

EXHIBIT 4

EXHIBIT 4

Consolidated Case No.: 08-CV-0363-D1
Case No.: 12-CV-0141
Case No.: 13-CV-00121

2014 JAN -6 PM 4:27

RECEIVED

JAN 06 2014

Dept. No.: I

Thomas J. Hall, Esq.
Nevada State Bar No. 675
305 South Arlington Avenue
Post Office Box 3948
Reno, Nevada 89505
Telephone: 775-348-7011
Facsimile: 775-348-7211

TED T. RAN
P. GREGORY
DEPUTY

DOUGLAS COUNTY
DISTRICT COURT

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR DOUGLAS COUNTY

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
County, Nevada.

REPLY IN SUPPORT OF
MOTION TO AMEND
ORDER TO INCLUDE
AN AWARD OF COSTS

J.W. BENTLEY and MARYANN BENTLEY,
Trustees of the Bentley Family 1995
Trust; JOY SMITH, DANIEL BARDEN,
and ELAINE BARDEN,

Petitioners,

vs.

State of Nevada, Office of the
State Engineer,

Respondent.

Come now, THOMAS J. SCYPHERS and KATHLEEN M. SCYPHERS, FRANK

1 SCHARO, SHERIDAN CREEK EQUESTRIAN CENTER, LLC, a Nevada Limited
2 Liability Company, DONALD S. FORRESTER and KRISTINA M. FORRESTER,
3 RONALD R. MITCHELL and GINGER G. MITCHELL, and HALL RANCHES, LLC,
4 a Nevada Limited Liability Company ("Intervenors"), by and through
5 their counsel, GREGORY J. HALL, ESQ., and THOMAS J. HALL, ESQ.,
6 and hereby submit their Reply in Support of Motion to Amend Order
7 to Include an Award of Costs as follows:
8

9 **A. Procedural Note.**

10 At the conclusion of the hearing held October 17, 2013, the
11 Court denied the three Petitions for Judicial Review and concluded
12 (p. 6, ll. 24-25):
13

14 "But for today, petitions for review are denied. You'll
15 prepare the order, Mr. Hall."

16 Consequently, a draft Order was prepared by Thomas J. Hall,
17 Esq., and submitted to the District Court for review. In that
18 Order, a copy of which is attached hereto, in paragraph 35, an
19 award of costs was requested.

20 In the Order entered November 27, 2013, proposed paragraphs
21 34 and 35 were omitted.
22

23 In Petitioners' Opposition to Memorandum of Costs and Motion
24 to Retax and Settle Costs, the Petitioners stated at p. 2, ll. 6-
25 8:

26 This Court did not order the payment of costs in this
27 matter and Intervenors should have requested costs in a
28 motion which included points and authorities in which
they explained the legal basis for their claim of costs.

1 In an interesting change of course and about face, the
2 Petitioners now claim that the Intervenor's Motion is "not
3 appropriate" and "moot because they withdrew their Memorandum."
4 Perhaps Petitioners did not intend to mean what they argued
5 earlier.

7 The Petitioners are hard-pressed to now argue that there was
8 no invitation to Intervenor's to file a Motion for Costs, which
9 Intervenor's did voluntarily.¹

10 **B. The Motion Was Timely.**

11 The Notice of Entry of Order was filed December 4, 2013.
12 Intervenor's Motion to Amend Order to Include an Award of Costs
13 ("Motion to Amend") was filed December 18, 2013. Pursuant to NRCP
14 Rules 6(a) and 59(b), the Motion was timely filed within ten (10)
15 days of the Notice of Entry of Order.

17 A Motion made under NRCP 59(e) is a tolling motion for any
18 appeals. Specifically, NRAP 4(a)(4) provides as follows:

19
20 ¹ See NRS 47.240(3), to wit:

21 NRS 47.240. Conclusive presumptions.

22 The following presumptions, and no others, are
23 conclusive:

24 * * *

25 3. Whenever a party has, by his or her own declaration,
26 act or omission, intentionally and deliberately led
27 another to believe a particular thing true and to act
28 upon such belief, the party cannot, in any litigation
arising out of such declaration, act or omission, be
permitted to falsify it.

