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2 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

3 In Re: Rotation Schedule

4 In the Matter of the Determination
5 of the Relative Rights in and to
6 The Waters of Mott Creek, Taylor
7 Creek, Cary Creek (aka Carey
8 Creek), Monument Creek, and Bulls
9 Canyon, Stutler Creek (aka Stattler
10 Creek), Sheridan Creek, Gansberg
11 Spring, Sharpe Spring, Wheeler
12 Creek No. 1 Wheeler Creek No. 2,
13 Miller Creek, Beers Spring, Luther
14 Creek and Various Unnamed Sources
15 in Carson Valley, Douglas County,
16 Nevada.

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Tracie K. Lindeman
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Supreme Court No.
District Court
Consolidated Case No.:
08-CV-0363-D1

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

Appellants,

vs.

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; KATHLEEN M. SCYPHERS;
DONALD S. FORRESTER AND KRISTINA M.
FORRESTER,

Respondents.

RESPONDENTS' AND INTERVENORS' ANSWERING BRIEF

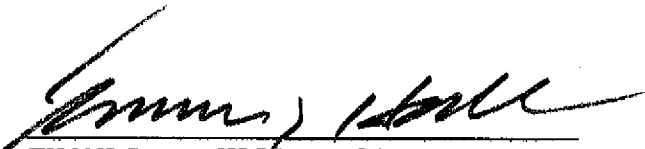
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2 **I. NRAP 26.1 DISCLOSURE STATEMENT.**

3 The undersigned hereby certifies that Respondents and
4 Intervenor Donald S. Forrester and Kristina M. Forrester,
5 Hall Ranches, LLC, Thomas J. Scyphers and Kathleen M.
6 Scyphers, Frank Scharo, Sheridan Creek Equestrian Center,
7 LLC, and Ronald R. Mitchell and Ginger G. Mitchell are
8 individuals or limited liability companies with no parent
9 corporations and with no publicly held companies that have an
10 interest in them. Thomas J. Hall, Esq., has been the
11 Respondents' and Intervenor's only attorney in the district
12 court proceedings below and no other attorney is expected to
13 appear on their behalf in this matter.
14

15 Respectfully submitted this 9th day of July, 2014.
16

17 LAW OFFICES OF THOMAS J. HALL

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III. TABLE OF AUTHORITIES:

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IV. STATEMENT OF JURISDICTION.

On April 5, 2012, the Ninth Judicial District Court entered its Findings of Fact, Conclusions of Law, Order and Judgment, in which it concluded, ordered and adjudged in pertinent part (1 JA 169:14-170:13):

- 4. The remainder of the Final Order of Determination, as it pertains to Ninth Judicial District Court Case No. 08-CV-0363 subpart D, is affirmed and shall become the Final Decree.
- 5. When the combined flow from the North Diversion of Sheridan Creek and tributaries drops below 2.0 cfs, the State Engineer shall impose a rotation schedule.
- 6. The rotation schedule shall be in effect from the time the North Diversion of Sheridan Creek drops below 2.0 cfs until superseded, until the flow rises to above 2.0 cfs or until the schedule is stayed or modified by this Court.
- 7. The rotation schedule shall be prepared at the beginning of the irrigation season to allow review by this Court, under NRS 533.450, if any party challenges the schedule.
- 8. The State Engineer has full authority to implement a rotation schedule if appropriate.
- 9. The rotation schedule shall reflect any agreements between the parties.
- 10. The State Engineer shall monitor the system and make changes as required by law or by request of the parties, which changes are subject to review in this Court.
- 11. The Intervenorers are awarded their costs and a reasonable attorney fee.

1
2 12. The Diversion Agreement is unenforceable,
3 invalid and ineffective.

4 None of these findings, conclusions or orders can be
5 reviewed under this appeal as "The Judgment is not a final
6 judgment." (See Case No. 60891; Bentleys' AOB 3:25 and 26:20-
7 21.)

8 The November 27, 2013, District Court's Order (5 JA
9 1046-1050), confirmed the District Court's previous rulings
10 of April 5, 2012, which the Bentleys themselves have claimed
11 several times is "not a final judgment." In the previous
12 Appeal from the District Court Case No. 08-CV-0363, Supreme
13 Court Case No. 60891, filed by the Bentleys, this Court
14 dismissed that appeal for lack of jurisdiction as the April
15 5, 2012, Order was not a final judgment.

17 It should be noted that the lower court consolidated
18 the several Petitions for Judicial Review which are the
19 basis for the current appeal into the not-yet final
20 proceedings under Case No. 08-CV-0363-D-1, a sub-proceeding
21 under the Final Order of Determination filed under Case No.
22 08-CV-0363. 5 JA 1047, ¶ 2.

24 At this time, the District Court still has not yet
25 issued a Final Decree for all the sub-parts of the
26 adjudication proceeding, and until it does so, no appeal can
27 be taken from the Adjudication Order. See, Bentley v. State
28

1
2 Engineer, Docket No. 60891 (Order Dismissing Appeal, February
3 15, 2013). It is expected, however, that a Final Decree will
4 soon be issued by the District Court. In fact, the Nevada
5 Attorney General's office issued a letter on June 26, 2014,
6 indicating that the Final Decree is ready to be issued. See
7 Respondents' and Intervenor's Supplemental Appendix.
8

9 At this time, the District Court still has not yet ruled
10 on the award of costs submitted by Respondents and
11 Intervenor's on April 18, 2014.

