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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

DAVID BURWEN, an individual, SUSAN BURWEN, an individual, and VENTURE DEVELOPMENT GROUP, LLC, a Utah limited liability company, Applicants/Complainants, v. PINEVIEW WEST WATER COMPANY, a Utah public water utility, Respondent.	**RESPONSE TO FORMAL COMPLAINT AND REQUEST FOR AGENCY ACTION** Docket No. 22-2438-01

Pineview West Water Company ("Pineview") hereby responds to the Formal Complaint and Request for Agency Action ("Complaint") filed by David Burwen, Susan Burwen ("Burwens"), owners of Venture Development Group, LLC, ("Venture"). The Complaint is without merit and should be dismissed because the reason Pineview agreed to provide serve to Venture, a non-shareholder in the company, has been resolved by the Utah Supreme Court in Pineview's favor. Venture has an available alternative means of water supply through its own

privately held water rights and well facilities. Requiring continued service to Venture would unduly stress Pineview's limited water resources and impair the ability of the company to provide adequate service to its shareholders.[1]

Pineview was created to provide water to the residences of its shareholders located in specific subdivisions developed by Pineview's founder. Pineview was not intended to provide water to the general public and has never possessed the resources that would allow it to do so. The Burwens and Venture operate a ten-unit commercial inn in the Ogden Valley known as the Snowberry Inn ("Snowberry"). Venture is not a Pineview shareholder and Snowberry is located outside of the subdivisions Pineview was created to serve.

When Pineview's developer drilled a seasonal irrigation well, Well No. 4, Venture claimed that operation of Well No 4 interfered with the small water right Venture diverted from a

[1] As of this writing, Pineview has been served by the Division of Public Utilities with document dated March 11, 2022 and entitled Action Request Response. Pineview objects to this late filing and suggests that its recommendation is entitled to no weight based on the Division's own admission that it "often does not comment on formal complaints because it generally lacks independent knowledge of the underlying facts" and acknowledges that that some of its "questions may already have answers that appear in the record." Pineview questions why the Division elected to offer an opinion herein because the Division indeed lacks knowledge of the facts and answers to its questions do appear in the record.
Pineview's system is not equipped to handle the commercial demands of the Snowberry Inn. See footnote 15, *infra.* Venture has its own well and adequate water rights to support the Inn. Indeed, it took steps to acquire the larger commercial water right it needed in 2017 *while it was receiving temporary mitigation water from Pineview*. If the Division really means its statement that it wants to "enable more of the state's residents to be served by its natural resources" and is truly interested in efficient use of those resources, then it should require Venture to use the water rights it acquired for the Snowberry Inn rather than leaving them fallow while it tries to force its way into an already stressed system.
Pineview also notes that the Division knows well the answers to the questions it raises about why Pineview serves a limited number of customers located outside its service area. Representatives and an attorney for the Division participated in a series of meetings with Pineview and the Araves and Ms. Southwick about the water connections that were established because of their claims of interference and rates charged by Pineview for the water service it offered in mitigation of those claims. The Division was also the primary drafter of Tariff No. 2 that described the service to these connections. It knew why they were listed when it proposed that the Commission approve Tariff No. 2. And the Division actively participated in the drafting to Tariff No. 3 and the revised service area map that was included in the Tariff and recommended by the Division for approval by the Commission. See, Responses to Paragraphs 57 and 61, *infra*.

well on the Snowberry property ("Snowberry Well"). To enable Pineview to continue to use its irrigation well pending resolution of the interference claim, Pineview agreed to provide Venture mitigation water and, as a courtesy to allow Venture to connect to Pineview's water system on a temporary basis at Venture's expense.

In 2013 Pineview informed Venture that it planned to cease providing mitigation water based on advice from an expert hydrologist who advised that Well No. 4 did not interfere with Venture's ability to divert its small domestic water right. Venture then filed suit against Pineview, again claiming that Pineview should be required to supply all of the water Snowberry needs due to the claimed interference with the Snowberry water right. Pineview has continued to supply water to Snowberry through the duration of this protracted litigation. However, in late 2020 the Utah Supreme Court threw out Venture's interference claim, finding it inadequate as a matter of law, thereby removing the reason Pineview had been providing mitigation water to Venture.

Venture owns ample water rights for Snowberry's operation and the Snowberry Well that would supply all of Snowberry's needs if Venture were to take steps deepen or otherwise improve its well. Rather than "chasing" the water to which Venture is entitled under its own water rights by maintaining and improving the capacity its own Snowberry Well (the fact that water is reasonably available slightly deeper in the ground is evident from the water levels in all surrounding wells), Venture embarked on a costly series of legal proceedings in an effort to force Pineview to cure Venture's internal problem. As noted, Venture first filed a complaint against Pineview based on a dubious legal theory of water right interference that was ultimately rejected by the Utah Supreme Court. Having failed in the courts, Venture now asks the Public Service

Commission to compel Pineview to continue supporting its commercial operation. The Commission should deny Venture's request because Pineview has neither the duty nor the capacity to serve the water needs of this commercial enterprise.

In this response, Pineview will first provide the Commission with background information about the parties and this dispute and will then address the numbered allegations of the Complaint, demonstrating why the Commission should decline to order the relief sought by Venture and the Burwens.

BACKGROUND

Pineview

Pineview is a small shareholder-owned non-profit mutual water company. Edward Radford, the original developer for the area, received Certificate No. 2438 in 2004, allowing Pineview to serve culinary and secondary water to the residential lot owners. The Commission approved Pineview to serve 133 connections based on the Division of Drinking Water's assessment that the Pineview water system (Water System No. 29029) only had the capacity to provide for 133 of 163 lots approved under the Radford Hills Subdivision Master Plan.[2] The Division of Drinking Water noted additional capacity would need to be added to supply the full subdivision as approved. This limited approval demonstrates that the Pineview system was neither sized for nor contemplated to provide water the public generally: it was intended to serve the owners of the residential lots in Radford's development.

[2] Division of Drinking Water, Approval, Additional Water Connections System #29029 (August 13, 2004) (Copy attached as Exhibit A.)

The 2004 Certificate referenced 41 connections that were to receive metered rates and 5 pre-existing homes were to receive a temporary flat fee. The Certificate did not refer to or authorize non-shareholder connections: it simply stated the Certificate was issued to the Applicant's mutual shareholder company to supply water for Radford Hills development. On October 12, 2004, the Commission issued a Clarifying Oder clarifying that Pineview's service area was to be described as the Radford Hills Subdivision and Pineview West No. 1 Subdivisions. The Clarifying Order did not disturb any other element of its prior order.[3]

The law firm that currently represents Venture is well aware that Pineview was never intended to serve the public generally because that firm represented Pineview in 2008 when Pineview applied to the Commission for assistance in addressing years of fiscal mismanagement by the then-developer. Pineview sought an emergency special assessment to resolve outstanding debt and a rate increase to bring it into solvency as the system was turned over by the developer to the resident shareholders. The Commission ultimately bifurcated the Special Assessment case into Docket No. 08-2438-01 and Pineview's rate request into Docket No. 09-2438-01.[4] A Memorandum from the Division of Public Utilities ("Division") informing the Rate Case indicates that Pineview is a non-profit entity that was intended to provide water to Shareholder lot owners in the Subdivisions. DPU states:

> "The service connection fee is intended to recover the costs, both material and labor, that the Water Company must spend in providing first time service. With

[3] Venture is not a Pineview shareholder and Snowberry is not located in the Radford Hills or Pineview West No. 1 subdivisions. It was not one of the 133 approved connections and was not intended to receive water from Pineview. (The Arave and Southwick residences and the Pineview Yacht Club that are mentioned by Venture are also located outside of these subdivisions but are small connections that are voluntarily served by Pineview for reasons that are explained below.)

[4] 1.27.2009 Order of Bifurcation 08-2438-01. https://pscdocs.utah.gov/water/08docs/08243801/08243801oob.pdf (In the interests of efficiency and economy, references to Commission docket materials will be supported herein by electronic link rather than bulky copies.)

> that said, it should be noted that the service mains have already been installed to each lot's property line by the original developer, Ed Radford. The service connection fee will also cover the cost of conveying water rights from the developer to the Water Company and in turn, the Water Company will issue the accompanying water share(s) to the shareholders."[5]

Pineview's initial filing states "in checking with … Smith Hartvigsen, attorneys at law, we were informed that a company of our size could and would operate more efficiently if they were independent of the PSC. Our attorney drafted new by-laws and we presented them to the shareholders of the water company last spring for approval. … The change, allowing us to operate independently was voted down by a very small margin."[6] The reason "we c[a]me to the [Commission] is so we could get the bills paid, … we felt the [Commission] could maybe help us decide [what a fair share of the Company's bills were]."[7] All Pineview communications to the Commission in 2008 and 2009 indicated the company was a shareholder company that looked for accounting and rate-making assistance from the Division and the Commission. At no time did Pineview indicate its request was submitted for the purpose of extending water service to the general public.

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[5] 6.25.2009 DPU Comments on PWWC Rate Case 09-2438-01, at 13. https://pscdocs.utah.gov/water/09docs/09243801/62716CommDPU.pdf

[6] 2008 Formal Request for Special Assessment and Tariff Increase 08-2438-01 https://pscdocs.utah.gov/water/08docs/08243801/112008email.pdf

[7] 1.5.2009 Testimony on PWWC Special Assessment and Rate Case Request 08-2438-01, at 9-11. https://pscdocs.utah.gov/water/08docs/08243801/60369RepTrans1-05-09.pdf *See also* 1.21.2009 Testimony on PWWC Special Assessment 08-2438-01, at 10-11 ("We discussed with the shareholders the option of going for new rates or setting up our own rate board, rewriting our bylaws and being able to operate independently as a small water company, rural water company, under the advice of the Rural Water Association of Utah and our attorney that we had sought advice from regarding the operation of them water company. Looking at various options that we could look at or go to increase the rates. …… And so we addressed those issues and rewrote our bylaws, but the shareholders voted down that option. So then we went forth with applying for the rate increase. And you mentioned something about the company trying to amend the bylaws to become independent Are you referring to the company wanting to become exempt from regulation by the Public Service Commission? A. Right, that's correct. Q. That's what the shareholders voted down?') https://pscdocs.utah.gov/water/08docs/08243801/60611RepTrans1-21-09.pdf

The administrative documents supporting the 2009 rate case provide only brief mention of the role and presence of the non-shareholder connections receiving mitigation water. Pineview testified it had 58 connections – 53 shareholders and 5 non-shareholders.[8] By this time, Pineview had completed its Well No. 4, a source authorized by the Utah State Engineer for seasonal summer diversion of Pineview's irrigation water rights. Venture and the Araves and Ms. Southwick, who are not Pineview shareholders and have never contributed to Pineview's capital facilities, claimed that Well 4 interfered with their ability to utilize some of their water rights. Interference with a water right is a complicated legal and factual determination often requiring expert assistance to resolve. As a means to continue to use Pineview's Well No. 4, Pineview offered to provide mitigation water and, as a courtesy, allowed these non-shareholders to connect with the Pineview system pending resolution of their interference claims.