1 (4) *Effect of Certain Motions on a Notice of Appeal.* If
2 a party timely files in the district court any of the
3 following motions under the Nevada Rules of Civil
4 Procedure, the time to file a notice of appeal runs for
5 all parties from entry of the order disposing of the
6 last such remaining motion, and the notice of appeal
7 must be filed no later than 30 days from the date of
8 service of written notice of entry of that order:

9 * * *

10 (C) a motion under Rule 59 to alter or amend the
11 judgment.

12 Here, the Notice of Appeal was not lodged until December 23,
13 2013, five (5) days after the tolling motion was actually filed.

14 The appeal is therefore premature to be dealt with under NRAP

15 4(a)(6):

16 (6) *Premature Notice of Appeal.* A premature notice of
17 appeal does not divest the district court of
18 jurisdiction. The Supreme Court may dismiss as
19 premature a notice of appeal filed after the oral
20 pronouncement of a decision or order but before entry of
21 the written judgment or order, or before entry of the
22 written disposition of the last-remaining timely motion
23 listed in Rule 4(a)(4). If, however, a written order or
24 judgment, or a written disposition of the last remaining
25 timely motion listed in Rule 4(a)(4), is entered before
26 dismissal of the premature appeal, the notice of appeal
27 shall be considered filed on the date of and after entry
28 of the order, judgment or written disposition of the
last-remaining timely motion.

1 The fact that Petitioners waited until after the tolling
2 motion was filed to file their Notice of Appeal, does not bode
3 well for their argument that they are prejudiced by the filing of
4 the Motion.

5 \\\

1 C. Argument.

2 The following authorities support the motion for amendment to
3 include costs as that was part of the relief requested.
4

5 Pursuant to NRS 533.450(7), costs must be paid:

6 **NRS 533.450 Orders and decisions of State Engineer**
7 **subject to judicial review; procedure; motions for stay;**
8 **appeals; appearance by Attorney General.**

9 * * *

10 2. The proceedings in every case must be heard by the
11 court, and must be informal and summary, but full
12 opportunity to be heard must be had before judgment is
13 pronounced.

14 3. No such proceedings may be entertained unless notice
15 thereof, containing a statement of the substance of the
16 order or decision complained of, and, of the manner in
17 which the same injuriously affects the petitioner's
18 interests, has been served upon the State Engineer,
19 personally or by registered or certified mail, at the
20 Office of the State Engineer at the State Capital within
21 30 days following the rendition of the order or decision
22 in question. A similar notice must also be served
23 personally or by registered or certified mail upon the
24 person[s] who may have been affected by the order or
25 decision.

26 * * *

27 7. Costs must be paid as in civil cases brought in the
28 district court, except by the State Engineer or the
State.

29 In addition to identifying the statutory authority described
30 above in support of an award of costs to Intervenor, the
31 Intervenor also pointed out in their Motion to Amend that this
32 Court previously determined that, as the prevailing party in a
33 special proceeding, the Intervenor was entitled to recover their

1 costs. In Judge Gamble's April 5, 2012, Order, Intervenor were
2 adjudged to be the prevailing parties entitled to costs. Motion
3 to Amend, Ex. 1, p. 2, ¶ 19. The Court's November 27, 2013, Order
4 states that "[t]he Judgment entered by this Court on April 5,
5 2012, will not be amended via these proceedings." Order, ¶ 21. A
6 fair assumption derived from the two Orders is that Intervenor
7 continue to be the prevailing parties entitled to costs.
8

