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Melvin Bingham v. Roosevelt City Corporation : Reply Brief

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

MELVIN BINGHAM *et al.*,

Plaintiffs/Appellants,

vs.

ROOSEVELT CITY CORPORATION, a
Utah municipal corporation,

Defendant/Appellee

**Reply Brief of
Appellants**

Appellate Case No. 20081061

Trial Court Case No. 040800250

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

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ARGUMENT

In arguing that its mining of the unconfined Neola-Whiterocks Aquifer does not constitute a taking of a protectable property interest, the City mischaracterizes the Group's claims. According to the City, the Group is attempting to assert control over the ground water to make the Group's surface water rights more "effective." In making this characterization, the City fails to recognize that its actions have not merely made the Group's surface water rights less effective; rather, the City has taken the Group's beneficial use of water, the very essence of their water rights.

The City does not dispute that its conduct has created an artificial condition under the Group's properties that intercepts and draws the Group's surface irrigation waters nearly 100 feet below ground level to replenish the waters mined by the City.¹ Instead, the City argues only that it, and not the Group, has appropriated the underground water and that, therefore, it is legally entitled to take the groundwater and the Group's irrigation water without constraint.

However, had the artificial condition created by the City's conduct been visible above ground, rather than being underground, the City could not make such an argument. For example, rather than creating an artificial cone of depression that intercepts the

¹ This artificial condition, a large cone of depression (i.e., the lowering of the water table in an inverted cone with the wells at the center), was formed as a direct result of the City's continuous over-pumping of the Hayden Well Field wells. It intercepts and captures the Group's surface waters, which were intended to be used to irrigate the Group's lands. Once the artificial cone of depression has captured and directed the North Hayden Group's waters down to replenish the aquifer, the City is able to pump that very same water from the aquifer to the surface through its wells.

Group's surface water rights by capturing and drawing those waters down nearly 100 feet to replenish the water taken from the aquifer, had the City simply directly intercepted the Group's surface waters while the water was still on the surface and diverted that water into the City's wells, there would be no question that the City would be liable to the Group for interfering with and taking their surface water rights. Yet, merely because the City's interception occurs below the surface, the City argues it cannot be liable for taking or interfering with the Group's water rights. Such an argument must be rejected pursuant to the basic principles of Utah water law that protect a water right holder's right, in fact, a duty, to beneficially use his or her water right.

1. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE NORTH HAYDEN GROUP'S TAKINGS CLAIMS. THE GROUP HAS A PROTECTABLE PROPERTY INTEREST IN (1) THEIR SURFACE WATER RIGHTS, (2) THEIR LANDS, AND (3) THE NEAR-SURFACE WATER LOCATED ON THEIR PROPERTY

The Group asserts three separate and independent protectable property interests taken by the City through its creation of the large cone of depression caused by its continuous over-pumping of the Hayden wells: (1) the taking of the Group's surface waters rights; (2) the taking of the value and use of the Group's lands by preventing the Group from using their surface waters to irrigate their once-productive farm and pasture lands; and (3) the taking of the near-surface water to which the Group is entitled. As the City has conflated these separate property interests in its treatment of the takings issue, it is important that each property interest be addressed separately on its merits.

a. The Group Has a Protectable Property Interest in the Beneficial Use of Their Surface Water Rights

In its brief, the City argues that the Group's right to beneficially use their surface

water rights is not a protectable property interest. However, such an argument flies in the face of Utah's water and real property law.² Both Utah's Legislature and its courts have consistently and emphatically declared that the right to use water in this State is defined by the amount of water beneficially used by the water right holder. *See* Utah Code Ann. § 73-1-3 (2009) ("Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state."); *Melville v. Salt Lake County*, 570 P.2d 687, 688 (Utah 1977) ("One's right to use water is measured by the amount he puts to beneficial use without interfering with another person's prior right to the use of the water."). Indeed, in *Weber Basin Water Conservancy Dist. v. Gailey*, 328 P.2d 175 (Utah 1958), a case heavily relied upon by the City, this Court emphasized that a water right holder's interest in a water right is dependent upon the beneficial use of that right, declaring as follows:

The historical development of our water law indicates that rights to the use of water are firmly grounded upon three things: (1) initiative in discovering useable water resources, (2) industry in taking overt action to bring the water under control for the purpose of putting it to a beneficial use, and (3) diligence in continuing the use thus established. ***The foregoing constitute the only recognized foundation upon which rights in water can be created and maintained.***

Id. at 178 (emphasis added). Consequently, without the ability to put their water to beneficial use, water right holders not only lose the most important stick in their bundle of property rights, they are also not legally entitled to maintain the water rights, and the

² Utah law considers a water right to be 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 often used real property analogy of the property right being like a "bundle of sticks" is particularly applicable here. The City has taken the most important stick, i.e., beneficial use.

water rights are subject to forfeiture. *See, e.g.*, Utah Code Ann. § 73-1-4(2)(a) (2009).

