

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

J.W. Bentley and Maryann Bentley,
Trustees of the Bentley Family
1995 Trust,

Case No. 56351

Petitioners

v.

THE NINTH JUDICIAL DISTRICT COURT
of the State of Nevada, in and for
the County of Douglas, and THE
HONORABLE DAVID R. GAMBLE, District
Court Judge,

Respondents,

AND

DONALD S. FORRESTER, KRISTINA M.
FORRESTER; HALL RANCHES, LLC, a
Nevada limited liability company;
THOMAS J. SCYPHERS; KATHLEEN M.
SCYPHERS; FRANK SCHARO; SHERIDAN
CREEK EQUESTRIAN CENTER, LLC, a
Nevada limited liability company;
RONALD R. MITCHELL; and GINGER G.
MITCHELL as Intervenors In the
Matter of the Determination of
the Relative Rights in and to the
Waters of Mott Creek, Taylor Creek,
Cary Creek (aka Carey Creek),
Monument Creek, and Bulls Canyon,
Stutler Creek (aka Stattler Creek),
Sheridan Creek, Gansberg Spring,
Sharpe Spring, Wheeler Creek No. 1
Wheeler Creek No. 2, Miller Creek,
Beers Spring, Luther Creek and
Various Unnamed Sources in Carson
Valley, Douglas Valley, Nevada.

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**ANSWER TO VERIFIED PETITION FOR WRIT OF
PROHIBITION AND/OR MANDAMUS**

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Interest

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1 COME NOW, Real Parties in Interest DONALD S. FORRESTER and
2 KRISTINA M. FORRESTER, HALL RANCHES, LLC, a Nevada Limited
3 Liability Company, THOMAS J. SCYPHERS and KATHLEEN M. SCYPHERS,
4 FRANK SCHARO, SHERIDAN CREEK EQUESTRIAN CENTER, LLC, a Nevada
5 Limited Liability Company, RONALD R. MITCHELL and GINGER G.
6 MITCHELL ("Real Parties"), by and through their counsel, THOMAS
7 J. HALL, ESQ., and pursuant to Order of the Court entered on
8 August 11, 2010, and NRS 21(b), hereby submit their Answer to
9 Verified Petition for Writ of Prohibition and/or Mandamus:
10

11 **III. STANDARD OF REVIEW:**
12

13 **A. The Bentleys Have A Plain, Speedy And Adequate Remedy**
14 **Which Precludes Extraordinary Relief.**

15 The Bentleys are not without relief under the circumstances
16 present here.

17 The Bentleys could post a bond to stay the Final Order of
18 Determination pursuant to NRS 533.235. Said section provides in
19 pertinent part:
20

21 **533.235. Operation of order of determination may be**
22 **stayed by filing bond with court; conditions of bond;**
duties of State Engineer.

23 1. At any time after the order of determination,
24 evidence and transcript has been filed with the clerk
25 of the court, the operation of the order of
26 determination may be stayed in whole or in part by any
27 party upon filing a bond in the court wherein such
28 determination is pending in such amount as the judge
thereof may prescribe, conditioned that such party will
pay all damage that may accrue by reason of such

1 determination not being enforced, pending a decree by
2 the court.

3 Because the Bentleys have suggested in the District Court
4 proceedings that a bond in the amount of \$1,500,000 is adequate
5 for their purposes and protection, 3 App. 621, the Real Parties
6 believe such a bond is adequate for their purposes and protection
7 as well.

8 If the Order for Division of Water filed on June 18, 2010, 3
9 App. 753-754, is in fact a form of injunctive relief, NRAP Rule
10 3A(b)(4) does provide for an appeal to be taken from "an order
11 granting or refusing to grant an injunction, dissolving or
12 refusing to dissolve an injunction." In fact, the Bentleys have
13 taken such an appeal from the Order in Case No. 56551 now pending
14 in this Court. Bentleys' appeal from the District Court's Order
15 is an adequate remedy in the ordinary course of law and precludes
16 the remedy of extraordinary relief sought in the instant
17 Petition. Karow v. Mitchell, 110 Nev. 958, 962, 878 P.2d 978
18 (1994); Kay v. Nunez, 122 Nev. 1100, 1104, 146 P.3d 801 (2006);
19 Howell v. Ricci, 124 Nev. Adv. Op. 99, 197 P.3d 1044, 1049
20 (2008).