9 In their Opposition, Petitioners argue that a NRCP 59(e)
10 Motion is not appropriate, as NRCP 59(e) does not pertain to
11 requests for relief of a type wholly collateral to the judgment.
12 Opposition, p. 3, ll. 3-15. Petitioners specifically state that
13 "a motion concerning costs is a collateral motion that is outside
14 the scope of Rule 59(e). Opposition, p 3, ll. 20-21. However,
15 that blanket proposition is not always true, as evidenced by
16 Fleisher v. August, 103 Nev. 242, 737 P.2d 518 (1987). In
17 Fleisher, the Nevada Supreme Court held that a motion to amend
18 judgment, rather than a motion to retax and to settle costs under
19 NRS 18.110(4) was the proper method for amending a judgment with
20 respect to costs and fees. Although the facts of Fleisher are
21 somewhat dissimilar to the facts of this case, the underlying
22 analysis is relevant; namely, that the procedures of NRS 18.110(4)
23 and NRCP 59(e) are not in direct conflict. Id., at 247.
24

25 The true test of the applicability of NRCP 59(e), as
26 Petitioners clearly state in their Opposition, is whether the
27
28

1 motion is the type that requests a substantive alteration of the
2 judgment. See Osterneck v. Ernst & Whinney, 489 U.S. 169, 109
3 S.Ct. 987, cited in Petitioner's Opposition at p. 3, l. 12. Here,
4 the issue is not simply whether the Intervenor's are to be awarded
5 costs—at issue is primarily whether Intervenor's are prevailing
6 parties in a special proceeding. The Court did not specifically
7 rule on this issue in its November 27, 2013, Order, despite the
8 fact that the issue was squarely addressed in Judge Gamble's April
9 5, 2012, Order. If the present Order is substantively altered to
10 find that the Intervenor's are prevailing parties, then costs must
11 be paid under NRS 533.450(7) and a Memorandum of Costs would then
12 be properly re-submitted by Intervenor's within five (5) days
13 following the entry of the modified Order. Petitioners will not
14 have been prejudiced in any way, as they maintain full ability to
15 challenge the Memorandum of Costs at that time and their pending
16 appeal is protected under NRAP 4(a)(6).
17
18
19

20 As previously noted, legal counsel for Petitioners has first
21 argued that Intervenor's Memorandum of Costs is defective and
22 stated clearly that the request for costs should have been
23 addressed in a motion which included points and authorities. Now
24 that Intervenor's have withdrawn their Memorandum of Costs and
25 timely filed their Motion to Amend under NRCP 59(e), legal counsel
26 for Petitioners has argued that the Motion is not appropriate.
27 Intervenor's submit that both their Memorandum of Costs and Motion
28

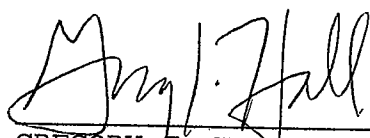
1 to Amend were timely filed in an effort to correctly address the
2 issue of the prevailing party/costs issue, which was neglected in
3 the final Order.
4

5 **D. Conclusion.**

6 This Court previously ruled that the proceedings in this
7 matter are to be considered a "special proceeding" for purposes of
8 an award of costs in favor of the Intervenor, as a result of
9 their adjudged status as "prevailing parties." NRS 533.450(7)
10 further mandates that "costs must be paid as in civil cases." The
11 Intervenor is, as prevailing parties, entitled to an award of
12 costs from the Petitioners and respectfully move this Court to
13 amend the Order entered herein on November 27, 2013, to include
14 findings of fact and rulings of law consistent with Intervenor's
15 status and award costs thereto.
16

17 DATED this 6th day of January, 2014.

18 LAW OFFICES OF THOMAS J. HALL

19
20 
21

22 GREGORY J. HALL, ESQ.

23 Nevada Bar No. 12221

24 305 South Arlington Avenue

25 Post Office Box 3948

26 Reno, Nevada 89505
27
28

CERTIFICATE OF SERVICE BY MAIL

I certify that I am an employee of Thomas J. Hall, Esq., and that on this date, pursuant to NRCP 5(b), I placed in the U.S. Mail, postage prepaid, a true and correct copy of the preceding document addressed to:

Matuska Law Offices, Ltd.
Michael L. Matuska, Esq.
937 Mica Drive, Suite 16A
Carson City, Nevada 89705

Sheridan Creek Equestrian
Glenn A. Roberson, Jr.
281 Tiger Wood Court
Gardnerville, Nevada 89460

