

IN THE SUPREME COURT OF NEVADA

Electronically Filed
Jun 16 2014 04:14 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

In Re: Rotation Schedule

Supreme Court Case No. 64773

In the Matter of the Determination of the
Relative Rights in and to the Waters of
Mott Creek, Taylor Creek, Cary Creek
(aka Carey Creek), Monument Creek, and
Bulls Canyon, Stutler Creek (aka Stattler
Creek), Sheridan Creek, Gansberg Spring,
Sharpe Spring, Wheeler Creek No. 1,
Wheeler Creek No. 2, Miller Creek, Beers
Spring, Luther Creek and Various
Unnamed Sources in Carson Valley,
Douglas County, Nevada.

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

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.

**SUPPLEMENT TO
APPELLANTS' OPENING BRIEF**

1 Matuska Law Offices, Ltd.
2 Michael L. Matuska, Esq. SBN 5711
3 937 Mica Drive, Suite 16A
4 Carson City NV 89705
5 Phone: (775) 392-2313
6 Fax: (775) 392-2318

7 Attorneys for Appellants, J.W. Bentley
8 and MaryAnn Bentley, Trustees of
9 The Bentley Family 1995 Trust

10 Attorney General
11 State of Nevada
12 Bryan L. Stockton, Esq. SBN 4764
13 Deputy Attorney General
14 100 North Carson Street
15 Carson City, Nevada 89701
16 Phone: (775) 684-1228
17 Fax: (775) 684-1103

18 Attorneys for Respondent, The State
19 of Nevada, Office of the State
20 Engineer

Dyer, Lawrence, Penrose, Flaherty,
Donaldson & Prunty
Jessica C. Prunty, Esq. SBN 6926
2805 Mountain Street
Carson City NV 89703
Phone: (775) 885-1896
Fax: (775) 885-8728

Attorneys for Appellants, Joy Smith,
Daniel Barden, and Elaine Barden

Law Office of Thomas J. Hall
Thomas J. Hall, Esq. SBN 675
305 South Arlington Avenue
P.O. Box 3948
Reno NV 89505
Phone: (775) 348-7011
Fax: (775) 348-7211

Attorneys for Intervenor, 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

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 Supplement to Opening Brief on Appeal in order to address the issue of jurisdiction as directed by this Court's Order of May 27, 2014. The Order follows the reply filed by Respondents/Intervenors where they suggested, for the first time, that the consolidation of the petitions for judicial review with the adjudication Case No. 08-CV-0363 affected the finality of the November 27, 2013 Order denying the petitions for judicial review. The order specifically cites *Mallin v. Farmers Ins. Exch.*, 106 Nev. 606, 797 P.2d 978 (1990) for the rule that there is no right to appeal from a judgment on one (1) part of a consolidated case unless that judgment is certified as final pursuant to NRCP 54(b).

I. INTRODUCTION

The three (3) petitions for judicial review were consolidated and heard together, but were not actually consolidated with the main adjudication case, 08-CV-0363. Rather, the petitions for judicial review were assigned a new case number 08-CV-0363-D-1 and designated as a related proceeding for administrative purposes. As such, either the *Mallin* rule does not apply, or this Court should recognize an exception to that rule in decree cases that have multiple related cases. This Court's Order states that Bentley is "effectively challenging the April 5 [2012] order" from the trial in Case No. 08-CV-0363-D. (Order at p.4). Bentley does not

1 agree with that characterization. Bentley does not need to challenge the April 5
2 order. The April 5 order is not clear. It is an interlocutory order that was not
3 intended to be a final judgment. The April 5 order reserved Bentley's right to
4 petition for judicial for review, and the issue of the rotation scheduled was not tried.
5 Bentley is not challenging the order; rather Bentley is aggrieved by the actions of
6 the State Engineer and has the right to petition for judicial review. The Order is
7 presumably relevant to the State Engineer, who will likely point to the
8 April 5 order as justification for the rotation schedule that is not authorized by
9 statute. Bentley explained in the Opening Brief that the Order has no preclusive
10 effect on the issues presented for judicial review, and does not offer the State
11 Engineer a defense. The April 5 Order also directed the State Engineer to comply
12 with NRS 533.075. The State Engineer failed to do so.
13
14
15
16

17 Respondents already conceded the finality of the underlying order when they
18 applied for costs, and are judicially estopped from taking a contrary position on
19 appeal.
20

21 Bentleys' appeal is equally viable as an original proceeding for a writ of
22 mandate to prevent the State Engineer from enforcing a rotation schedule in
23 violation of the Nevada Revised Statutes and Final Order of Determination.
24

25 **II. BACKGROUND**

26 This case concerns water rights to the North Branch of Sheridan Creek
27 located in Douglas County. Sheridan Creek is one of the stream systems that is
28

1 subject to the adjudication now pending in the Ninth Judicial District Court In and
2 For Douglas County, Nevada Case No. 08-CV-0363. That case encompasses the
3 adjudication of Sheridan Creek and various other streams located on the east slope
4 of the Carson Range, Sierra Nevada Mountains, in Douglas County, Nevada.
5

6 The purpose and scope of the water rights adjudication is to determine the
7 relative rights to the various stream and creek systems, not to enforce or quiet title to
8 a private diversion agreement or enforce a rotation schedule. This point is
9 reinforced throughout NRS Chapter 533.
10

11 “[D]etermination of the relative rights to the use of water of any
12 stream.” NRS 533.090(1);
13

14 “[D]etermination of the relative rights to the use of water of any
15 stream.” NRS 533.090(2);
16

17 “[D]etermination of the water rights in the stream.” NRS 533.100(1);
18

19 “[A] preliminary order of determination establishing the several rights
20 of claimants to the waters of the stream.” NRS 533.140(1);
21

22 “[Final] order of determination, defining the several rights to the
23 waters of the stream or stream system.” NRS 533.160;
24

25 “Upon the final determination of the relative rights in and to the
26 waters of any stream system, the State Engineer shall issue to each
27 person represented in such determination a certificate” NRS
28 533.265(1);

29 The adjudication proceeds through many stages, some of which are outside of
30 the Joint Appendix submitted with Bentleys’ opening brief. For instance, the
31 adjudication process commences upon an order from the State Engineer. NRS
32 533.090. One of the initial steps is for the State Engineer to commence preparing

1 surveys and maps. NRS 533.100. The State Engineer shall also provide notice of
2 commencement of taking of proofs. NRS 533.110. The State Engineer then
3
4 compiles this information in a Preliminary Order of Determination ("POD"). NRS
5 533.140. The State Engineer shall then fix a time to hear objections to the POD.
6 NRS 533.145, 533.150. The State Engineer then prepares a Final Order of
7
8 Determination ("FOD") which is filed with the clerk of the district court. NRS
9 533.165. The district court then fixes a time to hear exceptions of the FOD. NRS
10 533.170. The FOD is treated as the complaint and the exceptions are treated as the
11
12 answer. NRS 533.170(2). "[T]here shall be no other pleadings in the cause." *Id.*
13 Intervenor's quiet title action concerning a recorded Diversion Agreement (raised
14 through affirmative defenses) and request for the imposition of a rotation schedule
15 are not part of the statutory adjudication procedures.
16

17 The record in this case commences with the FOD, which was lodged with the
18 District Court and commenced Case No. 08-CV-0363 ("FOD") on August 14, 2008.
19 (App. Vol. 2 at 222-456). The FOD approved all of the vested claims listed on
20 *Appendix A* to Bentley's Opening Brief, including the proofs of claims filed by
21 Bentley's predecessors, Theodore and Katherine Weber, without reference to a
22 rotation schedule. (App. Vol. 2 at 418-420).
23
24

25 Bentley appeared in Case No. 08-CV-0363 to file its *Notice of Exceptions* to
26 the FOD on December 10, 2008 after learning that some of the claimants were going
27 to demand a rotation schedule. (App. Vol. 3 at 457-475). Bentley requested in
28

1 Exception No. 1 to be exempt from any forthcoming rotation schedule, especially
2 when doing so would have the effect of nullifying a Water Diversion and Use
3 Agreement that was recorded in the Official Records of Douglas County, Nevada,
4 on 27 March 1987, at Bk. 387 Pg. 2726, Doc. No. 152147 ("Diversion Agreement").
5 (App. Vol. 3 at 436-443). The Diversion Agreement was not referenced in the
6 FOD; however, it was explained in Proof Nos. V-06307 and V-06308 and formed
7 part of the support for those proofs (App. Vol. 3 at 477, 481; App. Vol. 4 at 601,
8 611). Those proofs were accepted in the FOD (App. Vol. 3 at 468-475).¹

9 Bentley filed its *Amended Notice of Exceptions* on March 25, 2009 to correct
10 some additional errors in the FOD regarding the approved acreage (App. Vol. 4 at
11 476-491). The proceedings on Bentley's exceptions were severed from the main
12 adjudication case and proceeded as Case No. 08-CV-0363 subproceeding D. On
13 November 19, 2009, Intervenors filed a document in subproceeding D called
14 *Response and Objections to Notice of Exceptions and Exceptions to Final Order of*
15 *Determination* ("Response") (App. Vol. 5 at 880-883). Intervenors' *Response* was
16 essentially a complaint, set forth as a series of affirmative defenses, that requested
17 relief from the Diversion Agreement.²

25 ¹ Bentley also sought to correct some small errors in the FOD that were not
26 contested and are not at issue in this appeal.

