

IN THE UTAH COURT OF APPEALS

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James O. Kennon and Dick	)	MEMORANDUM DECISION
Cumiskey,	)	(Not For Official Publication)
	)	
Petitioners,	)	Case No. 20080565-CA
	)	
v.	)	F I L E D
	)	(October 9, 2008)
	)	
Utah Air Quality Board and	)	2008 UT App 355
IPP Unit 3 Development	)	
Committee,	)	
	)	
Respondents.	)	

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Original Proceeding in this Court

Attorneys: James O. Kennon, Koosharem, and Dick Cumiskey,  
Monroe, Petitioners Pro Se  
Mark L. Shurtleff and Fred G. Nelson, Salt Lake City,  
for Respondent Utah Air Quality Board  
Matthew F. McNulty III, H. Michael Keller, and Mary  
Jane E. Wagg, Salt Lake City, for Respondent IPP  
Unit 3 Development Committee

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Before Judges Greenwood, Thorne, and Orme.

PER CURIAM:

Petitioners James O. Kennon and Dick Cumiskey seek judicial review of the decision of the Utah Air Quality Board (the Board) denying their petition to intervene as untimely. This case is before the court on a sua sponte motion for summary disposition.

The Board's issuance of an Approval Order pursuant to Utah Code section 19-2-108(3) is an agency action that is not subject to the Utah Administrative Procedures Act (UAPA). See Utah Code Ann. § 63G-4-102(3)(k) (Supp. 2008) (exempting the issuance of orders under title 19, chapter 2, Air Conservation Act from UAPA coverage ). Where an initial agency determination is not governed by UAPA, but subsequent agency and judicial review of those determinations are subject to UAPA, "a request for agency action must be filed with the agency within the time prescribed by the agency's rules." Id. § 63G-4-201(4). Accordingly, the

Board adopted an administrative rule governing appeals. Rule 307-103-6(2)(c) provides:

A person seeking to intervene in a proceeding for which agency action has not been initiated under [Utah Code section 63G-4-201] may file a Request for Agency action at the same time he files a Petition for Intervention. Any such Request for Agency Action and Petition to Intervene must be received by the board for filing within 30 days of the issuance of the initial order or notice of violation being challenged.

Utah Admin. Code R307-103-6(2)(c)(2008).

On October 15, 2004, the Board issued an Approval Order granting a permit to Intermountain Power Service Corporation to construct and operate Unit 3--an additional coal-fired power plant at the Intermountain Power Plant located in Millard County (IPP Unit 3). On November 15, 2004, the Sierra Club and Grand Canyon Trust filed a timely petition to intervene and request for agency action to challenge the IPP Unit 3 order. On November 1, 2004, Kennon filed a timely request for agency action and petition to intervene on behalf of Sevier County Citizens for Clean Air and Water to challenge an Approval Order granted to Sevier Power Company for construction of a different plant, but he did not challenge the IPP Unit 3 Approval Order. The Board heard both timely petitions to intervene in April 2005. Proceedings on the Sierra Club and Grand Canyon Trust's appeal of the IPP Unit 3 Approval Order are pending before the Board.

On April 15, 2008, well beyond the thirty-day period following issuance of the October 15, 2004 Approval Order, Kennon and Cumiskey petitioned to intervene in the appeal proceedings before the Board pertaining to the IPP Unit 3 plant. Neither Kennon nor Cumiskey filed a request for agency action to accompany the petition to intervene. The Board held that the petition to intervene was not timely filed within thirty days after issuance of the IPP Unit 3 Approval Order they sought to challenge. They now seek judicial review of that denial.

The only issue before us is whether the Board correctly determined that the petition to intervene, filed over three and one-half years after the Board issued the Approval Order for IPP Unit 3, was untimely. There is no credible argument that the petition to intervene was filed within the thirty-day period allowed by the rules. In addition, the petition to intervene was

not accompanied by a request for agency action, as required by the rule. Accordingly, we affirm the denial of the petition to intervene.

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Pamela T. Greenwood,  
Presiding Judge

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William A. Thorne Jr.,  
Associate Presiding Judge

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Gregory K. Orme, Judge