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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 : Reply Brief

Utah Supreme Court

No. 20180067-SC

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.

REPLY BRIEF OF APPELLANT

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

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

Attorneys for Appellees

Edwin C. Barnes (0217)
Timothy R. Pack (12193)
Emily E. Lewis (13281)
CLYDE SNOW & SESSIONS
201 S. Main St., 13th Floor
Salt Lake City, Utah 84111
ecb@clydesnow.com
trp@clydesnow.com
eel@clydesnow.com
(801) 322-2516

Attorneys for Appellant

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INTRODUCTION

The parties agree that all surface and groundwaters in Utah belong to the State. Utah Code Ann. §73-3-1. A water right, then, represents authorization to use the State's water on terms set by the State Engineer. Among those terms are permission to divert water in priority at a specific point, at a specific rate of flow, up to a specific volume, and to use it for a specific purpose. Only those attributes of the right established by the State Engineer are protected by law. Significantly in this case, while Appellees' water rights recognize their wells as authorized points of diversion, they do not grant Appellees an ownership interest in the aquifer or a guarantee that water will be available at a particular depth.

In order to prevail herein, the law requires Appellees to demonstrate that, after reasonable efforts, they were unable to obtain the authorized volume or flow of water granted by their rights because of actions by Pineview West. That is their burden as a matter of both law and logic, but it is a burden they could not carry and chose not to undertake. Indeed, the trial court found that Snowberry was able to divert from its well more water and at a much higher rate of flow than authorized, and there has been no effort made to draw any water from the Arave well for more than ten years. Fatal to their claim, Appellees have never, ever measured the amount of water produced by their wells, and they offered no quantification at all of the amount of water to which they believed they are entitled but could not receive because of Pineview West. Such proof is essential, both to demonstrate the fact of interference and to establish the diminished quantity of water Pineview West would be obligated to replace if interference were established.

Appellees argue that they do not have to prove actual interference if they show that Pineview West affected the water table to any degree, while acknowledging at the same time that the level of water in the aquifer, is not in general decline, changes seasonally, and is affected by withdrawals from other wells and Appellees' own pumping, all contributing factors they made no attempt to quantify. They claim that the level of water in an aquifer is one of their protected assets, citing cases about the impact of interference with free-flowing sources on stream flow rights, but they have never identified the particular level to which they are entitled. Appellees here posit a universe in which the first well to tap an aquifer has a protected right to the water table (with no requirement of reasonableness on the part of that water user), and where all owners of junior rights commit actionable interference when they pump their wells even if the first user is still able to divert the full amount of water authorized by the State Engineer. Appellees' hypothetical universe is an impossible one because *all* diversions from an underground aquifer impact that source to some degree. Utah requires a greater level of proof to establish actionable interference, including a demonstration of actual interference with a particular water right that persists notwithstanding reasonable and efficient efforts by the party claiming interference.

Appellees argue interference with the *source*, the vast water table itself, instead of attempting to quantify impacts on their specific water *rights*. They argue, for example, that the mere fact that their wells fall within a graphic "cone of depression" is demonstrative of interference. (Appellees' Brief (herein, "BR.") at 8, 34.) It is true the experts described that concept, but they also testified that the "cone" is not regular in

shape, and that the Appellees' wells which are located within the described radius do not communicate significantly with each other.[1]

Arave actually claims interference with the *non-diversion* of water. There was no effort made to pump the Arave well for more than ten years, even though Appellees' evidence confirms that the well is capable of producing 23-25 gallons per minute (GPM)[2], more than three times the Arave authorized diversion of 6.73 GPM. Non-use cannot be reasonable use as a matter of law. The Snowberry well has always been equipped with a single-speed 25 GPM pump, even though 6.73 GPM is the maximum diversion rate authorized by the State Engineer. Excessive diversion rates are illegal, and thus cannot be a reasonable use as a matter of law. The experts called by both parties testified that water has consistently been present and available within the existing cased depth of both wells, even when Pineview West's irrigation well was in operation.[3] Therefore, failing to equip the Arave well with a pump set at an appropriate depth[4], and

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[1] Appellees' expert Anderson testified to indirect communication. (R.0812). Pineview West's expert Loughlin testified to "No communication." (R.0714). This was not baseless speculation, as argued by Appellees (BR., at 34) but is amply borne out by Appellees' well data that show that pumping of the Snowberry well has little or no effect on the water level on the Arave well which is located only 400-500 feet away.(R.0841). Clearly, geographical proximity does not prove actual interference

[2] The Arave well was tested by Appellees shortly before trial. (Pltf.'s Exhibit 54).