27 ² Hon. David R Gamble refused to dismiss the affirmative defenses even though it
28 was not part of answer, did not constitute a pleading under NRCP 7 and is
prohibited in a statutory adjudication case wherein the Order of Final Determination

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

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

13 a. Exception 1, in part, was that the State Engineer would
14 not attempt to include a rotation schedule in the Decree itself,
15 but that the provisions of NRS 533.075 and the order of this
16 Court would be used to determine when and if a rotation
17 schedule is needed to efficiently use the waters of the State of
18 Nevada. However, Bentley reserves all objections to the
19 imposition of a rotation schedule, including objection about the
20 statutory authority to do so. (See April 5, 2012 order, App.
21 Vol. 1 at 158).

22 Because all of Bentley's exceptions were resolved by stipulations at the outset
23 of trial, there were no issues left to try. However, the Court clarified that it wanted

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 to proceed with trial on the Intervenor's claims and defenses contained in their
2 *Response* regarding the Diversion Agreement. None of those claims and defenses
3 involved a rotation schedule. (See excerpts from transcript, App. Vol. 1 at 136:16-
4 138:8).

5
6 Despite the foregoing stipulation that the Decree would not impose a rotation
7 schedule, Senior Deputy Attorney General Bryan Stockton, on behalf the State
8 Engineer, requested in closing argument for the Court's direction on a rotation
9 schedule. Smith and Barden were not parties to subproceeding D and Bentley was
10 denied an opportunity to respond. Consequently, the April 5 order stated, in
11 pertinent part, as follows:
12
13

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

28 (April 5 order, App. Vol. 1 at 169:17-170:5)

The April 5 order did not contain any findings that warranted a rotation

1 schedule and the portion of the April 5 order that directed the rotation schedule
2 contradicted the stipulation that a rotation schedule would not be part of the decree.
3 Bentley's Opening Brief addresses the subsequent action of the State Engineer to
4 impose the rotation schedule.
5

6 **III. ARGUMENT**

7 **A. The Cases Were Consolidated for Administrative Purposes, Only**

8
9 Smith and Barden petitioned for judicial review of the 2012 rotation schedule
10 on April 30, 2012. (Case No. 12-CV-0141) (App. Vol. 1 at 1-18). Bentley also
11 petitioned for judicial review of the 2012 rotation schedule on May 3, 2012 (Case
12 No. 12-CV-0145) (App. Vol. 1 at 19-38). Smith, Barden and Bentley filed a joint
13 petition for judicial review of the 2013 rotation schedule on April 25, 2013 (Case
14 No. 13-CV-0121) (App. Vol. 5 at 884-899).
15
16

17 On July 2, 2012, the State Engineer filed separate motions to consolidate Case
18 Nos. 0141 and 0145 (App. Vol. 1 at 89-96; 97-104). Although the State Engineer
19 cited NRCP 42(a) and the reference therein to common questions of law or fact, the
20 common questions were common legal and factual issues in Case Nos. 0141 and
21 0145. The State Engineer did not argue that the petitions for judicial review had
22 questions of law or fact in common with the adjudication Case No. 08-CV-0363 or
23 Subpart D. The State Engineer explained in his motions to consolidate that the court
24 has "continuing jurisdiction" over the water rights involved as part of the decree
25 proceeding (App. Vol. 1 at 91:12; 99:12). Each new matter is, however, a new case.
26
27
28

1 The State Engineer analogized this result to the federal court practice involving the
2 federal decrees (Alpine Decree, Orr Ditch Decree) wherein each new case gets a
3 new number, but is designated a sub-proceeding of the original decree. That does
4 not mean, however, that the decrees never become final. If that were the case, the
5 finality of the decree in Case No. 08-CV-0363 would depend not on the completion
6 of the decree itself, but on the happenstance of if and when related cases were filed,
7 such as petitions for judicial review, original writ proceedings, and contempt
8 proceedings, that would all need their own final ruling before they or the underlying
9 decree would be final.
10
11

12
13 In its opposition, Bentley acknowledged the on-going jurisdiction of the
14 decree court, but explained that the issues presented by the petitions for judicial
15 review were independent of the decree (App. Vol. 1 at 106). Hon. David R.
16 Gamble, presiding judge, ordered the matters consolidated (App. Vol. 1 at 113-116).
17 In so doing, he consolidated the petitions based on the "related issues fact and law
18 . . . with NJDC Case Nos. 12-CV-0141 and 12-CV-0145," and further consolidated
19 them with NJDC 08-CV-0363 merely because they "pertain to water of the existing
20 Mott Creek adjudication . . ." (App. Vol. 1 at 114). Judge Gamble did not identify
21 and common issues of law or fact between the petitions and the adjudication.
22
23

24
25 The State Engineer filed a third motion to consolidate the later filed petition
26 for judicial review, Case No. 13-CV-0121 (App. Vol. 5 at 928-933). That motion
27 was heard as part of the hearing on October 17, 2013. Senior Deputy Attorney
28

1 General Bryan Stockton explained on behalf of the State Engineer that the petitions
2 (and the consolidation) do not concern the decree, but that the consolidation simply
3 recognizes the decree court's continuing jurisdiction over the "rez" [sic]. Counsel
4 for Bentley, Smith and Barden explained that they expected to retain the right to
5 appeal from an adverse decision separately from any appeals concerning the decree
6 (See Transcript, App. Vol. 5 at 955-959). Mr. Stockton's position is suggested by
7 NRS 533.450, which governs petitions for judicial review. ". . . but on stream
8 systems where a decree of court has been entered, the action [petition for judicial
9 review, ed.] must be initiated in the court that entered the decree." NRS 533.450(1).
10 NRS 533.450(1) does not mandate that the new petitions for judicial review must be
11 assigned the same case number as the decree, but that is the practice for decree
12 courts. That practice is not objectionable so long as the new petition is assigned a
13 different sub-proceeding number.
14
15
16
17
18

19 In the instant case, Case Nos. 0141 and 0145 were simply renumbered and
20 designated as subproceedings of the adjudication case, Case No. 08-CV-0363, but
21 not actually consolidated for a common determination of any issues. The petitions
22 did not share any proceedings in common with the Mott Creek adjudication, and the
23 service list was never amended to include other parties or other attorneys from the
24 main case. The State Engineer's multiple motions to consolidate were not noticed in
25 the adjudication Case No. 08-CV-0363, and the hundreds of other parties to that
26 case were not given the opportunity to object to the consolidation.
27
28

1 This practice is also analogous the practice regarding the Humboldt River
2 decree, another statutory adjudication. Attached hereto as **Exhibit "1"** are excerpts
3 from the dockets and various orders in The Sixth Judicial District Court Case Nos.
4 CV-2804 and CV-2804-3 concerning the 1924 Humboldt River Decree. Sub-part 3
5 was appealed separately from the decree and reported as *South Fork Bank of the Te-*
6 *Moak Tribe of Western Shoshone Indians of Nevada v. State Engineer*, 118 Nev.
7 901, 59 P.3d 1226 (2002).
8

9
10 For the foregoing reasons *Mallin v. Farmers Ins. Exch.* does not address the
11 present situation where the cases were not fully consolidated, but merely assigned a
12 sub-proceeding number to denote the relation to the decree case. *Mallin* explains
13 that certification is necessary to avoid any possibility that "an appeal prior to the
14 conclusion of the entire action could well frustrate the purpose for which the cases
15 were originally consolidated." *Mallin v. Farmers Ins. Exch.*, 106 Nev. 606, 797
16 P.2d 978 at 609, 980 (quoting *Huene v. United States*, 743 F.2d 703, 704 (9th Cir.
17 1984)). In contrast, this appeal has no impact on the underlying decree, and
18 respondents have not identified any such impact.
19
20
21

22 The result was different in *Huene v. United States*, 743 F.2d 703. In that case,
23 the Ninth Circuit Court Appeals dismissed an appeal from a judgment in one (1) of
24 two (2) consolidated cases where the judgment was not certified as final under
25 FRCP 54(b). It is noteworthy that the Ninth Circuit discussed the split among the
26 various circuits and declined to follow the circuits which agree that consolidated
27
28

1 cases retain their separate identity. This competing line of cases comports with the
2 practice discussed above in decree cases, where the consolidated cases are assigned
3 separate sub-proceeding numbers. To the extent the *Mallin* rule applies to decree
4 cases, this Court can and should adopt this exception for decree cases, and rule that
5 the various consolidated sub-proceedings retain their own identity.
6

7
8 As a final point, this Court could grant a limited remand for the purpose of
9 certification, even if it decides that certification is required.

