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IN THE SUPREME COURT OF NEVADA

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

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.

APPELLANTS' OPENING BRIEF

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COME NOW Appellants, 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 file this Opening Brief on Appeal.

I. JURISDICTIONAL STATEMENT

This appeal is brought under NRAP 3(b)(1) following the entry of a final order on November 27, 2013 denying consolidated petitions for judicial review. The petitions for judicial review challenge the actions of the Nevada State Engineer imposing a rotation schedule on Appellants' vested water rights from the North Branch of Sheridan Creek. The Nevada State Engineer imposed rotation schedules for the entirety of the 2012 and 2013 irrigation seasons on all water rights users. Although the petitions for judicial review were consolidated with the pending adjudication case (08-CV-0363), they were designated as subproceeding D-1 and treated as a separate matter.

The petitions for judicial review proceeded to a hearing on October 17, 2013, before the Hon. Nathan Tod Young. The written *Order* was entered on November 27, 2013. Judge Young declined to address the merits of the petitions for judicial review on the basis that the rotation schedule was ordered in a previous order that was entered in the adjudication case (08-CV-0363) on April 5, 2012. Judge Young did not address the question of whether that prior has preclusive effect under the doctrines of issue preclusion or claim preclusion. Appellants filed their Joint Notice

of Appeal in this case on December 23, 2013 (App. Vol. 5 at 1063).

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

The overriding question in this case is whether the Court and the Nevada State Engineer can subject Appellants' vested water rights to a rotation schedule based on the preference of a bare majority, in this case six (6) of eleven (11) claimants.

This appeal presents the following issues for review:

1. Whether the *Findings of Fact, Conclusions of Law and Judgment* ("Judgment") that was entered in Case No. 08-CV-0363-D on April 5, 2012 is a final judgment that precludes the petitions for judicial review by operation of the doctrines of claim preclusion or issue preclusion. This is a question of law.

2. Whether a rotation schedule can be imposed over the objection of the water rights users under NRS 533.075. This is a question of law.

3. Whether a compulsory rotation schedule violates the Final Order of Determination in Case No. 08-CV-0363. This is mixed question of law and fact.

4. Whether a compulsory rotation schedule violates the non-impairment statute, NRS 533.085. This is a question of law.

5. Whether the rotation schedule alters the historical flow. This is a question of fact.

6. Whether the rotation schedule improperly sends water from Gansberg Springs to claimants who do not enjoy rights to Gansberg Springs. This is a mixed

1 question of law and fact.

2 7. Whether the rotation schedule is (a) in violation of constitutional or
3 statutory provisions, (b) in excess of the statutory authority of the State Engineer to
4 impose, (c) affected by other error of law, (d) not supported by substantial
5 evidence, and/or (e) arbitrary or capricious or characterized by abuse of discretion.
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7

8 **III. STATEMENT OF THE CASE**

9 This is an appeal from an order denying consolidated petitions for judicial
10 review of the actions of the Nevada State Engineer. The petitions for judicial
11 review challenge the actions of the Nevada State Engineer imposing a rotation
12 schedule on Appellants' vested water rights from the North Branch of Sheridan
13 Creek. Appellants enjoy vested water rights which have been proven, accepted,
14 adjudicated, and decreed in Case No. 08-CV-0363 free from conditions, including
15 rotation. The State Engineer maintains that he was required to impose a rotation
16 schedule pursuant to the *Judgment* entered by the Hon. David R. Gamble on April 5,
17 2012, after the trial in Case No. 08-CV-0363-D (App. Vol. 4 at 759-775). However,
18 that trial concerned a Diversion Agreement which benefits Bentley (App. Vol. 3 at
19 436-443). The Diversion Agreement is a separate issue from the rotation schedule
20 that is the subject of this appeal. The issue of the rotation schedule was not tried in
21 Case No. 08-CV-0363-D. The *Judgment* is not a final judgment (See Case No.
22 60891), expressly states that the order regarding the rotation schedule will not be
23 part of the forthcoming final decree, and the parties stipulated and the *Judgment*
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ordered that Bentley reserved the right to petition for judicial review:

15. The parties made the following stipulations in relation to these Exceptions at the beginning of the trial, which were adopted by the Court:

a. Exception 1, in part, was that the State Engineer would not attempt to include a rotation schedule in the Decree itself, but that the provisions of NRS 533.075 and the order of this Court would be used to determine when and if a rotation schedule is needed to efficiently use the waters of the State of Nevada. However, Bentley reserves all objections to the imposition of a rotation schedule, including objection about the statutory authority to do so. (*Judgment*, App. Vol. 4 at 762).

Nevertheless, the *Judgment* included a directive to the Nevada State Engineer to impose a rotation schedule on all users when the flow of the North Branch of Sheridan Creek drops below 2.0 cfs. (*Judgment*, App. Vol. 4 at 773).

NRS 533.075 was the only basis for the rotation schedule cited in the *Judgment*. However, that section only authorizes rotation schedules upon agreement from the water users, and when read in conjunction with the non-impairment statute, NRS 533.085, precludes the court and the State Engineer from imposing compulsory rotation schedules on vested claims.

IV. STATEMENT OF FACTS

1. The Nevada State Engineer filed the *Final Order of Determination* in Case No. 08-CV-0363 ("FOD") on August 14, 2008. (App. Vol. 2 at 222-456). Among other things, the FOD adjudicated the vested rights that pre-existed the adoption of Nevada's water statutes for various stream systems on the east slope of the Carson Range of the Sierra Nevada Mountains located in Douglas County,

1 Nevada. Claimants were given until five (5) days prior to the scheduled hearing on
2 April 1, 2008 to notice any exceptions to the FOD. The FOD has the effect of a
3 complaint, and any exceptions filed thereto have the effect of an answer. "There
4 shall be no other pleadings in the case." NRS 533.170.
5

