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**Roger B. Arave and Kimberly L. Arave; Janet Southwick, Trustee;
Venture Development Group, LLC, Plaintiffs and Appellees, v.
Pineview West Water Company Defendant and Appellant : Brief of
Appellant**

Utah Supreme Court

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THE UTAH SUPREME COURT

ROGER B. ARAVE AND KIMBERLY L. ARAVE; JANET SOUTHWICK, TRUSTEE;
VENTURE DEVELOPMENT GROUP, LLC,
Plaintiffs and Appellees,

v.

PINEVIEW WEST WATER COMPANY
Defendant and Appellant.

PRINCIPAL BRIEF OF APPELLANT

On appeal from the Second Judicial District Court, Weber County,
Honorable Ernie W. Jones, District Court No. 130907544

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Oral Argument Requested

PARTIES

1. Appellant Pineview West Water Company (“Pineview West”) is a non-profit mutual water company that was organized to serve the municipal needs of the Radford Hills and part of the Crimson Ridge subdivisions near Eden, Utah. The lot owners in those subdivisions are shareholders of Pineview West, which is regulated and operates under a tariff set by the Utah Public Service Commission (“PSC”). Pineview West is represented by Edwin Barnes, Tim Pack, and Emily E. Lewis, of the law firm Clyde Snow & Sessions.

2. Appellee Venture Development Group (“Snowberry”) is a Utah Limited Liability Company that operates an 11-unit commercial bed and breakfast enterprise known as the Snowberry Inn, also located near Eden, Utah.

3. Appellees Roger and Kimberly L. Arave (the “Araves”) are individuals who own a home near the Snowberry Inn.

4. Appellee Janet Southwick (“Southwick”) is an individual who owns a home located adjacent to the Arave property. Snowberry, the Araves, and Southwick are all represented by David Wright of the law firm Mabey, Wright, & James.

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INTRODUCTION

This is an appeal of a decision made by the trial court in a claim of common law interference with three approved water rights. The decision and the reasoning and grounds stated for it announce a dramatic departure from established ground water law and raise important concerns of statewide implication.

All parties to this action divert water from wells that are located within relatively close proximity, particularly the Arave and Snowberry Wells. Appellees, who own the Arave and Snowberry Wells, argued that Pineview West's Well 4 interfered with their water rights because the pumping of Well 4 lowers the level of water in the water table. Appellees offered no measurements of the amount of water their wells produced, either when Well 4 was in operation or when it was not, and they made no effort at trial to prove that they are unable to obtain the full quantity of water authorized by their water rights. (Indeed, the trial court found that Snowberry consumed more water than authorized by its water right.) Neither did Appellees undertake to prove that water was not available in their wells. Instead, they alleged, and the trial court found in its November 14, 2017 Memorandum Decision (Addendum 1, references to which herein will be by record page number), that the seasonal operation of Well 4 interfered with Appellees' domestic water rights because it lowered the level of the local water table.

There are numerous problems with the result found by the trial court, including the fact that Appellees' own expert confirmed that there was always a column of water available in both of their wells, even when Well 4 was in operation. Further, the water

table (the depth below the surface at which water may be found) is not a protected attribute of a water right. Water tables can vary for numerous reasons, including climate and precipitation, and the fact that diversions from all of the numerous water wells that tap into this same aquifer will necessarily impact the water table. For that reason, courts have required all parties to take reasonable steps to maintain the ability to divert the water allowed by their water rights, which steps may include placing their pumps lower in the well and deepening, or even re-drilling their wells. Appellees did not take those steps.

This is fundamentally a *water rights* interference case - not a well interference case. Though under certain circumstances, well interference may cause water rights interference, Appellees' burden in this action was to identify a specific quantity of water to which each is entitled under their water rights, but was unable to obtain due the operation of Pineview West's Well 4. Appellees do not know how much water their wells produce and they did not even attempt to meet this evidentiary burden.

The trial court acknowledged the applicable case law in its Memorandum Decision, which found in favor of the Appellees, but the court failed to correctly apply the law. Instead, the trial court adopted Appellees' argument that a claim for actionable interference can be based solely on the impact of a well on local water table levels. While Appellees' argument about underground aquifers and well communication may be academically interesting, it is legally irrelevant because it does not quantify any amount of water they are entitled to but are deprived of by Pineview West's actions. By basing its conclusion of interference on aquifer levels, and not on the protected elements of the

Appellees' water rights, the trial court erred. Its conclusion of actionable interference was incorrect as a matter of law and should be overturned.

This ruling, that the owner of a junior water right may not divert water in a manner that might lower the water table available to the owner of a senior right, if affirmed, would upend decades of established law relating to groundwater administration. This law has been developed over time to balance the practical realities of ground water diversions with the focus of the prior appropriation doctrine to encourage the beneficial use of the state's water. In an urbanizing state that is increasingly dependent on the development of ground water, it would be wholly impractical to require all holders of junior rights to guarantee a particular level of water in the water table for use by the most senior right. Accordingly, Pineview West encourages this court to overturn the finding of impairment based solely on water levels and maintain the established precedent that requires all parties to act reasonably in equipping and maintaining their water sources so they can provide the amount of water allowed by their approved water rights.

STATEMENT OF THE ISSUES

1. **Issue:** Whether the trial court applied the correct legal standard when it found actionable interference based on a finding that seasonal operation of the Pineview West's irrigation well temporarily affected the local aquifer level, and where Appellees offered no evidence to demonstrate that they were unable to receive the full amount of water to which they were entitled under their water right.

Standard of Review: Legal conclusions are reviewed for correctness. *See A.K. & R*

Whipple Plumbing & Heating v. Aspen Const., 1999 UT App 87, ¶ 11, 977 P.2d 518, cert. denied, 994 P.2d 1271. When reviewing a mixed question of fact and law, appellate courts grant some level of deference to the trial court's application of law to the facts *Wayment*, 2006 UT 56, ¶ 9.

Issue preserved at: R.1273.

2. **Issue:** Whether the trial court erred when it found that Appellees met their obligation to employ reasonable and efficient means to obtain their own water, a showing that is a predicate to a successful claim for interference.

Standard of Review: When reviewing a mixed question of fact and law, appellate courts grant some level of deference to the trial court's application of law to the facts *Wayment*, 2006 UT 56, ¶ 9.

Issue preserved at: R.01251.

3. **Issue:** Whether the trial court erred in finding that Pineview West was negligent in locating, drilling and using its well, when the well was not located, drilled or equipped by Pineview West.

Standard of Review: "The issue of whether a duty exists is entirely a question of law to be determined by the court, which determination we review for correctness." *Lopez v. United Auto. Ins. Co.*, 2009 UT App 389, ¶ 8, 222 P.3d 1192, *aff'd in part, rev'd in part on other grounds*, 2012 UT 10, 274 P.3d 897. The district court's findings of fact are reviewed for clear error. *LD III LLC v. Davis*, 2016 UT App 206, ¶ 12, 385 P.3d 689, 693, *cert. denied*, 387 P.3d 509 (Utah 2016), and *cert. denied sub nom. LD III, LLC v. BBRD, LC*, 137 S. Ct. 2167, 198 L. Ed. 2d 233 (2017).).

Issue preserved at: R.0482

4. **Issue:** Assuming actionable interference, whether the trial court erred in determining the proper measure of damages and whether the evidence presented was sufficient to support the damages awarded.

Standard of Review: The trial court's choice of the measure of damages is a question of law. *Traco Steel Erectors, Inc. v. Comtrol, Inc.*, 2009 UT 81, ¶ 28, 222 P.3d 1164, 1169. The trial court's findings of fact are reviewed for clear error. *LD III LLC*, 2016 UT App 206, ¶ 12.

Issued Preserved At: R.0489-0491.

STATEMENT OF THE CASE

1. Statement of the Facts

Appellees are private water users in the Ogden Valley. (R.0388). In the 1960's and 1970's Appellees, or their predecessors, appropriated small domestic water rights to supply water for their private residences, (Pltf.'s Ex.s 10 -12). Like all water rights in Utah, to protect one of the public's most valuable resources from waste or abuse, the State Engineer placed legally binding limitations on the quantity of water Appellees could divert, the rate the water was to be diverted at (in this case pumped), and stipulated the specific uses to which the water may be applied. (R.0404-0405).

The Snowberry Water Right

Snowberry owns water right No. 35- 1220. (Def.'s Ex. 3); (Pltf.'s Ex. 10A). Arave, Snowberry's predecessor, originally appropriated the Snowberry water right to

provide culinary water for a single-family residence (“The Red House”) (R. 0519-521); (Pltf.’s Ex. 10A). With a priority date of 1960 the Snowberry water right is the most senior of all of the Appellees’ water rights. *Id.* The State Engineer’s 1961 Memorandum Decision approving the Snowberry water right limited the beneficial use to the indoor needs of one family, also known as an Equivalent Domestic Unit (EDU). (Def.’s Ex. 55). The State Engineer’s office has determined that one EDU requires .45 Acre-Feet (“AF”) of water annually for interior use and no more. (Def.’s Ex. 55); (Pltf.’s Ex. 10A, 11C).¹

In the early 1990’s Arave built the Snowberry Inn. (R.0005); (R. 0519). From its inception, the Snowberry Inn was operated as a commercial bed and breakfast enterprise. (R.0005); (R.0388). Roger Arave acknowledged he was unaware of the limits of the Snowberry water right and admitted that the domestic Snowberry water right was used for commercial purposes. (R.0520-0521); (R.0623-R.0624). In 2005, Arave sold the Snowberry Inn and Snowberry water right to Snowberry, who continued to operate the facility as a bed and breakfast business. (R.0005).

Far from a single family residence, the Snowberry Inn accommodates up to 21 guests and includes 10 bedrooms and bathrooms, plus a residence for the innkeeper, two kitchens, a laundry, a hot tub and, eventually, the Red House which was used as an auxiliary rental. (Pltf.’s Ex.10E. Pg.2); (R.0529-0530). The Snowberry Inn also hosted special events like weddings. (R.0598). The trial court found that the Snowberry Inn

¹ AF is an abbreviation for acre-feet. One AF is 325,900 gallons, so .45 AF is equal to 146,655 gallons. CFS is an abbreviation for cubic feet per second. One CFS is equal to 450 GPM (gallons per minute), so .015 CFS is equal to 6.73 GPM.

irrigated 4600 square feet of lawn and garden and that the Snowberry water right was used for unauthorized commercial and irrigation purposes. (R.0390); (R.0388). The trial court also found that Snowberry used water in excess of its .45 AF annual authorization. (R.0398); (Def.'s Ex. 10E).

In 2007, Snowberry connected to Pineview West's water system. (R.0521). Prior to joining Pineview West's water system, the Snowberry water right was the only source of water for the Snowberry Inn. (*Id.*) Later, in 2017, Snowberry applied for authorization to divert an additional 2 AF of water under Exchange Application E5647 and an associated Weber Basin Water Conservancy District contract. (Def.'s Ex. 9); (Pltf.'s Ex. 10E). As the basis and reason for its new application, Snowberry stated that its ongoing water needs exceeded 1.25 AF per year, far in excess of the .45 AF authorized by the existing Snowberry water right. (Pltf.'s Ex. 10E, Pg.2). Snowberry also applied for permission to use the new water for commercial and irrigation uses. (Pltf.'s Ex. 10E, Pg. 2). The application was expressly approved "subject to prior rights" and E5647 was given a priority date of January 11, 2017. (Def.'s Ex. 8, Pg. 6). While the original 1 EDU Snowberry water right is senior to Pineview West's Well 4 diversion rights, the new Snowberry water right, including all irrigation and commercial uses, which were authorized there for the first time, is junior in priority to the Well 4 diversion rights. (Pltf.'s Ex. 32, 33); (R.0392); (Def.'s Ex. 6).

The Snowberry Well

The State Engineer's 1961 Memorandum Decision approving the original .45 AF Snowberry water right specifically authorized the diversion of water at rate no greater

than .015 CFS or 6.73 GPM. (Def.'s Ex. 55). This condition was added to avoid local shallow wells from pumping too aggressively and depleting the local aquifer. *Id.* The Snowberry water right was originally pumped from a shallow well drilled in 1963 (Red House well). (Pltf.'s Ex, 17). In 2001, Arave abandoned the Red House well due to poor yield (R. 0005); (Pltf.'s Ex. 18, 19, 20), and replaced the Red House well with the current Snowberry Well, located 80 feet away. The Snowberry Well:

- was completed to 133 feet deep
- was measured to have a static water level of 54 feet below ground level
- casing was perforated between 105 to 125 feet
- was equipped with a $\frac{3}{4}$ horse power 20+ GPM pump placed 100 feet deep
- had a one hour pump test that produced 45 GPM and created three feet of drawdown in the well column

(Pltf.'s Ex. 20); (R. 0395); (R. 0519); (Pltf.'s Ex. 20).

The Snowberry Well is pumped directly into an underground cistern, from which the water is then pumped, as needed, to the Snowberry Inn. (R.0389). Despite being restricted to a limit of .45 AF, the Snowberry Well was pumped to produce as much water as the well could produce. (R. 0535). The Snowberry Well was never equipped with a meter and no direct measurements of the pumping rate or volume of water produced by this well have ever been taken. Appellees have no record of the amount of water actually drawn from the Snowberry Well or the actual yield of the installed pump. (R.0535-R.0536); (R.0601); (R.0619); (R.0823-0825).

Having no actual data regarding pump rates, Appellees' expert, Paul Anderson, estimated that the Snowberry Well was pumped at 20-30 GPM and the trial court found

that the pump was rated at 25 GPM; it operated on or off and was not a variable speed pump that could be operated to produce a smaller yield (R.0390); (0815-0816); (0847).

The Arave and Southwick Water Rights

Roger and Kimberly Arave own water right No. 35-1483, with a priority date of 1967. (Pltf.'s Ex. 11A- 11C). The Arave water right authorizes the diversion of .506 AF of water annually to satisfy the water needs of 1 EDU and two livestock units. (Pltf.'s Ex. 11A- 11C)(R.0391).

Janet Southwick owns water right No. 35-6733 (E1349), which has a priority date of 1978. (Pltf.'s Ex. 12A- 11D). The Southwick water right authorizes the diversion of 1 AF of water annually to satisfy the needs of 1 EDU and .25 acres of irrigation. (Pltf.'s Ex. 12A- 11D).(R.0391). The Arave Well is the source of the Arave and the Southwick water rights.

The Arave Well

The Arave Well is drilled to the following parameters:

- drilled in 1967
- completed to 187 feet deep
- a static water level of 28 feet below the top of the well column
- perforated from 140 to 170 feet
- Equipped with a pump placed at 68-70 Feet in the well column
- tested at a specific capacity of .033 GPM per foot of drawdown (10 GPM with 30 feet of drawdown in water level).

(Pltf.'s Ex. 15); (R.0389).

The Arave and Southwick water rights are the only water rights for the Arave and Southwick residences. (R.0391). The Southwick water right is the only water right

with an authorized irrigation use and Ms. Southwick used her water right to water a large garden, trees, and lawn. (R.0579).

Like the Snowberry water right, the Arave water right is also limited to a diversion rate not exceeding 6.7 GPM. (Pltf.'s Ex. 11A- 11c) (R. 0391).

The State Engineer's 1979 Memorandum Decision approving the Southwick water right required Southwick to "install a permanent totalizing meter to measure the water obtained." (Pltf.'s Ex. 12A). That meter was never installed. The pump was removed from the Arave Well in 2012. (R.0832). The Arave Well pump was not replaced after 2012 and, with the exception of a 2017 pump test, no attempt has been made to draw water from the Arave Well since 2012. (R.0534); (R.0825-0827); (R.0832-0833). (Plt.'s Ex. 54).

The 2017 pump test of the Arave Well demonstrated that the well had a specific capacity of 1.6 GPM per foot of draw down, or 5 times the original specific capacity, indicating that the well is more productive now than when it was originally drilled. (R.0836-0837). The pump test also showed the static water level in the Arave Well stabilized at 72 feet below the ground level while being pumped at a rate of 23 – 25 GPM over a two-hour period, leaving an additional 109 feet of water in the well column while it was being pumped. (Pltf.s Ex. 54); (R.0836-0837).

The Pineview West Water Right

Among other rights, Pineview West owns water right No. 35-11891 (E4625) which authorizes Pineview West to divert 90 AF of water for the irrigation of 26.1 acres and 55 EDUs from Well 4. (Pltf.'s Ex. 32, 33); (R.0392); (Def.'s Ex. 6). The priority date

of water right No. 35-11891 is 2005. *Id.* Pineview West also owns water right No. 35-7263, which was modified by Change Application a27794, and allows Pineview West to divert 78 AF of water for the irrigation of 26 acres and 173 EDUs from Well 4. (R.0392);(Def.'s Ex. 4). The priority date for water right No. 35-7263 is 1876 and the priority date of Change Application a27794 is 2003. (Def.'s Ex. 4).

Pineview West's Well 4

In 2001, developer Ed Radford, who is not a party to this proceeding, retained Appellees' expert Paul Anderson to assist with siting Well 4. (R.0639). Though, Mr. Anderson did not consult on the exact siting of Well 4, he did identify the "optimal zone" for which Well 4 should be located. (R.0638-0643). Mr. Radford completed Well 4 in 2004. (Pltf.'s Ex. 14).

Well 4 was drilled to approximately 795 feet, much deeper than the Arave and Snowberry Wells and was later contributed to Pineview West to provide summer irrigation water for Pineview West's members. (Pltf.'s Ex. 14). Well 4 is operated seasonally and typically starts up in July and runs through September. (R.1055-1056). Water from Well 4 is used as a supplemental source of irrigation water in the summer when Pineview West's surface sources begin to dwindle. *Id.* Well 4 is first turned on manually when needed and is then operated by a timer during the peak irrigation season. *Id.* Well 4 was originally equipped with a 150 GPM pump that was replaced with a slower 100-105 GPM pump in 2014. (R.1256).