12 However, this Court may review the State Engineer's
13 Orders for Rotation under NRS 533.450(9) as further discussed
14 in the Argument, *infra*, at 11-12.
15

16 **V. STATEMENT OF ISSUES.**

17 1. Whether the Supreme Court has limited jurisdiction
18 over this appeal.

19 2. Whether the pre-statutory vested water rights held by
20 the parties can be modified by court-ordered rotation.

21 3. Whether the rotation of the scarce water has been
22 properly ordered by the District Court.

23 4. Whether substantial evidence supports the District
24 Court's order for rotation and the State Engineer's
25 implementation of the same.
26

27 \\\\
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1
2 **VI. STATEMENT OF CASE.**

3 On April 5, 2012, after trial in Case No. 08-CV-0363-D,
4 the Honorable David R. Gamble issued his Findings of Fact,
5 Conclusions of Law, Order and Judgment (4 JA 759-775)
6 concerning various issues of both fact and law raised in the
7 Exceptions filed by Bentley. 3 JA 425-443; 3 JA 444-491. The
8 District Court was concerned with waste of scarce water
9 resources and the inefficient and the inequitable use of
10 this water. In view of the ample evidence presented, the
11 District Court decreed that the State Engineer has full
12 authority to implement a rotation schedule, if appropriate.
13 Specifically, the District Court ordered as follows (1 JA
14 169):
15

16
17 5. When the combined flow from the North Diversion
18 of Sheridan Creek and tributaries drops below 2.0
19 cfs, the State Engineer shall impose a rotation
20 schedule.

21 6. The rotation schedule shall be in effect from
22 the time the North Diversion of Sheridan Creek
23 drops below 2.0 cfs until superseded, until the
24 flow rises to above 2.0 cfs or until the schedule
25 is stayed or modified by this Court.

26 In 2012 and 2013, the State Engineer did factually
27 determine that the flow of the North Branch of Sheridan
28 Creek dropped below 2.0 cfs and consequently did impose a
rotation schedule as specified in the Order and Judgment. 1
JA 186, 174-184; 5 JA 917-927.

1
2 All of the water rights to the North Diversion of
3 Sheridan Creek are vested and of equal priority except for
4 those under Gansberg Spring which is a statutorily permitted
5 water right with a later priority date. The water rights for
6 the North Diversion of Sheridan Creek have a priority date
7 of 1852 and the waters of Stutler Creek have a priority date
8 of 1905. 1 JA 157; 2 JA 328-331.
9

10 Because the water rights held by the Intervenorers are
11 vested with 1852 and 1905 priorities, those rights are not
12 necessarily determined and regulated by the later-enacted
13 statutory provisions of NRS 533.075 regarding rotation by
14 consent only. In fact, NRS 533.085 specifically provides for
15 non-impairment of vested, pre-statutory rights.
16

17 **VII. STATEMENT OF FACTS.**

18 On August 14, 2008, the State Engineer filed his Final
19 Order of Determination. 2 JA 190-424.

20 On March 25, 2009, J.W. Bentley and Maryann Bentley, as
21 Trustees of the Bentley Family Trust 1995 Trust
22 ("Bentleys"), filed their Amended Notice of Exceptions and
23 Exceptions to Final Order of Determination. 3 JA 444-491.
24 Within the Amended Notice of Exceptions and Exceptions to
25 Final Order Determination the following Exception was made
26 by the Bentleys as Exception No. 1 (3 JA 446:7-13):
27
28

1
2 Accordingly, Tables 5 and 6, and Part VIII "Proofs
3 Determined to Be Valid" should be amended to note
4 that all diversion rights from the North Branch of
5 Sheridan Creek (as well as Stutler Creek and
6 Gansberg Springs (to the extent those sources are
7 also diverted through the North Branch of Sheridan
8 Creek) are subject to this diversion agreement and
9 the Bentley property should be exempt from the
rotation to the extent of diverting water through
the ponds for stock watering and/or wildlife
purposes, all of which is described as a non-
consumptive use and returned to the irrigation
ditches. [Emphasis added.]

10 On March 27, 2009, Intervenor filed their Reply to
11 Exceptions setting forth the facts and law why the Water
12 Diversion and Use Agreement ("Diversion Agreement") was
13 unenforceable.

14 On November 19, 2009, Intervenor filed their Response
15 and Objections to the Notice of Exceptions and Exceptions to
16 Final Order of Determination and raised certain Affirmative
17 Defenses.

18 On January 13, 2012, following a full and complete
19 hearing, the District Court entered its oral decision in
20 which it stated (Respondents' and Intervenor's Supplemental
21 Appendix, Decision, 4:10-11 and 7:18-20):

22 The [Diversion A]greement from the date it was
23 recorded was ineffective and invalid.

24 * * *

25 So it will be the order that the State Engineer
26 has full authority to implement a rotation
27

1
2 schedule when the State Engineer deems it
3 appropriate.

4 Thereafter, on April 5, 2012, the District Court
5 entered its detailed Findings of Fact, Conclusions of Law,
6 Order and Judgment, in which it concluded and adjudged, in
7 pertinent part, the following (1 JA 169:13-170:12):

8 4. The remainder of the Final Order of
9 Determination, as it pertains to Ninth Judicial
10 District Court Case No. 08-CV-0363 subpart D, is
affirmed and shall become the Final Decree.

11 5. When the combined flow from the North Diversion
12 of Sheridan Creek and tributaries drops below 2.0
13 cfs, the State Engineer shall impose a rotation
schedule.

