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IN THE SUPREME COURT OF NEVADA

In Re: Rotation Schedule

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

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.

Supreme Court Case No. 64773

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

APPELLANTS' REPLY BRIEF TO INTERVENORS' ANSWERING BRIEF

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In their Answering Brief, Intervenors made no attempt to address the issues raised in Bentley's Opening Brief, but rather, submitted their own version of the factual and procedural history, as well as new legal arguments. Through it all, Intervenors seem confused about the different systems of water law in the Western states, the difference between vested rights and permitted rights, and the difference in Nevada between statutory adjudications (such as the adjudication at issue) and equitable adjudications. Intervenors' erroneous and inflammatory assertions of fact are addressed first.

1. Rebuttal To Intervenors' Factual Statements

a. The District Court Did Not Make Any Findings About Waste

In their Statement of the Case, Intervenors argue that:

> The Court was concerned with waste of scarce water resources and the inefficient and inequitable use of this water. In view of the ample evidence, the District Court decreed that the State Engineer has full authority to implement a rotation schedule, if appropriate. (Answering Brief at p.4, ll.8-13).

Intervenors later claim that "[T]he Bentleys have seen fit to make this the march of one individual who owns a ranch with two ponds for aesthetic purposes and fish raising against the Intervenors, some of whom live and work and earn their income from ranching." (Answering Brief at p.23, ll.16-21). These passages contain numerous inaccurate, unsubstantiated, and prejudicial statements. They were not accepted as findings in either Case No. 08-CV-0363-D or 08-CV-0363-D-1, and Intervenors cited no support for these statements in the record, despite the

representation in the Attorney's Certificate.

The Nevada Revised Statutes do not assign a hierarchy of beneficial uses. All beneficial uses enjoy the same treatment under the law. NRS 533.035. In other words, irrigating pasture does not create a stronger right than fish propagation or recreation.

Intervenors represent only six (6) of eleven (11) users. As summarized on ***Appendix A*** submitted with Bentley's Opening Brief, Intervenors' parcels are small parcels. They are not large enough to generate income to earn a living. Most of the Intervenors are retired, anyway, and some of the parcels have never been improved with houses.

The only analysis of waste and inefficiency was provided in the Stanka Report, which explains why the rotation is inefficient. Whereas a rotation system might be efficient for users irrigating from a single ditch, the distribution system in this case divides three (3) different directions. The rotation schedule allows the main ditch to dry out.[1] The rotation system is also incompatible with stockwater rights, which require a constant flow. Intervenors irrigate through an inefficient segmented pipe. Essentially, the pipe dumps into an unlined lateral, contour ditch, and then picks up again on the other side of the ditch after it is full to continue on to the next ditch. Ultimately, neither the District Court nor the State Engineer made

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[1] The inefficiencies produced by the rotation schedule are discussed throughout the Stanka Report and summarized at App. Vol. 3, p.571.

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any findings about inefficiencies.

The State Engineer is clear in his Answering Brief that he values the rotation schedule not because it is efficient, but because it is an easy way to divide the water. Bentley explained at length in his Opening Brief and again in the Reply to the State Engineer's Answering Brief that a compulsory rotation schedule is an abdication of the State Engineer's duty to divide the water, including the Gansberg Springs water to which Sheridan Creek Equestrian Center and the Mitchells have no right.

b. <u>The District Court Did Not Make Any Findings That Bentley Deprived Intervenors of Water</u>

Intervenors argue that:

> Because of the geographic location of the Appellants' property being at the headwaters whether waters of Sheridan Creek and Stutler Creek flow onto Appellant's property, the Appellants are able to divert the entire flow of water during times of scarcity, shortage and drought, thereby depriving the Respondents <u>of any water at all</u> during such periods of low flow. (Answering Brief at p.8, ll.19-26) [emphasis in original]

Intervenors failed to cite any findings which support this assertion and these statements should be disregarded. This argument is akin to the argument raised by the State Engineer for the first time in his Answering Brief about over-appropriation. This new argument lacks any support in the record and was inserted for its potential prejudicial effect, only. Intervenors demonstrate a lack of understanding of the effects of the rotation schedule they requested. Under the current rotation schedule, Bentley is deprived <u>of any and all water at all</u> except for 1.6 days out of a twenty-one (21) day rotation cycle, in contravention of his vested rights (See ***Appendix A*** to

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Bentley's Opening Brief). More importantly, Intervenors failed to rebut the argument raised in Bentley's Opening Brief that a mandatory rotation schedule is not a remedy for alleged over-appropriation.