Mr. Radford had tests performed on Well 4 in 2004 and 2006. (R.1256). When these tests began, the Araves and Southwick noted that the water level in the Arave Well

dropped below the level of the pump, and they were unable to pump any water unless they lowered their pump. (R.0503-0504). During these pump tests, Southwick complained of silt infiltration in her pipes when the pump failed to produce water. (R.0566-0567). Southwick acknowledged that the Arave Well did not have a backflow preventer and that, had one been installed, it would have prevented the silt infiltration problems and the claimed damage to her property. (R.0586).

In July of 2007, the entity that succeeded Mr. Radford as developer again pumped Well 4. (R.0605-0606). The pumping of Well 4 affected the water level in the Arave Well to the extent it was unable to produce water with the pump located at that level. (R.0396). Snowberry alleges that, beginning in the late summer of 2007, it began to take longer than normal to fill the Snowberry Well cistern, though Snowberry was able to fill the cistern. (R.0605-0606).

Appellees' Connection to the Pineview West Water System

In mid-2007, the entity that succeeded Mr. Radford connected the Southwick and the Araves to the Pineview West water system. (R.1257); (R.0396). Since 2007, the Araves and Southwicks have not attempted to use the Arave Well and have instead chosen to rely entirely on Pineview West to supply their water needs. (R.1257). Snowberry paid to install a line to connect the Snowberry Inn with the Pineview West water system in the fall of 2007. (R.0875); (R.0396). Since then, the Snowberry Inn has used both Snowberry Well water and Pineview West water to supply its needs. (R.0397-0398).

Appellees Attempt to Prove Interference with their Water Rights with Evidence of the Impacts of Well 4 on the Water Level in the Aquifers

Appellees retained expert Paul B. Anderson, a geologist by training, who testified to having expertise in hydrogeology. (R.0637-0638); (Pltf.'s Ex. 37). Mr. Anderson, in Pineview West's expert William Loughlin, a hydrogeologist, agreed and the trial court found, that the water level in the aquifers is affected by natural season fluctuations such as natural recharge in the winter and spring and lower levels of water in the summer and early fall. (Def.'s Ex. 46); (R.0393). Recharge and water levels are also affected by the amount and rate local wells are pumped. *Id.* Both experts were in agreement there are two distinct aquifers at issue in this case, the less productive being the Norwood Tuff and a generally more productive unconsolidated aquifer. (R.0393).

At trial, Mr. Anderson testified using illustrative graphs to discuss the relationship between high and low head in the Well 4, Arave, and Snowberry well columns to explain his interpretation of how water might move between wells and aquifers. (Pltf's Ex. 61); (R. 0964-0966). Mr. Anderson testified regarding the draw down curves of the various wells indicating when each well began to decline and when each well began to rebound and recover through recharge. (Pltf.'s Exhibit 26, 27); (Def.'s 54); (R.0799); (R.0818-0819); (R.0848-0856). Mr. Anderson also depicted water levels in a USGS well and Appellees' wells. (R.0586-0585).

Though Mr. Anderson's analysis is interesting, he provided no information on the quantity of water that was or could be produced by the wells, or whether Appellees were able to obtain the full amount of water authorized by their water rights.

Appellees Presented No Evidence of the Quantity of Water They Were Entitled to, But Did Not Receive, as a Result of Pineview West's Alleged Inference

Mr. Anderson prepared an expert report which is the foundation for Appellees' 2013 water rights interference claim. (Def.'s Ex. 27). In 2013, Mr. Anderson, installed water level monitoring devices in the Arave and Snowberry Wells. However, he did not install metering devices to determine how much water these wells pumped or were capable of pumping. Mr. Anderson did not perform any tests to quantify the amount the Arave and Snowberry Wells were capable of producing and no such evidence was offered at trial. (R.0823-0825). As a result, Mr. Allen's trial charts and testimony reflect only relative water levels and do not show the amount of water actually pumped from the wells. (Pltf.'s Ex. 26). Indeed, Mr. Anderson admitted he did not know how much water the wells were capable of producing at any point in time. (R.0824 – R.0825); (R.0877-0878).

Mr. Anderson acknowledged that he did not know amount of water Appellees were entitled to use until the trial. (R.0877). In other words, Mr. Anderson did not know there were specific volumes, flows, and uses that informed the question of whether a water right has been satisfied, or exceeded, when he wrote his report (R.0867-R.0869). As a result, Mr. Anderson acknowledged that he conflated the terms "water rights" with "water needs" in his report and did not address the crucial distinction between the two terms (R.0867-R.0868). He admitted that his testimony and conclusion that Appellees' were unable to satisfy their water rights when Well 4 was pumping really meant that Appellees were unable to pump the volume of water they were accustomed to. *Id.* He also

admitted he did no independent research to verify his opinion that “the Arave and Snowberry wells provided the full water needs of both water right owners” and did not have hard data on well production, but rather merely reported what the Appellees told him. *Id.* (R.0877).

Mr. Anderson also conceded that he failed to quantify the impact of climate and seasonal changes, the possible impact of the operation of other neighboring wells or, indeed, whether the pumping of the Snowberry Well itself affected the water levels in the Snowberry Well and the nearby Arave Well. (R.0586-0585); (R.0936).

The trial court found that the Snowberry Water Right was used for unauthorized commercial and irrigation purposes. (R.0388); (R.0398). Importantly, Snowberry admitted, and the trial court found, that Snowberry used water in quantities exceeding its .45 AF annual allocation in its water right. (R.0398). (Def.’s Ex. 10E).

Wells require continuous maintenance to produce optimal yields (R.0834-R.0835); (R.1087-R.1088) and a consequence of no maintenance can be excessive drawdowns of water in the well column to produce the same volume of water as originally produced (R.1087); (R.0835-0836). Besides a 2013 cleaning to remove a rust and debris clog, no maintenance was performed on the Arave Well since its installation in 1967. (R.0835-0836). No maintenance has been performed on the Snowberry Well since its installation in 2001. (R.0835-0836).

Mr. Anderson testified that water has been available in the Snowberry and Arave Well casings at all points in time,² and that Appellees made no efforts to lower their pumps in the wells or take other cost-effective measures, such as modifying pump operations to correspond with their diversion right, in order to put the available water to beneficial use. (R.0836-0837); (R.0856); (R.0874); (R.0845); (R.0895); (R.0983); (R.1113). Mr. Anderson also admitted that he did not perform any tests or calculations to determine the impact on the water table if Appellees' wells were pumped at the authorized rate of 6.7 GPM. (R.0823-0825). Finally, Mr. Anderson conceded that the Arave Well could be equipped with a pump to satisfy the Arave and Southwick Water Rights even when Well 4 was pumping. (R.1108-1111).

The Trial Court's Finding of Interference

The trial court found that Pineview West caused interference by partially dewatering the aquifers that are the source of supply for the Arave and Snowberry wells. (R0409). The trial court found the Arave Well to be a good surrogate when Well 4 was in operation, was pumping in that the two wells had an obvious a correspondence and most likely drew from the same aquifer. (R.0397). Pineview West's expert, William Loughlin, agreed and found the two wells to have similar characteristics and specific capacities. (R.1098-1099); (R.1132); (R.0831). Mr. Anderson stated, and the trial court found, that there is a sort of "teeter totter" effect between the water level in the Snowberry Well and that in the Arave Well, in that when the water level in the Arave Well drops below that of

² Even at times when Well 4 was in operation, Mr. Allen measured a water column of at least 109 feet available in the Arave Well and 33 feet in the Snowberry Well. (Def,'s Ex. 27, Pg. 9)

the Snowberry Well, it causes the water level in the Snowberry well to recede dramatically. (R.0401); (R.0412). (Mr. Anderson did not explain why those wells, located about 200 feet apart did not share the same water level if they are hydrologically connected, or what the effect of pumping the Arave Well might have on the water level in the Snowberry Well.)

Mr. Loughlin explained in detail the lack of a correlation between Well 4 and the Snowberry Well, as they do not have similar characteristics, including drastically different specific capacities, indicating they were most likely not completed in the same aquifer (R.1098-1099). This is evidenced by the drawdown and recharge curves of the two wells. (R.1102). Mr. Loughlin disagreed with the “teeter totter” theory and explained that the drawdown curve of the Snowberry Well was better explained by seasonal decline and Snowberry’s own aggressive pumping cycles. (R.1100).

The Trial Court’s Finding of Negligence

The trial court found that Pineview West owed the Appellees a duty of reasonable care and that Pineview West breached that duty when it located, drilled, and used Well 4. (R.0409). The trial court found interference was foreseeable given the close proximity of the wells, Well 4’s greater capacity, the depth of the well, and having perforated zones in aquifers shared by the Appellees. *Id.* Pineview West does not understand how it can be held responsible for those decisions which were not made by Pineview West, but by developers who are not parties to this action.

Appellees provided no testimony at trial regarding the standards or duty of care that apply to choices made in the siting, drilling, equipping or operating Well 4. The only

evidence presented regarding the initiation of Well 4 was that provided by Appellees' own expert Paul Anderson who had advised Mr. Radford.

The Award of Damages

The trial court ordered Pineview West to pay three categories of damages:

i) Reimbursement Damages - \$31,642.

Snowberry and Arave were billed and paid Pineview West for the water they used, initially at a rate negotiated with the developer who tested Well 4, and then, following a 2009 PSC Rate Case, at the rate Pineview West was required by the PSC tariff to charge Snowberry and Arave, who are included in Pineview West's service area, but are not shareholders. (R.0526-R.0527);(Pltf.'s Ex.18, Pgs. PWWC 000007 and 000019).

Pineview West bills have included a gallons-used measurement that is helpful for determining how much Pineview West water is being used by each Appellee. (Pltf.' Ex. 5). In other words, Pineview charged Appellees only for water Appellees actually used.

The trial court ordered Pineview West to repay the full amount paid by Appellees for water: Arave in the amount of \$7,003, Southwick in the amount of \$4,782, and Snowberry the amount of \$19,839. (R.0402). The amounts include charges for water used by Appellees during the nine months of the year when Well 4 is not pumped (October through June). (Pltf.'s Ex. 8, Pltf.'s Ex. 9) They are not correlated to any amount of water right that was proven to be unavailable because of impairment, but include the total amount of Pineview West water Appellees chose to use. *Id.*

ii) Pump Damages - \$4,500.

The trial court also awarded damages of \$4,500 in favor Arave for the cost of a new pump and accessories. (R.0402). That figure was an estimate, no pump has been purchased or installed in the Arave Well.

iii) Hard water Damages - \$9,399.

The trial court awarded Southwick \$1,000 and Snowberry \$8,399 for damages due to hard water deposits. (R.0402); (Pltf.'s Ex.5). No expert testimony was presented to substantiate the claim that Pineview West water was chemically different or to correlate the hard water problems as being with the water from Well 4. Such a result would also be inconsistent with Appellees' fundamental argument that all three wells draw from the same aquifer and thus influence each other. If that is the case, the water would all have the same chemical characteristics. To further compound Appellees' attempt to blame Pineview West for the hard water damage, the water used at the Snowberry Inn did not come solely from Well 4, but was consistently mixed with water from the Snowberry Well. (R.0556).

The Award of Non-monetary Relief in Favor of Appellees

The trial court found that Well 4 and the Appellees' well could not co-exist. (R.0411). As a result, the trial court ordered Pineview West to stop pumping Well 4 and pump its irrigation water from some other point of diversion, but only after pump-testing the other wells to ensure they did not cause interference with Appellees' wells. (R.0412); (R.0413).

The trial court purported to retain jurisdiction for the limited purpose of

determining if Well 4 could be pumped at a lesser rate so as not to interfere with the Arave and Snowberry Wells, and to maintain the head of water in the Arave Well above that in the Snowberry Well (R.0412).³ The trial court ordered that if Well 4 can operate without interfering, a flow meter must be installed to report pumping data to the State Engineer and Appellees on a weekly basis. *Id.* The trial court did not, however, order that flow meters be installed on the Appellees' wells.

PROCEDURAL HISTORY

This action was tried to the court on August 17, 18, 29, and September 25, 2017. The parties submitted Trial Briefs and Proposed Findings of Conclusions of Law. A Memorandum Decision was issued by the court on November 14, 2017. A Final Judgment, dated January 4, 2018, and an Amended Final Judgment dated January 10, 2018, were entered by the Second District Court. Copies of the Memorandum Decision and the Amended Final Judgment are included in the Addendum to this brief.

DISPOSITION BELOW

The trial court ruled in favor of the Appellees, finding that Pineview West interfered with Appellees' water rights and that Pineview West was negligent in locating, drilling and operating Well 4. The court ordered Pineview West to stop using Well 4 until it could demonstrate to the court's satisfaction that Well 4 could be operated in a

³ This requirement presents an impossible burden for Pineview West if the Arave and Snowberry Wells are hydrologically connected, as they must be to support a finding of interference. It will also be impossible for Pineview West to maintain this head differential in the event any attempt is made to divert the Arave water right from the Arave Well: pumping that well will necessarily lower the head of water in the well regardless of the actions of Pineview West.

way that would assure that the head of water in the Arave Well never drops below the head in the Snowberry Well. The court also awarded damages to Appellees in amounts that include the full amount of money they paid to Pineview West for the metered amounts of water they actually used (including all payments made for water consumed during periods when Well 4 was not in operation and could not have interfered with Appellees' water rights) and the estimated costs of a new pump and repairs associated with claimed hard water deposits.

SUMMARY OF THE ARGUMENT

The factual background for this case may be complicated, but the legal issues are not. The case presents the question of whether actionable interference with a water right requires proof that a party is unable to obtain the full measure of water authorized by its water right due to the actions of another party, or if interference can be found based solely on the lowering of the water table. This question should be easy to answer since this court has previously stated that parties have no enforceable right to the level of water in the water table. *Bingham v. Roosevelt City Corp.*, 2010; UT 37, ¶¶ 22, 53, 235 P.3d 730, 734, 744. This case also presents the question, perhaps for the first time in Utah, of whether a claim lies for actionable interference with an illegal use of water. Pineview West respectfully submits that there is no such cause of action.

The trial court erred when it found interference based solely on impacts to the water table without also requiring proof to link those impacts with measurements of a specific quantity of water to which Appellees were entitled but were unable to divert

from their wells due to the Pineview West's actions. Appellees cannot prevail on a claim of interference without proving the amount of water they diverted from their wells and proof of some amount of water authorized by their water rights that they cannot divert due to the operation of Well 4. Appellees offered *no* proof of the amount of water produced by their wells. They could not prove whether they used their full water right, or more or less, at any relevant time. This failure of proof is fatal to their claim.

The trial court also erred when it misapplied the rule of reasonableness established in *Wayman v. Murray City*, 458 P.2d 861, 865 (Utah 1969) and overlooked fatal factual problems to find that Appellee's means and methods of diversion were reasonable.

It was error for the trial court to finding Pineview West negligent in the siting, drilling, and equipping of Well 4 because those actions and decisions were not made by Pineview West, but by other parties who were not named in this action. Appellees also failed to meet their burden of establishing the requisite duty of care to be followed in the siting and equipping of wells and by failing to mitigate their damages (if negligence theory can be applied in this case).

Finally, the trial court erred when it awarded damages to Appellees, including ordering the repayment of money paid for water Appellees consumed during periods where no interference was claimed, ordering payment for the estimated cost of a replacement pump in a well the owner was obligated to maintain, and ordering payment for damages allegedly caused by hard water deposits from water that came from the same aquifer as that produced by Appellees' wells.

Included in all of these arguments are important issues of public policy regarding maintaining established water law precedent necessary for sustainable and orderly water use and development.

ARGUMENT

1. Water Rights are Unique Property Rights That Have Specific Attributes and Limitations.

Water is a most precious resource in this arid western state. Recognizing the importance of water, the Utah legislature long ago declared, “[a]ll 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.” Utah Code Ann. § 73-1-1. Additionally, the legislature codified the standard for the all water rights: “beneficial 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. In other words, “the extent of the right of an appropriator is limited to his reasonable necessities. The diversion and use of water creates a legal right only to the quantity necessary for that use.” *Mt. Olivet Cemetery Ass.n’ v. Salt Lake City*, 235 P.876, 880 (Utah 1925) (distinguished on other grounds).

In practice, water rights are unique rights in the nature of real property, where the public owns the water and the individual owns the right to use the public’s water subject to the limitations set by the State Engineer. *Garner v. Anderson*, 248 P. 496, 500 (Utah 1926); Utah Code Ann. § 73-2-1. To assure that water is properly used for beneficial purposes, the State Engineer sets terms and limitations for the use of each approved water right. Those limitations include a specific description of the allowed use of the water

(often called the nature of use), the quantity of water that may be diverted, the rate or flow at which the water may be diverted, the season or period of use, and the approved point-of-diversion or source of the water, which may be surface stream flows or from wells. Utah Code Ann. § 73-3-2. “The right to use water . . . exists only when exercised in the manner prescribed by law. *Adams v. Portage Irrigation Reservoir & Power Co.*, 72 P.2d 648. 654 (Utah 1937). Accordingly, the limits of a water right are law; they are not merely guidelines. Conspicuously absent from the list of the attributes of a water right is any description of or entitlement to a specific level of ground water.