6 2. This case concerns the North Branch of Sheridan Creek which was one
7 of the stream systems adjudicated in the FOD. Bentley included a list of the eleven
8 (11) interested parties to the North Branch of Sheridan Creek as determined by the
9 FOD as *Appendix A* to its *Opening Brief* in the proceedings below (App. Vol. 1 at
10 133). This list is also provided herewith as *Appendix A*. *Appendix A* summarizes
11 the approved acreage and the pro rata ownership. Bentley, Smith, and Barden are
12 Appellants herein. Bentley also leases Pestana's water rights. Sapp has not
13 appeared in these proceedings. Hall Ranches, LLC, Thomas J. Scyphers and
14 Kathleen M. Scyphers, Frank Scharo, Sheridan Creek Equestrian Center, LLC, a
15 Nevada Limited Liability Company, Ronald Mitchell and Ginger Mitchell, and
16 Donald S. Forrester and Kristina M. Forrester (collectively, "Intervenors")
17 intervened in the proceedings below (App. Vol. 1 at 113-116).
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23 3. Sheridan Creek splits into the North Branch and the South Branch. The
24 North Branch has approximately sixty percent (60%) of the flow, 2.1 cfs from a
25 measured flow of 3.5 cfs. (FOD, App. Vol. 2 at 388). Flows in the North Branch of
26 Sheridan Creek are also supplemented by two additional water sources, Stutler
27 Creek and Gansberg Spring. The water from those sources is captured by collection
28

1 boxes and piped into the North Branch of Sheridan Creek below the split with the
2 South Branch. (See FOD, App. Vol. 2 at 89; 418-419; see also Analysis of the
3 Distribution System and the 2011 Rotation Schedule Pertaining to the Waters of the
4 North Diversion of Sheridan Creek and its Tributaries prepared by Michael Stanka,
5 P.E. ("Stanka Report"), App. Vol. 3 at 522). The North Branch of Sheridan Creek
6 enters property owned by Bentley, from where it can be split three (3) ways through
7 a series of water boxes, pipes, and the original Sheridan Creek ditch/creek bed to
8 reach the various claimants. The Stanka Report provides the best illustration of the
9 three (3) way split in the delivery system for the North Branch of Sheridan Creek
10 (App. Vol. 3 at 522).

14 4. Bentley purchased 12.93 acres of property located on Sheridan Lane in
15 Douglas County, Nevada, from Theadore and Kathleen Weber on May 6, 2006.
16 (App. Vol. 3 at 463). The Webers had earlier submitted four (4) proofs of claim for
17 vested water rights in 1994, including:
18

- 19
- 20 i. V-036305 for irrigation rights from Sheridan Creek;
 - 21 ii. V-03606 for overlapping irrigation rights from Stutler Creek,
22 commingled with Sheridan Creek;
 - 23
 - 24 iii. V-03607 for stock water and wildlife rights from Sheridan
25 Creek;
 - 26
 - 27 iv. V-06308 for stock water and wildlife rights from Stutler Creek.
28 (App. Vol. 4 at 579-641).

1 5. Appellant Joy Smith is the owner of vested water rights, Proof V-
2 06346, to the waters of the North Branch of Sheridan Creek and the commingled
3 waters of Stutler Creek (App. Vol. 4 at 643). This claim also covers property owned
4 by Daniel and Elaine Barden.
5

6 6. Bentley, Smith and Barden also have an interest in permit 7595,
7 Certificate 1760, to the water of Gansberg Spring, which is also commingled with
8 the waters of North Sheridan Creek (See FOD App. Vol. 2 at 88). Although
9 Gansberg Spring and Permit 7595 are referenced in the FOD, Gansberg Spring was
10 permitted under Nevada's water statutes and is not one of the pre-existing, vested
11 rights adjudicated in the FOD.
12

13 7. Although properties owned by Sheridan Creek Equestrian Center and
14 Ronald and Ginger Mitchell have rights to North Sheridan Creek, those properties
15 do not have any rights or claim to Gansberg Springs, Permit 7595, Certificate No.
16 1760 (FOD, App. Vol. 2 at 315, 445; Stanka Report, App. Vol. 3 at 509).
17

18 8. The FOD approved all of the vested claims listed on *Appendix A*,
19 including the Weber/Bentley proofs, without reference to a rotation schedule. (App.
20 Vol. 2 at 418-420).
21

22 9. Bentley appeared in Case No. 08-CV-0363 to file their *Notice of*
23 *Exceptions* to the FOD on December 10, 2008 after learning that some of the
24 claimants were going to demand a rotation schedule. (App. Vol. 3 at 457-475).
25 Bentley requested in Exception No. 1 of the *Amended Notice of Exceptions* to be
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1 exempt from any forthcoming rotation schedule, especially when doing so would
2 have the effect of nullifying a Water Diversion and Use Agreement that was
3 recorded in the Official Records of Douglas County, Nevada, on 27 March 1987, at
4 Bk. 387 Pg. 2726, Doc. No. 152147 ("Diversion Agreement"). (App. Vol. 3 at 436-
5 443). The Diversion Agreement was not referenced in the FOD; however, it was
6 explained in Proof Nos. V-06307 and V-06308 and formed part of the support for
7 those proofs (App. Vol. 3 at 477, 481; App. Vol. 4 at 601, 611). Those proofs were
8 accepted in the FOD (App. Vol. 3 at 468-475).¹

11
12 10. Bentley filed the *Amended Notice of Exceptions* on March 25, 2009 to
13 correct some additional errors regarding the approved acreage (App. Vol. 4 at 476-
14 491).

15
16 11. The proceedings on Bentley's exceptions were severed from the main
17 adjudication case and proceeded as Case No. 08-CV-0363 subproceeding D. On
18 November 19, 2009, Intervenor filed a document in Case No. 08-CV-0363-D called
19 *Response and Objections to Notice of Exceptions and Exceptions to Final Order of*
20 *Determination ("Response")* (App. Vol. 5 at 880-883). Intervenor's *Response* was
21 essentially a complaint, set forth as a series of affirmative defenses, that requested
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28 ¹ Bentley also sought to correct some small errors in the FOD that were not
contested and are not at issue in this appeal.

1 relief from the Diversion Agreement.²

2 12. Trial on subproceeding D commenced on January 9, 2012. At the
3 outset of trial, the parties stipulated, and the Court clarified and ordered, that a
4 rotation scheduled would not be imposed as part of the adjudication and order in
5 Case No. 08-CV-0363. This resolved Bentley's Exception No. 1. All of Bentley's
6 other exceptions were also resolved by stipulation. All stipulations were reflected in
7 the April 5, 2012 *Judgment* (App. Vol. 1 at 158-160). Only the stipulation on
8 Bentley's Exception No. 1 is relevant to these proceedings:
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11 15. The parties made the following stipulations in relation to these
12 Exceptions at the beginning of the trial, which were adopted by the
13 Court:

14 a. Exception 1, in part, was that the State Engineer would
15 not attempt to include a rotation schedule in the Decree itself,
16 but that the provisions of NRS 533.075 and the order of this
17 Court would be used to determine when and if a rotation
18 schedule is needed to efficiently use the waters of the State of
19 Nevada. However, Bentley reserves all objections to the
20 imposition of a rotation schedule, including objection about the
21 statutory authority to do so. (See *Judgment* App. Vol. 1 at
22 158).