2. Rebuttal To Intervenors' Procedural History

a. The State Engineer Was Required to Comply With NRS 533.075

Intervenors concede the jurisdiction of this Court to hear this appeal when they admit that Bentley's right to petition for judicial review under NRS 533.450 includes "decisions of the State Engineer administering water rights during the pendency of the often long, drawn-out adjudication proceedings . . ." (Answering Brief at p.12, ll.4-6). Intervenors try to avoid the consequence of this admission by characterizing the petitions for judicial review as appeals of Judge Gamble's arpil 5, 2012 Finding of Fact, Conclusions of Law and Judgment ("Interlocutory Order"). This is not accurate. The petitions for judicial review challenge the State Engineer's administration of the water rights under the Final Order of Determination ("FOD") and NRS 533.230. Even the State Engineer concedes that a petition for judicial review is appropriate to challenge the actions of the State Engineer in administering the FOD.

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

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The FOD does not impose a rotation schedule for Sheridan Creek. Rather, the FOD incorporates the consent based provisions of NRS 533.075.

> **3. Rotation and Use of Water**
>
> Claimants of vested water rights and those owners of water rights acquired through the appropriative process from a common supply **may** rotate the use of water to which they are collectively entitled based on an agreement, so as to not injure nonparticipants or infringe upon their water rights, which is subject to approval by the State Engineer. The purpose is to enable irrigators to exercise their water rights more efficiently, and this to bring about a more economical use of available water supplies in accordance with their dates of priority. NRS §533.075. (FOD, App. Vol. 2 at 189) [emphasis added]

This passage from the FOD contemplates that there may be participants and nonparticipants in the rotation schedule from the same stream system. This is consistent with Appellants' position. Intervenors are free to rotate their water, but they cannot compel Bentley, Smith, and Barden to submit to a compulsory rotation. This same passage emphasizes that a rotation schedule is for irrigation purposes. The rotation schedule is incompatible with Appellants' stock and wildlife rights or other uses of the water, which require a constant flow.

The Interlocutory Order did not give the State Engineer unbridled authority to impose a rotation schedule. Rather, the State Engineer's authority was qualified by NRS 533.075.

> [T]he provisions of NRS 533.075 and the order of this Court would be used to determine when and if a rotation schedule is needed to efficiently use the waters of the State of Nevada. However, Bentley reserves all objections to the imposition of a rotation schedule, including objection about the statutory authority to do so. (See Interlocutory Order, App. Vol. 1 at 158).

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Neither the State Engineer nor the District Court made any findings that the rotation schedule promoted economical use of the water. NRS 533.075 is the only authority for a rotation schedule cited in the FOD and the Interlocutory Order.

After the decree is entered, the State Engineer must divide the water in accordance with the FOD and decree. NRS 533.220. The decree will not contain a rotation schedule. That is why the Interlocutory Order reserved Bentley's right to petition for judicial review.

All of the respondents now concede that NRS 533.075 is a consent-based statute. Nevertheless, NRS 533.075 was the only authority cited by the Respondents in Case No. 08-CV-0363-D and the only authority cited in the proposed order that was submitted by the Intervenors and adopted without revisions by Judge Gamble. The invited error doctrine precludes Intervenors from arguing that the reliance on NRS 533.075 was an error and that pre-statutory "common law" or some other source of law applies.

