

2008

# Melvin Bingham v. Roosevelt City Corporation : Brief of Appellant

Utah Court of Appeals

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David L. Church; Blaisdell & Church; Attorneys for Defendant/Appellee.

J. Craig Smith; Kathryn J. Steffey; Bryan C. Bryner; Smith Harvigsen, PLLC; Attorneys for Plaintiffs/Appellants.

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## Recommended Citation

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IN THE UTAH SUPREME COURT

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MELVIN BINGHAM *et al.*,

Plaintiffs/Appellants,

vs.

ROOSEVELT CITY CORPORATION, a  
Utah municipal corporation,

Defendants/Appellees

**Brief of Appellants**


*Appellate Case No. 20081061*

*Trial Court Case No. 040800250*

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Appeal from the Eighth Judicial District Court, Uintah County, Utah  
The Honorable John R. Anderson, District Court Judge

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J. Craig Smith  
Kathryn J. Steffey  
Bryan C. Bryner  
SMITH HARTVIGSEN, PLLC  
215 S. State Street, Suite 600  
Salt Lake City, UT 84111  
*Attorneys for Plaintiffs/Appellants Melvin  
Bingham et al.*

David L. Church  
BLAISDELL & CHURCH  
5995 South Redwood Road  
Salt Lake City, Utah 84123  
*Attorneys for Defendant/Appellee  
Roosevelt City*

FILED  
UTAH APPELLATE COURTS  
MAY 12 2009

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SMITH HARTVIGSEN, PLLC  
215 S. State Street, Suite 600  
Salt Lake City, UT 84111  
*Attorneys for Plaintiffs/Appellants Melvin  
Bingham et al.*

David L. Church  
BLAISDELL & CHURCH  
5995 South Redwood Road  
Salt Lake City, Utah 84123  
*Attorneys for Defendant/Appellee  
Roosevelt City*

Identification of all the parties plaintiff are:

MELVIN BINGHAM, GLENDA BINGHAM, HOWARD HORROCKS, ILA FAYE HORROCKS, VIRGINIA HOUSTON, FERN OBERHANSLY LABRUM, KENT NELSON, GEORGE RICHINS, and LORAIN RICHINS, individuals; MELVIN H BINGHAM in his capacity as TRUSTEE OF THE MELVIN H. BINGHAM FAMILY LIVING TRUST, DATED NOVEMBER 19, 1981; GLENDA G. BINGHAM in her capacity as TRUSTEE OF THE GLENDA G. BINGHAM FAMILY LIVING TRUST, DATED NOVEMBER 19, 1981; VIRGINIA C. HOUSTON, in her capacity as TRUSTEE OF THE VIRGINIA COLTHARP HOUSTON LIVING TRUST; FERN OBERHANSLY LABRUM, in her capacity as TRUSTEE OF THE MARK L. OBERHANSLY TRUST, DATED APRIL 17, 1987, AS AMENDED; HOWARD R. HORROCKS and ILA FAYE HORROCKS, in their capacities as TRUSTEES OF THE HOWARD R. HORROCKS FAMILY REVOCABLE TRUST, DATED JANUARY 11, 1979; and LORAIN RICHINS and PHYLLIS D. OBERHANSLY, in their capacities as TRUSTEES OF THE PHYLLIS D. OBERHANSLY TRUST DATED NOVEMBER 19, 1992.



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## **JURISDICTION**

The Utah Supreme Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78A-3-102(3)(j). By Order dated January 6, 2009, the Utah Supreme Court transferred this appeal to the Utah Court of Appeals subject to the right of the parties to request that the Court retain the matter. This Court subsequently vacated the prior order of transfer and elected to retain jurisdiction over this appeal by Order dated January 30, 2009.

## **ISSUES AND STANDARDS OF REVIEW**

Appellants (hereinafter the “North Hayden Group” or the “Group”) present the following issues in this appeal:

1. Did the district court err in granting summary judgment in favor of Defendant/Appellee Roosevelt City, concluding that the North Hayden Group did not have a protectable property interest that was taken by the City despite the fact that the City’s continuous pumping of the Hayden Well Field wells has resulted in dewatering the Group’s lands, thereby rendering the Group’s lands barren and their surface water rights useless? (Issue preserved: R. 254-261.)

*Standard of Review:* “An appellate court reviews a trial court’s legal conclusions and ultimate grant or denial of summary judgment for correctness and views the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party.” *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600 (internal quotation and citation

omitted).

2. Did the district court err in granting summary judgment in favor of Roosevelt City, concluding that the City has not interfered with the North Hayden Group's water rights despite the fact that the City's continuous pumping of the Hayden Well Field wells is depleting the aquifer underlying the Group's lands, thereby creating an artificial condition in the lands which has deprived the Group of their water rights and has rendered the Group's properties barren? (Issue preserved: R. 245-254.)

*Standard of Review:* "An appellate court reviews a trial court's legal conclusions and ultimate grant or denial of summary judgment for correctness and views the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600 (internal quotation and citation omitted).

3. Did the district court err in granting summary judgment in favor of Roosevelt City, concluding that the North Hayden Group's claim for interference with water rights is barred by the Utah Governmental Immunity Act despite the fact that the City's wells, due to their depth and perforated casings, tap into and deplete the unconfined aquifer underlying the Group's land, thereby dewatering the Group's lands? (Issue preserved: R. 245-247.)

*Standard of Review:* "An appellate court reviews a trial court's legal conclusions and ultimate grant or denial of summary judgment for correctness and views the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600 (internal quotation and citation

omitted).

4. Did the district court err in granting summary judgment in favor of the City, concluding that the City did not owe the North Hayden Group a duty to refrain from depleting the aquifer below their properties even though such conduct unreasonably and substantially invades the Group's rights? (Issue preserved: R. 242-245.)

*Standard of Review:* "An appellate court reviews a trial court's legal conclusions and ultimate grant or denial of summary judgment for correctness and views the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600 (internal quotation and citation omitted).

5. Did the district court err in granting summary judgment in favor of Roosevelt City, concluding that the continuous tort rule does not apply to the North Hayden Group's interference with water rights, negligence, and takings claims when the undisputed facts show that the City's continuous pumping of the wells has the effect of further decreasing the level of the aquifer and further increasing the extent of the Group's property damage? (Issue preserved: R. 240-242.)

*Standard of Review:* "An appellate court reviews a trial court's legal conclusions and ultimate grant or denial of summary judgment for correctness and views the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600 (internal quotation and citation omitted).

## **DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES**

The North Hayden Group attaches to its Addendum a copy of the following determinative constitutional provisions, statutes, and rules:

- (1) U.S. Const. amend V.
- (2) Utah Const. art. I, sec. 22.
- (3) Utah Code Ann. §§ 63-30d-201, -301 (2004).
- (4) Utah Code Ann. § 73-1-8 (2004).

### **STATEMENT OF THE CASE**

#### **1. Nature of the Case:**

This is an appeal by a group of land and water right owners who farm in the North Hayden area located outside Roosevelt City, Utah. The North Hayden Group appeals from the district court's order denying them any relief whatsoever from the harmful and damaging effects of the City's mining of the Neola-Whiterocks Aquifer, an unconfined, shallow aquifer underlying the North Hayden Group's lands.<sup>1</sup>

#### **2. Course of Proceedings:**

This appeal arises from a Complaint filed by the North Hayden Group on June 3, 2004, in the Eighth Judicial District Court for the State of Utah. (R. 1-16.) The North Hayden Group's Complaint sought relief from, and damages for, the increasing

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<sup>1</sup> Groundwater mining results from continued overdraft, which occurs when the water level drops because "the rate of withdrawal from a basin [or aquifer] is greater than its recharge rate." Susan Batty Peterson, Note, *Designation and Protection of Critical Groundwater Areas*, 1991 B.Y.U. L. Rev. 1393, 1394 (1991).

deterioration and dewatering of their lands caused by Roosevelt City's continuous pumping of five wells in the Hayden Well Field, which draw water from the unconfined Neola-Whiterocks Aquifer underlying the Group's farms and pasture lands. (R. 2-7, 9-10.) Specifically, the Complaint stated that Roosevelt City's development and use of the wells in the Hayden Well Field has caused the water table beneath the North Hayden Group's lands to decrease substantially, thereby dewatering the Group's once-productive farm lands. (R. 9-10.) As a result of this dewatering, the North Hayden Group is no longer able to effectively irrigate their lands because the water they apply to their lands will no longer flow across the fields but is instead quickly absorbed and drawn down far beneath the surface, past the root systems of the crops and pasture vegetation, in order to replenish the depleted aquifer. (R. 9-10.) Consequently, the North Hayden Group can no longer grow hay, pasture their cattle, or derive income from their properties as they had consistently done in the past, and their water rights and the land to which the water rights are appurtenant have lost substantially all of their value. (R. 9.)

On September 9, 2008, Roosevelt City filed a motion for summary judgment. (R. 132-133.) In its supporting memorandum, the City argued that the North Hayden Group's claims should be dismissed on the following grounds: (1) all three of the claims are barred by the statutes of limitations because the Group was aware of the damage to their properties more than four years prior to the time they filed their Complaint; (2) the North Hayden Group's claim for interference with water rights is barred by the Utah Governmental Immunity Act because the Complaint did not allege negligent conduct when it stated that the City's conduct "manifested a knowing and reckless indifference



for and disregard of the [Group's] rights in their property"; (3) the City has not interfered with the North Hayden Group's water rights because the City is pumping water that it has lawfully appropriated; (4) the City did not take the Group's water but is instead pumping water that it has established a right to use; and (5) the City cannot be found negligent as a matter of law because it does not owe the Group a duty of reasonable care. (R. 160-68.)

The North Hayden Group filed their Memorandum in Opposition to the Motion for Summary Judgment on October 14, 2008. (172-276.) In response to the City's statute of limitations argument, the North Hayden Group asserted that their claims are not barred by the statute of limitations pursuant to the continuous tort rule. (R. 240-42.) That rule provides that the statute of limitations is deemed to run from the date of each wrongful act or at the end of the continuing wrongful conduct. (*Id.*)

Responding to the City's governmental immunity argument, the North Hayden Group explained that the Governmental Immunity Act specifically waives immunity for any injury proximately caused by a negligent act or omission and that their claim properly alleges negligent conduct. (R. 245-47.) In so stating, the Group referred the court to at least two Utah Supreme Court cases that have recognized that negligent conduct may include conduct that "manifests a knowing and reckless indifference toward the rights of others." (R. 246.) The Group asserted that immunity has also been waived under the Act pursuant to section 63-30d-301(3)(a)(ii), which waives immunity for a defective and/or dangerous condition of a public improvement. (R. 245-46.)

With respect to the City's claim that it has not interfered with the North Hayden Group's water rights even though its conduct has resulted in depleting or mining the

aquifer and dewatering the Group's lands, the North Hayden Group responded by explaining that the City's mining of the aquifer has prevented the Group from beneficially using their water rights. (R. 250-54.) Indeed, relying on past precedent from this Court, the North Hayden Group asserted that they are entitled to protection from both direct interference with their water rights and interference with the ability to beneficially use their water rights. (*Id.*) Because the City's conduct in mining the unconfined aquifer has dewatered the Group's lands and has prevented the Group from beneficially using their surface water rights, the City should compensate the Group for the damages resulting from that interference. (*Id.*)

In response to the City's defense that it did not take any protectable property interest possessed by the North Hayden Group when it "used the water which it has rightfully appropriated," (R. 162), the North Hayden Group explained that Utah has long recognized that the right to beneficially use water is part of the real property rights afforded a water right holder. (R. 260-61.) As a result, Roosevelt City's conduct in dewatering the Group's lands and in preventing the Group from beneficially using their water rights constitutes a taking under the Utah Constitution. (R. 257-59, 260-61.) Additionally, the North Hayden Group asserted that the City has taken the value and use of their property by depleting the aquifer and preventing them from beneficially using their own water rights, thereby triggering application of the Fifth Amendment to the United States Constitution. (R. 254-56.)

Finally, with respect to the City's claim that it has no duty to avoid mining the aquifer, the North Hayden Group explained that the City's duty arises under two separate

principles. (R. 242-45.) First, the City has a common law duty to avoid using its property, which includes water rights, to the detriment of others. (R. 244-45.) Second, the City has a statutory duty to maintain its watercourses in such a manner as to prevent damage to the property of others. (R. 244.) The City breached both its common law duty and its statutory duty to act reasonably and to avoid substantial harm to the Group when it designed its wells to draw water from the shallow, unconfined Neola-Whiterocks Aquifer rather than the lower confined Duchesne River Formation. (R. 242-45.) Because the Group's water rights and lands have been and are continuing to be damaged by the depletion of the unconfined aquifer, the North Hayden Group is entitled to recover the damages they have incurred as a result of the City's breach. (*Id.*)

On November 24, 2008, without the aid of oral argument, the district court granted Roosevelt City's motion on all grounds. (R. 290-303.) First, with respect to the statute of limitations, the Court stated that the North Hayden Group failed to "explain how the continuous tort rule applies to each of their separate claims" and therefore refused to apply that rule to any of the claims before it. (R. 292.) Second, the district court found that the Governmental Immunity Act barred the North Hayden Group's claims for interference with water rights because the Complaint did not allege that the interference resulted from negligence and because section 63-30d-301(3)(a)(ii) did not apply to the facts of the case. (R. 297.) Third, in dismissing the North Hayden Group's claim for interference, the district court reasoned that "[i]f the [c]ourt were to accept the [North Hayden Group's] argument, it would allow the [Group] to control indirectly water which they have no right to control directly." (R. 299.) With respect to the City's fourth

argument, the district court found that the North Hayden Group's takings claims should be dismissed because "there is no evidence that the [City] has taken the beneficial use of the [Group's] irrigation water. The [Group is] free to use their irrigation water as they wish." (R. 295.) Finally, the district court held that the Group's negligence claims should be dismissed because the City "has no duty to refrain from using the water that they have rightfully appropriated." (R. 294.) The ruling and order is attached hereto as Addendum A. It is from this order that the North Hayden Group appeals.

## **STATEMENT OF FACTS**

### **1. Introduction**

The lands owned by the North Hayden Group have historically been flood irrigated and have consistently produced a substantial crop and good pasture grounds. (R. 185, 189-90, 263-66.) As is common in Utah, application of water to the land has made the land fertile, productive and valuable. (R. 185, 189-90.) Even during droughts in the past, the North Hayden Group's lands consistently produced a substantial crop each year through the use of flood irrigation. (R. 185, 190). However, after the City drilled and began pumping five separate wells in a well field located near the North Hayden Group's properties (the "Hayden Well Field") in the early 1990s, the water table dropped dramatically. (R. 198-99.) Lands which were once fertile and green are now barren, and cottonwood and cedar trees that had thrived are now dead. (R. 183-85; R. 189-90; 198.) Although the North Hayden Group continues to attempt to irrigate their lands, the water no longer sustains crops and pasture, instead moving quickly past the root zone of the soil

to the level of the dramatically lowered water table far below the root zone, vainly attempting to recharge the depleted aquifer. (R. 9-10, 183-85, 189-90, 198.)

The direct cause of the damage to the North Hayden Group's property is the continuous pumping of the Hayden Well Field wells by the City. (R. 198.) Indeed, the North Hayden Group's expert has determined that, rather than tapping into the lower confined Duchesne River Formation, the City's shallow wells drain the near-surface unconfined Neola-Whiterocks Aquifer. (R. 198-200.) Very simply, unlike the vast number of wells in Utah which tap *confined* underground aquifers and do not affect the surface water table, the City's wells drain the shallow unconfined aquifer. This aquifer, which has historically provided a near-surface water table, has dropped over 80 feet since the City began pumping the Hayden Well Field wells. (R. 198-201.) As a result, natural vegetation has died and the irrigation water which is applied to the North Hayden Group's properties is drawn quickly past the root zone of crops and natural pasture to the substantially lowered water table, thereby depriving the Group of any beneficial use of their water on their land. (R. 183-84; 189; 198.) This is the injury to the North Hayden Group for which they seek compensation. (R. 1-16.)

## **2. The Development of the Hayden Well Field**

In the early 1980s, Roosevelt City purchased property and the water rights associated with the property located in the North Hayden area from Verl Haslem. (R. 268.) At the time of the sale, Mr. Haslem's property contained two wells, with the associated water rights, which were approximately 90 to 95 feet deep. (*Id.*) Mr. Haslem

had generally used the two wells to seasonally irrigate land adjacent to or near the properties of the North Hayden Group. (R. 200, 268.) Mr. Haslem's wells were not drilled or intended to be used for continuous water production where the water pumped would be taken completely out of the hydrologic system. (R. 200.)

After purchasing Mr. Haslem's wells and water rights, in 1983, Roosevelt City began moving other water rights to the wells. It filed a Change Application with the Utah State Engineer to change the point of diversion of an existing water right, Water Right No. 43-3512, to the location of Mr. Haslem's two wells (hereinafter referred to as the "Hayden Well Field"). (R. 268.) The Change Application was approved in December 1983. (*Id.*) Shortly thereafter, in 1984, Roosevelt City hired a contractor to rehabilitate and deepen the two existing wells and to drill an additional well. (R. 267-68.) At the time of drilling, the static water level for the new well was reported as only 25.6 feet below ground surface. (R. 267.)

In 1985, the City filed another Change Application to change the point of diversion of Water Right 43-3607, moving another water right held by the City to the Hayden Well Field. (*Id.*) The Change Application was approved on May 2, 1986, and the City thereafter contracted to have two additional wells drilled in the Hayden Well Field: Well No. 1A and Well No. 4. (*Id.*) The well reports for Well Nos. 1A and 4 indicate that, by 1990, the static water level had dropped to 64 feet and 83 feet, respectively. (*Id.*)

Each of the five Hayden Well Field wells that were either rehabilitated or drilled by the City draw water from the Neola-Whiterocks Aquifer, which is an unconfined

shallow aquifer underlying the Hayden area that supports a near-surface water table. (*Id.*) Based on information contained in technical publications on file with the Division of Water Rights, historical data indicates that the static water level in the Hayden area before the Hayden Well Field was established was 14.3 feet below ground surface. (R. 266-67.) Using information provided in those publications, the North Hayden Group's expert, Jack R. Rogers, P.G., estimated that within the short time span of 12 years, the City's use of the Hayden Well Field had lowered the water table at least 40-50 feet from its original level in 1978. (R. 266.) Mr. Rogers also noted that the water levels measured and recorded by the City in 2000 and 2001 indicate that the water table has declined further since the additional wells were completed in 1990. (*Id.*) And, consistent with those measurements, the results of a test conducted in 2008 by Mr. Rogers on Well No. 5 shows that the water level in that area has dropped to 94.6 feet below ground level. (*Id.*)

### **3. The North Hayden Group's Farm and Pasture Lands**

The North Hayden Group consists of farmers that own land in Duchesne and Uintah Counties, including Fern Oberhansly and Howard Horrocks. (R. 14-16.) The North Hayden Group's lands historically consisted of highly productive pasture and farmlands, which allowed the Group to produce large amounts of hay and/or provide pasture for a large number of cattle. (R. 266.) In fact, prior to 1990, the year that Roosevelt City began pumping all five of the Hayden Well Field wells, Ms. Oberhansly and her husband used their 120 acre parcel of land to raise and feed 75 head of cattle year-round and to grow a plentiful crop of hay each year. (R. 265-66.) Ms. Oberhansly's

land also had a stand of young cottonwood trees reaching approximately fifteen to twenty feet in height and several cedar trees that provided shelter from the wind for her cattle. (R. 190.) Similarly, prior to 1990, Mr. Horrocks' land produced a substantial crop of hay each year, such that Mr. Horrocks averaged 4,500 bales of hay per year from only one 70 acre parcel. (R. 265). The North Hayden Group's properties were known as "good pasture ground," meaning "a lot of water got to them in order to keep the ground—keep the grass growing." (*Id.*) But this all changed once the City began mining the shallow, unconfined Neola-Whiterocks Aquifer beneath their properties.

Within a few years after Roosevelt City began pumping from the Hayden Well Field wells, the cottonwood and cedar trees that were growing on the Group's lands died. (*Id.*) Additionally, the North Hayden Group's properties, which were once fertile and productive, became barren. (*Id.*) In her affidavit, Ms. Oberhansly described how her property, which was once able to pasture 75 head of cattle year-round, is now only able to sustain 30 heifer calves, one cow, and one bull for only one month before being completely stripped of its vegetation. (R. 189-90.) Although Ms. Oberhansly historically flood irrigated 105 acres of land prior to the establishment of the Hayden Well Field, she declared that, once the City began using the Hayden Well Field, she is now only able to irrigate the first 40 acres of land before the water is completely absorbed into the ground. (R. 189-90.) In an attempt to develop stock water for her land after Roosevelt City began pumping the Hayden Well Field wells, Ms. Oberhansly and her husband contracted to have a backhoe dig on their property. (R. 264-65.) Although the backhoe dug down twenty feet, it never encountered any water. (264.) In contrast, before the City began



pumping the wells, the water table was so near the ground surface that any post holes dug would be filled with water by the following morning. (*Id.*)

Mr. Horrocks offered a similar description with respect to the deterioration of his property. Mr. Horrocks successfully flood irrigated his property for years prior to the time Roosevelt City established the Hayden Well Field. (R. 185.) But the condition of his land began to deteriorate after Roosevelt City began pumping the wells, and Mr. Horrocks discovered that he could no longer flood irrigate his property. (R. 184.) Consequently, Mr. Horrock's property stopped producing hay and instead grew only a small amount of weeds, which Mr. Horrocks cleared only to prevent fire damage. (*Id.*) Even after Mr. Horrocks installed a \$100,000.00 sprinkling system, he was still unable to produce the amount of hay that he had consistently raised before Roosevelt City began pumping from the Hayden Well Field wells. (R. 184-85.) Indeed, Mr. Horrocks' crop records show that he averaged approximately 2,000 bales of hay each year after the installation of the sprinkling system, and, even in his best year during that time period, his land only yielded 3,000 bales of hay. (R. 184.)

#### **4. The Cause of Damages to the North Hayden Group's Land and Water Rights**

Jack Rogers, a licensed Professional Geologist in both Utah and Wyoming, began studying the Neola-Whiterocks Aquifer, which is the unconfined aquifer underlying the Hayden Well Field and the North Hayden Group's farmlands, to determine and understand the hydrogeology and hydrologic properties of the aquifer. (R. 201.) After undertaking extensive review of documents and reports related to the Hayden area and

the aquifer and tests of selected wells in that area, Mr. Rogers began monitoring and conducting additional testing of selected wells and water sources. (*Id.*) Based on his study and testing, Mr. Rogers determined that the damage to the North Hayden Group's farmlands is caused by Roosevelt City's pumping of the Hayden Well Field wells. (R. 198.) Specifically, Mr. Rogers determined that production of the wells has caused the water level to drop substantially around the wells, creating a large cone of depression where the water level is significantly lower than it was historically.<sup>2</sup> (*Id.*) As a result, the irrigation water that would have flowed horizontally across the North Hayden Group's farm and pasture lands is now drawn vertically deep into the ground to replenish the depleted aquifer. (*Id.*) This, in turn, results in a reduced ability to irrigate and, thus, produce crops or pasture on the affected lands, which include the farm and pasture lands owned by the North Hayden Group. (*Id.*) Mr. Rogers concluded that the reduction of the water table due to the production of the Hayden Well Field is a result of the City's wells, which were not drilled deeper into the confined Duchesne River Formation but are instead pumping from the unconfined Neola-Whiterocks Aquifer. (*Id.*) With each additional year that the City continues to pump from the Hayden Well Field wells, the quality of the Group's farm and pasture lands continues to decrease. (R. 263.)