“In Utah, ‘ownership’ of water rights is equated with ‘right to use.’” *Strawberry Water Users Assoc. v. Bureau of Reclamation*, 2006 UT 19, ¶ 61, 133 P.3d 410. As such, Utah law safeguards a water right holder’s right to beneficially use the water by protecting both the quantity and quality of the water to which he or she is entitled. *See Salt Lake City v. Silver Fork Pipeline Corp.*, 2000 UT 3, ¶ 22 n.6, 5 P.3d 1206 (“We have consistently held that an appropriator of water rights also owns a vested interest in the sources of that water, and no one may interfere with the source of the appropriator’s water supply in a way that diminishes the quantity or quality of the appropriated water.”); *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.”³ (emphasis added)); *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.” (emphasis added)).

Accordingly, given the essential role beneficial use plays in the creation,

³ The City attempts to distinguish the holding in *Sigurd City* by claiming that it is limited to water that has been both appropriated and beneficially used. (Appellee’s Br. at 12.) However, this argument is irrelevant to the Group’s takings claim regarding their surface water rights as it is uncontested that the Group is lawfully entitled to the surface water rights, all of which have been lawfully appropriated pursuant to state law and were beneficially used long before the City began mining the unconfined aquifer.

maintenance, and utility of a water right, this Court must recognize that a water right holder not only has a right to protect the source but also a right to protect the beneficial use of water as a protectable property interest under Utah law.

The City also attempts to attack the Group's claim that the City has taken their surface water rights by arguing that the Group has no interest in the near-surface waters below their lands. But, as discussed, *infra*, Subsection C, such an argument is contrary to Utah law. More importantly, however, such an argument is irrelevant to the claim that the City has taken the Group's *surface* water rights.⁴

As noted above, although the Group has asserted that the City's mining of the Neola-Whiterocks Aquifer has taken a protectable property interest in the Group's lands and near-surface water rights, these claims are separate and independent from the Group's claim that the City's conduct has also resulted in a taking of the Group's surface water rights. The Group has presented undisputed evidence, including evidence from a licensed Professional Geologist, Jack Rogers, P.G., establishing that the City's conduct in mining the unconfined Neola-Whiterocks Aquifer has caused an artificial vacuum to form beneath the Group's properties. Indeed, the evidence shows that the City's continuous over-pumping of the Hayden wells has dramatically reduced the water table

⁴ Because this claim is based on the City's taking of the Group's surface water rights, the cases relied upon by the City in support of its arguments are inapposite. Specifically, in both *J.J.N.P. Co. v. State*, 655 P.2d 1133 (Utah 1982), and *Weber Basin Water Conservancy District v. Gailey*, 328 P.2d 175 (Utah 1958), the only issue before the Court was whether the plaintiffs had obtained an ownership interest in certain waters based *solely* on their ownership of land. *J.J.N.P.*, 655 P.2d at 1137; *Weber Basin*, 328 P.2d at 176. Neither case concerned the issue before this Court, i.e., whether the conduct of a governmental entity has deprived a water right holder of the ability to beneficially use a water right to which he or she is already lawfully entitled.

surrounding the wells, thereby forming a large cone of depression, which is capturing and drawing the Group's surface water rights to a level nearly 100 feet underground. (R. 198.)

The City does not dispute that its conduct has caused this artificial condition to occur beneath the Group's farm lands. Nor does it dispute that the Group's water rights are being drawn nearly 100 feet below ground level to replenish the aquifer that is continuously being depleted by the City. The City argues only, asserting form over substance, that the Group still has "the use of all of their leased or owned water rights in the same quantities, amounts, and at the same points of diversion as they did before the City put its Hayden well field into production."⁵ (Appellee's Br. at 10.) Essentially, then, the City is arguing that, regardless of the fact that a majority of the Group's surface waters is taken by the City's wells and is, therefore, useless, the City cannot be liable for taking the Group's surface water rights because it has not *physically* intercepted the Group's surface waters (while on the surface). Not only does this argument put form over substance, it is contrary to the United States Supreme Court's precedent. Indeed, in addition to its holding in *United States v. Cress*, 243 U.S. 316 (1917), which was discussed in the Group's opening brief and not addressed by the City, the United States Supreme Court reiterated in *United States v. Causby*, 328 U.S. 256 (1946), that, even if a governmental entity does not physically enter upon the land or physically take property, its conduct will nonetheless constitute a taking if it results in "an intrusion so immediate

⁵ But this argument ignores the fact that the Group does not have the same use of its water rights. Their water now goes into the wells of the City.

and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it." *Id.* at 265.

In *Causby*, the plaintiffs owned property located near an airport runway. *Id.* at 258. In addition to residing at the property, the plaintiffs also raised chickens on their land. *Id.* In May 1942, the United States began making "frequent and regular flights of army and navy aircraft over" the plaintiffs' property. *Id.* As a result of these flights, and the accompanying noise, the plaintiffs were unable to continue "the use of the property as a commercial chicken farm."⁶ *Id.* at 259. In affirming the Court of Claims' finding that a taking had occurred, the Court declared, "[g]overnmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking." *Id.* at 259, 263 n.7. In rejecting the United States' argument that no taking occurred because the "flights are made within the navigable airspace without any physical invasion of the property of the landowners," *id.* at 260, the Court reasoned as follows:

[i]f, by reason of the frequency and altitude of the flights, [plaintiffs] could not use this land for any purpose, their loss would be complete. It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it.