The official July 15, 2009 Report and Order approving Tariff No. 2 that set Pineview's rates noted that Pineview "serves" Pineview West, Radford Hills, Arave, Southwick, Snowberry Inn, the Pineview Yacht Club, HOA clubhouse and grounds" but does not include the term "service area" or state the service area for Pineview extended to the few non-shareholders that Pineview had allowed to connect to its system, let alone the public generally.[9] Tariff No. 2 included a flat non-shareholder contract rate of $55 per month, the same rate charged to the shareholders, not the $20 per month rate previously offered to them by the developer.[10]

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[8] 1.21.2009 Testimony on PWWC Special Assessment 08-2438-01, at 8.
https://pscdocs.utah.gov/water/08docs/08243801/60611RepTrans1-21-09.pdf
[9] 7.15.2009 PSC Report and Order. 09-2438-01, at 2.
https://pscdocs.utah.gov/water/09docs/09243801/09243801ROcn.pdf
[10] *Id.*

Titan Development, LLC, the then-developer of the served subdivisions, disputed how the Commission's Tariff No. 2 attributed and allocated expended funds and, on August 15, 2009, filed an "Application for Review and Rehearing – Docket No. 09-2438-01" requesting reconsideration of Tariff No. 2 and the July 15, 2009, Report and Order.[11] Titan eventually brought a parallel case in the local District Court and, as a result, the Commission issued an "Order on Stay" on November 16, 2009, stating "the Commission grants the stay and the matter is stayed … pending further order of the Commission."[12] Utah Code Ann. § 54-7-15 provides that "unless an order of the commission directs that an order is stayed or postponed, an application for review or rehearing does not excuse any corporation or person from complying with and obeying any order or decision of the commission." There is no later document in the Commission's database that resolved or released the stay – an obvious answer to Venture's complaint about why a specific service area map was not filed in Tariff No. 2. Nevertheless, Pineview continued to act as if Tariff No. 2 remained in effect even though compliance with it was officially stayed until Tariff No. 3 superseded it.

Snowberry

Snowberry, Venture's inn, is a 10-unit commercial enterprise. Venture purchased Snowberry from the Araves, along with the Snowberry Well and a small, single-family water right. That water right has a 1960 priority date, but it authorizes diversion of only 0.45 acre-feet of water each year at a flow rate of .67 gallons per minute for the domestic use of a single family

[11] 8.15.2009 Application for Review and Rehearing – Docket No. 09-2438-01
https://pscdocs.utah.gov/water/09docs/09243801/081209AppRevReqRehear.pdf
[12] 11.16.2009 Order on Stay 09-2348-01
https://pscdocs.utah.gov/water/09docs/09243801/6429609243801oos.pdf

(the "Single Family Right").[13] Snowberry's Single Family Right is diverted from the Snowberry well, which until recently, did not have a meter or other means to measure the amount of water Venture actually diverted from well. Venture utilized the Single Family Right as its sole source of water for the 10-unit inn, pumping all of the water it needed at a constant rate of 25 gallons per minute. The Utah Supreme Court found that Venture was "using more water than it had lawfully appropriated, and [] using the water in ways that were not permitted under its original water right." *Arave,* 2020 UT 67 at ¶ 7. In other words, Venture operated Snowberry by illegally pumping all of the water it needed from the Snowberry Well, in excess of and without regard to the limits of its Single Family Right.

Venture continued to operate the ten-unit Snowberry Inn on the basis of illegal diversions, undisturbed and unchallenged. When Pineview began operation of Well No. 4, Venture began to claim that Pineview's seasonal use of Well No. 4 interfered with the Single Family Right, even though Venture had no records or evidence of the amount of water it had pumped from the Snowberry Well, a requisite component of a water right interference claim. Well No. 4 is a critical piece of Pineview's water system and needed to relieve stresses on Pineview's limited culinary supply during peak summer demand. To continue use of Well No. 4, the then-developer allowed Snowberry to temporarily connect with the Pineview system at Venture's cost while the interference claim was evaluated. (Under Utah water law, a junior water right may impair a senior water right as long as they provide mitigation water.[14]) Midway

[13] *Arave v. Pineview W. Water Co.,* 2020 UT 67, ¶ 7,477 P.3d 1239. Venture attached as Exhibits L, M, and N to the Complaint copies of the District Court's finding that Pineview's Well 4 interfered with its water right but, curiously, omitted to attach a copy of the Supreme Court decision that *reversed* the finding of water right interference as a matter of law. Pineview cures Venture's omission by attaching a copy of the Supreme Court opinion as Exhibit B to this Answer.

[14] *See,* Utah Code Ann. § 73-3-17(3); Utah Code Ann. § 73-3-3.

through the prolonged legal proceedings, Venture finally recognized that it could not operate Snowberry on the basis of the Single Family Right and obtained a new water right by exchange application that allowed Venture to divert the additional water necessary for irrigation and commercial use at Snowberry. *Arave,* 2020 UT 67 at ¶ 7.[15]

Pineview should not be required to continue or make permanent the temporary offer it made to allow Snowberry to connect with the Pineview system pending resolution of the Venture's right interference claim. That claim was resolved. Venture lost. As the Supreme Court observed, by connecting to Pineview's system, Venture was able to receive all of the water it needed for its commercial operation, an amount in excess of that authorized by its small, senior water right. Eventually recognizing the insufficiency of its Single Family Right, in 2017 Venture obtained an additional water right that will finally allow Snowberry, a commercial operation, to operate legally. Despite having obtained the legal right to divert the amount of water needed by Snowberry more than five years ago, Venture has taken no steps to improve the Snowberry Well or otherwise develop the 2.45 acre-feet of well capacity it told the State Engineer was needed to support Snowberry's needs. Instead, Venture has continued its costly effort of trying to force Pineview to provide Snowberry's water needs. The business impact of

[15] A copy of the 2017 water right is attached hereto as Exhibit C. While Venture attempts in the Complaint to minimize the potential burden Snowberry would impose on Pineview with unverified consumption figures that include many months in which Snowberry's business must have been drastically impacted by the COVID 19 epidemic, Venture made a much more candid report of Snowberry's expected water use in the Application for Exchange of Water that it filed with the Utah State Engineer on January 11, 2017. There, Venture described its business as one supporting 21 guests on a 365 day/year basis, with 2.45 acre-feet of expected annual well diversions from the Snowberry Well. The Commission should note two things in this regard: 1) In the five years since Venture's Exchange Application was approved by the State Engineer Venture has taken no steps to enhance the capacity of the Snowberry Well so it could yield the additional water that was first authorized in 2017, and 2) Venture's 2017 water right is junior in priority to all of Pineview's water rights, meaning that the new 2017 water right cannot be the basis for compulsion of water service based on a claim of interference. Further, as the Supreme Court twice noted, Venture was able to access and use "more than its allotted [senior water] right. " *Arave,* 2020 UT 67 at ¶¶ 7, 57.

Venture's conscious decision not utilize its own water rights should be borne by Venture, and not by non-profit Pineview and its shareholders.

RESPONSE TO THE NUMBERED ALLEGATIONS OF THE COMPLAINT

In response to the numbered allegations of the Complaint, Pineview admits, denies, and alleges as follows:

1. The allegations of paragraph 1 are admitted.

2. The allegations of paragraph 2 are admitted although, given that it is not a profit-driven entity that was not intended for, and does not offer service to the public generally, it could qualify for a Certificate of Exemption if it no longer desired rate-making assistance from the Public Service Commission.

3. The allegations of paragraph 3 are admitted.

4. The allegations of paragraph 4 are admitted.

5. In response to the allegations of paragraph 5, Pineview admits that the cited provisions apply to the Public Service Commission but denies that Venture and the Burwens are entitled to any relief thereunder.

6. In response to the allegations of paragraph 6, Pineview admits that a Certificate of Public Convenience and Necessity No. 2438, was issued on September 30, 2004 at a time that Pineview was developer owned and operated, but denies the implication that Pineview was established or has ever operated to serve the public generally.

7. In response to the allegations of paragraph 7, Pineview admits that a Clarifying Order was issued on October 12, 2004 that clarified the original description of the areas served by Pineview, and affirmatively alleges that the Order did not disturb or change any other provision of

the Certificate but continued to limit service to the subdivisions developed by Pineview's founder and to provide water to shareholder's residences in those subdivisions.

8. In response to the allegations of paragraph 8, Pineview admits that the Clarifying Order referenced the listed subdivisions, as then platted, and affirmatively alleges that the Snowberry Inn is not located within the listed subdivisions.

9. In response to the allegations of paragraph 9, Pineview acknowledges that the quoted language appears in the Utah Code but denies that Pineview was established or ever intended to serve the public generally.

10. In response to the allegations of paragraph 10, Pineview admits the existence of Regulation F but denies any suggestion that that regulation applies to termination of water service that was temporarily extended to Snowberry during the pendency of Venture's now-disproven claims of interference with its Single Family Right, or to the Burwens or their commercial entity, Venture, which has its own water rights and well capable of providing sufficient water for the Snowberry Inn and is located outside of the service area described in Tariff No. 3.

11. In response to the allegations of paragraph 11, Pineview incorporates its response to paragraph 10, above.

12. The arguments of paragraph 12 are argumentative and require no response from Pineview.

13. The allegations of paragraph 13 are denied.

14. The allegations of paragraph 14 are denied.

15. In response to the allegations of paragraph 15, Pineview admits that, as acknowledged by the Division and the Commission in Tariff No. 2, it began temporarily providing

culinary water as a temporary mitigation measure and courtesy to the Araves and Ms. Southwick because of their claims that Pineview's Well No. 4 interfered with their well. Pineview later voluntarily agreed to continue providing water service to the Araves and Ms. Southwick in compromise of certain claims and to resolve pending litigation. Water service to the Pineview Yacht Club, which uses less water annually than a literal handful of Pineview's shareholders, is voluntarily provided in compromise of other claims.

16. The allegations of paragraph 16 are denied.

17. The allegations of paragraph 17 are denied. Pineview affirmatively alleges that, because of the Commission's November 16, 2009 Order of Stay, even though Pineview acted as though Tariff No.2 was in place, compliance with Tariff No. 2 was indefinity stayed and further updates were not required until Tariff No. 3, at which time the map of Pineview's service area was updated.

18. The allegations of paragraph 18 are admitted.

19. The allegations of paragraph 19 are admitted.

20. In response to the allegations of paragraph 20, Pineview admits that it informally agreed to provide culinary water service to Venture and others as temporary mitigation water to allow continued use of Well No. 4 and as a courtesy to those who claimed interference with their wells, but denies that its service area was formally expanded.

21. The allegations of paragraph 21 are denied.

22. The allegations of paragraph 22 are admitted.

23. The allegations of paragraph 23 are admitted.

24. The allegations of paragraph 24 are admitted.

25. In response to the allegations of paragraph 25, Pineview admits the quoted language appears in the Approval Order but denies that language defined, described, or approved an "Expanded Service Area".

26. In response to the allegations of paragraph 26, Pineview alleges that Tariff No. 2 speaks for itself and denies all allegations that are inconsistent therewith.

27. In response to the allegations of paragraph 27, Pineview alleges that Tariff No. 2 speaks for itself and denies all allegations that are inconsistent therewith.

28. The allegations of paragraph 28 are admitted, and Pineview affirmatively alleges that when Venture purchased the Snowberry Inn, they also purchased the Snowberry Well which is only 133 feet deep and the 1960-priority Snowberry water right which authorizes consumption of only of one EDU (Equivalent Domestic Unit) of water. A one EDU right authorizes diversion of up to 0.45 acre feet of water per year diverted at a rate not exceeding 6.73 gallons per minute. Even though their diversion right was limited to 6.73 gallons per minute and commercial and irrigation uses were not authorized, Venture illegally pumped the Snowberry Well at a fixed rate of 25 gallons per minute in order to provide water for all of the purposes of operating a commercial bed and breakfast, the Snowberry Inn. The Utah Supreme Court found the Snowberry Inn pumped and used water in amount far exceeding its limited water right.