Understanding the usufructuary nature of water rights is important here because this case involves the specific measure and attributes of Appellees’ water rights, both in definition and in practice. In addition, it is important to highlight the unique nature of water law because it, more than many other doctrines, deals with a tangible resource that varies over time for many reasons. The physicality of this important resource has resulted in the development of statutory and case law that addressed not only an orderly, legal apportionment of the public’s water, but also the applied, practicalities of putting that water to use. This Court has been sensitive to this balance in the past, and it is imperative the Court remain so today.⁴

2. The Trial Court Applied the Wrong Interference Standard.

This Court has plainly held a water rights interference analysis:

focuses on *actual interference in the quantity or quality of water to which the prior appropriator is entitled.*⁵ Put simply, to prevail on claims for interference

⁴ For a general reference on prior appropriation doctrine and water law please see *Law of Water Rights & Resources* by A. Dan Tarlock.

with water rights, plaintiffs must show that they have lawfully appropriated a certain quantity of the water, and that the defendant's actions are obstructing or hindering their ability to obtain *that water*.

Bingham v. Roosevelt City Corp., 2010 UT 37, ¶ 48, 235 P.3d 730, 743 (quoting *Salt Lake City v. Silver Fork Pipeline*, 2000 UT 16, ¶ 28 n. 10, 203 P.3d 1206) (emphasis added). The *Bingham* Court offered further clarification on the very argument raised by Pineview West herein when it affirmed the lower court's determination that the water right holders in that matter had "*no protectable in interest in the level of water* in the soil beneath their land", and that those water right holders "have no such enforceable right with regard to their soil saturation or the level of the water table." *Id.* at ¶¶12, 53 (emphasis added). To find that water rights interference has occurred, a court must follow a two-step process, "the trial court must first find facts regarding the claim of interference and then determine whether those facts are within the ambit of interference as applied to the water right at issue." *Wayment v. Howard*, 2006 UT 56, ¶ 9, 144 P.3d 1147, 1149.

The task before a trial court is therefore to find whether a plaintiff presented quantifiable evidence of an amount of water the plaintiff is entitled to receive under their rights, but was prevented from receiving as a result of a defendant's actions. This analysis cannot occur without actual data showing the volume of water diverted under the water right before the interference and comparing that volume with the volume of water available during the period of interference. In other words, a plaintiff must show both the nature and extent of the water right and the extent to which the right was diminished or went unmet as a result of a defendant's conduct.

In this case, the trial court cited the proper standard but failed to apply it, and Snowberry, Southwick, and the Araves failed to meet their burden of proof. Indeed, they didn't even attempt to meet it. While they effectively offered a treatise on ground water aquifers and their theoretical interactions, they do not know how much water their wells produce. They have never measured it. At trial they offered no evidence about the amount of water their wells actually yield, whether they were able to obtain the full amount of water allowed by their water rights and, if not, the measure of the diversion deficiency, or proof that the deficiency was due to the operation of Well 4 as opposed to the constellation of other factors that impact water tables.

Despite this failure of proof, and even though there has been water continuously available in the wells during the period of claimed interference, the trial court found actionable interference based on a temporary lowering of local water levels. The trial court here failed to apply the second prong of *Wayment* as it made no effort to link the claimed impact to Appellees' wells to a specific quantity of water to which Appellees were entitled but were unable to obtain. Well or water table interference does not equate with water rights interference without supporting information that quantifies the extent to which the claimed interference diminishes the ability to obtain the amount of water authorized by the water right. Here, Appellees offered no such evidence and the trial court made no such findings.

2.1 The Trial Court Erred When it Found Actionable Interference Where no Evidence Was Offered to Demonstrate That Appellees Were Unable to Receive the Full Quantity of Their Water Right.

Appellees provided evidence about the fluctuating water levels in their wells, but offered no evidence at all to prove that they were unable to obtain the full amount of water authorized by their water rights. Obtaining specific measurements regarding the quantity of water produced by a well is easily done by the installation of a totalizing meter. Indeed, installation of such a meter was already a legal requirement on the Arave Well. Yet, meters were not installed on either of Appellees' wells. (Pltf.'s Ex. 12A); (R.0535-R.0536);(R.0559) (R.0601); (R.0619); (R.0823-0825).

Appellees have no historic or current data to quantify the amount of water actually diverted from their wells. (R.0535-R.0536); (R.0559);(R.0601); (R.0619); (R.0823-0825).⁵ In fact, the Arave Well has not been equipped with a pump since 2012, and no effort has been made to use water from the Arave Well since 2006.⁶ Arave and Southwick have instead chosen to rely on Pineview West to supply all of their full year water needs. Neither have any volume or flow measurements ever been made of the amount of water produced by the Snowberry Well.

⁵ Pineview West has always acknowledged that the operation of Well 4 temporarily impacts the water level in the Arave Well. Testing has shown that the Arave Well is hydrologically separate from the nearby Snowberry Well, which shows no immediate response to Well 4 operation. As stated by Appellees' expert, the Arave and Snowberry Wells are "not well connected." (Def.'s Ex. 27, Pg. 6) . Regardless, there has always been a substantial column of water available in both wells even when Well 4 is in operation.

⁶ Where Arave and Southwick have not even attempted to use their water rights in over a decade, it follows that Pineview West has not interfered with their rights during that period.

Appellees retained an expert who installed water level measuring devices in the Arave and Snowberry Wells and monitored them over time. While perhaps helpful for understanding aquifer dynamics, a water level monitor does not measure the amount of water produced by a well and does not inform the ability of a well to fulfill water right entitlements. The expert did not install a pump and volume meter in the Arave Well, electing instead to use that well to only to monitor the water level. (R.0782-0783); (R.0823-0825). (Both experts acknowledged that the Arave Well could have been equipped with both a pump and a water level monitor, and that could have been used to produce water for Arave and Southwick.) Without any data showing the amount of water actually produced by the wells, it was impossible for the trial court to determine whether Appellees were unable to obtain the full amount of water to which their water rights entitled them.

The only information Appellees offered attempting to quantify their well diversions was Plaintiff's Exhibit 58 which focused on the Snowberry Well. (Pltf.'s Ex. 58). As the only document with an acre-foot quantification, the trial court's finding "that for the three years before trial Snowberry had used .33 AF of its total .45 acre foot right . . . in the months before PWWC #4 was turned on" is most likely based on Exhibit 58. (R.0398). To the extent Exhibit 58 has any relevance, it shows that Snowberry had used almost 75% of its annual entitlement in the first six months of the year and was on track to exceed its annual water right limitation by a considerable amount.

While Exhibit 58 is of questionable evidentiary value, it shows both that Snowberry consistently used more water than the .45 AF allowed by its 1 EDU water

right and that it used that water for unauthorized irrigation and commercial purposes. Those facts are confirmed by Plaintiff's 2017 application for an additional water right. That application, for Water Right E5647, claims that a "maximum amount of water used and to be used" is 1.25 AF of water, based on figures and monitoring over an eight year period. (Pltf.'s Ex. 10E). (R.0628-0630.) The application acknowledges that the existing Snowberry right is a 1 EDU domestic right and that the additional 2 AF authorization was sought to support irrigation and commercial uses that had not previously been authorized. While there are manifold other problems with Appellees' evidence, the trial court found that "Prior to acquiring its additional 2 AF under water right 35-13204 (E5647), [Snowberry] used in a typical year *more water than permitted by its original water right*, and it used that water for irrigating its lawn and garden even though the water right is not authorized for irrigation use." (R.0413) (emphasis added).

In the absence of evidence of the amount of water that Appellees' wells produce, and with no evidence to demonstrate that the wells produce some amount less than Appellees' water entitlement during periods of claimed interference, their interference claims fail, no cause of action. The trial court's finding of interference should therefore be reversed.

2.2 The Trial Court Only Applied the First Half of The *Wayment* Test and Prematurely Found Actionable Interference Solely Based on Seasonal Lowering of Water Levels in the Local Aquifer.

In making their water rights interference claim, Appellees relied on evidence relating underground aquifer mechanics and how the water levels in the Snowberry and Arave Wells might have been affected by the seasonal pumping of Well 4. The trial court

made numerous findings in its Memorandum Decision regarding the state of the local aquifers, the effect of well pumping, and apparent communication between the three wells (R. 0393-0401). Ultimately the Court found the pumping of Well 4 constituted interference because of its impact in partially “dewatering the aquifers that are the source of supply for the Arave and [Snowberry] wells” (R.0409).

Pineview West disagrees with the attribution of water level changes solely to Well 4, particularly with regard to the Snowberry Well, because the evidence also showed that climate, precipitation, activities of other wells, and the pumping pattern of the Snowberry Well are also acknowledged contributors to the water level changes. No effort was made to quantify those impacts. Instead, the trial court ended its analysis with a finding made under the first prong of *Wayment*. Instead of proceeding to the second *Wayment* prong and asking whether a link had been proven between the pumping of Well 4 and a specific, quantifiable decrease in the Appellees’ ability to divert their full water entitlement, the trial court simply concluded that the well interference “thus” interfered with Appellee’s water rights. (R0408-R.0409). Here, the trial court conflated well interference with water right interference, treating those separate findings as if they were one and the same. They are not.

In support of its conclusion in this regard, the trial court cited *Little Cottonwood Water Co. v. Sandy City*, 285 P.2d 440, 443 (Utah 1953). (R. 0405). The trial court stated:

...protection of a senior right extends to the source. ‘No one can interfere with the source of supply of [a water right], regardless of how far it may be from the place of use, and whether it flows on the surface or underground,

in such a manner as will diminish the quantity or injuriously affect the quality of the water of these established rights.⁷ (R.0405).

Pineview West agrees source protection is important and that source interference may be actionable under certain circumstances. This is not such a case. Appellees do not have a protected right to a specific level of groundwater just because groundwater is the source of their water. *See Bingham*, 2010 UT 37, ¶¶ 12, 53. The *Little Cottonwood* facts are somewhat complicated but telling. In that case, all surface waters to Little Cottonwood Creek had previously been appropriated. *Little Cottonwood*, 285 P.2d at 443. All parties agreed that the surface and ground waters were linked, shared the same source of water, and at certain places groundwater surfaced and acted as carrier water for the stream. *Id.* The Appellee had filed an Application to Appropriate requesting permission to pump ground water, deliver the groundwater water back to the stream to replace lost carrier water, and to appropriate any excess groundwater pumped. *Id.* Under Utah water law, an approved Application to Appropriate represents authority to proceed with water development plans, and a water right is not granted until the applicant proves water is available and can be put to beneficial use. Utah Code Ann. § 73-3-8; 73-3-10; 73-3-16.

⁷ The court's citation in the Memorandum Decision differs in substance from the actual text of the case. The case states: "...all of the waters of this surface stream are fully appropriated. Also, no one can interfere with the source of supply of **this stream**, regardless of how far" (emphasis added). The Memorandum Decision replaced the words "of this stream" with a general reference to "[a water right]." This is a substantive change, as the reference in the original citation was specifically tailored to the availability of water in Little Cottonwood Creek. That case did not involve water tables or claims involving an aquifer that is a source for multiple wells. It appears that the reference to *Little Cottonwood* in the Memorandum Decision may have been taken verbatim from the Appellees Proposed Findings of Fact and Conclusions of Law, Conclusion of Law 14 without further analysis. (R.0315).

The *Little Cottonwood* Court found that the Application could go forward to “test the waters” but that a water right could only be granted if there truly was available excess groundwater water to available to appropriate. *Little Cottonwood*, at 252.

The *Little Cottonwood* ruling relates to the case at hand only in that the trial court’s reference to the right of senior appropriators to protect their source from interference applies *when source water is unavailable*. As has been demonstrated, a column of groundwater has been continuously available in Appellees’ wells that could be used to satisfy their water rights. The evidence in this case demonstrates that the difficulties claimed by Appellees in obtaining their water come not from lack of water in the source, but from inefficient/unreasonable means of diversion or an unwillingness to take reasonable steps to access that water.

The trial court noted “[a] water right also includes an appropriator’s right to continue use of the ‘existing and historical method of diverting the water. *Wayment*, 2006 UT 56, ¶ 13.’” (R.0405). This is an accurate quote, but it is inapposite here. *Wayment* may not be read to generally extend diversion protections to guarantee a specific level of water in an aquifer. In *Wayment* the method and means of diversion involved a specific pattern of filling and refilling of a slough (small pond) such that the senior right holders would not be able to use their water right without the use of the slough. *Id.* at. ¶ 9. The specifics of this diversion were so specific and unique that they were found to be protected components of those water rights themselves and were included on the Certificate of Appropriation for the water right (i.e. the document finalizing the parameters of water right). *Id.* In contrast, the historic method and means of diversion for

the Appellees here are two wells. The water rights allow Appellees to divert water from (and only from) their wells, but the level at which water may be found is *not* a protected element of their water rights.

The trial court applied an incorrect legal standard when it found actionable interference solely based on impacts to the local water level and when it failed to require proof sufficient to meet the second half of the *Wayment* analysis. Ground water rights and the expectation of source protection do not include a right to a particular water level, which may vary over the long- and short-term for a multitude of reasons.

3. The Trial Court Misapplied the Law When it Concluded That Appellees' Methods and Means of Diversion Were Reasonable.

A predicate to a determination of actionable water rights interference is a finding that the means and methods of water diversion applied by the complaining party are reasonable. *Wayman v. Murray City*, 458 P.2d 861, 865 (Utah 1969). This requirement is a key factor in this case, and the trial court's ruling in this regard is contrary to long-standing precedent developed to address the practicalities of ground water diversions under the prior appropriation doctrine.

The trial court here acknowledged that "all water 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 the greatest amount of available water is put to beneficial use.'" *Id.* (R.0407). Accordingly, courts are not to review in isolation whether a water user's chosen method of diversion is reasonable, but must instead analyze the diversion in relation to other water users to avoid waste and

encourage the beneficial use of the available water. The trial court did not complete this required analysis.

3.1 Appellees Did Not Operate or Maintain Their Wells in a Reasonable Manner or in a Way That Would Support Their Interference Claims.

In concluding that Appellees met the reasonableness standard, the trial court simply stated “Plaintiffs’ means and method of diversion are reasonable. Their wells are the only possible method of diverting water under their rights.” (R.0408). While wells are certainly a reasonable means for the diversion of ground water and are the only authorized source for Appellees’ water rights, the Court failed to address the specificities of Appellees’ well mechanics and operations, and failed to explain how those operations furthered the broader policy of promoting the greatest beneficial use of the public’s water.

Appellees historically pumped their wells as desired to satisfy their “water needs” without reference or knowledge of quantities and limitations of their water rights. (R.0521); (R.0623-R.0624). Pineview West respectfully suggests that indiscriminate pumping without regard to the limits of their rights is not reasonable. Appellees’ expert made mistakes similar to those of his clients by admittedly conflating the terms “water needs” as explained by Appellees with “water rights” in the expert report upon which Appellees’ based their complaint. (R.0867); (R.0877).

Appellees never measured or metered their diversions, not during normal operations and not even in preparation for a trial in which they claimed they were unable to obtain enough water to satisfy their water rights. They did not install the meter in the

Arave Well that was required by a 1979 Memorandum Decision approving the Southwick water right (Pltf.'s Ex. 12A) and never installed a meter in the Snowberry Well. (R.0535-R.0536). Appellees have no direct measurements informing the pumping rate or volume of water produced by the wells and have no data that demonstrates they are or ever were operating the wells in accordance with their water rights. (R.0535-R.0536); (R.0601); (R.0619); (R.0632); (R.0823-0825). Pineview West submits that conduct was not reasonable.

Snowberry pumped its well at a flow rate much higher than authorized. The State Engineer expressly limited the Appellees to a .015 CFS/6.73 GPM pumping rate. (Def.'s Ex. 55); (Pltf.'s Ex. 11A- 11c); (R. 0391). The trial court found that the well was instead pumped at the rate of 25 GPM, more than three times the authorized rate. (R.0390).⁸ Snowberry complained that interference was demonstrated by the fact that its pump frequently cycled on and off during periods of demand and offered into evidence a series of charts indicating a decline in the water table as the oversized pump cycled.⁹ Snowberry never pumped the well at the authorized 6.73 GPM rate, nor did it attempt to mathematically model how diversion at that rate would affect performance of the well, even though Snowberry's expert acknowledged that pumping the well at such a rate would result in more water being available in the well column and could alleviate source

⁸ The authorized diversion rates contemplate use of the wells as necessary up to that maximum flow. They are not intended to be steady-state diversion rates, as illustrated by the fact that continuous pumping the Snowberry Well at a rate of 25 GPM would yield the full annual authorized yield of .45 AF in less than 100 hours.

⁹ Even though the pump in the Snowberry Well cycled on and off to produce 25 GPM of water, Appellees' charts confirm that the well consistently yielded water in excess of the authorized diversion rate during the period of alleged interference.

concerns (R.0823-0825). Pumping at higher rate than deemed appropriate by the State Engineer for the local circumstances is neither reasonable nor efficient, as it stresses the well and the aquifer, resulting in well productivity problems like those complained of by Snowberry. Pineview West submits that equipping a well that has an authorized diversion rate of 6.73 GPM with an oversized 25 GPM pump is not reasonable as a matter of law.

Appellees Arave and Southwick have not taken water from the Arave Well since 2007. There has not been a pump in the well since the well was cleaned in 2012. (R.0831-0832). Both experts stated that there has always been a column of water available in the well, even when Well 4 is operating, and that a pump could be installed in the well and could co-exist with the monitoring equipment utilized by Appellees' expert. Importantly, Well 4 typically starts operating in early July, is pumped intermittently for several weeks, and its use tails off as the irrigation needs end in September of each year. (R.1055-1056). In other words, even assuming a level of interference during the summer irrigation season, the Snowberry well is free from interference during the other nine months of the year. Pineview West did not interfere with the Arave and Southwick rights during that period because Arave and Southwick did not even attempt to use their rights. Regardless, even assuming one could interfere with the non-use of a water right, Pineview West respectfully submits that choosing not to put a pump in the Arave Well and not attempting to divert any water from the well under the water rights that may *only* be diverted from that well for more than 10 years is not reasonable conduct as a matter of law.

