

IN THE SUPREME COURT OF THE STATE OF NEVADA

In Re: Rotation Schedule
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.

Supreme Court Case No.: 64773

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Clerk of Supreme Court

Joy Smith, Daniel Barden and Elaine Barden,
J.W. Bentley and MaryAnn Bentley, Trustees of the
Bentley Family 1995 Trust,

Appellants,

vs.

The State of Nevada, Office of the State Engineer;
Hall Ranches, LLC; Sheridan Creek Equestrian
Center, LLC, a Nevada Limited Liability Company;
Frank Scharo; Ronald R. Mitchell; Ginger G.
Mitchell; Thomas J. Scyphers; Donald S. Forrester;
and Kristina M. Forrester,

Respondents.

On Appeal from the Ninth Judicial District Court
of the State of Nevada, in and for Douglas County
Hon. Nathan Todd Young, District Judge

OPENING BRIEF OF APPELLANTS
JOY SMITH, DANIEL BARDEN AND ELAINE BARDEN

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned hereby certifies that Appellants Joy Smith, Daniel Barden and Elaine Barden (Smith & Barden) are individuals with no parent corporations and with no publicly held companies that have an interest in them. Jessica C. Prunty of the Dyer, Lawrence, Flaherty, Donaldson & Prunty firm has been Smith & Barden's only attorney in the district court proceedings below and no other attorney is expected to appear on their behalf in this matter.

Dated this 9th day of June, 2014

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NRCP 42	12
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NRS 533.085	21
NRS 533.090	9
NRS 533.090 -533.140	9
NRS 533.145	9
NRS 533.150	9
NRS 533.160	9
NRS 533.170	9
NRS 533.185	10
NRS 533.200	10

NRS 533.220	11
NRS 533.230	11, 18
NRS 533.450(1)	<i>passim</i>
NRS 533.450(9)	<i>passim</i>
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<i>Water for Nevada, Special Information Report, Water -Legal and Administrative Aspects, Division of Water Resources, 1974</i>	17, 23
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JURISDICTIONAL STATEMENT

This is an appeal of the Ninth Judicial District Court's denial of petitions for judicial review, challenging the State of Nevada, Office of the State Engineer's ("State Engineer") imposition of a rotation schedule upon the use of water by Appellants Joy Smith, Daniel Barden and Elaine Barden ("Smith & Barden") without their consent. The petitions for judicial review were brought pursuant to NRS 533.450(1). The district court's order denying the petitions for judicial review was a final order and this Court has jurisdiction over this matter under NRAP 3(b) and NRS 533.450(9).¹

ISSUES PRESENTED FOR REVIEW

1. Is the district court's order denying consolidated petitions for judicial review challenging the actions of the State Engineer in administering the use of their water rights, which was brought under an on-going adjudication case, with a separate subsection case number assigned, appealable?

2. Did the State Engineer act arbitrarily and capriciously in forcing Smith & Barden, non-consenting vested water right users, to rotate their use of water in favor of other vested water right users whose water rights have the same priority as those of Smith & Barden?

3. Did the State Engineer act arbitrarily and capriciously in forcing Smith & Barden to rotate their use of water rights without making any findings that the rotation would not impair their use of their water rights or be the most economical and efficient use of the waters of the stream in question?

///

¹ This Court issued an order on May 27, 2014, requiring the parties to brief the issue of whether the district court's order denying the petitions for judicial review is a final, appealable order over which this Court has jurisdiction, which is addressed in the Argument section herein.

4. Did the State Engineer exceed his statutory authority and act in violation of statutes when he issued a rotation schedule which included Smith & Barden?

5. Did the district court err as a matter of law in concluding that the court has the independent authority to order the rotation of water rights in the absence of a consensual and statutorily authorized agreement amongst the common water users of a source of water?

6. Did the district court err as a matter of law in concluding that the rotation schedules imposed upon Smith & Barden were not “illegal.”

7. Did the State Engineer have any evidence, substantial or not, that forcing Smith & Barden to rotate their usage of their water rights would not conflict with or impair their water rights?

8. Did the State Engineer have any evidence, substantial or not, that forcing Smith & Barden to rotate their usage of their water rights and is the most economical and efficient use of the resource?

STATEMENT OF THE CASE

The State Engineer issued a rotation schedule in 2012 and in 2013, both of which required Smith & Barden, along with all other users holding water rights to the stream in question, to rotate the usage of their water rights during the irrigation season on a schedule dictated by him. Smith & Barden filed a petition for judicial review in 2012 challenging the rotation schedule in the Ninth Judicial District Court, Douglas County, before the Honorable Nathan Tod Young, District Judge, as did Appellants J.W. Bentley and MaryAnn Bentley, Trustees of the Bentley Family 1995 Trust (“Bentley”). Smith & Barden and Bentley jointly filed a petition for judicial review of the 2013 rotation schedule.

All three petitions for judicial review were formally consolidated into one action before the district court. The district court, at the request of the State Engineer and in consideration of its statutory continuing jurisdiction, also brought

1 the consolidated petitions for judicial review under the on-going adjudication
2 case, wherein the relative rights of users of numerous discrete stream systems,
3 including the one in question, were being determined. As is common in water
4 law cases involving surface waters that have been or are being adjudicated, the
5 district court assigned the petitions for judicial review a sub-file number under
6 the adjudication case number.

7 In their briefs and at oral argument of the petitions for judicial review,
8 Smith & Barden argued that Nevada water law does not allow for compulsory
9 rotation and that the State Engineer acted arbitrarily and capriciously, in excess
10 of his statutory authority, and in violation of Nevada water law in issuing
11 rotations schedules which included them, along with consenting water users, in
12 the rotation. The district court did not agree and denied the petitions for judicial
13 review. This appeal was taken of that order pursuant to NRS 533.450(9) and
14 NRAP 3(b).