29. Pineview lacks information sufficient to form a belief as to the consumption figures listed in paragraph 29 and accordingly denies them. However, Pineview affirmatively alleges that the quoted use of 1.1 acre-feet per year was more than double the amount authorized by the State Engineer for domestic use. In 2017, Snowberry finally recognized that it was acting illegally and obtained an additional water right sufficient for its operation by obtaining an additional

commercial water right. This new water right is junior to Pineview's water right associated with Well No. 4. Pineview notes that the figures reported in paragraph 29 include water use in the time period when travel was dramatically reduced by the Covid-19 epidemic. As noted in footnote 13, above, Venture more candidly described its business in its January 11, 2017, filing with the State Engineer as one supporting 21 guests on a 365 day/year basis, with of 2.45 acre-feet of expected annual well diversions from the Snowberry Well. Pineview's system has very limited capacity and simply cannot sustain the demands Venture projected.

30. The allegations of paragraph 30 are denied.

31. The allegations of paragraph 31 are admitted, and Pineview further alleges that it began providing temporary mitigation water and water service to Snowberry pending resolution of Snowberry's claim that Well No. 4 interfered with its ability to divert the 0.45 acre-feet of water authorized by Snowberry's 1960 water right. As observed by the Supreme Court, Snowberry was actually using more than the amount of water authorized by its 1960 water right.

32. The allegations of paragraph 32 are admitted, and Pineview affirmatively alleges that the Snowberry Inn subsisted after Venture acquired it by using its one EDU water right plus additional water it diverted from the Snowberry Well in excess of its authorization.

33. In response to the allegations of paragraph 33, Pineview admits the description of the location of the wells, and that there is some hydrological connection between them, and denies all other allegations of paragraph 33.

34. The allegations of paragraph 34 are denied and Pineview affirmatively alleges that Snowberry has never pumped its well at the authorized 6.73 gallons per minute and that the

Snowberry Well would produce all of the water, .45 acre-feet, allowed by the 1960 water right if it were pumped at the rate authorized by the state.

35. The allegations of paragraph 35 are denied and Pineview affirmatively alleges that the Snowberry Well struggles because Snowberry has historically pumped it at the rate of 25 gallons per minute, nearly four times the rate authorized by the State Engineer. Venture has never undertaken work to improve, deepen, or replace the Snowberry Well so that it could provide the additional amount of water allowed for by its new 2017 water right. Well owners in Utah have an obligation to "chase the water" when that can be reasonably done. Snowberry has never attempted to enhance its well so that it would satisfy its water rights even though nearby wells confirm that water is available at lower depths.

36. Pineview lacks information sufficient to form a belief as to the allegations of paragraph 36 and accordingly denies them.

37. In response to the allegations of paragraph 37, Pineview admits that Snowberry was allowed to connect to the Pineview system as a temporary measure to provide mitigation water while Snowberry pursued its claim that Well No. 4 interfered with its ability to divert under its small 1960 water right and denies all other allegations. Pineview admits that the initial rate extended by the then-developer was $20.00 per month, but the Public Service instead required payment at the rate provided by the Tariff.

38. Pineview admits that Venture was allowed to connect with the Pineview system pending resolution of Venture's claim of interference, provided Venture pay the cost of the connection, but denies that it ever committed to provide water to Snowberry on a permanent basis.

39. In response to the allegations of paragraph 39, Pineview admits that it engaged in some settlement negotiations with Venture, and alleges that those settlement negotiations are protected by Rule 408 of the Utah Rules of Evidence and that their content are thus inadmissible.

40. The allegations of paragraph 40 are denied.

41. In response to the allegations of paragraph 41, Pineview incorporates its response to paragraph 39 above.

42. In response to the allegations of paragraph 42, Pineview admits that, after consulting with a hydrologist who advised that operation of Well No. 4 did not interfere with the Snowberry water right, it sent the letter dated November 15, 2013.

43. In response to the allegations of paragraph 43, Pineview alleges that the referenced document speaks for itself and denies all allegations or inferences that are inconsistent therewith.

44. The allegations of paragraph 44 are denied and Pineview affirmatively alleges that Snowberry had operated previously with illegal diversions far in excess of its limited Single Family Right . Venture now owns adequate water rights to support Snowberry's operations and a well that is capable of providing sufficient water. If Snowberry Inn were to close, it would be solely because Snowberry failed initially to purchase adequate water rights for its operations, an omission it partially remedied in 2017 when it obtained additional water rights, and because it has made no effort during the last five years to improve its well and develop the diversion capacity necessary to put that water to beneficial use.

45. In response to the allegations of paragraph 45, Pineview incorporates its response to paragraph 44 above.

46. The allegations of paragraph 46 are denied. Venture owns water rights that are sufficient to support its business Snowberry, an approved point of diversion for those water rights, and well capable of providing that water.

47. In response to the allegations of paragraph 47, Pineview admits that Snowberry and others filed suit against Pineview in December of 2013 based on a claim of interference with the level of water in the water table that, the Supreme Court confirmed, is not supported by Utah law.

48. The allegations of paragraph 48 are denied.

49. The allegations of paragraph 49 are admitted.

50. The allegations of paragraph 50 are admitted, and Pineview affirmatively alleges that the Utah Supreme Court **reversed** the District Court's finding that Pineview's Well No. 4 interfered with Snowberry's ability to divert its 1960 water right from the Snowberry Well. Venture attached to the Complaint copies of the trial court rulings that favored it but, for some reason, failed to attach a copy of the Supreme Court opinion that reversed the trial court's interference ruling. As noted in footnote 12, above, Pineview has attached a copy of that opinion as Exhibit B.

51. In response to the allegations of paragraph 51, Pineview alleges that Snowberry's claim was of water interference, a claim which if proven, would have required Pineview to provide replacement water equal to the amount of Snowberry's 1960 water right that it was unable to divert during Pineview's seasonal operation of Well No. 4 efforts. Venture provided no such measurement and, as it turned out, did not need to since the Supreme Court found that Venture had used more water than was allowed by that right.

52. In response to the allegations of paragraph 52, Pineview admits that Venture has paid the invoices for culinary water service, even though it asked the trial court to require Pineview to refund all of the money it paid to Pineview for water that it admittedly used, including water in excess of its water rights but necessary for commercial operations of the Snowberry Inn and during times when Pineview's Well No. 4 was not in operation.

53. The allegations of paragraph 53 are admitted.

54. The allegations of paragraph 54 are admitted.

55. The allegations of paragraph 55 are denied.

56. In response to the allegations of paragraph 56, Pineview admits that it filed a Request for Approval of a Conservation Rate Increase. Pineview is without information sufficient to form a belief as to the Burwens' personal awareness, and they were on constructive notice of the proceedings. Further, the Araves, who were represented by the same attorneys that represented Venture, had actual notice of the proceedings as evidenced by their participation therein.

57. In response to the allegations of paragraph 57, Pineview affirmatively alleges that, after working with the Department of Public Utilities to complete the 2019 rate request and agreeing on the treatment of the pending litigation on the rate case, on November 20, 2020 the Division filed an Unopposed Motion to Approve Settlement Agreement to Hold Hearings as Scheduled which included three Exhibits: 1) Settlement Stipulation; 2) A clean version of DPU's recommend Tariff No. 3 for PWWC; and 3) A redline document comparing Tariff No. 2 and Tariff No. 3. Importantly, the Redline document removed the reference to "Non-Shareholder Contract

Rates" removing a distinction between contract water and shareholder water.[16] The Redline Tariff also provides a Service Area Map that excludes the area where the Snowberry Inn is located.[17] These references, all made after the Supreme Court ruled against Venture's interference claim, provided "notice" of the change in the Pineview service area.

58. The allegations of paragraph 58 are admitted, and Pineview notes that the Araves were at that time represented by the same attorneys that represented Venture.

59. In response to the allegations of paragraph 59, Pineview admits that the Araves filed a formal complaint but are without knowledge as to whether the Araves were aided by legal counsel in that effort.

60. The allegations of paragraph 60 are admitted.

61. The allegations of paragraph 61 are admitted.

62. In response to the allegations of paragraph 62, Pineview incorporates its response to the allegations of Paragraph 57, above. By this time, Venture's interference claim had been overruled by the Utah Supreme Court and thus the courtesy provision of mitigation water was no longer required. Pineview further notes that the stipulation and associated tariff changes were filed in connection with and with the concurrence with the Division of Public Utilities.

63. The allegations of paragraph 63 are admitted.

64. The allegations of paragraph 64 are admitted and Pineview affirmatively alleges that it is no longer required to provide mitigation culinary water as a courtesy to Venture because

[16] 11.20.20 Motion Exhibit 3 Redline Tariff - 19-2438-01, at 6. https://pscdocs.utah.gov/water/19docs/19243801/316479DPUAtt3RvsdTariffRedline11-20-2020.pdf

[17] *Id.*

Venture's water right interference claim was resolved and because Snowberry no longer is within the defined service area for Pineview.

65. In response to the allegations of paragraph 65, Pineview admits that it has certain paper water rights but has extremely limited source capacity and cannot provide water service to the 10-unit Snowberry Inn and still meet the needs of its other customer and shareholders. Pineview further affirmatively alleges that Venture has sufficient water rights to operate the Snowberry Inn and that the only reason Venture now seeks water service from Pineview is to avoid the expense of developing or improving the water source necessary to put its own water rights to beneficial use.

66. The allegations of paragraph 66 are denied.

67. In response to the allegations of paragraph 67, Pineview alleges that it has had to limit service to its customers because of drought and shortages but is unaware whether such instances might have been reported to the PSC.

68. The allegations of paragraph 68 are denied and Pineview affirmatively alleges that Snowberry has its own well and water rights which, if reasonably used, will satisfy the needs of that commercial establishment.

69. The allegations of paragraph 69 are denied.

70. The allegations of paragraph 70 are denied.

71. The allegations of paragraph 71 are denied, and Pineview affirmatively alleges that Snowberry has water rights sufficient to supply its own needs.

72. The allegations of paragraph 72 are denied.

73. The allegations of paragraph 73 are denied and Pineview affirmatively alleges that it has no obligation to guarantee the maintenance, operation or success of the Burwens' commercial business venture.

74. In response to the allegations of paragraph 74, Pineview affirmatively alleges it is required only to not interfere with Venture's senior Single Family Water Right; it has never been obligated to "serve the needs of the Snowberry Inn". Venture is required by Utah's "rule of reasonableness" to maintain the capacity and condition of its own well, and any failure or current unreliability of the Snowberry well is solely the result of Snowberry's failure to reasonably maintain and develop its sources.

75. Pineview lacks information sufficient to form a belief as to the truth of the allegations of paragraph 75 and accordingly denies them.

76. Pineview lacks information sufficient to form a belief as to the truth of the allegations of paragraph 76 and accordingly denies them. Pineview affirmatively alleges that it is Venture's responsibility to maintain source capacity sufficient for its water rights and there is no basis in law or equity to shift that burden or expense from the owner of the water right and commercial establishment to a company in which Venture has no equity.

77. In response to the allegations of paragraph 77, Pineview admits that the fact that Snowberry falls outside of the subdivisions served by Pineview is one reason it has no obligation to provide water service to Snowberry and that additional reasons include the fact that Pineview provided mitigation water as a courtesy to Snowberry in the first instance on a temporary basis during the pendency of Venture's claim of interference, which claim was rejected by the Utah Supreme Court. Venture owns water rights sufficient to support the operation of the Snowberry

Inn . It is Snowberry's obligation to maintain or improve its well to produce the additional water right it obtained in 2017.