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<sup>2</sup> "When water is pumped from a well, the initial withdrawal exceeds the rate at which groundwater flows into the vicinity of the well. The surrounding water table is lowered and slopes toward the well, forming a cone-shaped depression. Although the dimensions of the cone depend on the hydrologic characteristics of the aquifer, during the initial stages of pumping, the lateral expanse of the cone of depression is small and is unlikely to disturb possible sources of capture, such as streams. However, as pumping continues and the cone of depression expands, the growing zone of influence of the cone is more likely to intercept other sources of water, such as streams." 43 Rocky Mt. Min. L. Inst. § 22.02, at 22-12 to 22-13 (1997) (footnote omitted).

## SUMMARY OF ARGUMENT

The overarching position urged by Roosevelt City and adopted by the district court below is that the law imposes no constraints upon the City in its ability to use its property as it sees fit. Indeed, the district court ruled that, so long as Roosevelt City has lawfully appropriated a certain quantity of water, it may divert that water without any constraints, even when the undisputed evidence shows that such diversion substantially interferes with and invades the property rights of others. However, this position is not supported by, and, in fact, is clearly contrary to, the well-settled law in Utah. Accordingly, the North Hayden Group respectfully requests that this Court reverse the district court and hold that the district court erred in finding that (1) Roosevelt City's mining of the Neola-Whiterocks Aquifer did not effect a taking under either the Utah or United States Constitutions; (2) the City's mining of the Aquifer cannot interfere with the Group's water rights or the right to beneficially use their water rights; (3) the Group's interference claim is barred by the Governmental Immunity Act; (4) the City did not owe the Group a duty to refrain from using its property in a manner that was injurious to the Group; and (5) the continuous tort rule did not apply to the Group's claims.

First, this Court should reverse the district court's finding that the City's mining of the Aquifer, which has the effect of causing the Group's surface waters to be captured and redirected far beneath the ground to replenish the depleted aquifer, did not constitute a taking. It is well-settled that a water right holder's interest in his or her water right includes and, in fact, depends on the right to beneficially use the water right. In this case, the North Hayden Group had historically used their surface water rights to irrigate their

farms and pasture lands. However, by mining the unconfined, shallow Neola-Whiterocks Aquifer, the City has taken away the use and value of the Group's surface water rights and has deprived the Group of their ability to beneficially use their water rights. The City's conduct has also resulted in the taking of the near-surface water that had historically sustained natural vegetation on the Group members' properties. Lastly, the City's conduct has rendered the Group's lands barren and unproductive. Because the Group has a protectable property interest in their land, including their near-surface water, and the right to beneficially use their surface water rights, the Group has stated a claim for takings such that the case should be remanded to allow the Group to proceed to trial.

Second, this Court should reverse the district court's ruling that the City's mining of the aquifer has not interfered with the Group's surface water rights when the evidence clearly shows that the City's conduct has resulted in diverting the Group's water in order to replenish the depleted aquifer. Utah has long recognized that the quantity, quality, and method of diversion of a water right are protected under the law. Additionally, Utah law protects against conduct which has the effect of preventing a prior water user from continuing a beneficial use of a water right. In this case, the undisputed evidence demonstrated that the City's mining of the shallow, near-surface aquifer has caused the level of the aquifer to decrease over 80 feet. The evidence also established that, as a result of this substantial decrease in the aquifer's level, the Group's surface waters are captured and redirected far beneath the ground to replenish the depleted aquifer. As the City's diversion of water has substantially and detrimentally interfered with the Group's water rights, the City must compensate the Group for its damages. Consequently, this

Court should reverse the district court's ruling and remand the cause for trial.

Third, this Court should reverse the district court's ruling that the Governmental Immunity Act ("Act") barred the Group's interference claim. The Act waives immunity for both negligent conduct and defective or dangerous public improvements. The Group's Complaint alleged that the City's conduct in interfering with their water rights was "intentional, willful, and malicious, or at least manifested a knowing and reckless indifference for and disregard of the [Group's] rights in their property." As this Court has previously held that "a knowing and reckless indifference for and disregard of" the rights of another can be negligent conduct, the City is not immune under the Act. Additionally, because the Hayden Well Field wells were defectively designed to draw water from the shallow, unconfined Neola-Whiterocks Aquifer rather than the confined, Duchesne River Formation, and have caused damage to the Group's property as a result of such a design, immunity is again waived under the Act. Therefore, the district court's ruling should be reversed and this cause should be remanded for trial.

Fourth, this Court should reverse the district court's ruling that the City does not owe a duty to the Group to refrain from diverting its water in manner that is injurious to the rights of others. The law expressly limits a property owner's rights to use his or her property when such use detrimentally and substantially invades the rights of others. Additionally, under Utah law, the City is statutorily obligated to maintain its wells so as to prevent damage to the property of others. As such, the district court's finding that the City did not owe a duty to the Group is erroneous and should be reversed.

Finally, this Court should reverse the district court's ruling that the continuous tort

rule does not apply to Group's claims for takings, interference with water rights, and negligence. The continuous tort rule provides that the statute of limitations begins to run after each wrongful act has occurred or at the end of the continuing wrongful conduct. Because the Group presented evidence, which was not disputed by the City, that the City's ongoing conduct in continuing to pump from each of the Hayden Well Field wells has the effect of continually increasing the extent of the Group's damages, the rule should be applied. Therefore, this Court should reverse the district court and remand for trial.

### **ARGUMENT**

**1. The District Court Erred in Granting Summary Judgment on the Takings Claims because the North Hayden Group Has a Protectable Property Interest in both their Lands and the Water Rights Used to Irrigate those Lands.**

The district court erred in finding that Roosevelt City's mining of the Neola-Whiterocks Aquifer did not effect a taking of the North Hayden Group's protectable property interests. The undisputed facts presented to the district court shows that Roosevelt's conduct has created an artificial condition which has caused the water applied by the North Hayden Group to their lands to be captured and directed underground to replenish the aquifer depleted by the City's pumping of the wells, thereby damaging the Group's lands and rendering their water rights virtually useless. As discussed more fully below, the North Hayden Group has a protectable property interest in their farm and pasture lands and their right to beneficially use the water rights associated with those lands. Accordingly, the City is not entitled to judgment as a matter of law on the Group's takings claims under the Utah and United States Constitutions.

Therefore, this Court should reverse the district court's order granting summary judgment in favor of the City and remand the cause for trial.

**a. Property Rights Protected under the Utah Constitution**

As is well known, Article I, section 22 of the Utah Constitution provides that “[p]rivate property shall not be taken or damaged for public use without just compensation.” Utah Const. art. I, sec. 22. To establish a claim for taking under the Utah Constitution, a claimant must first “demonstrate some protect[a]ble interest in property.” *Strawberry Elec. Serv. Dist. v. Spanish Fork City*, 918 P.2d 870, 877 (Utah 1996) (internal quotations omitted). “If the claimant possesses a protect[a]ble property interest, the claimant must then show that the interest has been *taken or damaged* by government action.” *Id.* (emphasis added) (internal quotations omitted). A taking “is any substantial interference with private property which destroys or materially lessens its value, or by which the owner’s right to its use and enjoyment is in any substantial degree abridged or destroyed.” *Colman v. Utah State Land Bd.*, 795 P.2d 622, 626 (Utah 1990) (internal quotations omitted). “Damage” for purposes of an Article I, section 22 claim, “requires a definite physical injury cognizable to the senses with a perceptible effect on the present market value.” *Id.* (internal quotations omitted).

“Before a property interest will be considered protectable under Article I, Section 22,” the claimant “must show a legitimate claim of entitlement to it, or in other words, a vested, legally enforceable interest.” *Stevens v. LaVerkin City*, 2008 UT App 129, ¶ 21, 183 P.3d 1059 (internal quotations and citations omitted). “The kinds of property subject

to the [eminent domain] right . . . [are] practically unlimited,” *Strawberry Elec.*, 918 P.2d at 877 (alterations in original) (internal quotations omitted), and it is unquestioned that the ownership of land and the ownership of a water right are both protected property rights. *See* Utah Code Ann. § 78B-6-502; *see also Sigurd City v. State*, 142 P.2d 154, 157 (Utah 1943) (“To the extent that the plaintiff’s taking of the waters of Rosses Creek deprived the defendants of the use of water which would otherwise have been used upon their lands the plaintiff has taken the defendants’ water.”).

*i. The Right to Beneficially Use Water Is a Protected Property Right*

The right to beneficially use water is a property interest protected by the Utah Constitution. Beneficial use of water is the very essence of a water right. Indeed, without beneficial use there is no water right. As the often cited statute says, “[b]eneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state.” Utah Code Ann. § 73-1-3 (2008). Utah courts have often commented on the fundamental role beneficial use plays in determining the extent of the property rights that make up a water right. For example, in *Green River Canal Co. v. Thayn*, 2003 UT 50, 84 P.3d 1134, this Court held that a contract could not be interpreted as limiting beneficial use, declaring that the amount of water that can be beneficially used is the amount of water to which the water right holder is “lawfully entitled.” *Id.* at ¶ 33; *see also Fisher v. Bountiful City*, 59 P. 520, 521 (Utah 1899) (“The dominion and right to the use of the water, and the control and diversion of the same for irrigation, culinary, and other beneficial purposes, was vested in the plaintiffs by their appropriation and use, and they could not be deprived of such right, except by their voluntary act, by forfeiture, or



by operation of law.”).

Recognizing the fundamental role that beneficial use plays in determining the extent of a water right holder’s interest in a water right, this Court has held that a taking is not limited solely to the actual taking of a quantity of water to which a water right holder is entitled. Rather, as stated in *Sigurd City*, “[i]t is not necessary that such waters be actually taken into plaintiff’s pipelines. All that is necessary is that the defendants be ***deprived of the use of such waters by some action of the plaintiff.***” 142 P.2d at 157 (emphasis added); accord *Farmers New World Life Ins. Co. v. Bountiful City*, 803 P.2d 1241, 1244 (Utah 1990) (“[S]everance damages may be recoverable where property not actually taken is damaged by the construction or use of the improvement.”). Thus, under existing Utah statutes and case law, it cannot be reasonably argued that the taking of beneficial use is not a compensable taking. Yet, by disregarding the effects of the City’s conduct in depleting the aquifer and dewatering the overlying lands, the district court’s ruling essentially adopts such an argument.

*ii. The Group’s Property Right of Beneficial Use of Water Was Taken by the City*

In granting the City summary judgment, the district court declared, “there is no evidence that the [City] has taken the beneficial use of the [Group’s] irrigation water. The [Group is] free to use their irrigation water as they wish.” (R. 295). But this finding is contrary to the undisputed evidence presented to the court, which showed that, as a direct result of the City’s conduct, the Group is not free to beneficially use their irrigation water as they wish. Ms. Oberhansly’s and Mr. Horrock’s affidavits demonstrate that the Group cannot use their water to effectively flood irrigate their lands as they had

previously done in the past because the water cannot travel horizontally across their fields. (R. 184-85, 189-90.) This is so because the City's continuous pumping of its wells is depleting the near-surface aquifer by creating a large cone of depression that extends outward encompassing each of the North Hayden Group's properties. (R. 198.)

As a direct result of this artificial condition created by the City, rather than flowing horizontally across the Group's lands to irrigate the crops, the irrigation water applied to the affected lands is now captured within the large cone of depression and pulled down through the ground to the substantially lowered water level, which, as of 2008, is nearly 100 feet below ground level, at least 80 feet lower than before the City began pumping. (*Id.*) This means that, although the Group is technically "free" to do as they wish with their water, they cannot beneficially use their water for the approved purpose and place of use, i.e., irrigation on their farmlands.

Because, as discussed above, the Group has a protectable property interest in their ability to beneficially use their water, a part of their water rights just as much as their right to divert and transport the water to their fields,<sup>3</sup> Article I, section 22 mandates that the City compensate the Group because its conduct has interfered with and deprived the Group of the value of that right.<sup>4</sup> See *Sigurd City*, 142 P.2d at 157; *Fisher*, 59 P. at 521.

*iii. Near-Surface Water Which Supports Vegetation is a Protected Property Right*

In addition to the fact that the North Hayden Group is entitled to recover damages

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<sup>3</sup> Either through water rights issued by the State Engineer, through shares of a water company, or through water rights leased from the Uintah and Ouray Project administered by the Bureau of Indian Affairs.

<sup>4</sup> Additionally, by dewatering the once-productive farm and pasture lands, the City is also liable under Article I, section 22 for taking the value of the Group's lands.

for the City's taking of their lands and the right to beneficially use their water rights, the Group is also entitled to damages for the taking of their right to sufficient near-surface water to support natural vegetation. Although section 73-1-1 broadly classifies all water in the state of Utah as "property of the public," Utah Code Ann. § 73-1-1, this Court has recognized one exception to this rule. Specifically, in *Riordan v. Westwood*, 203 P.2d 922 (Utah 1949), this Court held that

[w]here, as here, in its natural state water is diffused and percolates through the soil so near the surface that without artificial diversion or application it produces plant life and thereby beneficially affects the land, and where its course cannot be traced onto the lands of any person other than the owner of the land where it is found, such water is percolating waters and as such are a part of the soil, they are not public waters, and the right to the use thereof cannot be acquired by appropriation under our appropriation statute.

*Id.* at 929. To hold otherwise, the Court noted, would require every owner of land that has a near-surface water table which sub-irrigates the land, such as the Group's, to "make application to appropriate such waters and unnecessarily divert the water from its natural course in order to preserve his right to the use thereof even though it would be more economical and beneficial to allow it to proceed in accordance with nature." *Id.* at 930.

In this case, it is undisputed that the North Hayden Group's land has benefited from the near-surface water table. This near-surface water table was sufficient to sustain plant life in the form of cottonwood and cedar trees. (R. 189-190.) Therefore, pursuant to the rule enunciated in *Riordan*, the members of the North Hayden Group, as owners of the land, also own a private right to the near-surface water sufficient to sustain plant life. This property right runs with the land and is not dependent upon the holding of any independent water right. By continually pumping the Hayden Well Field wells and

mining the unconfined aquifer, the City has taken this property right from the North Hayden Group in violation of Article I, section 22. Thus, this Court should reverse the district court's grant of summary judgment in favor of the City and hold that the City is not entitled to judgment as a matter of law.

In its order, the district court refused to apply the *Riordan* rule, holding that the rule is inapplicable because the groundwater was not "secluded" to only the Group's property. (R. 295.) But, in so holding, the district court failed to recognize that *Riordan* does not require that the groundwater be confined to a specific parcel of property (a virtual impossibility);<sup>5</sup> rather, *Riordan* focuses on whether groundwater, the course of which cannot be traced, is so near the surface that it constitutes "part of the soil." 203 P.2d at 929. Because the undisputed evidence shows that the North Hayden Group's land had been supported by water so near the surface that it sustained the growth of vegetation and trees on the lands, the Group members are entitled to the continued use of that near-surface groundwater pursuant to *Riordan*.

**b. Property Right Protection under the United States Constitution**

In addition to constituting a taking under the Utah Constitution, the City's mining of the aquifer and dewatering of the North Hayden Group's properties also violates the United States Constitution. The Fifth Amendment to the United States Constitution

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<sup>5</sup> The district court's ruling would essentially abrogate the *Riordan* rule because groundwater, by its very nature, cannot be confined within the arbitrarily determined boundaries of a parcel of property. See Michele Engel, Comment, *Water Quality Control: The Reality of Priority in Utah Groundwater Management*, 1992 Utah L. Rev. 491, 497 (1992) ("Groundwater flows along a natural gradient from the point of recharge to a point of natural discharge ....").

provides that private property shall not “be taken for public use, without just compensation.” U.S. Const. amend. V. “Under the United States Supreme Court’s interpretation of the fifth amendment, a ‘taking’ does not require complete destruction of the value of the property.” *Farmers New World Life*, 803 P.2d at 1247. Rather, “[i]t is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines ... whether it is a taking.” *Id.* (quoting *United States v. Cress*, 243 U.S. 316, 328 (1917)). In determining whether the invasion constitutes a taking, the “essential inquiry is whether the injury to the claimant’s property is in the nature of a tortious invasion of his rights or rises to the magnitude of an appropriation of some interest in his property permanently to the use of the Government.” *Id.* (internal quotations omitted).

In *Cress*, the United States Supreme Court was faced with the issue of whether the government’s act of damming a creek, which in turn lowered the creek’s water level to a point below the plaintiff’s milldam such that the plaintiff was no longer able to use the water to generate sufficient power to run the mill, constituted a taking under the Fifth Amendment. *Id.* at 318, 330. In that same opinion, the Court also considered a separate case in which the government’s dam resulted in “frequent overflows of water from the river” onto a portion of another plaintiff’s land. *Id.* at 318. In holding that the government’s act of damming the river constituted a taking in both cases, the Court declared, “[w]hile the government does not directly proceed to appropriate the title, yet *it takes away the use and value*; when that is done it is of little consequence in whom the fee may be vested.” *Id.* at 328 (emphasis added).

As in *Cress*, the City has taken away the use and value of the North Hayden Group's property by physically preventing the North Hayden Group members from beneficially using their water rights on their lands.<sup>6</sup> So long as the City continues to pump from the Hayden Well Field wells at its current rate, thereby mining the unconfined aquifer, the water applied to the North Hayden Group's farm and pasture lands will continue to sink deep underground to replenish the water taken by the City from the aquifer, rather than traveling horizontally to irrigate the lands. Consequently, the North Hayden Group will continue to be deprived of their right to beneficially use their water on their land, and their once productive and fertile farm and pasture lands will remain barren and unproductive. Pursuant to *Farmers* and *Cress*, this taking of the beneficial use of the North Hayden Group's property rises to the magnitude of an appropriation of "the use and value" of the Group's property to the use and benefit of the government. Thus, this Court should reverse the district court's grant of summary judgment in favor of the City on the Group's takings claim and remand the cause for trial.

**2. The District Court Erred in Dismissing the North Hayden Group's Interference with Water Rights Claims because Roosevelt City's Conduct in Continuously Pumping the Wells Has Created an Artificial Condition that Results in Causing the Group's Water to Sink into the Ground to Replenish the Depleted Aquifer.**

By continuously pumping its wells, the City has created an artificial condition within the lands that directs the waters, which were intended to be used by the North

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<sup>6</sup> Additionally, as discussed above, pursuant to *Riordan*, the City's pumping of the near-surface water underlying the North Hayden Group's properties constitutes a taking of the waters to which the North Hayden Group is legally entitled. 203 P.2d at 929-30.

Hayden Group to irrigate their properties, deep underground to replenish the depleted aquifer. Because such conduct constitutes an interference with the Group's water rights, the district court erred in granting summary judgment in favor of the City.

**a. Roosevelt City Is Liable for Interfering with Plaintiffs' Water Rights and the Near-Surface Water Underlying Their Land**

All water in the State of Utah, including groundwater, is the "property of the public." Utah Code Ann. § 73-1-1. However, rights to the beneficial use of any unappropriated water in the State can be obtained by filing an application with the State Engineer. *See id.* § 73-3-1. Those who are granted a water right from the State are entitled to receive a specific quantity and quality of water from a certain water source, which is measured and limited by the beneficial use of the water. *See id.* § 73-1-3 ("Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state.").

Utah courts have long recognized that "obstructing or hindering the quantity or quality of an existing water right constitutes" an illegal interference and is remediable by court action. *See Wayment v. Howard*, 2006 UT 56, ¶ 13, 144 P.3d 1147; *see also Salt Lake City v. Silver Fork Pipeline Corp.*, 2000 UT 3, ¶ 28 n.10, 5 P.3d 1206 ("Generally, the inquiry regarding interference focuses on actual interference in the quantity or quality of the water to which the prior appropriator is entitled."). Moreover, Utah courts have also held that a water right holder's right to the "continue[d] use of his [or her] existing and historical method of diverting the water" is also protected from interference. *Wayment*, 2006 UT 56 at ¶ 13. Indeed, in *Salt Lake City v. Gardner*, 114 P. 147 (Utah

1911), this Court held as follows:

If all rights can be protected and preserved, a mere change in prior established means or methods of diversion, if possible, ought not to prevent the use of water which could otherwise not be beneficially applied. But, in our judgment, the risk of interfering with prior rights and the cost of any change in the prior appropriator's means or methods of diversion should be assumed and borne by the subsequent appropriator ....

*Id.* at 153.

Unlike the typical cases addressing illegal interference with diversion of water rights, the taking of the North Hayden Group's water is less direct, but equally effective. Water used for irrigation ends up being pumped by the City's wells for use by the City. Also, the City's actions in pumping the five wells in the Hayden Well Field has decreased the aquifer's level by at least 80 feet and has thereby created the large artificial cone of depression interfering with the North Hayden Group members' beneficial use of the water to which they are entitled. Although this type of interference is one of first impression in Utah,<sup>7</sup> it is exceptionally similar to Utah cases in which a claim for

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<sup>7</sup> Although this type of interference is one of first impression in Utah, it has been long recognized that aquifer mining can interfere with surface water rights. *See Cappaert v. United States*, 426 U.S. 128, 142 (1976) (applying the implied-reservation-of-water-rights doctrine to surface water rights when the evidence showed that the "federal water rights," which consisted of surface water, were being depleted by the plaintiffs' pumping of groundwater because "the [g]roundwater and surface water are physically interrelated as integral parts of the hydrologic cycle." (internal quotations omitted)); *see also* Susan Batty Peterson, Note, *Designation and Protection of Critical Groundwater Areas*, 1991 B.Y.U. L. Rev. 1393, 1395 (1991) ("Groundwater mining is a serious concern because its results are often undesirable. Problems caused by prolonged overdraft include surface land subsidence, reduction of basin storage capacity through impaction, water quality degradation through contaminant migration and saline intrusion, [and] *interference with senior surface water rights* ...." (emphasis added)).



interference with water rights is raised in the context of an artesian or flowing well.<sup>8</sup>

In *Current Creek Irr. Co. v. Andrews*, 344 P.2d 528 (Utah 1959), this Court was faced with the question similar to the one currently before it. In that case, Current Creek Irrigation Company applied for and received approval to drill five wells in a basin which was “classified as a sensitive cone of influence, because the wells readily affect each other.” *Id.* at 529-30. The Court articulated the issue before it as follows:

The central problem is whether prior appropriators of water from an underground basin, who receive it by means of flowing wells and springs, have a vested right to continue receiving water by artesian pressure; and whether subsequent appropriators, whose withdrawals of water lower the water table and reduce the flow of prior wells, must restore the pressure or bear the expense of replacing the water of prior appropriators.

*Id.* at 529.