> The doctrine of "invited error" embodies the principle that a party will not be heard to complain on appeal of errors which he himself induced or provoked the court or the opposite party to commit.
>
> . . . .
>
> Since Young, on behalf of his client, filed the form requesting submission of the matter to the court for decision, Lawrence may not be heard to complain of the decision which resulted from her own attorney's request. (*Pearson v. Pearson*, 110 Nev. 293, 871 P.2d 343, 345-346 (Nev., 1994))

b. <u>The Trial Concerned the Diversion Agreement, Not the Rotation Schedule</u>

Intervenors misrepresent Bentley's Exceptions and Amended Exceptions to

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the FOD when they claim that Bentley asked to be "exempt from the rotation . . ." (Answering Brief at p.9, l.8). There was no rotation when Bentley filed the exceptions. Bentley's exceptions clearly express concern about the potential of a forthcoming rotation schedule.

EXCEPTION NO. 1 – DIVERSION SCHEDULE (PROOFS V-06307 andV-06308)

> Bentley is informed and believes that the Office of the State Engineer has created a diversion schedule for the waters from Sheridan Creek, Stutler Creek and Gansberg Springs that is not contained in the *Final Order of Determination.* The diversion schedule would presumably affect the Proofs and acreages identified in Tables 5 and 6 at pages 192 and 193. In fact, Bentley's diversion rights under Proofs V-06307 and V-06308 for Appropriation of Water for Stock or Wildlife Purposes should not be subject to a diversion schedule. Rather, Bentley's diversion rights are set forth in a series of diversion agreements between Bentley's predecessor(s)-in-interest and the predecessor(s)-in-interest to the owners of the other properties identified in Tables 5 and 6. Those diversion agreements are specifically identified in Proofs V-06307 and V-06308. The most recent and presumably final diversion agreement is also provided herewith as ***Exhibit 3***.
>
> Accordingly, Tables 5 and 6, and Part VIII "Proofs Determined to Be Valid" should be amended to note that all diversion rights from Stutler Creek and the North Branch of Sheridan Creek are subject to this diversion agreement and the Bentley property should be exempt from the diversion schedule 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.
>
> (See Exceptions, App. Vol. 3 at 426-27, and Amended Exceptions, App. Vol. 3 at 445-46)

Intervenors next explain that "On March 27, 2009, Intervenors filed their Reply to Exceptions setting forth the facts and law why the Water Diversion and

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Use Agreement ("Diversion Agreement") was unenforceable." (Answering Brief at p.6, ll.10-13). The reason for Intervenors' reference to this document is not clear, as it was considered a non-conforming pleading, stricken from the record, never mentioned in regard to the Petitions for Judicial Review, and not part of the appendix on this appeal.

Intervenors next refer to the affirmative defenses contained in their Response and Objections to the Notice of Exceptions and Exceptions to Final Order of Determination (Answering Brief at p.6, ll.14-18). Intervenors' Response/ Affirmative Defenses is part of the record on this appeal. (App. Vol. 5 at 880-83). The Response/Affirmative Defenses was also a non-conforming pleading which should have been stricken.[2] Regardless, that document does not mention a rotation schedule. This is important because Judge Gamble confirmed at the outset of trial in Case No. 08-CV-0363-D that the trial would proceed on Intervenors' Response/Affirmative Defenses, not Bentley's exceptions to the potential rotation

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[2] Hon. David R. Gamble refused to dismiss the affirmative defenses even though they were not part of an answer, did not constitute a pleading under NRCP 7, and are prohibited in a statutory adjudication case wherein the Order of Final Determination filed by the State Engineer is considered the complaint and any exceptions filed thereto are considered the answer(s). NRS 533.170. "There shall be no other pleadings in the cause." NRS 533.170(2). Bentley petitioned this Court for a writ of prohibition and/or mandamus and cited *Smith v. District Court*, 113 Nev. 1343, 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).