10
11 **B. Judicial Estoppel Prevents Intervenor from Denying the**
12 **November 27, 2013 Order As a Final, Appealable Order**

13 Judicial estoppel applies when the following five (5) criteria are met: “(1) the
14 same party has taken two positions; (2) the positions were taken in judicial or quasi-
15 judicial administrative proceedings; (3) the party was successful in asserting the first
16 position (i.e., the tribunal adopted the position or accepted it as true); (4) the two
17 positions are totally inconsistent; and (5) the first position was not taken as a result
18 of ignorance, fraud, or mistake.” *Marcuse v. Del Webb Communities, Inc.*, 123 Nev.
19 278, 287, 163 P.3d 462, 468-69 (2007). Here, Intervenor and their attorney have
20 treated the November 27, 2013 Order as a final judgment, and should now be
21 estopped from arguing that the consolidation affected the finality of that order.
22

23
24 At the October 17, 2013 hearing on the petitions for judicial review, Thomas
25 J. Hall, attorney for Respondents/Intervenors, discussed consolidation “because it is
26 in judicial economy to consider both petitions together.” (See Transcript, App. Vol.
27 5 at 955:16-19). He never argued that the petitions shared issues of fact or law in
28

1 common with the adjudication. Intervenor applied for their court costs following
2 entry of the written order on November 27, 2013. (See **Exhibit "2"** attached
3 hereto). Intervenor later filed a motion to amend the final order to include an
4 award of costs (See **Exhibit "3"** attached hereto). They argued that their motion
5 was authorized under NRCP 59(e) following the final order. A verified
6 memorandum of costs follows the entry of judgment. NRS 18.110. Likewise, a
7 motion to amend the judgment follows a final order or judgment.
8

9
10 Bentley appealed the November 27, 2013 order and moved for a
11 determination of whether Intervenor's pending motion should be considered an
12 NRCP 59 tolling motion. In their opposition before this Court, Intervenor argued
13 only that their motion should be considered a tolling motion following a final order
14 that extended the time to appeal. They also filed a motion to dismiss the appeal on
15 that basis. Intervenor never argued that the order was not final or that the
16 consolidation somehow affected the right to appeal. If they had, Appellants likely
17 would have requested an extension of the briefing schedule until that issue was
18 decided. Instead, Appellants were required to file extensive briefs and a five (5)
19 volume appendix, only to have Intervenor argue for the first time in their reply that
20 the consolidation affected the right to appeal.
21

22
23 After acknowledging the final order in the District Court and on appeal,
24 Intervenor should be estopped from changing their position and arguing that the
25 order was not final. Furthermore, Intervenor should be ordered to reimburse all
26
27
28

1 costs and fees incurred by the Appellants if this appeal is dismissed based on their
2 new argument.

3
4 **C. This Case Can Proceed as an Original Proceeding for Mandamus**

5 It does not help Intervenors to draw attention to the interlocutory nature of the
6 Order directing the State Engineer to impose a rotation schedule. Prior to the time
7 the final decree is entered, the State Engineer must administer the water rights in
8 accordance with the Final Order of Determination.
9

10 **NRS 533.230 Division of water by State Engineer during**
11 **time order of determination is pending in district court.**
12 From and after the filing of the order of determination, evidence
13 and transcript with the county clerk, and during the time the
14 hearing of the order is pending in the district court, the division
15 of water from the stream involved in such determination shall
16 be made by the State Engineer in accordance with the order of
17 determination.

18 See also *State v. Sixth Judicial District Court*, 53 Nev. 343, 1 P.2d 105, 107
19 (1931). The State Engineer may also enforce violations thereof by separate
20 contempt proceedings, even while the decree case is pending. *Id.* The separate
21 proceedings are appealed separately. In this case, the mandatory rotation schedule
22 imposed by the State Engineer impairs Bentleys' vested rights as determined by the
23 FOD. This appeal is equally viable as a writ proceeding to compel the State
24 Engineer to comply with the FOD and to enjoin further violations thereof.
25

26 The Nevada Revised Statutes also dictate how the State Engineer is to divide
27 the water following the adjudication.
28

NRS 533.305 Division of water among ditches and reservoirs; regulation of distribution among users; notice of regulation by water commissioner; duties of district attorney.

1. The State Engineer shall divide or cause to be divided the waters of the natural streams or other sources of supply in the State among the several ditches and reservoirs taking water therefrom, according to the rights of each, respectively, in whole or in part, and shall shut or fasten, or cause to be shut or fastened, the headgates or ditches, and shall regulate, or cause to be regulated, the controlling works of reservoirs, as may be necessary to insure a proper distribution of the waters thereof.

2. The State Engineer shall have authority to regulate the distribution of water among the various users under any ditch or reservoir, whose rights have been adjudicated, or whose rights are listed with the clerk of any district court of this state pursuant to the terms of this chapter, the actual cost of such regulation being paid by the ditch or reservoir receiving such service.

3. Whenever, in pursuance of his or her duties, the water commissioner regulates a headgate to a ditch or the controlling works of reservoirs, the water commissioner shall attach to such headgate or controlling works a written notice properly dated and signed, setting forth the fact that such headgate or controlling works has been properly regulated and is wholly under the water commissioner's control. Such notice shall be a legal notice to all parties interested in the diversion and distribution of the water of such ditch or reservoir. Such water commissioner shall have the right of ingress and egress across and upon public, private or corporate lands at all times in the exercise of his or her duties.

4. The district attorney shall appear for or in behalf of the State Engineer, or the duly authorized assistants of the State Engineer, in any case which may arise in the pursuance of the official duties of any such officer within the jurisdiction of the district attorney.

These methods have been employed in various cases. *South Fork Bank of Te-Moak Tribe v. Sixth Judicial Dist. Ct.* 118 Nev. 901, 59 P.3d 1226 concerned contempt proceedings brought against the tribe, a peace offer, and a tribal chairman,

1 following arrests of the water commissioners by tribal police. *State v. Sixth Judicial*
2 *Dist. Ct.* 52 Nev. 270, 286 P. 418 (1930) concerned an original writ petition brought
3 by the Nevada State Engineer against the Sixth Judicial District Court to compel the
4 court to pursue contempt proceedings against two water rights holders who blew up
5 a diversion dam on the Humboldt River system that was part of the Humboldt
6 Decree. This Court held that the powers granted to the State Engineer to enforce the
7 Final Order of Determination include the authority to remove a spillway. That case
8 was brought as a separate case while the Humboldt River decree was pending.
9 *State v. Sustacha*, 108 Nev. 223, 224, 826 P.2d 959 (1992) concerned an appeal
10 from an order entered by the Fourth Judicial District Court involving waters subject
11 to the Humboldt Decree. Part of the order reversed an order of contempt entered by
12 the Sixth Judicial District Court, which was the decree court for the Humboldt
13 Decree. The power to impose a mandatory rotation schedule is not one of the
14 powers granted to the State Engineer in NRS 533.305, and there is no precedent for
15 doing so.

16
17 Although Intervenor/Respondents may argue that the Court has broad
18 “equitable” powers, such is not the case. The Nevada Revised Statutes and
19 prevailing case law draw a sharp distinction between statutory adjudications of
20 vested rights under the 1913 water law as amended, such as the instant case, and
21 adjudication “in an equity suit.” See *McCormick v. Sixth Judicial District Court In*
22 *and For Humboldt County*, 69 Nev. 214, 244 P.2d 805 (1952) (citing *Pacific Live*

1 *Stock Co. v. Ellison Ranching Co.*, 52 Nev. 279, 286 P. 120 (1930)).³

2 For the foregoing reasons, these same issue can be resolved if this case is
3 denominated a writ of mandamus pursuant to NRCP 34.160. Bentley has been
4 subject to a rotation schedule since 2010. Bentley has tried to multiple times to have
5 these issues heard on appeal (See Case Nos. 56551, 59188, 60891 and 62620). It is
6 evident that Bentley has no plain, speedy and adequate remedy in law due to the
7 extraordinary delays in finalizing the decree in District Court, the continued
8 impairment of its vested rights, and the continued efforts from the Intervenor and
9 their attorney to deny Bentley's right to an appeal. The ability of the appellate court
10 to treat an appeal as a writ proceeding is well entrenched in the federal Ninth Circuit
11 and should be adopted here.

12 We refrain, however, from deciding whether either order is appealable. We
13 can accomplish the same result by treating each as a petition for mandamus
14 since they both relate to the usurpation of power by the District Court. Such
15 activity is properly reviewable by writs of mandamus. *Parr v. United States*,
16 351 U.S. 513, 520, 76 S.Ct. 912, 917, 100 L.Ed. 1377, 1384 (1956).

17 When a district court has taken action which a party claims was beyond its
18 jurisdiction as distinguished from being erroneous within its jurisdiction, this
19 Court has the power to set matters right. 28 U.S.C. § 1651; *Will v. United*
20 *States*, 389 U.S. 90, 95-96, 98 n. 6, 88 S.Ct. 269, 273-274, 275, 19 L.Ed.2d
21 305, 310-311, 312 (1967). Assuming that the orders are not appealable, we
22 should then treat the appeals as petitions for mandamus. *Shapiro v. Bonanza*
23 *Hotel Co.*, 185 F.2d 777, 779 (9th Cir. 1950); *Steccone v. Morse-Starrett*
24 *Products Co.*, 191 F.2d 197, 199-200 (9th Cir. 1951). In *Shapiro* we explained

25
26
27 ³ *McCormick* arose in the context of the equitable decree for the Quinn River
28 system and addressed the question of whether the 1951 amendments (now codified
at NRS 533.310), which allowed the State Engineer to administer equitable decrees
as well as statutory decrees, was unconstitutional.

1 why the appeal could be treated as a petition for a writ of mandamus. At p.
2 779, we said:

3 “However, we feel that under the particular facts of this case, and the matter
4 being only one of form, we may properly treat this appeal as though it were a
5 petition for a writ of mandamus. This court has power to issue the writ in aid
6 of its appellate jurisdiction. While it is true that the writ is an extraordinary
7 remedy to be applied with caution we are of the opinion that sufficient
8 grounds exist here to issue the writ if it clearly appears that the district court
9 was in error.”[Footnotes omitted].