Bryan L. Stockton, Esq.
Senior Deputy Attorney General
100 North Carson Street
Carson City, Nevada 89701

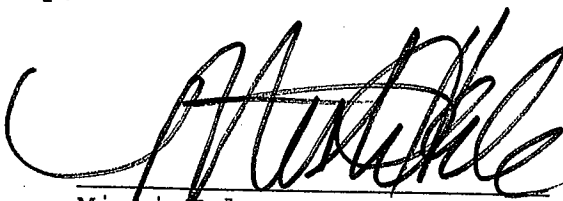
Donald S. Forrester
Kristina M. Forrester
913 Sheridan Lane
Gardnerville, Nevada 89460

Jessica C. Prunty, Esq.
Dyer, Lawrence, Penrose,
Flaherty, Donaldson & Prunty
2805 Mountain Street
Carson City, Nevada 89703

Frank Scharo
Post Office Box 1225
Minden, Nevada 89423

Ronald R. Mitchell
Ginger G. Mitchell
Post Office Box 5607
Stateline, Nevada 89449

DATED this 6th day of January, 2014.



Misti Hale

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT LIST

EXHIBIT 1: Proposed Order for Consolidation, Granting Requests
for Judicial Notice and Denying Petitions for Judicial Review.

EXHIBIT 1

EXHIBIT 1

Consolidated Case No.: 08-CV-0363-D-1
Case No.: 12-CV-0141
Case No.: 13-CV-0121

Dept. No.: I

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR DOUGLAS COUNTY

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
County, Nevada.

**ORDER FOR
CONSOLIDATION,
GRANTING REQUESTS FOR
JUDICIAL NOTICE AND
DENYING PETITIONS
FOR JUDICIAL REVIEW**

J.W. BENTLEY and MARY ANN BENTLEY,
TRUSTEES OF THE BENTLEY FAMILY
1995 TRUST; JOY SMITH, DANIEL BARDEN
and ELAINE BARDEN,

Petitioners,

v.

STATE OF NEVADA, OFFICE OF THE
STATE ENGINEER,

Respondent.

THIS MATTER came before the Court on October 17, 2013, on
petitions for judicial review ("Petitions") filed on April 30,
2012, and April 24, 2013. The Petitioners Joy Smith, Daniel
Barden and Elaine Barden ("Smith and Barden") were represented by

Jessica C. Prunty, Esq., of Dyer, Lawrence, Penrose, Flaherty, Donaldson & Prunty. The Petitioners J.W. Bentley and Mary Ann Bentley ("Bentleys") were represented by Michael L. Matuska, Esq., of Matuska Law Offices, Ltd. The Respondent State of Nevada, Office of the State Engineer ("State Engineer") was represented by Senior Deputy Attorney General Bryan L. Stockton, Esq. The following individuals and entities participated in defense of the State Engineer, to wit: Thomas Scyphers, Kathleen Scyphers, Frank Scharo, Sheridan Creek Equestrian Center, LLC, Donald Forrester, Kristina Forrester, Ronald Mitchell, Ginger Mitchell and Hall Ranches, LLC, (collectively "Intervenors") and were represented by Thomas J. Hall, Esq.

These matters have been fully briefed by the parties. The Court, having read all of the pleadings, including the petitions, the opening, answering and reply briefs, all requests for Judicial Notice and the previous orders entered herein. The Court, having also reviewed partial transcripts of the previous trial held herein, and having heard oral arguments and rendered an oral decision on October 17, 2013,

NOW THEREFORE, the Court makes the following findings, conclusions and orders as follows:

1. On October 11, 2012, this Court ordered two previous Petitions for Judicial Review which were filed in Case Nos. 12-CV-0141 and 12-CV-0145, shall be consolidated "into NJDC Case No.

08-CV-0363 and are hereby assigned the subsection designation of NJDC Case No. 08-CV-0363-D-1." That Order is hereby confirmed.

2. The Motion to Consolidate filed herein on June 13, 2013, is granted and the Petition for Judicial Review filed under Case No. 13-CV-0121, shall be consolidated with the ongoing adjudication proceedings under Case No. 08-CV-0363-D-1.