In concluding that the prior appropriators’ right to the static head pressure was protected, the Court declared, “all of our decisions have protected the rights to have the static head pressure maintained. We have consistently enjoined the lowering of the static head pressure which had *the effect of preventing a prior user from continuing a beneficial use* of underground waters.” *Id.* at 531 (emphasis added). Although the Court subsequently modified its holding in *Current Creek* by adopting a “rule of reasonableness,” which requires that “the means of diversion must be reasonable and consistent with the state of development of water in the area and not such as to abort the

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<sup>8</sup> “Artesian wells are generally thought of as artificial wells in which water from the lower stratum rises by its own pressure and flows continuously above the surface of the ground” due to the hydrostatic pressure caused by the formation of the strata of earth or rock. 78 Am. Jur. 2d *Waters* § 212 (2008).

declared purpose of the law of putting all of available water to use,” *Wayman v. Murray City Corp.*, 458 P.2d 861, 866 (Utah 1969), a defendant who interferes with a plaintiff’s ability to receive the beneficial use of his or her water may still be held liable if the plaintiff’s means of diversion is reasonable. *Id.*

In this case, the members of the North Hayden Group have historically used flood irrigation as the method of irrigation of their properties.<sup>9</sup> (R. 264-65.) However, when the City began pumping the Hayden wells and drawing water from the shallow, unconfined aquifer, the City caused an artificial condition underneath the North Hayden Group’s properties to occur wherein a large cone of depression was created which has the effect of capturing and intercepting irrigation waters applied to the overlying lands and drawing that water down through the ground to replenish the waters taken from the aquifer. (R. 198.) Because Roosevelt City’s pumping of the aquifer has reduced the level of the aquifer at least 80 feet, (R. 198-200), waters applied to the lands are directed past the shallow root zone of the crops, grasses, or vegetation existing on the surface in order to recharge the substantially lowered water table.

As in *Current Creek*, the City’s conduct has the effect of preventing the North Hayden Group, prior users, from continuing a beneficial use of their water by their historical method of diversion.<sup>10</sup> Indeed, even after North Hayden Group member

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<sup>9</sup> Flood irrigation consists of causing water to flow across the irrigated land, typically through furrows adjacent to the crops.

<sup>10</sup> Additionally, pursuant to *Riordan*, the City’s pumping of the groundwater constitutes direct interference with the water that has historically sub-irrigated the North Hayden Group’s properties and has sustained plant life on those properties. 203 P.2d at 929-30.

Howard Horrocks installed a \$100,000.00 sprinkling system, he is still unable to receive the same beneficial use of his water rights as he did before the City began mining the aquifer. (R. 264.) Because the undisputed evidence presented establishes that the City's conduct in draining the unconfined aquifer has interfered with the North Hayden Group's ability to beneficially use their water rights, the North Hayden Group is entitled to recover the damages caused by the City's interference with their water rights and the near-surface water associated with their land. *See Kano v. Arcon Corp.*, 326 P.2d 719, 721-22 (Utah 1958); *see also Riordan*, 203 P.2d at 929-30.

Moreover, pursuant to *Gardner*, Roosevelt City is also liable to the North Hayden Group for all costs incurred by them to change the historical method of application of the water due to the City's interference. The City, a junior appropriator, applied to change the point of diversion of its water rights in 1985 so that it could pump its water from the five Hayden Well Field wells. (R. 267.) This change in diversion and the resulting production of the Hayden Well Field wells by the City has lowered the water table, which, in turn, has essentially prevented the North Hayden Group from flood irrigating their lands. (R. 263-66.) Consequently, the only method of irrigating their lands now available to the Group is sprinkling. Even then, the sprinkling is less effective than the historic flood irrigation. As stated in *Gardner*, all costs incurred in changing the historic method of application should be borne by the junior appropriator that has caused the interference. 114 P. at 153. Thus, the City is liable for all damages sustained by the North Hayden Group as a result of the City's interference and for all costs incurred by the Group in installing and developing pressurized sprinkler irrigation systems.

*i. The Rights of the City and the North Hayden Group Must Be Balanced*

Despite the fact that the record showed Roosevelt's conduct has interfered with the Group's water rights and ability to beneficially use their water rights, the district court nevertheless granted summary judgment in favor of the City, reasoning as follows: "The [Group's] interference claim fails for one simple reason. If the [c]ourt were to accept the [Group's] argument, it would allow the [Group] to control indirectly water which they have no right to control directly." (R. 299). However, a review of the law in Utah establishes the fallacy of the district court's overly simplistic reasoning.

The law in Utah, consistently applied to land and water rights alike,<sup>11</sup> holds that a property owner's rights in his or her property are not "absolute." *Rowell v. State Bd. of Agriculture*, 99 P.2d 1, 7 (Utah 1940) (Wolfe, J., dissenting in part) ("[N]either property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm."); *see also N.M. Long & Co. v. Cannon-Papanikolas Constr. Co.*, 343 P.2d 1100, 1102 (Utah 1959) ("[I]t requires little imagination to realize that rights to use property cannot be absolute. If one holds property by force alone he is always subject to being dispossessed by force. If he holds it by rule of law this involves the agreement of everyone else. To the extent they are required to respect his rights, he must similarly respect theirs."); *Wayman*, 458 P.2d at 865 ("All users are required where necessary to employ reasonable and efficient means in taking their own waters in relation to others to

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<sup>11</sup> It should be noted that, under Utah law, water rights are treated as real property. *See Utah Dept. of Trans. v. G. Kay, Inc.*, 2003 UT 40, ¶ 15, 78 P.3d 612 (recognizing that "[w]ater rights are a type of interest in real property").

the end that wastage of water is avoided and that the greatest amount of available water is put to beneficial use.”). Instead, “every person has a right to use his own property as he sees fit *so long as that use does not invade the rights of his neighbor unreasonably and substantially.*” *Johnson v. Mt. Ogden Enters., Inc.*, 460 P.2d 333, 336 (Utah 1969) (emphasis added).<sup>12</sup>

Because property rights are not absolute, adjacent property owners are in actuality allowed to “control indirectly” property to which “they have no right to control directly.” For example, under the doctrine of private nuisance, a neighboring property owner is allowed to control indirectly the activities that a property owner may conduct on his or her own land. *See id.* (upholding judgment in favor of the plaintiffs, neighboring property owners, based on a finding that the defendant’s operation of a drive-in theater constituted a nuisance because such use of the defendant’s property “tended to substantially and unreasonably interfere with the plaintiffs’ enjoyment of their property”); *see also* Utah Code Ann. § 78B-6-1101(1) (“A nuisance is anything which is injurious to health, indecent, offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property....”). This Court has also held that adjoining landowners sharing a common support wall are not free to do as they wish with their buildings but rather must “use the highest possible care to prevent and avoid such injury which may be caused as the natural and proximate result of his

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<sup>12</sup> This principle of law has actually been codified in Utah’s law water. For example, section 73-3-20 expressly provides that “[a]ny person having stored his appropriated water in a reservoir for a beneficial purpose shall be permitted to withdraw the water at the times and in the quantities as his necessities may require *if the withdrawal does not interfere with the rights of others.*” Utah Code Ann. § 73-3-20(1) (emphasis added).

building operations.” *Mary Jane Stevens Co. v. First Nat. Bldg. Co.*, 57 P.2d 1099, 1117 (Utah 1936).

In *N.M. Long & Co.*, the plaintiffs and the defendants each presented a claim of absolute rights similar to that embraced by the district court in this case. 343 P.2d at 1102. The plaintiffs there claimed that they were entitled to an “absolute right to the possession and use of subterranean waters and in insisting upon maintaining it unimpaired,” while the defendants claimed that they had “the right to put their land to normal and ordinary uses” by installing a drainage system, even if that system “impair[ed] the plaintiffs’ claimed rights.” *Id.* In addressing the competing interests of the plaintiffs and the defendants, the Court declared as follows:

When conflicts of this character arise it is necessary to give consideration to the basic purposes for which property is possessed as established by the customs and practices of people in the use of property of similar character. It is the policy of the law to recognize the propriety of such uses and encourage the improvement of property so that it may be put to its best advantage.

*Id.*

Recognizing that the defendants’ land would remain a swamp if they were not allowed to install the drains, the Court held that the defendants “were entitled to make ordinary and reasonable uses of their property so long as they did so with due care and not in violation of the principles herein set forth [i.e., are not negligent or reckless with respect to the plaintiff’s water supply in the installation of their drains].” *Id.* at 1103. Such a holding, the Court declared, “accords with the salutary public policy of encouraging the development of property for [a] useful purpose.” *Id.*

In this case, the evidence established that the City did not act reasonably or with due care in developing and pumping the Hayden Well Field wells. Instead of simply drilling deeper to reach the confined Duchesne River Formation and installing non-perforated casings for the portion of their wells within the Neola-Whiterocks Aquifer, the City designed each of its wells to draw water directly from the unconfined, shallow Neola-Whiterocks Aquifer. (R. 198-200, 267-68.) The evidence also shows that Roosevelt City was aware that the development of its first three wells had caused the water table to decrease significantly within a matter of only six years, as shown by the Well Driller Reports filed in 1990, which reported that the water level had dropped to as low as 83 feet. (R. 267-68.) Yet Roosevelt City continued to develop an additional two wells and then began pumping from all five of the Hayden Well Field wells.

Had Roosevelt City's wells been designed to draw water from the confined Duchesne River Formation, the City would have been able to divert and use all of the water to which it is entitled without affecting the water level of the unconfined aquifer and without creating the artificial condition that now causes the Group's surface waters to be diverted downward to replenish the depleted aquifer. Such a reasonable course of action would have allowed both the City and the North Hayden Group to enjoy the benefits of their respective property rights. However, because the City chose instead to draw its water from the unconfined aquifer and continued to develop new wells despite the drop in the water table, it has exercised its rights to the detriment of the North Hayden Group. Such conduct is clearly prohibited under Utah law.

Moreover, it should be noted that the direct result of Roosevelt City's conduct in

draining the aquifer is that lands that were once fertile and productive have been rendered barren. As stated in *N.M. Long & Co.*, when competing property interests are before the Court, “[i]t is the policy of the law to recognize” the purposes for which the property is used and to “encourage the improvement of [the] property so that it may be put to its best advantage.” 343 P.2d at 1102. It is evident that to allow Roosevelt City to continue to drain the unconfined aquifer, which will continue the transformation of land that was historically fertile and productive to a dry, barren dustbowl, is not in conformity with the policy of the law, especially given the fact that it is not necessary for Roosevelt City to drain the unconfined aquifer in order to obtain the water to which it is entitled. Because damage to the North Hayden Group’s water rights and lands can be avoided merely by the City drawing its water from the lower, confined Duchesne River Formation, this Court should hold that the district court erred in finding that the City cannot be held liable for interfering with the Group’s surface water rights. Thus, this Court should reverse the district court’s order and remand the cause for trial.

**b. The Dewatering of an Aquifer Under One’s Water Rights Is Contrary to Public Policy**

It should be noted that the ruling of the district court, if affirmed and adopted as law in Utah, would have a substantial adverse impact on this State and its ability to prevent the mining of aquifers, such as that sought by the Southern Nevada Water Authority. The Southern Nevada Water Authority has proposed to pipe up to 50,000 acre feet of water from the aquifer underlying the Snake Valley, which is divided by the Utah-Nevada border. *See* Petitioners’ Opening Brief in Support of Petition for Judicial



Review, filed January 5, 2009, in the Seventh Judicial District Court of White Pine County, Nevada (hereinafter “Nevada State Court Petition”).

The Utah Legislature and both Salt Lake and Utah County are actively seeking to delay or prevent the withdrawal of the groundwater in Snake Valley, citing concerns regarding the predicted impact on the lands in Snake Valley and downwind along the Wasatch Front. *See* Josh Loftin, *Western Desert Resolution Urges Input on Water Plan*, DESERET MORNING NEWS, September 21, 2006, at B04, 2006 WLNR 16358603; Patty Henetz, *SL, Utah Counties Appeal Nevada’s Snake Valley Water Grab*, SALT LAKE TRIBUNE, August 7, 2008, 2008 WLNR 14788591; Nevada State Court Petition at 4.

Indeed, in September of 2006, the Utah Legislature’s Natural Resources, Agriculture and Environment Interim Committee approved a resolution calling for “scientific studies about the impact of removing the water from the aquifer[]” located in Snake Valley. *See* Loftin, *Western Desert Resolution Urges Input on Water Plan*, DESERET MORNING NEWS, at B04. The Utah Legislature subsequently passed the Joint Resolution Regarding Action on Groundwater in Snake Valley during the 2007 General Session, recognizing that the aquifer underlying Snake Valley “is the source of the springs, seeps, and wells that support the citizens’ livelihoods and fragile ecosystem in Snake Valley and other areas of western Utah.” *See* H.J.R.1, at 2 (Utah 2007). The resolution urged the Governor to “carefully assess the groundwater development project’s potential economic, social, and environmental consequences in Utah, including assessing impacts to indigenous flora and fauna and modeling groundwater behavior under any proposed pumping plan.” *Id.* at 3. And, in 2009, the Legislature passed and the

Governor signed House Bill 120, which creates the Snake Valley Aquifer Research Team and Advisory Council to compile research regarding the impact of the proposed plan on “surface water and groundwater,” “agriculture,” and “soils.” H.B. 120, 1, 5 (Utah 2009).

In addition to the Utah Legislature’s attempts to prevent mining of the aquifer underlying Snake Valley, both Salt Lake and Utah County have also taken action to respond to the Nevada proposal. Specifically, the counties have filed a petition with the Nevada district court, seeking a reversal of the Nevada State Engineer’s decision denying the counties “interested person” status. Nevada State Court Petition at 6-9. The counties’ petition is based on the following: “If [the Snake Valley Applications] are granted and significant groundwater pumping occurs in Snake Valley, that would likely cause the groundwater tables to drop significantly enough to destroy the groundwater dependent vegetation in Snake Valley, thus creating a dust bowl.” *Id.* at 4. The fate of the counties’ Petition has yet to be decided by the Nevada courts.

If the district court’s ruling is upheld and an appropriator in Utah is legally entitled to deplete an aquifer, regardless of the detrimental affects on the environment or the damage sustained by surrounding properties, it is unlikely that the State of Utah would be able to prevent the environmental consequences that have occurred in this case and that are expected to occur if Nevada is allowed to dewater the Snake Valley aquifer.

**3. The District Court Erred in Finding that the Governmental Immunity Act Barred the North Hayden Group’s Interference Claims because the City Was Negligent in Installing Wells that, due to their Depth and Perforated Casings, Tap Into the Unconfined Aquifer Below the Group’s Lands and Therefore Dewater the Group’s Lands.**

The district court erred in holding that the North Hayden Group’s interference claims were barred by the Governmental Immunity Act because the evidence presented to the district court establishes that Roosevelt City was negligent in installing defective and/or dangerous wells that are designed to deplete the unconfined aquifer. Accordingly, this Court should reverse the district court and remand the case for trial.

Section 63-30d-201 of the Utah Code provides that “[e]xcept as may be otherwise provided in this chapter, each governmental entity and each employee of a governmental entity are immune from suit for any injury that results from the exercise of a governmental function.” Utah Code Ann. § 63-30d-201(1) (2004).<sup>13</sup> Although “governmental function” is broadly defined as “each activity, undertaking, or operation of a governmental entity,” *id.* § 63-30d-102(4)(a), the Utah Governmental Immunity Act (“Act”) has nevertheless waived immunity for certain injuries, including “any injury proximately caused by a negligent act or omission of an employee committed within the scope of employment.” *Id.* § 63-30d-301(4).

While the district court recognized that the Act waives immunity for injuries resulting from negligent acts or omissions, (R. 298), it nevertheless held that the North Hayden Group’s Interference claim is barred by the Act because the Complaint did not allege negligence but instead alleged that Roosevelt’s activities were “intentional, willful, and malicious, or at least manifested a knowing and reckless indifference for and

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<sup>13</sup> Because the Governmental Immunity Act has been amended since the filing of the North Hayden Group’s Complaint, this brief will refer to the 2004 version of the Act, which was in place at the time the Complaint was filed.

disregard of the [Group's] rights in their property.”<sup>14</sup> (R. 297-98.) However, merely alleging that the City's activities manifested a knowing and reckless indifference for and disregard of the Group's rights does not take Roosevelt City's conduct out of the realm of negligent conduct. Rather, as stated by this Court, negligent conduct may include conduct that manifests a “knowing and reckless indifference toward the rights of others.” *Diversified Holdings, L.C. v. Turner*, 2002 UT 129, ¶ 29, 63 P.3d 686; *see also Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶ 27, 82 P.3d 1064 (“While simple negligence will not support punitive damages, negligence manifesting a knowing and reckless indifference toward the rights of others will.”) (quoting *Diversified Holdings*, 2002 UT 129 at ¶ 29). Thus, section 63-30d-301(4) is applicable, and the district court's finding that the Complaint did not allege negligence should be reversed.

This Court should also reverse the district court's finding that section 63-30d-301(3)(a)(ii) does not apply in this case. That section provides that, independent of the waiver of immunity for negligent conduct, immunity is also waived for any injury

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<sup>14</sup> The district court also held that “[t]here is no evidence offered that would tend to show that the pumping was negligent.” (R. 297.) However, it should be noted that Roosevelt City only challenged the fact that the Complaint did not allege negligent conduct. Roosevelt City did not argue that the evidence could not support a finding of negligence. (R. 166-67.) Thus, the ruling of the district court that “no evidence [was] offered that would tend to show that the pumping was negligent” was beyond the issues raised in the motion. Additionally, that ruling was erroneous in that the Group specifically discussed the duty owed by Roosevelt City and its subsequent breach of that duty by designing wells to pump from the unconfined, shallow aquifer rather than the confined Duchesne River Formation. (R. 242-45.) Because Roosevelt City's conduct in depleting the water table is unreasonable in light of the fact that it could easily obtain its water by simply drilling its wells deeper and using non-perforated casings in the unconfined aquifer, the evidence presented to the district court did in fact show that the City's conduct in pumping the wells was negligent.

“caused by: . . . any defective or dangerous condition of a public building, structure, dam, reservoir, or other public improvement.” *Id.* § 63-30d-301(3)(a)(ii). “The word ‘injury’ means ‘damage to or loss of property, or any other injury that a person may suffer to his person, or estate, that would be actionable if inflicted by a private person or his agent.’” *Williams v. Carbon County Bd. of Educ.*, 780 P.2d 816, 819 (Utah 1989) (quoting Utah Code Ann. § 63-30-2(5) (1988)). Although not defined in the Act, the term “defective” is commonly defined as “falling below the norm in structure or in mental or physical function.” Webster’s Ninth New Collegiate Dictionary 333 (9th ed. 1983). Similarly, although not included as a defined term in the Act, the term “dangerous” is commonly known to mean “able or likely to inflict injury.” *Id.* at 324.

Viewing the facts and all reasonable inferences in a light most favorable to the North Hayden Group, the non-moving party, *Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, Chartered*, 681 P.2d 1258, 1261 (Utah 1984), the evidence presented to the district court establishes that the dramatic decrease in the water table is a direct result of the fact that the City’s wells, due to their depth and perforations, tap into the unconfined aquifer rather than the confined Duchesne River Formation.<sup>15</sup> (R. 198-200,

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<sup>15</sup> The well owner controls the location at which water is drawn from a well through the depth of the well and the casing of the well. Well casings consist of a water proof pipe that lines the well to control the depth from which the well draws water. In fact, Utah drinking water regulations require that all culinary wells be cased for at least the first 100 feet. *See* Utah Admin. Code R309-515-6(6)(h).

The floor of the unconfined aquifer underlying the North Hayden area is approximately 190 feet below ground surface. In addition to failing to drill beyond the unconfined aquifer into the Duchesne River Formation, a confined aquifer, Roosevelt City also perforated the casings of each of its wells, thereby ensuring that the water it pumped would be drawn from the unconfined, shallow aquifer. (R. 199-201.)

263-64.) This defective design in the manner in which the City wells were drilled and cased causes the City wells to deplete the unconfined aquifer sitting directly below the Group's property. (R. 198-200.) Moreover, because the depletion of the aquifer resulting from the defective design and construction of the wells has caused damage to the Group's properties, the wells have inflicted injury and are likely to continue to inflict injury, thereby qualifying as a dangerous condition. Thus, section 63-30d-301(3)(a)(ii) does apply, and immunity is waived for all of the Group's injuries incurred as a result of the City's defective and dangerous wells. Consequently, the district court's ruling should be reversed and the case remanded.

**4. The District Court Erred in Finding that the City Did Not Have a Duty to Refrain from Diverting Water in a Manner that Was Injurious to the North Hayden Group.**

The district court also concluded that the North Hayden Group's negligence claim should be dismissed because Roosevelt City did not have a duty to refrain from using its property in a manner that is injurious to others. However, that conclusion is clearly contrary to Utah law. As discussed above, the law in Utah provides that a land owner has a duty to refrain from using his own property in such a manner that would injure others. *See AMS Salt Indus., Inc. v. Magnesium Corp. of America*, 942 P.2d 315, 322-23 (Utah 1997) ("A possessor of land is subject to liability to others outside of the land for physical harm caused by a structure or other artificial condition on the land, which the possessor realizes or should realize will involve an unreasonable risk of such harm, if (a) the possessor has created the condition . . . ." (quoting Restatement (Second) of Torts §

364)); *see also Johnson v. Mt. Ogden Enters., Inc.*, 460 P.2d 333, 336 (Utah 1969) (“It is recognized that every person has a right to use his own property as he sees fit so long as that use does not invade the rights of his neighbor unreasonably and substantially.”). And this duty extends to water right holders as well. *See Gunnison Irr. Co. v. Gunnison Highland Canal Co.*, 174 P. 852, 855 (Utah 1918) (“A priority to the use of water is a property right, which is the subject of purchase and sale, and its character and method of use may be changed, *provided such change does not injuriously affect the rights of others.*” (internal quotations omitted) (emphasis in original)).

In addition to the general duty of property owners to refrain from using their property in a manner that would harm others, section 73-1-8 of the Utah Code imposes an affirmative statutory duty on “[t]he owner of any ditch, canal, flume or other watercourse [to] maintain the same in repair so as to prevent . . . damage to the property of others.” Utah Code Ann. § 73-1-8 (2004). In interpreting this language, this Court has held that section 73-1-8 imposes “a statutory duty upon users” to exercise that degree of care “which persons of ordinary intelligence and prudence would observe under the particular circumstances.” *Erickson v. Bennion*, 503 P.2d 139, 140 (Utah 1972). The Court has also held that “the degree of care increases in proportion to the hazards to be anticipated.” *Id.*; *see also Dougherty v. California-Pacific Utils. Co.*, 546 P.2d 880, 882 (Utah 1976).

Pursuant to both Utah common law and section 73-1-8, Roosevelt City owed a duty to the North Hayden Group members to drill, case, and operate its wells in such a manner as to prevent harm to the Group’s properties. The City breached this duty, first, by failing to drill the wells deep enough to reach into the confined Duchesne River

Formation and instead by drawing its water from the unconfined Neola White-Rocks Aquifer, and, second, by continuing to pump the wells after learning that the production of the Hayden Well Field wells dramatically reduced the water table and resulted in the dewatering of the North Hayden Group's properties. Thus, Roosevelt City is liable to the North Hayden Group for the injuries they incurred as a result of its negligence.