10

11 Most recently this practice has been approved in a compelling dictum in *Varo*
12 *v. Comprehensive Designers, Inc.*, 504 F.2d 1103, 1103-04 (9th Cir. 1974), in
13 which we said:

14 “However, we do not pause to attempt to prove our views because we think
15 that the situation is such on the record here that were we to hold that the order
16 denying the stay was unappealable, we should take the extraordinary step of
17 converting the appeal into mandamus or prohibition, ordinarily something to
18 be done stingily. *Shapiro v. Bonanza Hotel Co.*, 185 F.2d 777, 779 (9th Cir.
19 1950).”

20 Writs of mandamus are accordingly granted, and the Honorable Peirson Hall
21 is directed and ordered to forthwith cause the Clerk of his Court to withdraw
22 the funds deposited as described in this Opinion, together with the interest
23 accrued thereon, and return the proceeds without undue delay to the
24 respective appellants.

25 *Hartland v. Alaska Airlines*, 544 F.2d 992, 1001-1002 (1976); See also *Special*
26 *Investments, Inc. v. Aero Air, Inc.*, 360 F.2d 989 (9th Cir. 2004).

27 Although this Court declined to treat an appeal as a petition for writ of
28 mandamus in the unpublished opinion of *Camerlengo v. Farmers Insurance*
Exchange, 281 P.3d 1159 (2009), that case was not reported and does not preclude
such a result in a different case based on a different set of facts. Bentley can still
file a petition for a writ of mandate in this Court and request consolidation with this

1 appeal. Doing so would render any further questions about the finality of the
2 November 27, 2013 Order moot. It should be unnecessary for Bentley to do so and
3 this Court could easily avoid the need for such extraordinary procedures by limiting
4 this Court could easily avoid the need for such extraordinary procedures by limiting
5 *Mallin* or by adopting an exception to that rule in decree cases and/or treating this
6 appeal as a petition for writ of mandamus.

7
8 Respectfully submitted.

9 Dated this 16th day of June 2014.

10 MATUSKA LAW OFFICES, LTD.

11
12 By: 

13 MICHAEL L. MATUSKA, SBN 5711
14 Attorneys for PETITIONERS,
15 J.W. BENTLEY and MARYANN
16 BENTLEY
17
18
19
20
21
22
23
24
25
26
27
28

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 16th day of June 2014.

MATUSKA LAW OFFICES, LTD.

By:


MICHAEL L. MATUSKA, SBN 5711
937 Mica Drive, Suite 16A
Carson City NV 89705
Attorneys for PETITIONERS,
J.W. BENTLEY and
MARYANN BENTLEY

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:

☐ Proportionately spaced, has a typeface of 14 points or more, and contains _____ words; or

☐ 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 10th day of June 2014.

MATUSKA LAW OFFICES, LTD.

By:


MICHAEL L. MATUSKA, SBN 5711

CERTIFICATE OF SERVICE

I certify that on the 16th day of June 2014, I served a copy of this
SUPPLEMENT TO 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):

Bryan L. Stockton
Deputy Attorney General
100 North Carson Street
Carson City, NV 89701

Thomas J. Hall
305 South Arlington Avenue
P.O. Box 3948
Reno NV 89505-3948

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

Dated this 16th day of June 2014.


LIZ STERN, ALS

EXHIBIT 1

EXHIBIT 1

Case #: CV-0002804

Judge: WAGNER, RICHARD A.

Date Filed: 05/18/88 Department: 01

Case Type: OTHRAL OTHER ADMINISTRATIVE LAW

Title/Caption: In the Matter of the Determination of
the Relative Rights of Claimants and
Appropriators of the Water of the
Humboldt River Stream System and its
Tributaries.

Defendant(s)
DAHL, HARVEY

Attorney(s)
MARVEL, JOHN E.

Defendant(s)
DAHL, MARGARET

Attorney(s)
MARVEL, JOHN E.

Plaintiff(s)
HUMBOLDT RIVER AJUDICATION

Attorney(s)
ATTORNEY GENERAL

Plaintiff(s)
NEVADA, DIV. WATER RESOURCES

Attorney(s)
ATTORNEY GENERAL

Plaintiff(s)
WATER RESOURCES, NEVADA DIV OF

Attorney(s)
ATTORNEY GENERAL

Disp/Judgment: ORD Date: 03/03/97

Hearings:

Date	Time	Hearing	Reference
12/18/96	1:00	MOTION HEARING	
2/10/97	9:00	CONT. MOTION HEARING	

Filings:

Date	Pty	Filing	Fees
8/26/96	P	SEE COURT DOCKET FOR PREVIOUS FILINGS	
8/26/96	D	MOTION FOR ORDER CORRECTING JUDGMENT AND DECREE NUNC PRO TU	
8/26/96	D	MEMORANDUM IN SUPPORT OF MOTION	
8/26/96	D	PEREMPTORY CHALLENGE OF JUDGE	200.00
9/18/96	D	ORDER PROVIDING FOR NOTICE	
10/08/96	P	NOMINAL PARTIES MOTION FOR CONTINUANCE	
10/08/96	P	AMICUS BRIEF OF NOMINAL PARTIES	
10/09/96	D	CERTIFICATE OF SERVICE	
2/03/97	O	TRANSCRIPT OF PROCEEDINGS - HEARING	
2/10/97	D	STATE ENGINEER'S BRIEF OF THE INAPPLICABILITY OF NRCP TO THI	
2/10/97	O	TRANSCRIPT OF PROCEEDINGS - COURT ORDER	
3/03/97	O	ORDER CORRECTING JUDGMENT AND DECREE NUNC PRO TUNC	
3/10/97	P	NOTICE OF ENTRY OF JUDGMENT	
5/02/97	O	TRANSCRIPT OF PROCEEDINGS - HEARING 2-1-97	
5/20/98	O	ORDER (RELEASE OF APPEAL BOND)	

Humboldt Land & Cattle Co. v. District Court of Sixth Judicial Dist., 47 Nev. 396 (1924)
224 P. 612

47 Nev. 396
Supreme Court of Nevada.

HUMBOLDT LAND & CATTLE CO. ET AL.

v.

DISTRICT COURT OF SIXTH
JUDICIAL DIST. ET AL.

No. 2622. | March 26, 1924.

Original proceeding in prohibition by the Humboldt Land & Cattle Company and others against the District Court of the Sixth Judicial District, and George A. Bartlett, Judge presiding. Dismissed.

Samuel C. Wiel, Percy Evans, and Albert C. Aiken, all of San Francisco, Cal., W. M. Kearney, of Reno, T. P. Wittschen, of San Francisco, Cal., and Brown & Belford, of Reno, for petitioners.

West Headnotes (7)

[1] **Constitutional Law**

— Remedies and procedure in general

It is the province of the Legislature to establish, within constitutional limits, the rules not only of procedure, but for determination of rights, by which the courts shall be governed.

Cases that cite this headnote

[2] **Constitutional Law**

— Executive Exercise of Statutory Authority as Encroaching on Judiciary

Water Law

— Statutory provisions

Water Law, §§ 29, 30, 32, as amended by St. 1921, c. 106, and section 31, merely requiring the state engineer, when objections are taken to the findings, or any part of the preliminary order of determination of relative rights of claimants to waters of a stream, to inquire into the existence of all the facts and apply the law thereto in order to

determine what his official conduct shall be, *held* not to confer judicial power on such ministerial officer.

1 Cases that cite this headnote

[3] **Constitutional Law**

— Factors considered; flexibility and balancing

In determining whether due process of law has been denied, regard must be had to the character of the proceeding involved, and respect given to the cause and object of the taking.

Cases that cite this headnote

[4] **Constitutional Law**

— Notice and Hearing

Notice and opportunity to be heard are of the essence of "the law of the land," or of the "due process of law" of the federal Constitution.

Cases that cite this headnote

[5] **Constitutional Law**

— Water

Water Law, § 35 (St. 1913, c. 140; St. 1915, c. 253; St. 1921, c. 106) *held* not to deny due process of law with respect to the trial of exceptions taken and filed to the state engineer's order of determination, defining the relative rights of the various claimants and appropriators to and of waters of a stream, because not requiring copies of the exceptions to be served on each claimant personally; the proceeding on reaching the district court not becoming a separable controversy between different claimants.

3 Cases that cite this headnote

[6] **Constitutional Law**

— Water

The notice to other claimants by filing in court as required by Water Law, § 35 (St. 1913, c.

No. 2804

IN THE SIXTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA, IN AND
FOR THE COUNTY OF HUMBOLDT

In the Matter of the Determination of the Relative Rights of
Claimants and Appropriators of the Waters of the Hum-
bolt River Stream System and Tributaries.

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND DECREE

GRAY MASHBURN, *Attorney-General*.
M. A. DISKIN, *Special Deputy Attorney-General*.

Filed this 20th day of October, 1931

J. W. DAVEY, *Clerk*

**INTERVENING ORDERS OF JUDGE
H. W. EDWARDS AND JUDGE L. O. HAWKINS**

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA, IN AND FOR THE COUNTY
OF HUMBOLDT.

IN THE MATTER OF THE DETERMINATION OF THE RELATIVE RIGHTS OF }
CLAIMANTS AND APPROPRIATORS OF THE WATERS OF THE HUM- } No. 2804
BOLDT RIVER STREAM SYSTEM AND ITS TRIBUTARIES.