21 Neither a writ of mandamus nor prohibition will issue when
22 the petitioner has a plain, speedy and adequate remedy in the
23 ordinary course of law. NRS 34.170; NRS 34.330; Pan v. Dist.
24 Ct., 120 Nev. 222, 224, 88 P.3d 840 (2004) (recognizing that the
25 right to appeal is generally an adequate legal remedy precluding
26
27
28

1 writ relief). Whether a petition for writ of mandamus or
2 prohibition will be considered is purely discretionary with this
3 Court. See, Smith v. District Court, 107 Nev. 674, 677, 818 P.2d
4 849 (1991). Petitioner bears the burden of demonstrating that
5 such extraordinary relief is warranted. Pan, 120 Nev. at 228.

6 The Petitioner has not met its burden of demonstrating that
7 this Court's intervention by way of extraordinary relief is
8 warranted at this time.

9
10 **B. No Proper Verification Or Service.**

11 The Verified Petition for Writ of Prohibition and/or
12 Mandamus, was neither properly verified by the Petitioners nor
13 served on the respondent Judge. A petition for writ of
14 extraordinary review must contain an affidavit of the "party
15 beneficially interested," who is the petitioner. See NRS 34.170
16 (mandamus) and 34.330 (prohibition). The petitioner's counsel
17 may not provide the requisite affidavit or verification except as
18 provided in NRS 15.010(1). When permitted under NRS 15.010, any
19 affidavit or verification by the attorney must set forth the
20 specific legal justification for the absence of an affidavit or
21 verification by the petitioner. NRS 15.010(2). No such
22 justification was set forth in the attorney's verification here
23 appearing. Petition, page 31.

24
25
26 In addition, NRAP 21(a) requires that a petition for
27 extraordinary review be accompanied by proof of service of the
28

petition upon the district judge. No such service was made or attempted here.

Because the Petition was not properly verified or served, it must be dismissed.

IV. STATEMENT OF FACTS:

A. The Real Parties Are Landowners And Water Right Holders.

J.W. Bentley and Maryann Bentley, as Trustees of the Bentley Family Trust 1995 Trust, are landowners and water right holders as set forth in the Final Order of Determination, to wit (1 App. 111-114):

<u>Owner</u>	<u>APN</u>	<u>Acreage</u>	<u>Proofs</u>
J.W. Bentley			V-06305
Maryann Bentley,	1219-14-001-013	12.93	V-06306
Trustees			V-06307
			V-06308

The Real Parties own ranch land located downstream from the Bentley Property. They also hold water rights in Sheridan Creek historically used to irrigate their ranch lands. They are obviously and necessarily interested in the excessive diversions made upstream by the Bentleys in violation of custom, practice, agreements and decrees. A tabulation of the Real Parties' land and water rights holdings are set forth in the Final Order of Determination as follows (1 App. 114-117, 137-138 and 141-142):

\\\\\\

\\\\\\

<u>Real Party</u>	<u>APN</u>	<u>Acreage</u>	<u>Proofs</u>
Donald S. and Kristina Forrester	1219-14-001-012	59.620	V-06309 V-06310
Hall Ranches, LLC	1219-14-001-003	23.800	V-06340 V-06341
Thomas J. Scyphers and Kathleen M. Scyphers	1219-14-001-004	13.010	V-06311 V-06312
Frank Scharo	1219-14-001-005	12.990	V-06311 V-06312
Sheridan Creek Equestrian Center Glenn Roberson	1219-14-001-008	35.960	V-06310
Ronald R. and Ginger G. Mitchell	1219-14-001-009 1219-14-001-010 1219-14-001-011	10.020 10.480 <u>10.370</u>	V-06336 V-06337
Total Acreage of Real Parties		176.430	

As stated by Petitioners (Petition, 15:25-26):

There is no dispute that all interested parties have the right to participate in these proceedings.