In ruling that, as a matter of law, Roosevelt City did not owe the North Hayden Group a duty to refrain from using its property in a manner that would injure or harm the Group, the district court declared, "[a]gain, if the [c]ourt were to accept the [Group's] negligence argument, it would allow the [Group] to control indirectly water which they had no right to control directly. In effect, accepting the [Group's] negligence argument would usurp the appropriation laws of this State." (R. 294.) But, as discussed *supra* Part 2(a), such a conclusion is clearly contrary to Utah law. Because the law expressly limits a property owner's rights to use his or her property when such use detrimentally and substantially invades the rights of others, the district court erred in dismissing the Group's claims solely on the basis that the City lawfully held title to the water rights.

**5. The District Court Erred in Refusing to Find that the City's Pumping of Its Wells Constitutes a Continuous Tort When the Facts Showed that, by Continuing Its Conduct, the City Is Increasing the Extent of the Group's Property Damages**

The continuous tort rule applies to Roosevelt City's ongoing pumping of the Hayden Well Field wells, which is further increasing the damage to the North Hayden Group's properties. It is a well-established rule that, in the case of a continuous tort, such as is occurring here, "the statute of limitations runs from the date of each wrong or from



the end of the continuing wrongful conduct.” 51 Am. Jur. 2d *Limitation of Actions* § 168; see also *Hensley v. City of Columbus*, 557 F.3d 693, 697 (6th Cir. 2009) (“[A] continuous violation exists if: (1) the defendants engage in continuing wrongful conduct; (2) injury to the plaintiffs accrues continuously; and (3) had the defendants at any time ceased their wrongful conduct further injury would have been avoided.”).

This rule, commonly referred to as the continuous tort rule, has been adopted and applied by Utah courts in vastly varying circumstances. For example, this Court has applied the rule to toll the statute of limitations for continuing nuisances or trespasses. See *Breiggar Properties, L.C. v. H.E. Davis & Sons, Inc.*, 2002 UT 53, ¶ 8, 52 P.3d 1133 (“[I]n the case of a continuing trespass or nuisance, the person injured may bring successive actions for damages until the nuisance [or trespass] is abated, even though an action based on the original wrong may be barred . . . .” (alterations in original) (internal quotations omitted).) Also, the Utah Court of Appeals has held that the continuous tort rule is applicable to Title VII claims and claims for infliction of emotional distress. See *Hatch v. Davis*, 2004 UT App 378, ¶¶ 42, 44, 102 P.3d 774.

Utah’s courts have also applied the continuous tort rule to medical malpractice claims, holding “[u]nder the continuous negligent treatment rule, where a patient is injured by a course of continuing negligent treatment by a health care provider, the cause of action does not accrue until the date of the final negligent act.” *Harper v. Evans*, 2008 UT App 165, ¶ 10, 185 P.3d 573. Finally, this Court has recognized that the continuous tort rule would also apply to “suits for infringement of patent that presupposes ownership.” *Becton Dickinson & Co. v. Reese*, 668 P.2d 1254, 1257-58 (Utah 1983).

In *Brieggar Properties*, this Court discussed the differences between a continuing tort and a permanent tort as it applied to the law of trespass and nuisance. It held that when determining whether the continuous tort rule should apply, the court should look at the act that constitutes the wrongful conduct, not the harm resulting from the act. See *Brieggar Props.*, 2002 UT 53 at ¶ 10. If multiple wrongful acts occur and continue to occur, “the statute of limitations begins to run anew with each act.” *Id.* at ¶ 11. However, “recovery is limited to actual injury suffered within the three years [the period of limitation] prior to commencement of each action.” *Id.*

In its ruling, the district court declared that it was unaware of any Utah court that has applied the continuing tort or continuing violation rule to causes of action for interference, negligence, or takings. (R. 293.) However, this statement is incorrect. Indeed, in opposing Roosevelt City’s motion for summary judgment, the North Hayden Group referred the district court to the Utah Court of Appeals opinion in *Harper v. Evans*, 2008 UT App 165, 185 P.3d 573, in which the court applied the “continuous negligent treatment rule” to address instances in which “a patient is injured by a course of *continuing negligent treatment* by a health care provider.” *Id.* at ¶ 10 (emphasis added). (R. 241.) Thus, contrary to the district court’s statements, Utah’s courts have previously applied the continuous tort rule to negligence actions.

The district court also refused to apply the continuous tort rule to the Group’s claims because it stated that the Group failed to show why the rule was applicable. (R.

292-93.) But the facts and briefing<sup>16</sup> presented to the district court clearly showed that Roosevelt's ongoing wrongful conduct in mining the aquifer is resulting in additional damages and injury to the Group's properties that could be prevented if Roosevelt were enjoined from continuing to pump from the shallow, unconfined aquifer. (R. 240-42.)

It is undisputed that Roosevelt City has been pumping the five wells located in the Hayden Well Field from at least 1990 to the present. (R. 265-66.) It is also undisputed that the City's pumping of the wells is increasing the extent of property damaged by the decreasing water table. (R. 263.) Indeed, as the City continues to pump from the Hayden Well Field wells each year, the water level of the aquifer continues to decrease and the damage to the North Hayden Group's lands continues to increase.<sup>17</sup> (R. 240, 263.)

The evidence shows that the North Hayden Group did not sustain permanent damages to their property at the time the City drilled each of the Hayden Well Field wells. Nor did the Group sustain permanent damages when the City began pumping the wells. The damages to the North Hayden Group's properties are directly related to the City's *ongoing* use of the wells, and further damages can be prevented if the City ceases its pumping activities.<sup>18</sup> Therefore, because the wrongful act is ongoing in nature and

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<sup>16</sup> As noted above, the district court did not hear oral argument on the City's motion.

<sup>17</sup> This is so because the lower the aquifer decreases, the further the cone of depression extends, which captures and diverts the surface waters underground. Therefore, when the aquifer's level had decreased only 25 feet, less of the Group's surface waters were used to replenish the aquifer. However, now that the aquifer's level has dropped over 80 feet, a significantly higher portion of the Group's surface waters are trapped in the cone of depression and redirected far beneath the surface level.

<sup>18</sup> Aquifers are recognized as being dynamic in that there is recharge and discharge of water in the aquifer. Over time, without the pumping of the wells, the Neola-Whiterocks Aquifer will recharge.

continues to cause additional damages to the Group, the statute of limitations “begins to run anew with each act” or at “the end of the continuing wrongful conduct,” and the North Hayden Group is entitled to recover their damages incurred within the last four years prior to the commencement of this action.<sup>19</sup>

It should be noted that application of the continuous tort rule to the Group’s claims is consistent with this Court’s application of the rule to temporary nuisance and trespass claims. Each of the North Hayden Group’s claims is based on Roosevelt City’s conduct of interfering with the Group’s water rights and of depriving the Group of their ability to beneficially use their water rights. Such conduct in and of itself supports a common law claim for trespass and/or nuisance. *See Morgan v. Quailbrook Condominium Co.*, 704 P.2d 573, 576 (Utah 1985) (“[A]n actor who interferes with the normal flow of surface waters across another’s land may be liable to the other under the general rules applicable to private nuisance.”); *see also* 78 Am. Jur. 2d *Waters* § 10 (“Any wrongful and direct interference with the rights of another in the possession of water rights constitutes a trespass or tort. A wrongful interference with rights in respect to waters may also constitute a nuisance.”). Thus, the legal reasoning supporting the application of the continuous tort rule in the case of a continuing trespass or nuisance is equally applicable to the City’s continuing interference with the Group’s right to beneficially use their water rights. Therefore, this Court should reverse the district court and hold that the continuous tort rule applies to each of the Group’s causes of action.

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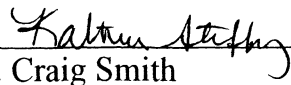
<sup>19</sup> The four year statute of limitation found in section 78B-2-307(3) is applicable to each of the Group’s claims.

## CONCLUSION

The question that is before the Court is whether Roosevelt City, a property owner, has the unfettered right to use its property in any manner it sees fit, even if such use results in harm to others. The answer to this question has been addressed by this Court on several occasions: the City's right to use the water it has lawfully appropriated is not absolute; rather, the City must exercise due care and divert its water in a reasonable manner. Because the undisputed evidence shows that the City did not exercise due care and was not reasonable when it designed its wells to pump from the shallow, unconfined aquifer rather than ensuring that its wells would draw water from the deeper, confined Duchesne River Formation, this Court should hold that the City was not entitled to judgment as a matter of law. Accordingly, this Court should reverse the district court's grant of summary judgment and hold that (1) the North Hayden Group has a legally protectable property interest in their property, near-surface water, and the right to beneficially use their surface water rights; (2) the North Hayden Group has stated a claim for interference based on Roosevelt City's conduct, which has depleted the aquifer and created an artificial condition in the land that is depriving the Group of their water rights; (3) Roosevelt City is not immune from liability under the Governmental Immunity Act; (4) Roosevelt City owes a duty to refrain from using its property in a manner that substantially and unreasonably harms others; and (5) the statute of limitations does not bar any of the Group's causes of action.

DATED this 7th day of May, 2009.

**SMITH HARTVIGSEN, PLLC**

  
\_\_\_\_\_  
J. Craig Smith  
Kathryn J. Steffey  
Bryan C. Bryner  
*Attorneys for Plaintiffs/Appellants*

## CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of May, 2009, I caused to be served, via U.S. first class mail, postage prepaid, a true and correct copy of the **BRIEF OF APPELLANTS** addressed as follows:

David L. Church  
**BLAISDELL & CHURCH**  
5995 South Redwood Road  
Salt Lake City, Utah 84123  
*Attorneys for Defendant*

\_\_\_\_\_

## **ADDENDUM**

- A. Ruling and Order on Defendant's Motion for Summary Judgment**
- B. Nevada State Court Petition**
- C. Deseret Morning News, September 21, 2006, "Western Desert Resolution Urges Input on Water Plan"**
- D. The Salt Lake Tribune, August 7, 2008, "Salt Lake, Utah Counties Appeal Nevada's Snake Valley Water Grab"**
- E. Joint Resolution Regarding Action on Groundwater in Snake Valley**
- F. Snake Valley Aquifer Research Team and Advisory Council**
- G. U.S. Const. amend V**
- H. Utah Const. art. I, sec. 22**
- I. Utah Code Ann. §§ 63-30d-201, (2004)**
- J. Utah Code Ann. §§ 63-30d-301, (2004)**
- K. Utah Code Ann. § 73-1-8 (2004)**



## **Addendum A**

IN THE EIGHTH JUDICIAL DISTRICT COURT  
IN AND FOR UINTAH COUNTY, STATE OF UTAH

FILED  
DISTRICT COURT  
UINTAH COUNTY, UTAH

NOV 24 2008

JOANNE MAKEE, CLERK  
DEPUTY

Melvin Bingham, et al.,

Plaintiffs,

vs.

Roosevelt City Corporation, a Utah municipal  
corporation,

Defendant.

RULING AND ORDER ON  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

Case No. 040800250WA

Judge JOHN R. ANDERSON

This matter is before the court on the Defendant's Motion for Summary Judgment.

Rule 56(c) of the Utah Rules of Civil Procedure allows a court to render summary judgment if there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

**Undisputed Facts**

1. Plaintiffs Melvin and Glenda Bingham own property located in Uintah and Duchesne Counties and have leased water rights from the Uintah and Ouray Project. (Complaint ¶ 1).
2. Plaintiffs Howard Horrocks and Ila Fay Horrocks own property located in Uintah County, have been issued water rights by the Division of Water Rights of the State of Utah, and have leased water rights from the Uintah and Ouray Project. (Complaint ¶ 2).
3. Plaintiff Virginia Houston, as Trustee of the Virginia Coltharp Houston Living Trust,

owns property in Duchesne and Uintah Counties, is the owner of shares of Uinta Independent Ditch Company and Dry Gulch Irrigation Company stock, and has leased water rights from Uintah and Ouray Project. (Complaint ¶ 3).

4. Plaintiffs Fern Oberhansly Labrum, as Trustee of the Mark L. Oberhansly Trust, owns property in Uintah County, owns shares of the Uinta Independent Ditch Company stock, and has leased water rights from the Uintah and Ouray Project. (Complaint ¶ 4).

5. Plaintiffs George and Loraine Richins lease property in Uintah County, own shares of Uinta Independent Ditch Company stock, and have leased water rights from the Uintah and Ouray Project. (Complaint ¶ 6).

6. Plaintiffs Loraine Richins and Phyllis D. Oberhansly, as Trustees of the Phyllis D. Oberhansly Trust, own property in Uintah County. (Complaint ¶ 7).

7. None of the Plaintiffs allege that they have water rights, approved by the office of the Utah State Engineer, to the water located in the water table below their property. (Complaint ¶¶ 1-8).

8. Roosevelt City Corporation is a municipality of the State of Utah located in Duchesne County. (Complaint ¶ 8).

9. Roosevelt City holds water rights and operates wells on property located in Duchesne and Uintah Counties. (Complaint ¶ 8).

10. Roosevelt City's application for a water right to supply municipal water was first approved in 1958. (Complaint ¶ 11).

11. Roosevelt City's application for water right to supply municipal water was approved in 1961. (Complaint ¶ 12).

12. Roosevelt purchased land previously owned by Verl and Leah Haslem. (Complaint ¶ 15).

13. In 1983 Verl and Leah Haslem assigned their interest in water rights to Roosevelt City. (Complaint ¶ 15).

14. Roosevelt City filed various change applications for its water rights to utilize the water at what is called in the complaint the “Hayden Well Field” and the applications were all approved prior to May 6, 1994. (Complaint ¶¶ 15-19).

15. By the fall of 1990 all five wells in the Hayden well field were producing water for Roosevelt City. (Complaint ¶ 20).

16. Plaintiffs allege that after development of the Hayden Well Field in the late 1980's and 1990's the trees and grass on their properties died and the Plaintiffs could no longer produce hay as they had before. (Plaintiffs' answers to Interrogatory 12 of Defendant's First Set of Discovery attached as Exhibit A hereto).

17. Plaintiffs' claims of interference with their water rights because of the pumping of the Hayden Well Field has lowered the water table under the Plaintiffs' property which makes it inefficient to water their respective properties with the water rights they either own or lease. (Plaintiffs' answers to Interrogatories 12, 13, 14 of Defendant's First Set of Discovery attached as Exhibit A hereto).

18. The Complaint does not allege that Roosevelt City has used any water right or water source for which it does not have approved certificated water right through the office of the Utah State Engineer. (See Complaint ¶¶ 11, 12, 14, 15, 16, 17, 33, 34, and 35).

## Analysis

### I. Interference with Water Rights

First, the Defendant argues that they have not interfered with the Plaintiffs' water rights.

The Plaintiffs allege two ways the Defendant has interfered with their water rights. First, the Plaintiffs argue the Defendant has interfered with their right to the beneficial use of their irrigation water. The Plaintiffs come to this conclusion by making the following connections: the Defendant's use of the wells and pumping of water has lowered the water table under their land; the lower water table has made the Plaintiffs' land drier; because the land is drier, the Plaintiffs' irrigation water is not as efficient in irrigating the land. Consequently, the Plaintiffs claim that the beneficial use of their irrigation water has been interfered with. Second, the Plaintiffs claim a right to the groundwater that has subirrigated their land. The Plaintiffs argue the Defendant's pumping has lowered the water table and consequently interfered with the water that has historically subirrigated their property.

As to the last argument, the Plaintiffs rely on the holding in *Riordan v. Westwood et al.*, for their claim that they have rights to the water subirrigating their land. 203 P.2d 922 (Utah 1949). In *Riordan*, the Court held:

Where, as here, in its natural state water is diffused and percolates through the soil so near the surface that without artificial diversion or application it produces plant life and thereby beneficially affects the land, and where its course cannot be traced onto the lands of any person other than the owner of the land where it is found, such water is percolating waters and as such are a part of the soil, they are not public waters, and the right to the use thereof cannot be acquired by appropriation under our appropriation statute.

*Id.* at 929.

Under *Riordan*, certain percolating waters are not subject to appropriation. However, the

water under the Plaintiffs' land is not the type of water that this holding applies to. The water under the Plaintiffs property can be traced onto the lands of others besides the owner of the land where it is found. Each individual Plaintiff landowner claims that the groundwater is found on their land. Consequently, the underground aquifer traverses under the land of more than one individual land owner. Therefore, the water is public water subject to appropriation. The Plaintiffs do not have a right to the water that subirrigates their land, and their interference claim on this basis is denied.

Next, the Plaintiffs' claim that the beneficial use of their irrigation water has been interfered with by the Defendant. The Plaintiffs' interference claim fails for one simple reason. If the Court were to accept the Plaintiffs' argument, it would allow the Plaintiffs to control indirectly water which they have no right to control directly. The Plaintiffs clearly have no water rights to the water under their land. The Defendant has appropriated this water under the laws of this State. Accepting the Plaintiffs' beneficial use argument would allow the Plaintiffs to control the ground water without ever taking the steps necessary to appropriate the water and establish rights to it. That is contrary to the prior appropriation laws of this State.

Furthermore, the Defendant's use of the groundwater has not interfered with the Plaintiff's water rights. The beneficial use the Plaintiffs are referring to is the historic efficiency of their irrigation water to irrigate their land. However, their irrigation water was beneficial at the historic levels only because of reliance on the underground water. The Plaintiffs' irrigation water was sufficient to irrigate their land at historic levels only because it was supplemented with the groundwater in which the Plaintiffs had no right to. In other words, the Plaintiffs were irrigating their land with less water because they were relying on the groundwater to saturate

their land. The Plaintiffs' irrigation water is the same as it was before the Defendant started pumping. The difference is that the Plaintiffs are no longer able to supplement their irrigation water with the groundwater which they did not have a right to.

Therefore, the Plaintiffs' interference claim fails as a matter of law. The Defendant's Motion is granted as to this issue.

Alternatively, the Defendant argues that the Plaintiffs' interference claim is barred by Utah Governmental Immunity Act.

"[E]ach governmental entity and each employee of a governmental entity are immune from suit for any injury that results from the exercise of a government function." Utah Code Ann. § 63G-7-201(1).

In *Ledfors v. Emery County Sch. Dist.*, the Court outlined the procedure for determining whether a governmental entity is immune from suit. 849 P.2d 1162, 1164 (Utah 1993). The first question is whether the governmental entity was performing a governmental function and immune from suit. *Id.* Next, if it was a governmental function, was the immunity waived by another section of the Governmental Immunity Act. *Id.* Finally, if the immunity was waived, is there an exception in the Act that negates the waiver. *Id.*

Here, neither party disputes that the Defendant was performing a governmental function and immune from suit under the first step. As the Defendant states, the basis for the claim concerns the operation of a city water department. The Defendant's pumping and use of the water is a governmental function and the Defendant is immune from suit.

The next step in the analysis is where the parties disagree. The Plaintiffs' complaint alleges that the Defendant's actions were intentional, willful, and malicious, or at least

manifested a knowing and reckless indifference for and disregard of the Plaintiffs' rights in their property. The Defendant argues that while immunity may be waived for negligent conduct under Utah Code Ann. § 63G-7-301(4), there is no waiver for intentional or reckless conduct.

The Plaintiffs argue that alleging the Defendant's actions were intentional or reckless does not rule out that they weren't also negligent. Alternatively, the Plaintiffs argue that Utah Code Ann. § 63G-7-301(3)(b)(ii) also waives governmental immunity for injuries caused by a defective or dangerous condition of a public building, structure, dam, reservoir, or other public improvement. The Plaintiffs allege that the injury was caused by the Defendant's use of perforated casings in their wells, and by tapping into an unconfined aquifer instead of the Duchesne River Formation.

First, the Plaintiffs complaint alleges that the Defendant intentionally or recklessly pumped water from the Defendant's wells. There is no evidence offered that would tend to show that the pumping was negligent. The Defendant intentionally pumped the water that the Defendant had water rights to, from wells that the Defendant owned. Furthermore, the Plaintiffs' claim that intentional or reckless conduct can include negligent conduct is unpersuasive. If intentional and reckless conduct also included negligence, then it would make little sense for the Legislature to draw a distinction for waiving immunity only for negligence.

Also, Utah Code Ann. § 63G-7-301(3)(b)(ii) does not apply to the facts here. There is no evidence presented that the Defendant's wells were defective. The Plaintiffs merely state that the Defendant used perforated casings for their wells. Apparently, the Plaintiffs conclude that perforated casings are defective. The Plaintiffs fail to explain why the perforated casings are defective. The Plaintiffs also fail to explain how the Defendant's act of drawing water from an



unconfined aquifer instead of the Duchesne River formation was defective. The Plaintiffs merely conclude that the act was defective without explaining how pumping water that the Defendant has water rights to is defective.

Therefore, government immunity applies to the Plaintiffs' interference claim.

Governmental immunity was not waived under a specific section of the Act. The Defendant's Motion for summary judgment as to this issue is granted.

## II. Takings

Next, the Plaintiffs claim that the beneficial use of their water has been taken away by the Defendant's pumping. The Plaintiffs argue that this is a compensable taking under both the Utah and United States Constitutions.

Article I, Section 22 of the Utah Constitution states: "Private property shall not be taken or damaged for public use without just compensation."

A takings analysis under the Utah Constitution consists of the two steps. *Strawberry Electric Service Dist. v. Spanish Fork City*, 918 P.2d 870, 877 (Utah 1996). First, the plaintiff must show they have some protectable property interest. *Id.* Second, if they have a protectable property interest, the plaintiff must show that the interest has been taken or damaged by government action. *Id.*

The Fifth Amendment of United States Constitution states: "Nor shall private property be taken for public use, without just compensation." A taking under the United States Constitution requires an actual and permanent invasion that amounts to an "appropriation of and not merely an injury to property." *Sanguinetti v. United States*, 264 U.S. 146, 149 (1924).

Here, the Defendant argues that the Plaintiffs have no protectable property interest in the

water rights they allege have been taken or damaged. The Defendant argues that the Plaintiffs only have protectable water rights in irrigation water, not the water under their land.

The Plaintiffs argue that they have a protectable property interest in the beneficial use of their irrigation water. The Plaintiffs claim that their irrigation water is no longer sufficient to irrigate their land because the Defendant's pumping of the groundwater has lowered the water table. Also, the Plaintiffs argue that they have a protectable property interest in the groundwater that subirrigates their land pursuant to *Riordan*.

First, the Plaintiffs do not have a protectable property interest in the groundwater pursuant to *Riordan*. The groundwater under each Plaintiffs' individual property is not secluded to their property only, but traverses under the property of others. Therefore, the *Riordan* holding does not apply.

Next, the Plaintiffs' takings claim fails for the same reason as their interference claim does. First, if the Court were to accept the Plaintiffs' takings claim, it would allow the Plaintiffs to control indirectly water which they could not control directly. Second, the Plaintiffs' irrigation water was beneficial for irrigation at the historic levels only because of reliance on the underground water. The Plaintiffs' irrigation water was sufficient to irrigate their land at historic levels only because it was supplemented with the groundwater in which the Plaintiffs had no right to.

Furthermore, there is no evidence that the Defendant has taken the beneficial use of the Plaintiffs' irrigation water. The Plaintiffs are free to use their irrigation water as they wish. There is no evidence that the Plaintiffs' irrigation water is not the same quantity and quality now, as it was before the Defendant started pumping the ground water.

