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## W. Water, L.L.C. v. Olds, No. 20060527, 2008 WL 465540 (Utah 2008)

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Accordingly, the court affirmed the decision of the circuit court and held that the Browns' unauthorized misuse of the water was not sufficient to extinguish the Agreement, and Hanson was not entitled to the remedy of rescission.

*Cameron Banko*

## UTAH

**W. Water, L.L.C. v. Olds, No. 20060527, 2008 WL 465540 (Utah 2008)** (dismissing for lack of subject matter jurisdiction where the water rights applicant failed to first exhaust administrative remedies in its submission of a request for reconsideration that dramatically differed from the original plan).

Western Water, L.L.C. ("Western Water") filed three related applications (collectively, the "Original Plan") with the Utah State Engineer ("State Engineer") to appropriate water through a plan that would "salvage and exchange" water that was spilling into Great Salt Lake. The State Engineer found the Original Plan to be massive, covering 288,107 acre-feet of water. However, Western Water described the plan as medium-sided because a number of its requests were in the alternative and it only sought to appropriate 86,000 acre-feet of water.

The State Engineer denied the Original Plan on the grounds that it failed to meet all the statutory requirements. The State Engineer decided: (1) there was insufficient evidence that water was available for the applications; (2) the approval of the applications would impair existing rights or interfere with the more beneficial use of water; (3) there was insufficient evidence that the plan was physically or economically feasible; (4) there was insufficient evidence that the applicants could complete the proposal; (5) the applicants filed the plan for the purpose of speculation or monopoly; and (6) the plan would ultimately harm public welfare.

Instead of requesting reconsideration of the Original Plan, Western Water filed a timely request for reconsideration of a "revised and reduced" version of the Original Plan (the "Revised Plan"). Western Water argued that the State Engineer or the applicant could pare down an application to remove infirmities. However, the State Engineer did not act on the request, which resulted in a statutory denial after twenty days.

Western Water sought de novo review of the State Engineer's denial of the Revised Plan in the Third District Court for the State of Utah. The district court dismissed Western Water's claim for lack of subject matter jurisdiction. The district court reasoned that the State Engineer did not consider the Revised Plan independent of the Original Plan. Accordingly, the State Engineer reviewed the Revised Plan only to see if it provided a reason to grant the Original Plan. Therefore, the court held that Western Water failed to exhaust administrative reme-

dies because there was no final agency action on the Revised Plan. Western Water subsequently appealed to the Supreme Court of Utah.

On appeal, as a threshold issue the Court established that the district court has the authority to review *de novo* any final agency action, including action by the State Engineer, only after the parties have exhausted administrative remedies. Moreover, in the context of water rights applications, the Court clearly stated that an applicant can not exhaust administrative remedies unless the applicant strictly complies with the application process.

First, the Court determined that the Revised Plan was a new application because it was sufficiently different from the Original Plan. Western Water argued that the Revised Plan was not a new application because the changes consisted only of deletions and subtractions from the Original Plan. The Court, however, reasoned that the Revised Plan was not simply a modification of the original. The Revised Plan reduced the appropriation request by almost 30,000 acre-feet, reduced the total cost by over \$60 million, and removed pumping stations, wells, pipelines, and storage facilities. Furthermore, the Court indicated that Western Water was possibly attempting to avoid republication of the plan by not addressing the impact of the drastic reductions on the proposed purpose for the water. Moreover, the Court determined that adopting Western Water's argument that the Revised Plan was merely a subset of the original would shift the burden of finding unappropriated water from the parties to the already limited resources of the State Engineer.

Second, the Court concluded that the State Engineer cannot reconsider a new application. Western Water asserted that a request for reconsideration permits modifications to the Original Plan because it furthers the administrative process. In response, the Court held that during reconsideration the State Engineer has limited discretion to permit small changes to an application, but has no concurrent duty to accept proposed changes during this phase. The Court held that it is only possible for the State Engineer to reconsider an application that he previously considered. Additionally, the Court held that the limited review that occurs during reconsideration does not allow substantive changes that would require republication by statute.

Finally, the Court held that Western Water did not submit the new application in the proper form. Thus, the State Engineer could not review the Revised Application as a new application. In a three-page narrative, the request for reconsideration detailed the portions of the Original Plan deleted from the Revised Plan. The Court concluded that Western Water's narrative failed to meet the prescribed requirements to initiate an application. Furthermore, the Court decided that Western Water did not clearly define the proposed purpose of the requested appropriation. The Revised Plan contained substantial changes and requested reconsideration of any portion of the Original

Plan down to a single well. The Court reasoned that this showed a lack of clear purpose because it was not possible for a single well to serve the same purpose as the vast system of pipelines, storage areas, and recovery facilities contained in the Original Plan. In conclusion, the Court determined that the State Engineer could not consider the Revised Plan as a new plan because it failed to specify the points of diversion or the dimensions, grade, shape, and nature of the proposed diversion channel, as prescribed by statute.

The Court affirmed the district court's dismissal of the case for lack of subject matter jurisdiction because Western Water's Revised Plan did not comply with the statutory requirements for initiating an application and, therefore, it failed to exhaust its administrative remedies.

*Susan Summers*