

IN THE SUPREME COURT OF THE STATE OF NEVADA

In Re: Rotation Schedule)	Electronically Filed
)	Jul 10 2014 09:37 a.m.
In the Matter of the Determination of the)	Tracie K. Lindeman
Relative Rights in and to the Waters of)	Clerk of Supreme Court
Mott Creek, Taylor Creek, Cary Creek)	
(aka Carey Creek), Monument Creek,)	Supreme Court Case No. 64773
And Bulls Canyon, Stutler Creek (aka)	
Stattler Creek), Sheridan Creek,)	District Court Consolidated Case No:
Gansberg Spring, Sharpe Spring,)	08-CV-0863-D1
Wheeler Creek No. 2, Miller Creek,)	
Beers spring, Luther Creek and Various)	
Unnamed Sources in Carson Valley,)	
Douglas County, Nevada)	
	/	
JOY SMITH, DANIEL BRANDEN and)	
ELAINE BARDEN, J.W. BENTLEY and)	
MARY ANN BENTLEY, TRUSTEES OF)	
THE BENTLEY FAMILY 1995 TRUST,)	
)	
Appellants,)	
v.)	
)	
STATE OF NEVADA, OFFICE OF THE)	
STATE ENGINEER,)	
)	
Respondent.)	
	/	

RESPONDENT'S ANSWERING BRIEF

RESPONDENT, JASON KING, P.E., in his official capacity by and through
his counsel Attorney General CATHERINE CORTEZ MASTO and Senior Deputy

Attorney General BRYAN L. STOCKTON, hereby submit Respondent's Answering Brief.

This brief is based on the following points and authorities and the papers and pleadings on file herein.

DATED this 9th day of July, 2014.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Bentley, Smith, and Barden (Collectively: Bentley) do not address the only issues over which this Court could arguably have jurisdiction. The State Engineer's imposed of Rotation Schedules for the 2012 and 2013 irrigation seasons in compliance with the order of the district court in case 08-CV-0363-D, on April 5, 2012. Joint Appendix (JA) I, 155. Therein, the court ordered that the State Engineer should issue a Rotation Schedule when the "combined flow from the North Diversion of Sheridan Creek and tributaries (North Diversion) drops below 2.0 cfs. . . ." JA I, 169.

The only questions for which jurisdiction may be proper, as noted in the court's Order of May 27, 2014, are whether the State Engineer properly found that the flow of the North Diversion of Sheridan Creek was below 2.0 cfs at the time the Rotation Schedule was implemented, and whether the State Engineer properly allocated the diversion times in the Rotation Schedule. The only evidence available supports the determination of the State Engineer on these two facts and the appeals herein must be dismissed.

The final Decree has not been issued. This Court held that the Order in 08-CV-0363-D is not final until the Decree is issued. The State Engineer is working with the Decree Court to get the Decree issued quickly, while remaining in

compliance with all the requirements for a Decree. *See* NRS 533.170 *Et Seq.* As noted by the district court in this case, these appeals are not moot because the conduct of issuing a Rotation Schedule will repeat until the court's Order is modified or reversed. JA V, 960–961.

II. ISSUES

1. Does this Court have jurisdiction over the State Engineer's actions implementing the district court's April 5, 2012 Order?
2. Were the State Engineer's findings of fact concerning the conditions requiring a rotation schedule supported by substantial evidence?
3. Does the Decree Court have jurisdiction to administer water rights under the Decree?
4. Does the rotation schedule restrict the transfer of water rights?

III. FACTS

A. Relevant Facts

The district court issued its Findings of Fact, Conclusions of Law, Order, and Judgment in sub-proceeding D of the Decree proceeding as case number 08-

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CV-0363-D on April 5, 2012. JA 155.¹ The district court determined that “When the combined flow from the North Diversion of Sheridan Creek and tributaries drops below 2.0 cfs (cubic feet per second), the State Engineer shall impose a rotation schedule.” JA I, 169.

A rotation schedule was not included in the Decree to allow the parties to make arrangements amongst themselves so as to make maximum beneficial use of the water. The Order declared that “[t]he rotation schedule shall reflect any agreements between the parties.” JA I, 170. In the irrigation season for 2012 at issue herein, Bentley had leased the water rights that would normally be applied to the Pestaña parcel and those rights were included in the rotation for Bentley’s ponds. JA V, 919.