It is unfortunate for the Plaintiffs that their water right is insufficient to sustain the use of their land in a way that they were accustomed to. But that was not caused by the Defendant taking the Plaintiffs water rights. The Defendant merely used the water in which it lawfully had appropriated. Consequently, the Plaintiffs have no protectable property interest in the groundwater and there is not taking. The Defendant's Motion is granted as to this issue.

### III. Negligence

Next, the Defendant argues that they owe no duty to maintain the ground water level at its historic level, and no duty to stop pumping water. Consequently, the Defendant argues that the Plaintiffs' negligence claim fails as a matter of law.

The Plaintiffs argue that the Defendant does owe them a duty to refrain from using their property in a way that injures their land. Alternatively, the Plaintiffs argue the Defendant has a duty to maintain the watercourse so as to prevent damage to their property under Utah Code Ann. § 73-1-8.

The Defendant has no duty to refrain from using the water that they have rightfully appropriated. Again, if the Court were to accept the Plaintiffs' negligence argument, it would allow the Plaintiffs to control indirectly water which they had no right to control directly. In effect, accepting the Plaintiffs' negligence argument would usurp the appropriation laws of this State.

The Defendant's Motion is granted as to this issue. The Defendant does not owe the Plaintiffs a duty to refrain from using water which the Defendant has rightfully appropriated and which the Plaintiffs have no right to.

#### IV. Statute of Limitations

The final issue is whether the Plaintiffs' three causes of action are barred because the applicable statute of limitations has run.

The Defendant argues that the Plaintiffs' causes of action are barred because the statute of limitations has passed. The Defendant argues that the longest statute of limitation for any of the three claims is the catchall, four year statute of limitation, found in Utah Code Ann. § 78B-2-307. The Defendant argues that the Plaintiffs knew of the alleged damage caused by pumping the water in the 1980's and 1990's. The Defendant argues that all three causes of action could have been brought when the Plaintiffs first observed that their problems with irrigation were associated with use of the Defendant's wells.

The Plaintiffs do not dispute that the four year statute of limitations applies. The Plaintiffs also do not dispute that they knew of the alleged damage caused by Defendant's pumping of the water in the 1980's and 1990's. Nonetheless, the Plaintiffs claim that the statute of limitations has not expired because the continuous tort rule applies.

Under the continuous tort rule, a statute of limitations begins to run on the date each wrong occurs or at the end of continuing wrongful conduct. 51 Am. Jur. 2d *Limitation of Actions* § 168.

The Plaintiffs have failed to carry their burden in explaining how and why the continuous tort rule applies to the three causes of action here. The Plaintiffs do not cite to, nor is the Court aware of, any Utah precedent that applies the continuous tort rule to the three claims the Plaintiffs assert here. Therefore, the Plaintiffs are arguing that new law should be applied. A party seeking to change the law must do the heavy lifting associated with moving the law. The

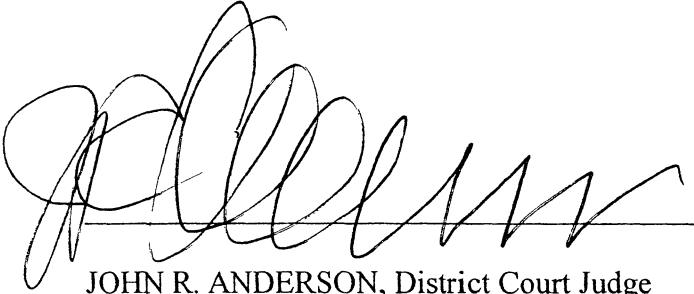
Plaintiffs merely cite to Utah cases where the continuous tort rule has been applied in other contexts. None of those cases applied the continuous tort rule to causes of action for interference with water rights, takings or negligence. Furthermore, the Plaintiffs do not explain how the continuous tort rule applies to each of their separate claims. The Plaintiffs merely lump them together, and fail to analyze whether the continuous tort rule applies, or why it should apply, to these causes of action.

The Plaintiffs do cite to Utah law that states: in determining whether the continuous tort rule should apply, courts are to look at the act that constitutes the wrongful conduct, not the harm resulting from the act. *Brieggar Properties, L.C. v. H.E. Davis & Sons, Inc.*, 52 P.3d 1133, 1135 (Utah 2002). However, it is clear from the *Brieggar* holding that in classifying a trespass as permanent or continuous, the courts look to the act, not the harm. *Id.* In other words, in determining whether the continuous tort rule should apply in a trespass situation, Utah courts look to the act, not the harm. The Plaintiffs' citation to this rule alone does not explain whether this rule does or should apply to the three claims the Plaintiffs assert here. Utah courts have clearly decided that the continuous tort rule can apply in trespass matters. What is not clear is whether the continuous tort rule should apply to causes of action for takings, interference with water rights and negligence. The Plaintiffs have failed to carry their burden to show why the continuous tort rule should apply to these causes of action.

Therefore, the continuous tort rule does not apply here. The Plaintiffs knew of their causes of action at least as far back as the early 1980's or 1990's. The complaint was filed in 2004. Therefore, the four year catchall statute of limitations has passed and the Plaintiffs' causes of action are barred.

Dated this 18 day of Nov., 2008.

BY THE COURT:



JOHN R. ANDERSON, District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 040800250 by the method and on the date specified.

METHOD	NAME
Mail	BRYAN C BRYNER Attorney PLA 215 S STATE STREET STE 600 SALT LAKE CITY, UT 84111
Mail	DAVID L CHURCH Attorney DEF 5995 S REDWOOD RD SALT LAKE CITY UT 84123
Mail	D. SCOTT CROOK Attorney PLA 215 S STATE ST STE 650 SALT LAKE CITY UT 84111
Mail	J. CRAIG SMITH Attorney PLA 215 S STATE ST STE 650 SALT LAKE CITY UT 84111
Mail	KATHRYN J STEFFEY Attorney PLA 215 S STATE ST STE 650 SALT LAKE CITY UT 84111

Dated this 24 day of Nov, 2008.

Chae  
Deputy Court Clerk

## **Addendum B**



1 J. Mark Ward, Esq. Utah Bar No. 4436 (Admitted pro-hac-vice)  
2 Utah Association of Counties  
3 5397 South Vine Street  
4 Murray, Utah 84107  
5 801-265-1331 Telephone  
6 801-265-9485 Fax

7 Aaron M. Waite, Esq., Nevada Bar No. 7947  
8 In Association with Hirschi Christensen, PLLC  
9 21 E. Mesquite Blvd.  
10 PO Box 3778  
11 Mesquite, Nevada 89024  
12 702-346-0820 Telephone  
13 801-322-0594 Fax

14 Attorneys for Petitioners Salt Lake County, Utah and  
15 Utah County, Utah

16 **SEVENTH JUDICIAL DISTRICT COURT**  
17 **WHITE PINE COUNTY, NEVADA**

18 SALT LAKE COUNTY, UTAH and UTAH  
19 COUNTY, UTAH,

20 Petitioners,

21 vs.

22 TRACY TAYLOR, P.E., Nevada State Engineer;  
23 STATE OF NEVADA, DIVISION OF WATER  
24 RESOURCES; DOES I through X; and ROE  
25 CORPORATIONS I through X, inclusive,

26 Respondents, and

27 SOUTHERN NEVADA WATER AUTHORITY,

28 Intervening Party in Interest.

29 CASE NO. <sup>cv</sup>0808100

30 DEPARTMENT NO. 2

31 **PETITIONERS' OPENING BRIEF IN**  
32 **SUPPORT OF PETITION FOR**  
33 **JUDICIAL REVIEW**

34 The undersigned affirms that this document does not  
35 contain the personal information of any person.

36 Petitioners SALT LAKE COUNTY, UTAH and UTAH COUNTY, UTAH (hereinafter  
37 "Petitioners"), by and through their attorney of record, J. Mark Ward, Esq. and Aaron M. Waite,  
38 Esq., submit the following opening brief in support of their petition for review of the Nevada  
39 State Engineer's July 9, 2008 "Interim Order No.1" denying Petitioners' application for  
40 interested person status in the matter of applications 54022 thorough 54030, inclusive, filed to

FILED

2009 JAN -5 PM 1:25

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BY *Shujan*  
DEPUTY

1 appropriate the underground waters of the Snake Valley hydrographic basin (195), White Pine  
2 County, Nevada.

3 **FACTS**

4 1. Petitioners are political subdivisions of the State of Utah.

5 2. Respondent Mr. Tracy Taylor, P.E. is the Nevada State Engineer.

6  
7 3. Respondent State of Nevada, Division of Water Resources is a governmental  
8 division of the State of Nevada.

9 4. In or about 1989 the Las Vegas Valley Water District (hereinafter "LVVWD")  
10 filed applications with the Nevada State Engineer (hereinafter "the State Engineer") to  
11 appropriate underground waters of the Snake Valley Hydrographic basin in White Pine County,  
12 Nevada (applications 54022- 54030 inclusive (hereinafter the "Snake Valley applications")).  
13 Intervenor Southern Nevada Water Authority ("SNWA") is the successor in interest to the Snake  
14 Valley applications. White Pine County is the county in which the matters affected or a portion  
15 thereof are situated.  
16

17  
18 5. The statutorily prescribed time period for filing a protest to a groundwater  
19 application is 30 days after the date of last publication of the notice of application. Nevada  
20 Revised Statutes ("NRS") 533.365(1).  
21

22 6. On or about May 28, 2008, the State Engineer gave written notice of a preliminary  
23 administrative hearing on the protested Snake Valley applications, scheduled for July 15, 2008.  
24 The State Engineer in the same notice established Monday, June 16, 2008 at 5:00 pm as the  
25 deadline to submit any request to be recognized as an interested person with respect to the Snake  
26 Valley Applications.  
27  
28

1           7.       Petitioners on June 9, 2008 and June 16, 2008 filed written requests with  
2 respondents requesting recognition as interested persons with respect to the subject groundwater  
3 applications. See Nevada Division of Water Resources Administrative Record on Appeal  
4 (“Record”) at 1-5.)

5           8.       Respondent Taylor found that petitioners timely filed their requests for interested  
6 person status. Interim Order No. 1 at page 2. (Record at 7)

7           9.       Petitioners requested interested person status in order to put on evidence at the  
8 State Engineer’s protest hearing on the Snake Valley applications, to show how granting the  
9 Snake Valley Applications and allowing a 50,000 acre feet per year inter-basin groundwater  
10 transfer could turn Snake Valley into another Owens Valley style dust bowl and seriously impact  
11 the down-wind air quality of in the 1.5 million person population centers of Salt Lake and Utah  
12 Valleys. (Record at 1-5)

13           10.      Petitioner Salt Lake County described to the State Engineer the reasons why it did  
14 not file a timely protest to the Snake Valley Applications:

15                   (1)      Salt Lake County is a political subdivision of the State of Utah and home  
16 to Utah’s capital Salt Lake City. Salt Lake County includes 764 square miles, is  
17 35 miles long north to south and 35 miles wide east to west. Salt Lake County has  
18 approximately 910,000 residents, and many thousands more commute to the  
19 County daily for work and other purposes.

20                   (2)      Though bounded by the Oquirrh Mountains to the west, Salt Lake County  
21 is situated in an air shed such that pollution and dust generated in Snake Valley is  
22 carried into the valleys of the Wasatch Front including the Salt Lake Valley.

23                   (3)      Salt Lake County includes part of the Great Salt Lake, which is the  
24 terminus of the Great Salt Lake desert groundwater flow system toward the Great  
25 Salt Lake Desert and Great Salt Lake itself.

26                   (4)      The Southern Nevada Water Authority (SNWA) is the successor in  
27 interest to the Las Vegas Valley Water District (LVVWD), the entity that filed  
28 Application Nos. 54022-54030.

1 (5) Approximately twenty years ago when LVVWD filed the subject  
2 groundwater applications for Snake Valley, little was known about air quality  
3 impacts from large scale groundwater pumping. Hence Salt Lake County, who  
4 owned no water rights in Snake Valley, did not feel it was necessary to file  
5 protests to the applications in the required time frame.

6 (6) Since then, experiences in other parts of the country with dust bowls  
7 caused by ground water pumping and the resulting air pollution, caused Salt Lake  
8 County to become concerned about the potential air quality impacts of  
9 groundwater pumping on the Snake Valley. If Application Nos. 54022-5430 are  
10 granted and significant groundwater pumping occurs in Snake Valley, that would  
11 likely cause the groundwater tables to drop significantly enough to destroy the  
12 groundwater dependent vegetation in Snake Valley, thus creating a dust bowl.

13 (7) Salt Lake County's concerns are amplified by the recent wildfire induced  
14 dust bowls in Millard County, Utah (in valleys situated due eastward from Snake  
15 Valley) which have produced wind-borne particulate matter pollution that has  
16 been carried to Salt Lake Valley, raising public health concerns for the  
17 approximately 1 million citizens who live and work there. Salt Lake County is  
18 concerned that the groundwater pumping that will occur in Snake Valley will  
19 produce a permanent dust bowl and provide a permanent source of wind-borne  
20 particulate pollution to be carried to the population centers of the Wasatch Front  
21 including Salt Lake Valley, causing chronic public health challenges for many  
22 citizens who live and work there.

23 (8) Salt Lake County has become so concerned about the potential air  
24 pollution impacts from SNWA's proposed Snake Valley pumping, that it has  
25 formally requested cooperating agency status in the BLM NEPA Environmental  
26 Impact Statement process on the SNWA groundwater project.

27 (9) Salt Lake County requests interested party status, in order to advise the  
28 hearing officer of the scientific basis for Salt Lake County's air quality concerns,  
and urge the hearing officer to protect the citizens of Salt Lake County against  
these potential impacts that will likely result if the subject groundwater  
applications are granted.

(Record at 3-5)

11. Petitioner Utah County described to the State Engineer the reasons why it did not  
file a timely protest to the Snake Valley Applications:

(1) Utah County is a political subdivision of the State of Utah, located 44  
miles south of Salt Lake City. With over 500,000 people, Utah County is Utah's  
second most populous county. The County seat is Provo. Utah County includes  
2,143 square miles.

1 (2) Utah County is believed to be situated in an air shed such that particulate  
2 pollution and dust that may be generated in Snake Valley is carried into the  
3 valleys of the Wasatch Front including Utah Valley.

4 (3) The Southern Nevada Water Authority (SNWA) is the successor in  
5 interest to the Las Vegas Valley Water District (LVVWD), the entity that filed  
6 Application Nos. 54022-54030.

7 (4) Approximately twenty years ago when LVVWD filed the subject  
8 groundwater applications for Snake Valley, little was known about air quality  
9 impacts from large scale groundwater pumping. Hence Utah County, who owned  
10 no water rights in Snake Valley, did not believe it was necessary to file protests to  
11 the Applications in the required time frame.

12 (5) Since then, experiences in other parts of the country with dust bowls  
13 caused by ground water pumping and the resulting air pollution, caused Utah  
14 County to become concerned about the potential air quality impacts of  
15 groundwater pumping on the Snake Valley. If the Applications are granted and  
16 significant groundwater pumping occurs in Snake Valley that would likely cause  
17 the ground water tables to drop significantly enough to destroy the ground water  
18 dependent vegetation in Snake Valley, thus creating a dust bowl.

19 (6) Utah County's concerns are amplified by the recent wildfire induced dust  
20 bowls in Millard County, Utah (in valleys situated due eastward from Snake  
21 Valley) which have produced wind-borne particulate matter pollution that has  
22 been carried to Utah County, raising public health concerns for the approximate  
23 half million citizens who live and work here. Utah County is concerned that the  
24 groundwater pumping that will occur in Snake Valley will produce a permanent  
25 dust bowl and provide a permanent source of wind-borne particulate pollution to  
26 be carried to the population centers of the Wasatch Front including Utah Valley,  
27 causing chronic public health challenges for many citizens who live and work  
28 here.

(7) Utah County has become so concerned about the potential air pollution  
impacts from SNWA's proposed Snake Valley pumping, that it has formally  
requested cooperating agency status in the BLM NEPA Environmental Impact  
Statement process on the SNWA ground water project.

(9) Utah County requests interested party status, in order to advise the hearing  
officer of the scientific basis for Utah County's air quality concerns, and urge the  
hearing officer to protect the citizens of Utah County against these potential  
impacts that will likely result if the Applications are granted.

(Record at 1-2)

1           12.     In SNWA's written opposition to Petitioners' requests for interested person status,  
2 SNWA did not deny or question any of the Petitioners' contentions quoted above. To the  
3 contrary SNWA expressly noted that

4                   The Utah Counties explain that they did not file timely protests  
5                   because, in 1989 when the groundwater applications were filed,  
6                   there was no information available about air quality impact from  
7                   large scale groundwater pumping.

8           See SNWA's Opposition (filed with the State Engineer) to Applications for Interested Person  
9 Status and Successor in Interest Status at page 6 (Petitioners' Supplemental Administrative  
10 Record ("Supp. Record") at 6-7).

11           13.     Nor did SNWA deny for purposes of Nevada Administrative Code ("NAC")  
12 533.100(2) that extreme circumstances prevented Petitioners from filing protests in a timely  
13 manner. Id. at 6-7. (Supp. Record at 6-7)

14           14.     Therefore, when Petitioners filed with the State Engineer their written response to  
15 SNWA's opposition, Petitioners had no reason to further address the question whether extreme  
16 circumstances prevented them from filing protests in a timely manner. See Petitioners' Response  
17 (filed with the State Engineer) to Opposition to Applications for Interested Party Status at pages  
18 1-9. (Supp. Record at 20-28)

19           15.     Thus the issue framed by SNWA's opposition and Petitioners' response was not  
20 whether extreme circumstances justified Petitioners' request for interested person status, but  
21 whether the air quality evidence Petitioners sought to put on was relevant and admissible at the  
22 upcoming Snake Valley protest hearing.

23           16.     The State Engineer's ruling denying Petitioners' interested person request  
24 bypassed the admissibility/relevance issue framed by SNWA and the Petitioners. The State  
25 Engineer opined merely that extreme circumstances did not justify Petitioners' failure to file a  
26  
27  
28

1 timely protest. See State Engineer's July 9, 2008 Interim Order No. 1 ("Interim Order No. 1")  
2 (Record at 19)

3 17. Air quality evidence never ran into a lack-of-relevance roadblock in the Spring  
4 Valley portion of the State Engineer's proceedings on SNWA's groundwater applications. To  
5 the contrary, evidence and information about air quality as it relates to the depletion of  
6 groundwater and impact on groundwater dependent vegetation and soil stability, was sufficiently  
7 significant to induce SNWA and the federal protestants in the Spring Valley hearings to negotiate  
8 for promises to protect against such air quality impacts and to submit that contract to the State  
9 Engineer for review and approval in the Spring Valley groundwater proceedings. See September  
10 8, 2006 Stipulation and Withdrawal of Protests entered into by SNWA and various Federal  
11 Agency protestants in the Spring Valley portion of the State Engineer's proceedings on SNWA's  
12 groundwater applications, which Stipulation is listed as an exhibit in the State Engineer's list of  
13 hearing exhibits in the Spring Valley hearing (hereafter "Spring Valley Stipulated Agreement")  
14 (Supp. Record at 29-75).

15 18. The Spring Valley Stipulated Agreement states in relevant part:

16  
17 The common goals of the Parties are 1) to manage the development  
18 of groundwater by SNWA in the Spring Valley HB in order to  
19 avoid unreasonable adverse effects to wetlands, wet meadow  
20 complexes, springs, streams, and riparian *and phreatophytic*  
21 *[ground water dependent] communities (hereafter referred to*  
22 *as Water-dependent Ecosystems)* and maintain the biological  
23 diversity and ecological health of the Area of Interest<sup>1</sup> over the  
24 long term, . . . ."

25 Id. at 4 (emphasis added). (Supp. Record at 32)

26 The common goals of the Parties is to manage the development of  
27 groundwater by SNWA in the Spring Valley HB to avoid an  
28 unreasonable degradation of the scenic values of, and visibility

---

<sup>1</sup> The "Area of Interest" agreed to by SNWA and the Federal Agencies is a vast that stretches well into Utah. See Figure 1 to Stipulated Agreement (Supp. Record at 48).

1 from Great Basin National Park *due to a potential increase in*  
2 *airborne particulates and loss of surface vegetation which may*  
3 *result from groundwater withdrawals by SNWA in the Spring*  
4 *Valley HB.*

5 Id. at 5 (emphasis added). (Supp. Record at 33)

6 Further, it is in the Parties' best interests to cooperate in the  
7 collection and analysis of additional information regarding the  
8 relationship between the development of groundwater resources,  
9 loss of surface vegetation, *drying of surface soils, increased*  
10 *susceptibility of land surfaces to wind erosion, and the long-term*  
11 *avoidance of unreasonable degradation of the scenic values of,*  
12 *and visibility from, Great Basin National Park.*

13 Id. at 5-6 (emphasis added). (Supp. Record at 33-34)

14 The DOI Bureaus hereby expressly agree to withdraw their protests  
15 to the SNWA Applications and agree that the Nevada State  
16 Engineer may rule on the SNWA Applications based upon the terms  
17 and conditions set forth herein.

18 Id. at 6. (Supp. Record at 34)

19 The Parties agree that a copy of this Stipulation shall be submitted  
20 to the Nevada State Engineer at the commencement of the  
21 administrative proceedings scheduled to begin on September 11,  
22 2006. At that time, the Parties shall request on the record at the  
23 beginning of the scheduled proceeding that the State Engineer  
24 include this Stipulation and Exhibits A and B as part of the permit  
25 terms and conditions in the event that he grants any of the SNWA  
26 Applications in total or in part.

27 Id. at 9. (Supp. Record at 37)

28 19. The Court in denying respondents' and SNWA's motions to dismiss, has declared  
that it has jurisdiction over the present matter pursuant to NRS 533.450.

20. If allowed interested person status at the Snake Valley hearing, Petitioners would  
look to and rely upon the expert opinion of hydrogeologist Timothy Durbin, a recognized expert  
on the predicted effects of groundwater pumping in Snake Valley and other nearby valleys.

Petitioners believe and proffer it is Mr. Durbin's opinion that Owens Valley California is the



1 model of what to expect in Snake Valley should the groundwater pumping proposed by SNWA  
2 occur there. In other words, the pumping proposed by SNWA will lower the water table so  
3 much, that it will kill off groundwater dependent vegetation, thus causing an Owens Valley style  
4 dust bowl. To further explain this proffer of Mr. Durbin's testimony and not intending it as  
5 evidence, Petitioners attach as Exhibit A hereto a copy of a Las Vegas Sun June 29, 2008 article  
6 reporting on Mr. Durbin reputed assessment of the SNWA groundwater project and its  
7 propensity to recreate another Owens Valley style dust bowl.  
8

9 21. Petitioners, if allowed interested person status, will also request the Utah Division  
10 of Environmental Quality and related air quality offices to assess and prepare a report on the  
11 potential for increased particulate matter pollution in Salt Lake and Utah Counties caused by the  
12 SNWA caused dust storm in Snake Valley that Mr. Durbin is reputed to anticipate. Petitioners  
13 will submit this report as part of its overall presentation as interested persons in the Snake Valley  
14 hearing.  
15  
16

#### 17 **RELEVANT STATUTES AND ADMINISTRATIVE RULES**

18 NRS 533.365 (1) states in relevant part:

19 Any person interested may, **within 30 days after the date of last publication of**  
20 **the notice of application**, file with the State Engineer a written protest against the  
21 granting of the application . . . .