14 6. The rotation schedule shall be in effect from
15 the time the North Diversion of Sheridan Creek
16 drops below 2.0 cfs until superseded, until the
flow rises to above 2.0 cfs or until the schedule
is stayed or modified by this Court.

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

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

22 9. The rotation schedule shall reflect any
23 agreements between the parties.

24 10. The State Engineer shall monitor the system
25 and make changes as required by law or by request
of the parties, which changes are subject to
26 review in this Court.

27 11. The Intervenor is awarded their costs and a
28 reasonable attorney fee.

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In its Findings of Fact, the District Court found (1 JA 165:7-12; 165:22-25):

FINDINGS OF FACT

F. Attorney Fees:

44. Mr. Bentley, through intimidation and threat, attempted to bully the Intervenor, acting in a manner to harass and financially exhaust the Intervenor.

45. Bentleys brought and maintained their Exception No. 1 relating to the Diversion Agreement without reasonable grounds.

* * *

48. The Bentleys proceeded in this matter under an erroneous theory and under an erroneous thought process, and therefore, their action was maintained by them without reasonable grounds.

No stay has ever been sought or obtained by Appellants in any regard.

VIII. SUMMARY OF THE ARGUMENT.

Because of the geographic location of the Appellants' property, being at the headwaters where the waters of Sheridan Creek and Stutler Creek flow onto the Appellants' property, the Appellants are able to divert the entire flow of water during times of scarcity, shortage and drought, thereby depriving the Respondents of any water at all during such periods of low flow.

1
2 The Bentleys initiated hearings on the Final Order of
3 Determination by filing their Amended Notice of Exceptions
4 and Exceptions to Final Order of Determination on March 25,
5 2009, wherein they state that their water rights were
6 subject to a Diversion Agreement "and the Bentley property
7 should be exempt from the rotation to the extent of
8
9 diverting water through the ponds for stock watering and/or
10 wildlife purposes." [Emphasis added.] 3 JA 446:10-12.

11 Following extensive pre-trial discovery, hearings and a
12 trial before District Judge David R. Gamble, it was
13 determined under the specific facts and circumstances
14 present here, that rotation should be imposed by the State
15 Engineer when water flows drop below 2.0 cfs, the level at
16 which the District Court determined that all users would not
17 be receiving their full complement and flow of their vested
18 water rights. 1 JA 169, ¶ 5 and 6.

19
20 Because the water rights subject to this case were
21 vested in 1852 and 1905, before statutory proceedings were
22 later legislated, these pre-statutory vested water rights
23 are not subject to the limitations contained in the current
24 rotation only by consent statute, NRS 533.075.

25
26 The common law is applicable in Nevada. NRS 1.030.
27 Throughout this nation, and apparently throughout the world,
28

1
2 rotation of water rights has been imposed on non-consenting
3 users. Here, solely by virtue of their superior geographic
4 location, Appellants have no motive, incentive or reason to
5 share scarce water in times of low flow. Historically, they
6 have actually used the entire flow during times of scarcity
7 contrary to the common law and contrary to principles of
8 equity, fairness and justice.
9

10 **IX. STANDARD OF REVIEW.**

11 Judicial review of the State Engineer's decisions or
12 orders is brought pursuant to NRS 533.450 and is in "the
13 nature of an appeal." NRS 533.450(1). Any aggrieved party
14 may bring such a petition. This Court "is free to decide
15 purely legal questions . . . without deference to the [State
16 Engineer's] decision." However, "[w]ith questions of fact,
17 the reviewing court must limit itself to a determination of
18 whether substantial evidence in the record supports the
19 State Engineer's decision." Town of Eureka v. State
20 Engineer, 108 Nev. 163, 165, 826 P.2d 948 (1992).
21

22 The Final Order of Determination provides for sharing
23 these water rights (2 JA 388; FOD 194):
24

25 The diversion rates for the north and south split
26 of Sheridan Creek are based on a spring and early
27 summer average stream flow of 3.5 c.f.s. Flow and
28 diversion rates during periods of drought and
middle to late irrigation season will generally be
less than the rates determined in the Preliminary

1
2 Order of Determination. Therefore, all parties
3 will have to share the water shortage during
4 periods of low flow. The total diversion from
5 either the north or south split can be used in its
entirety in a rotation system of irrigation.
[Emphasis added.]

6 **X. ARGUMENT.**

7 **1. The Supreme Court Has Limited Jurisdiction to**
8 **Consider This Appeal.**

9 Pursuant to NRS 533.450(10), "[t]he decision of the
10 State Engineer shall be prima facie correct, and the burden
11 of proof shall be upon the party attacking the same." Review
12 of a decision of the State Engineer is in the nature of an
13 appeal and is, consequently, limited and summary in nature.
14 NRS 533.450(1), (2) and (10). On appeal, the function of
15 this Court is to review the evidence on which the State
16 Engineer based his decision to ascertain whether the
17 evidence supports the decision, and if so, the court is
18 bound to sustain the State Engineer's decision. State
19 Engineer v. Curtis Park, 101 Nev. 30, 32, 692 P.2d 495
20 (1985).
21

22
23 The State Engineer may make decisions in the
24 administration of the rights determined under the FOD and the
25 under orders of the District Court, pending issuance of a
26 Final Decree, as he did here, thereby acting "under the
27 supervision and control of the district court." NRS 533.220.
28

1
2 And so, NRS 533.450(1) and (9) provide for judicial review
3 and appeal of such administrative actions, and therefore,
4 decisions of the State Engineer administering water rights
5 during the pendency of the often long, drawn-out,
6 adjudication proceedings fall within this purview. The scope
7 of review is limited to the administrative acts of the State
8 Engineer, and may not be a review of the Order and Judgment
9 of the District Court in the non-final matter.
10

11 Here, the State Engineer merely implemented the Order
12 and Judgment of the District Court which Order and Judgment,
13 as related above, cannot be reviewed here. No stay was ever
14 sought or obtained by Appellants. NRS 533.450(5).
15

16 **2. The Pre-statutory Vested Water Rights Held By The**
17 **Parties Can Be Modified By Court-Ordered Rotation.**

18 a) There are three types of water rights recognized in
19 Nevada.