[3] Given this consistent evidence and Appellees' graphs showing continued operation of the Snowberry well and a column of water available in both wells throughout the summer months, the hyperbolic statements that "Appellees cannot divert their water for up to three months, while #4 pumps" (BR., at 25), that "the water is there, possibly hundreds of feet deeper than where it is before #4 turns on" (*Id.*, at 29), and "[f]or about three months of every year, the senior rights are inaccessible" (*Id.*, at 30) are not helpful.

[4] Appellees elected to use the Arave well for monitoring purposes rather than water production. That is a choice that bears consequences. The parties' experts both agreed those uses are not mutually exclusive, and that the Arave well could always have been

refusing to equip the Snowberry well with a correctly sized pump that would even out its cycles or to set the pump in the existing well at a level where more water can be diverted, cannot be reasonable use as a matter of law.[5] Appellees have never attempted to measure or model how the Snowberry well would perform if pumped at its authorized rate of flow.[6] Neither is it reasonable for Appellees to pursue an interference claim based on two wells, where they elected to keep one well idle for ten years and where, as the trial court found, they have consistently diverted more water than allowed by the water right from the other well. Pineview West denies that it has interfered with Appellees' water rights but submits, in the alternative that, as a matter of law, there can be no cause of action for interference with an illegal use of water.[7]

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equipped with a pump in addition to the monitoring equipment. (R.1108-1111); (R.1132).

[5] Appellees concede that they, like all other appropriators, must "chase their water" when necessary. (BR. at, 42, n.45). They made no effort to do so. Where the means of diversion are inefficient, the priority doctrine does not strictly apply. (*Infra*, p. 17-18).

[6] (R.0824-0825); (R.0889-0890).

[7] Appellees dismissively acknowledge that they "put water on some lawn and flowers but should not have." (BR., at 36.) The evidence shows that this continuing offense was much more significant than Appellees admit, but the main point here is that Appellees' diversion of more water, and at far higher rates, than authorized, is illegal. Indeed, Appellees' brief is remarkable for its failure to acknowledge that Snowberry has *never* operated its well within the flow, quantity, and use parameters of its water right. A water user who exceeds the authorized limits of a water right without first obtaining approval of the State Engineer commits a criminal offense and, more pertinently here, "obtains no right" by that change. Utah Code Ann. §73-3-3(7). Appellees, in other words, have no right to complain about interference with any use of water not authorized by their water rights.

ARGUMENT

Pineview West set forth its arguments in full in its principal brief and will repeat them here only as necessary to respond to points raised by Appellees. In sum, to prevail on a water rights interference claim plaintiffs must demonstrate that defendant's actions prevented them from accessing the *specific quantity* of water to which they are entitled by their water right. *Bingham v. Roosevelt City Corp.,* 2010 UT 37, ¶ 48, 235 P.3d 730,743. Appellees did not attempt to meet this threshold. Indeed, they and their expert admitted that they do not know how much water their wells have produced at any time. Quite astonishingly, they did not even know that their water rights had flow or volume limits until apprised of that fact at trial, an admission that explains why, in several years of testing, they never attempted to measure the quantity of water diverted from the wells or to determine whether that production was more or less than that allowed under Appellees' rights. (R.0535-R.0536); (R.0601); (R.0619); (R.0823-0825).

Snowberry owns a small, .45 Acre-Foot ("AF") water right that is only authorized to satisfy the domestic needs of 5 people. (Def.'s Ex. 55). Yet, though nowhere acknowledged in Appellees' brief, Snowberry has historically used that small domestic right to meet the commercial needs of a 25 guest bed and breakfast that they admit consumes over 2 AF of water annually.[8] (Def.'s Ex. 9); (Pltf.'s Ex. 10E); (R.0398). To

[8] The trial court apparently confused Snowberry's original domestic right with its later-obtained commercial right, when it found that Pineview West's irrigation right is "junior in priority to plaintiff's rights." (R. 0407, ¶24) That finding was plainly incorrect. Shortly before trial, Snowberry obtained an additional 2 AF water right that, for the first time, authorized commercial and irrigation uses for water obtained from its well. That right has a 2017 priority and was granted subject to prior rights, including Pineview

prevail herein, Snowberry must show that Pineview West's activities prevented it from obtaining the .45 AF of water granted by its water right, an impossible showing without the missing well diversion measurements Snowberry had years to obtain.