3. The Requests for Judicial Notice filed on November 5, 2012, and November 12, 2012, by the Bentleys, and on March 14, 2013, by the Intervenor, are hereby granted.

4. The Petitions are not moot even though the rotation schedules ordered in 2012 and 2013 expired at the end of each irrigation season, as the issues raised by Petitioners are capable of repetition, yet evading timely appellate review.

5. Water is a scarce and precious resource in the State of Nevada and every effort should be made to conserve all available water resources.

6. Water is important for drinking and it is important for the rest of our lives, for everything that the parties here use it for, for livestock, for agriculture, for ponds for fish and for the enjoyment of life.

7. There is not enough water available in this part of the country for everything that all of the parties want to use it for.

8. On August 14, 2008, the State Engineer filed his Final Order of Determination which provides for the parties' water rights as follows (at page 194):

The diversion rates for the north and south split of Sheridan Creek are based on a spring and early summer 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 used in its entirety in a rotation system of irrigation.

[Emphasis added.]

9. Pursuant to NRS 533.450(10), "[t]he decision of the State Engineer shall be prima facie correct, and the burden of proof shall be upon the party attacking the same."

10. On appeal the function of this Court is to review the evidence on which the State Engineer based his decision, and ascertain whether the evidence supports the decision. If so, the Court is bound to sustain the State Engineer's decision. State Engineer v. Curtis Park, 101 Nev. 30, 32, 692 P.2d 495 (1985).

11. Nevada common law is applicable to all the courts of the State of Nevada as set forth in NRS 1.030, to wit:

1.030. Application of common law in courts.

The common law of England, so far as it is not repugnant to or in conflict with the Constitution and laws of the United States, or the constitution and laws of this state, shall be the rule of decision in all the courts of this state.

12. The statutory consent provisions of NRS 533.075 do not prohibit this Court from exercising jurisdiction and control over the pre-statutory 1852 vested water rights under review here, which said section relates to other circumstances, to wit:

533.075. Rotation in use of water.

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

13. Since before 1913, it has been the policy of Nevada water law to encourage rotation of water. It is also the basis upon which the Final Order of Determination was made, as cited above, and is entirely consistent with prudent and practical water distribution practices.

14. The concept of rotation of water is fairly ancient, as discussed by C. Kinney, A Treatise on the Law of Irrigation and Water Rights, 2nd Ed., §909, Rotation as a Matter of Economy, at 1607 (1912):

As was said in a recent Idaho case: "The use of water under the rotation system is approved by high engineering authorities." And the [Idaho] Court proceeds to quote from those great works by Robert B. Buckley and Sir Hanbury Brown, and we can do no better than to quote what these works say upon the subject: "The most wasteful system of irrigation possible is

that under which all branch canals, distributaries and village channels are in use continuously and the available supply is slowly dribbling into the fields. For not only is the actual loss of water greater, but under this system there is also this further disadvantage, that the velocities in all the distributaries and minor channels are reduced, and the silt in the water, which at these points of the system is nearly always advantageous to the fields, is largely deposited in the channels and not carried onto the cultivated ground. The system of irrigation by rotation or by tatils, as it is called in Upper India, is of great advantage, not only in checking the loss of water in the channel, but in teaching economical irrigation to the cultivators and in insuring an equitable division of the supply among the people.

15. The rotation system is recognized by the leading writers on irrigation and irrigation engineering as a most efficient and desirable method and as producing the highest duty of water of any method in use. State v. Twin Falls Canal Co., 121 Pac. 1039, 1049-50 (Idaho 1911).

16. In the absence of an agreement of the parties pursuant to NRS 533.075, the Court may by its orders fix the times when, by rotation, the whole may be used by each at different times in proportion to their respective rights.

17. This Court entered Findings of Fact, Conclusions of Law and Judgment, on April 5, 2012 ("Judgment"), ordering the State Engineer to impose a rotation schedule on the water rights from the North Diversion of Sheridan Creek and tributaries subject to certain conditions stated in the Judgment.