21 ² Hon. David R Gamble refused to dismiss the affirmative defenses even though it
22 was not part of answer, did not constitute a pleading under NRCP 7 and is
23 prohibited in a statutory adjudication case wherein the Order of Final Determination
24 filed by the State Engineer is considered the complaint and any exceptions filed
25 thereto are considered the answer(s). NRS 533.170. "There shall be no other
26 pleadings in the cause." NRS 533.170(2). Bentley petitioned this Court for a writ
27 of prohibition and/or mandamus and cited *Smith v. District Court*, 113 Nev. 1343,
28 1344-45, 950 P.2d 280, 281 (1997) as controlling authority for seeking a writ to
compel dismissal of a non-conforming pleading. This Court dismissed the writ
petition due to a defect in the proof of service without first directing Bentley to
either complete service or correct the proof of service to demonstrate that service
was completed (See Case No. 56351).

1 13. Because all of Bentley's exceptions were resolved by stipulations at the
2 outset of trial, there were no issues left to try regarding the adjudication. However,
3 the Court clarified that it wanted to proceed with trial on the Intervenor's claims and
4 defenses contained in their *Response* regarding the Diversion Agreement. None of
5 those claims and defenses involved a rotation schedule. (See excerpts from
6 transcript, App. Vol. 1 at 136:16-138:8).
7

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9 14. Despite the foregoing stipulation that the Decree would not impose a
10 rotation schedule, Senior Deputy Attorney General Bryan Stockton, on behalf the
11 State Engineer, requested in closing argument for the Court's direction on a rotation
12 schedule. Smith and Barden were not parties to the proceeding and Bentley was
13 denied an opportunity to respond. Consequently, the *Judgment* that was entered on
14 April 5, 2012 ordered, in pertinent part, as follows:
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16

- 17 5. When the combined flow from the North Diversion of
18 Sheridan Creek and tributaries drops below 2.0 cfs, the
19 State Engineer shall impose a rotation schedule.
- 20 6. The rotation schedule shall be in effect from the time the
21 North Diversion of Sheridan Creek drops below 2.0 cfs
22 until superseded, until the flow rises to above 2.0 cfs or
23 until the schedule is stayed or modified by this Court.
- 24 7. The rotation schedule shall be prepared at the beginning
25 of the irrigation season to allow review by this Court,
26 under NRS 533.450, if any party challenges the schedule.
- 27 8. The State Engineer has full authority to implement a
28 rotation schedule if appropriate.
9. The rotation schedule shall reflect any agreements
between the parties.

(*Judgment*, App. Vol. 1 at 169:17-170:5)

15. The *Judgment* did not contain any findings that warranted a rotation schedule, and the portion of the *Judgment* that ordered the rotation contradicted the stipulation that a rotation schedule would not be part of the decree.

16. On April 13, 2012, the State Engineer circulated an email which informed the parties that the measured flow had dropped below 2.0 cfs and that the rotation schedule was in effect (App. Vol. 1 at 186). As of that date, Bentley was required to rotate its use of water and was precluded from drawing water except during the allotted time set forth in the rotation schedule, included as App. Vol. 1 at 173-184. Bentley was not allowed to use its water outside of the allotted time and its water was sent downstream for the benefit of the other claimants.

17. The State Engineer proceeded to impose rotation schedules for the entirety of the 2012 and 2013 irrigation seasons on all water rights users, including Smith and Barden, even though they were not parties to subproceeding 08-CV-0363-D or the *Judgment*. (See Rotation Schedules, App. Vol. 1 at 173-184 and Vol. 5 at 917-927).

18. The rotation schedules made no distinction between the vested claims to North Sheridan Creek that were adjudicated in the FOD and Case No. 08-CV-0363, and water rights from Gansberg Spring rights, Permit 7595, Certificate 1760. As such, Sheridan Creek Equestrian Center and Ronald and Ginger Mitchell have been able to use the water from Gansberg Springs on rotation, even though they

1 have no rights to Gansberg Springs.

2 19. Smith and Barden petitioned for judicial review of the 2012 rotation
3 schedule on April 30, 2012. (Case No. 12-CV-0141) (App. Vol. 1 at 1-18). Bentley
4 also petitioned for judicial review of the 2012 rotation schedule on May 3, 2012
5 (Case No. 12-CV-0145) (App. Vol. 1 at 19-38). Smith, Barden and Bentley filed a
6 joint petition for judicial review of the 2013 rotation schedule on April 25, 2013
7 (Case No. 13-CV-0121) (App. Vol. 5 at 884-899). All petitions were consolidated
8 and designated as Case No. 08-CV-0363, subproceeding D-1. Hall Ranches, LLC;
9 Thomas J. Scyphers and Kathleen M. Scyphers; Frank Scharo; Sheridan Creek
10 Equestrian Center, LLC, a Nevada limited liability company; Donald S. Forrester
11 and Kristina M. Forrester; and Ronald R. Mitchell and Ginger G. Mitchell
12 intervened in those cases. (See Motions, App. Vol. 1 at 39-48 and 49-58; and Order,
13 App. Vol. 1 at 113-116).
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18 20. The petitions for judicial review proceeded to a hearing on October 17,
19 2013 before the Hon. Nathan Tod Young. Judge Young entered a ruling from the
20 bench in which he declined to address the merits of the petitions because the rotation
21 schedule was authorized by the *Judgment*. (Excerpts from Transcript, App. Vol. 5
22 at 1039-1043). The written *Order* followed on November 27, 2013 (App. Vol. 5 at
23 1046-1051). Smith, Barden, and Bentley noticed their *Notice of Joint Appeal* on
24 December 23, 2013 (App. Vol. 5 at 1063).
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28 21. Judge Young issued another Order on April 10, 2014, in which he

denied Intervenors' *Motion to Amend Order to Include an Award of Costs* (App. Vol. 5 at 1066- 1071). In this Order, Judge Young confirmed his understanding that the *Judgment* in Case No. 08-CV-0363-D preserved Bentley's right to petition for judicial review regarding the imposition of a rotation schedule.³ He did not explain, however, why he simply deferred to the *Judgment* and declined to hear the petitions for judicial on their merits.