20 In the case of Andersen Family Assocs. v. State
21 Engineer, 124 Nev. 182, 188-189, 179 P.3d 1201 (2008), the
22 Nevada Supreme Court elucidated the classifications and
23 attributes of water rights in Nevada stating:
24

25 Generally, "[t]he term 'water right' means . . .
26 the right to divert water by artificial means for
27 beneficial use from a natural spring or stream.
28 In Nevada, there are three different types of
water rights: vested, permitted, and
certificated. First, "vested" rights are those

1
2 that existed under Nevada's common law before the
3 provisions currently codified in NRS Chapter 533
4 were enacted in 1913. These rights may not be
5 impaired by statutory law and may be used as
6 granted in the original decree until modified by a
7 later permit. Second, "permitted" rights refer to
8 rights granted after the State Engineer approves a
9 party's "application for water rights." Such
10 permits grant the right to develop specific
11 amounts of water for a designated purpose. Third,
12 "certificated" rights are statutory rights granted
13 after a party perfects his or her permitted water
14 rights. In order to perfect permitted water
15 rights, an applicant must file proof of beneficial
16 use with the State Engineer. Once proof has been
17 filed, the State Engineer will issue a certificate
18 in place of the permit. [Emphasis added.]

19 In footnote 6, this Court noted:

20 The Legislature enacted NRS 533.085(1) to avoid
21 any unconstitutional impingements on water rights
22 that were in existence at the time Nevada's
23 statutory water law went into effect. *Manse*
24 *Spring*, 60 Nev. at 288-89, 109 P.2d at 315.

25 In the present case, all the parties pertinent pre-
26 statutory vested water rights have common dates of priority,
27 1852 and 1905, and are classified as vested water rights.

28 Rights acquired before 1913 can only be lost or
adjusted in accordance with the law in existence at the time
of the enactment of Nevada statutory water rights
provisions. In Ormsby County v. Kearney, 37 Nev. 314, 352-
353, 142 Pac. 803 (1914), this Court explained:

The greater portion of the water rights upon the
streams of the state were acquired before any
statute was passed prescribing a method of
appropriation. Such rights have uniformly been

1
2 recognized by the courts as being vested under the
3 common law of the state. Nothing in the act shall
4 be deemed to impair these vested rights; that is,
5 they shall not be diminished in quantity or value.
6 As they are all prior in time to water rights
7 secured in accordance with later statutory
8 provisions, such priorities must be recognized.
9 [Emphasis added.]

10 In J. Davenport, Nevada Water Law, at 13-14 (2003) it
11 is stated:

12 The 1905 Legislature accepted Chandler's
13 suggestions, amending the 1903 irrigation law by
14 prescribing a method of securing new
15 appropriations of water through application to the
16 state engineer. In 1907, the Nevada legislature
17 acted again, providing for the appropriation and
18 distribution and use of water. That act declared
19 that all natural watercourses and natural lakes
20 and the waters thereof, which were not held in
21 private ownership, belong to the state and are
22 subject to appropriation for beneficial uses.

23 * * *

24 FN22. Ch. 18, 1907 Nev. Stat. The Office of the
25 State Engineer thus uses the 1905 legislative
26 enactment as the dividing line between common law
27 means of establishment of the water right by
28 appropriation by diverting water and putting it to
beneficial use and the statutory means of
establishment of a water right by application to
the state engineer for the permit to divert water
and later prove up beneficial use.

Nevada common law is applicable to all the courts of
the State of Nevada as set forth in NRS 1.030, as follows:

1.030. Application of common law in courts.

The common law of England, so far as it is not
repugnant to or in conflict with the Constitution
and laws of the United States, or the constitution

1
2 and laws of this state, shall be the rule of
3 decision in all the courts of this state.

4 **b) Pre-statutory vested water rights are not impaired**
5 **by later statutory provisions.**

6 Furthermore, it is clearly provided in NRS 533.085(1):

7 **533.085. Vested rights to water not impaired.**

8 1. Nothing contained in this chapter shall impair
9 the vested right of any person to the use of
10 water, or shall the right of any person to take
11 and use water be impaired or affected by any of
12 the provisions of this chapter where
13 appropriations have been initiated in accordance
14 with law prior to March 22, 1913.

15 For example, the forfeiture statute does not apply to
16 water rights that vested before March 22, 1913, when the
17 statute took effect. United States v. Alpine Land &
18 Reservoir Co., 983 F.2d 1487, 1495 (9th Cir. 1993).

19 Thus, it is clear the later adopted statutory rotation-
20 by-consent-only provision of NRS 533.075 cannot control the
21 pre-statutory 1852 and 1905 vested water rights under review
22 here. Said section relates to other rights, to wit:

23 **533.075. Rotation in use of water.**

24 To bring about a more economical use of the
25 available water supply, it shall be lawful for
26 water users owning lands to which water is
27 appurtenant to rotate in the use of the supply to
28 which they may be collectively entitled; or a
single water use, having lands to which water
rights of a different priority attach, may in like
manner rotate in use, when such rotation can be
made without injury to lands enjoying an earlier

1
2 priority, to the end that each user may have an
3 irrigation head of at least 2 cubic feet per
second.