15 STATEMENT OF FACTS

16 **The water and its users.** Sheridan Creek is a discrete stream system
17 that arises in the Carson Range of the Eastern Sierra and flows into the Carson
18 Valley, but does not reach the Carson River. I JA 157, II JA 235-38. It
19 branches into a North and South Division. I JA 157. The North Division is the
20 branch that is the subject of these proceedings. I JA 1-3, V JA 884-86. The
21 waters of Stutler Creek and Gangsberg Springs are commingled with the North
22 Division of Sheridan Creek and are administered together (these commingled
23 waters are at times collectively referred to herein as "North Sheridan Creek").
24 I JA 157. North Sheridan Creek water is used for irrigation, stock-watering and
25 domestic purposes. See II JA 244-45, 247-49, 262-64, 266.

26 Smith & Barden are the joint owners of vested water rights, Proofs V-
27 06346 and V-06347, to the waters of the North Sheridan Creek and the
28 commingled waters of Stutler Creek. II JA 266. Smith & Barden also have an

1 interest in Permit 7595, Certificate 1760, to the waters of Gansberg Springs. II
2 JA 283.

3 Appellant Bentley² and Respondents Hall Ranches, LLC., Thomas
4 Scyphers, Kathleen Scyphers, Frank Scharo, Sheridan Creek Equestrian Center,
5 LLC., Donald Forrester, Kristina Forrester, Ronald Mitchell and Ginger
6 Mitchell are the current other users of North Sheridan Creek.³ I JA 7-18. All
7 of the water rights to North Sheridan Creek are vested and of equal priority,⁴
8 except those of Gansberg Springs, which is a statutorily permitted water right
9 with a later priority date.⁵ I JA 157.

10 **The adjudication proceeding.** The adjudication of Sheridan Creek and
11 of several other various discrete stream systems flowing into the Carson Valley
12 from the Carson Range began in 1987 when a petition was filed with the State
13 Engineer requesting a determination of the relative rights of claimants of those
14 different waters. II JA 195. The State Engineer proceeded with its statutory
15 adjudication pursuant to NRS Chapter 533 by giving notice, investigating the
16 historic practices, taking proofs of claims, issuing his preliminary order of
17 determination, and hearing and resolving any objections thereto. II JA 195-97,

18
19 ² Bentley uses his own rights, as well as leased rights from the Pestana
20 Family Trust. I JA 7-8, V JA 848.

21 ³ For ease of reference, the private party Respondents will be referred to
22 as “Intervenors”, as so identified by the district court below. V JA 1066-67.

23 ⁴ The waters rights of the North Division of Sheridan Creek have a priority
24 date of 1852; the waters of Stutler Creek have a priority date of 1905. I JA 157.

25 ⁵ The water rights to Gansberg Springs have a priority date of 1925 and the
26 use of the water is supplemental to that of several vested North Sheridan Creek
27 water rights, including Smith & Barden’s. II JA 370. Supplemental water rights
28 may augment or replace other water rights with the same place of use when that
other water is unavailable, but do not expand upon the maximum amount of water
that can be appropriated by the user. II JA 289.

1 239-43. In August 2008, the State Engineer issued his Final Order of
2 Determination (“FOD”), which was filed with the district court in November
3 2008 with the assigned case number 08-CV-0363. I JA 155, II JA 190. Given
4 that the adjudication involved stream systems that were separate and distinct,
5 the district court broke the adjudication into sub-parts.

6 Sub-part D, district court case number 08-CV-0363-D, involved the
7 determination of the relative rights of the users of the waters of North Sheridan
8 Creek and resolution of any exceptions to the State Engineer’s FOD filed by
9 interested parties. *See generally* I JA 155-70. Smith & Barden did not file any
10 exceptions to the FOD as the State Engineer found their proofs of claim to be
11 valid for the requested acreage and they had no dispute with the State
12 Engineer’s determination of their relative rights to North Sheridan Creek set
13 forth in the FOD.⁶

14 Bentley, however, did file exceptions to the FOD and the district court
15 proceeded with resolution of those exceptions and entered its Findings of Fact,
16 Conclusions of Law, Order and Judgment (“Adjudication Order”) affirming, for
17 the most part, the FOD settling the relative rights of users of the waters of the
18 North Sheridan Creek. *Id.*

19 The participating parties to the adjudication sub-proceeding D included
20 Interveners, who were allowed to intervene in the adjudication action to
21 challenge Bentley’s right to use water under a diversion agreement mentioned
22 in one of Bentley’s exceptions. *Id.*, III JA 445-46. That diversion agreement
23 required that water be diverted and continuously flow through ponds on
24 Bentley’s property. I JA 160-61. Bentley filed the exception to request that any
25 rotation schedule be subject to that diversion agreement. III JA 445-46. The
26

27 ⁶ Notably, the FOD did not mandate Smith & Barden to rotate the usage
28 of their rights. II JA 266.

1 district court allowed Interveners to file claims and defenses regarding the
2 validity and alleged violation of the diversion agreement in the adjudication
3 action. I JA 161. At the onset of trial, the State Engineer, Interveners and
4 Bentley stipulated to resolve all of the exceptions, except the issue of the
5 diversion agreement, including the following stipulation:⁷

6 [T]he State Engineer would not attempt to include a rotation
7 schedule in the Decree itself, but that *the provisions of NRS*
8 *533.075 and the orders of this Court* would be used to determine
9 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.

10 I JA 158-60 (emphasis added). The district court adopted all of the stipulations
11 and found that the FOD, with the stipulated modifications, “is proper and may
12 be included in the Decree.” I JA 160. He then ordered:

13 5. When the combined flow from the North Diversion of Sheridan
14 Creek and tributaries drops below 2.0 [cubic feet per second
“cfs”], the State Engineer shall impose a rotation schedule.

15 6. The rotation schedule shall be in effect from the time the North
16 Diversion of Sheridan Creek drops below 2.0 cfs or until the
17 schedule is stayed or modified by this Court.