B. Bentleys' Notice Of Exceptions.

In their Notice of Exceptions and Exceptions to Final Order of Determination filed with the District Court on December 11, 2008, (2 App. 239-257) ("Exceptions"), the Bentleys in EXCEPTION NO. 1, DIVERSION SCHEDULE, PROOFS V-06307 and V-06308, state that they believe the Office of the State Engineer has created a Diversion Schedule ("Diversion Schedule"), for the waters from Sheridan Creek, Stutler Creek and Gansberg Spring. 2 App. 240:26-28. The Bentleys contend they alone should not be subject to any Diversion Schedule because of a claimed preemptive Water

1 Diversion and Use Agreement ("Diversion Agreement"), dated June
2 9, 1986. 2 App. 250-257. The Real Parties believe that the
3 claimed Diversion Agreement is unenforceable and, even if
4 enforceable, has been violated by the Bentleys and should be
5 terminated according to its terms.

6 **V. THE PLEADINGS PROPERLY ESTABLISH THE DISTRICT COURT'S**
7 **JURISDICTION:**
8

9 **A. Real Parties Are Claimants To The Water.**

10 The Order filed November 17, 2009, by the District Court,
11 found that "Intervenors' subsequent pleadings clarify that they
12 'are aligned with the State Engineer and support the Final Order
13 of Determination" 3 App. 476:9-16.

14 Thus, the District Court approved and validated the Real
15 Parties' proposed response. Accordingly, the Real Parties filed
16 the same on November 19, 2009, being the identical response as
17 previously attached to their Reply in Support of Motion to
18 Correct Order Allowing Intervention. 3 App. 479-481.

19 As noted by the Bentleys, under NRS 533.170(2) the special
20 statutory proceedings for the review of the Final Order of
21 Determination are quite limited:
22

23 2. The order of determination by the State Engineer
24 and the statements or claims of claimants and
25 exceptions made to the order of determination shall
26 constitute the pleadings, and there shall be no other
pleadings in the cause. [Emphasis added.]

27 As set forth in NRS 533.160, "the final order of
28 determination when filed with the clerk of the district court as

1 provided in NRS 533.165, has the legal effect of a complaint in a
2 civil action." See, J. H. Davenport, Nevada Water Law, 101 - 117
3 (2003).

4 Nevada water law is specific in character and compliance
5 must be strictly observed. G&M Properties v. District Court, 95
6 Nev. 301, 305, 594 P.2d 714 (1979).

7 Because the Real Parties' rights are aligned with the State
8 Engineer as set forth in the Final Order of Determination, no
9 exceptions were filed by them and no further pleadings appear to
10 be necessary, desirable or allowed. The Affirmative Defenses in
11 the Real Parties' Response are adequate statements under the
12 Nevada Rules of Civil Procedure to alert the Bentleys and the
13 District Court as to the Real Parties' arguments and defenses to
14 the Bentleys' various claims and exceptions, particularly in
15 regards to their claimed exception based on the Diversion
16 Agreement. Even if the Real Parties had not set forth these
17 defenses, as nonexcepting claimants their rights would
18 necessarily be influenced by any Exceptions to the Final Order of
19 Determination. They would thus have standing as real parties in
20 interest in all such proceedings. This Court in In Re Silver
21 Creek, 57 Nev. 232, 237-38, 61 P.2d 987 (1936), discussed this
22 topic as follows:
23
24

25 However, the character of an adjudication, under the
26 water code, forbids the idea of separate controversies
27 being involved. It is a proceeding put in motion by an
28 agent of the state to determine the relative rights of
water claimants on a stream or stream system.