78. In response to the allegations of paragraph 78, Pineview admits that it agreed to provide culinary water service to the single-family homes Araves and Ms. Southwick in compromise of certain claims and that it agreed to continue providing water to the yacht club in compromise of other claims.

79. The allegations of paragraph 79 are denied.

80. The allegations of paragraph 80 are admitted.

81. In response to the allegations of paragraph 81, Pineview admits that it entered into a settlement agreement with the Araves and Ms. Southwick in compromise of certain claims, at a time that the Araves and Ms. Southwick were represented by the same attorneys that then represented Snowberry.

82. The allegations of paragraph 82 are admitted. Venture has water rights, an approved diversion point, and the existing Snowberry Well, which, if reasonably used and improved, would supply all of Snowberry's commercial needs without having to depend on the limited resources of a shareholder-owned non-profit company to which Venture has never contributed equity.

83. The allegations of paragraph 83 are denied. While Pineview certainly regrets having had to spend the enormous amount of money necessary for the successful defense of Venture's ill-founded interference claim, Pineview's position herein and in the referenced litigation is founded in law and logic, based on the belief that it and its shareholders should not be obligated to subsidize and support Snowberry when Venture has the water rights and resources to

stand on its own feet. Pineview's obligation is not to interfere with Venture's small, senior water right, which has been resolved in the favor of Pineview, not to guarantee that Venture can profitably operate its commercial enterprise.

84. The allegations of paragraph 84 are admitted.

85. The allegations of paragraph 85 are admitted, and the content of Pineview's October 29, 2021 response, Exhibit T to the Complaint, is incorporated herein by reference.

86. The allegations of paragraph 86 are admitted. Pineview has limited source capacity, a condition made more acute by Utah's well publicized drought conditions.

87. The allegations of paragraph 87 are denied, and Pineview affirmatively alleges that the minimal amounts of water that Venture claims it has consumed during the Covid-19 period when its operations have been all but shut down bear no relation to the amount of water it historically consumed or that it in the future would likely be consumed based upon Snowberry's representation to the State of Utah that its operations include 21 residents on a 365-day/year basis, requiring future water supplies of 2.45 acre-feet per year, many times the amount consumed by others served by Pineview.

88. The allegations of paragraph 88 are admitted. The Araves questioned the service area revision and did not appeal the implementation of Tariff No. 3 by the Commission.

89. The allegations of paragraph 89 are denied.

90. In response to the allegations of paragraph 90, Pineview affirmatively alleges that the statement referenced by John During anticipated a likely request for an *expansion* of the water service area by the neighboring Crimson Ridge development. Pineview further notes that the statement was made prior to the time the Utah Supreme Court's ruling that Venture had failed to

prove its water interference claim against Pineview, thereby removing the basis for Pineview's voluntary and temporary provision of water to Snowberry.

91. In response to the allegations of paragraph 91, Pineview denies there was a failure of disclosure but agrees that the map for Tariff No. 3 did effectively restore its service area to that served before Venture raised its interference claim.

92. The allegations of paragraph 92 are admitted, and Pineview affirmatively alleges that Snowberry has water rights sufficient for its own operations, has an authorized diversion point for those water rights. There is water available in the ground, as evidenced by the water levels in the Arave well and Well No. 4, but Snowberry has chosen to attempt to solve its water shortage through litigation rather than investment in its own well and facilities.

93. The allegations of paragraph 93 are denied.

94. The allegations of paragraph 94 are denied.

95. Pineview incorporates its response to the foregoing allegations in response to paragraph 95.

96. The allegations of paragraph 96 are denied.

97. The allegations of paragraph 97 are argumentative and require no response from Pineview. Pineview is not a "profit-driven corporation" that delivers "its water to the public generally": it is a shareholder-owned non-profit corporation that was incorporated and designed for the purpose of providing water to its shareholder's residences.[18]

[18] See, *Bear Hollow Restoration, LLC. V. Public Service Com'n of Utah,* 274 P.3d 956, 962 (Utah 2012)

98. In response to the allegations of paragraph 98, Pineview incorporates its response to paragraph 97. Pineview is a small, mutually owned water company; it is a far cry from Rocky Mountain Power and Dominion Gas and their millions of customers.

99. In response to the allegations of paragraph 99, Pineview incorporates its response to paragraph 97.

100. The allegations of paragraph 100 are denied.

101. The allegations of paragraph 101 are denied.

102. In response to the allegations of paragraph 102, Pineview admits that Venture accurately quoted a portion of the statute cited but denies that statutory excerpt defines Pineview's obligations to Venture. Pineview further notes that section addresses the rates charged for services. Venture has not challenged the rates it has been charged for water.

103. In response to the allegations of paragraph 103, Pineview incorporates is answer to paragraph 102.

104. The allegations of paragraph 104 are denied. The burdens of continuing water service to Snowberry, actual and as projected by Venture to the State Engineer, are much, much greater than those discrete burdens Pineview has elected to assume in resolution of other disputes.

105. The allegations of paragraph 105 are denied, and Pineview affirmatively alleges that its past voluntary provision of mitigation water and water service to Snowberry Inn never included the potential for fire protection and suppression because the system has never had that hydraulic capacity in that location.

106. The allegations of paragraph 106 are denied.

107. Pineview incorporates its responses to the preceding paragraphs in response to the allegations of paragraph 107.

108. In response to the allegations of paragraph 108, Pineview admits that Snowberry accurately quoted a portion of the statute cited but denies that it has any application herein.

109. The allegations of paragraph 109 are denied. Snowberry is a commercial 10-unit that is projected to house 21 people on a 365-day/year basis. It is not situated similarly to other Pineview customers.

110. The allegations of paragraph 110 are admitted.

111. The allegations of paragraph 111 are denied.

112. Pineview incorporates its responses to the preceding paragraphs in response to the allegations of paragraph 112.

113. The allegations of paragraph 113 are denied. The Commission did not there define an Expanded Service Area.

114. The allegations of paragraph 114 are denied.

115. Pineview denies the allegations in the first sentence of paragraph 115 and admits the allegations of the second sentence.

116. The allegations of paragraph 116 are denied.

117. The allegations of paragraph 117 are denied.

118. The allegations of paragraph 118 are denied.

119. The allegations of paragraph 119 are denied.

120. The allegations of paragraph 120 are denied.

121. Pineview denies all allegations of the Complaint not specifically admitted herein.

CONCLUSION AND REQUEST FOR AGENCY ACTION

Pineview is in good standing with the state of Utah and is owned and operated by its shareholders. Pineview was formed and equipped only to supply its shareholders, but temporarily extended service to Snowberry only based on Venture's interference claim. Venture previously operated on its own with its own resources and, with the rejection of the interference claim by the Utah Supreme Court, the sole rationale for water supply by Pineview is gone. Venture has acquired adequate water rights for its commercial operation as confirmed by Venture's 2017 representations to the State Engineer. Pineview's approved service area map set forth in Tariff No. 3 is consistent with Pineview's capabilities and the purpose for which it was formed and equipped.

Pineview therefore respectfully requests that the Commission reject and deny all of the requests for temporary and permanent agency action made by the Burwens and Venture. They should be required to operate their 10-unit inn as they did before, utilizing the water they obtained for that purpose. The Burwens do not need to connect to Pineview or another water company because they already possess a well and adequate water rights to support their business. The Commission should also confirm the service area map that was approved with Tariff No. 3, and also Pineview to disconnect Snowberry from its system and end this expensive dispute.

DATED this 11th day of March, 2022.

CLYDE SNOW & SESSIONS

/s/ Edwin C. Barnes
EDWIN C. BARNES
EMILY E. LEWIS
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2022, I caused a true and correct copy of the foregoing **RESPONSE TO FORMAL COMPLAINT AND REQUEST FOR AGENCY ACTION** to be served upon the following via email:

J. Craig Smith
jcsmith@shutah.law
Kathryn J. Steffey
ksteffey@shutah.law
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SMITH HARTVIGSEN, PLLC
257 East 200 South, Suite 500
Salt Lake City, Utah 84111

/s/ Ellen DePola
Legal Assistant

EXHIBIT A

State of Utah

Department of Environmental Quality

Dianne R. Nielson, Ph.D.
Executive Director

DIVISION OF DRINKING WATER
Kevin W. Brown, P.E.
Director

Drinking Water Board
Dale Pierson, *Chair*
Anne Erickson, *Vice-Chair*
Myron Bateman
Jay Franson
Laurie McNeill
Nancy Melich
Dianne R. Nielson, Ph.D.
Charlie Roberts
Petra Rust
Ron Thompson
Chris Webb
Kevin W. Brown, P.E.
Executive Secretary

OLENE S. WALKER
Governor

GAYLE F. McKEACHNIE
Lieutenant Governor

August 13, 2004

Edward Radford
Pineview West Water Company
1568 Connecticut Drive
Salt Lake City, Utah 84103

Dear Mr. Radford:

Subject: Approval, Additional Water Connections
(System #29029, File 06507)

The Division on Drinking Water (DDW) received a request to review adding additional water connections to the above water system on July 15, 2004. Currently, Pineview West Water Company is approved by DDW for 70 connections (letter dated June 26, 1998). Well No. 3 and a new 62,500 gallon tank were recently approved and put into operation to increase source and storage capacity. A separate tank and sources are used for irrigation. The Weber Fire District Chief, David L. Austin (letter dated November 2, 1998 and reconfirmed by Fire Martial Ted Black) requires 45,000 gallons of water for fire storage capacity.

Drinking Water Sources

Source Name (DDW #)	Capacity (gpm)	Capacity (gpd)
Well No. 2 (DDW #2)	18	25,920
Well No. 3 (DDW #4)	28	40,320
Ogden City Connection (DDW #3)	27.8	40,000
Totals	**73.8**	**106,240**

Drinking Water Storage

Storage Name	Storage Capacity (gallons)
Existing Tank	52,800
New Tank	62,500
Totals	**115,300**

Per R309-510-7 and R309-510-8, DDW requires a minimum source capacity of 800 gallons per day (gpd) per Equivilent Residential Connection (ERC). A minimum storage capacity of 400 gallons per ERC plus fire flow storage is required.

Calculations

Calculations	Allowed ERC
Source Capacity	
106,240 gpd ÷ 800 gpd/ERC =	133
Storage Capacity	
(115,300 gallons – 45,000) ÷ 400 gallons/ERC =	175

Based the new source and storage capacities, **Pineview West Water Company is approved for a total of 133 Equivilent Residential Connections**. As mentioned in your request letter, the master plan for the Radford Hills subdivision is for a total of 163 residential connections. For the remaining 30 lots to be developed additional source capacity (approximately 17 gpm) will need to be obtained.

If you have any questions or need further assistance, please call Nathan Lunstad, of my staff, at (801) 536-0069.

Sincerely,

DRINKING WATER BOARD

Kevin W. Brown, P.E.
Executive Secretary

NL

cc: Weber-Morgan Health Department
Dan Bagnes, Division of Public Utilities, P.O. Box 146751, Salt Lake City, Utah 84114-6751

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EXHIBIT B

This opinion is subject to revision before final publication in the Pacific Reporter

2020 UT 67

IN THE

SUPREME COURT OF THE STATE OF UTAH

ROGER B. ARAVE AND KIMBERLY L. ARAVE; JANET SOUTHWICK, TRUSTEE; VENTURE DEVELOPMENT GROUP, LLC,
Appellees,
v.
PINEVIEW WEST WATER COMPANY,
Appellant.