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schedule. "THE COURT: We're proceeding on the Intervenors' claim and defenses, if I can say it that way." (See Transcript, January 9, 2012, App. Vol. 1 at 137:7-8). The parties had already stipulated, and the district court had already ordered, that the rotation schedule would not be part of the decree and that Bentley reserved the right to petition for judicial review if and when the State Engineer imposed the rotation schedule.

3. Rebuttal To Intervenors' Argument

a. A Mandatory Rotation Schedule is Not a Remedy for Alleged Over-Appropriation

Intervenors' inchoate, unsubstantiated theory of over-appropriation is illuminating, even though it is beyond the record in this case. Intervenors seem to think that a compulsory rotation schedule is a remedy for alleged over-appropriation. It is not. Rather, the FOD and the Interlocutory Order incorporate NRS 533.075 and permit rotation. A rotation schedule is mentioned in the FOD for some stream systems, but not for Sheridan Creek. As such, the State Engineer is violating the FOD and exceeding his statutory authority by forcing rotation.

NRS 533.305 and earlier cases from this Court describe the power of the State Engineer to distribute the decreed water. These powers include shutting or fastening head gates and ditches, regulating release from reservoirs, and installing other mechanical devices such as diversion boxes and meters. These same methods can be employed to stop the over-appropriation of water and the parties and the State Engineer also have access to the court for contempt of injunction proceedings. The

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imposition of a compulsory rotation schedule is not one of the State Engineer's enumerated powers, nor has that remedy ever been approved by this Court.

Bentley expects the State Engineer to impose mechanical diversion devices and even requested the installation of a divider between the North and South Branch of Sheridan Creek in its Amended Notice of Exceptions (App. Vol. 3 at 447). The parties stipulated, and Judge Gamble ordered, the same (See Interlocutory Order, App. Vol. 1 at 159-160).

The Intervenors are more honest later in their Answering Brief about why they think a rotation schedule is justified. They no longer assert that a mandatory rotation schedule is authorized by the Nevada Revised Statutes. Rather, they candidly assert that they should be allowed to use Bentley's rights on a rotation basis because their own rights are insufficient to allow effective irrigation during the dry season. Bentley is not responsible for the drought or for Intervenors' inadequate water rights. Intervenors should do what Bentley does and pay to lease additional water. They should not expect this Court to allow them to use Bentley's water for free, especially when doing so is illegal and impairs Bentley's vested rights.

b. <u>Bentley's Pre-Statutory Vested Water Rights Cannot be Modified by Court-Ordered Rotation</u>

Intervenors assigned the following heading to their second argument: "2. The Pre-statutory Vested Water Rights Held By the Parties Can Be Modified By Court-Ordered Rotation." (Answering Brief at p.12, ll.16-17). Despite the heading of their second argument, Intervenors failed to address the central issue of

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impairment and explain how pre-statutory vested rights can lawfully be modified in light of the non-impairment statute, NRS 533.085.

The Weber/Bentley proofs of claims V-06305, V-06306, V-06307, and V-06308 were accepted and incorporated into the FOD without any conditions or restrictions. The rotation schedule imposed new conditions which prohibited Bentley from drawing his allocation of water, except on the dates and times allowed. The rotation schedule also serves as an unrecorded, restrictive covenant. Bentley has the right to file applications to change the place and manner of use of the water rights and to otherwise sell and transfer the water rights. Such transfers are allowed (if not encouraged) by NRS Chapter 533.[3] In the future, use of Sheridan Creek water could conceivably be changed to recreation, municipal, mining, or even power generation.[4] Such changes do not impair the rights or change the priority. *Andersen Family Associates v. Ricci*, 124 Nev. 182, 188, 179 P.3d 1201 (2008). Intervenors' attempt to use a rotation schedule to forever restrict the manner of use to the initial appropriation in 1862 is unreasonable, illogical, and simply wrong.

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[3] Such transfers are almost certain and are not merely hypotheticals. Bentley is in the process of acquiring additional rights from the South Branch of Sheridan Creek and could just as easily sell and transfer rights to claimants from the South Branch of Sheridan Creek. Any such transfers must be free from mandatory rotation.