18. Whenever the flow in the North Diversion of Sheridan Creek and tributaries is below 2.0 cubic feet per second (cfs), a rotation schedule would be needed to avoid injury to the water users.

20. Pursuant to the Judgment entered herein by District Judge David R. Gamble (Retired), on April 5, 2012, when the combined flow from the North Diversion of Sheridan Creek and tributaries drops below 2.0 cfs, the State Engineer shall impose a rotation schedule.

21. The rotation schedule shall be in effect from the time the North Diversion of Sheridan Creek flow drops below 2.0 cfs until superseded, until the flow rises to above 2.0 cfs or until the schedule is stayed or modified by this Court.

22. The rotation schedule shall be prepared at the beginning of each irrigation season to allow review by this Court, under NRS 533.450, if any party challenges the schedule.

23. The rotation schedules imposed by the State Engineer for the 2012 and 2013 irrigation seasons were predicated on a flow from the North Diversion of Sheridan Creek and tributaries of below 2.0 cfs.

24. Substantial evidence supports this Court's decision and Judgment for rotation and the State Engineer's implementation of the same.

25. The rotation of the available water has been properly ordered by this Court and properly implemented by the State Engineer.

26. The Court does not find that the rotation order was illegal.

27. It is not the function of this Court to readdress the prior decision and Judgment of this Court entered April 5, 2012.

28. The Judgment entered by this Court on April 5, 2012, will not be amended via these proceedings.

29. This Court has jurisdiction over the action and the parties, and has the legal authority to order the State Engineer to implement rotation of water during periods of low flow.

30. The Petition for Judicial Review filed in Case No. 12-CV-0141 is hereby denied in all regards.

31. The Petition for Judicial Review filed in Case 12-CV-0145 is hereby denied in all regards.

32. The Petition for Judicial Review filed in Case 13-CV-0121 is hereby denied in all regards.

33. This Order shall apply in a continuing fashion to all future rotation schedules imposed until such time as the Final Decree is entered herein.

34. Pursuant to NRS 533.450(7), costs must be paid as in civil cases brought in the district court.

35. The State Engineer and the Intervenor are entitled to their costs.

IT IS SO ORDERED.

DATED this _____ day of November, 2013.

DISTRICT JUDGE

Submitted by:
LAW OFFICES OF THOMAS J. HALL

Thomas J. Hall, Esq.
Nevada State Bar No. 675
305 South Arlington Avenue
Post Office Box 3948
Reno, Nevada 89505
Telephone: 775-348-7011
Facsimile: 775-348-7211

1
2 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

3 In Re: Rotation Schedule

4 In the Matter of the Determination
5 of the Relative Rights in and to
6 The Waters of Mott Creek, Taylor
7 Creek, Cary Creek (aka Carey
8 Creek), Monument Creek, and Bulls
9 Canyon, Stutler Creek (aka Stattler
10 Creek), Sheridan Creek, Gansberg
11 Spring, Sharpe Spring, Wheeler
12 Creek No. 1 Wheeler Creek No. 2,
13 Miller Creek, Beers Spring, Luther
14 Creek and Various Unnamed Sources
15 in Carson Valley, Douglas County,
16 Nevada.

12 JOY SMITH, DANIEL BARDEN and
13 ELAINE BARDEN, J.W. BENTLEY and
14 MARYANN BENTLEY, TRUSTEES OF THE
15 BENTLEY FAMILY 1995 TRUST,
16 1995 Trust,

15 Appellants,

16 vs.