V. STANDARD OF REVIEW

This Court does not "give any deference to the district court decision when reviewing an order regarding a petition for judicial review." *Elizondo v. Hood Mach, Inc.*, 129 Nev.Adv.Op. 84, 312 P3d 479, 482 (2013) (quoting *City of Reno Bldg. & Constr. Trades Council of N. Nev.*, 127 Nev.Adv.Op. 2, 251 P.3d 718, 721 (2011). "A de novo standard of review is applied when this court addresses a question of law, 'including the administrative construction of statutes.'" *Id.* (quoting *Holiday Ret. Corp. v. State Div. of Indus. Relations*, 128 Nev.Adv.Op. 13, 274 P.3d 759, 761 (2012); *Sierra Nev. Adm'rs v. Negriev*, 128 Nev.Adv.Op. 45, 285 P.3d 1056, 1058 (2012)). "Like the district court, [this court] decide[s] 'pure legal questions without deference to an agency determination.'" *Id.* (quoting *City of Reno*, 127 Nev.Adv.Op. 84, 251 P.3d at 721; *Jones v. Rosner*, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986)).

³ "For instance, the potential for judicial review regarding the imposition of a rotation schedule was specifically referenced within the court's judgment dated April 5, 2012, page 5, lines 25-27 . . ." (Order, App. Vol. 5 at 1069:11-13).

1 The November 27, 2013 *Order* denying the Petitions for Judicial Review
2 (“*Order*”) did not address any of the issues presented outright and avoided some of
3 the issues altogether. Instead, the *Order* simply deferred to the *Judgment* from Case
4 No. 08-CV-0363-D, even though this Court confirmed that the *Judgment* was not a
5 final judgment (See Case Nos. 60891 and 62620). As such, the State Engineer is
6 essentially imposing a rotation schedule based on the strength of an interlocutory
7 order. The *Order* omitted any discussion of issue preclusion or claim preclusion
8 and did not address the problems with allowing Gansberg Springs water to be used
9 by Mitchell and Sheridan Creek Equestrian Center who do not have rights to
10 Gansberg Springs. Because the *Order* did not address the issues presented in the
11 petitions for judicial review, it deserves little or no deference.
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16 VI. ARGUMENT

17 A. The Judgment in Case No. 08-CV-0363 is Not Final and 18 Does Not Preclude the Petitions for Judicial Review

19 Although the State Engineer argued below that “The question of whether a
20 rotation schedule should be implemented was fully litigated in this Court as subpart
21 D of the Mott Creek Decree adjudication” (*Answering Brief*, App. Vol. 4 at 671,
22 11.20-21), he failed to cite any portion of the record to support this statement. The
23 record supports the opposite conclusion. In order for issue preclusion to apply, each
24 of the following elements must be met:
25
26

27 “(1) the issue decided in the prior litigation must be identical to
28 the issue presented in the current action; (2) the initial ruling
must have been on the merits and have become final; . . . (3) the

1 party against whom the judgment is asserted must have been a
2 party or in privity with a party to the prior litigation"; and
3 (4) the issue was actually and necessarily litigated. *Five Star*,
4 124 Nev. at 1055, 194 P.3d at 713 (alteration in original)
5 (quoting *Univ. of Nev. v. Tarkanian*, 110 Nev. 581, 598, 879
6 P.2d 1180, 1191 (1994)); see also *Kahn v. Morse & Mowbray*,
7 121 Nev. 464, 474, 117 P.3d 227, 234-35 (2005) (noting that "a
8 litigant must show that an issue of fact or law was necessarily
9 and actually litigated in a prior proceeding").
10 *Frei v. Goodsell*, 129 Nev. Adv. Op. 43 at p.5 (2013).⁴

11 Trial in Case No. 08-CV-0363-D commenced on January 9, 2012. At the
12 outset of trial, the parties stipulated, and the Court clarified and ordered, that a
13 rotation scheduled **would not** be imposed as part of the adjudication and order in
14 Case No. 08-CV-0363. This stipulation was reflected in the April 5, 2012

15 *Judgment:*

16 15. The parties made the following stipulations in relation to these
17 Exceptions at the beginning of the trial, which were adopted by the
18 Court:

- 19 a. Exception 1, in part, was that the State Engineer would
20 not attempt to include a rotation schedule in the Decree
21 itself, but that the provisions of NRS 533.075 and the
22 order of this Court would be used to determine when and
23 if a rotation schedule is needed to efficiently use the
24 waters of the State of Nevada. However, Bentley
25 reserves all objections to the imposition of a rotation
26 schedule, including objection about the statutory
27 authority to do so. (*Judgment*, App. Vol. 4 at 158)

28 ⁴ *Frei v. Goodsell* focused on the final factor – whether the issue was actually or
necessarily litigated - and concluded that the issue of an attorney client relationship
was not actually and necessarily litigated as part of a motion to disqualify an
attorney in the underlying case such that the attorney would be precluded from
denying an attorney client relationship in a subsequent attorney malpractice action.

1 In similar manner, Hon. David R. Gamble confirmed at the outset of trial that
2 the rotation schedule was not the issue to be tried.

3
4 MR. MATUSKA: Yes, Your Honor, before I start though if I
5 could even ask a question of the court just to make sure that we're all
6 clear on where we're at as far as what's been agreed to and what will
be presented today.

7 I think we're all agreed based on the Nevada Revised Statutes
8 that the final order of determination has the effect of a complaint in
9 this case. And the Bentleys noticed some exceptions, they filed one
10 original set of exceptions and amended that and got another exception.

11 But essentially they filed five exceptions, all of which were the
12 subject of the stipulations this morning.

13 So in my mind, the stipulation -- excuse, me the exceptions
14 have been resolved. And what we're proceeding on now is I guess the
affirmative defenses that Tom Hall raised in November of 2009.

15 THE COURT: We're proceeding on the Intervenors' claim and
16 defenses, if I can say it that way.

17 (Tr. January 9, 2012, App. Vol. 1 at 136:17 – 137:8)

18 MR. MATUSKA: Right. I appreciate that, and thank you for
19 the clarification, I'm just trying to clarify the operative pleading that
20 the Intervenors are proceeding on. My understanding would be that is
21 [ed.] the Intervenors' response and objections to notice of exceptions -
22 - and exceptions to final order of determination dated November 19th
of 2009.