Filed December 14, 1931—J. W. Davey, Clerk

**PETITION AND MOTION FOR MODIFICATION, AMENDMENT,
AND CORRECTION OF DECREE**

COME NOW Josephine K. Pinson, Ella A. Pinson, Victor A. Pinson, Bertha S. Wilkinson, Gertrude M. Pinson and Camille Pinson, successors in interest to Paul A. Pinson estate, by their attorneys, Hawkins, Mayotte & Hawkins, and, upon information and belief, respectfully state, represent and show unto the court;

1. That your petitioners, Josephine K. Pinson, Ella A. Pinson, Victor A. Pinson, Bertha S. Wilkinson, Gertrude M. Pinson, and Camille Pinson, are the successors in interest in and to all of the lands and water rights formerly owned or possessed by Paul A. Pinson Estate, situated in Humboldt County, Nevada, along the Humboldt River, including the lands and water rights referred to and mentioned in the findings of fact, conclusions of law and decree filed in the above entitled matter and court, October 20, 1931.

2. That certain of said lands and water rights of your petitioners were omitted from said decree, and some of the years of priority, as designated in said decree, are erroneous, and some of the lands of your petitioners are improperly classified, and in some instances the duty of water is not correctly stated in said decree.

That all and each of such omissions, and the errors in the designated years of priority, and in the classification of the lands, and in the duty of water, herein mentioned, occurred by reason of an oversight, inadvertence and mistake in the preparation of said findings of fact, conclusions of law and decree, and are in conflict with the record in the above entitled matter; and that said decree should be modified, amended, changed and made to conform to the facts and law in reference thereto, as disclosed by the record in the above entitled matter.

3. That said findings of fact, conclusions of law and decree should be modified, corrected and amended, as to that portion thereof appearing on pages 89 and 90 thereof, under the heading "Claimant—Paul A. Pinson, Source—Humboldt River. Ditch—Louis Lay Dam. Ditch—Pinson Dam and Ditch System," so as to read as follows, to wit:

No. 2804

IN THE SIXTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA, IN AND
FOR THE COUNTY OF HUMBOLDT

In the Matter of the Determination of the Relative Rights of
Claimants and Appropriators of the Waters of the Hum-
boldt River Stream System and Its Tributaries.

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECREE

H. W. EDWARDS,
Former Judge Presiding.

Filed this 8th day of October, 1935
J. W. DAVEY, *Clerk.*

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA, IN AND FOR THE COUNTY
OF HUMBOLDT.

IN THE MATTER OF THE DETERMINATION OF THE RELATIVE RIGHTS OF
CLAIMANTS AND APPROPRIATORS OF THE WATERS OF THE HUM- } No. 2804
BOLDT RIVER STREAM SYSTEM AND ITS TRIBUTARIES.

Filed December 5, 1936—J. W. Davey, Clerk

**DECISION ON MOTION TO STRIKE PURPORTED AMENDED, CHANGED
AND CORRECTED FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DECREE.**

On October 28, 1935, John M. Marble and Robert E. Marble and others filed their motion to strike from the files in this matter, and declare null and void and of no effect, that certain instrument or document, entitled "Amended, Changed and Corrected Findings of Fact, Conclusions of Law and Decree" filed in this matter with the clerk of this court on the 8th day of October, 1935, and signed by H. W. Edwards, as Former Judge Presiding, on the grounds:

1. That they are not authorized by and are contrary to and in contravention of the statutes and laws of the State of Nevada.

2. That they were not signed by any person holding any judicial position or by any person authorized by law to sign the same.

3. That the same were signed by one H. W. Edwards, who was not the presiding judge at that time and for many months prior thereto had not been such presiding judge and was not clothed with any judicial or any authority to act in such matter at that time or for many months prior thereto.

4. That said action and said cause had been theretofore duly assigned to District Judge J. M. Lockhart, who was the presiding judge at the time the said H. W. Edwards signed the same.

5. That under the laws of the State of Nevada and the rules of the District Court, only one judge could preside in said cause at said time.

6. That the signing of the same was in violation of rules XLI, XLII and XLIII of the District Court.

7. That by the signing by the said H. W. Edwards of the "Amended, Changed and Corrected Findings of Fact, Conclusions of Law and Decree" filed December 24, 1934, he exhausted his powers and no further power existed in him except as to any matters that might have been properly brought before him during his term of office on due notice in the manner provided by law.

8. That if the act of 1931 purported to give the said H. W. Edwards, former presiding judge, authority to sign amended findings, etc., on October 8th, 1935, after having purported to have signed amended findings, etc., on the 26th day of December, 1934, after ceasing to be a district judge, and after said cause had been assigned duly, regularly and lawfully to another district judge, such statute would to such extent be unconstitutional and void.

9. That such signing and filing of the said amended findings, etc., on October 8, 1935, constituted a judicial act, and at that time the said H. W. Edwards was not clothed with any judicial powers.

10. That said findings, etc., constitutes in a form a cloud upon the title to

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA, IN AND FOR THE COUNTY
OF HUMBOLDT.

IN THE MATTER OF THE DETERMINATION OF THE RELATIVE RIGHTS OF }
CLAIMANTS AND APPROPRIATORS OF THE WATERS OF THE HUM- } No. 2804
BOLDT RIVER STREAM SYSTEM AND ITS TRIBUTARIES.

Filed December 5, 1936—J. W. Davey, Clerk

**DECISION ON MOTION OF SAMUEL McINTYRE INVESTMENT COM-
PANY FOR NEW TRIAL, FILED JANUARY 16, 1935**

In accordance with the decision of the court this day made granting the motion for a new trial made by Kearns Corporation,

It is ordered that the motion of Samuel McIntyre Investment Company, filed January 16, 1935, be, and the same hereby is, granted.

Dated at Ely, Nevada, this 3d day of December, 1936.

J. M. LOCKHART,
District Judge Presiding.

NOTE—Identical decisions with the above decision were made by Judge Lockhart on the same date on like motions submitted by S. N. Bond, successor to Metropolis Land Co., a corporation; John M. Marble, and Robert E. Marble, successors to John E. Marble, successor to Union Land and Cattle Co.; A. G. McBride; Hibernia Savings and Loan Society, successor to X. Rodwell Meyer, successor to William Dunphy Estate; H. H. Cazier and Jno. I. Cazier Estate, successors to John H. Cazier and Sons Co.; J. Leslie Carter; J. H. Carter Estate Co., successor to J. H. Carter; and Rufus H. Kimball, successor to Thomas Hunter and to Hunter and Bauks Co. (See discussion of above motions and decisions in the Carpenter v. District Court case on rehearing. Pages 10-12, post.)

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA, IN AND FOR THE COUNTY
OF HUMBOLDT.

IN THE MATTER OF THE DETERMINATION OF THE RELATIVE RIGHTS OF
CLAIMANTS AND APPROPRIATORS OF THE WATERS OF THE HUM- } No. 2804
BOLDT RIVER STREAM SYSTEM AND ITS TRIBUTARIES.

Filed December 5, 1936--J. W. Davey, Clerk

**DECISION ON MOTION FOR A NEW TRIAL FILED OCTOBER 28, 1935,
BY T. S. CATTLE COMPANY AND HIBERNIA SAVINGS AND LOAN
SOCIETY.**

The court having this day granted the motions of the above parties for a new trial and it appearing to the court that errors have been made in the findings of Fact, Conclusions of Law and Decree filed herein on the 8th day of October, 1935, which are contrary to the evidence submitted, and it being the desire of the court to correct such errors.

It is therefore ordered that said motion for a new trial be, and the same hereby is, granted.

Dated at Ely, Nevada, this 3d day of December, 1936.

J. W. LOCKHART.
District Judge Presiding.

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA, IN AND FOR THE COUNTY
OF HUMBOLDT.

IN THE MATTER OF THE DETERMINATION OF THE RELATIVE RIGHTS OF }
CLAIMANTS AND APPROPRIATORS OF THE WATERS OF THE HUM- } No. 2804
BOLDT RIVER STREAM SYSTEM AND ITS TRIBUTARIES.

Filed December 5, 1936—J. W. Davey, Clerk

**DECISION ON MOTION FOR NEW TRIAL FILED OCTOBER 28, 1935, BY
JOHN M. MARBLE AND OTHERS**

The court this day has granted new trials on motions made therefor by practically all parties named as movants in the above motion.

It is therefore the order of this court that the above motion for a new trial be, and the same hereby is, granted.

Dated at Ely, Nevada, this 3d day of December, 1936.

J. W. LOCKHART,
District Judge Presiding.

Case #: CV-02804-3

Judge: WAGNER, RICHARD A.

Date Filed: 06/11/98 Department: 01

Case Type: OTHRAL OTHER ADMINISTRATIVE LAW

Title/Caption: In the Matter of the Determination of the
Relative Rights of Claimants &
Appropriators of the Waters of Humboldt
River Stream System and Tributaries.