¹ For the court’s information and not to be considered evidence or argument in the current appeal: The Mott Creek, *et al.* Final Order of Determination was filed under case number 08-CV-0363. The Decree Court determined to hear the matter in six sub-proceedings. The Order in the final sub-proceeding to be heard, 08-CV-0363-E was entered on December 26, 2013. The State Engineer assembled the decree to incorporate the various rulings and agreements and submitted the proposed Decree to the court in early 2014. The Decree Court reviewed the Decree and returned it to the State Engineer for corrections. The corrected copies must now be served on the attorneys that have appeared in the case and the Decree Court must allow 30 days for review of the proposed decree. NRS 533.170(5). Once the Decree is signed, the State Engineer will record the Decree. NRS 533.185(2). The State Engineer will then have copies of the Decree printed for all claimants by the State Printing Office and mail them to claimants. The State Engineer will also file a Notice of Entry of Order and the decree, which will be appealable at that time.

On March 30, 2012, Steve Walmsley, Water Resource Specialist, sent a letter outlining the rotation schedule for the 2012 irrigation season. JA I, 26. Although not explicitly stated in the letter, Mr. Walmsley measured the flow on January 12, 2012, and found that the flow was below 2.0 cfs at 1.85 cfs. JA IV, 679. The flow was again measured on April 12, 2012, and found that the North Split of Sheridan Creek remained below 2.0 cfs at 1.57 cfs. JA IV, 681. It is important to note that the appellants do not challenge these factual findings, nor do they offer any evidence that the flow in the North Diversion was above 2.0 cfs.

The schedule includes the temporary transfer of water from the Pestaña property to Bentley, and adjusts the rotation schedule to account for the lease. JA I, 37. The rotation schedule graphically depicts the time for which each user may take water during the 2012 irrigation schedule. JA I, 28–37.

On March 29, 2013, Steve Walmsley, Water Resource Specialist, sent a letter outlining the Rotation Schedule for the 2013 irrigation season. JA V, 847. The letter indicates that Mr. Walmsley measured stream flow on March 27, 2013. JA V, 848. He found that the flow was 0.9 cfs in the North Diversion. JA V, 848. The letter also describes the temporary transfer of water from the Pestaña property to Bentley, and adjusts the Rotation Schedule to account for the lease. JA 848. The

Rotation Schedule again graphically depicts the time for which each user may take water during the irrigation schedule. JA V, 849–857.²

B. Background

The waters of Sheridan Creek were first put to beneficial use in 1852. JA I, 157.³ All the properties currently claiming water rights thereto were part of one parcel, and all dates of priority for the water rights therein stem therefrom as the water appears to “have been put to beneficial use continuously to the present day.” JA I, 157. The water from Sheridan Creek is divided into North and South diversions. Sixty percent (60%) of the flow is to the North Diversion and forty percent (40%) flows to the South Diversion. JA I, 157. The matters at issue herein concern only the North Diversion.

The waters of Stutler Creek were put to beneficial use in 1905 and are conveyed by a pipeline and co-mingled with the waters of the North Diversion and are administered with the North Split of Sheridan Creek. JA I, 157. The waters of Gansberg Spring are the subject of State Engineer’s Permit 7595. JA I, 157. The waters of Gansberg Spring are also conveyed by a pipeline and co-mingled with the waters of the North Diversion and are administered therewith. Collectively,

² It has been noted that the rotation schedule mistakenly retained 2011 as the year, however, the parties understood and appear to have implemented the Rotation Schedule on the dates indicated therein in 2013.

³ These facts are taken from the Order dated April 5, 2012 in sub-proceeding 08-CV-0363-D.

these waters are known simply as the North Diversion of Sheridan Creek. JA I, 157.

Evidence was produced that the place of use for Permit 7595 does not match exactly with the place of use for the vested waters of Sheridan Creek and Stutler Creek. JA III, 509. However, because the waters are co-mingled with the waters of Sheridan Creek, it would be difficult and expensive to administer the waters separately; therefore, the court determined that the waters would be administered in accordance with the Decree. JA I, 157.

Gansberg Spring, like most springs in Nevada does not flow at the same rate at all time. In addition, the flow generally contributes a variable percentage of the flow, but the amount of water contributed generally less than five percent. The district court found that the flow did not justify a water commissioner to regulate to the flow and that the waters should be administered together despite the *de minimus* advantage to the properties that were not within the boundaries for Permit 7595. JA III, 509.

At the time the original property began to be divided, a single pond, known in the record as lower pond was located on the property now owned by Bentley. JA I, 163. A diversion agreement was drafted, but not signed by all the affected parties, wherein Bentley's predecessor in interest was allowed continuous flow into the single pond. JA I, 161. June Irene Bartlett (aka June Irene Rolph) and Nancy

Rolph Welch (collectively Rolphs) held title to the water rights of the North Diversion of Sheridan Creek. JA I, 161–163. The Rolphs did not sign the Water Use and Diversion Agreement. JA I, 163. The district court found that the diversion agreement was invalid as it was not signed by all the parties. JA I, 170.