No. 20180067
Heard November 13, 2018
Filed October 15, 2020

On Direct Appeal

Second District, Ogden
The Honorable Ernie W. Jones
No. 130907544

Attorneys:
John H. Mabey, Jr., David C. Wright, Salt Lake City, for appellees

Edwin C. Barnes, Timothy R. Pack, Emily E. Lewis, Salt Lake City, for appellants

JUSTICE PETERSEN authored the opinion of the Court, in which CHIEF JUSTICE DURRANT, ASSOCIATE CHIEF JUSTICE LEE, JUSTICE HIMONAS, and JUSTICE PEARCE joined.

JUSTICE PETERSEN, opinion of the Court:

INTRODUCTION

¶1 Roger B. and Kimberly L. Arave, Janet Southwick, and the owners of the Snowberry Inn bed-and-breakfast (collectively, Plaintiffs) each have decades-old water rights that allow them to meet their own water needs. They divert their water through the use of two wells. Pineview West Water Company has a much larger, junior water right that allows it to supply water to seventy single-family homes and irrigate over twenty acres of land.

Pineview operates five wells that are much deeper and stronger than those of the Plaintiffs. The Plaintiffs claim that Pineview has interfered with their water rights because when one of Pineview's wells operates (Well 4), it lowers the water table and puts the available water beyond the reach of their pumps. After a bench trial, the district court found in favor of the Plaintiffs on their claims of interference and negligence.

¶2 Pineview appeals, raising the following issues. With regard to the Plaintiffs' interference claims, Pineview asserts the Plaintiffs did not establish interference because they did not prove that they were unable to obtain some amount of their respective water rights and that their means and methods of diversion were reasonable. Pineview asserts that the Plaintiffs' negligence claim should fail because they did not bring it against the proper parties. And finally, Pineview argues that even if the Plaintiffs properly prevailed on their interference and negligence claims, the district court incorrectly calculated damages.

¶3 We reverse the district court's determination that Pineview interfered with the Plaintiffs' wells. We do not disturb the court's ruling on negligence. However, we remand that claim to permit the district court to consider whether it survives the dismissal of the Plaintiffs' interference claims and to make additional findings, if necessary. We vacate a portion of the Plaintiffs' damages award. And we remand the district court's calculation of the remaining damages and imposition of forward-looking remedies for the court to determine if and how they are impacted by the dismissal of the Plaintiffs' interference claims.

BACKGROUND[1]

The Parties

¶4 Roger B. and Kimberly L. Arave are joint owners and residents of a single-family residential property. They own a water right with a priority date of 1963. The Araves' water right allows them to divert 0.45 acre-feet[2] of water annually at a flow

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[1] "On appeal from a bench trial, we view and recite the evidence in the light most favorable to the [district] court's findings." *Utah State Tax Comm'n v. See's Candies, Inc.*, 2018 UT 57, ¶ 5 n.2, 435 P.3d 147 (citation omitted).

[2] The acre-foot is "the standard unit of measurement of the volume of water," which is "the amount of water upon an acre

(Continued . . .)

rate of 6.7 gallons per minute to supply water for single-family domestic use[3] and two livestock units.

¶5 Janet Southwick, as trustee, is the sole owner and resident of a single-family residential property. She owns a water right with a priority date of 1978. Southwick's water right allows her to divert one acre-foot of water annually to irrigate 0.25 acres of land and supply water for single-family domestic use.

¶6 The Araves and Southwick share the Arave Well as the sole diversion point for their year-round water rights. The Arave Well was drilled in 1963 to a depth of 187 feet with perforations from 140 to 170 feet. The perforations are entirely in an aquifer called the Norwood Tuff.[4]

¶7 Venture Development Group, a limited liability company, is the sole owner of a residential property that operates a commercial bed-and-breakfast known as the Snowberry Inn. It includes nine bedrooms, nine bathrooms, two kitchens, and serves as the year-round residence of the Inn's operator. Venture owns two water rights with priority dates of 1960 and 2017. Venture's original water right allows it to divert 0.45 acre-feet of water annually at a flow rate of 6.7 gallons per minute to supply water for single-family domestic use. However, Venture had been using more water than it had lawfully appropriated, and it was using the water in ways that were not permitted under its original water right. So in 2017, it applied to appropriate additional water. Its new water right, acquired pursuant to a change application,

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covered one foot deep, equivalent to 43,560 cubic feet." UTAH CODE § 73-1-2.

[3] One domestic unit permits a water right holder to divert 0.45 acre-feet of water to meet the indoor supply needs of five people.

[4] There are two local aquifers relevant to this case: the Norwood Tuff and an area of unconsolidated material that lies on top of it. While the Norwood Tuff is a consolidated bedrock aquifer, the unconsolidated material consists predominantly of sand, gravel, and cobble. The unconsolidated material generally has greater permeability than the Norwood Tuff, meaning that fluid is able to pass through it more easily. But the area of the Norwood Tuff surrounding the three wells is likely fractured, which increases its permeability. The intensity and extent of the fracturing are unknown.

allows Venture to divert an additional 3.25 acre-feet of water for irrigation and commercial use at the Snowberry Inn.

¶8 Venture diverts water year-round from the Snowberry Well, which was drilled in 2001 to a depth of 133 feet. Its perforations are from 105 to 125 feet and span both the Norwood Tuff and the unconsolidated material on top of it. The well likely gets the majority of its water from the more permeable unconsolidated material, but it is hydrologically connected to the Norwood Tuff. The Snowberry Well is equipped with a pump that has the capacity to pump twenty-five gallons per minute. The pump transfers water into a cistern, which then pumps water into the Snowberry Inn. The cistern is equipped with sensors that turn the pump on when the water level inside the cistern drops below a certain point and then signal the pump to turn off when the cistern is full.

¶9 While the Plaintiffs use their water rights to meet their own domestic and business needs, Pineview is a small water company that owns and operates five wells, including the one at issue here—Well 4. Pineview's water rights are almost thirty-three times larger than the Plaintiffs' rights combined,[5] and it supplies water to seventy single-family homes and irrigates over twenty acres of land. But its rights are junior to all of the Plaintiffs' rights except the latest one that Venture acquired. Its earliest right, modified by a change application, has a 2003 priority date. The state engineer's approval stated that modification was "subject to prior rights." In 2013, the state engineer approved a new change application, allowing Pineview to divert additional water. Pineview may divert its water from any combination of the five wells.

¶10 Well 4 is located approximately 700 feet from the Arave Well and approximately 460 feet from the Snowberry Well. It was drilled in 2004 to a depth of 738 feet with four perforated zones from 58 to 98 feet, 208 to 228 feet, 408 to 448 feet, and 648 to 738 feet. Well 4 draws water from both aquifers, but most of its water

[5] Pineview's 2003 water right allows it to divert 90 acre-feet of water annually to irrigate 21.66 acres of land and supply water to fifty-five single-family domestic units. Its 2013 water right allows it to appropriate an additional 78 acre-feet of water annually.

likely comes from the Norwood Tuff. Well 4 is equipped with a pump that has the capacity to pump 100 gallons per minute.

The Dispute

¶11 When Well 4 was tested for the first time in 2004, it affected the Arave Well almost immediately. Within hours, the Arave Well was unable to pump any water and began sucking air, resulting in silt damage to the Araves' and Southwick's property. So the test was cut short. The Arave Well recovered within a day or two following that initial test. But a subsequent test produced the same result.

¶12 Nevertheless, Pineview later began regularly pumping Well 4 during irrigation season, from early July until September. When Well 4 was operating, the Arave Well was once again unable to produce water. Eventually, the Snowberry Well had trouble as well. It had traditionally been able to fill its cistern within fifteen minutes. But with Well 4 operating, the Snowberry Well struggled for hours to complete the same task.

¶13 In the beginning, the parties resolved this problem amongst themselves. Pineview agreed to connect the Plaintiffs to its water supply and provide them with culinary water for a flat rate of $20 per month. Once the Araves and Southwick began using Pineview's water, the Araves removed the pump from the Arave Well and no longer used it to obtain water. Instead, they used it as a monitoring well to gather data regarding the impact of Well 4 on the water level.

¶14 Several years later, Pineview sought to increase the Plaintiffs' fees to match those paid by its other water users. The parties tried to reach an agreement regarding new fees, but those negotiations broke down and this suit followed.

¶15 The Plaintiffs sued Pineview, asserting causes of action for interference with water rights, negligence, and nuisance.[6] In their complaint, they sought injunctive relief, damages, and attorney fees.

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[6] During the final day of trial, the district court asked whether nuisance was actually a claim in this case. Although the Plaintiffs argued that it was, the court's findings of fact and conclusions of law do not address this claim. And it is not before us on appeal.

The Final Amended Judgment

¶16 Following a four-day bench trial during which the district court heard expert testimony from both sides, the court ruled in favor of the Plaintiffs on their interference and negligence claims. In support of the verdict, the district court entered findings of fact and conclusions of law.

¶17 The district court found that neither the Arave Well nor the Snowberry Well had ever experienced difficulty diverting water before Well 4 began pumping. But when Well 4 was in operation, the court found that it created a cone of depression that encompassed both the Arave and Snowberry Wells. The district court explained that a cone of depression is an "underground area of reduced soil saturation [that] 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. . . . [T]he depth of the water table will be most significantly impacted at the point of extraction . . . ." (Quoting *Bingham v. Roosevelt City Corp.*, 2010 UT 37, ¶ 3, 235 P.3d 730.) The actual shape of a cone of depression varies depending on the nature, depth, and permeability of the surrounding aquifer.

¶18 The district court noted that the Arave Well is a "very good surrogate" for Well 4 because it reacts "quickly and accurately" when Well 4 is operating. But the impact on the Snowberry Well is more complex. The district court found that the Arave Well is hydrologically connected to the Snowberry Well. When Well 4 operates, it immediately draws down the water level of the Arave Well. When the elevation of the Arave Well head falls below that of the Snowberry Well, water is drawn away from the Snowberry Well. As a result, the Snowberry Well "struggles to produce even a minimal yield." Recovery time for both wells varies based on several factors.

¶19 The district court concluded that Pineview was liable for interference with the Plaintiffs' water rights and negligence. The court acknowledged that an aquifer's water level is influenced by various factors, including seasonal fluctuations and the amount of water withdrawn by pumping wells. And it found that there had not been a general decline in the groundwater levels where the wells are located.

¶20 But the district court ultimately concluded that pumping Well 4 dewatered the aquifer to such a degree that it temporarily reduced the level of water available to the Plaintiffs' wells. In particular, when Well 4 was pumping, it deprived the Arave Well

of "virtually all water" and obstructed the Snowberry Well's ability to produce water. After determining that the Plaintiffs' means and methods of diverting water were reasonable, the court concluded that Pineview should bear the costs associated with rectifying the interference.

¶21 The district court also found that before expanding its water right in 2017, Venture had used more than its allotted share of water, thereby violating the terms and limitations of its original water right. But the court rejected Pineview's argument that this should bar Venture's ability to prevail on an interference claim. Instead, the district court noted that the state engineer may remedy any such violations by commencing an action under the relevant statutory provision.

¶22 As to negligence, the district court ruled that Pineview was negligent in locating, drilling, and using Well 4 in a manner that interfered with the Arave and Snowberry Wells. According to the court, harm to the Plaintiffs was foreseeable because Well 4 is located near the Plaintiffs' wells, it draws water from the same aquifers that the Plaintiffs use, and it operates at a much larger capacity.

¶23 As a forward-looking remedy, the district court ordered Pineview to stop pumping Well 4 unless and until it could demonstrate that Well 4 could operate without interfering with the Arave and Snowberry Wells. The court retained jurisdiction to determine whether the wells could coexist and to fashion an appropriate remedy based on the outcome of that determination. In the event that interference proved unavoidable, the district court stated that it may order Pineview to provide replacement water to the Plaintiffs at Pineview's sole expense.