... The fact that the planes never touched the surface would be as irrelevant as the absence in this day of the feudal livery of seisin on the transfer of real estate. The owner's right to possess and exploit the land—that is to say, *his beneficial ownership of it*—would be destroyed....

There is no material difference between the supposed case and the present one, except that here enjoyment and use of the land are not completely

⁶ This was so because "[a]s many as six to ten of their chickens were killed in one day by flying into the walls from fright." *Id.*

destroyed. But that does not seem to us to be controlling....

Id. at 261-62 (emphasis added).⁷

As in *Causby*, although the City has not physically entered upon the Group's properties to divert the Group's surface water rights that are now vainly used to irrigate their lands, the effects of its conduct in continuously over-pumping the Hayden Well Field wells and, consequently, creating the extended cone of depression are so complete as to deprive the Group of most of their property interest in their surface waters rights. Indeed, because the cone of depression intercepts the Group's irrigation water and draws it nearly 100 feet below ground to replenish the depleted unconfined aquifer, the Group cannot beneficially use their water rights. Thus, the City's conduct in depriving the Group of the ability to beneficially use their surface water rights constitutes a taking, and the trial court's grant of summary judgment in favor of the City should be reversed.

b. The Group Has a Protectable Property Interest in their Lands

In addition to taking the Group's surface water rights, the City has also taken the value and benefit of the Group's lands by preventing the Group from beneficially irrigating those lands. It is undisputed that the Group has a protectable property interest in their land. *See Farmers New World Life Ins. Co. v. Bountiful City*, 803 P.2d 1241, 1244 (Utah 1990) ("The kinds of property subject to the [eminent domain] right ... is practically unlimited. Under general principles of eminent domain, 'property' includes but is not limited to land and improvements subject to the substantive law of real property." (internal quotations and citations omitted)). It is also undisputed that, as a

⁷ This same reasoning also applies to near-surface water and land owned by the Group.

result of the City's conduct in over-pumping the Hayden Well Field wells, which, in turn, has prevented the Group from beneficially using their surface water rights to irrigate their property, the once highly productive farm and pasture lands have transformed into barren lands on which little, if any, crops, or even natural vegetation, will grow. Because the City's conduct has destroyed the Group's ability to use their lands, the City must compensate the Group for such damages, as mandated by the Utah and United States Constitutions.⁸ *See Colman v. Utah State Land Bd.*, 795 P.2d 622, 626 (Utah 1990) (defining taking as "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." (internal quotations omitted)).

c. The Group Has a Protectable Property Interest in the Near-Surface Waters Below Their Lands

Finally, the Group has a separate and independent protectable property interest in the near-surface waters that support natural vegetation. The general rule in Utah is that all water in the state is "property of the public." Utah Code Ann. § 73-1-1 (2009). However, as discussed in the Group's initial brief, this Court has previously recognized an exception to this rule. Specifically, as stated in *Riordan v. Westwood*, 203 P.2d 922

⁸ Although the City argues that the "amount of crop and cattle expected from a particular property is not a protected property interest," (Appellee's Br. at 13), it should be noted that, as in *Causby*, where the United States' flights prevented the plaintiffs from using their property as a chicken farm, the City's conduct in this case has destroyed the Group's ability to use their lands as they have historically done, i.e., to raise crops and pasture cattle. This is so because the cone of depression created by the City's over-pumping of the unconfined Neola-Whiterocks Aquifer deprives the Group of the benefit of irrigating their properties. Thus, pursuant to *Causby*, because the effects of the City's conduct "are so complete as to deprive the owner of all or most of his interest in the subject matter," the City's conduct constitutes a taking. 328 U.S. at 263 n.7.

(Utah 1949),

[w]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.

In arguing against application of the *Riordan* exception, the City attempts to deflect the Court's inquiry by claiming that the Group has not alleged damages to natural vegetation. (Appellee's Br. at 17.) But this argument misses the point. The point is whether or not the near-surface water has been taken, not what grows because of it.⁹

Also in arguing against application of the *Riordan* exception, the City relies heavily on *Weber Basin*. However, just as this Court distinguished *Weber Basin* from *Riordan*, the *Weber Basin* case is also clearly distinguishable from the present case. In its opinion, the *Weber Basin* Court recognized that, pursuant to *Riordan*, "[i]t seems that the landowner does have some rights in the waters naturally occurring in his soil in the right to use and exercise dominion over them while they remain therein" such that "no one from the outside could, in effect, pirate the waters, by making an artificial canal or other excavation for the purpose of draining the land, without being held responsible." 328

⁹ This claim also ignores the record. The Group's responses to the City's discovery requests clearly state that, as a result of the City's conduct, "the trees and grass on the affected properties died and the North Hayden Group could no longer produce hay as they had before." (R. 146.) And, in their opposition to the City's motion for summary judgment, the Group again asserted that the near-surface water table sustained plant life in the form of cottonwood and cedar trees on the land, which died after the City began mining the unconfined Neola-Whiterocks Aquifer. (R. 189-90, 256.)