4 See generally, Andersen Family Assocs. v. State
5 Engineer, 124 Nev. 182, 185-186, 179 P.3d 1201 (2008).

6 **3. The Rotation Of The Scarce Water Resources During**
7 **The Dry Season Has Been Properly Ordered By The District**
8 **Court.**

9
10 Since long before 1913, it has been the policy of
11 Nevada water law to encourage rotation during the dry
12 season. It is also the basis upon which the Final Order of
13 Determination was made, as cited above, and is entirely
14 consistent with prudent and practical irrigation water
15 distribution practices.

16
17 The concept of rotation of irrigation water is fairly
18 ancient as discussed by C. Kinney, A Treatise on the Law of
19 Irrigation and Water Rights, 2nd Ed., §909, Rotation as a
20 Matter of Economy, at 1607 (1912):

21 As was said in a recent Idaho case¹: "The use of
22 water under the rotation system is approved by
23 high engineering authorities." And the [Idaho
24 Supreme] Court proceeds to quote from those great
works by Robert B. Buckley and Sir Hanbury Brown,

25 ¹ State v. Twin Falls Canal Co., 121 Pac. 1039, 1049-1050
26 (Idaho 1911), "The rotation system is recognized by the
27 leading writers on irrigation and irrigation engineering as
a most efficient and desirable method and as producing the
highest duty of water of any method in use."

1
2 and we can do no better than to quote what these
3 works say upon the subject: "The most wasteful
4 system of irrigation possible is that under which
5 all branch canals, distributaries and village
6 channels are in use continuously and the available
7 supply is slowly dribbling into the fields. For
8 not only is the actual loss of water greater, but
9 under this system there is also this further
10 disadvantage, that the velocities in all the
11 distributaries and minor channels are reduced, and
12 the silt in the water, which at these points of
13 the system is nearly always advantageous to the
14 fields, is largely deposited in the channels and
15 not carried onto the cultivated ground. The system
16 of irrigation by rotation or by tatils, as it is
17 called in Upper India, is of great advantage, not
18 only in checking the loss of water in the channel,
19 but in teaching economical irrigation to the
20 cultivators and in insuring an equitable division
21 of the supply among the people.

22 Long ago, in 1875, this Court in the case of Barnes v.
23 Sabron, 10 Nev. 217, 243-247 (1873), approved the common law
24 doctrine of rotation for vested water rights. There, junior
25 upstream appropriators intercepted and failed to rotate use
26 of water from Currant Creek in Nye County, damaging the
27 senior downstream appropriator's crops. This Court held:

28 In a dry and arid country like Nevada, where the
rains are insufficient to moisten the earth, and
irrigation becomes necessary for the successful
raising of crops, the rights of prior
appropriators must be confined to a reasonable and
necessary use. The agricultural resources of the
State cannot be developed and our valley-lands
cannot be cultivated without the use of water from
the streams, to cause the earth to bring forth its
precious fruits. No person can by virtue of a
prior appropriation claim or hold any more water
than is necessary for the purpose of the
appropriation. Reason is the life of the law, and

1
2 it would be unreasonable and unjust for any person
3 to appropriate all the waters of a creek when it
4 was not necessary to use the same for the purposes
5 of his appropriation. The law which recognizes the
6 vested rights of prior appropriators has always
7 confined such rights within reasonable limits. "We
8 say within reasonable limits," with the court in
9 *Basey v. Gallagher*, "for this right to water, like
10 the right by prior occupancy to mining ground, * *
11 * is not unrestricted. It must be exercised with
12 reference to the general condition of the country
13 and the necessities of the people, and not so as
14 to deprive a whole neighborhood or community of
15 its use and vest an absolute monopoly in a single
16 individual." What is a reasonable use depends upon
17 the peculiar circumstances of each particular
18 case.

12 * * *

13 It was the duty of the defendants every fifteen
14 days, or thereabouts, as plaintiff might need
15 water, to turn down a sufficient quantity, within
16 plaintiff's appropriation, required to irrigate
17 his lands.

18 Further, continuing, in *C. Kinney, supra*, §910,
19 Rotation as a Matter of Economy - The law as applied to the
20 subject, at 1608:

21 And upon the question of the application of the
22 principle without contract or statute the courts
23 are gradually falling in line, and are granting
24 the right of rotation upon the theory that it
25 tends to extend the duty of water and the
26 suppression of waste. And although the cases are
27 somewhat scarce upon this subject, the general
28 tendency is to enforce rotation, where it can be
done, without infringing upon the rights of
others, even in cases of prior and subsequent
appropriators upon the same stream on the ground
that it tends toward a more economical use of a
given quantity of water and the suppression of
waste.

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In McCoy v. Huntley, 119 Pac. 481, 481-482 (Ore. 1911),
the Oregon Supreme Court observed:

[W]ater, in the arid parts of the state, is the
life of the land....

* * *

We see no reason why, even in cases involving
prior and subsequent appropriations of water, the
courts cannot require the appropriators to
alternate in the use of the water. The time when
water may be used recklessly or carelessly has
passed in this State. With increasing settlement
water has become too scarce and too precious to
justify any but an economical use of it. An
appropriator has only the right to use so much as
his needs require, and at the time his needs
require. And if these are satisfied by a use of
the whole flow every other day, or every alternate
week, he ought not to be heard to complain.