Defendant(s)	Attorney(s)
SOUTH FORK BAND OF TE-MOAK TRB	No "Attorney 1" Listed

Defendant(s)	Attorney(s)
MCDADE, MARVIN, CHAIRMAN	No "Attorney 1" Listed

Defendant(s)	Attorney(s)
SHOSHONE INDIANS OF NV, SO FORK	No "Attorney 1" Listed

Plaintiff(s)	Attorney(s)
NEVADA, ST OF, STATE ENGINEER	ATTORNEY GENERAL

Plaintiff(s)	Attorney(s)
HUMBOLDT RIVER STREAM SYSTEM	ATTORNEY GENERAL

Plaintiff(s)	Attorney(s)
WATER COMMISSIONERS, 6TH JUD C	ATTORNEY GENERAL

Disp/Judgment: ORD Date: 04/28/03

Hearings:

Date	Time	Hearing	Reference
8/17/98	1:30	SHOW CAUSE HEARING	
1/26/00	9:00	SHOW CAUSE HEARING-AMENDED PETITION	10/19/98
1/26/00	9:00	SHOW CAUSE HEARING-PETITION FILED	11/9/99 12:
1/26/00	9:00	SHOW CAUSE HEARING-PETITION FILED	11/9/99 12:
1/26/00	9:00	ALL MATTERS NOW PENDING BEFORE THE COURT	
2/28/00	9:00	SHOW CAUSE HEARING	
9/11/00	9:00	HEARING	
2/19/03	9:30	STATUS HEARING	
3/06/03	10:00	HEARING	
4/18/03	10:00	SHOW CAUSE HEARING	

Filings:

Date	Pty	Filing	Fees
6/11/98	P	MOTION FOR ORDER TO SHOW CAUSE	
7/02/98	P	REQUEST FOR REVIEW	
7/10/98	D	MOTION TO DENY REVIEW	
7/17/98	P	ORDER TO SHOW CAUSE	
7/22/98	P	CERTIFICATE OF SERVICE	
8/21/98	O	ORDER	
8/27/98	P	NOTICE OF ENTRY OF ORDER	
9/14/98	D	NOTICE OF APPEARANCE	
9/18/98	D	MOTION TO VACATE	

9/18/98 D MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF MOTION TO V
9/30/98 P NOTICE IN LIEU OF OPPOSITION TO MOTION TO VACATE
10/02/98 D REQUEST TO SUBMIT
10/02/98 D AFFIDAVIT OF COUNSEL IN SUPPORT OF REQUEST TO SUBMIT
10/07/98 P OPPOSITION TO REQUEST TO SUBMIT
10/08/98 D REPLY TO OPPOSITION TO REQUEST TO SUBMIT
10/08/98 D POINTS & AUTHORITIES IN SUPPORT OF REPLY TO OPP TO REQUEST T
10/19/98 P PETITION FOR AMENDED ORDER TO SHOW CAUSE
10/27/98 O TRANSCRIPT OF PROCEEDINGS - MOTION TO SHOW CAUSE
11/20/98 D NOTICE OF FILING NOTICE OF REMOVAL W/NOTICE OF REMOVAL ATTAC
11/09/99 P PETITION FOR ORDER TO SHOW CAUSE
11/09/99 P PETITION FOR ORDER TO SHOW CAUSE
11/24/99 O NOTICE OF REMOVAL TO U.S. DISTRICT COURT (COPY)
12/15/99 O ORDER TO ISSUE INJUNCTION (6TH JUDICIAL DISTICT COURT)
12/15/99 O INJUNCTION (6TH JUDICIAL DISTRICT COURT)
1/04/00 P REQUEST FOR HEARING
1/13/00 O ORDER SETTING HEARING DATE
1/14/00 P MOTION TO BIFURCATE SHOW CAUSE PROCEEDING
1/20/00 O AMENDED ORDER SETTING HEARING DATE
1/24/00 D TRIBAL RESPONDENTS' MOTION TO DISMISS
1/24/00 D MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF TRIBAL MOTI
2/03/00 O ORDER (MOTION TO DISMISS BY DEFENDANT DENIED)
2/04/00 O ORDER TO SHOW CAUSE
2/09/00 D TRIBAL RESPONDENT'S MOTION TO STAY
2/16/00 O TRANSCRIPT HEARING OF JANUARY 26, 2000
2/18/00 O ORDER REQUESTING ANSWER & ISSUING STAY (SUPREME CT)
5/30/00 O ORDER DEFERRING RULING ON MOTION TO LIFT STAY ETC. (SC)
5/30/00 O ORDER DENYING 2ND MOTION FOR EXPEDITED REVIEW (SC)
7/26/00 O ORDER VACATING STAY
8/21/00 O ORDER TO SHOW CAUSE
8/31/00 O JUDGMENT IN CIVIL CASE (FEDERAL CT)
8/31/00 O ORDER (FEDERAL CT)
9/01/00 D TRIBAL RESPONDENT'S MOTION TO STAY
9/01/00 O JUDGMENT IN A CIVIL CASE
9/12/00 O ORDER DENYING STAY (SC)
9/21/00 O NOTICE IN LIEU OF REMITTITUR (SC)
11/01/00 O TRANSCRIPT OF PROCEEDINGS - HEARING ON MOTION TO SHOW CAUSE
11/13/00 P AFFIDAVIT OF MAILING
11/28/00 D NOTICE OF APPEAL
11/28/00 D CASE APPEAL STATEMENT
1/22/03 O REMITTITUR
1/22/03 O CLERK'S CERTIFICATE
1/22/03 O ORDER
1/31/03 O ORDER (RE: COURT DATE)
3/03/03 D MOTION TO WITHDRAW AS COUNSEL
3/06/03 D ORDER TO WITHDRAW AS COUNSEL
3/26/03 P ORDER TO SHOW CAUSE
4/01/03 P NOTICE OF ENTRY OF ORDER TO SHOW CAUSE
4/14/03 P NOTICE TO THE COURT RE: SERVICE OF ORDER TO SHOW CAUSE DATED
4/28/03 O PROPOSED ORDER/ORDER
5/02/03 D NOTICE OF ENTRY OF ORDER
7/21/11 O MOTION FOR RELEASE OF APPEAL BOND ON DEPOSIT IN CLERK'S TRUS
7/22/11 O ORDER FOR RELEASE OF APPEAL BOND ON DEPOSIT IN CLERK'S TRUST

274.00

59 P.3d 1226

118 Nev. 901

**In the Matter of the DETERMINATION OF THE RELATIVE RIGHTS OF THE CLAIMANTS
AND APPROPRIATORS OF THE WATERS OF THE HUMBOLDT RIVER STREAM SYSTEM
AND TRIBUTARIES.**

**South Fork Band of the Te-Moak Tribe of Western Shoshone Indians of Nevada; and Marvin
McDade, in His Capacity as Chairman of the South Fork Band Council, Appellants,**

v.

**State Engineer of the State of Nevada and Water Commissioners of the Sixth Judicial District
Court, Respondents.**

No. 37094.

Supreme Court of Nevada.

December 26, 2002.

Historical perspective

[59 P.3d 1227]

Nevada Legal Services and Raymond
Rodriguez, Carson City, for Appellants.

Frankie Sue Del Papa, Attorney General,
and Paul G. Taggart, Deputy Attorney General,
Carson City, for Respondents.

BEFORE THE COURT EN BANC.

OPINION

PER CURIAM:

This appeal concerns the scope of a district court's power to enter orders of contempt, and the standard upon which we must review such orders. When the legislature has provided for a direct appeal of a district court's contempt order, we will review for abuse of discretion. We hold that a district court's contempt power does not encompass the power to order an Indian tribe to enact a legislative resolution. The district court may order that, if a contemnor continues in its contempt, it must post a bond as security to cover costs incurred as a result of the contempt. Additionally, the district court has the power to sentence a government official to jail for criminal contempt committed in an official capacity, but, under the facts here, it was an abuse of discretion to do so.

FACTS

This appeal represents the latest chapter in more than 100 years of litigation over water rights appurtenant to properties bordering the Humboldt River.¹ In 1913, responding to protracted litigation over the Humboldt and other rivers, the Nevada Legislature enacted a statutory system allowing the State Engineer to determine water rights from the State's rivers and streams. After this court upheld this statutory scheme,² the State Engineer began a lengthy process of determining water rights on the Humboldt River. This process concluded in 1935, when the Sixth Judicial District Court entered a modified set of water rights decrees, collectively known as the Humboldt Decree.

Among the properties covered by the Humboldt Decree were five privately-owned ranches, which the United States purchased between 1937 and 1942 to create a reservation for appellant South Fork Band of the Te-Moak Tribe of Western Shoshone Indians of Nevada ("the Tribe"). The original Humboldt

[59 P.3d 1228]

Decree required affected landowners to pay a water assessment fee, which the United States paid on behalf of the Tribe for some period of time after creation of the reservation, although it is disputed whether the Tribe ever paid the fee itself.

EXHIBIT 2

Consolidated Case No.: 08-CV-0363-D1
Case No.: 12-CV-0141
Case No.: 13-CV-0121

Dept. No.: I

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

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR DOUGLAS COUNTY

In the Matter of the Determination of
the Relative Rights in and to the
Waters of Mott Creek, Taylor Creek,
Cary Creek (aka Carey Creek), Monument
Creek, and Bulls Canyon, Stutler Creek
(aka Stattler Creek), Sheridan Creek,
Gansberg Spring, Sharpe Spring,
Wheeler Creek No. 1, Wheeler Creek
No. 2, Miller Creek, Beers Spring,
Luther Creek and Various Unnamed
Sources in Carson Valley, Douglas
County, Nevada.

MEMORANDUM OF COSTS

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

Petitioners,

vs.

State of Nevada, Office of the
State Engineer,

Respondent.