To divert attention from the fatal lack of any quantitative evidence of interference, Appellees' Brief asks this Court to focus instead on general characteristics of underground "geology, physics and hydrology." (BR., at 2, 24-25). These characteristics and generalities are immaterial to their claims unless they are tied to the specific quantity entitlements under Appellees' water rights.

Appellees assert that the District Court correctly found interference without identifying the extent of that interference. Appellees support their argument with an overly simple "bundle of sticks" interference argument that assumes a number of ways Pineview West has upset Appellees' water rights. (BR., at 26-37). This argument necessarily assumes entitlement to a specific, undisclosed water level in a very large aquifer that Appellees share with hundreds of other well owners, and is extraneous to *Bingham's* clear direction to determine whether a *specific quantity* of a water right entitlement has been obstructed.

Beyond its error in finding actionable interference, the remedy declared by the trial court was arbitrary and not in accordance with precedent. The trial court cited *Wayman v. Murray City Corp.'s* rule of reasonableness as the relevant standard for

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West's prior irrigation right. (Pltf's. Ex.10F.) Therefore, Snowberry is limited to the use of 0.45 AF of water for domestic purposes and cannot pump or use any water under its new right for irrigation or commercial purposes until *after* Pineview West's irrigation right has been fully satisfied.

guiding an interference remedy, but fundamentally misunderstands how to apply the case. 458 P.2d 861 (Utah 1969).[9] The result is a ruling that promotes a disfavored inefficient means of diversions, unfairly burdens Pineview West, and prevents the greatest beneficial use of the state's water.

The Court should not be distracted by Appellees' arguments that this is run-of-the-mill interference case and that affirming the trial court would make no lasting impact on Utah water law and groundwater development. That decision, if not reversed, would tell future water users that they do not need to adhere to the limits of their water rights, that they do not need to monitor their water use, that they are not required to be efficient in their means of their diversion, and that they can initiate expensive damage claims against junior water right holders without proof of any quantum of foregone water. Stating that a senior water right holder has an actionable interference claim against all junior right holders who divert from, and thus lower, an aquifer, will inevitably chill the necessary development of Utah's water resources. While this case was wrongly decided because there was no proof that Appellees could not receive the full quantity of water to which they are entitled, the result was also incorrect as a matter of public policy. That having been stated, Pineview West will focus the remaining portion of this reply brief on case law that was misread and misapplied in Appellees' brief.

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[9] The trial court ordered that Pineview West's wells (including wells outside of Appellees' claims and proof) be metered, for example, but did not require meters on Appellees' wells. He ordered that all use of Pineview West's irrigation well cease, but did not required Snowberry to act within its domestic right and allowed continued commercial use of the Snowberry well under the new 2017 right even though that right is junior to that of Pineview West.

I) THE FUNDAMENTAL ISSUE BEFORE THE COURT IS WHETHER PINEVIEW WEST'S ACTIONS PREVENTED APPELLEES FROM RECEIVING THE QUANTITY OF WATER AUTHORIZED BY THEIR WATER RIGHTS.

This water rights interference case is governed by specific case law and standards. "In order to prevail on claims for interference with water rights, plaintiffs mush show that they have lawfully appropriated a certain quantity of water, and that the defendant's actions are obstructing or hindering their ability to obtain that water. *Bingham,* at ¶ 48. *See also, Wayment v. Howard,* 2006 UT 56, ¶13, 144 P.3d 1147, 1150 ("in our water law, obstructing or hindering the quantity or quality of an existing water right constitutes interference."). Appellees are incorrect to claim this matter as a "groundwater interference" case. (BR., at 2, 24, 25, and 26). Influence on the *groundwater*, a shared resource, if proven, is not proof of interference with a specific *water right.*

Appellees did not offer proof of interference with their water rights. Indeed, they now claim that their expert, Paul Anderson, "was not retained to evaluate the 'rights'", even though his expert report is replete with references to the Appellees' "water rights." (R.0867- 0868); (BR. at 17, fn 18). Mr. Anderson freely conflated the terms "water needs" with "water rights" to advance his opinion that Pineview West had interfered with Appellees' water rights. *Id.* (Def.'s Ex. 27). At trial, Mr. Anderson admitted that he did not know Appellees' water rights had volume of flow limits, or that hindrance to the quality or quantity of a water right was the legal standard for interference. (R.0876-0877); (R.0867-0869). Mr. Anderson was Appellees' only expert – they called no one else to opine on the subject of interference.