22 (Emphasis added)

23 NRS 533.370(5) states in relevant part:

24 Except as otherwise provided in subsection (1), where there is no unappropriated  
25 water in the proposed source of supply, or where its proposed use or change  
26 conflicts with existing rights or with protectible interests in existing domestic wells  
27 as set forth in NRS 533.024, **or threatens to prove detrimental to the public**  
28 **interest**, the State Engineer shall reject the application and refuse to issue the  
requested permit.

(Emphasis added)

1 NRS 533.370(6) states:

2 In determining whether and application for an interbasin transfer of groundwater  
3 must be rejected pursuant to this section, the State Engineer shall consider:

- 4 (a) Whether the applicant has justified the need to import the water from  
5 another basin;
- 6 (b) If the State Engineer determines that a plan for conservation of water is  
7 advisable for the basin into which the water is to be imported, whether the  
8 applicant has demonstrated that such a plan has been adopted and is being  
9 effectively carried out
- 10 (c) **Whether the proposed action is environmentally sound as it relates to**  
11 **the basin** from which the water is exported;
- 12 (d) Whether the proposed action is an appropriate long-term use which  
13 will not unduly limit the future growth and development in the basin  
14 from which the water is exported; and
- 15 (e) Any other factor the State Engineer determines to be relevant.

16 (Emphasis added)

17 NRS 533.450 states in relevant part:

- 18 (1) Any person feeling himself aggrieved by **any order or decision of the**  
19 **State Engineer**, acting in person or through his assistants or the water  
20 commissioner, affecting his interests, when the order or decision relates to  
21 the administration of determined rights or is made pursuant to NRS  
22 533.270 to 533.445 inclusive, or NRS 533.481, 534.193, 535.200, or  
23 536.200, may have the same reviewed by a proceeding for that purpose,  
insofar as it may be in the nature of an appeal, which must be initiated in  
the proper court of the county in which the matters affected or a portion  
thereof are situated . . . .

24 (Emphasis added)

25 NAC 533.100 states:

- 26 (1) A person who wishes to be recognized by the state engineer as an interested  
27 person must file a written request for recognition with the office of the state  
28 engineer and pay a fee in the amount prescribed by NRS 533.435 for filing a  
protest, at least 30 days before the hearing or prehearing conference at which he  
wishes to be recognized.

1 (2) The state engineer will grant the request for recognition upon a showing that  
2 extreme circumstances prevented the person from filing his own protest in a  
3 timely manner.

4 (3) An interested person may only testify on matters of law, broad public issues or  
5 matters concerning how any action of the state engineer with regard to a particular  
6 application may affect the operation of a specific water transportation and supply  
7 project.

8 (Emphasis added)

### 9 ARGUMENT

#### 10 Factual History and Basis for Reversal

11 The standard for becoming an interested person in a proceeding before the State Engineer  
12 is a two part standard. First, the applicant must show “that extreme circumstances prevented the  
13 person from filing his own protest in a timely manner.” NRS 533.100(2). Second, the interested  
14 person may “testify only on matters of law, broad *public policy* issues or matters concerning how  
15 any action of the State Engineer with regard to a particular application may affect the operation  
16 of a specific water transportation and supply project.” (Emphasis added).  
17

#### 18 A. Extreme Circumstances – No Actual Notice

19 SNWA’s opposition to the Petitioners’ application completely ignored the “extreme  
20 circumstances” provision, claiming only that the Petitioners’ concerns about air quality impacts  
21 were irrelevant to the proceeding before the State Engineer. By contrast, the State Engineer’s  
22 Order focused only on the extreme circumstances provision and ignored the relevance of the  
23 public policy issues involving the applications associated with environmental impacts, including  
24 air quality.  
25

26 The applications were filed in 1989. Nineteen years later in 2008, the Petitioners cannot  
27 unequivocally state that it did or did not receive notice in 1989 or otherwise learn of the Snake  
28

1 Valley Applications, nor can the State Engineer unequivocally state that Petitioners did receive  
2 such notice or otherwise learn of the Snake Valley Applications. It is extremely unlikely that  
3 actual notice was either sent by the State Engineer or otherwise received by either Salt Lake  
4 County or Utah County, however, because NRS 533.095 and 533.110 only require the State  
5 Engineer to give notice to persons claiming rights in or to the waters involved in any particular  
6 adjudication proceeding. If the State Engineer maintains that notice was in fact given to the  
7 Petitioners, then notice would have been given for a reason *other* than a claim to water rights in  
8 the basin and would acknowledge the Petitioners' status as an interested party.  
9

10 An "interested person" is defined as "a person who fails to file a protest in a timely  
11 manner but who is *recognized* by the State Engineer, pursuant to NAC 533.100, as a person  
12 *entitled to testify at the hearing.*" (Emphasis Added) NRS 533.040. By implication, an  
13 interested person may not claim a right to water, but may demonstrate an interest in public issues  
14 or matters concerning a particular application. An interested party may not, therefore, receive  
15 actual notice as a claimant of water rights.  
16  
17

18 The "extreme circumstances" preventing the Petitioners from filing a timely protest in  
19 this matter are two fold: The first extreme circumstance was the lack of actual notice. The  
20 second extreme circumstance was alluded to in Petitioners' letters requesting interested person  
21 status, when they stated that even if the Petitioners were aware of the petitions, the potential  
22 impacts of groundwater pumping on soil stability and particulate matter on air quality were not  
23 well understood at the time and the public interest issues were not apparent. It should be noted  
24 that NAC 533.010.1(b) acknowledges that the adjudication provisions "must be *liberally*  
25 *construed* to secure the just, speedy and economical determination of all issues presented to the  
26 state engineer." (Emphasis added).  
27  
28

1 At the time of the preliminary hearing on July 15, 2008 the hearing officer announced that  
2 the evidentiary hearing on the applications will not occur until "sometime in the fall of 2009."  
3 NRS 533.130.1 provides that "any person interested in the water of any stream upon whom no  
4 notice shall have been had of the pendency of proceedings for the determination of the relative  
5 rights to the use of water of such stream system, and who shall have no actual knowledge or  
6 notice of the pendency of the proceedings, may, at any time prior to the expiration of six months  
7 after the entry of the determinations of the State Engineer, file a petition to intervene in the  
8 proceedings." Although apparently intended to apply to claimants, this provision is further  
9 evidence of the ability to deviate from a strict application of the time provisions. Allowing the  
10 Petitioners to participate as an interested party will not disadvantage the other parties or delay the  
11 adjudication proceeding.  
12

13  
14 B. Public Policy – Air Quality  
15

16 The very nature of an inter-basin transfer of groundwater involves broad public issues.  
17 An interested person may testify on broad public issues with regard to a particular water  
18 transportation or supply project. *See*, NAC 533.100(3).  
19

20 In considering an application for an interbasin transfer of groundwater, the State Engineer  
21 *shall* consider whether the proposed action is "environmentally sound as it relates to the *basin*  
22 *from which the water is exported.*" (Emphasis Added) NRS 533.370 (6)(c). The State Engineer  
23 also has the authority to require an environmental or other study prior to a final determination on  
24 an application. *See*, NRS 555.368.  
25

26 Petitioners are concerned that the diversion of groundwater from Snake Valley will lower  
27 the water table and eradicate phreatophytic vegetation resulting in soil instability in the basin  
28 from which the water is exported. Soil instability may create dust conditions in the basin of such

1 a magnitude, that it will aggravate the already challenged particulate air quality conditions in the  
2 in the nearby valleys occupied by the Petitioners. The public policy at issue is, therefore,  
3 whether the project is environmentally sound with regard to its' potential impact on conditions in  
4 the basin from which the water is exported.

5 The State Engineer previously considered the issue of what constitutes "environmentally  
6 sound" in the Spring Valley determination (Ruling 5726) as follows:  
7

8 While there are no definitions [in the statutes] of what environmentally sound is,  
9 there are examples of what environmentally sound is not, such as the Owens  
10 Valley project in California. The State Engineer believes that the legislative intent  
11 of NRS Section 533.370(6)(c) was to protect the natural resources of the basin of  
12 origin and prevent a repeat of the Owens Valley while at the same time allowing  
13 for responsible use of the available water resources by the citizens of Nevada.

14 22. In the Spring Valley proceedings, air quality was determined to be a substantial  
15 public policy matter. SNWA negotiated an agreement with various federal agencies to monitor  
16 and mitigate against regional air quality impacts caused by the proposed action's depletion of  
17 groundwater dependent vegetation. That agreement was incorporated in the State Engineer's  
18 ruling on the Spring Valley matter.

19 23. Thus the Petitioners seek interested party status to advise the State Engineer of the  
20 scientific basis for the Petitioners' concerns of the potential impacts of the applications on the  
21 natural resources in the basin of origin. Air quality has previously been determined to be a  
22 substantial public policy matter. Allowing the Petitioners to participate as an interested party  
23 will not disadvantage the other parties or delay the adjudication proceeding scheduled for the fall  
24 of 2009  
25

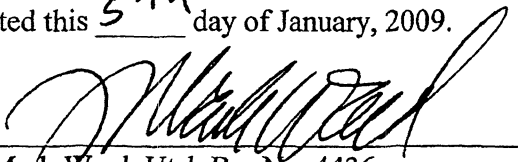
26 WHEREFORE, Petitioners pray that they be awarded the following relief:

27 A. For reversal of the State Engineer's denial of Petitioners' request for interested  
28 person status with respect to SNWA's Snake Valley Applications Nos 54011-54030 inclusive;

1 B. For an order requiring the State Engineer to allow Petitioners to participate as  
2 interested persons in the protest hearing on SNWA's Snake Valley Applications Nos 54011-  
3 54030 inclusive; and

4 C. For such other and further relief as the Court deems appropriate.

5 Dated this 5<sup>th</sup> day of January, 2009.

6  
7   
8 J. Mark Ward, Utah Bar No. 4436  
9 Utah Association of Counties  
10 5397 South Vine Street  
11 Murray, Utah 84017  
12 801-265-1331 Telephone  
13 801-265-9485 Fax

14 Aaron M. Waite, Esq., Nevada Bar No. 7947  
15 In Association with Hirschi Christensen, PLLC  
16 21 E. Mesquite Blvd.  
17 PO Box 3778  
18 Mesquite, Nevada 89024  
19 702-346-0820 Telephone  
20 801-322-0594 Fax

21 Attorneys for Petitioners Salt Lake County, Utah and Utah County, Utah  
22  
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**CERTIFICATE OF SERVICE**

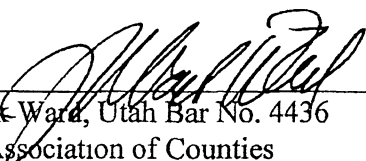
Pursuant to NRCP 5(b), I certify that on this date, I caused to be served a true and correct copy of the foregoing document on the following by U.S. Postal Service, postage prepaid:

Tracy Taylor, State Engineer of Nevada  
Division of Water Resources  
901 South Stewart Street, Suite 2002  
Carson City, Nevada 89701

Bryan Stockton  
Deputy Attorney General  
Nevada Attorney General's Office  
100 North Carson Street  
Carson City, Nevada 89701-4717

Paul G. Taggart, Esq.  
TAGGART & TAGGART, LTD.  
108 North Minnesota Street  
Carson City, Nevada 89703

Dated this 5<sup>th</sup> day of January, 2009.

  
\_\_\_\_\_  
J. Mark Ward, Utah Bar No. 4436  
Utah Association of Counties  
5397 South Vine Street  
Murray, Utah 84017  
801-265-1331 Telephone  
801-265-9485 Fax



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**JUDICIAL REVIEW** does not contain the Social Security Number or Taxpayer Identification Number of any person.

Dated this 5 day of January, 2009.

Aaron M. Waite, Esq., Nevada Bar No. 7947  
In Association with Hirschi Christensen, PLLC  
21 E. Mesquite Blvd.  
PO Box 3778  
Mesquite, Nevada 89024  
702-346-0820 Telephone  
801-322-0594 Fax

Attorneys for Petitioners Salt Lake County, Utah and Utah County, Utah

# Exhibit A

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## LAS VEGAS SUN

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Quenching Las Vegas' thirst: Part 5:

# 'Owens Valley is the model of what to expect'

**As Las Vegas policymakers eye the water beneath Nevada, a scientific debate erupts over the possible effects**



Sam Morris

Hydrogeologist Timothy Durbin was recruited by the Southern Nevada Water Authority in 2001 to help predict the effects of ground water pumping in the Great Basin Desert. The former U.S. Geological Survey employee found pumping could result in a significant drop in the area's water table.

**By Emily Green, Las Vegas Sun**

Sun, Jun 29, 2008 (2 a.m.)

The raw glory of the Mojave and Great Basin deserts is difficult to imagine from the paved fantasyland of Las Vegas.

As the road wends north of the city, past sun-soaked bluffs into Pahrangat Valley, there is what looks like a river but are in fact four spring-fed lakes running for some 40 miles.

Audubon himself would weep at the birdlife working this watering spot on the Pacific flyway. Bald eagles ride the breezes. Herons skid across the water.

Proceed across huge desert valleys and the land rises. Yucca gives way to pine, the hot desert to cold, Paiute territory to Shoshone.

This is the land of nut gatherers.

Three hours into the drive north from the Las Vegas offices of the Southern Nevada Water Authority, there is no missing the entry to Spring Valley. Farms begin to dot the valley floor, alfalfa fields meld with bright green carpets of greasewood and rabbitbrush.

By the time Wheeler Peak appears, the conifers rival those of the Sierra. In Spring Valley, one type of cedar is thought unique on Earth. There are bats, owls, woodpeckers, rabbits, elk, mountain lions.

Yet throughout the Great Basin Desert, the fecundity persists on the slimmest of margins.

It survives because, after spring thaw, not all of the mountain snowmelt is immediately absorbed by the desert.

Rather, springs, creeks and ponds form, all held above ground by pressure from more water below.

This water below is the Great Basin aquifer, a vast pool dating back to the ice age.

There could be no more enticing prospect for a desert city like Las Vegas than these millions of sleeping gallons.

But if the aquifer is pumped too hard, the system of springs, streams and lakes supporting life above ground could disappear.

At issue, then, was could, and should Las Vegas attempt to get this water.

In considering a pipeline to tap the aquifer, Las Vegas calculated how much water flowed into the valleys of the Great Basin each year, then how much went legally unclaimed.

In 1989, Las Vegas filed applications with the state engineer for what was thought to be the rights to half the available water in Nevada — more than 800,000 acre-feet from some 30 valleys.

When, more than a decade later, the Southern Nevada Water Authority considered how to turn the massive block of claims into real water, the plan was pared down to six key valleys in Clark, Lincoln and White Pine counties, spanning the terrain north of Las Vegas, from hot desert to cold.

This time Las Vegas sought roughly 200,000 acre-feet a year of water, enough to serve a million people.

The pipeline length shrank from more than 1,000 miles to 285 miles.

It could always sprout arteries later.

As a next step, the state engineer would need to hold hearings in which Las Vegas would make its case for the water and protesters would appear with their objections.

The state engineer's decisions would not come in a single finding. Rather, since 2002, he has been scrutinizing applications valley by valley, or several valleys at a time. Each green light he gives adds water to the pipeline.

One hearing over one valley had make-or-break status for the pipeline plan.

Of the 200,000 acre-feet of water a year sought by Las Vegas, roughly 90,000 acre-feet would ideally come from Spring Valley, one of the basins receiving spring snowmelt from the snow-studded queen of Nevada ranges, Wheeler Peak.

Las Vegas was seeking what it estimated to be all legally unclaimed water in Spring Valley.

The Spring Valley hearing began on Sept. 11, 2006. The two weeks of testimony that followed were most remarkable for what wasn't said.

...

Making the case in 2006 that hot desert Nevada needed the cold desert's water was not hard. Seventy percent of Nevadans lived in or around Las Vegas.

What was difficult was demonstrating the cold desert had water to spare.

Arguing that it didn't would be the Princeton-educated eminence grise of American ground water, John Bredehoeft, whose title at the U.S. Geological Survey in the 1970s and '80s was no less than Regional Hydrologist Responsible for Water Activities in the Eight Western States.

Bredehoeft had been aware of Las Vegas pipeline plan from its inception.

He never liked it.

Bredehoeft was going to appear at the Spring Valley hearing as an expert witness for rural communities protesting the Las Vegas pipeline.

As he explains it, there is no water to spare for Las Vegas without disrupting the equilibrium between water flowing in from snowmelt and water taken out every year by ranchers, plants and animals.

Las Vegas managed to insert itself into this equation because under Nevada water law, only some of the Great Basin's traditional water users are legally entitled to it.

Towns are, farms are, mines are, but under increasingly antiquated definitions developed in the first half of the last century to do with "beneficial use," most of the native flora isn't.

Following this logic, water used by plants such as the cold desert's signature shrub, greasewood, may be legally diverted hundreds of miles away to Las Vegas.

But by the time Las Vegas was going for greasewood's share of Spring Valley's water in 2006, the law of "beneficial use" was at loggerheads with a host of other modern laws protecting the environment.

Greasewood belongs to a class of plants called "phreatophytes," named because their long roots are capable of reaching deep underground to access the water table.

As Bredehoeft sees it, if Las Vegas sinks its wells and the roots of the phreatophytes continue to chase the descending water table, that means Las Vegas won't be taking the water from the greasewood but from storage in the aquifer.

"Taking water out of storage," he says, "is mining."

Mining ground water is illegal in Nevada.

Mine enough of it and the water table can drop for hundreds of miles around. Springs stop flowing, streams disappear, plants and animals dependent on them die.

So the logic goes: Target the phreatophytes whose water you intend to take, and don't allow them to compete for water.

Pump hard. Kill them fast. Then let the system return to equilibrium so what water comes in from snowmelt equals what is taken out by Las Vegas pumps, and the water table doesn't fall inexorably.

But this weeds-for-water logic becomes a problem when greasewood serves an important function above and beyond offering forage to deer and cattle.

Phreatophytes prevent dust storms.

Spring Valley sits at the foot of Mt. Wheeler. In 1986, then-Congressman Harry Reid led Wheeler's transformation into Great Basin National Park, in no small part because of Spring Valley's pristine air.

Without a high water table saturating the valley floor and the long roots of phreatophytes anchoring the soil, Spring Valley could become the kind of dust bowl created by Los Angeles after William Mulholland began pumping Owens Lake in 1913.

Once Los Angeles drained the lake in California's high Sierra, it began taking Owens Valley ground water. By the 1980s, the wasteland created by Los Angeles had given dust a new common name.

*The vile mix of fine sand, arsenic and assorted metals billowing out of Owens Valley became the single worst source of "particulate pollution" in the nation, registering at 23 times the level allowed by federal health standards. It filled local emergency rooms with asthmatic children. It traveled hundreds of miles, clouding three national parks and repeatedly shutting down China Lake Naval Weapons Center.*

Owens Valley was not the image the keepers of Nevada's only national park wanted on their postcards.

Las Vegas found itself putting on two faces.

It was applying to the state engineer of Nevada to seize the greasewood's share of Spring Valley's water.

But in 2004, in seeking passage for the pipeline across federal land, Mulroy had gone before the U.S. Senate Committee on Energy and Natural Resources and promised, "An Owens Valley cannot and will not occur in Nevada."

• • •

In the 1980s, when ground around wells in the Las Vegas Valley had collapsed in feet, not inches, from pumping, geologist Terry Katzer got an idea.

He was in the Nevada office of the Geological Survey, one of the many western research outposts then overseen by John Bredehoeft.

He asked Bredehoeft: Could Great Basin ground water be moved south to Las Vegas?

Not without mining, Bredehoeft responded.

Katzer declined to speak for this series, but Bredehoeft remembers their relationship at the Geological Survey as strained.

As relations soured, Katzer quit and took the idea for pumping the Great Basin to a more receptive audience: the Las Vegas Valley Water District.

In 1985, Katzer became the district's director of research and in 1986, he hired Kay Brothers, a hydrologist with a bachelor's degree in engineering from the New Mexico Institute of Mining and Technology.

Brothers' background was helping the petroleum industry comply with environmental regulations. As Katzer's pipeline plan was set in motion in 1999, this was the skill most needed by Mulroy and her newly formed Southern Nevada Water Authority.

Brothers became Mulroy's director of resources and by 2002, she was named deputy general manager. Second to Mulroy, Brothers became the face of the pipeline project.

Katzer began working for Brothers, his former assistant.

But in the new administrative setup, if the politics lay with Mulroy and Brothers, the science remained with Katzer and his old network of colleagues out of the Nevada office of the U.S. Geological Survey.

If the Great Basin aquifer were to become a major new water supply for Las Vegas, Brothers and Katzer would need someone capable of modeling the effects of pumping.

Katzer turned to his former boss at the Geological Survey's Nevada office, hydrogeologist Timothy Durbin. Katzer had

been Durbin's principal assistant. Durbin, in turn, reported to Bredehoeft.

Between the time the pipeline idea first horrified Bredehoeft in the 1980s and the moment that his former No. 2 man in Nevada began recruiting his former No. 1 to work on it in 2001, Bredehoeft had left the federal agency and opened a private hydrology practice.

So had Durbin, who had done some consulting jobs for Katzer and Las Vegas.

Durbin was intrigued by the Katzer plan: Here was a chance to come into a massive new project and design it in a way that you could manage the effects.

If, Durbin wondered, that were possible. And it was a mother of an if.

As Durbin joined Katzer and both men looked over the Las Vegas pipeline plan, Durbin saw exactly what Bredehoeft had tried to warn Katzer about those years earlier.

The plan was fraught with risks.

The Great Basin comprises many valleys. Underlying them, the prehistoric jumble of rock and sand is often so permeable that ground water can flow hundreds of miles from valley to valley.

This meant the effects of pumping one valley could conceivably be felt hundreds of miles away.

They would clearly have to avoid pulling water from the sources feeding the four lakes of the Pahranaagat Valley, the Muddy River and other places protected by the U.S. Park Service, U.S. Fish and Wildlife and Nevada environmental programs.

The best target for Las Vegas was the lush and lovely Spring Valley, 100 miles long and roughly 12 miles wide. It not only received the bonanza snowmelt of Wheeler Peak, but the aquifer's flow also seemed relatively contained there.

But they knew there would be sacrifices:

- Depleting spring flows.
- Denuding hundreds of thousands of acres of federally owned grazing and recreational land of its native flora and fauna.
- Supplanting phreatophytes with the nonnative and invasive cheat grass, which by late spring is so dry it is akin to setting tinder at the feet of Nevada's fire-prone alpine ranges.
- Sullyng air around Great Basin National Park.
- Unseating ranchers who were direct descendants of Nevada's earliest pioneers.

According to Durbin, after years of arguing with Bredehoeft, Katzer too began to see his point.

"There is no free water."

But to Durbin's mind, "Las Vegas was not going to go away."

He knew he could not create public policy. But he could help inform it.

As a scientist, he would lay out the options and the effects, and then the public could decide whether it was willing to make the sacrifices necessary for Las Vegas to tap Great Basin water.