¶24 The court also awarded compensatory damages. It ordered Pineview to refund all of the fees that the Plaintiffs had previously paid for water service. It also included the cost of a new pump and associated accessories for the Arave Well as well as costs that Southwick and Venture had incurred due to hard water damage to their property. In sum, the district court awarded $11,503 to the Araves; $5,782 to Southwick; and $28,238 to Venture, along with post-judgment interest at the statutory rate. The Plaintiffs, as prevailing parties, were also entitled to $2,059.96 in costs.

¶25 Pineview appealed. We have jurisdiction pursuant to Utah Code section 78A-3-102(3)(j).

STANDARD OF REVIEW

¶26 A determination of interference with a water right is a mixed question of law and fact. *See Wayment v. Howard*, 2006 UT 56, ¶ 9, 144 P.3d 1147. When reviewing mixed questions, "we typically grant some level of deference to the district court's application of law to the facts." *Id.* The level of deference afforded varies based on the issue being reviewed. *Searle v. Milburn Irr. Co.*, 2006 UT 16, ¶ 16, 133 P.3d 382. Here, "because the issue of interference is extremely fact dependent, we grant broad deference to the district court." *Wayment*, 2006 UT 56, ¶ 9. The same is true of a determination of negligence. "[A] negligence finding is a classic finding that, while mixed, calls for deference to the lower court." *In re Adoption of Baby B.*, 2012 UT 35, ¶ 43, 308 P.3d 382.

ANALYSIS

¶27 Water has been characterized as the "very life blood" of Utah. *Fairfield Irr. Co. v. White*, 416 P.2d 641, 644 (Utah 1966). Recognizing water's importance as a vital resource in our arid state, Utah statutory and case law have been crafted to maintain the flexibility necessary to meet changing circumstances and promote optimal beneficial use of our water supply. *See id.* at 644–45; *see also Wayman v. Murray City Corp.*, 458 P.2d 861, 863–65 (Utah 1969). But our statutory law also protects appropriators of water in order of seniority. *See* UTAH CODE § 73-3-1(5)(a). The balance between protecting senior appropriators and maximizing the beneficial use of water has led to several rules of water law that can sometimes seem to be in tension with one another.

¶28 We begin by identifying those rules. We then explain how they combine to establish the elements of a prima facie case for interference with a water right. Finally, we determine whether the district court's findings sufficiently support its determination of interference.

I. INTERFERENCE

¶29 "All waters in this state, whether above or under the ground, are . . . the property of the public, subject to all existing rights to the use thereof." UTAH CODE § 73-1-1(1). A person seeking to acquire the right to use the state's unappropriated waters must apply for and receive approval from the state engineer. *See id.* § 73-3-2(1)(a).

¶30 Appropriators are prioritized according to the dates of their respective water rights. *See id.* § 73-3-21.1(2)(a). In practice,

this means that except in times of a temporary water shortage emergency, "each appropriator is entitled to receive the appropriator's whole supply before any subsequent appropriator has any right." *Id.* § 73-3-21.1(2)(a); *see also id.* § 73-3-1(5)(a) ("Between appropriators, the one first in time is first in rights."); *id.* § 73-3-8(1)(a)(ii) (stating that the state engineer must consider whether the proposed use will impair existing rights when approving an application to appropriate). Generally, a cause of action for interference lies where a junior appropriator's use of water diminishes the quantity or quality of the senior appropriator's existing water right. *Bingham v. Roosevelt City Corp.*, 2010 UT 37, ¶ 48, 235 P.3d 730.

¶31 If a junior appropriator interferes with a senior appropriator's water right, the junior appropriator has the right—at his or her own expense—to replace the senior appropriator's water. *Id.* ¶ 63; see also *Fairfield Irr. Co. v. White*, 416 P.2d 641, 645–46 (Utah 1966) (upholding the district court's order requiring defendant to supply replacement water as being supported by the evidence). This protection also extends to a senior appropriator's "right to continue use of his [or her] existing and historical method of diverting the water." *Wayment v. Howard*, 2006 UT 56, ¶ 13, 144 P.3d 1147.

¶32 When rights clash, however, seniority of rights is not the sole consideration. We have previously recognized that ordering a junior appropriator to supply replacement water in perpetuity is a "sweeping and pervasive responsibility" that "could prove to be highly inequitable and inconsistent with the objectives of our water law." *Wayman v. Murray City Corp.*, 458 P.2d 861, 864 (Utah 1969). The primary objective is ensuring that "the greatest amount of available water is put to beneficial use." *Id.* at 865; *see also* Utah Code § 73-1-3 ("Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state."). This objective becomes an important consideration when a junior appropriator's diversion interferes with a senior appropriator's water right. *See Wayman*, 458 P.2d at 864–67.

¶33 In *Wayman*, we adopted the "rule of reasonableness," which allows courts to balance competing rights in a manner that best achieves the goal of putting the greatest amount of water to beneficial use. *Id.* at 865–67. Under the rule of reasonableness, "[a]ll users are required where necessary to employ reasonable and efficient means in taking their own waters in relation to others to the end that wastage of water is avoided and that the

greatest amount of available water is put to beneficial use." *Id.* at 865. This rule tempers the prior appropriation doctrine, which could otherwise allow a senior appropriator to hold unappropriated water hostage due to outdated and inefficient methods of diversion. *Id.* at 865–66. In assessing reasonableness, courts should consider the total situation, including "the quantity of water available, the average annual recharge in the basin, the existing rights and their priorities." *Id.* at 865.

¶34 Protecting senior water rights and maximizing the beneficial use of available water both have a place in our law. But these concepts do not always easily coexist. We take this opportunity to clarify the specific elements of a claim of interference with a water right. In doing so, we do not depart from prior case law; instead, we seek to synthesize it by explaining how the governing concepts should come together to establish a prima facie case of interference.

¶35 To prevail on an interference claim, we clarify that plaintiffs must establish that: (1) they have an enforceable water right,[7] (2) their water right is senior to the defendant's water right,[8] (3) their methods and means of diversion are reasonable,[9] (4) despite their reasonable efforts, they are unable to obtain the quantity or quality of water to which they are entitled,[10] and (5) the defendant's conduct obstructed or hindered their ability to obtain that water (causation).[11]

¶36 The district court found that Pineview interfered with both the Arave and Snowberry Wells when it operated Well 4. Pineview argues that the district court erred in multiple ways.

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[7] *See Bingham v. Roosevelt City Corp.*, 2010 UT 37, ¶¶ 48, 53, 235 P.3d 730.

[8] *See* UTAH CODE §§ 73-3-1(5)(a), -21.1(2)(a).

[9] This element is based upon the rule of reasonableness, which requires that each appropriator's "means of diversion must be reasonable and consistent with the state of development of water in the area." *Wayman v. Murray City Corp.*, 458 P.2d 861, 866 (Utah 1969).

[10] *See* UTAH CODE § 73-3-23; *see also Wayment v. Howard*, 2006 UT 56, ¶ 13, 144 P.3d 1147.

[11] *See* UTAH CODE § 73-3-23; *see also Bingham*, 2010 UT 37, ¶ 48.

First, it argues that none of the Plaintiffs established interference because they offered no evidence showing they were unable to get some quantity of their respective water rights. Second, Pineview argues that the district court erred in concluding the Plaintiffs' means of obtaining their water was reasonable. And finally, Pineview argues that the district court's damages assessment was wrong. We address the Arave Well and then the Snowberry Well, applying the prima facie case outlined above.

A. Arave Well

¶37 The district court correctly found that the Araves and Southwick[12] satisfied the first, second, and fifth elements of an interference claim: specifically, that the Plaintiffs possess enforceable water rights, those rights are senior to Pineview's water rights, and Pineview's pumping of Well 4 hindered the Plaintiffs' ability to get their water because it dropped the water table below the level of the Arave Well's pump. However, the court made insufficient findings to establish that the Plaintiffs' method and means of diversion were reasonable (the third element). Consequently, the court could not properly conclude that despite reasonable efforts, the Plaintiffs were unable to obtain some quantity of their water rights (the fourth element). For these reasons, we reverse the district court's interference determination.

¶38 With regard to the first element of an interference claim, Pineview does not dispute that the Araves and Southwick possess lawfully appropriated water rights. However, Pineview contends that the district court essentially granted the Plaintiffs a right to a certain level of the water table, to which they have no enforceable right. Pineview correctly characterizes the district court's conclusions. The court ruled that:

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

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[12] In this section of the opinion addressing only the Arave Well, when we refer to the "Plaintiffs," we mean Arave and Southwick.

¶39 Pineview relies on our decision in *Bingham v. Roosevelt City Corporation*, for its contention that the Plaintiffs have no enforceable right to the level of the water table. *See* 2010 UT 37, ¶ 12. In *Bingham*, the plaintiffs sued the city, alleging that its manner of diverting water had reduced the level of soil saturation beneath the plaintiffs' properties, thereby impairing their ability to raise crops and livestock. *Id.* ¶¶ 1, 5–6. Significantly, the plaintiffs had not appropriated the water in the soil. *Id.* ¶¶ 29, 36. Nevertheless, they argued that the level of soil saturation was a component of the water rights that they had appropriated because it allowed them to use the appropriated water more beneficially. *Id.* ¶¶ 20, 25. In other words, the plaintiffs required less water to irrigate their land before the city's diversion had lowered the water table. *Id.* ¶ 20. We affirmed the district court's grant of summary judgment in favor of the city, reasoning that beneficial use of water does not substitute for appropriation. *Id.* ¶¶ 29–30. Thus, because the plaintiffs had not appropriated the water in their soil, they did not have an enforceable right to its continued presence. *Id.* We also explained that the plaintiffs had sustained no compensable injury because they were still able to access all of the water to which they were entitled under their water rights. *Id.* ¶¶ 49–50.

¶40 The circumstances here are different than those in *Bingham*. Here, the Plaintiffs each have lawfully appropriated water rights, allowing them to divert water from their respective wells. They are not claiming an enforceable right to use additional unappropriated water simply because it is present in their soil. *Cf. id.* ¶ 24. Instead, they seek to enforce their existing senior water rights. And although we held in *Bingham* that the plaintiffs had no enforceable right to the water in their soil, we recognized that "a claim of interference can be sustained where a junior appropriator lowers the water table in a manner that hinders the diversion of water by a senior appropriator." *Id.* ¶ 51.

¶41 We conclude that the Plaintiffs have satisfied this element of an interference claim because they have lawfully appropriated water rights. But we clarify that the Plaintiffs have an enforceable right only in these lawfully appropriated water rights—not in a particular level of the water table. The Plaintiffs' claim that Pineview's dewatering of the aquifer constitutes actionable interference cannot be divorced from the requirement that the Plaintiffs make reasonable efforts to obtain their water. Fundamentally, the Plaintiffs must show that because of the actions of Pineview, they can no longer access the water to which

they are entitled even though they have made reasonable efforts to do so. If they cannot make such a showing, they have demonstrated only that Pineview has lowered the water table, not that it has prevented them from obtaining some quantifiable portion of their water right.

¶42 With regard to the second element, it is undisputed that the Araves' and Southwick's water rights are senior to Pineview's.