P.2d at 178. The Court then declared that such a situation was not before it. *Id.*¹⁰

Such a situation is, however, presently before this Court. While it is true that the City has not excavated the surface of the Group's lands to drain the near-surface water under those lands, the City has caused an artificial vacuum to occur directly beneath the Group's land that captures and diverts the near-surface water that had historically sustained plant life on those lands. Thus, although the City's means of interference differs from the means employed in *Riordan*, the result remains the same—the City's conduct has taken the near-surface water underlying the Group's properties. Consequently, the City should be liable to the Group for the damages they have sustained as a result of the City's conduct in draining the Group's near-surface waters.

The City also argues that the *Riordan* exception should not apply in this case because the near-surface waters constitute part of an established aquifer. But it should be noted that Mr. Rogers has opined that the aquifer “*supports* a near surface water table.” (R. 201 (emphasis added).) It is this near-surface water table that provides the water afforded protection pursuant to the rule announced in *Riordan*. The City has taken this water by causing the unconfined aquifer to drop over 80 feet.

Lastly, relying solely on *Salt Lake City v. Silver Fork Pipeline Corp.*, 2000 UT 3, 5 P.3d 1206, the City argues that *Riordan* does not reflect the law as it currently exists in this State. *Silver Fork* does not, however, overrule the limited exception announced in *Riordan*, and the City has set forth no basis or reasoning for the Court to do so now.

¹⁰ In *Weber Basin*, previously appropriated water was being stored upstream in a reservoir, not drained from the land of Gailey. Here, the City is not merely storing appropriated water; instead, it is draining the water directly from the Group's lands.

2. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE NORTH HAYDEN GROUP'S INTERFERENCE CLAIMS BECAUSE THE EVIDENCE SHOWS THAT THE CITY HAS INTERFERED WITH THE GROUP'S WATER RIGHTS

In an apparent attempt to excuse its actions, the City asserts that the Group's claims for interference allege only that the Group's "owned and leased water rights are not as effective in irrigating their properties as they were prior to the City putting it[s] own water into production." (Appellee's Br. at 19.) But this argument mischaracterizes the record. The Group has alleged, and the undisputed evidence has shown, that the City's continuous over-pumping of the Hayden Well Field wells has not simply made the Group's water rights less effective. Rather, the City's mining of the unconfined Neola-Whiterocks Aquifer has created an artificial vacuum, in essence, underlying each of the Group's lands. This vacuum captures the appropriated surface water applied to the lands and then draws that water down nearly 100 feet to replenish the depleted aquifer. Those waters are then available only to the City to be pumped by it through its wells.

Although the City's interference with the Group's surface water rights is not as obvious as a typical interference case, such as when a canal is unlawfully diverted to another's property, the City's conduct in over-pumping its wells and mining the aquifer has nonetheless directly interfered with the Group's surface water rights in a manner that is prohibited by Utah law. Indeed, as stated in *Current Creek Irrigation Co. v. Andrews*, 344 P.2d 528 (Utah 1959), precedent ignored by the City in its brief, this Court has consistently enjoined conduct that has "had the effect of preventing a prior user from

continuing a beneficial use of underground waters.”¹¹ *Id.* at 531. As the undisputed evidence presented to the trial court establishes that the City’s conduct has “had the effect of preventing a prior user from continuing a beneficial use of [surface] waters,” the trial court should have applied the “rule of reasonableness” as set forth in *Wayman v. Murray City Corp.*, 458 P.2d 861 (Utah 1969). That rule provides that “[a]ll users are required where necessary to employ reasonable and efficient means in taking their own waters in relation to others to the end that wastage of water is avoided and that the greatest amount of available water is put to beneficial use.” *Id.* at 865. Applying this rule would have required the trial court to evaluate the “total situation,” including the “quantity of water available, the average annual recharge in the [aquifer], the existing rights and their priorities.” *Id.* Because the trial court failed to apply the rule and conduct the required analysis, this Court should reverse and remand with instructions to do so.

In attempting to absolve the trial court from its failure to apply the rule of reasonableness, the City argues, without authority, that the rule should not be applied when the conflicting water rights involved are both underground and surface water rights. (Appellee’s Br. at 19-20.) However, such an arbitrary distinction ignores the physical reality, recognized by Utah law and the United States Supreme Court, that

¹¹ Although the issue before the *Current Creek* Court concerned underground waters, the ruling is equally applicable to this conflict given the fact that Utah’s statutory scheme governing appropriation of water does not distinguish between surface and underground water. See Utah Code Ann. § 73-1-1 (2009) (“All waters in this state, whether above or under the ground are hereby declared to be the property of the public, subject to all existing rights to the use thereof.”); *id.* § 73-3-8 (2009) (setting forth requirements for approval of application to appropriate, which include, *inter alia*, a finding that “there is unappropriated water in the proposed source” and that “the proposed use will not impair existing rights or interfere with the more beneficial use of the water”).