17 STATE OF NEVADA, OFFICE OF THE STATE
18 ENGINEER,

18 Respondent.

19
20
21 **OPPOSITION TO MOTION FOR DETERMINATION OF APPEALABLE ORDER**
22 **AND COUNTER MOTION TO DISMISS APPEAL**

23 COME NOW THOMAS J. SCYPHERS and KATHLEEN M. SCYPHERS, FRANK
24 SCHARO, SHERIDAN CREEK EQUESTRIAN CENTER, LLC, a Nevada Limited
25 Liability Company, DONALD S. FORRESTER and KRISTINA M. FORRESTER,
26 RONALD R. MITCHELL and GINGER G. MITCHELL, and HALL RANCHES, LLC, a
27 Nevada Limited Liability Company ("Intervenors"), as Real Parties
28 in Interest and as Judgment Creditors in the Order entered November

Electronically Filed
Jan 23 2014 11:26 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

Supreme Court No. 64773
District Court Consolidated
Case No.: 08-CV-0363-D1

1
2 27, 2013, by and through their counsel, THOMAS J. HALL, ESQ., and
3 oppose the Motion for Determination of Appealable Order and file a
4 Counter Motion to Dismiss as follows:

5 **I. PROCEDURAL NOTE.**

6 The continued unhappiness of J.W. Bentley and Maryann
7 Bentley, Trustees of the Bentley Family 1995 Trust, with the
8 orders of the Ninth Judicial District Court in administering water
9 rights from Sheridan Creek has been before this Court multiple
10 times, including the following:

- 12 1. Appeal 56551, Order Dismissing Appeal entered January
13 18, 2011, as being moot.
- 14 2. Writ proceeding 56351, Order Denying Petition for Writ
15 of Prohibition or Mandamus entered March 18, 2011.
- 16 3. Appeal 59188, Order Dismissing Appeal entered January
17 23, 2012, as being moot.
- 18 4. Appeal 60891, Order Dismissing Appeal entered February
19 15, 2013, as the district court's Order was not appealable.
- 20 5. Appeal 62620, Order Dismissing Appeal entered March 14,
21 2013, holding that the Order awarding attorney fees is not
22 substantially appealable.
- 23
- 24

25 Furthermore, in their attached partial record, the Appellants
26 failed to include a copy of Intervenor's Reply in Support of Motion
27 to Amend Order to Include an Award of Costs. A copy is attached
28 hereto as Exhibit 4.

1
2 **II. ANALYSIS AND DISCUSSION.**

3 Here, the Notice of Appeal was not lodged until December 23,
4 2013, five (5) days after the tolling motion was actually filed.
5 The appeal is therefore premature to be dealt with under NRAP
6 4(a)(6):

7
8 (6) *Premature Notice of Appeal.* A premature notice of
9 appeal does not divest the district court of
10 jurisdiction. The Supreme Court may dismiss as
11 premature a notice of appeal filed after the oral
12 pronouncement of a decision or order but before entry of
13 the written judgment or order, or before entry of the
14 written disposition of the last-remaining timely motion
15 listed in Rule 4(a)(4). If, however, a written order or
16 judgment, or a written disposition of the last remaining
17 timely motion listed in Rule 4(a)(4), is entered before
18 dismissal of the premature appeal, the notice of appeal
19 shall be considered filed on the date of and after entry
20 of the order, judgment or written disposition of the
21 last-remaining timely motion.

22 The fact that Appellants waited until after the tolling
23 motion was filed to file their Notice of Appeal, does not bode
24 well for their argument that they are prejudiced by the filing of
25 the Motion.

26 As further explained in the Intervenor's Motion to the
27 District Court, and in their Reply, NRS 533.450 mandates that
28 costs be awarded as follows:

Pursuant to NRS 533.450(7), costs must be paid:

**NRS 533.450 Orders and decisions of State Engineer
subject to judicial review; procedure; motions for stay;
appeals; appearance by Attorney General.**

* * *

1
2 2. The proceedings in every case must be heard by the
3 court, and must be informal and summary, but full
4 opportunity to be heard must be had before judgment is
pronounced.

5 3. No such proceedings may be entertained unless notice
6 thereof, containing a statement of the substance of the
7 order or decision complained of, and, of the manner in
8 which the same injuriously affects the petitioner's
9 interests, has been served upon the State Engineer,
10 personally or by registered or certified mail, at the
11 Office of the State Engineer at the State Capital within
30 days following the rendition of the order or decision
in question. A similar notice must also be served
personally or by registered or certified mail upon the
person[s] who may have been affected by the order or
decision.