23 THE COURT: Is that your position also, Mr. Hall?

24 MR. HALL: Yes, that is, Your Honor.

25 THE COURT: Okay. I agree with that.

26
27 (Tr. January 9, 2012, App. Vol. 1 at 137:25 – 138:81)
28

Intervenors' filed their *Response* in Case No. 08-CV-0363-D on November 19, 2009. (App. Vol. 5 at 880-883). That document contains affirmative defenses, set forth in a non-conforming pleading. Nevertheless, that document only refers to Bentleys' ponds and the disputed Water Diversion and Use Agreement that was the subject of trial. That is a separate issue from the rotation schedule that is the subject of these petitions for judicial review. Intervenors' *Response* does not mention a rotation schedule and the rotation schedule was not the subject of the trial. Even if the topic of the rotation schedule arose during the trial on Intervenors' *Response* or made its way into the *Judgment*, the issue of a rotation schedule was separate from the issues tried in Case No. 08-CV-0363-D and was not a necessary part of the trial or *Judgment*. Judge Young even confirmed in his recent Order the Bentley reserved the right to petition for judicial review (App. Vol. 5 at 1069: 11-13).

B. A Rotation Schedule Can Only Be Imposed With the Consent of the Water Rights Holders (NRS 533.075)

NRS 533.090-533.320 govern adjudication cases of vested water rights. Those statutes do not authorize the Court or the State Engineer to mandate a rotation schedule as part of the adjudication process. Rather, the only mention of a rotation schedule in the Nevada Revised Statutes occurs in NRS 533.075. That statute is not part of the statutory scheme for water rights adjudication.

NRS 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

1 appurtenant to rotate in the use of the supply to which they may
2 be collectively entitled; or a single water user, having lands to
3 which water rights of a different priority attach, may in like
4 manner rotate in use, when such rotation can be made without
5 injury to lands enjoying an earlier priority, to the end that each
6 user may have an irrigation head of at least 2 cubic feet per
7 second.

8 NRS 533.075 is clear on its face and should be given its plain meaning.
9 (*Nevada State Democratic Party v. Nev. Republican Party*, 127 Nev. ___, 256
10 P.3d 1, 4-5 (2011)). That section allows water users to agree on a rotation schedule
11 in order to "bring about a more economical use of the available water supply."
12 Nothing in NRS 533.075 or elsewhere authorizes the State Engineer or District
13 Court to mandate a rotation in the use of water over the objection of the interested
14 parties, especially when doing so alters the historical diversion patterns and creates
15 waste, inefficiency, and damage to lands to which the water rights are appurtenant.
16

17 **C. The Rotation Schedule Also Violates the FOD**

18 The State Engineer emphasized throughout the proceedings below that it was
19 necessary to impose a rotation schedule when stream flows dropped. This is
20 contrary to the FOD which largely incorporates and restates NRS 533.075 almost
21 verbatim.
22
23

24 **3. Rotation and Use of Water**

25 Claimants of vested water rights and those owners of water
26 rights acquired through the appropriative process from a
27 common supply may rotate the use of water to which they are
28 collectively entitled based on an agreement, so as to not injure
nonparticipants or infringe upon their water rights, which is
subject to approval by the State Engineer. The purpose is to
enable irrigators to exercise their water rights more efficiently,

1 and this to bring about a more economical use of available
2 water supplies in accordance with their dates of priority.
3 NRS §533.075. (FOD, App. Vol. 2 at 189) [emphasis added]

4 This passage from the FOD contemplates that there may be participants and
5 nonparticipants in the rotation schedule from the same stream system. This is
6 consistent with Appellants' position. Intervenor is free to rotate in the use of their
7 water if they want to, but they cannot compel Bentley, Smith, and Barden to submit
8 their water to a compulsory rotation. This same passage emphasizes that a rotation
9 schedule is for irrigation purposes. The rotation schedule is incompatible with
10 Appellants' stock and wildlife rights or other uses of the water, which require a
11 constant flow.
12

13
14 Intervenor often quoted the following footnote from Table 6 of the FOD as
15 authority for the compulsory nature of a rotation schedule:
16

17 The diversion rates for the north and south split of Sheridan
18 Creek are based on a spring and early summer average stream
19 flow of 3.5 c.f.s. Flow and diversion rates during periods of
20 drought and middle to late irrigation season will generally be
21 less than the rates determined in the Preliminary Order of
22 Determination. Therefore all parties will have to share the
23 water shortage during periods of low flow. The total diversion
24 from either the north or south split can be used in its entirety in
25 a rotation system of irrigation. (FOD, App. Vol. 2 at 388)

26 Although Bentley acknowledges that it may only be able to draw water on a
27 reduced, pro-rata share during times of drought, nothing in the above-quoted
28 passage from the FOD, the Nevada Revised Statutes, or the accepted proofs of
vested claims limits the days they can draw water or otherwise subjects their rights

1 to a rotation schedule.

2 **D. The Compulsory Rotation Schedule Violates the Non-**
3 **Impairment Statute, NRS 533.085**

4 The underlying adjudication concerns pre-statutory, vested rights. “[V]ested
5 rights are those that existed under Nevada’s common law before the provisions
6 currently codified in NRS Chapter 533 were enacted in 1913.” *Andersen Family*
7 *Associates v. Ricci*, 124 Nev. 182, 188, 179 P.3d 1201 (2008). All of the water
8 rights at issue originated from a single claim and enjoy the same date of priority.
9 Judicial review should have ended with Intervenor’s concession that “the statutory
10 consent provision of NRS 533.075 cannot control the pre-statutory 1852 vested
11 water rights under review here . . .” (*Answering Brief*, App. Vol. 4 at 727:13-15).

12 NRS 533.075 and the adjudication statutes, NRS 533.090 et seq., were
13 adopted in 1913. Nevada’s original 1913 water law was adopted with a non-
14 impairment rule.

15 **NRS 533.085 Vested rights to water not impaired.**

16 1. Nothing contained in this chapter shall impair the vested
17 right of any person to the use of water, nor shall the right of any
18 person to take and use water be impaired or affected by any of
19 the provisions of this chapter where appropriations have been
20 initiated in accordance with law prior to March 22, 1913.

21 2. Any and all appropriations based upon applications and
22 permits on file in the Office of the State Engineer on March 22,
23 1913, shall be perfected in accordance with the laws in force at
24 the time of their filing.