[4] Sheridan Creek powered a small mill in the past and could still be equipped with new generators to generate power for the claimants and to pay for improvements to the distribution system. (See Stanka Report, App. Vol. 3 at 568).

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Intervenors represent six (6) of eleven (11) water users who simply think it is easier for them to irrigate when they are allowed to use the water belonging to the other five (5) users. In contrast, Bentley is defending his right to draw his allocated, adjudicated, proportionate share of water at will, regardless of how ample or meager that share might be. Bentley's vested water rights are not subject to conditions or limitations and must not be conscripted for the perceived or actual benefit of the Intervenors.

c. Intervenors Have Confused Common Law, Equitable Adjudications, with this Statutory Adjudication

The invited error doctrine prevents Intervenors from abandoning their reliance on NRS 533.015 in favor of "the common law." Moreover, there is no conflict between "the common law" and Bentley's statutorily decreed water rights. The Intervenors' argument is based on cases from other jurisdictions and treatises that do not address Nevada's statutory adjudication procedures. To the limited extent Intervenors cite any Nevada cases on the issue of rotation, those cases predate the adoption of Nevada's water law in 1913. Intervenors' failure to cite any relevant, post-1913 case law mandating a rotation schedule must be seen as an admission that there is none.

To the extent Intervenors' cases may authorize rotation in the use of water, they do so in lieu of a statutory adjudication which decrees the extent of the right. Although Intervenors may argue that the District Court conducting the statutory adjudication has broad "equitable" powers, such is not the case. The purpose and

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scope of the water rights adjudication is to determine the relative rights to the various stream and creek systems, not to enforce or quiet title to a private diversion agreement or enforce a rotation schedule. The Nevada Revised Statutes and prevailing case law draw a sharp distinction between statutory adjudications of vested rights under the 1913 water law as amended, such as the instant case, and adjudication "in an equity suit." See *McCormick v. Sixth Judicial District Court In and For Humboldt County*, 69 Nev. 214, 244 P.2d 805 (1952) (citing *Pacific Live Stock Co. v. Ellison Ranching Co.*, 52 Nev. 279, 286 P. 120 (1930)).[5] This point is reinforced throughout NRS Chapter 533. See NRS 533.090(1); NRS 533.090(2); NRS 533.100(1); NRS 533.140(1); NRS 533.160; NRS 533.265(1).

Mimbres Valley Irrigation Co. v. Salopek, 140 P.3d 1117, 140 N.M. 168 (2006) is the only case cited by the Intervenors that is factually or procedurally similar to this case. That case concerned a statutory adjudication of the Mimbres River system in New Mexico. The state engineer commenced the adjudication and filed the decree with the court. The San Lorenzo Community Ditch Association ("San Lorenzo") asserted a priority over upstream users of 6.7 c.f.s. San Lorenzo claimed a prior right and filed a petition for a preliminary and permanent injunction to prevent the upstream diversions if the flows in the Mimbres River were

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[5] *McCormick* arose in the context of the equitable decree for the Quinn River 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.

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insufficient to satisfy its allocated right.

Intervenors quoted a passage from the *Mimbres* opinion which explains that the district court referred the matter to the State Engineer to convene a meeting of the users to apportion the water and to "specify a rotation period," if necessary. (Answering Brief at p.22, l.25 – p.23, l.6, quoting *Mimbres* at 1119, 169). Intervenors failed to explain what happened next. San Lorenzo filed a petition for writ of mandamus when the state engineer imposed the rotation schedule. The district court entered the writ in the alternative and allowed the state engineer to answer. The district court subsequently quashed the writ on the basis that the state engineer's answer set forth disputed issues of fact. San Lorenzo appealed that order. The court of appeals confirmed that the disputed issues of fact required a trial and prevented the entry of mandamus. Also, because the case remained for trial, the order quashing the writ was not a final, appealable order. Nothing in the *Mimbres* decision supported the mandatory rotation schedule. San Lorenzo would be entitled to writ relief depending on the facts proven at trial.