Appellees have no historic or current data to quantify their diversions. (R.0535-R.0536);(R.0559); (R.0601); (R.0619); (R.0823-0825). They acknowledged, and the trial court found, that Snowberry regularly used water in excess of its water rights. (R.0398); (R.0536); (R.0619-0620). (BR., at 17).[10] To avoid addressing their failure of proof, Appellees note the factual nature of interference cases and cite *Salt Lake City v. Silver Fork Pipeline Corp.* for the proposition that actual measurements are not required to prove interference with a water right. 2000 UT 3, ¶ 27, 5 P.3d 1206, 1218. (BR., at 27, 28). This reading of *Silver Fork* does not help them – it actually undercuts Appellees' assertion that abstract water level data is sufficient for proving interference with a specific water right. The cited passage generally states that surface stream flow measurements are irrelevant for determining water rights interference because flow measures are impacted by natural forces and cannot speak to the specific quantity of a water right obstructed by the claimed interference. *Silver Fork,* at ¶ 27, 28. Water table levels are also affected by natural forces and represent the broader source of water from which a water right is diverted. (R.1101). Accordingly, like stream flow measurements, water table level measurements do not speak to the impact of an act of claimed interference on a specific water right. Appellees' use of *Silver Fork* not only neutralized

[10] Appellees claim that they "squared up" this over-use by obtaining a new 2 AF water right. (BR. at 17); Pltf's. Ex. 10F). As noted, this new 2 AF right has a priority date of 2017, junior to all of Pineview West's water rights. So, while Appellees may have prospectively remedied their need for water, they are not allowed to access this additional water or use any water for commercial purposes until *after* Pineview West has satisfied all of its irrigation right, an important point the trial court failed to recognize.

the import of their own evidence, but does not eliminate the requirement that they quantify their diversions and measure the extent of the claimed interference.[11]

Appellees argue that source is a protected element of a water right. (BR., at 31, 32). This is a correct statement, but only to a limited degree. Appellees attempt a bridge too far when they argue that the general right to pursue surface water to its source equates to ownership of specific level of water in an aquifer that is tapped by hundreds of wells. This argument was explicitly rejected by *Bingham. Bingham*, at ¶ 37. Further, the cases cited by Appellees predate *Wayman's* rule of reasonableness. These cases do not establish a right to a specific level of ground water.

The line of cases on which Appellees rely ultimately rest on dicta from *Justesen v. Olsen* which was decided in 1935. 40 P.2d 802 (Utah 1935); (BR. at 32, citing *Silver Fork,* which relied on *Little Cottonwood Water Co. v. Sandy City,* which in turn cited *Justesen*).[12] Appellees quote:

> "[O]ur courts have consistency enforced the 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. It makes no difference whether the interference be with the main stream of the tributaries thereto, or whether the interference be with water flowing over the surface of the

[11] The mitigation statute, Utah Code Ann. § 73-3-23, that provides a remedy for proven interference demonstrates why a specific quantification of water is needed. It requires replacement of the specific quantity of water that is made unavailable by the act of interference. General water level measurements do show the quantity of a water right that is impaired, they are simply one indication of the aquifer Appellees share with many others.

[12] *Silver Fork* was decided in 2000. While that case addresses the relationship between ground (percolating mine waters) and surface waters, it ultimately focuses on impairment of surface water flows and would therefore not be modified by *Wayman*

> ground, flowing in subterranean streams or merely percolating through the through the ground."