This conclusion is amply reinforced by the pump test Appellees' had performed on June 27, 2017, less than two months before trial. The test demonstrated that the Arave Well is capable of producing 23-24 GPM (more than three times the Arave's authorized diversion rate) over a two-hour period. The test showed the static water level equalized at 72 feet below the ground leaving over 100 feet of water in the well column. (Pltf.s Ex. 54); (R.0836-0837) (R.0874). Notably, the 2017 well test showed that the Arave Well is capable of producing as much as 5 times more water than when it was originally drilled. (R.0836-0837). Complaining of interference while refusing to equip a well that Appellees themselves demonstrated was capable of producing water in excess of the combined Arave and Southwick water rights was unreasonable conduct as a matter of law.

Appellees did not install the equipment necessary to prove their case. Their expert installed a water level monitoring devices in the wells but no meters to collect flow and volume data required to prove that the claimed interference prevented them from obtaining the amount of water authorized by their water rights. (R.0823-0825). Well metering and water level monitoring equipment could both have been installed in the well. (R.1115). Pineview West submits that Appellees' choice to not equip their wells with measuring devices was not reasonable, particularly when Appellees planned to assert claims that Pineview West interfered with their ability to obtain the full measure of their water rights.

3.2 There is no Cause of Action for Interference with an Illegal Diversion.

There is no case that states this proposition, perhaps because the conclusion is so obvious, but Pineview West believes, and therefore argues, that claimed interference with an illegal use of water is not actionable.

Pineview West demonstrated, and the trial court found, that Snowberry historically used its 1 EDU domestic water right for irrigation and commercial purposes that were not authorized by the State Engineer, and that Snowberry used water in excess of the permitted amount. (R. 0398); (Def.'s Ex. 8). Use in excess of the authorized amount of water or its use for purposes that were not previously authorized are changes in the water rights that must be authorized in advance by the State Engineer. Pineview West argued that these uses made without an approved change were illegal and could not be the basis for an interference claim, citing, among other authorities, Utah Code Ann. Section 73-3-3(7), which provides that a party who makes unapproved changes obtains no right by virtue of the change and, indeed, may have committed a criminal offense. The trial court demurred, stating that enforcement of water rights is a matter between Appellees and the State Engineer, and not a defense that can be raised by Pineview West.

Leaving aside the obvious question of how a party that is diverting more water than authorized by a water right can assert interference with that right, the trial court misapprehended and improperly disregarded Pineview West's argument. Pineview West made no affirmative claims in this matter and did not ask the Court to compel Snowberry to comply with the limits of its water right. Rather, the Pineview West's argument was that there is no right to enforce an unauthorized, and therefore illegal, use of water, and

therefore there can be no justiciable claim for interference with an illegal use of water. Certainly, an illegal use of water cannot, as a matter of law, be deemed to a reasonable use of water as that term is used in the applicable case law.

3.3 The Rule of Reasonableness Sometimes Require Affirmative Actions on Behalf of the Senior Appropriator to “Chase Their Water”.

The trial court correctly makes multiple findings highlighting the importance of priority dates in the prior appropriation doctrine. (R.0404).¹⁰ While priority is a central tenet of that doctrine, it is buffered by the overriding policy of putting the most water possible to beneficial use. This balance is applied through the *Wayman* reasonableness standard, which is directly on point here. Citing the numerous complexities of groundwater and uncertain availability, this Court was unwilling to allow a senior shallow ground water well to hold hostage an entire aquifer simply to maintain a static ground water level. 458 P.2d 861, 864-865. Accordingly, this Court held a water user may be required to bear the costs of modifying its diversions, such as deepening a well to reach available water if that is a reasonable solution, in order to balance the rights of the few and the interests of the many who are in a position to put more water to beneficial use. *Id.* One import of this ruling is that interference can only be found if the Plaintiff's diversions are first found to be reasonable.

¹⁰ The trial court erred, however, in finding that Snowberry's new, 2017 2 AF commercial and irrigation right was senior to Pineview West's irrigation right. (R.0392-0393). The new 2 AF right was plainly granted “subject to prior rights.” (Exhibit 8.) Those prior rights include all of Pineview West's irrigation rights. In other words, as a matter of priority, Snowberry may use its .45 AF right for domestic purposes ahead of Pineview West's irrigation needs, but all of Pineview West's irrigation rights must be satisfied before Snowberry is entitled to use any water for commercial or irrigation purposes.

The trial court cited *Wayman* for the reasonableness principal, and even went so far as to annotate “*Wayman* means essentially that, when rights clash, the court invokes reason so that, as far as possible, water is developed for beneficial use.” (R.0407). The trial court’s ruling here did not comply with those principals. Appellees have approximately 2 AF of water rights cumulatively that are prior to Pineview West’s 168 AF irrigation right. All of these rights are important. Yet the trial court ordered Well 4 to be shut down entirely until it can be proven that it can be operated in a way that not only does not affect the level of water in the Appellees’ wells, but that guarantees the water level in the Arave Well is always higher than that in the Snowberry Well. (R.0412).

Water has always been present in both of Appellees’ wells, even during periods of claimed interference. Reinstalling or lowering pumps is a common means to access available water in a well and would be a reasonable way to have satisfy Appellee’s water rights and avoid an expensive water rights interference suit. (R.0836 837); (R.0874); (R.0895); (R.1111). For a relatively low cost, Appellees could have modified their wells by installing or lowering properly sized pumps to access the water that is admittedly available in the lower parts of their wells to satisfy their water rights, if impacted. Instead of issuing a ruling in line with *Wayman* that reasonably requires Appellees to reasonably maintain their well diversions, the trial court ordered Pineview West to stop pumping Well 4 entirely, move its diversions and irrigation system to other wells that cannot satisfy its irrigation needs, and subjected Pineview West to ongoing monitoring of *all* its wells by the trial court. The trial court incorrectly found that Appellees acted reasonably in equipping and using their wells as a basis for its order.

4. The Trial Court Erred in Finding That Pineview West Was Negligent in Locating, Drilling and Using Well 4 Because Well 4 Was Located, Drilled and Equipped by a Non-Party to This Action.

Appellees offered no evidence, expert or otherwise, about the duty of care owed by one who locates, drills, and equips a well. Further, the evidence confirms that Well 4 was originally owned, located, drilled and equipped by a developer, Ed Radford, who later conveyed Well 4 to another developer who, in turn, gave the well to Pineview West. The initial test and equipping of the well in 2006 and 2007 was conducted by the second developer. Neither developer was named as a party to this action, and no effort was made to prove successor liability on the part of Pineview West. (R.1067); (R.0639).

Nevertheless, the trial court found that Pineview West was negligent in the siting and drilling of Well 4, and that Pineview West breached its “duty of reasonable care to others foreseeably harmed by the method PWWC uses to obtain its water” citing *Bingham*, 2010 UT ¶ 65. (0409).

For the reasons stated above, Pineview West did not breach its duty because it operated Well 4 within the parameters of its water right and did not interfere with Appellees’ ability to obtain the water to which they are entitled. In addition, the trial court’s finding of negligence should be overturned because Appellees did not meet their burden of proving negligence. It is a plaintiff’s duty to prove breach of an established duty of care and show “(1) a duty of reasonable care owed by the defendant to the plaintiff; (2) a breach of that duty; (3) the causation, both actually and proximately, of injury; and (4) the suffering of damages by the plaintiff.” *Schreiter v. Wasatch Manor, Inc.*, 871 P.2d 570, 573 (Utah 1994) (internal quotation marks omitted). Further, “Utah

courts generally require expert testimony to prove causation in tort cases in all but the ‘most obvious cases.’” *Ladd v. Bowers Trucking, Inc.*, 2011 UT App 355, ¶ 10, 264 P.3d 752 (quoting *Williams v. Melby*, 699 P.2d 723, 726 (Utah 1985)). The Appellees failed to join the parties who sited and equipped the well, and who operated it in 2006 and 2007 at the time of the claimed interference, and did not call them as trial witnesses.

In order to support a negligence claim, Appellees are obligated to establish, among other things, a standard of care and a violation of that standard. They offered no expert or other evidence to substantiate a particular standard of care. Indeed, the only expert who talked about the origins of Well 4 was Appellees’ own expert, Paul Anderson, who was originally retained to assist Ed Radford (R.0820); (R.0638-0643). Though, Mr. Anderson did not advise Mr. Radford about the exact siting of Well 4, he did identify for Mr. Radford the “optimal zone” within which Well 4 should be sited. (R.0638-0643). Understandably, Mr. Anderson found no fault with the location of Well 4. There was, in short, no basis for a finding of negligence in this matter.

5. Assuming that Pineview West Interfered with Appellees’ Water Rights, the Trial Court Erred in its Assessment of Damages.

Pineview West believes that no damages should have been awarded in this matter because it did not interfere with Appellees’ water rights. The trial court, however, awarded three categories of damages: 1) reimbursement of the \$31,624 in payments made to Pineview West for water used by Appellees; 2) \$4,500 for the estimated cost of a new pump and accessories for the Arave Well; and 3) \$9,399 for “hard water issues and related issues”. (R.0397); (R.0402); (R.0413). Here again, there was a failure of proof on

the part of Appellees and, even assuming a finding of interference, the trial court's award of damages in each of the three categories was incorrect and should be overturned.

5.1 Damages Awarded Exceed the Amount of Interference Purportedly Suffered.

The remedy in a water rights interference case is an obligation to replace the water a plaintiff is unable to obtain as a result of the interference, so the plaintiff is made whole in its water right. *Current Creek Irr. Co. v. Andrews*, 9 Utah 2d 324,328; 344 P 2d 528, 531(Utah 1959); *see also* Utah Code Ann. 73-3-23. In order to substantiate a claim for replacement water, a plaintiff claimant must show the amount of water authorized by its water right that it cannot divert due to the interference. If that showing had been made in this case, the proper remedy would have been to require that Pineview West provide that quantity of replacement water from its water system at no cost to the Appellees.

Rather than attempting to quantify the amount of replacement water owed to Appellees by Pineview West, the trial court ordered Pineview West to refund to Appellees *all* of the \$31,624 in fees that they had paid for water service. This was a gross overreach, if for no other reason than the award included fees paid by Appellees for water used during the nine months each year when Well 4 is idle. If interference with water rights by Well 4 operation is found, Pineview West should only be responsible to provide replacement water when the interference is occurring. There was water available in Appellees' wells during the period of claimed interference so, even if interference were found, Pineview West would not have the obligation to provide all of the water Appellees chose to use but only replacement water for that portion of Appellees' water rights that

they cannot divert because of the interference. As noted above, Appellees chose not to offer proof on that point.

Additionally, Appellees' entitlement to replacement water must necessarily be capped at by the amount of water to which they are entitled under their water rights: .45 AF, 1 AF; and .506 AF respectively. Pineview West cannot be required to provide replacement water in excess of Appellees' water rights or, indeed, in excess of the amount of water remaining for use under those rights each year as of the time Well 4 is turned on. As noted above, Appellees have no measurements of the amount of water they have pumped and, thus, no proof of the amount by which their rights have arguably been impaired. In the case of Snowberry, the trial court's finding that the Snowberry Inn used more water than allowed by its .45 AF right should mean, at a minimum, that there was no water deficit that Pineview West would be responsible to replace.

The trial court erred when it ordered Pineview West to provide year-around, free water to Appellees and to refund all amounts they have been charged based on the mandatory tariff set by the PSC. All of the water deliveries to Appellees were metered and there is no question that they used the water for which they were charged. Requiring Pineview West to refund those sums and to provide water to Appellees for water when Well 4 is not operated, and for amounts in excess of proven quantification of interference, is to ask Pineview West's shareholders to subsidize the water use of the Appellees. The water replacement damages awarded by the trial court simply do not correlate with any proven interference with water rights and are not supported by law, all to the prejudice of Pineview West.

5.2 Appellees Failed to Mitigate their Claimed Damages.

As has been discussed above in the context of Appellees' burden of proving interference, Appellees' expert testified at all points water has been present in their wells but Snowberry made no efforts to lower its pump, install a pump that would efficiently yield the limited amount of water represented by its water right, or take other reasonable and cost effective measures to reach and utilize the water that was admittedly available. Arave and Southwick decided not to install a pump in their well or otherwise attempt to utilize their water rights, choosing instead to buy water from Pineview West. As noted, that conduct demonstrates a failure of proof of actionable interference. In the context of a negligence analysis, Appellees' conduct also shows a failure to mitigate potential injuries to their water rights.

5.3 Appellees Failed to Provide Adequate Support for Their Special Damages Claims.

"Special damages" means particular items of damages which result from circumstances peculiar to the case at hand. It is this type of damage which should be specially pleaded and proved by evidence showing such circumstances in the individual case." *Prince v. Peterson*, 538 P.2d 1325, 1328 (Utah 1975). In this case, the special damages claimed are for the estimated cost of a new pump and accessories for the Arave Well, as well as the Southwick and Snowberry claims for damages allegedly caused by claimed hard water deposits.

It was always the obligation of Arave and Southwick to equip and maintain the Arave Well. All wells require maintenance from time to time, including the need to

replace failed pumps, and Pineview West is unaware of any authority that would justify a shifting of that burden – particularly when the period of claimed interference lasts less than three months. That result should follow with greater force here, since Appellees demonstrated by their 2017 pump test that the Arave Well is presently capable of producing flows and amounts of water considerably in excess of the entitlement in the combined Arave and Southwick water rights.

The claim for the estimated cost of damages due to hard water deposits should be rejected both because of the lack of expert testimony and because the claim itself is nonsensical. Matters of chemical analysis and causation are subjects that require scientific, technical or other specialized knowledge. Such matters of proof require expert analysis and testimony. *State v. Rothlisberger*, 2006 UT 49, ¶ 11, 47 P.3d 1176, 1180. Both are lacking here. Proof of hard water damage on the part of Pineview West would require, at a minimum, a demonstration that the chemical composition of the water supplied by Pineview West is somehow different and more damaging than the water Appellees would otherwise have pumped from their own wells.

The reason this damage claim is nonsensical is that the fundamental premise of Appellees' interference claim is that the Arave Well, the Snowberry Well and Well 4 all draw water from the same aquifer. That very premise defeats Appellees' claim for damages due to hard water deposits: if Appellees are correct in asserting that Appellees and Pineview West all divert water from the same aquifer (and the trial court found that they do), then the water delivered by Pineview West must have the same chemical composition as the water drawn from Appellees' wells. The water from the Snowberry

Well and that purchased from Pineview West was regularly comingled in the Snowberry system.

All well water is hard water of varying degrees. Where Appellees claim that the water provided by Pineview West comes from the same source as their well water, and where Appellees offered no chemical analysis or expert testimony to prove that Pineview West's water was more aggressive or damaging than Appellees' well water, there was no basis for the trial court to blame Pineview West for hard water deposits that would have occurred anyway. It was error to award the claimed expenses as damages.

6. Pineview West's Claim for Attorney Fees.

This claim was brought against Pineview West based on an expert report that did not distinguish between Appellees' water needs and their water rights. The case was filed and then tried with no measurements or calculations of the amount of water available in the Appellees' wells. They could not tell, and did not attempt to prove, whether their wells produce more or less than the amount of water authorized by their water rights and they offered no proof of the amount of authorized water that they unable to obtain when Well 4 is in operation. Water has been continuously available in both wells, but Appellees have been unwilling to set or adjust their pumps so that their operation correlates with the parameters of their water rights.

Pineview West is a small company. It asked in its answer, and again at the close of the trial, that the court award Pineview West the attorney fees and costs it incurred in defending this meritless claim. Appellees did not ask for fees at the conclusion of the

trial, no award of fees was made, and Appellees did not appeal that result. Pineview West asked to recover its fees under Utah Code Ann. §73-2-28, because Appellees claimed injuries caused by a diversion of water in violation of an existing water right, and Pineview West believes their claims to be groundless, Pineview West also sought recovery of fees under Utah Code Ann. § 78B-5-825, because the claim was filed by Appellees who based their interference claim in part on an illegal use and did not even attempt to show that they could not obtain the full measure of their water right. Pineview West hereby renews its request for an award of attorney fees and costs, both those incurred before the trial court and those required to pursue this appeal.

CONCLUSION

Pineview West respectfully requests the Court to reverse the decision of the trial court on the grounds set forth above, to dismiss Appellees' complaint with prejudice, and to award Pineview West the attorney fees and costs incurred herein.

DATED this 21st day of June, 2017.

CLYDE SNOW & SESSIONS

A handwritten signature in blue ink, appearing to read 'Edwin C. Barnes', written over a horizontal line.

Edwin C. Barnes

Timothy R. Pack

Emily E. Lewis

Attorneys for Appellants

Certificate of Compliance with Rule 24(f)(1)

I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 13,897 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 13 point Times New Roman

DATED this 21st day of June, 2018.

CLYDE SNOW & SESSIONS



Edwin C. Barnes

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of June, 2018, I caused the foregoing document to be served on the following via first class mail and email:

John H. Mabey, Jr. – 4625
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Email: jmabey@mwjlaw.com
dwright@mwjlaw.com

A handwritten signature in blue ink, appearing to read "David C. Wright", is written over a horizontal line.

ADDENDA

A. Statutes Cited:

Utah Code Ann. §73-3-23

Utah Code Ann. §73-3-3(7)

Utah Code Ann. §73-2-28

Utah Code Ann. § 73-1-1

Utah Code Ann. § 73-1-3

Utah Code Ann. § 73-2-1

Utah Code Ann. § 73-3-2

Utah Code Ann. § 73-3-8

Utah Code Ann. § 78B-5-825

B. Memorandum Decision issued by the court on November 14, 2017

C. Final Judgment, dated January 4, 2018 entered by the Second District Court

D. Amended Final Judgment dated January 10, 2018 entered by the Second District Court

E. 2017 Arave Well Driller Report

ADDENDUM A

Utah Code Ann. §73-3-23

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|--|
| West's Utah Code Annotated Title 73. Water and Irrigation Chapter 3. Appropriation |
|--|

U.C.A. 1953 § 73-3-23

§ 73-3-23. Replacement of water

Currentness

In all cases of appropriations of underground water the right of replacement is hereby granted to any junior appropriator whose appropriation may diminish the quantity or injuriously affect the quality of appropriated underground water in which the right to the use thereof has been established as provided by law. No replacement may be made until application in writing has been made to and approved by the state engineer. In all cases replacement shall be at the sole cost and expense of the applicant and subject to such rules and regulations as the state engineer may prescribe. The right of eminent domain is hereby granted to any applicant for the purpose of replacement as provided herein.

