

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

vs.

STATE OF NEVADA, OFFICE OF THE
STATE ENGINEER,

Respondent.

No. 64773

FILED

MAY 27 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

*ORDER DENYING MOTION TO DISMISS, GRANTING IN PART
MOTION FOR DETERMINATION OF APPEALABLE ORDER, AND
DIRECTING PARTIES TO BRIEF JURISDICTIONAL ISSUE*

This is an appeal from a district court order denying consolidated petitions for judicial review of the State Engineer's water use rotation schedule.

Appellants J.W. Bentley and Maryann Bentley have moved this court to determine whether jurisdiction exists over this appeal, asserting that it is unclear whether the appeal period was tolled by a post-judgment motion citing to NRCP 59(e) and seeking to amend the appealed order to award costs to respondents Donald S. Forrester and Kristina M. Forrester, Hall Ranches, LLC, Thomas J. Scyphers and Kathleen M. Scyphers, Frank Scharo, Sheridan Creek Equestrian Center, LLC, and Ronald R. Mitchell and Ginger G. Mitchell, intervenors below.¹ Respondents, asserting that the motion tolled the appeal period and, thus,

¹The clerk of this court shall modify the caption of this appeal to include these parties as respondents.

that the appeal was premature, opposed appellants' motion to determine jurisdiction and filed a countermotion to dismiss. Appellants opposed the countermotion to dismiss, and in reply, respondents, for the first time, suggested that because the underlying water law case remains pending below, the district court's order denying the consolidated petitions for judicial review, entered in a sub-subpart of the main case, is not final and appealable.

Thereafter, appellants filed a supplement to their motion for determination of jurisdiction, noting that the district court had resolved the potential tolling motion and that, as a result, even if the appeal period was tolled, this appeal is timely under NRAP 4(a)(6), which allows this court to deem an otherwise premature appeal timely filed after a tolling motion is resolved. In response, respondents again asserted that this appeal should be dismissed because no final, appealable judgment has been entered.

Jurisdiction

With respect to whether the motion to amend to add costs tolled the time to appeal, appellants correctly note that that issue has been rendered moot by the district court's resolution of that motion, and thus, this appeal is timely in that regard. NRAP 4(a)(6). As for whether the order denying the consolidated petitions for judicial review is appealable, however, we conclude that additional briefing is warranted.

In 2008, the State Engineer filed in the district court an order of determination adjudicating various water rights in the stream systems of Douglas County. Numerous exceptions were filed, and the district court divided the case into subparts, presumably by individual stream system.

At issue here is case subpart D regarding the North Diversion of Sheridan Creek; it is unclear at which stage the other subparts exist, but the parties assert that the district court has not yet entered a final decree on the State Engineer's order of determination. *See* NRS 533.185 (providing that, after the district court holds a hearing on the exceptions, it must enter a final decree affirming or modifying the State Engineer's determination, which can be appealed). The court did, however, address the exceptions and rights pertaining to the North Diversion of Sheridan Creek. The court entered an order in subpart D on April 5, 2012, resolving the exceptions and issues raised by the intervening respondents and affirming as modified the State Engineer's order of determination with respect to that water system. In the April 5 order, the district court directed that, when the water levels reached a certain low point, the State Engineer must impose a rotation schedule, to be effective until the water levels rose or the schedule was superseded or stayed or modified by the court. The court provided that the schedule should be prepared at the start of the irrigation season so that it could be reviewed by the court under NRS 533.450 if challenged by any party. Although appellants appealed from the April 5 order, their appeal was dismissed for lack of jurisdiction because the district court had not entered a final judgment below. *Bentley v. State Engineer*, Docket No. 60891 (Order Dismissing Appeal, February 15, 2013).

Meanwhile, in 2012 and 2013, the State Engineer imposed rotation schedules as directed, which appellants challenged in petitions for judicial review that were consolidated into a sub-subpart of the main case. The district court, after noting that the irrigation seasons had expired and

concluding that the issues were capable of repetition yet evading review, considered and denied the petitions. This appeal followed.

Because the petitions were made part of the main case, which remains unresolved, and not thereafter unconsolidated or severed, it appears that the order resolving them is not final or appealable. See NRCP 42(a); *Mallin v. Farmers Ins. Exch.*, 106 Nev. 606, 797 P.2d 978 (1990) (holding that consolidated actions are treated as one, and thus, all of the claims, rights, and obligations of all parties must be resolved before an order is considered final for purposes of appellate jurisdiction); *cf.* NRCP 21 (explaining that claims may be severed and proceeded with separately). Further, the district court indicated that it retained jurisdiction over the rotation matter, despite allowing for the filing of petitions for judicial review, and thus, it is unclear whether the rotation schedule mandate imposed by the April 5 order is permanent or temporary in nature, to be implemented while the main litigation remains in the district court pending final decree. Moreover, in the Bentley appellants' opening brief, they do not address the rotation schedule itself, but instead challenge the State Engineer's authority to implement a rotation schedule at all and, thus, they are effectively challenging the district court's April 5 order, which we already determined was interlocutory and not appealable. As a result, it is unclear whether this court has jurisdiction over this appeal.

Accordingly, we direct the parties to address, in their briefs, whether the order denying the petitions for judicial review is an appealable order over which this court has jurisdiction. Although the Bentley appellants have already filed their opening brief, which somewhat addresses these jurisdictional issues, the Bentley appellants shall have

until June 9, 2014, to file any supplement to their opening brief solely addressing this court's jurisdiction over this appeal. Thereafter, briefing shall proceed in accordance with NRAP 31(a)(1), with the parties briefs addressing both the merits of the appeal and the jurisdictional issues discussed in this order. The motion for determination of appealable judgment is granted in part and deferred in part, and the counter motion to dismiss is denied.

It is so ORDERED.

Hardesty, J.
Hardesty

Douglas, J.
Douglas

Cherry, J.
Cherry

cc: Matuska Law Offices, Ltd.
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