* * *

It must be conceded that there is a paucity of
authority on the subject of requiring rotation in
the use of water between appropriators. The
remedy has frequently been applied in cases of
dispute between riparian proprietors, and it is
difficult to discern any difference in principle
between the rights of a riparian proprietor and
those of an appropriator in the beneficial use of
water. The trend of the later decisions is to
apply this method where practicable.

In W. Hutchins, California Law of Water Rights, at 173
(1956), it is stated:

Rotation in Use of Water

In a controversy over the use of water between
appropriators, the court by its decree may fix the
times when, by rotation, the quantity of water to
which they are collectively entitled may be used

1
2 by each exclusively at different times in
3 proportion to their respective rights. If the
4 wants of the prior appropriator are fully supplied
5 by this method of distribution, he obtains all
6 that he is entitled to and has no ground of
7 complaint. The supreme court stated that this
8 remedy of rotation in the use of waters for
9 irrigation purposes had been applied more
10 generally as between riparian proprietors but that
11 in principle there is no reason why it should not
12 be made applicable as between claimants by
13 appropriation, inasmuch as the rule of
14 appropriation entitles the claimant only to the
15 right to a beneficial use. (Citing Hufford v.
16 Dye, 121 Pac. 400 (Cal 1912).)

17 In A. Tarlock, Law of Water Rights and Resources, §
18 5:34 (2010) it is stated:

19 **§ 5:34 Priority--Modification of Priority--**
20 **Rotation**

21 Priorities may be subordinated by rotation. To
22 encourage the maximum use of water among the
23 widest class of users, the use of water may be
24 rotated among users. Under rotation one user may
25 take all the available water, regardless of senior
26 priorities for a limited period of time and the
27 next user may do the same. Rotation will allow a
28 junior to use water subjected to a senior right
out of priority. Rotation may be imposed by a
court as part of a decree. (Citing Hufford v. Dye,
121 Pac. 400 (Cal 1912).) [Emphasis supplied.]

In Hufford v. Dye, 121 Pac. 400, 406 (Cal. 1912), the
California Supreme Court stated:

If there is not water enough (and this appears to
be the fact) to permit a diversion of the stream
and a simultaneous use of part by both parties
without injury, the court may by its decree fix
the times when, by rotation, the whole may be used
by each at different times in proportion to their
respective rights.

1
2 The case of Anderson v. Bassman, 140 Fed. 14, 29 (N.D.
3 Cal. 1905), is interesting and instructive because it dealt
4 with a court-ordered rotation of water from the West Fork of
5 the Carson River in Douglas County, Nevada, between upstream
6 and downstream appropriators, some with a priority of 1852:

7
8 The right of each is to have a reasonable
9 apportionment of the water of the stream during
10 the season of the year when it is scarce. But to
11 divide the water so as to allow a certain number
12 of inches to the complainants and a certain number
13 of inches to the defendants is plainly
14 impracticable. The only method that appears to
15 provide a just and equitable division is some fair
16 and appropriate division in time by which the
17 complainants and defendants shall have the use of
18 the water alternately during the dry season. It
19 shall therefore direct that a decree be entered
20 restraining the defendants from diverting the
21 waters of the West Fork of the Carson River in
22 excess of five days in every ten days during the
23 months of June, July, August, September, and
24 October in each year....

25
26 In the more recent case of Crawford v. Lehi Irrigation
27 Company, 350 P.2d 147, 168-169 (Utah 1960), where a water
28 user held a state issued permit, the Utah Trial Court
imposed and the Utah Supreme Court sustained rotation, and
stated:

29
30 The intent to place water, and the application of
31 it, to be a beneficial use do not alone govern the
32 distribution of water that is being appropriated.
33 Water may not be appropriated in excess of the
34 reasonable amount that may be used for the
35 beneficial use designated in the application. As
36 this court said in the case of Little Cottonwood
37 Water Co. v. Kimball, 76 Utah 243, at pages 246-

1
2 47, 289 P. 116, at page 117, 'The question is
3 important because, on the one hand, the statute
4 ought not to be a shield of protection to prior
5 appropriators who divert water in excess of their
6 reasonable necessities; * * * In the arid region
7 water is precious, and it is the undoubted policy
8 of the law to prevent its waste and promote its
9 largest beneficial use. Water is a bounty of
nature, and, while prior rights to its use are
obtained by those who first apply it to a
beneficial use, those rights are limited to the
quantities reasonably necessary for the uses to
which it is applied. This is a cardinal principle
of law of prior appropriation.'

10 The evidence supports the finding of the trial
11 court that the above stated water from the
12 'unnamed drain' is the amount which could
13 beneficially be used upon the plaintiff's land to
14 which it is applied. It appears that the
15 objective of achieving the most economical use of
16 the water will be served by the order made
17 directing that it be used under a rotation system,
and that it will result neither in hardship nor
injustice to the plaintiff. Accordingly we see no
basis to justify interference with the conclusion
reached by the trial court in refusing to issue an
injunction. [Emphasis added.]