“[g]roundwater and surface water are physically interrelated as integral parts of the hydrologic cycle.” *Cappaert v. United States*, 426 U.S. 128, 142 (1976) (alteration in original) (internal quotations omitted). Recognition of this interconnection of groundwater and surface waters is integral to Utah’s water law, as stated in *Silver Fork Pipeline*, where this Court held as follows:

We have consistently held that an appropriator of water rights also owns a vested interest in the sources of that water, and no one may interfere with the source of the appropriator’s water supply in a way that diminishes the quantity or quality of the appropriated water. This principle holds true regardless of how far the source may be from the place of use, and ***regardless of whether the source waters flow on the surface or underground.***

2000 UT 3 at ¶ 22 n.6 (emphasis added) (citation omitted).

The City also argues that this Court should not balance the rights of the City to beneficially use its water with the rights of the Group to beneficially use their surface water because such a balancing was already performed by the State Engineer. But such is clearly not the case. Indeed, this Court has stated on several occasions that the “office of state engineer was not created to adjudicate vested rights between parties, but to administer and supervise the appropriation of the waters of the state.” *Whitmore v. Murray City*, 154 P.2d 748, 750 (Utah 1944). Consequently, the State Engineer “acts in an administrative capacity only and has no authority to determine rights of parties.” *Id.*¹²

Accordingly, under Utah law, it was the responsibility and obligation of the trial

¹² Also, the State Engineer’s approval of the City’s change applications that allowed diversion from the Hayden wells is based on a “reason to believe” standard not applicable here, *see* Utah Code Ann. § 73-3-8 (2009), and is specifically subject to prior water rights, *see id.* 73-3-3 (2009).

court to balance the competing property interests of the parties. *See Johnson v. Mt. Ogden Enters., Inc.*, 460 P.2d 333, 336 (Utah 1969) (“[E]very 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.*” (emphasis added).); *N.M. Long & Co. v. Cannon-Papanikolas Constr. Co.*, 343 P.2d 1100, 1102 (Utah 1959) (“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.”). In this case, it is evident that the City’s mining of the unconfined aquifer, which has in turn rendered useless and valueless the lands and surface water rights in the surrounding area, is not putting the property to its best advantage; rather, such conduct is wasting and destroying what was once valuable property. This waste is unnecessary and, indeed, unreasonable given the fact that the City may easily obtain the water that it has appropriated by simply deepening its wells so that it pumps from the confined Duchesne River Formation rather than the unconfined Neola-Whiterocks surface aquifer.

The trial court erred when it did not consider or apply the rule of reasonableness and did not balance the competing property interests of the parties. Accordingly, the Group requests that this Court reverse the trial court and remand the cause for trial.

3. THE DISTRICT COURT ERRED IN FINDING THAT THE CITY DID NOT HAVE A DUTY TO REFRAIN FROM OPERATING ITS WELLS IN A MANNER THAT WAS INJURIOUS TO THE NORTH HAYDEN GROUP

On appeal, the City argues only that the Group’s interference and negligence

claims should be dismissed because it owes no duty to the Group to refrain from using its property in a manner that substantially interferes with the Group's property rights.¹³ In so arguing, the City relies on the case of *Estate of Steed v. New Escalante Irrigation Co.*, 846 P.2d 1223 (Utah 1992). However, *Steed* does not address the issue of whether a property owner has a duty to refrain from injuring a neighboring landowner. Rather, the issue before the *Steed* Court was whether the plaintiff could legally appropriate the defendant's waste water such that the defendant should be compelled to maintain the same level of waste water for the benefit of the plaintiff. *See id.* at 1224. In denying the plaintiff's claim, the Court held that, although waste water may be reappropriated, "the reappropriator acquired no rights as against the original appropriator to have the waste water continue to escape to the wash." *Id.* at 1225.

In this case, the Group has not alleged that they have a vested right to abandoned or waste water of the City or even that they have a vested right to have the aquifer remain at its historic level. Rather, the Group has alleged that they have a vested right to the beneficial use of their earlier appropriated surface waters and that that right has been substantially invaded by the City's negligent conduct in drilling shallow wells, mining the aquifer, and creating an artificial vacuum to form beneath their land which intercepts and diverts the Group's waters. Thus, *Steed* is inapplicable to this case.¹⁴

¹³ It appears from its failure to respond to the arguments raised in the Group's initial brief that the City is now conceding that the Group's interference and negligence claims are not barred by the Governmental Immunity Act.

¹⁴ The City also erroneously argues that *Wayman* imposes no duty on the City to cease the operation of its pumps. (Appellee's Br. at 23.). While *Wayman* did refuse to apply a *per se* rule in cases with competing water right interests, the Court expressly adopted the

Utah's common law imposes a duty on property owners to refrain from using their property in a manner that would harm the property interests of others. *See, e.g., Johnson*, 460 P.2d at 336 (“[E]very 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.”).¹⁵ Further, Utah's Legislature has imposed an additional “statutory duty” on “[t]he owner of any ditch ... or other watercourse [to] maintain the same in repair so as to prevent waste of water or damage to the property of others.” *Erickson v. Bennion*, 503 P.2d 139, 140 (Utah 1972) (third alteration in original) (quoting Utah Code Ann. § 73-1-8 (1953)). Thus, pursuant to both statutory and common law, the City has a duty to exercise reasonable care in the development and operation of its wells. As the trial court's ruling failed to properly consider this duty, its grant of summary judgment was erroneous.