"It's a societal issue," he says. "It's a value judgment. What's valuable and what's not?"

The sacrifices implicit in the plan for rural Nevada were so great, particularly for its watery heart of White Pine County, that Durbin half expected Las Vegas to hold them up as proof that Southern Nevada couldn't possibly tap this source and Las Vegas instead deserved more Colorado River water.

Except by the close of 2003, the pipeline's inevitable effects weren't being used to argue for an alternate source of water.

Instead, as Durbin saw it, in pushing the project forward for an ever-thirstier Las Vegas, the Southern Nevada Water Authority began hiding possible outcomes.

According to Durbin, pressure to downplay and even deny the project's effects started to come in 2003 in meetings with Paul Taggart, the attorney representing Las Vegas' claims before the state engineer.

The first glimpse of it involved relatively minor hearings concerning a spangle of wells that Las Vegas wanted to sink in Clark and southern Lincoln counties.

According to Durbin, Taggart wanted him and Katzer to testify "no impacts."

"Neither of us felt we could do that," Durbin says.

They sent Taggart a memo laying out a strategy, emphasizing the need to kill off phreatophytes for the Las Vegas pipeline plan.

First, Las Vegas could take the pipeline to relatively uninhabited "dry" valleys of Lincoln County.

This would be stopgap. There weren't enough greasewood-type plants here whose water they could legally intercept.

They would be mining.

But if they used shallow pumps, Durbin calculated, they could spread out effects in space and time in such a way as to be able to stop pumping short of the point that Las Vegas dried up the White and Muddy rivers and the precious lakes of Pahranaagat.

This would buy time to get to the more verdant "wet valleys" of the northern cold desert, where mining wouldn't be such a worry.

There were plenty of phreatophytes in Spring Valley to part from their water.

Once Las Vegas got into Spring Valley, Katzer and Durbin recommended buying water rights from ranchers willing to sell. This would preempt protests.

Then, they recommended, Las Vegas should pump hard to quickly kill off greasewood communities. With Spring Valley on line, they could then ease up in "dry" Lincoln County in time to spare Pahranaagat Valley and the White and Muddy rivers.

Their plan — effects and all — on record within the water authority, Durbin and Katzer worked on the model and pumping strategy throughout 2004 and 2005.

But in the background, news that rural ranchers were mounting a rousing defense for Spring Valley's water played incessantly in the Las Vegas press.

To quell the uproar, Mulroy and Brothers began arguing to reporters and in public meetings in White Pine County that they could pump Spring Valley — and save the greasewood, save the rabbitbrush, save the meadows, even save the alfalfa and cattle ranches.

In other words, they were pledging to save the very things Katzer and Durbin worked so hard figuring out how and where and when to sacrifice.

As the Spring Valley hearing approached in September 2006, after five years' work, Durbin's model was finally ready to simulate pumping for the full 90,000 acre-feet of water being sought by Las Vegas. The result? The level of the water table underlying Spring Valley would drop on the order of 200 feet or more over 75 years.



This would, as Durbin and Katzer had envisioned, indeed kill off Spring Valley's phreatophytes.

It would also end traditional ranching in the valley.

And with no water saturating the top soil and no roots to anchor it, the parched earth of Spring Valley could indeed become a new Owens Valley.

...

In 1989, the Department of Interior agencies that manage most of the land in Nevada — the Bureau of Land Management, the U.S. Park Service, U.S. Fish and Wildlife Service and Bureau of Indian Affairs — had been among the most forceful opponents of the original Las Vegas applications.

As the Spring Valley hearing approached in September 2006, Mulroy and Brothers still faced their opposition.

During a prehearing evidence exchange between Las Vegas' attorneys and the opponents, the U.S. Park Service received Durbin's model and ran it.

The Park Service hydrologist came up with the same result as Durbin.

This could have been a brutal embarrassment for Mulroy and Brothers, except on the last working day before the Spring Valley hearing began, all four Interior agencies, including the Park Service, withdrew their protests.

Swallowing hard, the Interior agencies instead agreed to take places on committees to monitor the effects of pumping.

Representatives of almost every agency to sign the agreement explained the logic this way: By settling, they were assured some measure of control and could work with Las Vegas toward its much-vaunted goal of little or no damage. But if they protested and lost, they had nothing.

Durbin, the man trained as a scientific adviser to these very Interior agencies, didn't think monitoring would work.

"I'm going to guess that even with the monitoring, there will be long-running disputes with one side saying, 'OK, something happened in the mountains. Was it caused by pumping by the Southern Nevada Water Authority, or did a cow drink all the water, or was it low precipitation?' " he says.

The agreement between federal agencies and the water authority meant the Park Service's running of Durbin's pumping model (and the result being the same finding of a drop of 200 feet or more in the water table), could not be used in the hearing before the state engineer, either.

So, as the Spring Valley hearing commenced, the man with the most damning case against the Las Vegas pumping plan was Timothy Durbin, the Southern Nevada Water Authority's own expert witness.

...

Almost three years after the meetings that prompted their pumping plan memo of 2003, Katzer and Durbin were back consulting with water authority attorney Paul Taggart over how to mount Las Vegas' case for the all-important Spring Valley hearing.

Taggart would not comment for this story.

However, according to Durbin, he and Terry Katzer again came under pressure from a water authority engineer and Taggart to soft-pedal the project's effects.

"At that point, Terry was agreeing with me: That's nonsense," Durbin says.

Shortly after preparation for the hearing began with Taggart, Durbin got a call from Katzer.

He had just quit.

Katzer was the one who brought the idea of the Las Vegas pipeline to the water authority in the first place, and then hired Durbin.

But Durbin said he could not follow Katzer's move in quitting.

In five years as a consultant to the Southern Nevada Water Authority, Durbin had accepted what he reckons was roughly \$1 million in consulting fees.

The point of retaining him had been to generate a model for the state engineer. He could not betray his client and walk out just before the first key hearing.

That said, relations between him and his client could not have been worse.

Still, Taggart had little option but to put a now-hostile Durbin on the stand.

In a series of smaller hearings leading up to the Spring Valley one in September 2006, the state engineer had demanded modeling.

As Durbin took the stand before the state engineer on Sept. 14, 2006, he had decided that if anyone asked flat out whether he had run his model and what the results were, he would give the answer.

If not, he wouldn't.

Durbin was not questioned by Taggart, a man guaranteed to make him bristle, but by another attorney for Las Vegas, Michael Van Zandt.

In more than an hour of detailed testimony, Van Zandt led Durbin on a journey through the minutiae of how models are created.

"Identifying data gaps ... version two of that model ... just an evolution from version one ... simulation of faults ... efficient equation solvers ... meshes for individual compartments ..."

"It was stultifying," says Matt Kenna, a lawyer from the Western Environmental Law Center representing the protesters. "The incredible irrelevant detail."

Finally, Van Zandt led Durbin home to the single point Las Vegas wanted to land about modeling: The uncertainty of any result that might embarrass it.

Questioned about margins of error, Durbin responded with yet more mind-numbing detail: "The plus standard error of the estimated water level measurements ... are plus or minus 50 feet ... 30 percent chance that the estimated ground water levels are more than 50 feet off what the true level would be ..."

When at last the state engineer himself asked Durbin how the model could be used to predict the future of the Spring Valley aquifer if pumping began, Durbin brightened and quickly reeled off some simple steps. Van Zandt — seeing where this was going — quickly interjected to the state engineer, "There will be other witnesses who will probably answer that question for you."

In cross examination, Kenna had no idea of the hostility between Las Vegas' attorneys and their star witness, or how accommodating Durbin might have been if asked flat out: "Did he run his model and, if so, what was the result?"

Instead, he fished around the margins and hooked more technical gobbledygook.

Why? According to Kenna, "The standard lawyer's advice is 'don't ask the ultimate question.' " The witness might not answer it.

A week later, the protesting parties brought in the lion.

Bredehoeft took the stand for them.

The former Regional Hydrologist Responsible for Water Activities in the Eight Western States was there to defend modeling.

Whether it be to calculate potential effects of nuclear waste leaking from Yucca Mountain or predict effects of Las Vegas' pumping of Great Basin ground water, Bredehoeft insisted that modeling was the only tool available to help inform public policy decisions. "That's it. We don't have another tool."

This time Taggart was representing Las Vegas.

Bredehoeft was well aware that Durbin hadn't given the result of his model, so he let drop that the Park Service had also run it and produced a written report on the result.

"Objection!" Taggart called. "Those documents are not in evidence and any statements about what the predictions in those models say would be inappropriate."

The upshot: The Park Service report was also suppressed.

And so predictions by the Southern Nevada Water Authority's own modeler and the former head of the Nevada office of the U.S. Geological Survey about what the cost to the Great Basin might be from Las Vegas pumping were never entered into evidence.

"I allowed myself to be badly used," Durbin says. "I'm an adult. I allowed it to happen."

...

It's April 16, 2007, 3:30 p.m., at the Las Vegas offices of the Southern Nevada Water Authority.

Pat Mulroy halted a conversation in midsentence to reach for a pulsing BlackBerry. As she read the text message, a small smile crossed her face.

Tracy Taylor, Nevada's state engineer, had just granted the authority somewhat less than half the water it asked for — 40,000 acre-feet a year for 10 years.

In return, the authority would be required to "file an annual report by March 15 of each year detailing the findings of the approved monitoring and mitigation plan."

After this, and presuming success, the amount could be raised to 60,000 acre-feet a year.

"Now, bear in mind, we'll be in Lincoln County first," a briefly triumphant Mulroy explained. "And in the Lincoln County basins, there's no one. No one!"

She was referring to Cave, Dry Lake and Delamar valleys, three of the four basins that Katzer and Durbin envisioned tiding Las Vegas over until Spring Valley could be aggressively tapped.

By December 2007, the state engineer's hearing concerning Dry Lake, Cave and Delamar valleys was approaching. Las Vegas was seeking a total of almost 35,000 acre-feet a year.

Attorneys for Mulroy and the protesters were in the by now familiar pretrial ritual of exchanging evidence lists.

Among the scheduled witnesses was Timothy Durbin, except this time he was not testifying for Taggart, Brothers, Mulroy and the water authority, but for the legal team representing the protesters.

Shortly after Christmas, Durbin's phone began to ring.

The first call had two people on the line: Taggart and an engineer from the water authority. Durbin says they wanted to know whether it was true he was testifying and what he would testify about. "I was pretty guarded there. I don't trust those people at all."

The second call, Durbin says, came from Katzer.

"I told him I was feeling uncomfortable with my testimony in the Spring Valley hearing and I thought that the Southern Nevada Water Authority had an obligation to disclose what the impacts were going to be and that was hidden in that hearing."

The third call came from Mulroy's deputy. "I told Kay the same thing. Basically Kay said she was she was disappointed but she respected my right to do it."

On the morning of Feb. 11, 2008, a clearly nervous Durbin again took the stand before the state engineer of Nevada.

"Please come forward and be sworn, Mr. Durbin. Nice to see you again," a curious hearing officer said.

And so, with Taggart objecting a few times, Durbin more or less recited to the court distillations of the memos that he had sent during the past four years to Taggart and Mulroy about sacrificial choices and the problems of monitoring.

"All that the monitoring and mitigation can do is shift the focus of the impacts ... I believe that their (Southern Nevada Water Authority's) reliance on monitoring and mitigation is most likely not going to work," he said.

Las Vegas owed it to the public to discuss what the environmental effects of its Great Basin water were going to really be, he said. "I think that for everybody concerned, including the rate payers in Las Vegas, that it's better to have that discourse now."

Protesters braced themselves for a Las Vegas retort to Durbin's appearance.

There was none.

The strategy all along had been to keep Durbin's concerns off the record. Now that he'd had his day in court, they were not about to call attention to it.

...

Nearly four years after pledging to the U.S. Senate Committee on Energy and Natural Resources that modern protections make a repeat of Owens Valley impossible, Mulroy maintains the position.

Of Durbin's work, she says, "It's just a model!"

Shortly before publication of this series, Mulroy's information officer dismissed the Durbin-Katzer memo as "recommendations from two consultants to a contract attorney on one potential course of action. That is two bus transfers and a cab ride short of being a policy."

Brothers has heard the Owens Valley comparison so often for so long that the mere mention of it in an interview for this story made her irate.

"They're totally different projects," she snapped. Owens Valley had a large lake. "To even compare them is to be out of date and not understand what a ground water project is versus surface water."

Also, she noted, William Mulholland and early Los Angeles were not subjected to the modern protections ensured by federal government.

Part of Brothers' management strategy for Spring Valley involves still-evolving ideas about capturing water that streams off the hills in springtime, then evaporates on hot playas.

Ideally, she'd like to force this into the ground, just as she and Katzer used injection wells to store unused river water in the Las Vegas Valley.

They also might use water purchased from the ranchers to help maintain the phreatophytes.

"I'm not saying that you would never lose a greasewood," she said, "but I think you would never lose much at all by managing it properly."

Brothers is confident that if she sat down with Bredehoeft, Durbin and Katzer, they would see her point.

Becoming soothing, she added, "I don't know that we disagree."

But on hearing this, the normally shy Durbin retorted, "I hope she's lying, because otherwise she's a bad scientist."

In the early 1980s as then-director of the Geological Survey's California office, Durbin led modeling teams looking precisely at the effect of Los Angeles' pumping on Owens Valley phreatophytes.

Removing water from the playas, Durbin said, almost perfectly emulates what Los Angeles did, first draining Owens Lake and then pumping the ground water.

"The Owens Valley is a model of what to expect," he said.

Moreover, he added, playa water plays a key role in keeping down alkaline dust.

Another key part of Brothers' strategy is moving pumping around so as to "rest" certain areas.

But to Durbin, this wouldn't decrease the effect, but make it more diffuse, difficult to track and hard if not impossible to reverse once damage became evident.

"We know from basic physics that in some time or some place the impacts of the pumping will be equal to the volume of the pumping," Durbin said. "You don't need a ground water model to make that statement with absolute certainty. It's simple. If you take water from one place and give it to another, it will be missed at the other end."

With the pipeline originator and his chosen modeler, Durbin, now gone, among the rank of scientists now reporting to Brothers is a new modeler from the U.S. Geological Survey.

His model, still under construction, will not be able to embarrass them.

It will be used only to contrast predictions against measured effects of actual pumping.

If monitoring wells and models both suggest there are problems, monitoring committees will seek "consensus-based" actions.

Mulroy's and Brothers' new team speculates greasewood may do just fine on rainwater that percolates around root zones.

Mulroy and Brothers say they now have extra water to irrigate Spring Valley's greasewood if necessary and to keep the ranches working, except with more efficient irrigation.

The Southern Nevada Water Authority plans to pump the Great Basin indefinitely.

It will revisit how much it intends to pump, possibly returning some water to White Pine County, only after paying off the pipeline in 75 years.

Unlike the original Katzer-Durbin plan, they do not see the water now being sought from the "dry" valleys of Cave, Dry and Delamar as temporary.

"I don't think in the lifetime of this project, we'll affect Pahrnagat Springs," Southern Nevada Water Authority hydrologist Andrew Burns says. "But having said that, we'll have monitoring of those pumping wells and those areas. If we see effects, we'll have opportunity to move the pumping around."

The long and the short of it, Burns concludes, is "we're going to pump what's permitted to us."

• • •

If this were fiction, the story would have a neat ending. But this being about the search for water in Nevada, it doesn't.

- The Southern Nevada Water Authority hopes to start importing Great Basin ground water in 2015.

- The state engineer's decision for Cave, Dry Lake and Delamar valleys is expected by October.
- Pretrial hearings over Snake Valley begin in mid-July and a hearing is expected by the end of the year. Because Snake Valley sits on the state line, water will not be able to be taken from the valley until Utah approves it.
- The latest estimate of the pipeline cost is \$3.5 billion, eliciting the quip from Ely Daily Times Editor Kent Harper that it would be cheaper for Las Vegas to bathe in Dom Perignon than Great Basin ground water.
- If the Great Basin pipeline project fails, and drought persists on the Colorado River, Las Vegas' decision to keep building and dare the Department of Interior to let it run dry will probably pay off. Few think that Uncle Sam would cut off a city.

But Las Vegas would have to learn to live within its means — maybe by slowing growth — while searching for alternate sources: building a desalination plant in California or Mexico then exchanging it for more Colorado River water and pursuing more aggressive indoor conservation.

- Whatever the outcome of Mulroy's pipeline, Nevada Senator Harry Reid says, "you have to recognize what Pat Mulroy's done with conservation. If she has no other legacy other than what she's done to conserve water in Southern Nevada, her legacy is very significant."
- Former Clark County Manager Richard Bunker, the man who groomed Mulroy to become Las Vegas' water manager, is largely retired.

One of the last jobs this fifth generation Southern Nevadan vows to do for Las Vegas is to represent Mulroy in negotiations for Snake Valley's water.

When Bunker is finished with the Utah negotiations, he plans to spend as little time in Las Vegas as possible. He devotes most of his time now to his ranch — in Utah.

Las Vegas no longer feels like home, he says.

"It's too crowded."

## **Addendum C**

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9/21/06 Deseret News B04  
2006 WLNR 16358603

Deseret Morning News  
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September 21, 2006

Section: Local

Western desert resolution urges input on water plan

Josh Loftin, Deseret Morning News

Residents of Utah's western desert received a political boost in their fight to prevent a large portion of the region's groundwater from being piped to Las Vegas.

The Natural Resources, Agriculture and Environment Interim Committee approved a resolution Wednesday that encourages more local involvement in the discussions with Nevada. The resolution also calls for a delay of any final decisions until scientific studies about the impact of removing the water from the aquifers are completed.

"We have an important resource out in the west desert," said Rep. Richard Wheeler, R-Ephraim, who sponsored the resolution. "And we have people's lives, their livelihoods, at stake."

The focus of the resolution is a proposal by Nevada officials to pipe up to 176,000 acre feet of water from five aquifers in the region to Las Vegas. One of the aquifers, which is located in the Snake Valley and straddles the Utah-Nevada state line, could supply up to 25,000 acre feet of water.

The sparsely populated valley is used for ranching by mostly Utah residents. Because of that, Utah officials have been negotiating to maintain the existing aquifer in the valley.

The problem is that the water that feeds into the valley comes from mountains in Nevada. Boyd Clayton of the Utah Division of Water Rights said that the negotiations with Nevada officials are working to find a system that will not turn the water into a resource that is being sold before it can reach the Snake Valley.

"In Utah, we're not mining groundwater, and we're keen about making sure that doesn't happen" in Nevada, Clayton said.

Nevada activists have filed suit in that state to put the brakes on the ap-

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proval process and allow more time for public input.

Residents of the area, some of whom were in attendance at the committee hearing, would also like more involvement in the process. Ken Hill, who lives in Partown, Juab County, said that even if they are not in the room during negotiations, they would like somebody who is at least kept in the loop.

More importantly, he said that the resolution -- even though it is only approved by a committee and will probably not receive approval of the full Legislature until the next general session -- still provides Gov. Jon Huntsman Jr. and other Utah officials with some needed support.

"It's encouraging, and we're hoping that it will give the governor some political elbow to do what he knows is right," Hill said.

E-mail: jloftin@desnews.com

---- INDEX REFERENCES ----

NEWS SUBJECT: (Legal (1LE33))

REGION: (USA (1US73); Americas (1AM92); Utah (1UT90); North America (1NO39); Nevada (1NE81))

Language: EN

OTHER INDEXING: (ENVIRONMENT INTERIM COMMITTEE) (Boyd Clayton; Clayton; Hill; Jon Huntsman Jr.; Ken Hill; Richard Wheeler; Western)

EDITION: All

Word Count: 494

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## **Addendum D**

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8/7/08 SLTR (No Page)

Page 1

8/7/08 Salt Lake Trib. (Pg. Unavail. Online)  
2008 WLNR 14788591

Salt Lake Tribune, The  
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August 7, 2008

SL, Utah counties appeal Nevada's Snake Valley water grab  
Patty Henetz  
The Salt Lake Tribune

Aug. 7--Salt Lake and Utah counties have appealed a Nevada water official's decision to keep them out of a project that would tap groundwater under Snake Valley and the west desert to feed growth in Las Vegas.

Last month, Nevada State Engineer Tracy Taylor denied the two counties' request for "interested party" status, saying the counties should have filed a formal objection in 1989 to the Southern Nevada Water Authority's plans to build a \$3.5 billion, 285-mile pipeline project.

In a lawsuit filed this week in Nevada state court, the Utah counties allege siphoning water from an aquifer that lies under the two states to feed Las Vegas would cause vegetation to die. If that happens, winds could pick up the destabilized soils and send them in dust-storm clouds to the Wasatch Front, already struggling with particulate pollution.

Twenty years ago, when Las Vegas filed its application in Nevada for the project, little was known about the effects of groundwater pumping on air quality, the petition states.

Opponents say that if Las Vegas takes the groundwater, the water table will be out of reach of the roots from plants that fix the soil, the same phenomenon that led to the destruction of the Owens Valley in California when Los Angeles imported water. Dust storms make the Owens Valley one of the nation's most polluted places.

All the Utah counties want is to be at the table while Taylor proceeds with the project application, said Utah Association of Counties attorney Mark Ward.

"You cannot adequately assess the environmental soundness of this [water proposal] without taking into account regional air quality," said Ward, who drafted the petition for the Nevada attorney representing the counties.

Taylor also denied requests for interested-party status from three Indian tribal bands and grass-roots groups in a move seen as a new, aggressive tactic to push

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aside Utah concerns about what could happen to Snake Valley vegetation if the water table drops too low.

In its legal filing with the state engineer, the Southern Nevada Water Authority says the interested-party applicants failed to demonstrate that extreme circumstances prevented them from filing official protests in 1989.

Utah and Nevada are still negotiating on the project, which requires both states' approval. The U.S. Bureau of Land Management also is working on an environmental-impact study.

Taylor has said he would hold a final hearing on the project in late 2009.

phenetz@sltrib.com

----- INDEX REFERENCES -----

COMPANY: US BUREAU OF LAND MANAGEMENT; SOUTHERN NEVADA WATER AUTHORITY

NEWS SUBJECT: (Environmental Law (1EN88))

REGION: (Utah (1UT90); North America (1NO39); Americas (1AM92); Nevada (1NE81); USA (1US73))

Language: EN

OTHER INDEXING: (SL; SOUTHERN NEVADA WATER AUTHORITY; US BUREAU OF LAND MANAGEMENT; UTAH; UTAH ASSOCIATION; WASATCH FRONT) (Aug; Mark Ward; Nevada; Opponents; Taylor; Tracy Taylor; Twenty; Ward)

Word Count: 493

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## **Addendum E**

**JOINT RESOLUTION REGARDING ACTION  
ON GROUNDWATER IN SNAKE VALLEY**

2007 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Richard W. Wheeler**

**Senate Sponsor: Dennis E. Stowell**

Cosponsors:	Lorie D. Fowlke	Kay L. McIff
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Carl W. Duckworth	David Litvack	Mark A. Wheatley
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Ben C. Ferry	Steven R. Mascaro	Carl Wimmer
Janice M. Fisher	John G. Mathis	Scott L. Wyatt
Julie Fisher	Rosalind J. McGee	

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**LONG TITLE**

**General Description:**

This joint resolution of the Legislature expresses to the Governor the will of the Legislature regarding the division of the aquifer shared with Nevada.