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

SCHARO, SHERIDAN CREEK EQUESTRIAN CENTER, LLC, a Nevada Limited Liability Company, DONALD S. FORRESTER and KRISTINA M. FORRESTER, RONALD R. MITCHELL and GINGER G. MITCHELL, and HALL RANCHES, LLC, a Nevada Limited Liability Company ("Proposed Intervenor"), by and through their counsel, THOMAS J. HALL, ESQ., and pursuant to NRS 18.005, 18.020, 18.110 and 533.450(7), hereby submit their Memorandum of Costs as follows:

A. CLERK'S FEES; NRS 18.005(1)

Clerk's filing fees May 22, 2012	\$ 503.00
Clerk's filing fees May 22, 2012	\$ 503.00
TOTAL	\$ 1,006.00

B. OFFICIAL COURT REPORTER; NRS 18.005(8)

Capital Reporters - Transcript for October 17, 2013, hearing	\$ 317.50
TOTAL	\$ 317.50

C. PHOTOCOPIES; NRS 18.005(12)

1,243 x \$0.25 Black and white copies	\$ 310.75
TOTAL	\$ 310.75

D. POSTAGE; NRS 18.005(14)

Postage - as recorded on Hall Law Firm records	\$ 190.61
TOTAL	\$ 190.61

E. TRAVEL EXPENSES; NRS 18.005(15)

Travel to Minden January 28, 2013	\$ 37.86
TOTAL	\$ 37.86

1 F. LEXIS AND WESTLAW RESEARCH; NRS 19.005(17)

2 WestLaw online legal research - 05/31/12 \$ 311.55
3 WestLaw online legal research - 06/30/12 \$ 75.54
4 WestLaw online legal research - 02/28/13 \$ 808.58
5 WestLaw online legal research - 03/31/13 \$ 113.45
6 TOTAL \$1,309.12

7 G. TOTAL COSTS \$3,171.84

8 STATE OF NEVADA)
9) ss:
10 COUNTY OF WASHOE)

11 Thomas J. Hall, being duly sworn, states that he is the
12 attorney for the Intervenor and has personal knowledge of the
13 above costs and disbursements expended based on records and
14 reports in his custody and control; that the items contained in
15 the above Memorandum are true and correct to the best of his
16 knowledge and belief; and that the said disbursements have been
17 necessarily incurred and paid in this action.

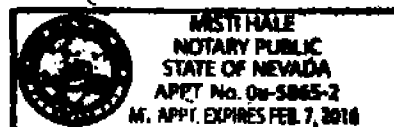
18 DATED this 2nd day of December, 2013.

19 LAW OFFICES OF THOMAS J. HALL

20
21 *Thomas J. Hall*
22 THOMAS J. HALL, ESQ.
23 Nevada Bar No. 675
24 305 South Arlington Avenue
25 Post Office Box 3948
26 Reno, Nevada 89505

27 SUBSCRIBED AND SWORN to before me this 2nd day of December,
28 2013, by Thomas J. Hall.

Mark A. Dale
NOTARY PUBLIC



1
2
3 **CERTIFICATE OF SERVICE BY MAIL**

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

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

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

10 Bryan L. Stockton, Esq.
11 Senior Deputy Attorney General
12 100 North Carson Street
Carson City, Nevada 89701

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

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

Frank Scharo
Post Office Box 1225
Minden, Nevada 89423

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

19 DATED this 2nd day of December, 2013.
20

21
22
23 
Misti Hale

EXHIBIT 3

Consolidated Case No.: 08-CV-0363-D1
Case No.: 12-CV-0141
Case No.: 13-CV-0121

Dept. No.: I

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

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR DOUGLAS COUNTY

In the Matter of the Determination of
the Relative Rights in and to the
Waters of Mott Creek, Taylor Creek,
Cary Creek (aka Carey Creek), Monument
Creek, and Bulls Canyon, Stutler Creek
(aka Stattler Creek), Sheridan Creek,
Gansberg Spring, Sharpe Spring,
Wheeler Creek No. 1, Wheeler Creek
No. 2, Miller Creek, Beers Spring,
Luther Creek and Various Unnamed
Sources in Carson Valley, Douglas
County, Nevada.

**MOTION TO AMEND
ORDER TO INCLUDE
AN AWARD OF COSTS**

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

Petitioners,

vs.

State of Nevada, Office of the
State Engineer,

Respondent.

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

1 SCHARO, SHERIDAN CREEK EQUESTRIAN CENTER, LLC, a Nevada Limited
2 Liability Company, DONALD S. FORRESTER and KRISTINA M. FORRESTER,
3 RONALD R. MITCHELL and GINGER G. MITCHELL, and HALL RANCHES, LLC,
4 a Nevada Limited Liability Company ("Intervenors"), by and
5 through their counsel, THOMAS J. HALL, ESQ., and hereby
6 respectfully move this Court pursuant to NRCP 59(e) to amend the
7 Order entered herein on November 27, 2013, to include and to
8 provide for costs pursuant to NRS 533.450(7).
9

10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 **A. Brief History.**

12 On November 27, 2013, this Court entered its Order Denying
13 Petitions for Judicial Review, Case Nos. 12-CV-0141, 12-CV-0145
14 and 13-CV-0121, among other matters. The Court failed to include
15 an award of costs to the Intervenors under NRS 533.450(7).
16

17 On December 4, 2013, the Notice of Entry of Order was filed.

18 On December 4, 2013, a Memorandum of Costs was filed.

19 On December 9, 2013, an Opposition to Memorandum of Costs
20 and Motion to Retax and Settle Costs ("Opposition") was filed.
21

22 On December 10, 2013, a Joinder was filed.

23 Within the Opposition, the following appears:

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

Intervenors believe that the above statement of counsel in the Opposition has merit and therefore elects to file the instant Motion to Amend Order to Include an Award of Costs.

B. Analysis and Discussion.

1. A Motion to Amend Judgment in the Proper Procedure.

In the Nevada Civil Practice Manual, § 25.07, Motion to Amend or Alter Judgment Under NRCP 59(e), provides as follows:

A motion to alter and amend a judgment is not limited in scope, as long as it is timely, in writing, complies with procedural requirements, and requests substantive alteration or vacation of a judgment, not merely correction of a clerical error or relief that is wholly collateral to the judgment. AA Primo Builders, L.L.C. v. Washington, 126 Nev. Adv. Op. 53, 245 P.3d 1190, 1192-93 (2010). Among the grounds for such a motion are correcting manifest errors of law or fact, newly discovered or previously unavailable evidence, a need to prevent a manifest injustice

2. Costs Must be Paid Pursuant to NRS 533.450(7).

NRS 533.450 provides in part as follows:

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

* * *

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

3. No such proceedings may be entertained unless notice thereof, containing a statement of the substance of the order or decision complained of, and, of the manner in which the same injuriously affects the petitioner's interests, has been served upon the State Engineer, personally or by registered or certified

1 mail, at the Office of the State Engineer at the State
2 Capital within 30 days following the rendition of the
3 order or decision in question. A similar notice must
4 also be served personally or by registered or certified
5 mail upon the person[s] who may have been affected by
6 the order or decision.

7 * * *

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

11 8. The practice in civil cases applies to the informal
12 and summary character of such proceedings, as provided
13 in this section.

14 Here, Intervenor[s] were served with a Notice pursuant to NRS
15 533.450(3) and appeared herein.

16 In civil cases, NRS 18.020 identifies a number of instances
17 in which costs "must be awarded as a matter of course." Those
18 cases include:

19 (1) Recovery of real property; (2) recovery of personal
20 property in excess of \$2,500; (3) recovery of money or
21 damages where the plaintiff seeks to recover more than
22 \$2,500; (4) special proceedings; and (5) cases
23 concerning title or boundaries to real property, taxes
24 imposts or fines. [Emphasis added.]

25 This case, a special proceeding, is such a case. It is
26 acknowledged that costs are not to be paid by the State Engineer.
27 However, costs must be paid as in other civil cases, including an
28 award of costs to the Intervenor[s] herein. In fact, this Court
previously awarded costs to the Intervenor[s] under its Order
entered January 4, 2013, a copy of which is attached as Exhibit 1
for the Court's ready reference. In that Order, this Court held:

1 THEREFORE, the Court finds Intervenor are hereby
2 entitled to recover, as the party prevailing in a
3 special proceeding pursuant to the judgment entered on
4 April 5, 2012, and NRS 18.020(4), total costs of
\$7,127.05 from the Bentleys.

5 This ruling has become the law of the case and should be
6 followed by this Court in these proceedings which emanate from
7 the initial case now consolidated with the Petitions under
8 review.

9 **3. Intervenor Stand in Same Position as Original Litigants.**

10 Costs should be awarded to the Intervenor who stand in the
11 same position as the original litigants. The general rule is set
12 forth in 20 C.J.S., Costs § 52, as follows:

13 **§ 52. Intervenor**

14 For the purpose of obtaining an award of costs, an
15 intervening party stands in the same position as the
16 original litigants. A successful intervenor is entitled
17 to costs caused by contesting his or her claim, against
18 the party who makes the contest.

19 For the purpose of taxing costs, an intervening party stands
20 in the same position as the original parties. See Kleiman v.
21 Aetna Cas. & Sur. Co., 581 A.2d 1263, 1267-68 (D.C.
22 1990) (reversing for abuse of discretion when the court failed to
23 allocate costs against the plaintiff and intervening plaintiff
24 jointly); Smith v. Board of School Comm'rs, 119 F.R.D. 440, 442
25 (S.D. Ala. 1988) (finding "defendant-intervenor ought to stand in
26 like case with defendants as prevailing parties"). Del Rosario v.
27 Wang, 804 A.2d 292, 297 (D.C. 2002).

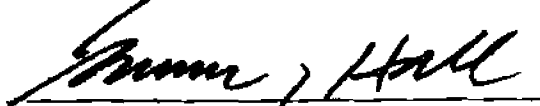
1 Once intervention has been granted, the intervenors have the
2 same rights as any one of the original parties. Moore v.
3 District Court, 77 Nev. 357, 363-64, 364 P.2d 1073 (1961),
4 (holding that intervenors are entitled to avail themselves of all
5 the procedures and remedies to which the defendant would be
6 entitled.) Here, the Intervenorrs were served by the Petitioners
7 with the Petitions pursuant to NRS 533.450(3); they appeared and
8 successfully defeated the three Petitions. Costs should be
9 awarded to Intervenorrs.
10

11
12 C. Conclusion.