Credits

Laws 1935, c. 105, § 2.

Codifications R.S. 1933, § 100-3-23; C. 1943, § 100-3-23.

Notes of Decisions (9)

U.C.A. 1953 § 73-3-23, UT ST § 73-3-23

Current with 4, 5, 7 to 21, 23 to 29, 31, 32, 34 to 38, 40 to 63, 65 to 68, 71, 72, 74, 76 to 80, 82, 83, 86 to 90, 93, 94, 97, 103, 105, 106, 108 to 111, 126, 135, 139, 143, 179, 267, 271, 294, 338, 379, 406, 460, 466 and 467 of the 2018 General Session.

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Utah Code Ann. §73-3-3(7)

West's Utah Code Annotated
Title 73. Water and Irrigation
Chapter 3. Appropriation

U.C.A. 1953 § 73-3-3

§ 73-3-3. Permanent or temporary changes to a water right

Currentness

(1) For purposes of this section:

(a) "Permanent change" means a change, for an indefinite period of time, to the:

(i) point of diversion;

(ii) place of use;

(iii) period of use;

(iv) nature of use; or

(v) storage of water.

(b) "Person entitled to the use of water" means:

(i) the holder of an approved but unperfected application to appropriate water;

(ii) the record owner of a perfected water right;

(iii) a person who has written authorization from a person described in Subsection (1)(b)(i) or (ii) to file a change application on that person's behalf; or

(iv) a shareholder in a water company who is authorized to file a change application in accordance with [Section 73-3-3.5](#).

(c)(i) "Quantity impairment" means any reduction in the amount of water a person is able to receive in order to satisfy an existing right to the use of water that would result from an action proposed in a change application, including:

(A) diminishing the quantity of water in the source of supply for the existing right;

(B) a change in the timing of availability of water from the source of supply for the existing right; or

(C) enlarging the quantity of water depleted by the nature of the proposed use when compared with the nature of the currently approved use.

(ii) "Quantity impairment" does not mean a decrease in the static level of water in an underground basin or aquifer that would result from an action proposed to be taken in a change application, if the volume of water necessary to satisfy an existing right otherwise remains reasonably available.

(d) "Temporary change" means a change for a fixed period of time, not exceeding one year, to the:

(i) point of diversion;

(ii) place of use;

(iii) period of use;

(iv) nature of use; or

(v) storage of water.

(2)(a) A person who proposes to file a permanent or temporary change application may request consultation with the state engineer, or the state engineer's designee, before filing the application in order to review the requirements of the change application process, discuss potential issues related to the change, and provide the applicant with information.

(b) Statements made and information presented in the consultation are not binding on the applicant or the state engineer.

(c) The consultation described in Subsection (2)(a) may occur in the state engineer's regional office for the region where the proposed change would occur.

(3)(a) A person entitled to the use of water may make a permanent or temporary change to an existing right to use water, including a right involved in a general determination of rights or other suit, if:

(i) the person makes the change in accordance with this section;

(ii) except as provided by Section 73-3-30, the change does not impair an existing right without just compensation or adequate mitigation; and

(iii) the state engineer approves the change application, consistent with the requirements of Section 73-3-8.

(b) A change application on a federal reclamation project water right shall be signed by:

(i) the local water users organization that is contractually responsible for:

(A) the operation and maintenance of the project; or

(B) the repayment of project costs; and

(ii) the record owner of the water right.

(c) A change application on a United States Indian Irrigation Service water right that is serving the needs of a township or municipality shall be signed by:

(i) the local public water supplier that is responsible for the operation and maintenance of the public water supply system; and

(ii) the record owner of the water right.

(4)(a) Before making a permanent or temporary change, a person entitled to the use of water shall submit a change application upon forms furnished by the state engineer.

(b) The application described in Subsection (4)(a) shall include:

(i) the applicant's name;

(ii) the water right description, including the water right number;

(iii) the water quantity;

(iv) the stream or water source;

(v) if applicable, the point on the stream or water source where the water is diverted;

(vi) if applicable, the point to which it is proposed to change the diversion of the water;

(vii) the place, nature, period, and extent of the currently approved use;

(viii) the place, nature, period, and extent of the proposed use;

(ix) if the change applicant is submitting a change application in accordance with Section 73-3-3.5, the information required by Section 73-3-3.5;

(x) any proposed change to the storage of water; and

(xi) any other information that the state engineer requires.

(c) A shareholder in a water company who seeks to make a permanent or temporary change to a water right to which the water company is the record owner shall file a change application in accordance with Section 73-3-3.5.

(5) In a proceeding before the state engineer, the applicant has the burden of producing evidence sufficient to support a reasonable belief that the change can be made in compliance with this section and Section 73-3-8, including evidence:

(a) that the change will not cause a specific existing right to experience quantity impairment; or

(b) if applicable, rebutting the presumption of quantity impairment described in Subsection 73-3-8(6)(c).

(6) A change of an approved application to appropriate water does not:

(a) affect the priority of the original application to appropriate water; or

(b) extend the time period within which the construction of work is to begin or be completed.

(7) Any person who makes a permanent or temporary change without first filing and obtaining approval of a change application providing for such change:

(a) obtains no right by the change;

(b) is guilty of an offense punishable under Section 73-2-27 if the change is made knowingly or intentionally; and

(c) shall comply with the change application process.

(8)(a) This section does not apply to the replacement of an existing well by a new well drilled within a radius of 150 feet from the point of diversion of the existing well.

(b) Any replacement well must be drilled in accordance with the requirements of [Section 73-3-28](#).

Credits

Laws 1919, c. 67, § 8; Laws 1937, c. 130, § 1; Laws 1939, c. 111, § 1; Laws 1949, c. 97, § 1; Laws 1959, c. 137, § 1; Laws 1986, c. 40, § 1; Laws 1987, c. 161, § 289; Laws 1992, c. 208, § 1; Laws 2001, c. 136, § 3, eff. April 30, 2001; Laws 2005, c. 215, § 5, eff. May 2, 2005; Laws 2008, c. 311, § 2, eff. May 5, 2008; Laws 2012, c. 229, § 1, eff. May 8, 2012; Laws 2015, c. 245, § 2, eff. May 12, 2015; Laws 2015, c. 249, § 3, eff. May 12, 2015; Laws 2015, c. 251, § 1, eff. May 12, 2015; Laws 2015, c. 298, § 1, eff. May 12, 2015.

Codifications R.S. 1933, § 100-3-3; C. 1943, § 100-3-3.

Notes of Decisions (76)

U.C.A. 1953 § 73-3-3, UT ST § 73-3-3

Current with 4, 5, 7 to 21, 23 to 29, 31, 32, 34 to 38, 40 to 63, 65 to 68, 71, 72, 74, 76 to 80, 82, 83, 86 to 90, 93, 94, 97, 103, 105, 106, 108 to 111, 126, 135, 139, 143, 179, 267, 271, 294, 338, 379, 406, 460, 466 and 467 of the 2018 General Session.

Utah Code Ann. §73-2-28

| |
|---|
| West's Utah Code Annotated Title 73. Water and Irrigation Chapter 2. State Engineer--Division of Water Rights |
|---|

U.C.A. 1953 § 73-2-28

§ 73-2-28. Costs and fees in civil actions

Currentness

The prevailing party in a civil action is entitled to collect reasonable costs and attorney fees, if that action is brought:

- (1) under [Section 73-1-14](#);
- (2) under [Section 73-1-15](#);
- (3) for injuries caused by a diversion of water for which no water right has been established;
- (4) for injuries caused by a diversion of water in violation of an existing water right; or
- (5) for injuries caused by a violation of a written distribution order from the state engineer.

Credits

Laws 2005, c. 33, § 5, eff. May 2, 2005.

U.C.A. 1953 § 73-2-28, UT ST § 73-2-28

Current with 4, 5, 7 to 21, 23 to 29, 31, 32, 34 to 38, 40 to 63, 65 to 68, 71, 72, 74, 76 to 80, 82, 83, 86 to 90, 93, 94, 97, 103, 105, 106, 108 to 111, 126, 135, 139, 143, 179, 267, 271, 294, 338, 379, 406, 460, 466 and 467 of the 2018 General Session.

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Utah Code Ann. § 73-1-1

West's Utah Code Annotated
Title 73. Water and Irrigation
Chapter 1. General Provisions

U.C.A. 1953 § 73-1-1

§ 73-1-1. Waters declared property of public

Currentness

(1) 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.

(2) The declaration of public ownership of water in Subsection (1) does not create or recognize an easement for public recreational use on private property.

(3) The Legislature shall govern the use of public water for beneficial purposes, as limited by constitutional protections for private property.

(4) The right of the public to use public water for recreational purposes is governed by Chapter 29, Public Waters Access Act.

Credits

Laws 1919, c. 67, § 1; Laws 1935, c. 105, § 1; [Laws 2010, c. 410, § 3, eff. May 11, 2010](#).

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

[Notes of Decisions \(64\)](#)

U.C.A. 1953 § 73-1-1, UT ST § 73-1-1

Current with 4, 5, 7 to 21, 23 to 29, 31, 32, 34 to 38, 40 to 63, 65 to 68, 71, 72, 74, 76 to 80, 82, 83, 86 to 90, 93, 94, 97, 103, 105, 106, 108 to 111, 126, 135, 139, 143, 179, 267, 271, 294, 338, 379, 406, 460, 466 and 467 of the 2018 General Session.

Utah Code Ann. § 73-1-3

| |
|---|
| West's Utah Code Annotated Title 73. Water and Irrigation Chapter 1. General Provisions |
|---|

U.C.A. 1953 § 73-1-3

§ 73-1-3. Beneficial use basis of right to use

[Currentness](#)

Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state.

Credits

Laws 1919, c. 67, § 3.

Codifications R.S. 1933, § 100-1-3; C. 1943, § 100-1-3.

[Notes of Decisions \(73\)](#)

U.C.A. 1953 § 73-1-3, UT ST § 73-1-3

Current with 4, 5, 7 to 21, 23 to 29, 31, 32, 34 to 38, 40 to 63, 65 to 68, 71, 72, 74, 76 to 80, 82, 83, 86 to 90, 93, 94, 97, 103, 105, 106, 108 to 111, 126, 135, 139, 143, 179, 267, 271, 294, 338, 379, 406, 460, 466 and 467 of the 2018 General Session.

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Utah Code Ann. § 73-2-1

West's Utah Code Annotated
Title 73. Water and Irrigation
Chapter 2. State Engineer--Division of Water Rights

U.C.A. 1953 § 73-2-1

§ 73-2-1. State engineer--Term--Powers and duties--Qualification for duties

Currentness

- (1) There shall be a state engineer.
- (2) The state engineer shall:
 - (a) be appointed by the governor with the consent of the Senate;
 - (b) hold office for the term of four years and until a successor is appointed; and
 - (c) have five years experience as a practical engineer or the theoretical knowledge, practical experience, and skill necessary for the position.
- (3)(a) The state engineer shall be responsible for the general administrative supervision of the waters of the state and the measurement, appropriation, apportionment, and distribution of those waters.
 - (b) The state engineer may secure the equitable apportionment and distribution of the water according to the respective rights of appropriators.
- (4) The state engineer shall make rules, in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, consistent with the purposes and provisions of this title, regarding:
 - (a) reports of water right conveyances;
 - (b) the construction of water wells and the licensing of water well drillers;
 - (c) dam construction and safety;
 - (d) the alteration of natural streams;
 - (e) geothermal resource conservation;

(f) enforcement orders and the imposition of fines and penalties; and

(g) the duty of water.

(5) The state engineer may make rules, in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, consistent with the purposes and provisions of this title, governing:

(a) water distribution systems and water commissioners;

(b) water measurement and reporting;

(c) groundwater recharge and recovery;

(d) wastewater reuse;

(e) the form, content, and processing procedure for a claim under Section 73-5-13 to surface or underground water that is not represented by a certificate of appropriation;

(f) the form and content of a proof submitted to the state engineer under Section 73-3-16;

(g) the determination of water rights; or

(h) the form and content of applications and related documents, maps, and reports.

(6) The state engineer may bring suit in courts of competent jurisdiction to:

(a) enjoin the unlawful appropriation, diversion, and use of surface and underground water without first seeking redress through the administrative process;

(b) prevent theft, waste, loss, or pollution of those waters;

(c) enable him to carry out the duties of the state engineer's office; and

(d) enforce administrative orders and collect fines and penalties.

(7) The state engineer may:

(a) upon request from the board of trustees of an irrigation district under Title 17B, Chapter 2a, Part 5, Irrigation District Act, or another local district under Title 17B, Limited Purpose Local Government Entities--Local Districts, or a special service district under Title 17D, Chapter 1, Special Service District Act, that operates an irrigation water system, cause a water survey to be made of all lands proposed to be annexed to the district in order to determine and allot the maximum amount of water that could be beneficially used on the land, with a separate survey and allotment being made for each 40-acre or smaller tract in separate ownership; and

(b) upon completion of the survey and allotment under Subsection (7)(a), file with the district board a return of the survey and report of the allotment.

(8)(a) The state engineer may establish water distribution systems and define their boundaries.

(b) The water distribution systems shall be formed in a manner that:

(i) secures the best protection to the water claimants; and

(ii) is the most economical for the state to supervise.

Credits

Laws 1919, c. 67, § 7; Laws 1921, c. 69, § 1; Laws 1941, c. 96, § 1; Laws 1991, c. 3, § 1; Laws 2001, c. 90, § 61, eff. April 30, 2001; Laws 2005, c. 165, § 1, eff. May 2, 2005; Laws 2007, c. 329, § 461, eff. April 30, 2007; Laws 2008, c. 360, § 163, eff. May 5, 2008; Laws 2008, c. 382, § 2139, eff. May 5, 2008; Laws 2013, c. 221, § 2, eff. May 14, 2013; Laws 2017, c. 60, § 1, eff. May 9, 2017.

Codifications R.S. 1933, § 100-2-1; C. 1943, § 100-2-1.

Notes of Decisions (16)

U.C.A. 1953 § 73-2-1, UT ST § 73-2-1

Current with 4, 5, 7 to 21, 23 to 29, 31, 32, 34 to 38, 40 to 63, 65 to 68, 71, 72, 74, 76 to 80, 82, 83, 86 to 90, 93, 94, 97, 103, 105, 106, 108 to 111, 126, 135, 139, 143, 179, 267, 271, 294, 338, 379, 406, 460, 466 and 467 of the 2018 General Session.

Utah Code Ann. § 73-3-2

West's Utah Code Annotated
Title 73. Water and Irrigation
Chapter 3. Appropriation

U.C.A. 1953 § 73-3-2

§ 73-3-2. Application for right to use unappropriated public water--Necessity--Form--
Contents--Validation of prior applications by state or United States or officer or agency thereof

Currentness

(1)(a) In order to acquire the right to use any unappropriated public water in this state, any person who is a citizen of the United States, or who has filed his declaration of intention to become a citizen as required by the naturalization laws, or any association of citizens or declarants, or any corporation, or the state of Utah by the directors of the divisions of travel development, business and economic development, wildlife resources, and state lands and forestry, or the executive director of the Department of Transportation for the use and benefit of the public, or the United States of America shall make an application in a form prescribed by the state engineer before commencing the construction, enlargement, extension, or structural alteration of any ditch, canal, well, tunnel, or other distributing works, or performing similar work tending to acquire such rights or appropriation, or enlargement of an existing right or appropriation.

(b) The application shall be upon a form to be furnished by the state engineer and shall set forth:

- (i) the name and post office address of the person, corporation, or association making the application;
- (ii) the nature of the proposed use for which the appropriation is intended;
- (iii) the quantity of water in acre-feet or the flow of water in second-feet to be appropriated;
- (iv) the time during which it is to be used each year;
- (v) the name of the stream or other source from which the water is to be diverted;
- (vi) the place on the stream or source where the water is to be diverted and the nature of the diverting works;
- (vii) the dimensions, grade, shape, and nature of the proposed diverting channel; and
- (viii) other facts that clearly define the full purpose of the proposed appropriation.

(2)(a) In addition to the information required in Subsection (1)(b), if the proposed use is for irrigation, the application shall show:

(i) the legal subdivisions of the land proposed to be irrigated, with the total acreage thereof; and

(ii) the character of the soil.

(b) In addition to the information required in Subsection (1)(b), if the proposed use is for developing power, the application shall show:

(i) the number, size, and kind of water wheels to be employed and the head under which each wheel is to be operated;

(ii) the amount of power to be produced;

(iii) the purposes for which and the places where it is to be used; and

(iv) the point where the water is to be returned to the natural stream or source.

(c) In addition to the information required in Subsection (1)(b), if the proposed use is for milling or mining, the application shall show:

(i) the name of the mill and its location or the name of the mine and the mining district in which it is situated;

(ii) its nature; and

(iii) the place where the water is to be returned to the natural stream or source.

(d)(i) The point of diversion and point of return of the water shall be designated with reference to the United States land survey corners, mineral monuments or permanent federal triangulation or traverse monuments, when either the point of diversion or the point of return is situated within six miles of the corners and monuments.