4. THE DISTRICT COURT ERRED IN REFUSING TO APPLY THE CONTINUOUS TORT RULE

In arguing against application of the continuous tort rule, the City claims that each of the Group's causes of action “stem from the City establishing wells” in the unconfined Neola-Whiterocks Aquifer. (Appellee's Br. at 26.) The City wrongly compares this case to the hypothetical case in which a city installs a road on private property, claiming it was

“rule of reasonableness,” which requires the trial court to conduct an “analysis of the total situation” in order to determine whether “the means of diversion ... are reasonable and consistent with the state of development of water in the area.” 458 P.2d at 865-66. In this case, the trial court refused to apply the rule of reasonableness and thus erred.

¹⁵ Indeed, this concept is the very genesis for the claim of nuisance. *See id.* (affirming trial court's ruling that defendant's operation of a drive-in theater constituted a nuisance because such use of defendant's property “tended to substantially and unreasonably interfere with the plaintiff's enjoyment of their property”); Utah Code Ann. § 78B-6-1101(1) (2009) (“A nuisance is anything which is ... an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property”).

the initial installation of the wells, not the use of the wells, that triggered the statute of limitations and that, therefore, the continuous tort rule does not apply.

However, in so arguing, the City fails to recognize that the actual installation of the wells on its own property did not result in any damage to the Group—the wells were lawfully established on the City’s property and their existence is perfectly legal. Rather, the Group’s damages have resulted from the cumulative effect of the City’s mining of the aquifer, i.e., the City’s continuous over-pumping of the wells without allowing the aquifer time to adequately recharge. Consequently, because the installation of the wells did not result in any damage to the Group’s property rights, the Group could not have maintained a cause of action against the City at the time the wells were installed.¹⁶ See *Davidson Lumber Sales, Inc. v. Bonneville Inv., Inc.*, 794 P.2d 11, 19 (Utah 1990) (“The general policy in Utah is that statutes of limitations commence to run when the cause of action accrues. A tort cause of action accrues when it becomes remediable in the courts, that is, when all elements of a cause of action come into being.” (citation omitted)).

Unlike the City’s analogy of installing a road on private property, the City’s wrongful conduct in this case is not based on one discrete action that occurred in the

¹⁶ As shown by the City’s own inconsistent statements, it is impossible to isolate one single date for purposes of determining when the statute of limitations would have begun to run because the North Hayden Group’s claims accrued as a result of the cumulative effect of the City’s continuous over-pumping of the wells. Compare Appellee’s Brief at 27 (stating “[i]f their damage is being caused by the City’s wells or well design then that cause of action accrued when they were first placed in production, which according to the complaint was in the **1990s**.” (emphasis added)) with *id.* (“They are asserting that even though the City took their property for public use beginning in **1980’s**, and that they knew about this, the statute of limitations did not start to run when the taking first took place, but each time the use occurs.” (emphasis added)).

past.¹⁷ Instead, the City's wrongful conduct in this case is ongoing. Indeed, it is the continuous, almost daily, pumping of the Hayden Well Field wells that has created the cone of depression, which is intercepting the Group's waters. The City's ongoing conduct can be discontinued at any time, and such cessation of over-pumping will prevent further damages from occurring to the Group's properties and water rights. Thus, as set forth in *Breiggar Properties, L.C. v. H.E. Davis & Sons, Inc.*, 2002 UT 53, 52 P.3d 1133, because the City's conduct consists of "multiple acts" that "have occurred, and continue to occur," the wrongful conduct should be characterized as "continuing." *Id.* at ¶ 11 ("We characterize a trespass as 'permanent' to acknowledge that the act or acts of trespass have ceased to occur. We characterize a trespass as 'continuing' to acknowledge that multiple acts of trespass have occurred, and continue to occur").

5. THE CITY'S MINING OF THE AQUIFER VIOLATES PUBLIC POLICY

In its brief, the City does not contest that it is mining the unconfined Neola-Whiterocks Aquifer; rather, the City argues only that it is entitled to mine the aquifer because it has been granted water rights from the State Engineer. In so arguing, the City claims that its conduct is in conformity with the public policy of the State of Utah.¹⁸ However, the declarations of the Legislature demonstrate otherwise.

¹⁷ Because the City continuously shuts off and turns on the well pumps, a more analogous hypothetical would be if the City had installed a temporary roadblock on the Group's property, which the City would take down at the end of the day and then re-set up the following day. Such conduct would clearly qualify as a continuing tort because the City's conduct continues to occur each day. Therefore, the statute of limitations would not begin to run until the end of the continuing wrongful conduct.

¹⁸ The City's view of public policy harkens back to the 19th Century when wetlands were worthless and should be drained and rivers were consistently dried up without concern.

