a72027), 59-5606(a72026), and 57-10282(a73473) and denying Plaintiff's Request for Reconsideration of his decision. A true and correct copy of the State Engineer's Memorandum Decision rejecting the applications is attached as Exhibit B to this complaint and incorporated by reference. A true and correct copy of Western Water's Request for Reconsideration is attached as Exhibit C and incorporated by reference.

7. Plaintiff's Request for Reconsideration was properly and timely filed.

8. Jurisdiction in this court is proper.

9. Venue in this county is proper pursuant to Utah Code Ann. § 73-3-14(b) as the water source sought to be appropriated, the Great Salt Lake, the Jordan River, and its tributaries, lies in part in Salt Lake County.

10. Plaintiff, Western Water, LLC. is a limited liability company organized under the laws of the State of Utah for the purpose of water development and providing new water supplies to the public.

11. On March 5, 1999, Western Water filed Applications to Appropriate Nos. 55-9399(a72027) and 59-5606(a72026) with the office of the State Engineer.

12. The State Engineer returned the two applications unfiled to Western Water whereupon on March 23, 1999 Western Water refiled the two applications.

13. On May 23, 2001, Western Water filed Application to Appropriate No. a73473 (57-10282) with the office of the State Engineer and requested processing and a hearing for all three applications.

14. Notice of the three applications to appropriate was properly published in the local newspapers with a protest deadline of July 11, 2001.

15. Protestants listed in Exhibit A filed protests to one or more of the three applications some of which were timely filed and some of which were filed late after the protest deadline. Those Protestants who filed late have been named as Defendants, but Plaintiff contends they lack standing to challenge this action as a matter of law.

14. Plaintiff further contends that any other individuals and/or entities who did not protest the Plaintiff's Applications also lack standing to challenge this action as a matter of law.

15. As part of the application process, the Plaintiff prepared a Statement of Facts which was distributed to the State Engineer and the Protestants in accordance with statutory and administrative rules and regulations. An executive Summary of the Statement of Facts is attached hereto as Exhibit D and incorporated herein by reference.

16. On March 12, 2004, the State Engineer issued a Memorandum Decision rejecting the three applications to appropriate.

17. On March 17, 2004, the State Engineer amended and reissued his Memorandum Decision rejecting the three applications to appropriate.

18. On April 6, 2004, Western Water timely filed with the office of the State Engineer a Request for Reconsideration of the three applications to appropriate which included a greatly reduced Revised Conservation Plan project under the applications to appropriate.

19. The corrections of the mistakes made in the State Engineer's rejection of the applications, together with the Revised Conservation Plan project contained in its Request for Reconsideration entitled Western Water to approval of the three applications to appropriate for the Revised Conservation Plan project pursuant to the criteria for approval set by Utah statute and case law.

20. The State Engineer failed to respond to Western Water's Request for Reconsideration of the three applications to appropriate within 20 days of the receipt of the request and such failure to respond is considered a denial of the Request under Utah statute.

21. Western Water provided to the State Engineer in its submissions and in the hearing sufficient evidence to comply with all the approval requirements of Utah statute and case law.

22. The State Engineer has made errors in fact and law and chosen to ignore the evidence and arguments of the Plaintiff and wrongfully denied its Applications to Appropriate.

FIRST CAUSE OF ACTION

(Judicial review of informal adjudicative proceeding—UTAH CODE ANN. § 63-46a-14)

23. Western Water incorporates by reference the preceding allegations.

24. In rejecting Western Water's Applications to Appropriate Nos. 55-9399(a72027), 59-5606(a72026), and 57-10282(a73473) the State Engineer made errors in law and fact, did not properly apply the statutory standards, and used various criteria contrary to public policy in rejecting the Plaintiff's Applications.

25. Western Water's Applications to Appropriate Nos. 55-9399(a72027), 59-5606(a72026), and 57-10282(a73473) meet all of the statutory criteria for approval under the Revised Conservation Plan and are entitled to approval.

26. Western Water is thus entitled to judgment approving Applications to Appropriate Nos. 55-9399(a72027), 59-5606(a72026), and 57-10282(a73473) for diversions under the Revised Conservation Plan submitted with the Request for Reconsideration.

SECOND CAUSE OF ACTION

(Judicial review of informal adjudicative proceeding--UTAH CODE ANN. § 63-46a-14)

27. Western Water incorporates by reference the preceding allegations.

28. If somehow all of the water sought to be appropriated under the applications pursuant to the Revised Conservation Plan cannot be approved, Western Water is entitled to approval of any and all parts of the applications and Revised Conservation Plan that can be approved under the statutory criteria.

REQUEST FOR RELIEF

WHEREFORE, Western Water prays for judgment as follows:

1. That Applications to Appropriate Nos. 55-9399(a72027), 55-5606(a72026), and 57-10282(a73473) be approved for implementation of the Revised Conservation Plan described in the Request for Reconsideration.
2. That, if all of the water sought to be appropriated under the applications and the Revised Conservation Plan cannot be approved, the Court approve any and all parts of the applications and Revised Conservation Plan that can be approved under the statutory criteria.
3. That, each and every Protestant that cannot be shown to be an appropriate party to the judicial review in this action be dismissed from the action and that each and every Protestant that remains in the action that cannot be shown to be an appropriate party for review of criteria (c)

through (e) of Utah Code Ann. § 73-3-8 be barred from participating in the review of these criteria.

4. That Western Water be granted any further legal and equitable relief the court finds just and proper.

DATED this 25 day of May, 2004.



J. Michael Gottfredson
Co-Counsel for Western Water, LLC.