25 *Andersen v. Ricci* is the clearest judicial pronouncement of the non-
26 impairment rule. In that case, the Court concluded that although applications for
27
28

1 permits to change the type, manner, or place of use of vested rights had to be made
2 in conformance with NRS Chapter 533, the statutory penalty of a loss of priority for
3 a cancelled permit cannot be enforced against vested rights. *Andersen v. Ricci* relied
4 heavily on the non-impairment statute:
5

6 *Nothing in the act shall be deemed to impair these vested*
7 *rights; that is, they shall not be diminished in quantity or value.*
8 As they are all prior in time to water rights secured in
9 accordance with later statutory provisions, such priorities must
10 be recognized. In this sense, although *Ormsby* makes clear that
11 vested water rights are subject to regulation under Nevada's
12 statutory system, such regulation may not impair the quantity or
13 value of those rights.

14 (*Andersen v. Ricci*, 124 Nev. at 190) (quoting *Ormsby County*
15 *v. Kearney*, 37 Nev. 314, 142 P. 803 (1914)) [italics in original]

16 It is noteworthy that the rotation statute, NRS 533.075, comes before the non-
17 impairment statement, NRS 533.085. NRS 533.075 and 533.085 can be harmonized
18 to avoid conflicts between those sections, or other sections of Chapter 533, only if
19 NRS 533.075 offers holders of vested water rights the option of lawfully using
20 vested water rights on a rotation schedule without regard to priority dates.

21 The compulsory rotation schedule advocated by the Intervenor impairs
22 Bentleys' vested rights in a number of different ways. The rotation schedule is
23 incompatible with Bentley's stock and wildlife water rights, which require a
24 constant flow. Water rights are also transferrable, and NRS Chapter 533 allows (if
25 not encourages) changes in the manner and place of use to achieve the most benefit.
26 For example, the vested rights at issue in *Anderson v. Ricci* were changed to
27
28

1 municipal use for the benefit of Carson City. The FOD also contemplates changes
2 in the type of manner of use of the vested rights adjudicated therein. (FOD, App.
3 Vol. 2 at 289-290).
4

5 Bentley's vested water rights were accepted and incorporated into the FOD
6 without any conditions or restrictions. However, such changes to the place and
7 manner of use are not possible if the rights are subject to a compulsory rotation
8 schedule for the benefit of the Intervenor and restricted to irrigation purposes, only.
9 The compulsory rotation schedule therefore impairs and devalues Bentley's
10 irrigation rights because it serves as a sort of unrecorded restrictive covenant that
11 forever prevents Bentley from changing the place or manner of use as allowed (if
12 not encouraged) by NRS Chapter 533.⁵
13
14
15

16 **E. Water From Gansberg Springs Cannot Be Subjected**
17 **to the Rotation Schedule and Cannot Be Sent to**
18 **Owners Without Rights to Gansberg Springs**

19 Intervenor may also try and bootstrap their defense of the rotation schedule to
20 NRS 533.320 which confirms that the distribution of adjudicated water rights shall
21 be made by the State Engineer under the supervision and control of the District
22 Court. Intervenor want this Court to infer that a rotation schedule mandated by the
23 Court and/or the State Engineer is the best or only way to administer adjudicated
24
25

26
27 ⁵ Such transfers are almost certain, and are not merely hypotheticals. Bentley is in
28 the process of acquiring additional rights from the South Branch of Sheridan Creek,
and could just as easily sell and transfer rights to claimants from the South Branch
of Sheridan Creek. Any such transfers must be free from mandatory rotation.

1 water rights. However, this is not the case. Most of the stream systems identified in
2 the FOD, including the South Branch of Sheridan Creek, **do not** have mandatory
3 rotation schedules, if they have any rotation schedules.⁶
4

5 Moreover, a mandatory rotation schedule does not divide or distribute the
6 water. Rather, it results in a single, combined flow that can only be drawn at
7 scheduled times. Not only does this allow others to use Bentley's adjudicated,
8 vested rights, but it allows Mitchell and Sheridan Creek Equestrian Center to use the
9 commingled water from Gansberg Spring when they have no such rights. Gansberg
10 Spring rights were appropriated and certificated pursuant to NRS 533.324, et seq.,
11 also without reference to a rotation schedule. Although listed in the FOD (App. Vol.
12 2 at 282-283), these rights were not part of the adjudication. The FOD correctly
13 describes Permit 7595, Certificate 1760 as "supplemental" to the various proofs
14 involved in the proceeding, including notably V-06305 and V-06306 now belonging
15 to Bentleys, and just as notably excluding proofs V-06336 and V-06337 belonging to
16 the Mitchells and proof V-03610 belonging to the Sheridan Creek Equestrian Center
17 (Compare FOD, App. Vol. at 282, and Proof/Permit Number Index at 213-218).
18
19
20
21

22 The mandatory rotation schedule does not fulfill the State Engineer's duty to
23 divide and distribute the water according the FOD; rather it allows him to abdicate
24
25

26 ⁶ Compare to the rotation schedules set forth in the FOD for Mott Creek (App. Vol.
27 2 at 384) and Unnamed Spring "A" (App. Vol. 2 at 396). The rotation schedules
28 appear to be consensual and based on historical use. With regard to Mott Creek, the
dispute was not whether a rotation schedule should be allowed, but the length of the
rotation schedule (i.e., 7 days v. 14 days) (FOD, App. Vol. 2 at 234).

1 his responsibility and encourages use in violation of vested rights, the FOD and the
2 permit for Gansberg Springs.

3
4 **F. The Rotation Schedule Altered the Historical Flow and Use**

5 No evidence was presented at the trial in Case No. 08-CV-0363-D to support
6 a finding that the rotation schedule brought about a more economical use of the
7 water, even though that is the main consideration under NRS 533.075. Rather,
8 Intervenor themselves were clear that the rotation schedule disrupted the historical
9 flow, allowed the original Sheridan Creek channel to run dry and that it takes a
10 substantial length of time to recharge that channel.
11

12
13 Mr. Bentley testified that there was a continuous flow through the original
14 pond when he purchased the property from Theodore and Katherine Weber in 2006,
15 and that the discharge continued down the historical channel for Sheridan Creek
16 (Tr., App. Vol. 1 at 152:8-16).
17

18
19 Mr. Roberson testified on behalf of Sheridan Creek Equestrian Center that he
20 preferred the historical, continuous flow from the outlet at the Weber/Bentley pond,
21 which continued down the original channel for Sheridan Creek (Tr., App. Vol. 1 at
22 140:8-22; 141:2-10).
23

24 Daniel Barden and Joy Smith also testified about the historical continuous
25 flow through the four inch (4") lateral pipe to their properties and how it was
26 difficult for them to irrigate on a rotation schedule (Tr., App. Vol. 1 at 145:18-
27 146:3; 147:2-8; 153:2-131).
28

1 Mr. Scyphers also testified and confirmed the historical continuous flow, both
2 through the Weber/Bentley pond that continued down the Sheridan Creek channel
3 and the historical and the continuous flow through the four inch (4") lateral to the
4 Smith/Barden properties (Tr., App. Vol. 1 at 142:1-5; 143:20-24).