(BR. at 32, citing *Justesen,* at 805). While Appellees correctly repeat language from that opinion, the case does not stand for the proposition that Appellees have a guaranteed right to a specific groundwater level.[13] In *Justesen,* the court grappled with whether correlative rights under the riparian rights doctrine, which granted a water right based on land ownership, applied in Utah. The court, in the passage cited by Appellees, rejected this argument and declared that the doctrine of prior appropriation has always applied to Utah groundwater. Appellees fail to acknowledge the subsequent portion of that passage which reads "the burden has always been placed on the prior appropriator to show that subsequent claimants have *interfered with his right to the use of water,* but when that is shown he is protected whether the interference is with surface flow, subterranean flow, or percolation." *Justesen,* at 805 (emphasis added.) Accordingly, *Justesen* is consistent with *Bingham* in stating that the relevant interference inquiry requires assessment of impact to the quantity of a specific water right, not a general review of changes to the source. Additionally, *Justesen* instructively states,

> "if in a given case there is enough for all, then if follows that priority will not affect the situation. If the event should prove that the supply is insufficient, the experience with surface streams has fully demonstrated that the law of priority is the safest guide."

[13] It is significant that *Justesen* was decided prior to 1936 when the Utah Legislature expanded the statutory appropriation process to groundwater.

Id. at 808. Here, all parties agree that aquifer is not in decline so supply is not an issue. (R.0836-0837); (R.0856); (R.0874); (R.0845); (R.0895); (R.0983-0984); (R.1113).[14] Accordingly, as suggested in *Justesen,* and more recently echoed in *Wayman,* priority is not a concern.

It is difficult to understand how Snowberry claims interference. Invoices show the Inn used between .94 and 1.25 AF of Pineview West water annually from 2011 and 2014. (Def. Ex. at 57). These numbers are all *in addition to* the unmetered water from Snowberry's well, and Appellees admit total water use at the Inn was historically higher. (R.1051-1052). That is a logical conclusion, as the Snowberry Inn has ten or more bathrooms and houses up to 25 people, or five times the burden authorized by Snowberry's domestic water right. They may have used water at a rate as much as five times greater than allowed. (Pltf's. Ex. 10E).

Pineview West cited *Bingham* for its clear statement that there is no protectable interest in underground water levels. *Bingham*, at ¶ 37. (Pineview West Brief, at 25). Appellees claim that *Bingham* is inapplicable because plaintiffs there did not own groundwater rights. (BR., at 34, 35). Appellees demur that they own underground water rights and can therefore claim an interest to a specific groundwater level. This argument is unpersuasive. As the *Bingham* Court states, "[Plaintiffs] cite a number of cases that support its position [that changes to the water table constitute interference] but our review

[14] Appellee acknowledge that the aquifer in the Ogden Valley is "stable." (BR., at 8.) Thus, water is available in the source aquifer. If Snowberry did not believe that, it would not have applied for, and the State Engineer would not have approved, Snowberry's application for its junior 2017 2 AF commercial right.

of these cases confirms our conclusion that, without obstruction of an established *water right* no interference can be sustained." *Bingham,* at ¶ 51 (emphasis added.) To prevail on interference, it is not merely ownership of a water right that is required, but also a showing that the right was obstructed and by how much. *Bingham* remains the governing standard to prove water rights interference.[15]

Nevertheless, Appellees argue that the trial court found facts sufficient to show interference with their senior rights. They state "interference comes in many forms because a water right consists of many things" (BR., at 26), and that *Wayment's* requirement that that interference be applied to *"*the water right at issue*"* may include an analysis of the whole "bundle of sticks" associated with a water right. (BR., at 29).[16] This is not the law.

As noted, *Bingham* states that the relevant interference criteria are impacts to the quantity or quality of a water right. *Bingham,* at ¶ 48. "[T]he water right at issue" language referenced by Appellees is a requirement to tie the claimed impacts to a water source to the volume or flow limitations of a specific water right. *Wayment* is not an invitation to find impairment on grounds unassociated with diminished quantity or quality.

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[15] This reading of *Bingham* is supported by the related Quantity Impairment statute that states "'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." Utah Code Ann. § 73-3-3(1)(c)(ii)

[16] *Wayment v. Howard,* 2006 UT 56, ¶9, 144 P.3d, 1147, 1149 ("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").

Aside from being outside the relevant legal inquiry, Appellees' bundle of sticks arguments fails on the merits. Here, there is no claimed interference with the Appellees' physical method or means of diversion: Pineview West has not cemented in or vandalized their wells. There has always been water available in their wells, which could be diverted even during periods of claimed interference, if Appellees would equip the wells with properly sized pumps or lower them to access the available water. (R.0836-0837); (R.0856); (R.0874); (R.0845); (R.0895); (R.0983-0984); (R.1113).