18 7. The rotation schedule shall be prepared at the beginning of the
19 irrigation season to allow review by this Court, under NRS
20 533.450, if *any party challenges* the schedule.

21 8. The State Engineer has full authority to implement a rotation
22 schedule *if appropriate*.

23 I JA 169-70 (emphasis added). The Adjudication Order did not specify the
24 content or manner of any rotation schedule imposed, nor the scope of any such
25 rotation. *See* I JA 155-70.

26 Bentley appealed the Adjudication Order, but that appeal was dismissed
27 by this Court. *See Bentley v. State Engineer*, Docket No. 60891 (Order
28

⁷ The trial centered around the issues of the validity of a diversion agreement running to the benefit of Bentley’s property and whether Bentley was violating the agreement, which was the focus of the Adjudication Order. *See* I JA 160-68.

1 Dismissing Appeal, February 15, 2013). While the Adjudication Order was the
2 final determination of the relative rights of water users of North Sheridan Creek,
3 I JA 169, the district court had not yet finished its adjudication of other stream
4 systems subject to the adjudication and no decree had been issued.⁸ Therefore,
5 the appeal was dismissed as premature.

6 **State Engineer's rotation schedules.** In 2012 and 2013, the State
7 Engineer issued rotation schedules as directed by the district court because
8 stream flows fell below 2.0 cfs. I JA 7-18, V JA 889-899. The rotation
9 schedules issued required all users of the commingled waters of North Sheridan
10 Creek to rotate their use of those waters on a 21-day cycle during the irrigation
11 season, including Smith & Barden. *Id.* No agreement amongst all the water
12 users of North Sheridan Creek to rotate their use of water exists.⁹ The State
13 Engineer provided no information or documentation with his rotation decisions
14 that the particular rotation imposed would accomplish a more efficient and
15 economic use of the waters by all water users or that the rotation would not
16 impair any of the water rights. *Id.*

17 **The petition for judicial review proceedings.** Upon receipt of notice of
18 the 2012 rotation, Smith & Barden brought a petition for judicial review
19 challenging their inclusion in the rotation schedule. I JA 1-4. Bentley also filed
20 a petition for judicial review in 2012. I JA 19-21. In 2013, Smith & Barden and
21 Bentley filed a joint petition for judicial review. V JA 884-86. The three
22 petitions were formally consolidated together pursuant to NRCP 42, and then
23 brought under the adjudication case, with a designated sub-case number, 08-CV-

24 ⁸ Nor, to date, has the final decree adjudicating all of the stream systems
25 been issued.

26 ⁹ Accounting for the Bentley's lease of Pestana's water rights, the water
27 rights of the non-consenting users, Bentley and Smith & Barden comprise
28 approximately 35% of the total waters of North Sheridan Creek. I JA 7-8, 133.

1 0363-D1, by orders of the district court on October 11, 2012, and November 27,
2 2013. I JA 113-15, V JA 1058, 1067.

3 Interveners were in favor of the rotation schedules because they worked
4 to their benefit, and thus, participated in the judicial review proceeding in
5 support of the State Engineer. V JA 1057-58. The district court rejected Smith
6 & Barden's arguments, finding that forced rotation is authorized in Nevada, that
7 the rotation schedules at issue were not "illegal", that substantial evidence
8 supported the State Engineer's decision to require Smith & Barden to rotate their
9 use of the water, and that the district court and the State Engineer had full
10 authority to order the rotation. V JA 1059-61. The petitions were denied and
11 this appeal was taken. V JA 1063.

12 **ARGUMENT SUMMARY**

13 The very premise of rotation is grounded in its voluntary nature, which is
14 iterated in NRS 533.075. The concept is that a group of irrigators of a common
15 source can agree to rotate their use of the water so that each irrigator will have
16 the full flow of the water source for certain times in order to build enough
17 irrigation head to force the water to the fields. The rotation schedules at issue
18 here were not creatures of such an agreement.

19 While the State Engineer was ordered to impose a rotation schedule to
20 achieve a more efficient use of the waters of North Sheridan Creek by the district
21 court under certain flow conditions, the scope and manner of rotation was left
22 up to the discretion of the State Engineer. Any such discretion must be exercised
23 within the bounds of NRS 533.075. A rotation schedule which inures only to the
24 benefit of certain water users, while impairing the water rights of other users, all
25 of whom have rights that are vested and of equal priority, cannot be imposed in
26 Nevada. Accordingly, the district court's directive to the State Engineer to order
27 rotation must be read within this constraint and the State Engineer is not
28 statutorily authorized to require non-consenting water users to rotate their use

1 of their vested water rights. If he does so, as he did here, his actions are arbitrary
2 and capricious and cannot be sustained.

3 Moreover, even if water users could be ordered to rotate their use of water
4 over their objection, the State Engineer must have substantial evidence that the
5 particular rotation ordered achieves a more economical and efficient use of the
6 waters for *all* water users and does not impair *any* water right of equal or earlier
7 priority. There is no evidence of such findings in this case; therefore, the rotation
8 schedules cannot be upheld.

9 ARGUMENT

10 **I. The District Court's Denial of the Petitions for Judicial Review Is** 11 **Appealable and this Court Has Jurisdiction over this Matter.**

12 A. Adjudication Proceedings in Nevada and the State Engineer's 13 Administration of Water Rights During Such Proceedings Are Governed by NRS Chapter 533.

14 Water rights in Nevada are adjudicated under the statutory procedure set
15 forth in NRS Chapter 533. An adjudication determines the relative rights of
16 claimants to waters of the subject surface waters. NRS 533.090(1). After notice
17 and investigation, the State Engineer takes proofs of claims of water right
18 claimants and issues a preliminary order of determination of the validity of the
19 claims. NRS 533.090-533.140. Objections can be made to the preliminary order
20 of determination, which are resolved after hearing by the State Engineer. NRS
21 533.145; 533.150.