13 This Court previously ruled that the proceedings in this
14 matter are to be considered a "special proceeding" for purposes
15 of an award of costs in favor of the Intervenorrs. NRS 533.450(7)
16 further mandates that "costs must be paid as in civil cases."
17 The Intervenorrs are entitled to an award of costs from the
18 Petitioners and respectfully move this Court to amend the Order
19 entered herein on November 27, 2013, to include such an award.
20

21 DATED this 18th day of December, 2013.

22 LAW OFFICES OF THOMAS J. HALL

23 
24 THOMAS J. HALL, ESQ.
25 Nevada Bar No. 675
26 305 South Arlington Avenue
27 Post Office Box 3948
28 Reno, Nevada 89505

1
2
3 **CERTIFICATE OF SERVICE BY MAIL**

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

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

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

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

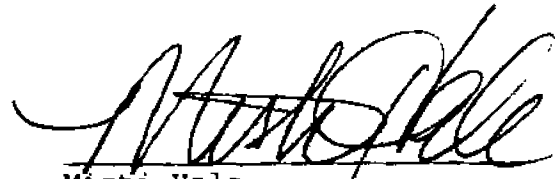
Donald S. Forrester
Kristina M. Forrester
913 Sheridan Lane
Gardnerville, Nevada 89460

13 Jessica C. Prunty, Esq.
14 Dyer, Lawrence, Penrose,
Flaherty, Donaldson & Prunty
15 2805 Mountain Street
Carson City, Nevada 89703

Frank Scharo
Post Office Box 1225
Minden, Nevada 89423

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

19 DATED this 18th day of December, 2013.
20
21

22 
23 Misti Hale
24
25
26
27
28

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

EXHIBIT LIST

EXHIBIT 1: Order entered January 4, 2013.

EXHIBIT 1

EXHIBIT 1

RECEIVED

JAN - 4 2013

FILED

1 Case No. 08-CV-0363-D

2 Dept. No. I

2013 JAN -4 PM 2:38 DOUGLAS COUNTY
DISTRICT COURT CLERK

TED THIRAN
CLERK

4 P. GREGORY
BY _____ DEPUTY

7 IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

8 IN AND FOR THE COUNTY OF DOUGLAS

9 In the Matter of the Determination of the relative
10 rights in and to the Waters of Mott Creek, Taylor
11 Creek, Cary Creek (aka Carey Creek), Monument
12 Creek, and Bulls Canyon, Stutler Creek (aka Stattler
13 Creek), Sheridan Creek, Gansberg Spring, Sharpe
14 Spring, Wheeler Creek No. 1, Wheeler Creek No. 2,
15 Miller Creek, Beers Spring, Luther Creek and various
16 unnamed sources in Carson Valley, Douglas County,
17 Nevada.

ORDER

15 THIS MATTER comes before the Court upon a Motion For Attorney's Fees and a
16 Memorandum of Costs filed by Donald S. Forrester and Kristina M. Forrester, Hall Ranches,
17 LLC, a Nevada Limited Liability Company, Thomas J. Scyphers and Kathleen M. Scyphers,
18 Frank Scharo, Sheridan Creek Equestrian Center, LLC, a Nevada Limited Liability Company,
19 and Ronald R. Mitchell and Ginger G. Mitchell (hereinafter referred to collectively as
20 "Intervenors"). J.W. Bentley and MaryAnn Bentley, Trustees of the Bentley Family Trust 1995
21 Trust (hereinafter referred to as the "Bentleys") have opposed the motion while filing their own
22 Motion To Retax Costs. The Bentleys have also filed a Motion For Leave To File Sur-Reply
23 regarding the Motion for Attorney's Fees, which is opposed by intervenors.
24

25 Having now examined all relevant pleadings and papers on file herein, the Court enters
26 the following order, good cause appearing:
27
28

11. The Intervenor's are awarded their costs and a reasonable attorney fee.

Nevada Revised Statute 18.010 provides the following, among other things:

2. In addition to the cases where an allowance is authorized by specific statute, the court may make an allowance of attorney's fees to a prevailing party:

(a) When the prevailing party has not recovered more than \$20,000; or

(b) Without regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party. The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations. It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public.

3. In awarding attorney's fees, the court may pronounce its decision on the fees at the conclusion of the trial or special proceeding without written motion and with or without presentation of additional evidence.

4. Subsections 2 and 3 do not apply to any action arising out of a written instrument or agreement which entitles the prevailing party to an award of reasonable attorney's fees.

Having already pronounced its decision on fees at the conclusion of trial, the only remaining issue is to set the amount of the award. The Intervenor's post-hearing pleading in reply concludes by requesting attorney's fees in the amount of \$171,814.00.¹

Considering the factors provided within *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969), the Court determines that the amount requested is reasonable based upon the following findings:

1. Professional Qualities: As reflected within the resumes attached to Intervenor's motion, Thomas Hall, Esq. is a Martindale-Hubbell AV-rated lawyer practicing regularly in the following areas of law for decades: real estate, water rights and litigation. Work billed by an

Intervenor's original award request was listed as \$165,049.00. That amount increased to \$171,814.00 within their reply pleading. Because that amount increased without the Bentleys having an opportunity to comment, the Bentleys' motion for leave to file a sur-reply is hereby granted, allowing the Court to receive and consider the Bentleys' position regarding the increased amount.

1 associate attorney and paralegal, both of whom are educated and experienced, has been
2 performed under Mr. Hall's supervision, constituting a savings to the client. The professional
3 qualities of Mr. Hall and his legal staff are satisfactory and reasonable.

4 2. Character Of Work To Be Done: The written judgment referenced within this Order
5 reflects the substance of the dispute between the parties. The nature and importance of
6 contested exceptions to the State Engineer's order of determination regarding the relative rights
7 in and to the water sources at issue herein speaks for itself. The legal work necessary included
8 conducting, defending and participating in contested litigation, which in turn required legal
9 research, analysis and writing in preparation for, and specific to, this matter.

10 3. The Work Actually Performed: Based upon a review of the billing statements
11 attached to the Motion for Attorney's Fees, and having previously ruled upon the pleadings
12 received in this sub-matter, and having further presided over the trial herein, during all of
13 which the Court observed the work of the appearing attorneys, the Court finds the work of the
14 Intervenor's legal team to have been satisfactory and reasonable.

15 4. The Result Obtained: As reflected within the written judgment entered on April 5,
16 2012, the result of trial was determined to be in favor of the Intervenor's.

17 However, although the amount of attorney's fees requested is reasonable and justified
18 as reflected above, considering the purpose of the award as stated within NRS 18.010(2)(b), the
19 Court hereby determines that an award of \$90,000.00 is appropriate to accomplish the statutory
20 purpose as stated therein.

21 THEREFORE, Intervenor's are hereby awarded \$90,000.00 in attorney's fees, to be paid
22 by the Bentleys.

23
24 **Motion To Retax Costs**

25 Intervenor's Memorandum of Costs presents costs expended in this sub-matter of
26
27
28

1 \$13,072.85. The Bentleys' Motion to Retax Costs seeks to reduce that amount by \$9,350.91 to
2 a retaxed amount of \$3,721.94. In opposition to the Motion to Retax Costs, Intervenor's cite
3 NRS 18.110(4), arguing that the Bentleys did not timely file their motion within the statutory
4 time allotted. No reply to the opposition has been received.

5
6 A review of the record indicates that the Motion to Retax Costs should have been filed
7 certainly no later than May 1, 2012. On May 2nd, a stipulation was filed extending the time in
8 which the Bentleys could file an opposition to the Motion for Attorney's Fees. That stipulation
9 did not specifically include an extension to the statutory time limit regarding a Motion to Retax
10 Costs. The Court adopted the stipulation within its Order dated May 10, 2012. That Order
11 likewise did not extend the time to seek the retax of costs.


12
13 Regardless, NRS 18.005, which defines costs that may be recovered by the prevailing
14 party, consistently references reasonable costs. Therefore, reviewing the Intervenor's
15 Memorandum of Costs, the Court hereby reduces the amounts requested by the following:

Item	Reduction
23,272 of black and white copies at a cost of \$0.10 in lieu of \$0.25:	(\$3,445.80)
Postage:	(\$500.00)
Legal research:	(\$2,000.00)
Total Reduction:	(\$5,945.80)

21 THEREFORE, the Court finds that Intervenor's are hereby entitled to recover, as the
22 party prevailing in a special proceeding pursuant to the judgment entered on April 5, 2012, and
23 NRS 18.020(4), total costs of \$7,127.05 from the Bentleys.

24 IT IS SO ORDERED.

25 Dated this 4 day of January, 2013.

26
27 
28 DAVID R. GAMBLE
District Judge

1 Copies served by mail this 4th day of January, 2013, to:

2 Bryan L. Stockton, Esq.
3 Deputy Attorney General
4 State of Nevada
5 100 North Carson Street
6 Carson City, NV 89701

7 Thomas J. Hall, Esq.
8 P. O. Box 3948
9 Reno, NV 89505

10 Michael L. Maruska, Esq.
11 937 Mica Drive, #16A
12 Carson City, NV 89705
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

John Shaler