1 Necessarily such interrelated rights must be adjusted
2 as a whole in order to reach an equitable settlement of
3 the controversy. This conclusion has been heretofore
4 declared by this court. In Humboldt Land & Cattle
5 Company v. Sixth Judicial District Court, 47 Nev. 396,
6 P. 612, 613, we said: "There is nothing in the context
7 or in the subject-matter to require such construction
8 [separable controversies], but the entire scope of the
9 legislation is persuasively to the contrary. As said
10 in one of the cases quoted from in Re Chewaucan River,
11 89 Or. 659 [171 P. 402], 175 P. 421: 'It is a case
12 where diverse and sundry parties are entitled to use so
13 much of the waters of a stream as they have put to
14 beneficial use and the purpose is to ascertain their
15 respective rights by a simple, economical, effective,
16 and comprehensive proceeding, and is not a separable
17 controversy between different claimants.'"

18 When such a controversy reaches this court on appeal,
19 it is not discernible how its character in this respect
20 can undergo any change by reason of nonexcepting
21 claimants. Although satisfied with the final order of
22 determination of the state engineer, they are still
23 vitally concerned in every other appropriation, because
24 a modification of the order might affect them.
25 [Emphasis supplied.]

26 NRS 533.240 provides that "In any suit brought in the
27 district court for the determination of a right or rights to the
28 use of water of any stream, all persons who claim the right to
use the waters of such stream and the stream system of which it
is a part shall be made parties." Thus, the Real Parties were
provided notice of the Final Order of Determination by the State
Engineer and were made parties to the adjudication just like all
other claimants. The fact that they are nonexcepting parties
does not diminish their right to participate.

1 As the Bentleys fully and forthrightly acknowledge, the Real
2 Parties have the absolute right to participate in these
3 proceedings. Petition, 15:25-26. Bentleys mainly quibble about
4 the form of such participation, never about the right to
5 participate.

6 As allowed by the District Court the Real Parties filed
7 their Response and Objections to Notice of Exceptions and
8 Exceptions to Final Order of Determination on November 19, 2009,
9 stating the following affirmative defenses (3 App. 479-482):

11 **FIRST AFFIRMATIVE DEFENSE**

12 The Notice of Exceptions and Exceptions to Final order
13 of Determination fails to state any claims upon which
14 relief can be granted.

15 **SECOND AFFIRMATIVE DEFENSE**

16 The lands of Intervenor lie downstream from the lands
17 of Bentley and the uses and proposed uses by Bentley as
18 described in their Exceptions conflict with the rights
19 of the Intervenor herein.

20 **THIRD AFFIRMATIVE DEFENSE**

21 The Water Diversion and Use Agreement is unenforceable.

22 **FOURTH AFFIRMATIVE DEFENSE**

23 The Water Diversion and Use Agreement is unenforceable
24 under the Nevada Statute of Frauds.

25 **FIFTH AFFIRMATIVE DEFENSE**

26 The use by Bentley to fill a new pond on their property
27 violates the Water Diversion and Use Agreement, even if
28 enforceable.

SIXTH AFFIRMATIVE DEFENSE

Bentley holds no permit for the new larger pond, in
violation of NRS 533.525.

These affirmative defenses gave the Bentleys fair notice of
the basis for the Real Parties contest of the Bentleys'

1 Exceptions. As the Bentleys have acknowledged that Real Parties
2 clearly have standing to participate in these proceedings, it is
3 proper to allow the District Court to proceed to hear the
4 Bentleys' Exceptions and the Real Parties' defenses.

5 Because NRS 533.170(2) disallows any other pleadings in the
6 case, the affirmative defenses by Real Parties serve the purpose
7 of giving fair notice to the Bentleys of the Real Parties'
8 defenses. No other pleading is necessary.
9

10 C. The Lower Court Has Complete And Full Jurisdiction.

11 In their Exceptions, 2 App. 239-257, the Bentleys in
12 EXCEPTION NO. 1, DIVERSION SCHEDULE, PROOFS V-06307 and V-06308,
13 state that the Office of the State Engineer has created a
14 Diversion Schedule ("Diversion Schedule"), for the waters from
15 Sheridan Creek, Stutler Creek and Gansberg Springs. The Bentleys
16 contend they are not subject to the Diversion Schedule because of
17 the Diversion Agreement. 2 App. 250-257. For various reasons, the
18 Real Parties believe that the Diversion Agreement is
19 unenforceable and, even if enforceable, has been violated by the
20 Bentleys.
21

22 If the District Court has jurisdiction to consider Bentleys'
23 Exception No. 1, seeking to avoid the State's proposed Diversion
24 Schedule based on the Diversion Agreement, then the District
25 Court presumably would have the same jurisdiction to hear the
26 Real Parties' defenses to the Diversion Agreement as downstream
27 users.
28

1 Bentleys' Exception No. 2, follows in the same vein, seeking
2 a corresponding map amendment. The Court's jurisdiction, or lack
3 of jurisdiction, would be the same.