22 At this juncture, the State Engineer finalizes his preliminary order and
23 files a FOD with the district court in the county in which the stream system is
24 situated, which acts as a complaint in a civil action, initiating the adjudication
25 proceeding at the district court level. NRS 533.160. Any party "aggrieved or
26 dissatisfied" with the FOD may file exceptions in the adjudication case and the
27 court will resolve the exceptions through hearing. *See* NRS 533.170(1). After

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1 the hearing of any exceptions, the district court enters its final “decree affirming
2 or modifying the order of the State Engineer.” NRS 533.185.

3 NRS 533.200 provides that an appeal of the decree may be taken. This
4 Court has held that only the *final* decree is appealable, because adjudication
5 proceedings, by their very nature, affect the rights of all of the claimants or
6 water users to a particular stream system, and a dispute between particular water
7 claimants is not “severable” and separately appealable, unless the disputes
8 between all claimants of the subject waters have been resolved through the entry
9 of a decree. *See, e.g., In re Waters of Humboldt River*, 54 Nev. 115, 7 P.2d 813
10 (1932) (dismissing attempted appeal from judgment determining relative rights
11 of claimants to waters diverted from the Humboldt River through a connected
12 canal, prior to entry of final decree adjudicating all the connected waters in the
13 Humbolt river system).

14 This case is somewhat unique in that the district court has not issued a
15 series of orders determining the relative rights of users of different sections or
16 tributaries of the *same* stream system, such as in the Humboldt River case cited
17 above. Rather, this is an adjudication where the State Engineer logically
18 grouped together various, discrete stream systems that drain into the Carson
19 Valley from the Eastern slope of the Carson Range into the adjudication for what
20 appears to be administrative ease. *See* II JA 195.

21 The district court stated that the Adjudication Order, affirming and
22 modifying the FOD was a final order as to the claimants of North Sheridan
23 Creek, and the FOD, as amended by the Adjudication Order, “shall become the
24 Final Decree” as to that sub-part of the adjudication, district court case number
25 08-CV-0363 D. I JA 169. However, at this time, the district court still has not
26 issued a final decree for all the sub-parts of the adjudication proceeding, and
27 until he does so, no appeal can be taken of the Adjudication Order. *See Bentley*

28 ///

1 *v. State Engineer*, Docket No. 60891 (Order Dismissing Appeal, February 15,
2 2013).

3 That does not mean that the parties are in a limbo state without recourse
4 to the courts until entry of the final decree. The State Engineer is charged to
5 *administer* the rights of the water law claimants in accordance with the FOD and
6 under the adjudicating district court's "supervision and control." NRS
7 533.220(1); 533.230. For example, if a water law claimant refuses to follow
8 the FOD or the adjudication court's orders determining the relative rights of
9 water users, the State Engineer may petition the adjudicating district court for a
10 show cause hearing for enforcement, and an appeal may be made to this Court
11 of the resulting judgment. NRS 533.220(2)-(5).

12 The State Engineer will also make decisions in his administration of the
13 rights determined under the FOD and orders of the district court, pending
14 issuance of a final decree, as he did here. NRS 533.220; 533.230. NRS
15 533.450(1) provides for judicial review of such administrative actions, and
16 therefore, decisions of the State Engineer *administering* water rights during the
17 pendency of the often long, drawn-out, adjudication proceedings falls within its
18 purview.¹⁰ And NRS 533.450(1) also requires that any such petition for judicial
19

20 ¹⁰ Except as otherwise provided in NRS 533.353, *any person feeling*
21 *aggrieved by any order or decision of the State Engineer*, acting in
22 person or through the assistants of the State Engineer or the water
23 commissioner, affecting the person's interests, when the order or
24 decision relates to the *administration of determined rights* or is
25 made pursuant to NRS 533.270 to 533.445, inclusive, or NRS
26 533.481, 534.193, 535.200 or 536.200, may have the same reviewed
27 by a proceeding for that purpose, insofar as may be in the nature of
28 an appeal, which must be initiated in the proper court of the county
in which the matters affected or a portion thereof are situated, but on
stream systems where a decree of court has been entered, the action
must be initiated in the court that entered the decree.

1 review regarding the State Engineer's administration of water rights of a stream
2 system subject to an adjudication, must be brought in the adjudicating court. *Id.*
3 Appeal of the district court's order granting or denying a petition for judicial
4 review of the decision or action of the State Engineer is specifically provided for
5 as well. NRS 533.450(9).

6 Here, the issue of the ability to force rotation upon non-consenting water
7 users of the same water source was not litigated as part of the North Sheridan
8 Creek adjudication proceeding. Rather, the district court ordered that when the
9 flow of North Sheridan Creek dropped below 2.0 cubic feet per second (cfs),
10 "the State Engineer shall impose a rotation schedule . . . [and] shall monitor the
11 system and make changes as required by law or by the request of the parties."
12 I JA 169-170. The district court did not specify the content, manner or scope of
13 any such rotation schedule. *See generally* I JA 155-170. In recognition of the
14 fact that the decision of the State Engineer in formulating a particular rotation
15 schedule is an administration of the water rights subject to the court's continuing
16 jurisdiction, the district court expressly provided that aggrieved persons could
17 petition for judicial review of any rotation schedule imposed. I JA 169.

18 B. The "Consolidation" of the Petitions for Judicial Review Brought
19 Challenging the State Engineer's Administration of Determined Water
20 Rights into the Adjudication Case, with the Assignment of a Separate
21 Subsection Case Number Does Deprive this Court of Jurisdiction to Hear
22 This Appeal.

23 Smith & Barden, upon receipt of notice of the 2012 and 2013 rotation
24 schedules, challenged their inclusion in the scope of those schedules by
25 petitioning the district court for judicial review. Bentley did the same. The
26 district court ordered that the three petitions for judicial review be consolidated
27 pursuant to NRCP 42(a) as they "pertain[ed] to related issues of fact and law."¹¹
28

¹¹ The consolidation order was only to the 2012 petitions, but the 2013
petition was later consolidated as well.