12 * * *

13 7. Costs must be paid as in civil cases brought in the
14 district court, except by the State Engineer or the
15 State.

16 In Fleisher v. August, 103 Nev. 242, 737 P.2d 518 (1987),
17 this Court held that a motion to amend judgment, rather than a
18 motion to retax and to settle costs under NRS 18.110(4) was the
19 proper method for amending a judgment with respect to costs and
20 fees. Although the facts of Fleisher are somewhat dissimilar to
21 the facts of this case, the underlying analysis is relevant;
22 namely, that the procedures of NRS 18.110(4) and NRCP 59(e) are
23 not in direct conflict. Id., at 247.

24 The true test of the applicability of NRCP 59(e), as
25 Appellants clearly state in their trial court Opposition, is
26 whether the motion is the type that requests a substantive
27 alteration of the judgment. See Osterneck v. Ernst & Whinney, 489

1
2 U.S. 169, 109 S.Ct. 987, cited in Petitioner's Opposition at p. 3,
3 1. 12. Here, the issue is not simply whether the Intervenor's are
4 to be awarded costs--at issue is primarily whether Intervenor's are
5 prevailing parties in a special proceeding. The Court did not
6 specifically rule on this issue in its November 27, 2013, Order,
7 despite the fact that the issue was squarely addressed in Judge
8 Gamble's April 5, 2012, Order. If the present Order is
9 substantively altered to find that the Intervenor's are prevailing
10 parties, then costs must be paid under NRS 533.450(7) and a
11 Memorandum of Costs would then be properly re-submitted by
12 Intervenor's within five (5) days following the entry of the
13 modified Order. Appellants will not have been prejudiced in any
14 way, as they maintain full ability to challenge the Memorandum of
15 Costs at that time, and would retain their right to appeal the
16 Amended Order.
17
18

19 **III. CONCLUSION.**

20 The Notice of Appeal is clearly premature and this Appeal
21 should be dismissed.

22 The undersigned does hereby affirm that the preceding
23 document does not contain the social security number of any
24 person.
25

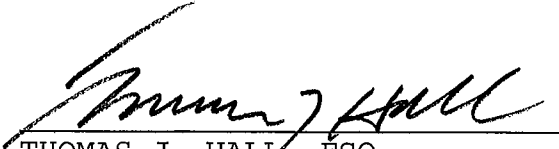
26 \\\

27 \\\

28 \\\

1
2 Respectfully submitted this 22nd day of January, 2014.

3 LAW OFFICES OF THOMAS J. HALL

4
5 
6 THOMAS J. HALL, ESQ.

Nevada Bar No. 675

7 305 South Arlington Avenue

8 Post Office Box 3948

Reno, Nevada 89505

9 Telephone: (775) 348-7011

10 Facsimile: (775) 348-7211
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I certify that I am an employee of Thomas J. Hall, Esq., and that on this date, pursuant to NRCP 5(b), I placed in the U.S. Mail, postage prepaid, a true and correct copy of the preceding document addressed to:

Matuska Law Offices, Ltd.
Michael L. Matuska, Esq.
937 Mica Drive, Suite 16A
Carson City, Nevada 89705

Sheridan Creek Equestrian
Glenn A. Roberson, Jr.
281 Tiger Wood Court
Gardnerville, Nevada 89460

Bryan L. Stockton, Esq.
Senior Deputy Attorney General
100 North Carson Street
Carson City, Nevada 89701


Donald S. Forrester
Kristina M. Forrester
913 Sheridan Lane
Gardnerville, Nevada 89460

Jessica C. Prunty, Esq.
Dyer, Lawrence, Penrose,
Flaherty, Donaldson & Prunty
2805 Mountain Street
Carson City, Nevada 89703

Frank Scharo
Post Office Box 1225
Minden, Nevada 89423

Ronald R. Mitchell
Ginger G. Mitchell
Post Office Box 5607
Stateline, Nevada 89449

DATED this 22nd day of January, 2014.


Misti Hale

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT LIST

EXHIBIT 4: Reply in Support of Motion to Amend Order to Include
an Award of Costs.