

IN THE SUPREME COURT OF NEVADA

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Tracie K. Lindeman
Clerk of Supreme Court

In Re: Rotation Schedule

Supreme Court Case No. 64773

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.

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

**REPLY TO OPPOSITION TO
MOTION FOR DETERMINATION
OF APPEALABLE ORDER**

AND

**OPPOSITION TO COUNTER
MOTION TO DISMISS APPEAL**

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

Appellants,

v.

STATE OF NEVADA, OFFICE OF THE
STATE ENGINEER,

Respondent.

COME NOW J.W. BENTLEY and MARYANN BENTLEY, Trustees of the
Bentley Family 1995 Trust ("Bentley"), by and through their counsel of record,
Matuska Law Offices, Ltd., Michael L. Matuska, and hereby reply to the *Opposition*
to Motion for Determination of Appealable Order and Counter Motion to Dismiss
Appeal ("*Opposition*") filed by Donald S. Forrester and Kristina M. Forrester,
Hall Ranches, LLC, a Nevada limited liability company, Thomas J. Scyphers and

1 Kathleen M. Scyphers, Frank Scharo, Sheridan Creek Equestrian Center, LLC, a
2 Nevada limited liability company, and Ronald R. Mitchell and Ginger G. Mitchell
3 (collectively, "Intervenors").
4

5 This appeal concerns vested water rights from the North Branch of Sheridan
6 Creek located in Douglas County, Nevada. The Ninth Judicial District Court, David
7 R. Gamble, Judge, imposed a court mandated rotation schedule on those water rights
8 for the 2010 and 2011 irrigation seasons. It did so without evidentiary hearings and
9 without legal authority. Bentley appealed those orders as Case Nos. 56551 and
10 59188. Those appeals were dismissed on the basis that the rotation schedules in
11 question expired on their own terms at the end of the irrigation season. Although
12 Intervenors referred to those appeals and others in their *Opposition*, it is not clear
13 what legal significance, if any, Intervenors assign to the prior appeals. What is clear
14 is that Intervenors wish to preclude an appeal on the merits of the rotation
15 schedules.¹
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21 ¹ Intervenors also referenced a writ proceeding and two (2) other appeals.
22 Intervenors filed a set of affirmative defenses in Case No. 08-CV-0363-D that was
23 essentially a complaint which requested relief from a recorded, private diversion
24 agreement entered into between the predecessors to these parties. Intervenors'
25 affirmative defenses were separate from an answer. Hon. David R Gamble refused
26 to dismiss the affirmative defenses even though it did not constitute a pleading
27 under NRCP 7 and is prohibited in a statutory adjudication case wherein the Order
28 of Final Determination filed by the State Engineer is considered the complaint and
any exceptions filed thereto are considered the answer(s). NRS 533.170. "There
shall be no other pleadings in the cause." NRS 533.170(2). Bentley petitioned this
Court for a writ of prohibition and/or mandamus and cited *Smith v. District Court*,
113 Nev. 1343, 1344-45, 950 P.2d 280, 281 (1997) as controlling authority for

1 The Nevada State Engineer then imposed a rotation schedule for the 2012 and
2 2013 irrigation seasons. Appellants petitioned for judicial review in the Ninth
3 Judicial District Court. Those petitions were consolidated and proceeded as Case
4 No. 08-CV-0363-D-1. The Nevada State Engineer was the respondent in Case
5 No. 08-CV-0363-D-1. The petitions for judicial review were denied on
6 November 27, 2013 (See **Exhibit "1"** to *Motion for Determination of Appealable*
7 *Order*). However, Nathan Tod Young, Judge, confirmed in the *Order* that Bentley's
8 challenge to the rotation schedule was ripe because the issue was not just likely to
9 repeat, but was in fact repeating.
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12 The Nevada State Engineer did not oppose Bentleys' *Motion for*
13 *Determination of Appealable Order*. Rather, the *Opposition* was filed by a group of
14 individuals who intervened in Case No. 08-CV-0363-D-1. Intervenors include other
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17 seeking a writ to compel dismissal of a non-conforming pleading. This Court sua
18 sponte dismissed the writ petition due to a defect in the proof of service without first
19 directing Bentley to either complete service or correct the proof of service to
20 demonstrate that service was completed.

21 Case No. 08-CV-0363-D proceeded to trial on Intervenors' unauthorized
22 pleading. The *Findings of Fact, Conclusions of Law and Judgment* ("*Judgment*")
23 was entered on April 5, 2012. David R. Gamble, Judge, certified that *Judgment* as
24 final, even though no motion for certification had been filed. Bentley was obligated
25 to notice the appeal in Case No. 60891. Bentley agreed with this Court's Order
26 which ruled that the *Judgment* was not a final judgment and dismissed the appeal.
27 Nevertheless, Intervenors proceeded to move for attorney's fees, even though the
28 *Judgment* was not final. Bentley was likewise obligated to appeal from the order
awarding attorney's fees in Case No. 62620 and promptly requested a determination
of whether that order was an appealable order. Bentley also agreed with this Court's
Order which ruled that it was not a final order and dismissed the appeal regarding
attorney's fees.


1 claimants with water rights from the North Branch of Sheridan Creek. Intervenor
2 consider themselves to be prevailing parties in Case No. 08-CV-0363-D-1. They
3 moved to have the November 27, 2013 *Order* amended to include an award of costs
4 in their favor. Intervenor contend that their motion for an award of costs is a
5 tolling motion under NRCP 59(e). Appellants disagree, but in an abundance of
6 caution, filed the *Motion for Determination of Appealable Order*.
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9 Intervenor did not address NRAP 4(a)(6) in their *Opposition*. Dismissal of
10 this appeal is not certain, even if this Court determines that Intervenor's motion for
11 an award of costs is a tolling motion. Whether dismissal is required depends on the
12 timing of the lower court's resolution of Intervenor's putative tolling motion.
13 Dismissal of a premature appeal is not appropriate where the lower court resolves
14 the last tolling motion prior to dismissal of the appeal.
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17 DATED this 28th day of January 2014.

18 MATUSKA LAW OFFICES, LTD.

19
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21 By:


22 Michael L. Matuska, SBN 5711
23 Attorneys for Appellants J.W. Bentley
24 and MaryAnn Bentley
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of MATUSKA LAW OFFICES, LTD. and that on the 28th day of January 2014, I served a true and correct copy of the preceding document entitled **REPLY TO OPPOSITION TO MOTION FOR DETERMINATION OF APPEALABLE ORDER AND OPPOSITION TO COUNTER MOTION TO DISMISS APPEAL** addressed to:

Bryan L. Stockton Deputy Attorney General 100 North Carson Street Carson City, NV 89701	Thomas J. Hall, Esq. 305 South Arlington Avenue P.O. Box 3948 Reno NV 89505-3948
Jessica Prunty Dyer Lawrence Flaherty Donaldson and Prunty 2805 Mountain Street Carson City, Nevada 89703	

☒ **BY U.S. MAIL:** I deposited for mailing in the United States mail, with postage fully prepaid, an envelope containing the above-identified document at Carson City, Nevada, in the ordinary course of business.

☐ **BY FACSIMILE:** I transmitted via facsimile from Matuska Law Offices, Ltd., the above-identified document in the ordinary course of business to the individual and facsimile numbers indicated.


LIZ STERN, ALS