¶43 However, with regard to the third element, we conclude that the district court did not find sufficient facts to establish that the Plaintiffs' method and means of diversion were reasonable. This element is based upon the rule of reasonableness, which requires that each appropriator's "means of diversion must be reasonable and consistent with the state of development of water in the area." *Wayman*, 458 P.2d at 866. The rule of reasonableness permits the factfinder a measure of flexibility in considering the totality of relevant facts—such as the quantity of water available, the average annual recharge, the existing rights that are in conflict, and their relative priorities—with the objective of putting the greatest amount of water to beneficial use. *Id.* at 865. As we explained in *Wayman*, all water users are required to "employ reasonable and efficient means in taking their own waters in relation to others to the end that wastage of water is avoided and that the greatest amount of available water is put to beneficial use." *Id.*

¶44 Here, the district court concluded, the "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 [Well 4] was drilled."

¶45 These findings are not sufficient to establish that the operation of the Arave Well was reasonable during the relevant time period. The district court appears to have based its conclusion on two findings: first that the Araves can divert their water only through the use of the well based on the terms of their water right, and second that the well functioned without issue until Well 4 began to operate. Those facts are certainly relevant to the reasonableness question, but they do not complete the analysis. It is also necessary to consider whether the Araves were operating the well efficiently and consistent with the current state of development in the area, and to identify and consider any other factors relevant to maximizing the beneficial use of water.

¶46 Here, the record evidence established that although the water table dropped when Well 4 pumped, "there ha[d] not been a general decline in groundwater levels in the regional basin in which [the] aquifers are located," although it fluctuated seasonally. Under these circumstances, it was necessary to determine whether the Plaintiffs made reasonable efforts to obtain the available water but were unable to do so. However, the court did not make findings related to whether the Plaintiffs could have lowered their pump or otherwise modified the well to reach the available water, or conversely, explain why this would have been futile or otherwise not possible.[13] Without this, there are not adequate findings to establish that the Plaintiffs made reasonable efforts to obtain their water.

¶47 While the Plaintiffs' failure to meet the requirements of the third element is dispositive, we note that the third and fourth elements are closely related. If the Plaintiffs cannot demonstrate that their means and method of diversion are reasonable, it is impossible to satisfy the fourth element of the prima facie case—that despite reasonable efforts, the Plaintiffs could not obtain the quantity of water to which they were entitled.

¶48 We note an additional problem with the Plaintiffs' proof on the fourth element. The district court did not make findings about the specific amount of their respective water rights that the Araves and Southwick were unable to obtain. Rather, the court found that Pineview's operation of Well 4 interfered with the Plaintiffs' well. But this does not necessarily establish that the Plaintiffs were unable to obtain some quantity of their water right.

¶49 The Plaintiffs did not offer evidence of how much water they used or how much of their appropriated water they were not able to obtain. This is because the Araves did not have a metering device in their well. We do not mean to suggest that it was

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[13] Rather, the court found that the Araves removed the pump and used the well as a monitoring well to document the impact of pumping Well 4. The court accepted the Plaintiffs' explanation that if they had pumped the well at the same time, it would have been more difficult to interpret the data. While this may be the case, it does not excuse the Araves from showing that at some point after the alleged interference, they made reasonable efforts to reach available water but were unable to do so.

impossible for Plaintiffs to show interference by proving that Pineview interfered with the year-round nature of their water rights. But it is difficult for them to establish that Pineview prevented them from obtaining some quantifiable amount of the water to which they were entitled with no measurements of the amount of water they *could* obtain at the time of the alleged interference.

¶50 In sum, we conclude there are insufficient findings to establish that the Plaintiffs' means of diversion was reasonable and that despite their reasonable efforts the Plaintiffs were unable to obtain some quantity of their water rights. Accordingly, we reverse the district court's ruling that Pineview interfered with the Arave Well.

B. Snowberry Well

¶51 With regard to the Snowberry Well, Pineview argues that because Venture exceeded the terms and limits of its senior water right,[14] it cannot make a viable interference claim. In other words, Pineview asserts that Venture's water use was illegal, and any alleged interference with an illegal use is not actionable. Pineview further argues that Venture did not prove it was unable to obtain the water to which it was entitled under its original, senior water right. We reject the first argument, but we agree that the district court did not make sufficient findings to establish that Pineview could not obtain some portion of its senior water right.

¶52 Pineview argues that Venture's excessive water use is fatal to its interference claim. This relates to the first element of the prima facie case. Pineview essentially argues that Venture's violation of its water right renders it unenforceable. We reject this argument. While excessive use may make it more difficult for Venture to prove that it could not obtain the water allotted to it under its 1960 right and that its diversion was reasonable, Venture has not lost its water right. Certainly, it risked an enforcement action by the state engineer. *See* UTAH CODE § 73-2-25(2)(a). But if Venture can make out a claim for interference, its excessive use would not bar such an action or shield Pineview from liability.

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[14] Venture not only used more water than it was allotted, but used it to support a commercial bed-and-breakfast and to irrigate when it was entitled to use its water only for domestic purposes.

¶53 However, we agree with Pineview that Venture has not proven interference. With regard to the first element, it is undisputed that Venture has an enforceable 1960 water right that allows it to divert 0.45 acre-feet of water at a flow rate of 6.7 gallons per minute from the Snowberry Well for single-family domestic use.

¶54 Second, this water right is senior to both of Pineview's water rights. Because Venture exceeded the limits and terms of this senior water right, it obtained an additional water right from the state engineer. The new 2017 water right is junior to Pineview's rights and is not part of Venture's interference claim.

¶55 Third, with regard to reasonableness, the district court made the same finding for both wells. As described above, the court concluded that the "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 [Well 4] was drilled." For the reasons we explained above, this is insufficient to establish that the Snowberry Well was a reasonable means of diversion in the manner in which Venture operated it. *See supra* ¶¶ 43–45.

¶56 This impacts Venture's ability to satisfy the fourth element. As we have explained, without a sufficient finding of reasonableness, Venture cannot show that despite reasonable efforts it was unable to obtain its water. *See supra* ¶¶ 46–48.

¶57 And while this is determinative, we also note that the district court's findings regarding Venture's inability to obtain some measure of its water right were insufficient. While the district court found that Well 4 hindered the Snowberry Well's ability to produce water, it did not specifically find that Venture was unable to obtain the quantity of water to which it was entitled under its senior water right. The findings state only that the Snowberry Well "struggles" when Well 4 operates. So we do not know whether Venture was ultimately unable to obtain some portion of the 0.45 acre-feet of water allotted to it under its 1960 right. This is especially problematic where Venture used more than its allotted right.

¶58 Accordingly, we reverse the district court's determination that Pineview interfered with the Snowberry Well.

II. NEGLIGENCE

¶59 Pineview next contends that the district court erred in concluding it was negligent in locating, drilling, and using Well 4.

The district court concluded Well 4 operates in a manner that interferes with the Arave and Snowberry Wells and that such harm was foreseeable due to Well 4's close proximity to the Plaintiffs' wells, its use of the Plaintiffs' water source, and its larger capacity.

¶60 First, Pineview argues that this ruling is erroneous because it was not Pineview but other developers who sited, drilled, and tested Well 4 and the Plaintiffs did not join those developers in this case. But even assuming Pineview did not site or drill Well 4, it does currently own and operate the well. And Pineview provides no argument or authority as to why the current operator of a well should be insulated from liability for negligence because it did not originally site and drill the well. Likewise, Pineview does not provide any legal argument or authority as to why not joining the prior developers is fatal to the Plaintiffs' negligence claim against Pineview.

¶61 Pineview also asserts that the Plaintiffs' negligence claim fails because they did not offer expert testimony establishing the relevant standard of care and causation. But Pineview has not explained why the Plaintiffs were obligated to present expert testimony to establish causation or the standard of care in this case. Pineview cites *Ladd v. Bowers Trucking, Inc.* to assert that "Utah courts generally require expert testimony to prove causation in tort cases in all but the 'most obvious cases.'" 2011 UT App 355, ¶ 10, 264 P.3d 752 (citation omitted). While that language was accurate in context—proving causation of medical injuries—we have also explained that "[q]uestions of ordinary negligence are properly determined by the lay juror without the need for expert testimony." *Graves v. N. E. Servs., Inc.*, 2015 UT 28, ¶ 40, 345 P.3d 619. Expert testimony is necessary only for "issues that do not fall within the common knowledge and experience of lay jurors." *Callister v. Snowbird Corp.*, 2014 UT App 243, ¶ 19, 337 P.3d 1044. Yet Pineview has failed to specify which matters are beyond the capacity of the factfinder in this case.

¶62 By failing to adequately analyze or argue either point, Pineview has failed to meet its burden of persuasion and has shifted the burden of research and argument to this court. *See Smith v. Four Corners Mental Health Ctr., Inc.*, 2003 UT 23, ¶ 46, 70 P.3d 904. Under rule 24(a)(8) of the Utah Rules of Appellate Procedure, an appellant's argument "must explain, with reasoned analysis supported by citations to legal authority and the record, why the party should prevail on appeal." This briefing

requirement is "a natural extension of an appellant's burden of persuasion." *Living Rivers v. Exec. Dir. of the Utah Dep't of Env't. Quality*, 2017 UT 64, ¶ 33, 417 P.3d 57 (citation omitted). Thus, "[a]n appellant who fails to adequately brief an issue will almost certainly fail to carry its burden of persuasion on appeal." *Id.* (citation omitted) (internal quotation marks omitted).

¶63 Accordingly, we decline to reverse the district court's negligence ruling. However, in light of our reversal of the district court's interference determinations, we remand this claim for reconsideration and further factfinding, if necessary. This is because the district court's negligence determination flows from its finding of interference. The district court concluded that Pineview had breached a duty of care to the Plaintiffs when it "located, drilled, and used [Well 4] in a manner that *interferes with plaintiffs' wells*." (Emphasis added.) It is not clear how our reversal of the Plaintiffs' interference claims impacts the district court's negligence ruling. Accordingly, we remand for the district court to consider that question and make any additional findings of fact that it deems necessary.

III. DAMAGES

¶64 We also remand to the district court its calculation of damages and imposition of prospective remedies. The court should determine whether these are altered by the reversal of its interference determinations. Any damages now stem only from the Plaintiffs' negligence claim.

¶65 Additionally, we vacate a portion of the court's compensatory damages award. Pineview argues the damages award is excessive to the extent the district court required Pineview to refund water service fees paid by the Plaintiffs for periods when Well 4 was inactive and therefore did not impact the Plaintiffs' ability to obtain water. We agree. The evidence presented at trial established that Well 4 pumped only seasonally and the Plaintiffs' wells recovered within a day or two after Well 4 ceased pumping. In assessing the damages caused by Pineview's negligence, the court should award damages only for fees paid during the period of the year that Well 4 injured the Plaintiffs' use of their wells. Accordingly, we vacate the portion of the damages award that compensates the Plaintiffs for fees paid during periods in which their wells would have been unimpeded by Well 4 if they had attempted to use them.

IV. ATTORNEY FEES

¶66 Pineview requests attorney fees under Utah Code sections 73-2-28(4) and 78B-5-825. Because we affirm the district court's judgment that Pineview was negligent, we conclude that Pineview is not entitled to attorney fees on appeal.

CONCLUSION

¶67 We reverse the district court's determination of interference regarding the Arave and Snowberry Wells. In light of this, we remand the court's determination of negligence for reconsideration and further factfinding, as the court deems necessary. We vacate the damages award to the extent that it compensates the Plaintiffs for fees paid during periods of the year when Pineview did not utilize Well 4. And finally, we remand to the district court to determine whether to revisit its damages award and imposition of remedies in light of the reversal of its interference determinations.