Appellees' arguments regarding impacts to source are similarly unpersuasive. All agree that the source for Appellees' water right, an underground aquifer, is diminished by seasonal fluctuations and the activities of other neighboring well, but nevertheless, water has all times remained available to them. (R.0393); (R.0779-0781); (R.0809-0811); (R.1129); (R.0836-0837); (R.0856); (R.0874); (R.0845); (R.0895); (R.0983-0984); (R.1113). This Court in *Wayman v. Murray City Corp.* specifically rejected Plaintiffs' claim that a specific "water table in such an underground basin must be maintained at sufficiently high levels to sustain" well pressures because it may cause waste, promote inefficient wells, and local users could "demand tribute" from those who seek to improve their diversions. *Wayman,* at 865.

II) THE TRIAL COURT IS OWED NO DEFERENCE BECAUSE ITS REMEDY IS NOT REASONABLE AND IS CONTRARY TO *WAYMAN*

Notwithstanding Appellees failure of proof under the *Bingham* elements, the District Court found interference and ordered that:

1) Pineview West cease pumping well #4 and use other its wells to meet its irrigation demands. These wells[17] were ordered to first be pump-tested to determine if they impact or interfere with Appellees' wells;

2) The Court retained jurisdiction to determine if well #4 can be pumped at a rate that does not interfere with specific water levels in Appellees wells;

3) If well #4 can be pumped in a manner that does not interference with Appellees' wells, flow meter shall be installed and weekly metering data be submitted to the Utah State Engineer and Appellees; and

4) If well #4 cannot be pumped in a manner that does not interference with Appellees' wells, the Court may order Pineview to provide replacement water.

(R. 0412-0413.) Notably, the trial court did not order Appellees to meter their own wells or limit their diversions to the volume and flow authorized by the State Engineer. Neither was Snowberry limited to its .45 AF domestic right or required to not use its junior 2 AF commercial right until Pineview West had satisfied its full senior irrigation right. This ordered remedy is arbitrary and failed to properly apply *Wayman's* rule of reasonableness. It is a remedy that prejudices Pineview and is counter to Utah water law and prudent public policy. It requires no deference.

The trial court and Appellees correctly cite *Wayman* as the source for the relevant legal standards for crafting a remedy in a water rights interference case. (BR., at 40-41). In *Wayman* this Court struggled with balancing water law's competing demands of priority and beneficial use. Rejecting a draconian application of either tenet as poorly

[17] Pineview West's other wells were not the basis of Appellees' interference claim. Pineview only has three active wells. (R.1082). The two culinary wells, Well 2 and Well 3 produce water at relatively low rates of 20 -10 GPM and 30-15 GPM, respectively. (R.1052). Well # 4, Pineview West's only irrigation well, produces water at 100 GPM, and supplies water for a separate secondary irrigation system. (R.1053). The culinary system is physically unable meet the irrigation needs for those Pineview shareholders not connected to the secondary irrigation system. (R.1075).

serving the public, the Court determined "it is both logical and necessary that the rights of each individually should be to some degree subordinate to and correlated with reasonable conditions and limitations." *Wayman,* at 865.

Wayman requires scrutiny of each party's means of diversion. Appellees correctly note "[a]llocating rights in groundwater involves an analysis of the total situation: the quantity of water available, the average annual recharge in the basin, and the existing rights and their priorities." (BR., at. 41 (citing *Wayman,* at 865 (emphasis removed))). However, Appellees ignore the next sentence in the case that reads "[a]ll users are *required where necessary to employ reasonable and efficient means in taking their own waters* in relation to others to the end that wastage of water s avoided and the greatest amount of available water is put to beneficial use." *Wayman,* at 865; (R.0407). Accordingly, "Plaintiffs will not be eligible for replacement water unless their means of diversion are reasonable." *Bingham,* at ¶ 64.

The trial court found "Plaintiff's means of and method of diverting their water are reasonable" because "their wells are the only possible method of diverting the water under their water rights." (R.0408). This simple statement does not demonstrate the scrutiny required by *Wayman.* Wells are a generally reasonable means of diversion of underground water. For example, well #4 is also the only available means for Pineview West to obtain its summer irrigation water. That is not the end of the inquiry. Appellees' use of their wells has been demonstrably unreasonable and inefficient.