1 I JA 114. But it made no such reference to NRCP 42 when it “consolidated” the
2 petitions into the adjudication case, district court case number 08-CV-0363, at
3 the request of the State Engineer due to the district court’s continuing
4 jurisdiction over waters subject to an adjudication.¹² The court ordered that the
5 consolidated petitions be “assigned the subsection designation of NJDC Case
6 08-CF-0363-D-1.”¹³ *Id.*

7 The nature of the petitions are a challenge of the State Engineer’s
8 administration of the FOD and the Adjudication Order and are properly before
9 this Court. The issuance of the rotation schedules was not merely a ministerial
10 act conducted at the direction of the interlocutory Adjudication Order. Instead,
11 the State Engineer was charged with the responsibility of determining which

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13 ¹² The district court expressly consolidated the three petitions for judicial
14 review together pursuant to NRCP 42, which was entirely appropriate. If the
15 district court had deferred ruling on any one of the consolidated petitions for
16 judicial review, there is no argument that this appeal would have been premature.
17 *See Mallin v. Farmers Ins. Exch.*, 106 Nev. 606, 797 P.2d 978 (1990) (holding
18 that consolidated actions are treated as one, and thus, all of the claims, rights, and
19 obligations of the parties must be resolved before an order is considered final for
20 purposes of appellate jurisdiction). But that does not hold true for the appeal at
21 hand.

22 ¹³ It is common for the decree court to assign petitions for judicial review
23 or other disputes over the subject water rights the same case number, sometimes
24 with a separate subsection designation, as the court did here. As the State
25 Engineer pointed out, this is because the potential for water disputes over the
26 same stream system are never-ending and the decree court has developed the
27 record and expertise to deal with the disputes of the waters it adjudicates. I JA
28 89-93 (The State Engineer included the first page of a pleading contesting on of
his rulings on the Truckee River, which was assigned a subfile number under the
main adjudication case of the Orr Ditch Decree). For informational purposes,
Smith & Barden’s have provided an Addendum filed contemporaneously with
this brief that includes, as Exhibit 1, pages of the docket of the Humboldt County
district court listing cases regarding Humboldt River water rights. This Court
will note that the all the disputes are listed under the same case number.

1 water right users would be subject to the rotation schedule and the details of the
2 manner of the rotation.

3 There was no mandate from the district court that the State Engineer had
4 to force non-consenting users of water, such as Smith & Barden, who
5 historically used their pro-rata share of water on a continuous basis, to be part
6 of the rotation or under what parameters the State Engineer could compel any
7 particular user to rotate the usage of their water. These are issues that were not
8 and will not be resolved by the adjudication case as they have no bearing on the
9 *determination* of the relative rights of the various water claimants. The petitions
10 raise issues that challenge the State Engineer's *administration* of these rights.
11 As such, and pursuant to NRS 533.450(9), the district court's denial of the
12 consolidated petitions for judicial review is appealable, regardless of the on-
13 going nature of the adjudication.

14 The State Engineer agrees. At the oral argument of the petitions for
15 judicial review, Deputy Attorney General for the State Engineer stated that the
16 State Engineer did not dispute that Smith & Barden and Bentley were entitled
17 to bring the petitions for judicial review. V JA 957. He agreed that the petitions
18 involved "the administration of the decree rather than the decree itself." *Id.* And
19 he further explained that

20 once the decree becomes final, disputes such as this don't reopen
21 the whole decree under NRS 533. So our position is this appeal
22 does not concern the decree itself but it is by the decree court, and
23 because this Court takes exclusive jurisdiction over the rez [sic],
24 then this Court has exclusive jurisdiction. . . . [S]ince this Court has
25 exclusive jurisdiction over th rez [sic], that's why we filed the
26 motion . . . to . . . have the same number as the adjudication so that
27 all of these cases are together[.] . . . [I]t's our position that they are
28 not part of the decree, these are concerning the administration of
the order of this Court."

29 V JA 958-59. Counsel for Intervenors concurred. V JA 959.

30 What if this case involved not the decision of the State Engineer to include
31 objecting user in a rotation, but to a decision of the State Engineer to grant an

1 application to change the place or manner of use or point of diversion of North
2 Sheridan Creek water rights? The result would be the same. The act of the
3 State Engineer would be an administrative act that could be reviewed by the
4 district court under NRS 533.450(1). The petition would be assigned a
5 subsection number under the main adjudication case and the grant or denial of
6 the petition would be appealable to this Court per NRS 533.450(9). Thus, this
7 case is squarely and properly before the Court and this Court has jurisdiction to
8 proceed.

9 **II. Standard of Review**

10 Judicial review of the State Engineer's decisions or order is brought
11 pursuant to NRS 533.450 and is in "the nature of an appeal." NRS 533.450(1).
12 Any aggrieved party may bring such a petition. This Court "is free to decide
13 purely legal questions . . . without deference to the [State Engineer's] decision."
14 *Town of Eureka v. State Engineer*, 108 Nev. 163, 165, 826 P.2d 948 (1992).
15 However, "[w]ith questions of fact, the reviewing court must limit itself to a
16 determination of whether substantial evidence in the record supports the State
17 Engineer's decision." *Id.* The matter at hand presents both questions of law and
18 fact.

19 **III. Rotation of Vested Water Rights of Equal Priority in Nevada must Be** 20 **Consensual**

21 The State Engineer issued rotation schedules requiring *all* users of the
22 commingled waters of North Sheridan Creek to rotate their use of those waters,
23 including Smith & Barden, during the 2012 and 2013 irrigation seasons,
24 regardless if they objected to the rotation. But there is no statutory authority in
25 Nevada that allows for the State Engineer to impose a rotation schedule upon
26 non-consenting water users.