18 In Mimbres Valley Irrigation Co. v. Salopek, 140 P.3d
19 1117, 1119 (N.M.App. 2006), the New Mexico Court was faced
20 with a similar situation as presented here, where there was
21 not sufficient water flows during the dry season to
22 accommodate all demands. The District Court ordered
23 rotation, to wit:

24
25 The district court then filed an order of
26 reference to the Water Master directing the Water
27 Master to convene a meeting of San Lorenzo and
28 private upstream ditches in an effort to apportion
the water so that San Lorenzo could get its

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2 rightful priority and if no agreement among the
3 ditches was reached, "the Water Master may specify
4 a rotation period for the allocation of water
5 among the ditches." A meeting was subsequently
6 convened and the representatives of the ditches
7 were unable to agree upon a rotation schedule for
8 distribution of water. Accordingly, the Water
9 Master ordered a rotation system of water
10 distribution on April 8, 2004.

11 When all water users with the same priority cannot
12 agree to rotation because one or more users have a physical
13 geographic advantage as by intercepting the stream flow
14 first, the only practical and equitable remedy is rotation
15 during the dry season. Why should three water right owners
16 get all the water and five others with equal rights get none
17 during the dry season?

18 Contrary to these persuasive and long-standing
19 authorities, even recently approved, the Bentleys have seen
20 fit to make this a march of one individual who owns a ranch
21 with two ponds for aesthetic purposes and fish-raising,
22 against the Intervenor, some who live and work and earn
23 their income from ranching. The Bentleys, although certainly
24 allowed 1.6 days of irrigation water within the 21-day
25 rotation (5 JA 917-927), are not entitled to demand a
26 continuous flow in preference and priority over the other
27 downstream water right holders during the dry season.

1
2 And as for Appellants Smith/Barden, they receive all
3 the water they are entitled, but in rotation. As
4 demonstrated in the next section, they have received more
5 than their fair share in the past, even to the exclusion of
6 any use by Intervenor.

7
8 The court-ordered rotation is sustained by ample,
9 substantial and persuasive legal authorities.

10 **4. Substantial Evidence Supports The District Court's**
11 **Order For Rotation And The State Engineer's Implementation**
12 **Of Same.**

13 The Intervenor are essentially water users downstream
14 from the Bentleys' two ponds and the Smith/Barden pipe
15 diversion. The principal diversion, on the uphill side of
16 the collective properties, also delivers a four-inch water
17 pipeline full of water to the Smith and Barden properties (4
18 JA 794-795; I TR 95:15-96:1). Abundant proof was offered at
19 trial that during the implementation of a rotation schedule,
20 the Intervenor's irrigation water supply was greatly
21 enhanced.
22

23 Intervenor Frank Scharo, a downstream water user,
24 testified at the trial in this matter (4 JA 789; I TR
25 172:13-21):
26

27 Q. How do you irrigate your property?
28

1
2 A. [I i]rrigate the property through the Park and
3 Bull Ditch to the north and from Sheridan Creek
waters to the south.

4 Q. What is the history of irrigating your property
5 as you know it? How does the water get to your
property?

6 A. Well, we've had an informal rotation agreement
7 with the surrounding neighbors and water flows up
8 to the southern portion from the Forresters'
ranch.

9 In 2010, a Rotation Schedule was implemented by
10 District Court Order. See Case No. 56531, filed July 6,
11 2010, denied March 18, 2011.

12 Frank Scharo went on to testify (4 JA 790; I TR 177:9-
13 17):
14

15 Q. What happened in 2010?

16 A. A significant difference, there was a very
17 substantial increase in water to the back southern
portion of our land and we had a very good year.

18 Q. And what do you attribute the very good year in
19 2010?

20 A. Court-ordered rotation.

21 Finally, Mr. Scharo asked the District Court to impose
22 a future rotation schedule, as follows (4 JA 791; I TR
23 180:22-181:5):
24

25 Q. So what are you asking the court to do for you,
Mr. Scharo?

26 A. I would ask the court to bring this to a
27 conclusion by either going back to a rotation
agreement or by having some other fair
28

1
2 distribution of the water that we all have water
3 rights to, and to not allow a preference to any
4 one user or more than one user to have water being
5 they're [located] upstream, that's what I would
6 like to see.

7 Mr. Scharo also discussed the previous informal
8 rotation practices, as follows (4 JA 792; I TR 184:18-
9 185:4):

10 Q. Was there a rotation schedule prior to the
11 rotation schedule that this court imposed in 2010?

12 A. There was an informal rotation amongst the
13 adjacent property owners.

14 Q. Okay. Can you describe to me what that
15 rotation agreement was?

16 A. Well, it was an informal agreement as the
17 water moved through the lateral ditches, moved
18 downhill we would take turns on using the water.
19 And Mr. Scyphers would get water and he'd call me
20 up and say after his turn and say, well, we are
21 done with it, the water's coming your way for
22 being next in line. And that's kind of how it
23 worked.

24 Intervenor Don Forrester testified as to his experience
25 and observations regarding over fifteen (15) years
26 irrigating his ranch. Mr. Forrester described the informal
27 system of rotation practiced for many years (4 JA 796; I TR
28 98:4-19):

Q: Did you have a habit and custom of rotating the
water between the different parcels?

A. Yes, as the parcels were fenced off and other
people came in buying them we went into an
informal rotation that's similar to the court-

1
2 imposed rotation where Mr. Weber's [now Bentleys']
3 property would start for a couple of days, then
4 when he got done it would go to me and then it
5 would go on down and it would just - and if it was
6 low on water we'd take a little longer and the
7 rotation could take almost a month. And if it was
8 a lot of water we could do it in two weeks.

9
10 Q. When Mr. Whitmire [the prior common owner]
11 owned the property was that the method he used to
12 irrigate the property?