6 Mr. Bentley further testified about various inefficiencies with the rotation
7 schedule in that it results in additional losses through the segmented, lateral pipe and
8 actually delivers too much water and floods the Hall Ranches property (Tr., App.
9 Vol. 1 at 148:22-151:23).

11
12 **G. The State Engineer's Decision to Impose a Rotation**
13 **Schedule Is Not Supported by Substantial Evidence**

14 "When a decision of an administrative body is challenged, the function of this
15 court is identical to that of the district court. It is to review the evidence presented to
16 the administrative body and ascertain whether that body acted arbitrarily or
17 capriciously, thus abusing its discretion." *Gandy v. State ex rel. Div. Investigation*,
18 96 Nev. 281, 282, 607 P.2d 581, 582 (1980). The District Court "may not substitute
19 its judgment for that of the agency as to the weight of the evidence on questions of
20 fact." *Id.*; see also NRS 233B.135(3). The District Court must "affirm the decision
21 of the administrative agency on questions of fact **if** the decision is supported by
22 substantial evidence in the record." *SIIS v. Thomas*, 101 Nev. 293, 296, 701 P.2d
23 1012, 1015 (1985) [emphasis added]; See also *State of Nevada ex. rel. Employment*
24 *Security Dept. v. Holmes*, 112 Nev. 275, 279, 914 P.2d 611 (1996) (App. Vol. 1 at
25 158:20-21).

1 Intervenor relied on NRS 533.075 throughout the proceedings in Case No.
2 08-CV-0363-D as the authority for the mandatory rotation schedule. They submitted
3 the proposed judgment for Judge Gamble's signature. The *Judgment* references
4 NRS 533.075 as the only source of authority for the rotation schedule. The decision
5 of the State Engineer must therefore conform to NRS 533.075, which allows a
6 voluntary rotation, only. There is no room for Intervenor now to argue that some
7 statute other than NRS 533.075 controls the outcome of this case.
8

9
10 The State Engineer made no findings that a rotation schedule "would bring
11 about a more economical use of the available water supply as required by NRS
12 533.075." In fact, there was no hearing before the State Engineer. As such there is
13 no record to review and no evidence to support the State Engineer's decision to
14 propose a rotation schedule. Presumably, the State Engineer is merely relying on the
15 *Judgment* in Case No. 08-CV-0363-D. The State Engineer cannot use an
16 interlocutory order from another case to excuse the lack of a record and substantial
17 evidence. Barden and Smith were not parties to Case No. 08-CV-0363-D. The
18 *Judgment* from that case is not final. Furthermore, the parties stipulated in Case No.
19 08-CV-0363-D, and the Court ordered, that Bentley reserved the right to petition for
20 judicial review. The trial was about the Diversion Agreement, not the rotation
21 schedule. There were no findings that a rotation would bring about a more
22 economical use of the available water supply.
23
24
25
26
27

28 The *Judgment* admittedly orders the State Engineer to impose a rotation

1 schedule when the flows drop below 2.0 cfs "if appropriate." (*Judgment*, App. Vol.
2 1 at 169-170).⁷ This portion of the *Judgment* is internally contradictory in that it
3 appears to mandate the rotation schedule but then seems to give the State Engineer
4 discretion "to impose a rotation schedule if appropriate." This portion of the
5 *Judgment* is also incompatible with the stipulation. The issue of the rotation
6 schedule was not part of the trial and there are no findings that the rotation schedule
7 would "bring about a more economical use of the available water supply." The
8 State Engineer cannot rely on the Court's non-existent findings of fact to excuse the
9 lack of a record supporting his decision.
10
11

12
13 The Parties do not agree that the rotation schedule is more economical or
14 efficient. In fact, the parties are not even located on a single ditch where it is
15 feasible to use the water in rotation. Rather, the North Branch of Sheridan Creek is
16 divided three (3) ways, and is effectively three (3) different systems. Smith and
17
18

19 ⁷ The *Judgment* arbitrarily and capriciously adopts the reference to 2.0 cfs from
20 NRS 533.075 or the *Judgment*. Bentley is left to speculate that 2.0 cfs was adopted
21 as the benchmark optimum flow to irrigate large parcels. As shown on *Appendix A*,
22 the parcels at issue in this case are small parcels that are subject to flooding at 2.0
23 cfs. To avoid flooding at the flows near 2.0 cfs, some of the water (including
24 Bentley's water) has to remain in the channel and continue, wasted and unused, to
25 the main ditch (Park & Bull Ditch) below the properties. (See Stanka Report, App.
26 Vol. 3 at 526). Likewise, there is no mandatory rotation schedule for the South
27 Branch of Sheridan Creek, even though the flows seldom reach 2.0 cfs. The South
28 Branch gets 40% (1.40 cfs) of the total flow which averages 3.50 cfs in spring and
early summer (See FOD, App. Vol. 2 at 388). The State Engineer never made his
own determination of an appropriate flow to properly irrigate these parcels without
causing flooding or waste. Alternatively, the reference to 2.0 cfs might just be a
rounded reference to 2.1 cfs, which is the average early season flow for the North
Branch of Sheridan Creek.