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1 A. Rotation of Water in Nevada Must be Conducted Pursuant to NRS
2 533.075, Which is a Grant of Authority to Water Users of a Common
3 Source to Agree to Use their Water on a Rotation Basis.

4 The only Nevada water law statute that provides for implementation of a
5 rotation schedule is NRS 533.075, which provides:

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

14 Emphasis added.

15 “[I]t is well established that when the language of a statute is plain and
16 unambiguous, a court should give that language its ordinary meaning and not go
17 beyond it.” *United States v. State Engineer*, 117 Nev. 585, 589-90, 27 P.3d 51
18 (2001) (internal citations, quotations and brackets omitted). NRS 533.075 is not
19 ambiguous. To be considered ambiguous, a statute must be capable of two or
20 more reasonable, but inconsistent interpretations. *Id.*

21 NRS 533.075 *allows* users of a single source of water to agree to use their
22 water outside the terms and conditions of their water rights to bring about a more
23 economical use of the water. In essence, it is a grant of authority to water right
24 users of a common source to alter the amount and timing of water used for
25 irrigation outside of any dictate of the State Engineer to achieve a more efficient
26 use of a scarce resource. On the face of the statute, a rotation schedule cannot
27 be imposed upon non-consenting water-users and cannot impair users rights.¹⁴

28 ¹⁴ NRS 533.075 is similar to rotation statutes in other states. Oregon,
Washington and Wyoming all permit water users of a single source to agree upon
a rotation schedule. See Or. Rev. Stat. §§ 540.150 (“To bring about a more
economical use of the available water supply, water users owning lands to which
are attached water rights may rotate in the use of the supply to which they may be

1
2 In construing water law statutes, the State Engineer's "interpretation of its
3 own regulation or statute is entitled to consideration and respect[.]" so long as
4 it does not contravene the plain language of the statute. *Id.* Here, the State
5 Engineer's interpretation of NRS 533.075 is consistent with that articulated
6 herein. As he set forth in the FOD, citing to NRS 533.075:

7 claimants of vested water rights and those owners of water rights
8 acquired through the appropriative process from a common supply
9 may rotate the use of water to which they are collectively entitled
10 *based on an agreement*, so as to not *injure nonparticipants* or
11 *infringe upon their water rights*, which is subject to approval by the
12 State Engineer. The purpose is to enable irrigators to *exercise their*
13 *water rights more efficiently, and thus, to bring about a more*
14 *economical use* of available water supplies in accordance with their
15 dates of priority.

16 II JA 289 (emphasis added). This interpretation is further buttressed by an
17 informational report issued by the office of the State Engineer in 1974, wherein
18 the State Engineer described NRS 533.075 as follows:

19 A unique feature permitted in Chapter 533 of the Nevada Water
20 Law is the principle of rotation to bring about a more economical
21 use of the available water supply. An example of rotation is when
22 users on a stream agree that when the natural flow has reached a
23 minimum, they can combine their rights to develop a larger head
24 and rotate this larger head among the individual users on an agreed

25 collectively entitled."); Rev. Code Wash. § 90.03.390 ("Water users owning lands
26 to which water rights are attached may rotate in the use of water to which they are
27 collectively entitled, . . . when such rotation can be made without detriment to
28 other existing water rights, and has the approval of the water master or
department."); Wyo. Stat. § 41-3-612(a) ("To bring about a more economical use
of the available water supply, it is lawful for water users owning lands to which
are attached water rights, to rotate in the use of supply to which they may be
collectively entitled[.] . . . Rotation of water will only be allowed only if it can be
accomplished without injury to other appropriators."). The common thread
amongst NRS 533.075 and these statutes is that rotation is premised upon the
water users' agreement and that rotation achieves, in the opinion of those water
users, a more economical use of the water and cause no injury to other water
rights of equal or earlier priority.

1 upon schedule. The practice can give larger heads for shorter
2 periods of time, with resultant increases in irrigation efficiency and
lower operating costs.

3 *Water for Nevada, Special Information Report, Water - Legal and*
4 *Administrative Aspects*, Division of Water Resources, 1974, at 17, available at
5 [http://images.water.nv.gov/images/publications/water%20planning%20reports/](http://images.water.nv.gov/images/publications/water%20planning%20reports/wfn_special_admin.pdf)
6 [wfn_special_admin.pdf](http://images.water.nv.gov/images/publications/water%20planning%20reports/wfn_special_admin.pdf), and attached for this Court's courtesy as Exhibit 2 to
7 Smith & Barden's Addendum.

8 NRS 533.075 was enacted as part of the 1913 comprehensive statutory
9 water law scheme. It embodies the common law policy in existence at that time
10 of encouraging the practice of agreed-upon rotation as an efficient use of a single
11 source of water by its different users. Neither the State Engineer nor Interveners
12 dispute that NRS 533.075 is a consent-based statute. It is clear that the law in
13 Nevada only allows for consensual rotation and the State Engineer may not use
14 rotation as an administrative tool to force rotation upon non-consenting users.

15 Moreover, during an ongoing adjudication proceeding, NRS 533.230
16 provides that the State Engineer is to *administer* water in accordance with the
17 FOD pending issuance of a final decree. In regards to the waters of North
18 Sheridan Creek, all the FOD states is that in times of low flow, all users will
19 have to share in the water shortage. II JA 388. This is due to the fact that all
20 North Sheridan Creek water users rights are of equal priority and why the FOD
21 suggests, but does not mandate, that "[t]he total diversion from either the north
22 or south split *can* be used in its entirety in a rotation system of irrigation." II JA
23 387-88 (Emphasis added).