13 A. Yes.

14 Q. Was there cooperation between the various water
15 users?

16 A. Yes.

17 Intervenor Forrester further discussed the Smith/Barden
18 four-inch pipeline (4 JA 797; I TR 105:8-11):

19 THE WITNESS: The four-inch pipe was taking a
20 substantial amount of water and the rest of it was
21 going our way. And so the whole rest of the ranch
22 had to try to irrigate out of what was going down
23 our pipe.

24 * * *

25 Q. Okay. So then in 2010, what happened in the
26 2010 irrigation season?

27 A. Well, 2010 we got the first court order
28 diversion - I mean, rotation. And the rotation is
good for me most of the time, and then sometimes
it's not good for me. The best part about it is
was the four-inch pipe being shut off, the Bentley
pond being shut off.

* * *

THE WITNESS: That [four-inch pipe] used to run
all the time, except I felt over the years they
were getting too much water down that pipe on a

1
2 low [water] year. And it has a large drop so
3 there would be a lot of pressure in that pipe.
4 And we didn't realize how much that pipe could
5 take until 2010, because one time when it was
6 their time to rotate and that little four-inch
7 pipe took all of Sheridan Creek in 2010. It took
8 the whole thing. So it was amazing how much water
9 could go in a four-inch pipe with pressure on it.
10 [Emphasis added.]

11 Q. So rotation then actually limited that four-
12 inch draw of the four-inch pipe to the point of
13 rotation that they were entitled under the decree?

14 A. Right. And so then for the first time ever we
15 were able to block off the Bentley pipe and the
16 [Smith/Barden] four-inch pipe, we've never been
17 able to do that.

18 (4 JA 798-799; I TR 115:9-116:24)

19 Intervenor Forrester further discussed the rotation
20 schedule (4 JA 800; I TR 117:5-9):

21 Q. So [in] 2010 the court imposed a rotation
22 schedule by court order and you're describing what
23 the changes were effective?

24 A. It was a huge change, I had enough water to
25 ditch irrigate, to be able to flood the ditches.

26 * * *

27 Q. How much more water would you estimate?

28 A. Double or triple.

Q. Double or triple the water?

A. Yes.

Q. On rotation as opposed to the previous year
with no rotation?

A. Yes.

1
2 Q. Okay. Was 2010 a real wet year, a dry year, a
3 medium year?

4 A. I think it was a medium year.

5 Q. So you had two to three times amount of water
6 coming through your irrigation system on rotation
on an average year, average water year?

7 A. Yes. (4 JA 800-801; I TR 117:24-118:12)

8 Intervenor Tom Scyphers testified that there was an
9 informal rotation method in place to irrigate the
10 Intervenors' property and that "We strictly were on an
11 informal rotation ever since I've owned the property." 4 JA
12 806; II TR 287:9-10.

13
14 **XI. CONCLUSION.**

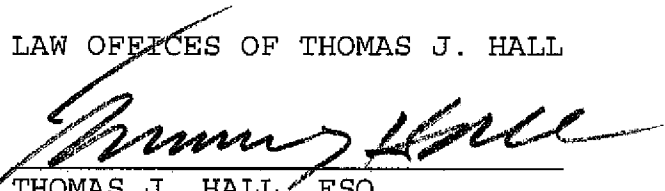
15 The District Court ordered and the State Engineer, on
16 proper measurement, implemented the rotation schedules. The
17 District Court had clear legal authority to order rotation
18 of irrigation water during the dry season for the early non-
19 statutory vested water rights held by the parties. There was
20 substantial evidence before the District Court authorizing
21 its Order for Rotation. The State Engineer merely
22 implemented the District Court's Order under the factual
23 findings for downstream flow measurements as found by his
24 staff.
25

26 \\\

27 \\\

1
2 Respectfully submitted this 9th day of July, 2014.

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2 **ATTORNEY'S CERTIFICATE**

3 I hereby certify that this brief complies with the
4 formatting requirements of NRAP 32(a)(4), the typeface
5 requirements of NRAP 32(a)(5) and the type style
6 requirements of NRAP 32(a)(6) because this brief has been
7 prepared in a monospaced typeface in 12 point Courier New
8 font.
9

10 I further certify that this brief complies with the
11 page limitation of NRAP 32(a)(7) because, excluding the
12 parts of the brief exempted by NRAP 32(a)(7)(C), it does not
13 exceed 30 pages.
14

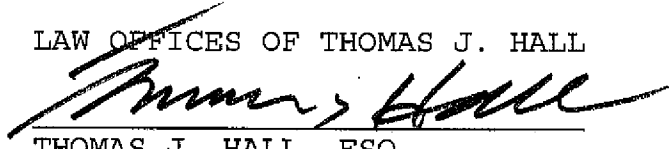
15 Finally, I hereby certify that I have read this brief,
16 and to the best of my knowledge, information and belief, it
17 is not frivolous or interposed for any improper purpose. I
18 further certify that this brief complies with all applicable
19 Nevada Rules of Appellate Procedure, in particular NRAP
20 28(e)(1), which requires every assertion in the brief
21 regarding matters in the record to be supported by a
22 reference to the page and volume number, if any, of the
23 transcript or appendix where the matter relied on is to be
24 found.
25

26 \\\

27 \\\

1
2 DATED this 9th day of July, 2014.

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3 I certify that I am an employee of Thomas J. Hall,
4 Esq., and that on this date, pursuant to NRAP 25(b), I
5 electronically filed the foregoing with the Clerk of the
6 Court by using the ECF system and placed in the U.S. Mail,
7 postage prepaid and, a true and correct copy of the
8 preceding document addressed to:
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