(ii) If the point of diversion or point of return is located in unsurveyed territory, the point may be designated with reference to a permanent, prominent natural object.

(iii) The storage of water by means of a reservoir shall be regarded as a diversion, and the point of diversion in those cases is the point where the longitudinal axis of the dam crosses the center of the stream bed.

(iv) The point where released storage water is taken from the stream shall be designated as the point of rediversion.

(v) The lands to be inundated by any reservoir shall be described as nearly as may be, and by government subdivision if upon surveyed land. The height of the dam, the capacity of the reservoir, and the area of the surface when the reservoir is filled shall be given.

(vi) If the water is to be stored in an underground area or basin, the applicant shall designate, with reference to the nearest United States land survey corner if situated within six miles of it, the point of area of intake, the location of the underground area or basin, and the points of collection.

(e) Applications for the appropriation of water filed prior to the enactment of this title, by the United States of America, or any officer or agency of it, or the state of Utah, or any officer or agency of it, are validated, subject to any action by the state engineer.

Credits

Laws 1919, c. 67, § 42; Laws 1935, c. 105, § 1; Laws 1939, c. 111, § 1; Laws 1941, c. 96, § 1; Laws 1941, 1st Sp.Sess., c. 40, § 1; Laws 1945, c. 134, § 1; Laws 1949, c. 97, § 1; Laws 1969, c. 198, § 9; [Laws 1991, c. 137, § 88](#); [Laws 2001, c. 136, § 2, eff. April 30, 2001](#).

Codifications R.S. 1933, § 100-3-2; C. 1943, § 100-3-2.

Notes of Decisions (19)

U.C.A. 1953 § 73-3-2, UT ST § 73-3-2

Current with 4, 5, 7 to 21, 23 to 29, 31, 32, 34 to 38, 40 to 63, 65 to 68, 71, 72, 74, 76 to 80, 82, 83, 86 to 90, 93, 94, 97, 103, 105, 106, 108 to 111, 126, 135, 139, 143, 179, 267, 271, 294, 338, 379, 406, 460, 466 and 467 of the 2018 General Session.

Utah Code Ann. § 73-3-8

West's Utah Code Annotated
Title 73. Water and Irrigation
Chapter 3. Appropriation

U.C.A. 1953 § 73-3-8

§ 73-3-8. Approval or rejection of application--Requirements for approval--Application
for specified period of time--Filing of royalty contract for removal of salt or minerals

Currentness

(1)(a) It shall be the duty of the state engineer to approve an application if there is reason to believe that:

(i) for an application to appropriate, there is unappropriated water in the proposed source;

(ii) the proposed use will not impair existing rights or interfere with the more beneficial use of the water;

(iii) the proposed plan:

(A) is physically and economically feasible, unless the application is filed by the United States Bureau of Reclamation; and

(B) would not prove detrimental to the public welfare;

(iv) the applicant has the financial ability to complete the proposed works;

(v) the application was filed in good faith and not for purposes of speculation or monopoly; and

(vi) if applicable, the application complies with a groundwater management plan adopted under [Section 73-5-15](#).

(b) If the state engineer, because of information in the state engineer's possession obtained either by the state engineer's own investigation or otherwise, has reason to believe that an application will interfere with the water's more beneficial use for irrigation, municipal and industrial, domestic or culinary, stock watering, power or mining development, or manufacturing, or will unreasonably affect public recreation or the natural stream environment, or will prove detrimental to the public welfare, the state engineer shall withhold approval or rejection of the application until the state engineer has investigated the matter.

(c) If an application does not meet the requirements of this section, it shall be rejected.

(2)(a) An application to appropriate water for industrial, power, mining development, manufacturing purposes, agriculture, or municipal purposes may be approved for a specific and certain period from the time the water is placed to beneficial use under the application, but in no event may an application be granted for a period of time less than that ordinarily needed to satisfy the essential and primary purpose of the application or until the water is no longer available as determined by the state engineer.

(b) At the expiration of the period fixed by the state engineer the water shall revert to the public and is subject to appropriation as provided by this title.

(c) No later than 60 calendar days before the expiration date of the fixed time period, the state engineer shall send notice by mail or by any form of electronic communication through which receipt is verifiable, to the applicant of record.

(d) Except as provided by Subsection (2)(e), the state engineer may extend any limited water right upon a showing that:

(i) the essential purpose of the original application has not been satisfied;

(ii) the need for an extension is not the result of any default or neglect by the applicant; and

(iii) the water is still available.

(e) No extension shall exceed the time necessary to satisfy the primary purpose of the original application.

(f) A request for extension of the fixed time period must be filed in writing in the office of the state engineer on or before the expiration date of the application.

(3)(a) Before the approval of any application for the appropriation of water from navigable lakes or streams of the state that contemplates the recovery of salts and other minerals therefrom by precipitation or otherwise, the applicant shall file with the state engineer a copy of a contract for the payment of royalties to the state.

(b) The approval of an application shall be revoked in the event of the failure of the applicant to comply with terms of the royalty contract.

(4)(a) The state engineer shall investigate all temporary change applications.

(b) The state engineer shall:

(i) approve the temporary change if the state engineer finds there is reason to believe that it will not impair an existing right; and

(ii) deny the temporary change if the state engineer finds there is reason to believe it would impair an existing right.

(5)(a) With respect to a change application for a permanent change:

(i) the state engineer shall follow the same procedures provided in this title for approving an application to appropriate water; and

(ii) the rights and duties of a change applicant are the same as the rights and duties of a person who applies to appropriate water under this title.

(b) The state engineer may waive notice for a permanent change application if the application only involves a change in point of diversion of 660 feet or less.

(c) The state engineer may condition approval of a change application to prevent an enlargement of the quantity of water depleted by the nature of the proposed use when compared with the nature of the currently approved use of water proposed to be changed.

(d) A condition described in Subsection (5)(c) may not include a reduction in the currently approved diversion rate of water under the water right identified in the change application solely to account for the difference in depletion under the nature of the proposed use when compared with the nature of the currently approved use.

(6)(a) Except as provided in Subsection (6)(b), the state engineer shall reject a permanent change application if the person proposing to make the change is unable to meet the burden described in Subsection 73-3-3(5).

(b) If otherwise proper, the state engineer may approve a permanent or temporary change application upon one or more of the following conditions:

(i) for part of the water involved;

(ii) that the applicant acquire a conflicting right; or

(iii) that the applicant provide and implement a plan approved by the state engineer to mitigate impairment of an existing right.

(c)(i) There is a rebuttable presumption of quantity impairment, as defined in Subsection 73-3-3(1), to the extent that, for a period of at least seven consecutive years, a portion of the right identified in a change application has not been:

(A) diverted from the approved point of diversion; and

- (B) beneficially used at the approved place of use.
- (ii) The rebuttable presumption described in Subsection (6)(c)(i) does not apply if the beneficial use requirement is excused by:
 - (A) Subsection 73-1-4(2)(e);
 - (B) an approved nonuse application under Subsection 73-1-4(2)(b);
 - (C) Subsection 73-3-30(7); or
 - (D) the passage of time under Subsection 73-1-4(2)(c)(i).
- (d) The state engineer may not consider quantity impairment based on the conditions described in Subsection (6)(c) unless the issue is raised in a:
 - (i) timely protest that identifies which of the protestant's existing rights the protestant reasonably believes will experience quantity impairment; or
 - (ii) written notice provided by the state engineer to the applicant within 90 days after the change application is filed.
- (e) The written notice described in Subsection (6)(d)(ii) shall:
 - (i) specifically identify an existing right the state engineer reasonably believes may experience quantity impairment; and
 - (ii) be mailed to the owner of an identified right, as shown by the state engineer's records, if the owner has not protested the change application.
- (f) The state engineer is not required to include all rights the state engineer believes may be impaired by the proposed change in the written notice described in Subsection (6)(d)(ii).
- (g) The owner of a right who receives the written notice described in Subsection (6)(d)(ii) may not become a party to the administrative proceeding if the owner has not filed a timely protest.
- (h) If a change applicant, all protestants, and all persons identified by the state engineer under Subsection (6)(d)(ii) come to a written agreement regarding how the issue of quantity impairment shall be mitigated, the state engineer may incorporate the terms of the agreement into a change application approval.

Credits

Laws 1919, c. 67, § 48; Laws 1939, c. 111, § 1; Laws 1941, c. 96, § 1; Laws 1959, c. 137, § 1; Laws 1971, c. 187, § 1; Laws 1976, c. 32, § 1; Laws 1985, c. 139, § 1; [Laws 2007, c. 136, § 40, eff. April 30, 2007](#); [Laws 2015, c. 245, § 3, eff. May 12, 2015](#).

Codifications R.S. 1933, § 100-3-8; C. 1943, § 100-3-8.

[Notes of Decisions \(72\)](#)

U.C.A. 1953 § 73-3-8, UT ST § 73-3-8

Current with 4, 5, 7 to 21, 23 to 29, 31, 32, 34 to 38, 40 to 63, 65 to 68, 71, 72, 74, 76 to 80, 82, 83, 86 to 90, 93, 94, 97, 103, 105, 106, 108 to 111, 126, 135, 139, 143, 179, 267, 271, 294, 338, 379, 406, 460, 466 and 467 of the 2018 General Session.

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Utah Code Ann. § 78B-5-825

West's Utah Code Annotated
Title 78b. Judicial Code
Chapter 5. Procedure and Evidence
Part 8. Miscellaneous (Refs & Annos)

U.C.A. 1953 § 78B-5-825
Formerly cited as UT ST § 78-27-56

§ 78B-5-825. Attorney fees--Award where action or defense in bad faith--Exceptions

Currentness

(1) In civil actions, the court shall award reasonable attorney fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).

(2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:

(a) finds the party has filed an affidavit of impecuniosity in the action before the court; or

(b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1).

Credits

Laws 2008, c. 3, § 857, eff. Feb. 7, 2008.

Notes of Decisions (242)

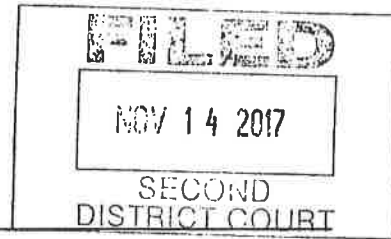
U.C.A. 1953 § 78B-5-825, UT ST § 78B-5-825

Current with 4, 5, 7 to 21, 23 to 29, 31, 32, 34 to 38, 40 to 63, 65 to 68, 71, 72, 74, 76 to 80, 82, 83, 86 to 90, 93, 94, 97, 103, 105, 106, 108 to 111, 126, 135, 139, 143, 179, 267, 271, 294, 338, 379, 406, 460, 466 and 467 of the 2018 General Session.

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ADDENDUM B



**IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY
OGDEN DEPARTMENT, STATE OF UTAH**

Roger B Arave and Kimberly L
Arave, Janet Southwick,
Trustee, and Venture
Development Group, LLC, a
Utah limited liability company,
Plaintiffs,

vs.

Pineview West Water
Company, a Utah corporation,
Defendant.

**MEMORANDUM
DECISION**

Civil No. 130907544
Judge Ernie W Jones

This action was tried to the bench August 18, 19, and 29, with closing arguments on September 25, 2017. Plaintiffs were represented by David C. Wright. Defendants were represented by Edwin C. Barnes and Emily E. Lewis. The parties also filed trial briefs. The court heard testimony from the witnesses, including expert witnesses from both sides, and has reviewed the trial exhibits. The court also heard argument from counsel. After the close of the evidence, the court asked the parties to submit proposed findings of fact and conclusions of law. Having listened to the testimony, reviewed the evidence, and applying the law concerning water right interference and negligence, the court makes the

following findings of fact and conclusions of law pursuant to Rule 52(a) of the Utah Rules of Civil Procedure:

FINDINGS OF FACT

A. The parties

1. Plaintiffs Roger B. Arave and Kimberly L. Arave, individuals and husband and wife (referred to jointly as "Araves"), are joint tenant owners and residents of a single family residential real property located in Weber County, with a street address of 1364 North Highway 158, Eden, Utah.
2. Plaintiff Janet Southwick, Trustee, (sometimes referred to herein as "Southwick"), is the sole owner and resident of certain single family residential real property located in Weber County, with a street address of 1375 North Highway 158, Eden, Utah.
3. Venture Development Group, LLC ("Venture"), owns certain improved real property located in Weber County, with a street address of 1315 North Highway 158, Eden, Utah, which property is operated as a commercial bed-and-breakfast known as the Snowberry Inn ("SI"). The Inn includes nine bedrooms and bathrooms and two kitchens. SI also serves as the year-round residence for the Inn operator, Andrea Burk.
4. Defendant Pineview West Water Company ("PWWC" or "Pineview") is a private, Utah non-profit corporation with its principal place of business in Eden, Weber County, Utah. PWWC is regulated by the Public Service Commission. It

operates multiple wells and other sources for its culinary and secondary (irrigation) water delivery purposes.

B. The parties' wells

5. Three wells are at issue:

a. Plaintiffs Arave and Southwick share the Arave well, which was drilled in 1963 (and cleaned out in 2013).

b. Venture Development owns the rights in the well operated by Snowberry Inn, a bed and breakfast establishment near the Araves ("SI well"), drilled in 2001.¹

i. The SI well operates with a cistern, which is a tank with a functional capacity of between approximately 300 gallons and 500 gallons.

ii. The cistern contains level sensors. When the cistern drops below a certain level, it triggers the SI well pump to turn on.

iii. The pump runs until a sensor signals that the cistern is full, which then turns off the pump.

iv. Water is then pumped again, with a separate pump, into the Inn, where it is held in two tanks, which then distribute the water throughout the Inn.

¹ The current SI Well is a newer well. The original was drilled in 1960 and then replaced in 2001

v. Although the original Venture water right did not allow irrigation use, the Inn irrigated approximately 4600 square feet of lawn and garden around the structure.

vi. The SI well pump is rated at 25 gallons per minute.

vii. The SI and Arave wells are in hydrological communication.

viii. The SI well pump was rated at 25 gallons per minute when installed in 2001. The same pump is presently in the well.

ix. The SI well, which replaced a previous well drilled in 1960, was drilled into both the unconsolidated and bedrock aquifers, while the old well was completed in just the unconsolidated aquifer.

c. The third well is PWWC's #4 Well ("PWWC #4," or just "#4"), drilled in 2004.

i. The #4 is approximately 700 feet from the Arave well and approximately 460 feet from the SI well.

ii. The Arave and SI Wells are approximately 200 feet apart.

iii. PWWC #4 is used solely for secondary irrigation water.

iv. The current #4 pump is rated at 100 gallons per minute.

C. The parties' water rights

6. Roger and Kimberly Arave own appurtenant water right 35-1483, which allows them to divert from their well .015 cfs (approximately 6.7 gallons per minute) for the needs of one home and two livestock.²

7. Janet Southwick owns appurtenant water right 35-6733 (E1349) allowing her to divert from the Arave well up to 1 acre-foot ("af") to irrigate .25 acres and for the indoor domestic needs of one home.

8. Prior to its shutdown and use as a monitoring well, the Arave well was the sole source of culinary and secondary water for Araves and Southwick.

9. Venture Development owns the property and building where Snowberry Inn operates. It owns two appurtenant water rights that were diverted from the SI Well on its property:

a. Water right 35-1220 allows SI to divert .45 af, at the rate of .015 cubic feet per second ("cfs"), for single family domestic use.

b. Water right 35-13204 (E5647), acquired in March 2017, allows diversion up to 2 af to irrigate .25 acres and 1.25 af of commercial use at the Inn.

² "The standard unit of measurement of the flow of water shall be the discharge of one cubic foot per second of time, which shall be known as a second-foot; and the standard unit of measurement of the volume of water shall be the acre-foot, being the amount of water upon an acre covered one foot deep, equivalent to 43,560 cubic feet." Utah Code §73-1-2. In these findings and conclusions, cubic feet per second is abbreviated as "cfs," and acre-foot is abbreviated as "af."

10. PWWC owns (among others) water right 35-11891 (E4625), allowing it to divert 90 af annually for irrigation of 21.66 acres and the indoor domestic requirements of 55 families ("PWWC Right").

a. In 2006, PWWC received State Engineer approval to divert this water right from any combination of five wells, including #4.

b. That approval is, as all such approvals are under the law of prior appropriation, "subject to prior rights."

11. PWWC right 35-7263 was modified by change application a27794, approved in 2013, allowing PWWC to divert 78 af at .33 cfs from the same five wells as E4625 (35-11891).³

12. PWWC can pump its water from any one, or any combination, of the five wells.

13. The parties' relative water right priorities are as follows:

a. Venture (SI) is October 10, 1960.

b. Arave is October 14, 1963.

c. Southwick is August 25, 1978.

d. PWWC #4 is October 14, 2005.

14. Thus, all of plaintiffs' rights are senior to PWWC's Well #4 rights.

³ The "E" designation included with the Southwick, SI, and PWWC rights indicates simply that an exchange of water was approved. See Utah Code §73-3-20. The exchanges themselves are not at issue.

D. The local aquifers

15. There are two relevant local aquifers, an unconsolidated or alluvial aquifer, which consists mostly of sand, gravel, and cobble, and a consolidated rock aquifer, known as the Norwood Tuff.

16. Permeability is a measure of the ability of a porous material, such as rock or an unconsolidated material, to allow fluids to pass through it.

17. The unconsolidated aquifer has much higher permeability than the Norwood, which has generally poor permeability.

18. The Norwood can be fractured, which increases its permeability. The area around the three wells at issue likely contains fracturing, but the intensity and extent of fracturing are not determined.

19. There has not been a general decline in groundwater levels in the regional basin in which these aquifers are located. There are, however, seasonal fluctuations, with lower water levels in the late summer and early autumn, followed by increasing water levels during recharge in the winter and spring.

20. Aquifer recharge depends primarily on the amount of water withdrawn by well pumping and how quickly the aquifer begins to recharge with winter precipitation.