24 The district court affirmed the FOD as to the determination of the relative
25 rights of claimants to use the waters of North Sheridan Creek, with a few minor
26 modifications. I JA 160, 169. The district court also ordered that the State
27 Engineer would impose a rotation schedule under certain flow conditions, but
28 that no such rotation would be included in the decree. I JA 158, 169-70. The

1 Adjudication Order was silent as to the scope and manner of the rotation
2 imposed. *See* I JA 155-70. Thus, the State Engineer's discretion in formulating
3 a particular rotation schedule must be exercised within the bounds of Nevada's
4 statutes and the State Engineer may not reach beyond the plain language of the
5 statutes or the FOD to force non-consenting water users to rotate their usage of
6 their water. *See State ex rel. Hinckley v. Sixth Judicial District Court*, 53 Nev.
7 343, 353-54, 1 P.2d 105 (1931) (water "could be properly and legally distributed
8 by the [State Engineer's] officers . . . only when done in accordance with the
9 terms of the order of determination"); *see also G & M Properties .v District*
10 *Court*, 95 Nev. 301, 594 P.2d 714 (court's authority in statutory adjudication is
11 limited to that set forth in adjudication statutes).

12 In the case at hand, it is undisputed that there is no agreement amongst all
13 the users of North Sheridan Creek to rotate their usage of those waters and that
14 Smith & Barden do not consent to the rotation schedules imposed. Smith and
15 Barden's rights cannot be subjected to a rotation schedule, and the State
16 Engineer acted arbitrarily and capriciously and in excess of his statutory
17 authority in including them in the rotation. Thus, the district court erred as a
18 matter of law in holding that the challenged rotation schedules were not "illegal"
19 and were within the bounds of the court's and the State Engineer's authority to
20 order.

21 B. The State Engineer Acted Arbitrarily and Capriciously in Forcing Smith
22 & Barden, Non-Consenting Vested Water Right Users, to Rotate the Use
23 of Their Water in Favor of Other Vested Water Right Users Whose Water
24 Rights Have the Same Priority as Those of Smith & Barden.

25 Nevada's water rights are administered on a "first in time, first in right"
26 prior appropriation scheme. The importance of being "first in time" is
27 demonstrated in times of water shortage where the priority of rights dictates who
28 will receive water and who will not. In other words, the holders of junior rights
will be cut off from their water to protect the rights of senior users. *See Ophir*

1 *Silver Mining Co. v. Carpenter*, 4 Nev. 534, 543 (1869) (“priority of
2 appropriation gives the superior right”).

3 The water users of North Sheridan Creek all hold vested water rights of
4 *equal* priority. Thus the question becomes, how to deal with shortages if there
5 is no junior appropriator whose supply of water can be curtailed to satisfy the
6 needs of the senior appropriator? Respondents are likely to argue that the only
7 way for holders of equal priority water rights to share the water of the same
8 source in times of shortage is on a rotational basis. That is simply not the case.

9 Individuals that enjoy the use of water rights on an equal par with other
10 users of the same source are entitled to expect the State Engineer to administer
11 and protect those rights in a non-arbitrary and non-discriminatory matter. Water
12 users of a common source of water may always agree to rotate the use of their
13 water, but such an agreement cannot bind the non-consenting users. In such
14 times, those non-consenting users will have to share in the shortage, by taking
15 their reduced pro-rata share based upon available supply. *See Richlands Irr. Co.*
16 *v. Westview Irr. Co.*, 80 P.2d 458, 466 (Utah 1938) (“those of equal right and
17 priority must prorate the shortage between them”); *see also Artemas Holman v.*
18 *Pleasant Grove City*, 30 P. 72 (Utah 1892)(distribution of water to city residents
19 could not be unequal and when there is not enough water to furnish all users
20 with what they need, the city should make a pro rata reduction).

21 Otherwise, forcing objecting users to rotate their water in favor of
22 consenting users that hold rights of the same priority is discriminatory and
23 impairs their water rights. *See Neubert v. Yakima-Tieton Irr. Dist.*, 814 P.2d 199
24 (Wash. 1991) (irrigation district improperly discriminated against water users by
25 giving preference to users who signed up for frost protection service over the
26 users who did not, and all of whom shared the same priority of their water
27 rights). By including non-consenting users in a rotation schedule, the State

28 ///

1 Engineer is effectively and inappropriately relegating those users to a “junior”
2 appropriator status, contrary to the long-held mandates of Nevada water law.

3 Furthermore, the State Engineer’s duty to equally administer rights of
4 equal priority is heightened when it comes to vested water rights. When the
5 Nevada Legislature enacted the water law scheme in 1913, it intended to “place
6 the distribution of the waters of the streams or stream systems of the state to the
7 person entitle thereto, under state control.” *Ormsby County v. Kearney*, 37 Nev.
8 314, 336, 142 P. 803 (1914). But in doing so, it ensured that vested rights, *i.e.*,
9 rights that were initiated prior to adoption of the statutory scheme, would be
10 protected from *impairment* as memorialized in NRS 533.085:

11 [n]othing contained in this chapter shall impair the vested right of
12 any person to the use of water, nor shall the right of any person to
13 take and use water be impaired or affected by any of the provisions
of this chapter where appropriations have been initiated in
accordance with law prior to March 22, 1913.

14 This protection was built into the water act by the Legislature as a due process
15 measure to ensure that vested rights would not be impaired, “that is, they shall
16 not be diminished in quantity or value,” by the administration of the statutes or
17 the State Engineer’s exercise of his authority thereunder. *See Ormsby County*,
18 37 Nev. at 352, 142 P. at 806. The Nevada Supreme Court has consistently
19 affirmed and applied this mandate. *Anderson Family Associates v. Kicei*, 124
20 Nev. 182, 186-88, 179 P.3d 1201 (2008); *Filipini v. State Engineer*, 66 Nev. 17,
21 22-23, 202 P.2d 535 (1949).