The Utah Legislature has declared its intent to prevent the mining of underground basins and aquifers on at least three separate occasions. First, in 2006, the Utah Legislature passed the Groundwater Management Plan (the “Plan”), which clearly expresses the Legislature’s policy against the mining of aquifers. *See* Groundwater Management Plan, 2006 Utah Laws Ch. 193 (codified as Utah Code Ann. § 73-5-15). Indeed, that Plan authorizes the State Engineer to adopt groundwater management plans to limit the withdrawal of water from a basin or aquifer to the “safe yield,” which is defined as “the amount of groundwater that can be withdrawn from a groundwater basin over a period of time without exceeding the long-term recharge of the basin or unreasonably affecting the basin’s physical and chemical integrity.” Utah Code Ann. § 73-5-15(1)(b), (4)(a)-(b) (2009). Although the City is correct in asserting that the Plan must be based on “the principles of prior appropriation,” *id.* § 73-5-15(3)(b), the Legislature has firmly declared that withdrawal of water from a basin or aquifer under the Plan must not exceed the safe yield¹⁹ in order to accomplish the Plan’s objectives, which are threefold: (1) to “limit groundwater withdrawals to safe yield”; (2) to “protect the physical integrity of the aquifer”; and (3) to “protect water quality.” *Id.* § 73-5-15(2)(b).

In addition to this firm pronouncement, the Legislature approved a resolution in 2007 that reaffirmed the State’s policy against the mining of aquifers. Specifically, in the Joint Resolution Regarding Action on Groundwater in Snake Valley, the Legislature urged the Governor to “carefully assess the [Snake Valley] groundwater development

¹⁹ Section 73-5-15 provides one limited exception to this rule: upon determination of the State Engineer, the groundwater management plan may be implemented gradually. *See* Utah Code Ann. § 73-5-15(4)(a)-(b).

project's potential economic, social, and environmental consequences in Utah, including assessing impacts to indigenous flora and fauna." H.J.R. 1 at 3 (Addendum E to Brief of Appellants). And, in 2009, the Legislature enacted the Snake Valley Aquifer Research Team and Advisory Council to investigate the affect the proposed project would have on "surface water and groundwater," "vegetation," "agriculture," "soils," and "air quality." H.B. 120 at 5 (codified as Utah Code Ann. §§ 63C-12-101 to -108 (2009) (Addendum F to Brief of Appellants). Thus, the Legislature has clearly articulated its policy of preventing the mining of aquifers and the resulting environmental consequences.

Apparently recognizing the Legislature's policy against the mining of aquifers, the City resorts to *Wayman* as support for its argument that its mining of the unconfined Neola-Whiterocks Aquifer is proper. Specifically, the City relies on the following language in *Wayman*: "Because of the vital importance of water ... both our statutory and decisional law have been fashioned in recognition of the desirability and of the necessity of insuring the highest possible development and of the most continuous beneficial use of all available water with as little waste as possible." 458 P.2d at 863.

However, as discussed, *supra*, the City's mining of the unconfined aquifer does not promote the policy enunciated in *Wayman* because the City's conduct has resulted in a substantial waste of water. Indeed, because the City's excessive withdrawal of water from the unconfined Neola-Whiterocks Aquifer has created the cone of depression underlying the Group's lands, the Group's once-valuable and beneficially used senior water rights are now useless. Had the City simply drilled its wells deeper to reach the confined Duchesne River Formation and encased those portions of its wells within the

unconfined aquifer, the City would have been able to withdraw all of the water which it has appropriated without any effect on the Group's water rights.²⁰ Alternatively, the City could limit its diversion to the safe yield of the aquifer. Either would have been in accordance with the dictates of *Wayman*. But as it stands, the City's conduct in mining the unconfined aquifer is resulting in the waste of thousands of acre feet of water each year, which in turn has detrimentally affected the lands surrounding the Hayden wells.

The City also argues against the application of the public trust doctrine in this case. However, as discussed in the Brief of the *Amici Curiae*, the public trust doctrine applies to prevent the City's unfettered mining and destruction of the Neola-Whiterocks Aquifer by placing limits on the extent of the City's beneficial use of its approved water rights. While the trial court essentially held that the City's approved water rights are absolute, the public trust doctrine holds otherwise.

The City argues that the public trust doctrine is not implicated in this case because this is not a case involving protection of the "natural environment" or "natural flora and fauna"²¹ but is instead a case "where two water users are in a contest over two unnatural

²⁰ The City erroneously claims that "[t]he North Hayden Group has taken the position that for their own economic interest the City must leave the water underlying their ground without use." (Appellee's Br. at 30.) As discussed above, the Group's claims against the City stem from the City's mining of the **unconfined** aquifer. The option is available to the City at any time to deepen its wells so that it may withdraw the water it has appropriated from the **confined** Duchesne River Formation. Because the Duchesne River Formation is a confined aquifer, no cone of depression will result from the withdrawal of water from that aquifer. Thus, both the Group and the City would be able to beneficially use the water which they have appropriated. In sum, this dispute exists because the City drilled shallow wells in an apparent effort to save well-drilling costs.