E. The effect of well pumping

21. Well pumping is a cause of seasonal discharge of water from an aquifer and consequent groundwater decline in a given aquifer.

22. When a well is drilled for production purposes, such as the three wells in this case, its casing is perforated at one or more depths. Water enters the well from the surrounding aquifer through these perforations, which supplies water to any pumps in the wells, when turned on.

23. Water flows from high pressure to low pressure or, in other words, from high head to low head.

24. When a well is pumped, the water level drops and a point of low pressure is created at the depth of the perforations in the well casing, which is at its maximum at the location of the pump itself. This has the effect of causing the water in the aquifer to draw down, flowing toward the pump or lower pressure.

25. The pumping thus creates a zone of low pressure, resulting in a cone of depression, usefully described as follows in *Bingham v. Roosevelt City*, 2010 UT 37, ¶3, 235 P.3d 730:

The underground area of reduced soil saturation is in the shape of an inverted cone, with the point of the cone extending downward toward the point at which the water is extracted. Accordingly, the depth of the water table will be most significantly impacted at the point of extraction, but even as one moves away from this point, the water table will be lower than it otherwise might be. Therefore, the effects on the water table are apparent even on parcels of land that are not immediately adjacent to the wells.

26. A cone of depression creates a "radius of influence," a zone that is measured from the well outward and represents an area within a given aquifer that is dewatered due to well pumping.

27. An illustration of a simple cone of depression and a radius of influence is depicted below. This drawing is for illustrative purposes only and is not intended to depict any particular cone of depression from any well in this case. (*Cf.* Pltf. Trial Exhibit 52).

28. The shape and reach of a cone of depression depends on several factors, such as the nature, depth, and permeability of the surrounding aquifer(s).

29. The Arave Well is 187 feet deep. Its perforations are from 140 to 170 feet deep, entirely in the Norwood Tuff.

30. The original SI well, drilled in 1960 and replaced in 2001, was 120 feet deep. When it was abandoned, its static water level was at 55 feet from the top of the well casing. That well was drilled into the unconsolidated aquifer.

31. The current SI Well is 133 feet deep. Its perforations are from 105 to 125 feet deep, and are in both the unconsolidated aquifer and the Norwood Tuff. When drilled, its static water level was at 54 feet from the top of the well casing, which is one foot higher in water level than the original well.

32. The SI well likely gets the majority of its water from the unconsolidated aquifer but is hydrologically connected to the Norwood Tuff aquifer. The new well had a specific capacity during the initial pump test, much higher than the old well, which was exclusively completed in unconsolidated deposits.

33. PWWC #4 is 738 feet deep. It has four perforated zones. Zone 1 is from 58 to 98 feet deep, which zone is divided between the unconsolidated aquifer and the

Norwood Tuff. Zone 2 is from 208 to 228 feet deep. Zone 3 is from 408 to 448 feet deep, and Zone 4 is 648 to 738 feet deep. Zones 2-4 are entirely within the Norwood Tuff.

34. Both the Arave and SI wells lie within the cone of depression and the radius of influence created by pumping PWWC #4.

35. When #4 was first pump-tested, interference with the Arave well, expressed as a drop in the water level sufficient to leave the pump in the Arave well without water, was quickly noted by the Araves, and the test was stopped.

36. Later, after #4 was turned on again, the interference returned, first at the Arave well and later at the SI Well.

37. PWWC put well #4 well into operation, and the effect on the Arave well was again noticed within a short time. The Arave well was unable to produce any water when #4 was pumped. Because of this interference, PWWC connected the Araves to the PWWC culinary system in 2007.

38. The SI well also began to struggle to produce water in September, 2007. Because the SI well could not fill the cistern, the SI operators, the Dohrers, were forced to use a hose to connect to the Arave home and fill the Inn cistern with PWWC water obtained from the Arave connection.

39. Later, in 2007, the Inn was also connected to the PWWC system because its well could no longer meet its water needs.

40. The Araves, Southwick, and SI originally were offered and accepted an arrangement with PWWC under which they would pay a flat rate of \$20.00 per month for PWWC culinary water. Later, in 2012, PWWC unilaterally increased that amount to PWWC's standard tariff rates, which plaintiffs have paid each year since.

41. The Araves have paid \$7,003 to PWWC for water service. Southwick has paid \$4,782. Venture has paid \$19,839.

42. PWWC #4 is turned on typically around July 1 of each year and is pumped through the remainder of the irrigation season, ending in late summer/early fall.

43. Once hooked up to PWWC's water system, the Araves removed the pump from their well and have used the well as a monitoring well to document the impact of pumping #4 for several years.

44. The use of the Arave well as a monitoring well has facilitated the parties' ability to gather data concerning the effect of PWWC #4. Had the Araves attempted to pump at the same time that PWWC #4 was pumped, the data would have been more difficult to interpret.

45. The fact that the Arave Well has not been pumped has allowed good data collection to determine the impact of PWWC #4.

46. The Arave Well is a very good surrogate for PWWC #4, meaning that it reacts quickly and accurately to pumping in the #4.

47. Prior to the introduction of PWWC #4, neither the Araves (including Southwick) nor SI had any well or water availability or well pumping issues or problems in their current wells. The Arave and SI wells produced water year-round to satisfy the Arave, Southwick, and SI (Venture Dev.) water rights and uses.

48. In March of 2017, Venture Development acquired 2 acre-feet of additional water by virtue of an approved Exchange with Weber Basin Water Conservancy District. This additional water is approved for irrigation of .25 acres and year-round commercial purposes for the Inn.

49. Prior to acquiring its additional 2 af under water right 35-13204 (E5647), SI used in a typical year more water than permitted by its original water right, and it used that water for irrigating its lawn and garden even though the water right is not authorized for irrigation uses.

50. During the three years prior to trial, SI used approximately .33 af of its total .45 acre foot right (prior to the Exchange (E5647)) in the months before PWWC #4 was turned on.

51. The prior SI operators, the Dohrers, kept a record of well use versus PWWC culinary water use. Patrick Dohrer explained how he alternated between using SI well water and PWWC culinary water after SI was connected to the PWWC culinary system by turning certain valves inside the Inn.

52. The Dohrer SI well versus PWWC water use record was not perfectly kept. It showed no SI well use during a time in approximately late August to early September 2014 when the SI well was actually being used. That well use during that period is depicted on plaintiffs' Exhibits 26 and 27.

53. PWWC also kept a record of its #4 well use, but that record also was not entirely accurate.

54. These errors in record keeping by the Dohrers and by PWWC were inadvertent. No bad faith or improper motive is found in connection with those errors.⁴

55. Andrea Burk took over SI operations in 2014. She explained how she understood that valve system to work, but her understanding was incorrect. She did not understand how that valve system worked until it was shown to her during the trial.

56. When PWWC #4 starts pumping the Arave well head begins to fall within hours. When the elevation of the Arave well head falls below the elevation of the SI well head, some water moves downward and away from the SI well unconsolidated aquifer toward the lower elevation of head now present in the

⁴ For example, it is clear that the SI well was pumped during the late August to early September 2014 time frame because plaintiffs' expert, Paul Anderson, collected SI pumping head (i.e. water elevation) data during that period, which data is depicted on plaintiffs' Exhibits 26 and 27. There was no way to collect such data unless the SI well was being pumped.

Norwood Tuff, essentially draining some of the water away from the unconsolidated aquifer and causing the head in the SI well to drop.

57. As PWWC #4 continues to pump, it continues to draw down the level of the Arave well due to the deepening and widening cone of depression, created by pumping this deeper and higher volume well. The SI well clearly lies within this deep and wide cone of depression; hence, water moves from higher head in the SI well's aquifers to the lower head created by the #4 deepening cone in the Norwood Tuff. The result is that the SI well head drops, and the well struggles to produce even a minimal yield.

58. In the winter-late spring of each year, the head in the Arave well is consistently higher in elevation (as shown on Plaintiffs Exhibit 27) than the SI well.

a. Water moves from high to low head, indicating that water monitored in the Norwood Tuff, at the Arave well, is moving upward toward the water monitored in the SI well, which is perforated in both the unconsolidated and Norwood Tuff aquifers.

b. When this head relationship between the Arave and SI exists, there is no problem for the SI well to quickly fill and re-fill the Inn's cistern as demonstrated in Plaintiffs Exhibits 26 and 27.

c. It is when this Arave – SI head level reverses—when the normally higher Arave head drops below the normally lower SI head—that the SI well is most noticeably affected. Its water level drops dramatically at that point.

59. PWWC #4's interference with the SI well is illustrated in plaintiffs' Exhibit 23. The graphs on that exhibit show that in December the SI well recovers quickly, filling the cistern within fifteen minutes. During August, when PWWC #4 is pumping, the SI well struggles for hours to fill the cistern.

60. The Arave and SI wells coexisted without interfering with each other.

61. After PWWC #4 stops pumping, recovery time for the water levels in the Arave and SI wells depends on the factors described above—how much #4 pumps and how quickly the aquifer is recharged.

62. The PWWC right is evidenced by an underlying Bureau of Reclamation water right, 35-7397, which has a 1930 priority.

63. In 2006, PWWC obtained approval to move the point of diversion of its water right to a complex of five wells, including #4, subject to prior rights.

64. The PWWC water delivered to plaintiffs after PWWC connected them to its system caused damage in the form of hard water deposits and build-up, requiring certain repairs and maintenance by each of the plaintiffs.

65. The Araves pump was damaged due to PWWC interference.

F. Damages

66. Araves incurred damages proximately caused by reason of PWWC's pumping of its well #4 in the form of (a) fees paid to PWWC for the water connection to PWWC's system necessitated by PWWC's interference with the Arave well, in the amount of \$7,003; (b) the cost of a new pump and associated accessories estimated at \$4,500.

67. Southwick incurred damages proximately caused by reason of PWWC's pumping of its well #4 in the form of (a) fees paid to PWWC for the water connection to PWWC's system necessitated by PWWC's interference with the Arave well, in the amount of \$4,782, (b) expenses incurred by reason of the hard water problems and related issues in the amount of \$1,000, for total damages in the amount of \$5,782.⁵

68. Venture incurred damages proximately caused by reason of PWWC's pumping of its well #4 in the form of (a) fees paid to PWWC for the water connection to PWWC's system necessitated by PWWC's interference with the SI well, in the amount of \$19,839; expenses incurred by reason of the hard water problems and related issues in the amount of \$8,399, for total damages in the amount of \$28,238.

69. Patrick and Sherrie Dohrer operated SI from August 2005 to approximately August 2014, and during that time incurred certain costs and expenses caused

⁵ Southwick also lost several trees and a garden due to the inability to irrigate after connection to the PWWC system. No value was placed on these items, however.

by or related to interference with the SI well. Those expenses total \$10,538.83, and are identified in plaintiffs' Exhibit 1. Dohrers assigned the claim for those expenses to Venture on May 31, 2016. That figure is included in the foregoing Venture damages calculation.

70. All of the parties' water uses are for beneficial purposes.

CONCLUSIONS OF LAW

1. The court has personal jurisdiction over the parties.
2. The court has subject matter jurisdiction pursuant to Utah Code §78A-5-102(1).
3. Venue is proper pursuant to Utah Code §78B-3-301 inasmuch as the real property and water rights at issue in this matter are located in Weber County, Utah.

A. Water Right Interference

4. A determination of interference is a mixed question of fact and law. See *Wayment v. Howard*, 2006 UT 56, ¶9, 144 P.3d 1147. The court "must first find facts regarding the claim of interference and then determine whether those facts are within the ambit of interference as applied to the water right at issue." *Id.*
5. Water is public property, "subject to all existing rights to the use thereof." Utah Code §73-1-1(1).
6. Beneficial use is the basis, measure, and limit of a water right. Utah Code §73-1-3.

7. The law of prior appropriation means that senior water rights have priority over junior rights. Prior appropriation applies always and everywhere to protect senior rights. “[S]enior water right holders are entitled to their full water right before junior water right holders are entitled to any water.” *Heal Utah v. Kane Cnty. etc.*, 2016 UT App 153, ¶6, 378 P.3d 1246).

8. Water rights are real property. Utah Code §57-1-1(3)(“Real property” or “real estate” means any right, title, estate, or interest in land . . . and all water rights . . .”).

9. No one may diminish, obstruct or interfere with the approved water rights of another. See *North v. Marsh*, 504 P.2d 1378, 1379 and n.2 (Utah 1973).

10. Interference means to obstruct or hinder. See *Black's Law Dictionary* 831-32 (8th ed. 2004). Specifically, in Utah water law, “obstructing or hindering the quantity or quality of an existing water right constitutes interference.” *Wayment*, 2006 UT 56, ¶ 13 (citations omitted). See also *Bingham*, 2010 UT 37, ¶48.

11. “Because underground waters cannot be observed nor measured with precision, but must be determined on the basis of geology, physics and hydrology, there are greater difficulties involved in their allocation and regulation than with respect to surface waters.” *Wayman v. Murray City*, 458 P.2d 861, 863 (Utah 1969).

12. A water right consists of several constituent elements, which when taken together define a right to the use of water. Those elements include (i) quantity,

either or both in terms of volume (measured in acre-feet) and flow rate (measured in cubic feet per second), (ii) purpose of use, (iii) place of use, (iv) point of diversion, (v) time during which the water may be used, (vi) the source from which the water is diverted (either above or below ground), and (vii) priority date. *See, e.g., Utah Code §73-3-17(1).*

13. A water right also includes an appropriator's right to continue use of the "existing and historical method of diverting the water." *Wayment*, 2006 UT 56, ¶13. Here, plaintiffs' water rights are diverted solely by means of their wells.

14. Protection of a senior right extends to the source. "No one can interfere with the source of supply of [a water right], regardless of how far it may be from the place of use, and whether it flows on the surface or underground, in such a manner as will diminish the quantity or injuriously affect the quality of the water of these established rights." *Little Cottonwood Water Co. v. Sandy City*, 258 P.2d 440, 443 (Utah 1953).⁶

15. The timing of water right use is protected. When implementing a change in the use of water, as PWWC did here when it moved water rights to its #4 well, it

⁶ See also *Justesen v. Olsen*, 40 P.2d 802, 805 (Utah 1935) ("From the beginning of our history, when a man went upon a stream of water, diverted it, and applied it to a beneficial use, his right to the use of that stream was recognized as being prior and superior to the rights of all subsequent appropriators to the extent of the reasonable necessities of the ... first appropriation. During the progress of our development, as new conditions presented themselves from time to time our courts have consistently enforced this right of priority and protected appropriators not only as against all subsequent claimants taking water from the body of the stream, but as against all persons interfering with its source.").

must ensure that senior rights are not harmed. "This requires that the vested rights of the lower users shall not be impaired by such changes either by reducing the flow of water... or by changing the time of such flow to the[] detriment [of senior rights]." *East Bench Irr. Co. v. Deseret Irr. Co.*, 271 P.2d 449, 453 (Utah 1954).⁷

16. Plaintiffs' water rights are essential to their properties. The Araves and Southwick live there and, until being interfered with, depended on their water rights and the Arave well as the sole source of their culinary and secondary water.

17. The SI well and water rights also add significant value to Venture's property.

18. Without water, land loses tremendous, sometimes all, value. *See, e.g., Sanpete America v. Willardsen*, 2011 UT 48, ¶40, 269 P.3d 118, and cases cited (discussing water's importance to land value).

19. This action concerns groundwater and local well interference. The "rule of reasonableness" governs groundwater interference. *Wayman*, 458 P.2d at 866.

20. Plaintiffs' and PWWC's respective water rights should be addressed under this "rule of reasonableness" to balance plaintiffs' senior water rights with PWWC's junior rights.

⁷ *See also Logan, Hyde Park, etc. v. Logan City*, 269 P. 776, 778 (Utah 1928)(city "perpetually" enjoined from "operating its diverting works and power plant as to impound, obstruct, or impede in any manner the free and natural flow of the water of the river to which the [senior appropriators were] entitled . . .).

21. This requires analysis of the circumstances: the quantity of water available, the average annual recharge in the basin, the existing rights, and their priorities.

Wayman, 458 P.2d at 865.

22. All water 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.” *Wayman*, 458 P.2d at 865.

23. *Wayman* means essentially that, when rights clash, the court invokes reason so that, as far as possible, water is developed for beneficial use.⁸

24. PWWC’s #4 rights are junior in priority to plaintiffs’ rights.

25. Between appropriators, the one first in time is first in rights. Utah Code §73-3-1(5)(a).

26. Accordingly, “senior water right holders are entitled to their full water right before junior water right holders are entitled to any water.” *Heal Utah v. Kane Cnty. Water Conserv. Dist.*, 2016 UT App 153, ¶¶ 6, 378 P.3d 1246 (citation omitted).

27. No junior appropriator may interfere, directly or indirectly, with senior rights.

Rasmussen v. Moroni Irr. Co., 189 P. 572, 577 (Utah 1920)(“The first appropriator

⁸ The “inquiry regarding interference focuses on actual interference in the quantity or quality of water to which the prior appropriator is entitled.” *Salt Lake City v. Silver Fork Pipeline Corp.*, 2000 UT 3, ¶ 28 n.10, 5 P.3d 1206, abrogated on other grounds by *Otter Creek Reservoir Co. v. New Escalante Irrigation Co.*, 2009 UT 16, ¶¶ 11-13, 203 P.3d 1015.

on the stream ... acquires a prior right to the use of all those waters, and no subsequent appropriator may interfere either directly or indirectly with the rights of the prior appropriator.").⁹

28. Plaintiffs' means and method of diverting their water are reasonable. Their wells are the only possible method for diverting the water under their rights.

Those wells functioned without problem until PWWC #4 was drilled.

29. The PWWC change of its junior water rights to well #4, as all such changes are, was approved "subject to prior rights." Utah Code §73-3-17(6).