1 Barden irrigate through a four inch (4") lateral pipe. Forrester, Hall Ranches,
2 Scyphers and Sharo irrigate through a variegated, segmented pipe. Mitchell and
3 Sheridan Creek Equestrian Center irrigate from the original creek bed.
4

5 Bentley has maintained throughout these proceedings that the rotation
6 schedule is not an economical way to draw water for their ponds. Joy Smith has
7 likewise maintained that the rotation schedule is not efficient for her alpacas and that
8 her allotted time in the rotation is too short to allow her to effectively irrigate her
9 pastures. She would rather have her proportionate share of water on a continuous
10 basis. Daniel Barden has made this same point. Glenn Robison testified on behalf
11 of the Sheridan Creek Equestrian Center that he prefers to maintain a constant flow
12 down the original ditch. When the water is rotated out of the ditch, the ditch runs
13 dry, and Mr. Roberson has to use a substantial portion of his allotted 1.4 days in the
14 rotation to rehydrate the ditch before he receives irrigation water.
15
16
17

18 Water can easily be divided with mechanical devices. There is no indication
19 that the State Engineer analyzed the relative benefit of a mechanical diversion
20 structure, meters, some combination thereof, or simply continuing the historical
21 flow patterns. Regardless, there is no evidence that a rotation schedule is the only or
22 best way to divide or otherwise administer the water. Moreover, even if the parties
23 were resolved to implement a rotation schedule, there are many different rotations
24 available. There is no indication that the State Engineer considered any variations
25 of the rotation schedule, including a block rotation, a 14-day rotation, or otherwise.
26
27
28

1 The Stanka Report addresses these other options and the inefficiency with the 2,000-
2 foot long segmented pipe and allowing the 4,250-foot long ditch to dry (Stanka
3 Report, App. Vol. 4 at 550-557).
4

5 Likewise, there is no reason to assume that the only way to stop an excessive
6 diversion is with a rotation schedule. The Court can enjoin excessive diversions and
7 even order a diversion device, such as a dam or diversion box. *South Fork Bank of*
8 *Te-Moak Tribe v. Sixth Judicial Dist. Ct.*, 116 Nev. 805, 7 P.3d 455 (2000), *State v.*
9 *Sixth Judicial Dist. Ct.*, 52 Nev. 270, 286 P.418 (1930), and *State Engineer v.*
10 *Sustacha*, 108 Nev. 223, 826 P.2d 959 (1992). *State Engineer v. Sustacha* and *State*
11 *v. Sixth Judicial Dist. Ct.* confirm that the remedy for an alleged overuse or
12 misappropriation of water is to install diversion devices (i.e., a dam) and a tamper-
13 proof measuring device – not to impair vested rights by imposing a rotation
14 schedule.
15
16
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18

19 VII. CONCLUSION

20 Nothing in the Nevada Revised Statutes or any other rule of law authorized
21 the District Court and the State Engineer to subject Bentley's vested rights to a
22 mandatory rotation schedule for the benefit of "common good." Bentleys' vested
23 rights are theirs alone and may not be appropriated or commandeered for the
24 "common good" under NRS 533.075 or any other statute especially when doing so
25 alters the historical flow and use of the water.
26
27
28

1 The authority of the State Engineer and the District Court administering a
2 water rights adjudication proceeding are defined by the Nevada Revised Statutes.
3
4 The only mention of a rotation schedule in the Nevada Revised Statutes is found in
5 NRS 533.075. That section clarifies that water users may agree to rotate the use of
6 water if doing so would bring about a more economical use of the water. Neither the
7
8 District Court nor the State Engineer made any findings that the mandatory rotation
9 schedule is the best or only way to achieve "the common good" or bring about a
10 more economical use of the water.

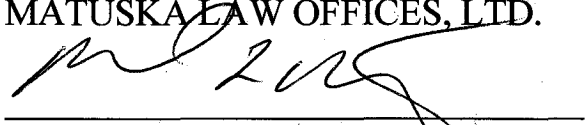
11
12 As a matter of fact, there is no evidence, let alone substantial evidence, that
13 the rotation schedule produced a more economical use of the water. In the case of
14 the Mitchells and Sheridan Creek Equestrian Center, the rotation schedule leads to
15 illegal use of water of Gansberg Spring by persons without any right to that water.

16
17 Bentley should be allowed to draw its pro-rata share of water from the North
18 Branch of Sheridan Creek, however abundant or meager that share may be, without
19 the restriction of a rotation schedule. Bentley must be allowed to draw its
20 stockwater rights on a continual basis.

21
22 Dated this 12th day of May 2014.

23
24 MATUSKA LAW OFFICES, LTD.

25 By:

26 
27 MICHAEL L. MATUSKA, SBN 5711
28 Attorneys for PETITIONERS,
J.W. BENTLEY and MARYANN
BENTLEY

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

The Bentley Family 1995 Trust

James W. Bentley, Trustee

MaryAnn Bentley, Trustee

Dated this 12th day of May 2014.

MATUSKA LAW OFFICES, LTD.

By: 

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because:

☒ This brief has been prepared in a proportionally spaced typeface using Word [state name and version of word-processing program] in 14 Times New Roman; or

☐ This brief has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of type style].

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

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☐ Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

☒ Does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, 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 NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript 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 12th day of May 2014.

MATUSKA LAW OFFICES, LTD.

By:

MICHAEL L. MATUSKA, SBN 5711

CERTIFICATE OF SERVICE

I certify that on the 12th day of May 2014, I served a copy of this

APPELLANTS' OPENING BRIEF, upon all counsel of record:

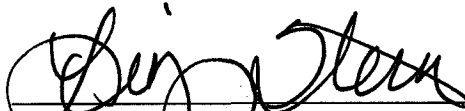
- ☐ By personally serving it upon him/her; or
- ☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es):

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Dated this 12th day of May 2014.


LIZ STERN, ALS

APPENDIX A

APPENDIX A

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NAME	APN	APPROVED ACREAGE	PERCENTAGE	21-DAY ROTATION	PROOFS
J.W. and MaryAnn Bentley	1219-14- 001-013	12.93	7.67%	1.6	V-06305 V-06306 V-06307 V-06308
Ernest Pestana	1219-14- 001-014	23.76	13.66%	2.9	V-06339
Joy Smith f/k/a Joy Whipple	1219-14- 001-002	17.71	9.31%	1.9	V-06346 (part) V-06347 (part)
Dan and Elaine Barden	1219-14- 001-001	7.23	4.29%	.9	V-06346 (part) V-06347 (part)
Alan Sapp	1219-14- 002-005	1.13 5.10	0%	0	V-04594 V-06356
Donald S. and Kristina Forrester	1219-14- 001-012	60.87	29.40%	6.2	V-06309 V-06310 (part)
Hall Ranches, LLC	1219-14- 001-003	22.03	13.06%	2.7	V-06340 V-06341
Thomas J. and Kathleen M. Scyphers	1219-14- 001-004	16.61	5.54%	1.2	V-06311 (part) V-06312 (part)
Frank and Camille Scharo	1219-14- 001-005	*	4.28%	.9	V-06311 (part) V-06312 (part)
Sheridan Creek Equestrian Center (Glenn Roberson)	1219-14- 001-008	*	6.64%	1.4	V-06310 (part)
Ronald and Ginger Mitchell	1219-14- 001-011	10.37	6.15%	1.3	V-06336 V-06337
		177.74	100%	21	