**Highlighted Provisions:**

## H.J.R. 1

## Enrolled Copy

37 This resolution:

38 ▶ urges the Governor to:

- 39 • consider the consequences of a potential groundwater development project;
- 40 • involve the citizens in developing the division agreement with Nevada; and
- 41 • refrain from entering into the division agreement with Nevada until scientific

42 studies have been completed and the agreement provides how to divide the

43 water; and

44 ▶ directs a copy of the resolution be sent to various parties.

### 45 Special Clauses:

46 None

47

48 *Be it resolved by the Legislature of the state of Utah:*

49 WHEREAS, there is an interstate aquifer underlying Snake Valley in western Utah and

50 eastern Nevada;

51 WHEREAS, this aquifer is the source of the springs, seeps, and wells that support the

52 citizens' livelihoods and fragile ecosystem in Snake Valley and other areas of western Utah;

53 WHEREAS, the Southern Nevada Water Authority has filed groundwater applications

54 with the Nevada State Engineer to pump 50,680 acre-feet of water annually out of the aquifer

55 as part of the Clark, Lincoln, and White Pine Counties Groundwater Development Project;

56 WHEREAS, the impacts this groundwater development project could have on the water

57 resources, land, economy, wildlife, and overall quality of life in western Utah greatly concern

58 the citizens of the state;

59 WHEREAS, Public Law 108-424, the Lincoln County Conservation, Recreation, and

60 Development Act of 2004, requires the United States Geological Survey, the Desert Research

61 Institute, and a designee from the State of Utah to conduct a study known as the Basin and

62 Range Carbonate Aquifer System Study;

63 WHEREAS, the steps of the study required by the Lincoln County Conservation,

64 Recreation, and Development Act of 2004 are:

65           (1)     investigate groundwater quantity, quality and flow characteristics in the deep  
66 carbonate and alluvial aquifers of White Pine County, Nevada;

67           (2)     investigate groundwater quantity, quality, and flow characteristics in any  
68 groundwater basins that are located in White Pine County, Nevada, or Lincoln  
69 County, Nevada, and adjacent areas in Utah;

70           (3)     include new data and review existing data;

71           (4)     determine the approximate volume of water in the aquifers;

72           (5)     determine the discharge and recharge characteristics of each aquifer system;

73           (6)     determine the hydrogeologic and other controls that govern discharge and  
74 recharge of each aquifer system; and

75           (7)     develop maps at a consistent scale depicting the aquifer systems and the  
76 recharge and discharge areas of such systems;

77           WHEREAS, the Bureau of Land Management's environmental impact study for the  
78 groundwater development project will analyze the environmental impacts associated with the  
79 anticipated groundwater withdrawal;

80           WHEREAS, the Lincoln County Conservation, Recreation, and Development Act of  
81 2004 requires that, prior to any transbasin diversion from groundwater basins located both  
82 within the State of Nevada and the State of Utah, Utah and Nevada shall reach an agreement  
83 dividing the water resources of the interstate groundwater flow systems in which those  
84 interstate groundwater basins are located; and

85           WHEREAS, the Governor has assured the citizens of western Utah that he would not  
86 approve a project that would compromise peoples' lives and livelihoods, and there would be  
87 some continuity to their quality of life:

88           NOW, THEREFORE, BE IT RESOLVED that the Legislature urges the Governor to  
89 carefully assess the groundwater development project's potential economic, social, and  
90 environmental consequences in Utah, including assessing impacts to indigenous flora and  
91 fauna and modeling groundwater behavior under any proposed pumping plan.

92           BE IT FURTHER RESOLVED that the Legislature urges the Governor to allow public



## **H.J.R. 1**

## **Enrolled Copy**

93 participation in the development of the agreement with Nevada by inviting a citizen from  
94 Snake Valley to participate in the negotiations with Nevada and allowing public review and  
95 comment on a preliminary draft of the agreement.

96 BE IT FURTHER RESOLVED that the Legislature urges the Governor to refrain from  
97 entering into an agreement with Nevada until:

98 (1) all steps of the scientific study required by the Lincoln County Conservation,  
99 Recreation, and Development Act of 2004 are complete to ensure that there is an adequate  
100 scientific basis on which to form an agreement; and

101 (2) the terms of the agreement itself provide for how to divide the water resources of  
102 the interstate groundwater flow systems in which the interstate groundwater basins are located,  
103 as required by the Lincoln County Conservation, Recreation, and Development Act of 2004.

104 BE IT FURTHER RESOLVED that a copy of this resolution be sent to the Governor of  
105 the state of Utah, the Governor of the state of Nevada, the Executive Director of the Utah  
106 Department of Natural Resources, the Director of the Nevada Department of Conservation and  
107 Natural Resources, the Utah State Engineer, the Nevada State Engineer, the General Manager  
108 of the Southern Nevada Water Authority, and a representative of the Snake Valley Citizen's  
109 Alliance.

## **Addendum F**

**SNAKE VALLEY AQUIFER RESEARCH TEAM**

**AND ADVISORY COUNCIL**

2009 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Bradley A. Winn**

Senate Sponsor: Dennis E. Stowell

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**LONG TITLE**

**General Description:**

This bill creates the Snake Valley Aquifer Research Team and Advisory Council.

**Highlighted Provisions:**

This bill:

- creates the Snake Valley Aquifer Research Team;
- creates the Snake Valley Aquifer Advisory Council;
- establishes council duties; and
- establishes research team data and information collection and reporting duties.

**Monies Appropriated in this Bill:**

None

**Other Special Clauses:**

None

**Utah Code Sections Affected:**

AMENDS:

**63J-4-603**, as last amended by Laws of Utah 2008, Chapter 381 and renumbered and amended by Laws of Utah 2008, Chapter 382

ENACTS:

**63C-12-101**, Utah Code Annotated 1953

**63C-12-102**, Utah Code Annotated 1953

**63C-12-103**, Utah Code Annotated 1953

**63C-12-104**, Utah Code Annotated 1953

30        **63C-12-105**, Utah Code Annotated 1953  
31        **63C-12-106**, Utah Code Annotated 1953  
32        **63C-12-107**, Utah Code Annotated 1953  
33        **63C-12-108**, Utah Code Annotated 1953

34

35        *Be it enacted by the Legislature of the state of Utah:*

36        Section 1. Section **63C-12-101** is enacted to read:

37                    **CHAPTER 12. SNAKE VALLEY AQUIFER ADVISORY COUNCIL**

38        **63C-12-101. Title.**

39        This chapter is known as the "Snake Valley Aquifer Advisory Council."

40        Section 2. Section **63C-12-102** is enacted to read:

41        **63C-12-102. Definitions.**

42        As used in this chapter:

43        (1) "Council" means the Snake Valley Aquifer Advisory Council created in Section  
44 63C-12-103.

45        (2) "Research team" means the Snake Valley Research Team created in Section  
46 63C-12-107.

47        Section 3. Section **63C-12-103** is enacted to read:

48        **63C-12-103. Council creation -- Members -- Terms.**

49        (1) There is created a state advisory council known as the "Snake Valley Aquifer  
50 Advisory Council."

51        (2) The advisory council is composed of the following seven members:

52        (a) the governor or the governor's designee; and

53        (b) six members appointed by the governor as follows:

54        (i) two county commissioners, from individuals recommended by an organization that  
55 represents counties in the state, who are residents of:

56        (A) Tooele County;

57        (B) Juab County;

58        (C) Millard County; or  
59        (D) Beaver County;  
60        (ii) one elected representative of Salt Lake County government, from individuals  
61 recommended by an organization that represents counties in the state;  
62        (iii) two residents of:  
63        (A) Tooele County;  
64        (B) Juab County;  
65        (C) Millard County; or  
66        (D) Beaver County; and  
67        (iv) a representative of the Confederate Tribes of Goshute Reservation.  
68        (3) A member appointed under Subsection (2)(b) is appointed to a two-year term.  
69        (4) Notwithstanding the requirements of Subsection (3), the governor shall, at the time  
70 of appointment or reappointment, adjust the length of terms to ensure that the terms of council  
71 members appointed under Subsection (2)(b) are staggered so that approximately half of the  
72 council is appointed every two years.  
73        (5) The governor shall appoint a chairperson.  
74        (6) If a vacancy occurs in council membership for any reason the replacement shall be  
75 appointed for the unexpired term in the same manner as the vacated member was appointed.  
76        Section 4. Section **63C-12-104** is enacted to read:  
77        **63C-12-104. Advisory council duties -- Meetings.**  
78        (1) The council shall:  
79        (a) meet at least annually but may also meet at the call of:  
80        (i) the chair; or  
81        (ii) at least two council members;  
82        (b) provide advice to the research team, including recommendations concerning the  
83 type of data and information gathered by the research team;  
84        (c) review the data and information gathered and reported by the research team,  
85 including baseline data and changes from baseline data; and

86        (d) act as liaison between the research team and the persons represented by the  
87 council

88        (2) A majority of the council members constitute a quorum for the transaction of  
89 council business.

90        (3) The council may advise the governor and the Legislature on any issue relating to  
91 its review under Subsection (1)(c).

92        Section 5   Section **63C-12-105** is enacted to read

93        **63C-12-105. Compensation of members -- Expenses.**

94        (1) This section applies to members of the council

95        (2) (a) A member who is not a government employee may not receive compensation or  
96 benefits for the member's service, but may receive per diem and expenses incurred in the  
97 performance of the member's official duties at the rates established by the Division of Finance  
98 under Sections 63A-3-106 and 63A-3-107.

99        (b) A member may decline to receive per diem and expenses for the member's service

100       (3) (a) A state government officer and employee member who does not receive salary,  
101 per diem, or expenses from the agency the member represents for the member's service may  
102 receive per diem and expenses incurred in the performance of the member's official duties at  
103 the rates established by the Division of Finance under Sections 63A-3-106 and 63A-3-107.

104       (b) A state government officer and employee member may decline to receive per diem  
105 and expenses for the member's service.

106       (4) (a) A local government member who does not receive salary, per diem, or expenses  
107 from the entity that the member represents for the member's service may receive per diem and  
108 expenses incurred in the performance of the member's official duties at the rates established by  
109 the Division of Finance under Sections 63A-3-106 and 63A-3-107.

110       (b) A local government member may decline to receive per diem and expenses for the  
111 member's service.

112       Section 6   Section **63C-12-106** is enacted to read

113       **63C-12-106. Staff.**

114        The director of the Public Lands Policy Coordinating Office shall provide staff services  
115 to the council.

116        Section 7. Section **63C-12-107** is enacted to read:

117        **63C-12-107. Research team.**

118        (1) There is created a Snake Valley Aquifer Research Team composed of the following  
119 four members:

120        (a) a representative of the Division of Air Quality, appointed by the executive director  
121 of the Department of Environmental Quality;

122        (b) a representative of the Department of Agriculture and Food, appointed by the  
123 commissioner of the Department of Agriculture and Food;

124        (c) the executive director of the Department of Natural Resources or the executive  
125 director's designee; and

126        (d) the director of the Public Lands Policy Coordinating Office.

127        (2) The director of the Public Lands Policy Coordinating Office shall coordinate and  
128 direct the research team's data and information compilation and reporting required by Section  
129 63C-12-108.

130        Section 8. Section **63C-12-108** is enacted to read:

131        **63C-12-108. Research team duties.**

132        The research team shall:

133        (1) compile existing scientific research baseline data on the potential impact of the use  
134 of water resources in the interstate groundwater flow system specified in the Lincoln County  
135 Conservation, Recreation, and Development Act of 2004, Pub. L. No. 108-424, including the  
136 impact on:

137        (a) surface water and groundwater;

138        (b) vegetation, including invasive species;

139        (c) agriculture;

140        (d) soils;

141        (e) air quality;

- 142        (f) wildlife;  
143        (g) the geologic integrity of the aquifer; and  
144        (h) socioeconomic conditions;  
145        (2) compile changes to the baseline data compiled under Subsection (1);  
146        (3) seek to enter into cooperative agreements with governmental entities to share  
147 relevant data and information;  
148        (4) provide an annual data and information report to the council; and  
149        (5) seek the voluntary participation of experts in academia and the private sector in the  
150 activities of the research team.

151        Section 9. Section **63J-4-603** is amended to read:

152        **63J-4-603. Powers and duties of coordinator and office.**

153        (1) The coordinator and the office shall:

154        (a) assist the state planning coordinator in fulfilling the duties outlined in Section  
155 63J-4-401 as those duties relate to the development of public lands policies by:

156        (i) developing cooperative contracts and agreements between the state, political  
157 subdivisions, and agencies of the federal government for involvement in the development of  
158 public lands policies;

159        (ii) producing research, documents, maps, studies, analysis, or other information that  
160 supports the state's participation in the development of public lands policy;

161        (iii) preparing comments to ensure that the positions of the state and political  
162 subdivisions are considered in the development of public lands policy;

163        (iv) partnering with state agencies and political subdivisions in an effort to:

164        (A) prepare coordinated public lands policies;

165        (B) develop consistency reviews and responses to public lands policies;

166        (C) develop management plans that relate to public lands policies; and

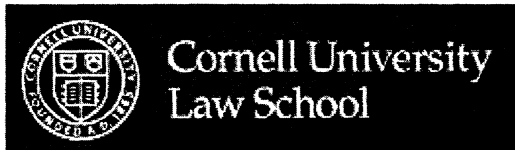
167        (D) develop and maintain a statewide land use plan that is based on cooperation and in  
168 conjunction with political subdivisions; and

169        (v) providing other information or services related to public lands policies as requested



- 170 by the state planning coordinator; [~~and~~]  
171 (b) facilitate and coordinate the exchange of information, comments, and  
172 recommendations on public lands policies between and among:  
173 (i) state agencies;  
174 (ii) political subdivisions;  
175 (iii) the Office of Rural Development created under Section 63M-1-1602;  
176 (iv) the Resource Development Coordinating Committee created under Section  
177 63J-4-501;  
178 (v) School and Institutional Trust Lands Administration created under Section  
179 53C-1-201;  
180 (vi) the committee created under Section 63F-1-508 to award grants to counties to  
181 inventory and map R.S. 2477 rights-of-way, associated structures, and other features; and  
182 (vii) the Constitutional Defense Council created under Section 63C-4-101;  
183 (c) perform the duties established in Title 9, Chapter 8, Part 3, Antiquities, and Title 9,  
184 Chapter 8, Part 4, Historic Sites; [~~and~~]  
185 (d) consistent with other statutory duties, encourage agencies to responsibly preserve  
186 archaeological resources[-];  
187 (e) provide staff services to the Snake Valley Aquifer Advisory Council created in  
188 Section 63C-12-103; and  
189 (f) coordinate and direct the Snake Valley Aquifer Research Team created in Section  
190 63C-12-107.  
191 (2) In providing assistance to the state planning coordinator under Subsection (1)(a),  
192 the coordinator and office shall take into consideration the:  
193 (a) findings provided under Subsections 63J-4-401(6) and (7); and  
194 (b) recommendations of the council.

## **Addendum G**

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# United States Constitution

## Bill of Rights

### Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

### Amendment II

A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

### Amendment III

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

### Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

### Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public

trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

### Amendment VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

### Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

### Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

### Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

- 
- [Next Amendment](#)
  - [Table of Articles and Amendments](#)
  - [Overview of Full Constitution](#)
-

## **Addendum H**

U.C.A. 1953, Const. Art. 1, § 22

West's Utah Code Annotated Currentness  
Constitution of Utah

☞Article I. Declaration of Rights

☛**Sec. 22. [Private property for public use]**

Private property shall not be taken or damaged for public use without just compensation.

U.C.A. 1953, Const. Art. 1, § 22

## **Addendum I**

U.C.A. 1953 § 63-30d-201

*WEST'S* UTAH CODE ANNOTATED

TITLE 63. STATE AFFAIRS IN GENERAL

CHAPTER 30D. GOVERNMENTAL IMMUNITY ACT OF UTAH

PART 2. GOVERNMENTAL IMMUNITY--STATEMENT, SCOPE, AND EFFECT

**§ 63-30d-201. Immunity of governmental entities from suit**

(1) Except as may be otherwise provided in this chapter, each governmental entity and each employee of a governmental entity are immune from suit for any injury that results from the exercise of a governmental function.

(2) Notwithstanding the waiver of immunity provisions of Section 63-30d-301, a governmental entity, its officers, and its employees are immune from suit for any injury or damage resulting from the implementation of or the failure to implement measures to:

(a) control the causes of epidemic and communicable diseases and other conditions significantly affecting the public health or necessary to protect the public health as set out in Title 26A, Chapter 1, Local Health Departments;

(b) investigate and control suspected bioterrorism and disease as set out in Title 26, Chapter 23b, Detection of Public Health Emergencies Act; and

(c) respond to a national, state, or local emergency, a public health emergency as defined in Section 26-23b-102, or a declaration by the President of the United States or other federal official requesting public health related activities.

Laws 2004, c. 267, § 11, eff. July 1, 2004.

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

Prior Laws:

Laws 1991, c. 15.

Laws 1991, c. 248.

Laws 2003, c. 3, § 5.

C. 1953, § 63-30-3.



UT ST § 63-30d-201

## **Addendum J**

U.C.A. 1953 § 63-30d-301

*WEST'S* UTAH CODE ANNOTATED  
TITLE 63. STATE AFFAIRS IN GENERAL  
CHAPTER 30D. GOVERNMENTAL IMMUNITY ACT OF UTAH  
PART 3. WAIVERS OF IMMUNITY

**§ 63-30d-301. Waivers of immunity--Exceptions**

(1)(a) Immunity from suit of each governmental entity is waived as to any contractual obligation.

(b) Actions arising out of contractual rights or obligations are not subject to the requirements of Sections 63-30d-401, 63-30d-402, 63-30d-403, or 63-30d-601.

(c) The Division of Water Resources is not liable for failure to deliver water from a reservoir or associated facility authorized by Title 73, Chapter 26, Bear River Development Act, if the failure to deliver the contractual amount of water is due to drought, other natural condition, or safety condition that causes a deficiency in the amount of available water.

(2) Immunity from suit of each governmental entity is waived:

(a) as to any action brought to recover, obtain possession of, or quiet title to real or personal property;

(b) as to any action brought to foreclose mortgages or other liens on real or personal property, to determine any adverse claim on real or personal property, or to obtain an adjudication about any mortgage or other lien that the governmental entity may have or claim on real or personal property;

(c) as to any action based on the negligent destruction, damage, or loss of goods, merchandise, or other property while it is in the possession of any governmental entity or employee, if the property was seized for the purpose of forfeiture under any provision of state law;

(d) subject to Subsection 63-30d-302(1), as to any action brought under the authority of Article I, Section 22, of the Utah Constitution, for the recovery of compensation from the governmental entity when the governmental entity has taken or damaged private property for public uses without just compensation;

(e) subject to Subsection 63-30d-302(2), as to any action brought to recover attorneys' fees under Sections 63-2-405 and 63-2-802; or

(f) for actual damages under Title 67, Chapter 21, Utah's Protection of Public Employees Act.

(3)(a) Except as provided in Subsection (3)(b), immunity from suit of each governmental entity is waived as to any injury caused by:

(i) a defective, unsafe, or dangerous condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located on them; or

(ii) any defective or dangerous condition of a public building, structure, dam, reservoir, or other public improvement.

(b) Immunity is not waived if the injury arises out of, in connection with, or results from:

(i) a latent dangerous or latent defective condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located on them; or

(ii) a latent dangerous or latent defective condition of any public building, structure, dam, reservoir, or other public improvement.

(4) Immunity from suit of each governmental entity is waived as to any injury proximately caused by a negligent act or omission of an employee committed within the scope of employment.

(5) Immunity is not waived under Subsections (3) and (4) if the injury arises out of, in connection with, or results from:

(a) the exercise or performance, or the failure to exercise or perform, a discretionary function, whether or not the discretion is abused;

(b) assault, battery, false imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, or violation of civil rights;

(c) the issuance, denial, suspension, or revocation of, or by the failure or refusal to issue, deny, suspend, or revoke, any permit, license, certificate, approval, order, or similar authorization;

(d) a failure to make an inspection or by making an inadequate or negligent inspection;

(e) the institution or prosecution of any judicial or administrative proceeding, even if malicious or without probable cause;

(f) a misrepresentation by an employee whether or not it is negligent or intentional;

(g) riots, unlawful assemblies, public demonstrations, mob violence, and civil disturbances;

(h) the collection of and assessment of taxes;

(i) the activities of the Utah National Guard;

(j) the incarceration of any person in any state prison, county or city jail, or other place of legal confinement;

(k) any natural condition on publicly owned or controlled lands, any condition existing in connection with an abandoned mine or mining operation, or any activity authorized by the School and Institutional Trust Lands Administration or the Division of Forestry, Fire, and State Lands;

(l) research or implementation of cloud management or seeding for the clearing of fog;

(m) the management of flood waters, earthquakes, or natural disasters;

(n) the construction, repair, or operation of flood or storm systems;

(o) the operation of an emergency vehicle, while being driven in accordance with the requirements of Section 41-6-14;

- (p) the activities of:
  - (i) providing emergency medical assistance;
  - (ii) fighting fire;
  - (iii) regulating, mitigating, or handling hazardous materials or hazardous wastes;
  - (iv) emergency evacuations;
  - (v) transporting or removing injured persons to a place where emergency medical assistance can be rendered or where the person can be transported by a licensed ambulance service; or
  - (vi) intervening during dam emergencies;
- (q) the exercise or performance, or the failure to exercise or perform, any function pursuant to Title 73, Chapter 10, Board of Water Resources--Division of Water Resources; or
- (r) unauthorized access to government records, data, or electronic information systems by any person or entity.

Laws 2004, c. 267, § 13, eff. July 1, 2004.

<General Materials (GM) - References, Annotations, or Tables>

## HISTORICAL AND STATUTORY NOTES

### Prior Laws:

Laws 1965, c. 139

Laws 1991, c. 76.

Laws 1991, c. 251.

Laws 1995, c. 299, § 35.

Laws 1996, c. 159, § 6.

Laws 1996, c. 264, § 1.

Initiative B, adopted Nov. 7, 2000.

Laws 2001, c. 185, § 1.

C. 1953, §§ 63-30-5 to 63-30-10.5.

UT ST § 63-30d-301

## **Addendum K**

U.C.A. 1953 § 73-1-8

*WEST'S* UTAH CODE ANNOTATED  
TITLE 73. WATER AND IRRIGATION  
CHAPTER 1. GENERAL PROVISIONS

**§ 73-1-8. Duties of owners of ditches--Safe condition--Bridges**

The owner of any ditch, canal, flume or other watercourse shall maintain the same in repair so as to prevent waste of water or damage to the property of others, and is required, by bridge or otherwise, to keep such ditch, canal, flume or other watercourse in good repair where the same crosses any public road or highway so as to prevent obstruction to travel or damage or overflow on such public road or highway, except where the public maintains or may hereafter elect to maintain devices for that purpose.

Laws 1919, c. 67, § 12.

**Codifications** R.S. 1933, § 100-1-8; C. 1943, § 100-1-8.

UT ST § 73-1-8