EXHIBIT C

APPLICATION FOR EXCHANGE OF WATER

STATE OF UTAH

Rec. by V6930
Fee Reqd $ 150.00
Receipt # 17-00085

For the purpose of obtaining permission to make an exchange of water in the State of Utah, application is hereby made to the State Engineer, based upon the following showing of facts, submitted in accordance with the requirements of Laws of Utah (Sec.73-3-20, Utah Code Annotated, 1953).

EXCHANGE: E 5647 (X753NJANKO) BASE: 35-7397 CONTRACT/STOCK#: 76022 COUNTY TAX ID: 20-003-0007 35-13204

1. NAME: Venture Development Group LLC
ADDRESS: 431 Calderon Ave.
Mountain View, CA 94041

2. Filed: Jan. 11, 2017 Priority: Jan. 11, 2017

********** CURRENT RIGHT **********

3. RIGHT EVIDENCED BY:
U.S. Bureau of Recl. & Contract with Weber Basin Water Conservancy District under 35-7397 (A10989)

4. FLOW: 2.0 acre-feet
SOURCE: Pineview Reservoir
COUNTY: Weber

5. POINT OF DIVERSION -- SURFACE:
(1) N 1,699 ft. E 603 ft. from S¼ corner, Section 16, T 6N, R 1E, SLBM
Diverting Works: Pineview Reservoir
Source: Ogden River

6. NATURE OF USE: PERIOD OF USE:
OTHER: Irrigation, domestic, municipal, industrial, power & stockwatering. Supplemtl. Jan 1 to Dec 31

********** PROPOSED EXCHANGE **********

7. FLOW: 2.0 acre-feet PERIOD OF USE: Jan 1 to Dec 31
SOURCE: Underground Water Well (Existing)
COUNTY: Weber COMMON DESCRIPTION: 1 miles SW Eden

8. POINT OF EXCHANGE -- UNDERGROUND:
(1) N 1,440 ft. E 513 ft. from S¼ corner, Section 03, T 6N, R 1E, SLBM
Diameter of Well: 6 ins. Depth of Well: 120 feet

Continued on Next Page

DEFENDANT'S EXHIBIT 8

RECEIVED
JAN 11 2017 DC
WATER RIGHTS
SALT LAKE

[redacted] *Exchange* [redacted]

SCANNED DC

9. POINT(S) OF RELEASE:
FLOW: 2.0 acre-feet PERIOD OF USE: Jan 1 to Dec 31
***Location of Release Point(s) is the SAME as Point(s) of Diversion in CURRENT RIGHT above

10. WATER USE INFORMATION:

IRRIGATION: from Apr 1 to Oct 31. SOLE SUPPLY: 0.2500 acres

OTHER: from Jan 1 to Dec 31. COMMERCIAL: Bed and Breakfast and other associated uses

The Acre Foot SOLE SUPPLY contributed by X753 for COMMERCIAL use in this group is UNEVALUATED.

PLACE OF USE: (which includes all or part of the following legal subdivisions:)

	Northwest Quarter				Northeast Quarter				Southwest Quarter				Southeast Quarter				Section
BS TOWN RANG SC	NW	NE	SW	SE	NW	NE	SW	SE	NW	NE	SW	SE	NW	NE	SW	SE	Totals
SL 6N 1E 03												0.2500					0.2500
																Group Total:	0.2500

EXPLANATORY

The well under this exchange application currently includes water right 35-1220 for 1 domestic use for 0.45 acre-feet. This exchange application adds another 2.0 acre-feet from the well based on an underlying contract with Weber Basin Water Conservancy District. The 2.0 acre-feet will be used for outside irrigation of 0.25 acres (0.75 acre-feet) and 1.25 acre-feet commercial use for the Snowberry Inn.

Based on meter readings and well monitoring over an eight year period, the maximum amount of water used and to be used in one given year for the Snowberry Inn will not exceed 1.25 acre-feet. The Inn not exceeding 1.25 acre-feet is substantiated by assuming the following calculation of 21 guests x 40 gpd x 365 days = 306.600 gallons per year = 0.9409 acre-feet. A total of 1.25 acre-feet will be allocated to meet the needs of the bed and breakfast and the special events associated with the Inn operation.

Because of ongoing well interference by a nearby well, applicant has been unable to divert sufficient water to satisfy water right 35-1220, let alone the water demands for irrigation and the Inn. Applicant anticipates being able to divert up to 2.45 acre-feet from the well after ongoing litigation is resolved.

Continued on Next Page

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If applicant is a corporation or other organization, signature must be the name of such corporation or organization by its proper officer, or in the name of the partnership by one of the partners, and the names of the other partners shall be listed. If there is more than one applicant, a power of attorney, authorizing one to act for all should accompany the application.

****

The undersigned hereby acknowledges that even though he/she/they may have been assisted in the preparation of the above-numbered application through the courtesy of the employees of the Division of Water Rights, all responsibility for the accuracy of the information contained herein, including maps and other attached documents, at the time filing, rests with the applicant(s).

David M Burnett, TRUSTEE

Venture Development Group LLC

Utah Water Right Exchange Map

N
W E
S

Legend
Place of use
Point of diversion

(1) N 1440 ft, E 513 ft, from S4 cor, Sec 03, T 6N, R 1E, SL B&M (UTM-27: 431092.7, 4570273.2)

I/we VENTURE DEVELOPMENT GROUP, LLC, hereby acknowledge that this map was prepared in support of Application 35-13204. I/we hereby submit this map as a true representation of the facts shown thereon to the best of my/our knowledge and belief.

David M Burnett, TRUSTEE
Applicant(s)

1/10/17
Date

GARY R. HERBERT
Governor
SPENCER J. COX
Lieutenant Governor

State of Utah
DEPARTMENT OF NATURAL RESOURCES
Division of Water Rights

MICHAEL R. STYLER
Executive Director

KENT L. JONES
State Engineer/Division Director

MAR 3 0 2017

ORDER OF THE STATE ENGINEER
For Exchange Application Number 35-13204 (E5647)

Exchange Application Number 35-13204 (E5647) in the name of Venture Development Group LLC, was filed on January 11, 2017, to exchange 2.00 acre-feet (af) of water as evidenced by Water Right Numbers 35-7397 (A10989) and 35-827 (A27608) owned by the U.S. Bureau of Reclamation and a contract (Number 76022 associated with Tax I.D. Number 20-003-0007) for its use with Weber Basin Water Conservancy District. The 2.00 acre-feet of water is to be released from Pineview Reservoir and, in lieu thereof, 2.00 acre-feet of water will be diverted from a well located North 1440 feet and East 513 feet from the S¼ Corner of Section 3, T6N, R1E, SLB&M (existing 6-inch, 120 feet deep). The water is to be used for the irrigation of 0.25 acre from April 1 to October 31 and year-round commercial purposes for a bed and breakfast and other associated uses). The water is to be used in all or portion(s) of Section 3, T6N, R1E, SLB&M.

Notice of the exchange application was published in the Standard Examiner on January 26 and February 2, 2017. No protests were received.

It is the opinion of the State Engineer that this exchange application can be approved without adversely affecting existing rights. The applicant is put on notice that diligence must be shown in pursuing the development of this application, which can be demonstrated by the completion of the project as proposed in the exchange application.

It is, therefore, **ORDERED** and Exchange Application Number 35-13204 (E5647) is hereby **APPROVED** subject to prior rights and the following conditions:

1. The basis for this exchange right is a contract between the applicant and Weber Basin Water Conservancy District. This contract must be maintained for this exchange to remain valid. No water may be withdrawn under this application if a contract is not in effect.

2. Total diversion under this exchange application is limited to 2.00 acre-feet (af) of water per year for the irrigation of 0.25 acre (0.75 af) from April 1 to October 31 and year-round commercial purposes for a bed and breakfast and other associated uses (1.25 af).

3. Section 73-5-4 of the Utah Code provides that "...a person using water in this state, except as provided by Subsection (4), shall construct or install and maintain controlling works and a measuring device at: (a) each location where water is diverted from a source; and (b) any other location required by the State Engineer." Instruction will also be given concerning any monitoring of your water diversion. Failure to comply could result in an order to cease the use of water and/or the revocation of this approval.

4. The applicant shall install and maintain suitable measuring devices to accurately measure the amount of water being used. Measurement records shall be submitted with the Proof of Beneficial Use.

5. This approval is limited to the rights to divert and beneficially use water and does not grant any rights of access to, or use of land or facilities not owned by the applicant.

6. As noted, this approval is granted subject to prior rights. The applicant shall be liable to mitigate or provide compensation for any impairment of or interference with prior rights as such may be stipulated among parties or decreed by a court of competent jurisdiction.

7. The water being exchanged shall be released from Pineview Reservoir into Ogden River as called for by the river commissioner.

The applicant is strongly cautioned that other permits may be required before any development of this application can begin and it is the responsibility of the applicant to determine the applicability of and acquisition of such permits. Once all other permits have been acquired, this is your authority to develop the water under the above referenced application which under Sections 73-3-10 and 73-3-12, Utah Code Annotated, 1953, as amended, must be diligently prosecuted to completion. The water must be put to beneficial use and proof must be filed on or before **March 31, 2022**, or a request for extension of time must be acceptably filed; otherwise the application will be lapsed.

Under the authority of Section 73-3-20 of the Utah Code, the applicant is required to submit a proof of diversion and beneficial use of water upon 60 days notification by the State Engineer. The proof shall be in the same form and contain the same elements as required for appropriation or permanent change of water under Section 73-3-16 of the Utah Code Annotated.

Proof of beneficial use is evidence to the State Engineer that the water has been fully placed to its intended beneficial use. By law, it must be prepared by a registered engineer or land surveyor, who will certify to the location, uses and extent of your water right.

Upon the submission of proof as required by Section 73-3-16, Utah Code, for this application, the applicant must identify every source of water used under this application and the amount of water used from that source. The proof must also show the capacity of the sources of supply and demonstrate that each source can provide the water claimed to be diverted under this right as well as all other water rights which may be approved to be diverted from those sources.

Failure on your part to comply with the requirements of the applicable statutes may result in the lapsing of this exchange application.

It is the applicant's responsibility to maintain a current address with this office and to update ownership of their water right. Please notify this office immediately of any change of address or for assistance in updating ownership. Additionally, if ownership of this water right or the property with which it is associated changes, the records of the Division of Water Rights should be updated. For assistance in updating title to the water right please contact the Division at the phone number below.

Your contact with this office, should you need it, is with the Weber River/Western Regional Office. The telephone number is 801-538-7240.

This Order is subject to the provisions of Administrative Rule R655-6-17 of the Division of Water Rights and to Sections 63G-4-302, 63G-4-402, and 73-3-14 of the Utah Code which provide for filing either a Request for Reconsideration with the State Engineer or an appeal with the appropriate District Court. A Request for Reconsideration must be filed with the State Engineer within 20 days of the date of this Order. However, a Request for Reconsideration is not a prerequisite to filing a court appeal. A court appeal must be filed within 30 days after the date of this Order, or if a Request for Reconsideration has been filed, within 30 days after the date the Request for Reconsideration is denied. A Request for Reconsideration is considered denied when no action is taken 20 days after the Request is filed.

Dated this 30th day of March, 2017.

FOR Kent L. Jones, P.E., State Engineer

Mailed a copy of the foregoing Order this 30th day of March, 2017 to:

Venture Development Group LLC
431 Calderon Ave.
Mountain View, CA 94041

Weber Basin Water Conservancy District
2837 East Highway 193
Layton, UT 84040

Cole Panter, River Commissioner
PO Box 741
Ogden, UT 84402

BY: _____
Sonia R. Nava, Applications/Records Secretary