4 The State Engineer lacks authority to resolve questions of
5 title to water rights, Howell v. Ricci, supra, 197 P.3d at 1047-
6 1050 (2008). NRS 533.024(2). Therefore, the District Court must
7 resolve the title issues raised by Bentleys' Exceptions. The
8 Bentleys cannot have it both ways, to invoke the District Court's
9 jurisdiction to hear their Exceptions, but to deny the District
10 Court's jurisdiction to hear the Real Parties' defenses thereto.
11 The Bentleys should not be allowed to take totally inconsistent
12 positions.
13

14 D. The Order For Division Of Water Was Specifically
15 Authorized By State Statute.
16

17 Almost a century ago in 1913, the Nevada Legislature adopted
18 the Nevada Water Code. Within the this Water Code is NRS 533.230,
19 which provides:

20 **533.230. Division of water by State Engineer during**
21 **time order of determination is pending in district**
22 **court.**

23 From and after the filing of the order of
24 determination, evidence and transcript with the county
25 clerk, and during the time the hearing of the order is
26 pending in the district court, the division of water
27 from the stream involved in such determination shall be
28 made by the State Engineer in accordance with the order
of determination. [Emphasis added.]

1 On January 8, 2010, Real Parties filed their Motion for
2 Division of Water and for Remand and Reference to State Engineer
3 for Further Evidence. 3 App. 581-594. The Motion was specifically
4 predicated upon NRS 533.230 providing that the Final Order of
5 Determination must be complied with pending resolution of any
6 exceptions and claims.

7 It has been held that "[t]he findings of the state engineer
8 are entitled to the presumption of correctness that they support
9 the decree." Scossa v. Church, 46 Nev. 254, 259, 205 P. 518, 210
10 P. 563 (1923). Furthermore, NRS 533.450(9) provides:

12 9. The decision of the State Engineer shall be prima
13 facie correct, and the burden of proof shall be upon
14 the party attacking the same.

15 In Anderson Family Assocs v. State Engineer, 124 Nev. Adv.
16 Op. 17, 179 P.3d 1201, 1203 (2008), this Court held as follows:

17 Still, because the appropriation of water in Nevada is
18 governed by statute, and the State Engineer is
19 authorized to regulate water appropriations, that
20 office has the implied power to construe the state's
water law provisions and great deference should be
given to the State Engineer's interpretation when it is
within the languages of those provisions.

21 In State Ex Rel. Hinckley v. District Court, 53 Nev. 343, 1
22 P.2d 105 (1931), this Court held that the waters of the Humboldt
23 River subject to an order of determination could only be properly
24 and legally distributed by the State Engineer when done in
25 accordance with the terms of the order. In the course of its
26 opinion, this Court stated (53 Nev. at 352-53):

1 In determining this question, we must look to the
2 intention of the legislature in enacting the water law.
3 In Vineyard Land & Stock Co. v. District Court, 42 Nev.
4 1, 171 Pac. 166, we held that the proceeding under the
5 water law is a quasi public proceeding, wherein all
6 claimants to the use of water of a stream system may
7 have their claims adjudicated, to the end that the
8 waters of the stream may be distributed under public
9 supervision without needless waste or controversy. In
other words, it was the intention of the legislature
that the people who are entitled to the use of the
waters of a stream system actually get it without
needless waste or controversy. The statute must be
interpreted in the light of that intention. [Emphasis
supplied.]

10 The Nevada Attorney General has offered the same opinion
11 that the State Engineer should distribute water of a river
12 subject to an order of determination according to that order of
13 determination until a court decree is filed. AGO 31-12 (3-10-
14 1931).