²¹ The City also appears to question whether the public trust doctrine is even recognized in this state. (See Appellee's Br. at 28.) However, the public trust doctrine has a well-

uses of the water.” (See Appellee’s Br. at 28.) But this argument is contrary to the record. The North Hayden Group’s Complaint alleges that, “[a]s a result of the pumping from the Hayden Well Field, the [Group’s] properties have become almost completely dewatered. The land, which was fertile and productive, is now largely barren.” (R. 9.) And the Group likewise explained in its Response to the City’s motion for summary judgment that natural pasture land has become barren, and natural cottonwood and cedar trees that once existed on the properties have died. (R. 265.) Thus, the Group has alleged that, not only has the City’s mining of the unconfined Neola-Whiterocks Aquifer resulted in dewatering the surrounding lands, the City’s conduct has also resulted in environmental damages to the plant life indigenous to the area.

More importantly, the City’s myopic view of this case as simply a contest between two water users ignores the widespread and long-lasting effects its conduct will have on not just the Group but on all citizens of Utah. It is well-recognized that “[g]roundwater mining is a serious concern 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, interference with senior

documented history in Utah’s courts, both in principle and in name. See *Conatser v. Johnson*, 2008 UT 48, ¶ 15, 194 P.3d 897 (holding that “the scope of the public’s easement in state waters provides the public the right to engage in all recreational activities that *utilize* the water and does not limit the public to activities that can be performed *upon* the water.”); *Nat’l Parks & Conservation Ass’n v. Bd. of State Lands*, 869 P.2d 909, 919 (Utah 1993) (noting that public trust doctrine protects ecological integrity and public recreational uses of public lands); *Colman*, 795 P.2d at 635 (finding that the state “exercised its powers under the public trust in leasing” a brine canal easement to plaintiff); *J.J.N.P. Co.*, 655 P.2d at 1136 (“The State regulates the use of the water, in effect, as trustee for the benefit of the people.”).

surface water rights, increased costs of groundwater retrieval, and economic depletion of the groundwater basin.” Susan Batty Peterson, Note, *Designation and Protection of Critical Groundwater Areas*, 1991 B.Y.U. L. Rev. 1393, 1395 (1991).

Given that “[a]ll waters in this state, whether above or under the ground are hereby declared to be the property of the public,” Utah Code Ann. § 73-1-1, the public trust doctrine prevents the mining of groundwater as detrimental to the public’s interest. Public trust principles pervade Utah’s law, requiring the State Engineer to consider the effects on the “natural stream environment” and the “public welfare” of various activities relating to both surface and groundwater. *See, e.g., id.* §§ 73-3-8(1)(b)(i); 73-3-29(4)(b)(ii)–(iv). The early triad of uses protected by the doctrine—navigation, fishing, and commerce—were protected because they were necessary for the welfare and existence of the early agrarian societies. In recent years, the doctrine has been extended to protect the natural environment as an important public benefit. Protecting the State’s aquifers from irreversible degradation is thus at the heart of the public trust doctrine.

And contrary to the City’s assertions otherwise, this case presents the very situation that the public trust doctrine is intended to prevent. The City’s mining of the unconfined aquifer threatens the existence and long-term vitality of the Neola-Whiterocks Aquifer. Depletion of this valuable resource, owned by the public, would be felt for generations to come. Pumping at the City’s current levels has decimated the natural vegetation, including pasture used by the Group for decades. Continued pumping will destroy the aquifer forever. Even under the City’s limited and dated view of the public trust doctrine, the City’s continued mining of the unconfined aquifer threatens, and has

damaged, the “healthy environment” and the “natural flora and fauna.”²²

The public trust doctrine is squarely implicated in this case because it serves to correct the trial court’s erroneous conclusions, which the City embraces, that an approved water right is absolute and diversion and use of such a water right is subject to no limitation. (R. 294, 299.) If the trial court’s conclusions are allowed to stand in this case, the ability of the public trust doctrine to protect some of the state’s most vital natural resources and ensure their continued benefit to the future welfare of the public may well indeed diminish, just like the aquifers the doctrine once preserved.

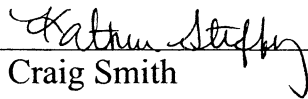
CONCLUSION

Because Utah is a desert state, water is a scarce and valuable natural resource. Indeed, given our dry climate and our limited water resources, this Court has likened a drop of water to a drop of gold. But despite these stark realities, Roosevelt City comes before this Court and asks that it be allowed to continue, without restraint, in mining an unconfined aquifer, even when such conduct has resulted and will continue to result in the waste of thousands of acre feet of water each year held by the North Hayden Group and others. As such conduct is clearly contrary to the State’s laws and policies regarding use of the State’s waters, this Court should reverse the trial court’s grant of summary judgment in favor of the City on the Group’s claims.

²² The claim of the City that the parallels between this situation and the Snake Valley Controversy are “tenuous, if nonexistent,” (Appellee’s Br. at 29), only emphasizes once again the City’s refusal to acknowledge the facts. Snake Valley and this matter closely parallel each other, and affirming the trial court’s ruling will compromise Utah’s ability to prevent future efforts to protect the integrity and viability of the public’s aquifers.

DATED this 31st day of August, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August, 2009, I caused to be served, via U.S. first class mail, postage prepaid, two true and correct copies of the **REPLY BRIEF OF APPELLANTS** addressed as follows:

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