After Bentley purchased the property, he unilaterally destroyed a portion of the distribution system, installed a new junction box and dug a second and larger pond, known as the Upper Pond. Supplemental Joint Appendix 10 (SJA). The interveners claimed that the combined ponds used significantly more water. At the direction of the district court, the State Engineer conducted two seepage tests in May and August 2010. SJA 1–21.

Bentley repeatedly asserts that there was no evidence to support the district court’s finding that a Rotation Schedule should be imposed. However, in derogation of his duty of candor to this Court,⁴ he ignores the fact that the seepage study showed that Bentley’s two ponds consume less than or equal to his share of the water when the flows of the North diversion are above 2.0 cubic feet per second (cfs). SJA 19–21. Evidence also showed that at flows below 2.0 cfs, Bentley’s ponds consume more than his proportional share of the water. SJA 19–

⁴ See Nevada Rules Of Professional Conduct, Rule 3.3 Candor Toward the Tribunal.

(a) A lawyer shall not knowingly:

(1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer. . . .

21. Thus, there was evidence in the record that the court could rely upon to make this finding. Bentley refuses to even acknowledge the evidence and has made no effort to show that the evidence was not the type that a reasonable mind could rely upon to come to the conclusion that water should be rotated during periods of low flow.

Smith and Barden point to what they call the historical use of the four-inch pipe that runs from Bentley's diversion box to a pond on Smith's parcel. Water from the pond may only be diverted to the Smith and Barden's properties. ROA at III, 524. However, at the time the water right vested on the property in 1852, no pipeline existed and Smith and Barden's water rights are determined by reference to the original right, not by a use obtained to the detriment of others in the recent past.

Bentley, Smith, and Barden essentially advocate what is commonly called "highority" rather than priority. Users higher up on the stream often attempt to use their position to gain advantage over users lower on the system. Nevada's water law does not allow users to manipulate the system in a way that denies water to others of equal priority and this Court must reject these arguments.

Many of Bentley's exceptions to the Final Order of Determination were resolved by stipulation. Bentley repeatedly misstates the language of the agreement to assert that no Rotation Schedule was contemplated. The parties also

agreed that the State Engineer would not attempt to include a rotation schedule in the decree itself, but that the provisions of NRS 533.075 and the orders of the district court would be used to determine when and if a Rotation Schedule is needed to efficiently use the waters of the State of Nevada. JA I, 169–170.

IV. STANDARD OF REVIEW

The State Engineer is appointed by and is responsible to the Director of the Nevada Department of Conservation and Natural Resources and performs duties prescribed by law and by the Director of the Department. NRS § 532.020, NRS § 532.110. Those duties include administering the appropriation and management of Nevada's public water, both surface and ground water, under NRS Chapters 533 and 534.

Pursuant to NRS § 533.450(10) "[t]he decision of the State Engineer shall be prima facie correct, and the burden of proof shall be upon the party attacking the same." On appeal, the function of this Court is to review the evidence on which the State Engineer based his decision to ascertain whether the evidence supports the decision, and if so, the Court is bound to sustain the State Engineer's decision. *State Engineer v. Curtis Park*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985).

Review of a decision of the State Engineer is in the nature of an appeal and is, consequently, limited in nature. NRS § 533.450(1) states, in pertinent part:

Any person feeling himself aggrieved by any order or decision of the State Engineer, acting in person or through

his assistants or the water commissioner, affecting his interests, when such order or decision relates to the administration of determined rights or is made pursuant to NRS §§ 533.270 to 533.445, inclusive, may have the same reviewed by a proceeding for that purpose, insofar as may be in the nature of an appeal. . . .

Purely legal questions may be reviewed without deference to an agency determination. However, the agency's conclusions of law that are closely related to its view of the facts are entitled to deference and will not be disturbed if they are supported by substantial evidence. *Town of Eureka v. State Engineer*, 108 Nev. 163, 826 P.2d 948 (1992). Likewise, an agency's view or interpretation of its statutory authority is persuasive, even if not controlling. *State Engineer v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205, quoting *State v. State Engineer*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988). Any review of the State Engineer's interpretation of his legal authority must be made with the thought that "[a]n agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action." *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743, 747, 918 P.2d 697, 700 (1996); citing *State v. State Engineer*, 104 Nev. at 713, 766 P.2d at 266 (1988).