15 Here, the Bentleys have classified the Real Parties' request
16 for the division of water according to the Final Order of
17 Determination as a request for a preliminary injunction or a
18 quiet title action. However, there has been full compliance with
19 the provisions of NRS 533.230. The non-water case of Number One
20 Rent-A-Car v. Ramada Inns, Inc., 94 Nev. 779, 587 P. 2d 1329
21 (1978), cited by the Bentleys, has no application to this water
22 right case.
23

24 The Order For Division Of Water was filed following an
25 extensive hearing on May 17, 2010. 3 App. 728-748. The Court
26 entered its Order For Division of Water, specifically limiting
27

28

1 the time the Order would be in effect. 3 App. 753-755. See,
2 paragraph 3, which provides as follows:

3 The Court finds the 21 Day Rotation Schedule attached
4 hereto as Exhibit 1 is a fair and equitable Rotation
5 Schedule for the 2010 irrigation season. [Emphasis
6 supplied.]

7 Under the Final Order of Determination, the 2010 irrigation
8 season runs from April 1, 2010 to October 15, 2010. See Order of
9 Determination, Period of Use, 1 App. 98-99. Therefore, it is
10 unlikely that this Rotation Schedule will be in effect by the
11 time the Court hears this Petition.

12 **E. The Rotation Schedule Is Authorized.**

13 As noted by the District Court in its Order, NRS 533.230
14 specifically provides as follows:

15 **NRS 533.230 Division of water by State Engineer during**
16 **time order of determination is pending in district**
17 **court. From and after the filing of the order of**
18 **determination, evidence and transcript with the county**
19 **clerk, and during the time the hearing of the order is**
20 **pending in the district court, the division of water**
21 **from the stream involved in such determination shall be**
22 **made by the State Engineer in accordance with the order**
23 **of determination.**

24 The Final Order of Determination dated August 14, 2008,
25 pages 193-194, provides as follows (1 App. 199):

26 The diversion rates for the north and south split of
27 Sheridan Creek are based on a spring and early summer
28 average stream flow of 3.5 c.f.s. Flow and diversion
rates during periods of drought and middle to late
irrigation season will generally be less than the rates
determined in the Preliminary Order of Determination.
Therefore, all parties will have to share the water
shortage during periods of low flow. The total
diversion from either the north or south split can be

1 used in its entirety in a rotation system of
2 irrigation. [Emphasis supplied.]

3 NRS 533.075 provides as follows:

4 **NRS 533.075 Rotation in use of water.** To bring about
5 a more economical use of the available water supply, it
6 shall be lawful for water users owning lands to which
7 water is appurtenant to rotate in the use of the supply
8 to which they may be collectively entitled; or a single
9 water user, having lands to which water rights of a
10 different priority attach, may in like manner rotate in
11 use, when such rotation can be made without injury to
12 lands enjoying an earlier priority, to the end that
13 each user may have an irrigation head of at least 2
14 cubic feet per second.

15 Since 1913, it has been the policy of Nevada water law set
16 forth by the legislature to encourage rotation. It is the basis
17 upon which the Final Order of Determination was made as cited
18 above and is entirely consistent with prudent and practical water
19 distribution practices.

20 In A. Tarlock, Law of Water Rights and Resources, § 5:34
21 (2010), it is stated:

22 **§ 5:34 Priority--Modification of Priority--Rotation**

23 Priorities may be subordinated by rotation. To
24 encourage the maximum use of water among the widest
25 class of users, the use of water may be rotated among
26 users. Under rotation one user may take all the
27 available water, regardless of senior priorities for a
28 limited period of time and the next user may do the
29 same. Rotation will allow a junior to use water
30 subjected to a senior right out of priority. Rotation
31 may be imposed by a court as part of a decree.
32 [Emphasis supplied.]