As noted, even though well #4 only pumps intermittently for summer months, the Arave well has not been used for water production for over 10 years, and from 2013 there

has been no pump in the well. (R.1257); (R.0534). Snowberry, in turn, consistently used more water than authorized and pumped its well at 25 GPM, more than three times faster than the approved rate of 6.7 GPM. (R.0390). Appellees conducted no tests and attempted no calculations to determine the impact on the water table of their excessive pumping. (R.0823-0825).[18] Further, Appellees made no efforts at self-help such as lowering their pumps or modifying pump operations to put the water available in their well columns to beneficial use. (R.0836-0837); (R.0856); (R.0874); (R.0845); (R.0895); (R.0983); (R.1113). Finally, Appellees acknowledged that they have not maintained their wells. Wells require continuous maintenance to produce optimal yields and one consequence of lack of maintenance can be excessive drawdowns of water in the well column to produce the same volume of water as originally produced. (R.0834-0836); (R.1087-R.1088).

In *Wayman,* this Court specifically looked at the issue presented here: what is a reasonable remedy where there is adequate groundwater to meet a Plaintiff's entitlement but Plaintiff's current means of diversion are too inefficient to access that water. This Court stated:

> " . . . *appropriation does not give a right to an inefficient means of diversion*, such as a well which reaches to such a shallow depth into the available water supply that a shortage would occur to such senior even though diversion by others did not deplete the stream below where there would be an adequate supply for the senior's lawful demand." *Wayman,* at 865 (emphasis added).

[18] Ironically, Appellees' own Footnote 51 regarding the Salt Lake Valley Groundwater Management Plan, which is not in force here, emphasizes the need to pump wells at their authorized rate of diversion so that drawdowns remain within the safe yield of the aquifer. (BR., at 45 fn 51).

and

> " ... to accord the first appropriator . . . the right to have the water level maintained at the point which he first pumps it, or damages in lieu of, so long as there is adequate water supply of equivalent quality at lower depths from which it is feasible to pump, would unduly complicate the administration of water rights ... and might seriously curtail the fullest utilization of the ground-water supply . . .. Accordingly, these factors and implications are worthy considerations in determining the question of reasonableness of the first appropriator's diversion under such circumstances." *Wayman,* at 866.

Appellees have water available in their wells but their means of diversion are inefficient. *Wayman* requires the District Court to take this inefficiency into consideration when determining how to apply priority. This District Court made no analysis nor adjustments to priority on these grounds and instead crafted a remedy that requires Pineview West to cease diversion without requiring Appellees to act reasonably within the limits of their water rights.

Appellees cite *Fairfield Irr. Co. v. White* to avoid a reasonable remedy of requiring them to "chase their water" by lowering the pumps in their wells. 416 P2.d 641 (Utah 1966); (BR., at 42, 43). While claimants cite *Fairfield* as prohibiting "the longest straw" argument and compelled lowering of pumps, the statement cited in Appellees' brief was made in reference to the need to monitor well diversions to ensure aquifer diversions were within safe yields so there is no literal race to the bottom of the aquifer. *Id.* at 645. This is not the case here where Appellees' application for its 2017 commercial right confirms their belief that the parties' diversions are all within the safe yield of the local aquifer. That being the case, it would be eminently reasonable to expect them to lower pumps or deepen wells to access the water they acknowledge is available. (BR., at

42, fn 45); (R.0393); (R.0779-0781); (R.0809-8011); (R.0963); (R.1129); (Pltf.'s Exs. 26,27).

Appellees also claim that *Wayman* is distinguishable because it dealt with a Change Application, and Pineview West's withdrawals are new to the system. (BR., at 45).[19] This distinction does not undercut *Wayman's* central tenet that interference must be evaluated in light of the entirety of the circumstances. *Wayman,* at 865. Appellees also try to distinguish Pineview West's diversions based on a claimed lack of supply in the basin. (BR., at 45). As discussed, the record and parties agree that the local aquifer is not in decline. (BR., at 42, fn 45); (R.0393); (R.0779-0781); (R.0809-8011); (R.0963); (R.1129); (Pltf.'s Exs. 26,27). The *Wayman* Court found that when the basin has adequate water an interference claim may not exist. They state, "the underground basin involved here still has an abundant supply of water" and "inasmuch as there is plenty of water available in the basin, it is apparent that the plaintiffs are not deprived of water…" but solely of well pressure, to which they do not have protectable interest. *Wayman,* at 863.