V. ARGUMENT

A. The Court May Have Jurisdiction Over the Rotation Schedules

The implementation of the rotation schedules may be subject to appeal under NRS 533.450(1). However, the appeal must be limited to the actions of the State

Engineer in implementing his duty under the interim order of the Decree Court. NRS 533.220(1) (“ . . . the distribution of water by the State Engineer . . . shall, at all times, be under the supervision and control of the district court.”).

The April 5, 2012, Order in Sub-proceeding 08-CV-0363-D, is not properly before the Court at this time. The Court has already dismissed an appeal of the April 5, 2012 Order as premature. *Bentley v. State Engineer*, Case No. 60891. Appellants’ briefs substantially contain arguments solely related to the April 5, 2012 Order and must be rejected by the Court.

The Supplement to Appellants’ Opening Brief completely ignores the Order of this Court to address the issues actually before this Court: the Rotation Schedules. Instead, Bentley uses numerous rhetorical devices to avoid directly confronting the issue of whether the State Engineer properly executed his duty. Bentley again argues against the ruling in Sub-proceeding 08-CV-0363-D, and never once confronts the actual issues of this case. As such, the appeal should be dismissed.

Bentley cites NRS 533.230 for the surprising proposition that the State Engineer can only administer water rights in conformity with the Final Order of Determination (FOD) and must ignore the interim orders of the district court. Supplement at 14. NRS 533.230 is the authority for the State Engineer to administer the Decree prior to any proceedings in the district court. Once the

district court proceedings begin, NRS 533.220(1) specifically requires the State Engineer to administer the water rights in accordance with the orders of the Decree Court that may modify the FOD.

NRS 533.305 is likewise inapplicable to this proceeding. That statute concerns the actions of the State Engineer or water commissioners to enforce decrees by regulating headgates and other control facilities. The State Engineer in this case, was implementing the interim orders of the Decree Court by issuing a Rotation Schedule.

If the Court determines it has jurisdiction to hear this appeal, the issues that would be appropriate for review concern the State Engineer's determinations that led to the Rotation Schedule and the actual drafting of the schedule. Bentley's pleading does not make any good faith attempt to address the issues that may be properly before this Court.

B. The State Engineer Properly Imposed a Rotation Schedule Pursuant to the Order dated April 5, 2012

The Findings of Fact, Conclusions of Law and Order issued on April 5, 2012, directed the State Engineer to impose a Rotation Schedule based on the flow of the North Diversion of Sheridan Creek. JA I, 169–170. (“When the combined from the North Diversion of Sheridan Creek and tributaries drops below 2.0 cfs, the State Engineer shall impose a rotation schedule.”)

On March 30, 2012, Water Resource Specialist Steve Walmsley sent a letter outlining the Rotation Schedule for the 2012 irrigation season. JA I, 26. Although not explicitly stated in the letter, Mr. Walmsley measured the flow on January 12, 2012, and found that it was already below 2.0 cfs prior to the beginning of the irrigation season. JA IV, 679. As the State Engineer was in compliance with the Order of the district court and no factual showing is made that the State Engineer was in error, the decision to implement the Rotation Schedule must be affirmed. NRS 533.450(10).

Bentley, Smith and Barden assert that the State Engineer must make a separate finding each year that the implementation of a rotation schedule will “bring about a more economical use of the available water supply. . . .” Bentley at 17, quoting NRS 533.075. However, once the Decree Court has ordered a rotation schedule when flow is less than 2.0 cfs, the State Engineer must implement the Order. NRS 533.220(1). The district court found that the Rotation Schedule was necessary to prevent Bentley, Smith, and Barden from defeating the beneficial use of the other water rights to the North Diversion of Sheridan Creek. JA 169–170.

In *Andersen Family Associates v. Ricci*, 124 Nev. 182, 179 P.3d 1201 (2008), this Court considered the application of the statutory cancellation provisions in relation to “Ash Canyon Creek water rights [adjudicated] as part of an 1885 decree. . . .” *Id.* at 185, 179 P.3d at 1202. In footnote 1 to the opinion, the

court noted that the “State Engineer suggested that ‘only the decree court can [make] the decision as to whether a decreed right can lose its priority when this decreed right is changed under the provisions of NRS 533 and cancelled.’” *Id.* at 186, 179 P.3d at 1203. Likewise, in this case it would be inappropriate for the State Engineer to re-determine issues already determined by the Decree Court in this case. *See Dictor v. Creative Mgmt. Servs., LLC*, 126 Nev. Adv. Op. 4, 223 P.3d 332, 334 (2010) (“The law-of-the-case doctrine provides that when an appellate court decides a principle or rule of law, that decision governs the same issues in subsequent proceedings in that case.”).