33 In Hufford v. Dye, 121 P. 400, 406 (Cal. 1912), the
34 California Supreme Court stated:

1 If there is not water enough (and this appears to be
2 the fact) to permit a diversion of the stream and a
3 simultaneous use of part by both parties without
4 injury, the court may by its decree fix the times when,
5 by rotation, the whole may be used by each at different
6 times in proportion to their respective rights. In
7 doing so, the court should recognize the paramount and
8 primary right of the respondent to the first flow in a
9 full ditch and the use of all of it, or a lesser
10 quantity, for given periods during the irrigating
11 season, as it may be required. If this can be done so
12 that by giving respondent the first flow for a week or
13 every other week, or on certain days in the week, and
14 the appellant the right thereto in the intervals, the
15 wants of respondent are fully supplied, he obtains all
16 he is entitled to and has no ground of complaint.
17 While this remedy of rotation and use of waters for
18 irrigation purposes has been more generally applied as
19 between riparian proprietors [citations], in principle
20 there is no reason why it should not be made applicable
21 as between claimants by appropriation. It is applied
22 as between riparian owners to permit the beneficial use
23 of the waters by all, and as by appropriation only the
24 right to a beneficial use is acquired, there is no
25 reason why, when it can be justly made applicable, the
26 same rule of rotation should not be applied as between
27 appropriators.

16 Contrary to these persuasive and long standing authorities,
17 the Bentleys have seen fit to make this a march of one individual
18 who owns a ranch with two ponds for aesthetic purposes, against
19 the Real Parties who live and work and earn their income from
20 ranching. The Bentleys, although certainly allowed 1.6 days of
21 water within the 21 day rotation, are not entitled to priority
22 over the other water right holders to demand a continuous flow.

24 VI. CONCLUSION:

25 The Final Order of Determination of the State Engineer is
26 entitled to presumption of validity, from and after filing.
27 During the time the hearing of the Order is pending in District
28

1 Court, the division of water from the subject stream shall be
2 made by the State Engineer in accordance with the Final Order of
3 Determination. NRS 533.230. The Diversion Agreement which the
4 Bentleys claim to adjust and preempt the Final Order of
5 Determination has not been determined by the Court and in fact,
6 the Court has entered an Order for Division of Water without
7 reference to the Diversion Agreement. 3 App. 753-755. The Court
8 was within its jurisdiction to so order. The Bentleys have the
9 statutory remedy of filing a bond and staying the Order of
10 Determination pursuant to NRS 533.235. Because the Bentleys have
11 not availed themselves of the opportunity to stay the operation
12 of the Final Order of Determination pursuant to NRS 533.235, this
13 Court should not intervene by way of extraordinary writ.
14

15 The Bentleys also have an adequate remedy of appeal which
16 precludes extraordinary relief. Lastly, the Bentleys did not
17 follow the procedures applicable to a petition for writ by not
18 having a properly verified Petition or making service on the
19 District Court Judge David R. Gamble. For all of these reasons,
20 the Petition should be denied.
21

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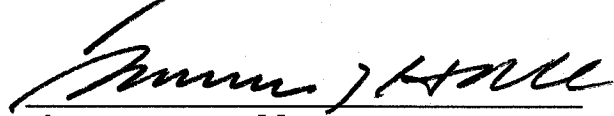
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1 DATED this 13th day of September, 2010.

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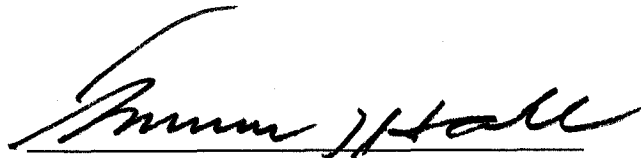
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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read the foregoing Answer, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to administrative record or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 13th day of September, 2010.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I am an employee of Thomas J. Hall, Esq., and that on this date, pursuant to NRAP 25(d), I placed in the U.S. Mail, postage prepaid, a true and correct copy of the foregoing document addressed to:

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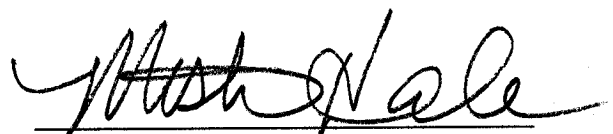
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