22 Historical usage is what defines the extent and terms of vested water
23 rights. *See generally Steptoe Livestock Co. v. Gulley et al.*, 53 Nev. 163, 295 P.
24 772 (1931). Throughout the adjudication process, after conducting a stream
25 flow investigation pursuant to NRS 535.100, taking proofs pursuant to NRS
26 533.110-533.125, and preparing the preliminary and final orders of
27 determination pursuant to NRS 533.140-533.165, the State Engineer never made
28 any findings that Smith and Barden’s water rights were historically used in

1 rotation. II JA 195-97, 235, 266, 289, 386-87. In sum, the determination of the
2 extent and terms of use of Smith & Barden's water rights did not include rotation
3 of those rights.

4 Therefore, the only way the State Engineer could order Smith & Barden
5 to rotate their water rights in administering the vested rights of North Sheridan
6 Creek was to ensure that the rotation schedule equally benefits all water users
7 of North Sheridan Creek, which of course would mean that the users would
8 likely consent to the rotation. If not, he can only order non-consenting users to
9 take a pro-rata reduced share of available water. Otherwise, the rotation will
10 effectively diminish the quantity and value of the vested water rights, but will
11 purportedly improve the quantity and value of vested rights with the same
12 priority. This discriminatory administration smacks of arbitrariness and is not
13 countenanced by Nevada law.¹⁵

14 **IV. The State Engineer Did Not Have Substantial Evidence to Support**
15 **His Rotation Schedules.**

16 Assuming *arguendo*, that the State Engineer did not act contrary to
17 Nevada law, in excess of his authority, or arbitrarily and capriciously in
18 imposing a rotation schedule upon Smith and Barden, his decision to do so is not
19 supported by substantial evidence. Substantial evidence is defined "as that
20 which a reasonable mind might accept as adequate to support a conclusion."
21 *Bacher v. State Engineer*, 122 Nev. 1110, 1121, 146 P.3d 793 (2006).

22 ///

23
24 ¹⁵ Water rights in Nevada can be changed as to place and type of use upon
25 approval by the State Engineer. They are also freely alienable. Yet, mandated
26 rotation circumscribes any attempt by Smith and Barden to change the type of use
27 of their water rights from irrigation or to sell or lease such rights to a third party
28 for a different type of use. This significant curtailment of their property interest
in their water rights by virtue of a forced rotation schedule was not contemplated
by the Legislature, nor can it be sustained by this Court.

1 In this case, the State Engineer must have made some conscious decision
2 to include Smith & Barden in the rotation, which could only be justified if he
3 determined that the rotation would achieve a more economical and efficient use
4 of their water rights, the entire purpose of rotation. *See* NRS 533.075; *Water for*
5 *Nevada, supra*, Ex. 2 to Addendum. Moreover, in subjecting Smith & Barden
6 to the rotation, he must also have had evidence that the rotation would not impair
7 their rights to the benefit of rights of equal priority, which is a parameter that
8 guards against discriminatory, arbitrary or capricious actions. In the absence of
9 such evidence, how can a decision to include Smith & Barden in a rotation
10 schedule over their objection be justified?

11 Nonetheless, the State Engineer's rotation orders are devoid of any
12 reference that he had any evidence to support his decision to impose the rotation
13 upon Smith & Barden in a manner that did not impair their rights or achieve a
14 more economical use of their water. I JA 5-18, V JA 847-857.¹⁶ Neither did the
15 State Engineer produce any such evidence in the proceedings before the district
16 court. A reasonable mind could not possibly accept that no evidence equates to
17 adequate evidence. Therefore, the district court erred in finding that substantial
18 evidence supported the State Engineer's imposition of the rotation schedule.

19 CONCLUSION

20 The State Engineer's authority is not unlimited. He must act within the
21 bounds of the statutes in his administration of water rights pursuant to a FOD or
22 adjudicating court order or decree. In Nevada, rotation of water rights of a
23 common source must be consensual and the State Engineer cannot impose
24 rotation upon non-consenting users whose rights are of equal priority to those
25 users who consent to rotation.

26
27 ¹⁶ The rotation schedules issued in 2012 and 2013 are virtually identical
28 as to parties included and dictated timing of the use of their rights. *Id.*

1 The district court erred in concluding that forced rotation is condoned by
2 Nevada law and that the rotation schedules imposed that did not carve out Smith
3 & Barden from their purview were valid, legal and supported by substantial
4 evidence. Accordingly, and for the foregoing reasons, the order of the district
5 court must be reversed and the matter remanded with instructions that the State
6 Engineer must structure his rotation schedules for North Sheridan Creek in such
7 a manner that non-consenting water users are exempted from their scope.

8 Respectfully submitted this 17 day of June, 2014.

9
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CERTIFICATE OF COMPLIANCE

1
2 1. I hereby certify that this brief complies with the formatting requirements
3 of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style
4 requirements of NRAP 32(a)(6) because: this brief has been prepared in a
5 proportionally spaced typeface using WordPerfect, Times New Roman 14 point
6 font.

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

10 (a) proportionately spaced, has a typeface of 14 points or more, and
11 contains 7937 words; and (2) does not exceed 30 pages.

12 3. Finally, I hereby certify that I have read this appellate brief, and to the
13 best of my knowledge, information, and belief, it is not frivolous or interposed
14 for any improper purpose. I further certify that this brief complies with all
15 applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1),
16 which requires every assertion in the brief regarding matters in the record to be
17 supported by a reference to the page and volume number, if any, of the transcript
18 or appendix where the matter relied on is to be found. I understand that I may be
19 subject to sanctions in the event that the accompanying brief is not in conformity
20 with the requirements of the Nevada Rules of Appellate Procedure.

21 Dated this 9th day of June, 2014

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Dyer, Lawrence, Flaherty, Donaldson & Prunty, and that on the 10th day of June, 2014, I caused a true and correct copy of the within **OPENING BRIEF OF APPELLANTS JOY SMITH, DANIEL BARDEN AND ELAINE BARDEN** to be deposited in the U.S. Mail, first-class postage prepaid, addressed to the persons listed below:

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