C. The Decree Court Has Jurisdiction to Administer Water Rights Under The Decree

Bentley appears to make the absurd argument that the State Engineer improperly followed the order of the district court dated April 5, 2012. Bentley also argues that Smith and Barden were not parties to the hearing in sub-proceeding 08-CV-0363-D and are thus not bound by the ruling. Both of these assertions are patently incorrect as a matter of law.

The State Engineer acts as an officer of the court in distributing water under both the Final Order of Determination and a Decree. Nevada law clearly requires that “. . . the distribution of water by the State Engineer . . . shall, at all times, be under the supervision and control of the district court.” NRS 533.220(1). “The idea that the individual has a vested right to enjoy the use of running water without

public regulation or control is subversive of the sovereignty of the state.” *Bergman v. Kearney*, 241 F. 884, 893 (D. Nev. 1917); *see also, Vineyard Land & Stock Co. v. Dist. Court of Fourth Judicial Dist.*, 42 Nev. 1, 171 P. 166, 168 (1918). This Court found “it abundantly clear that the district court sitting as a court of equity had full and complete authority . . . to see that its decree was enforced . . . through the services of the state engineer's office.” *McCormick v. Sixth Judicial Dist. Court*, 69 Nev. 214, 226, 246 P.2d 805, 811 (1952). The State Engineer thus properly executed the order of the district court in imposing a rotation schedule.

Smith and Barden are parties to the decree proceedings as a result of having filed claims for water and are subject to the orders of the decree court. NRS 533.125(1). Even if they had not filed claims, the State Engineer, and the district court, would still have jurisdiction to determine their rights. NRS 533.125(2) (“Upon neglect or refusal of any person to make proof of his or her claim . . . the State Engineer shall determine the right of such person. . . .”) Water users cannot defeat the jurisdiction of the State Engineer or the district court by sitting on the sidelines. *Ormsby Cnty. v. Kearney*, 37 Nev. 314, 142 P. 803, 805-06 (1914) (“the state has a right to exercise a superintending control over the entire river system.”). All parties to the decree proceedings are bound by the district court’s decision whether they chose to make an appearance or not.

D. Transfer of Water Rights

Bentley makes a vague argument that the rotation schedule is a restraint on alienation. However, the restraint on alienation actually comes from the Nevada's Statutory Law.

The State Engineer must deny a change “where its proposed use or change conflicts with existing rights. . . .” NRS 533.370(2). The State Engineer defines a conflict as occurring when a senior, or equal priority, water user would not receive their water as a result of the change. Thus, if a change of one water right will result in another water user getting less than their share of the water, then the change must be denied. In this case, allowing Bentley to take continuous flow would result in water users lower on the system getting no water, and is a clear conflict. In addition, a transfer of water that harms other water users would likewise be in conflict.

Water rights generally have consumptive and non-consumptive components. Agricultural rights in Carson Valley were found to have a consumptive component of 2.4 acre-feet annually for low managed pasture grass. J. L. Huntington and R. G. Allen, *Evapotranspiration and Net Irrigation Water Requirements for Nevada*, Nevada Department of Water Resources, (2010), p 209.⁵

⁵ Full report found at http://water.nv.gov/mapping/et/Docs/Evapotranspiration_and_Net_Irrigation_Requirements_for_Nevada_Compiled.pdf

The State Engineer may consider the consumptive use of a water right and the consumptive use of a proposed beneficial use of water in determining whether a proposed change in the place of diversion, manner of use or place of use complies with the provisions of subsection 2 of NRS 533.370.

Thus, Nevada's water law will not allow a transfer of the non-consumptive component of a right to a higher consumptive use that will harm other users on the system. Any changes to the system must be made in a manner that does not harm other users. Bentley's arguments that the rotation schedule limits his ability to make changes to his water rights are incorrect and the limitations come from the complexity of administering usufructary water rights in Nevada in accordance with the statutory requirements.

VI. CONCLUSION

The State Engineer properly issued a rotation schedule based upon the April 5, 2012 order and the factual finding that the flow of the North Diversion of Sheridan Creek was below 2.0 cfs. Bentley is precluded from re-litigating the issues already decided on the need for a rotation schedule, and the administration of the waters of Gansberg Spring. As the briefs for Bentley, Smith, and Barden do

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not actually address the State Engineer's conduct in implementing the April 5, 2012 order, the appeals must be dismissed.

DATED this 9th day of July, 2014.

CATHERINE CORTEZ MASTO

Attorney General

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on July 9, 2014.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Sandra Geyer

Sandra Geyer, an employee of the
Office of the Attorney General

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Signature s/Bryan Stockton

Attorney for Respondent, State Engineer, Jason King

Date July 9, 2014