III) THE FINDING OF NEGLIGENCE AND REMEDIES ORDERED BY THE TRIAL COURT SHOULD BE REVERSED BECAUSE THEY ARE ARBITRARY AND LACK EVIDENTIARY SUPPORT

The trial court improperly found that Pineview West was negligent when it "located, drilled, and used its #4 well." (R. 409, ¶ 38.) Those findings lack evidentiary support. The record confirms, without contradiction, that well #4 was located and drilled by Ed Radford, a non-party. Pineview West had no role at all in those activities, though

[19] Snowberry's 2017 commercial right is also new to the system and is junior to Pineview West's irrigation right.

Appellees' expert was consulted by Mr. Radford in that regard. Looking past Appellees' failure to name a party indispensable to its negligence claim, Appellees offered no evidence at all as to the standard of care for locating and drilling wells, and thus no evidence to support a breach of that standard. Neither did they offer any evidence relating to the standard of care for well operation or to support their novel claim that diverting water within the limits of Pineview West's water right violated some established standard of care.

Appellees' claim is really not one for negligence, but interference with their particular water rights, a burden they chose not to shoulder, and their remedy is to obtain replacement water in an amount equal to that portion of their approved rights that they could not reasonably divert due to Pineview West's actions. Utah Code Ann. §73-3-23. As noted above, even though operation of well #4 has an influence on the level of water in the Arave well, the consistent evidence, including the testimony of both experts, confirms that there was always a column of water available in both of Appellees' wells during the periods of claimed interference. The trial court found that Snowberry used more water each year than allowed by its domestic right, so it had no water deficit Pineview West could be required to make up. The Arave well was tested by Appellees just before trial and it proved capable of producing more than three times the flow authorized by that right, demonstrating that the deficit in Arave well deliveries resulted from Arave's ten-year choice not to equip or pump that well. No actionable water deficit was proven. Yet, the trial court ordered Pineview West to repay Appellees for years of full annual water use, quantities of water that not only exceeded any possible claim of

interference, but surpassed the sum of their water rights. (R.0413). Appellees paid for water they actually consumed at rates the Public Service Commission required Pineview West to charge, and ordering repayment of all amounts paid therefor is a grant of windfall damages without precedent.

Even assuming proof of interference during the three months each year when Pineview West operates its irrigation well, some water was always available to Appellees during that period and Pineview West could only be charged to make up the actual deficit. There was is no basis for the order requiring Pineview West to repay all of the money paid by Appellees for water they elected to consume during the other nine months of the year when well #4 was not in operation.[20]

Appellees conducted no tests and offered no expert testimony as to the chemical characteristics of the water delivered by Pineview West. They claim that hard water damaged their pipes and equipment but, as an essential predicate to their interference claim, have also maintained that the water delivered by Pineview West came from the very same source utilized by the Arave and Snowberry Wells. It must therefore have had the same chemical characteristics: if Pineview West's "straw" drew from the same aquifer as Appellees' wells, its water could not have been more "hard" or had different chemistry than the water their own water. Moreover, Snowberry regularly mixed its well water with that from Pineview West, and Snowberry offered no evidence that would support allocation of its claimed damages entirely to Pineview West. There is no basis in

[20] Appellees admit that it "is true" they could obtain their water from their own wells "[b]etween approximately October through June" of each year. (BR., At 28.)

this record for a finding that the hard water deposits complained of could have been caused exclusively by Pineview West's water or for the award of damages based on that claim. Similarly, Appellees did not retain or test the Arave pump that was claimed to have been damaged by well interference, and did not prove that the problems with that pump were other than the normal maintenance and repair required of all well owners. *Wayman,* at 750 (requiring water users employ reasonable and efficient means of diversion).

CONCLUSION

The judgment entered by the trial court, including the findings of interference and negligence, and the damages and other remedies ordered therein, should be reversed in its entirety for the manifold reasons set forth above and in Pineview West's principal brief.

DATED this 22nd day of October, 2018.

CLYDE SNOW & SESSIONS

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 6,870 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

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DATED this 22nd day of October, 2018.

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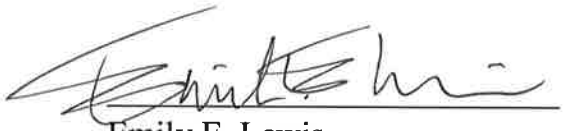

Emily E. Lewis

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of October, 2018, I caused the foregoing document to be served on the following via first class mail and email:

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