30. The priority of the underlying right survives the change unless it interferes with other rights. *Hague v. Nephi Irr. Co.*, 52 P. 765, 769 (Utah 1898) ("When water has been lawfully appropriated the priority acquired is not lost by changing the use for which was first appropriated and applied, or the place at which it was first employed, provided that the alterations made are not injurious to the rights acquired by others prior to the change.")

31. PWWC's pumping of its well #4 interferes with the Arave well, thus interfering with the senior Arave water rights.

⁹ Moroni Irr. continues: "If ... the appellant may cut off one of the sources of supply... any other landowner and water user may cut off another source of supply, and so on until all the sources of supply which pass underneath the surface of the soil are cut off, and thus the lower and prior appropriator would be left without any, or at least only a meager, supply of water in the low-water season. This may not legally be done." 189 P. at 577.

32. PWWC's pumping of its well #4 interferes with the Arave well, thus interfering with the senior Southwick water rights.

33. PWWC's pumping of its well #4 interferes with the SI well, thus interfering with the senior Venture water rights.

34. PWWC's interference consists of dewatering the aquifers that are the source of supply for the Arave and SI wells, thus obstructing and hindering the quantity of water available to the Arave and SI wells, first by depriving the Arave well of virtually all water, and by obstructing the SI well's ability to produce water.

35. Because that change in PWWC's point of diversion interferes with the senior Arave, Southwick, and Venture Development rights, the original priority of the PWWC rights is lost.

36. The PWWC #4, Arave and SI wells cannot co-exist under these circumstances.

B. Negligence

37. PWWC owes each plaintiff a duty of reasonable care to others foreseeably harmed by the method PWWC uses to obtain its water. See *Bingham*, 2010 UT 37, ¶65 (City owed "a duty of reasonable care to landowners who will foreseeably be harmed" by the method the city used to obtain its water.").

38. PWWC breached that duty when it located, drilled, and used its #4 well in a manner that interferes with plaintiffs' wells.

39. Such interference was foreseeable given the close proximity to plaintiffs' wells, the much larger capacity of PWWC #4, and its depth and perforated zones in the aquifers used by the Arave and SI wells.

40. The harm to plaintiffs' wells is proximately caused by PWWC's pumping of its well #4.

41. Plaintiffs have been damaged by reason of PWWC's negligence as identified above.

C. Plaintiffs' water use is not a defense to local well interference.

42. The fact that, historically, SI (or any other plaintiff) has or may have used more water than permitted by its water right is not a defense to local well interference. Neither is it a defense that SI used water for irrigation when it did not then have an irrigation right.

43. The amount of water used under an approved water right, and the manner in which it is used, is a matter between the State (the Utah Division of Water Rights and the Utah State Engineer) and the water user. Utah Code §73-3-17(1)(b). The State Engineer has enforcement powers to remedy such matters.

44. Even if SI used water only within its water right limit, and even if used only for indoor, domestic purposes for a single family, PWWC's pumping of its #4 well would still interfere with Venture's water right because it interferes with both the source, by dewatering the aquifer from which Venture's senior right is drawn, and the SI well, thus interfering with Venture's means and method of diversion. The

interference would be the same even if SI used less than its full water right because the interference affects the SI (and Arave) well's ability to produce water as needed on a year-round basis.

45. Use of water pursuant to a water right is regulated by the Utah State Engineer, who has enforcement powers pursuant to Utah Code §73-2-25 if water is used without the right to do so, or beyond an existing right.¹⁰

46. Furthermore, if a senior water right user exceeds the limit of its right, thus taking more water from a source than is authorized, then a junior water right user on the same source (whether on the surface or underground) could have an interference claim because the excess water used by the senior user should be available to satisfy junior rights. PWWC brought no such claim.

D. Remedies

47. The PWWC #4, Arave, and SI wells cannot coexist under PWWC's current pumping routine.

a. Pumping in #4 first depletes the water in the Arave well, causing its water level to drop below the SI water level, which reverses the pressure gradient, in turn causing the SI well level to drop.

b. Accordingly, PWWC's pumping of #4 must either be stopped or curtailed sufficiently to permit the Arave and SI wells to function.

¹⁰ "[T]he state engineer may commence an enforcement action ... if [he] finds that a person ... is diverting, impounding or using water in violation of an existing water right" Utah Code §73-2-25(2)(a).

c. Under *Wayman's* rule of reasonableness, the court must try to find a remedy that allows PWWC to use as much water as it can without interfering with the Arave and SI wells.

d. PWWC owns other wells authorized for use under the same approval that permitted it to pump water from #4.

e. PWWC is ordered to stop pumping #4 and use one or more of its other wells to satisfy its irrigation demand.

f. The court retains jurisdiction for the limited purpose of determining whether it can be shown that PWWC #4 can be pumped at a lesser rate so as not to interfere with the Arave and SI wells, and specifically to prevent the Arave head from dropping below the SI head. If so, then PWWC #4 may continue to function under those circumstances.

i. If PWWC #4 can be pumped at a level or rate that does not interfere with the Arave and SI wells, then PWWC shall install a flow meter pursuant to Utah Code §73-5-4. That meter shall be accessible by the state engineer pursuant to §73-5-4(2). PWWC shall further report its pumping data to the state engineer in a manner acceptable to the state engineer, and such pumping data shall be provided to plaintiffs on a weekly basis while #4 is pumped.

ii. If PWWC #4 cannot be pumped at a level or rate that does not interfere with the Arave and SI wells, the court may order that PWWC

provide replacement water pursuant to Utah Code §73-3-23 at PWWC's sole expense. *See Current Creek Irr. Co. v. Andrews*, 344 P.2d 528, 531 (Utah 1959)("[Junior appropriators] can appropriate water to a beneficial use from the underground basin if it is available but they must replace the flow of the wells and springs at the prior appropriator's place of diversion solely at their own cost.").

iii. Should PWWC shift any of its well pumping to any one or more of its other approved wells, those wells must be pump tested first to determine whether there is any impact to or interference with either the Arave or SI wells.

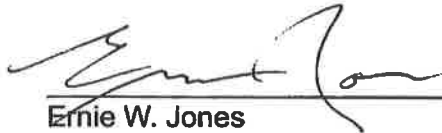
48. PWWC is ordered to pay damages as follows: Araves \$11,503, Southwick \$5,782, and Venture Development \$28,238, plus post-judgment interest on each of these amounts at the statutory rate pursuant to Utah Code §15-1-4.

49. As the prevailing parties, plaintiffs are entitled to their costs pursuant to Rule 54(d) of the Utah Rules of Civil Procedure in an amount to be set forth in a Verified Memorandum of Costs.

E. Judgment

Pursuant to Rule 52(a)(1), a separate judgment consistent with this Memorandum Decision will be entered. Plaintiff will prepare the judgment and submit it to the court for signature.

Dated this 14 day of November, 2017.


Ernie W. Jones
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that on the 14~~th~~ day of November 2017, I sent a true and correct copy of the foregoing decision to counsel as follows:

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Judicial Assistant

ADDENDUM C

The Order of the Court is stated below:

Dated: January 04, 2018
05:08:41 PM

/s/ Ernie W. Jones
District Court Judge



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STATE OF UTAH
IN THE SECOND DISTRICT COURT OF WEBER COUNTY

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| <p>ROGER B. ARAVE and KIMBERLY L. ARAVE, JANET SOUTHWICK, Trustee, and VENTURE DEVELOPMENT GROUP, LLC, a Utah limited liability company;</p> <p>Plaintiffs,</p> <p>vs.</p> <p>PINEVIEW WEST WATER COMPANY, a Utah corporation,</p> <p>Defendant.</p> | <p>FINAL JUDGMENT</p> <p>Case No. 130907544</p> <p>Judge Ernest W. Jones</p> |
|--|---|

This action was tried to the bench August 18, 19, and 29, with closing arguments on September 25, 2017. Plaintiffs were represented by David C. Wright. Defendants were represented by Edwin C. Barnes and Emily E. Lewis. The parties also filed trial briefs. The court heard testimony from the witnesses, including expert witnesses from both sides, and has reviewed the trial exhibits. The court also heard argument from counsel. After the close of the evidence, the court asked the parties to submit proposed findings of fact and conclusions of law,

which they did on September 21, 2017. The court entered its Memorandum Decision on November 14, 2017, instructing plaintiffs to prepare a separate judgment pursuant to Rule 52(a)(1) to be entered under Rule 58A.

Consistent with the court's Memorandum Decision, the court enters this Final Judgment as follows:

1. Judgment is hereby entered in favor of plaintiffs, and each of them, and against Pineview West Water Company ("PWWC"), on plaintiffs' First Claim for Relief for common law interference with water rights.
 - a. PWWC is ordered to stop pumping its Well #4 (State of Utah Well Identification No. 28707) and use one or more of its other wells to satisfy its irrigation demand.
 - b. The court retains jurisdiction for the limited purpose of determining whether it can be shown that PWWC #4 can be pumped at a lesser rate so as not to interfere with plaintiffs' wells (State of Utah Well Identification Nos. 11238 (Arave Well) and 11242 (Venture Development Well), and specifically to prevent the Arave head from dropping below the SI head. If so, then PWWC #4 may continue to function under those circumstances.
 - i. If PWWC #4 can be pumped at a level or rate that does not interfere with plaintiffs' wells, then PWWC shall install a flow meter pursuant to Utah Code §73-5-4. That meter shall be accessible by the state engineer pursuant to §73-5-4(2). PWWC shall further report its pumping data to the state engineer in a manner acceptable to the state engineer, and such pumping data shall be provided to plaintiffs on a weekly basis while #4 is

pumped.

ii.If PWWC #4 cannot be pumped at a level or rate that does not interfere with plaintiffs' wells, the court may order that PWWC provide replacement water pursuant to Utah Code §73-3-23 at PWWC's sole expense.

iii.Should PWWC shift any of its well pumping to any one or more of its other approved wells (including but not limited to Well Identification Nos. 11248, 11249, 427479), those wells must be pump tested first to determine whether there is any impact to or interference with either the Arave or Venture Development wells.

2. Judgment is hereby entered in favor of plaintiffs, and each of them, and against PWWC, on plaintiffs' Second Claim for Relief for negligence.
3. Damages against PWWC are awarded on plaintiffs' First and Second Claims as follows:
 - a. Roger and Kimberly Arave: \$11,503, plus post-judgment interest at the statutory rate pursuant to Utah Code §15-1-4.
 - b. Janet Southwick, Trustee: \$5,782, plus post-judgment interest at the statutory rate pursuant to Utah Code §15-1-4.
 - c. Venture Development Group, LLC: \$28,238, plus post-judgment interest at the statutory rate pursuant to Utah Code §15-1-4.
4. As prevailing parties, plaintiffs are entitled to their costs pursuant to Rule 54(d) of the Utah Rules of Civil Procedure in an amount to be set forth in a Verified Memorandum of Costs.

5. The court's limited retention of jurisdiction in aid of this Judgment in ¶1.b. does not affect its finality. All of the claims and the parties' respective rights have been determined. Accordingly, there is no just reason for delay of entry of this Final Judgment as to all of the claims and all of the parties.

-----*End of Judgment*-----
Court's e-signature at top of first page

Approved as to Form:

Edwin C. Barnes (e-signature w/ permission)
Edwin C. Barnes
Emily E. Lewis
Counsel for Defendant

CERTIFICATE OF SERVICE

I certify that on December 19, 2017, the foregoing Final Judgment was served via E-Filing system to the following:

Edwin C. Barnes – ecb@clydesnow.com
Emily E. Lewis – eel@clydesnow.com
Clyde Snow & Sessions
201 South Main Street, 13th Floor
Salt Lake City, Utah 84111-2216

David C. Wright

ADDENDUM D

The Order of the Court is stated below:

Dated: January 10, 2018
08:38:26 AM

/s/ Ernie W. Jones
District Court Judge



John H. Mabey, Jr. – 4625
David C. Wright – 5566
MABEY WRIGHT & JAMES, PLLC
175 South Main, #1330
Salt Lake City, Utah 84111
Telephone: 801-359-3663
Facsimile: 801-359-3673
Email: jmabey@mwjlaw.com
dwright@mwjlaw.com

Counsel for Plaintiffs

STATE OF UTAH
IN THE SECOND DISTRICT COURT OF WEBER COUNTY

ROGER B. ARAVE and KIMBERLY L.
ARAVE, JANET SOUTHWICK, Trustee,
and VENTURE DEVELOPMENT GROUP,
LLC, a Utah limited liability company;

Plaintiffs,

vs.

PINEVIEW WEST WATER COMPANY, a
Utah corporation,

Defendant.

AMENDED FINAL JUDGMENT

Case No. 130907544

Judge Ernest W. Jones

This action was tried to the bench August 18, 19, and 29, with closing arguments on September 25, 2017. Plaintiffs were represented by David C. Wright. Defendants were represented by Edwin C. Barnes and Emily E. Lewis. The parties also filed trial briefs. The court heard testimony from the witnesses, including expert witnesses from both sides, and has reviewed the trial exhibits. The court also heard argument from counsel. After the close of the evidence, the court asked the parties to submit proposed findings of fact and conclusions of law,

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which they did on September 21, 2017. The court entered its Memorandum Decision on November 14, 2017, instructing plaintiffs to prepare a separate judgment pursuant to Rule 52(a) (1) to be entered under Rule 58A.

Consistent with the court's Memorandum Decision, the court amends paragraph 4 of its Final Judgment as follows:

As prevailing parties, plaintiffs are awarded costs in the amount of \$2,059.96 pursuant to Rule 54(d) of the Utah Rules of Civil Procedure.

-----*End of Judgment*-----

Court's e-signature at top of first page

Approved as to Form:

Edwin C. Barnes (e-signature w/ permission)

Edwin C. Barnes

Emily E. Lewis

Counsel for Defendant

CERTIFICATE OF SERVICE

I certify that on January 8, 2017, the foregoing Amended Final Judgment was served via E-Filing system to the following:

Edwin C. Barnes – ecb@clydesnow.com

Emily E. Lewis – eel@clydesnow.com

Clyde Snow & Sessions

201 South Main Street, 13th Floor

Salt Lake City, Utah 84111-2216

David C. Wright

ADDENDUM E



PUMP INSTALLATION REPORT (PUMP LOG)
UTAH DIVISION OF WATER RIGHTS
PO BOX 146300, SLC, UT 84114-6300
(801) 538-7240; (801) 538-7467 fax; waterrights.utah.gov



Well Identification (e.g., Water Right or Non-Production Well Number): 35-1483

Owner Info (Name and Address):

Well Location:

Physical Street Address:

Point of Diversion (Public Land Survey): North/South 1220 feet, East/West 2373 feet from the E4 corner of
Section 03, Township 6N, Range 1E, SLB&M/USB&M

GPS (UTM OR Lat-Long, Incl. Map Datum):

Existing Well Details (if known)

Is a Well Driller's Report available? ☒ Yes ☐ No Well Depth 181 feet Well Diameter 0-80 6"

Nature of Use: ☒ Domestic ☐ Irrigation ☐ Stock ☐ Industrial ☐ Commercial ☐ Municipal ☐ Provisional ☐

Casing Type: ☒ Steel ☐ Stainless Steel ☐ PVC ☐ Fiberglass ☐ ABS ☐ SR ☐ Other

☐ Screen ☒ Perforations ☐ Open Pipe Screen/Perforation Interval 140-170

Filter Pack ☐ Yes ☒ No

Other details (if known):

Pump Installation Details

Type of Installation: ☐ New ☐ Replacement ☐ Repair ☐ Other Pump Draw Down Test

Date of Installation (single date or range as applicable):

Type of Pump: ☒ Submersible ☐ Lineshaft ☐ Jet ☐ Other

Pump Manufacturer: Pump Model:

Number of Stages: Riser/Discharge Pipe Type/Size: Shaft Size (in):

Height of Casing Above Ground Surface (in): -8 Pump Intake Depth Below Top of Casing (ft):

Pump Size (hp): 1hp Pump Capacity (gpm): 23-25 Static Water Level (ft below top of casing): Ground 57

Pump Water Level (ft below top of casing): Ground 72 Shut-in Head for Flowing Wells (ft or psi):

Artesian Flow (gpm): Drawdown at End of Test (ft):

Pitless Installation ☐ Yes ☒ No Manufacturer: Model:

Pitless Type: ☐ Pitless Adapter ☐ Pitless Unit ☐ Screw On ☐ Welded ☐ Compression

Method of Cutting Hole in Casing: Depth of Pitless (ft BGS):

Pump Testing? ☐ Yes ☐ No Test Pumping Rate (gpm) 23-25 GPM Test Pump Duration (hrs) 2 hours

Water Level Measurement Method ☐ Airline ☒ Electric Sounder ☐ Steel Tape ☐ Other

Discharge Measure Method ☐ Bailor ☒ Bucket/Barrel/Stopwatch ☐ Current ☐ Air Lift ☐ Guage ☐ Meter

☐ Orifice ☐ Volume ☐ Weir-Flume ☐ Other

Down Hole Camera Survey? ☐ Yes ☒ No Water Quality Sample Taken? ☐ Yes ☐ No

Well Pump Works Disinfection Upon Completion in accordance with R655-4? ☐ Yes ☐ No

Well Driller Statement

Comments by Installer: Pump Test started with static water level at 57ft below Land Surface, after 5 min pumping 23-25 GPM. Draw Down Reached its max at 72ft below surface, Pumped 1hr & 55min longer and Draw Down

Name: STAYED AT 72 License No.: 593

Oliver Drilling
Signature of Licensee: Michael F Oliver
(Licensed Well Driller or Pump Installer)

Date: 6-27-2017

Note: All pump work shall be performed in accordance with the provisions of the State of Utah Administrative R



Pump Log