In the instant case, the facts are not in dispute. All of the water rights have been adjudicated. The State Engineer is required to distribute the waters of Sheridan Creek according to the FOD. The order regarding the rotation schedule is not part of the decree, nor did the Interlocutory Order authorize the State Engineer to violate the Nevada Revised Statutes, or the FOD, or impair Bentley's vested rights.

None of the Intervenors' other cases concerned a statutory decree. For

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example, in *Anderson v. Bassman*, 140 F. 14 (N.D. Cal. 1905), the federal district court divided the lands irrigated from the Carson River into two (2) general groups – the upper lands and the lower lands. Each group was to receive the water from the West Fork Carson River five (5) days out of a ten (10) day period. The federal district court did so instead of adjudicating the acreage and duty of each of the affected landowners. In contrast, the very purpose of the adjudication in the underlying Case No. 08-CV-0363 is to determine the relative rights of every water rights holder and adjudicate the priorities and duty.

Intervenors begin their discussion of *Crawford v. Lehi Irrigation Company*, 350 P.2d 147, 168-69 (Utah 1960) (Answering Brief at p.17, ll.8-9), by acknowledging that the water rights at issue were permitted rights, not vested rights. Post-1913 permitted rights are by their very nature subject to conditions stated in the permit. That case is irrelevant to this case, which involves vested rights.

Intervenors' statement that *Barnes v. Sabron*, 10 Nev. 217, 243-47 (1873) "approved the common law doctrine of rotation for vested water rights" (Answering Brief at p.13, ll.8-9) is only loosely accurate. *Barnes v. Sabron*, *Hufford v. Dye*, 121 P. 400, 406, 162 Cal. 147, 160-161 (Cal. 1912), and *McCoy v. Huntley*, 119 P. 481, 60 Or. 372 (Or. 1911) all concerned only two (2) users, where the lower user held the prior rights. Because the water was used on a periodic basis for irrigation purposes only, the courts in those cases did not attempt to adjudicate the water rights, but simply directed the upstream user to turn down a sufficient quantity of

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water on a periodic basis to allow the other user to irrigate as usual.

None of the cases cited by Intervenors involved a permitted spring such as Gansberg Spring, where only some of the parties have rights. There is nothing in *Barnes v. Sabron* or Intervenors' other cases that would preclude the simultaneous use of the water in this case based on the adjudicated approved acreage and duty in the FOD or mandate the imposition of a rotation schedule. Also, *Barnes v. Sabron* did not involve stock water rights and cannot be used as authority for imposing a rotation schedule to the impairment of such rights.

The Oregon court in *McCoy v. Huntley*, 119 P. 481, 60 Or. 372 (Or. 1911) noted the "paucity of authority on the subject of requiring rotation." (Answering Brief at p.19, ll.16-17) (quoting *McCoy v. Huntley* at 482). Intervenors have proven that observation to be true. The reason is that these cases predate statutory water laws and the adjudication procedures embodied therein. A forced rotation is unnecessary and incompatible with the statutory decree and the FOD in this case, as well as Bentley's right to apply to change the place and manner of use of his rights.

d. <u>The Decision of the State Engineer is Not Supported by Substantial Evidence</u>

Intervenors failed to address the various shortcomings with the rotation system and failure of the State Engineer to make any findings. Instead, the Intervenors argue that there was substantial evidence presented at the trial in Case No. 08-CV-0363-D. This argument fails for a number of reasons.

First, Intervenors' testimony from Case No. 08-CV-0363-D is irrelevant to

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the question of the sufficiency of the State Engineer's record to support the rotation schedule. The State Engineer was ordered to follow NRS 533.075 and he failed to do so. Intervenors' testimony was not adopted in the findings by either the District Court or the State Engineer and there is no indication that it was relied on for any purpose.

Second, the trial in Case No. 08-CV-0363-D concerned Intervenors' Response/Affirmative Defenses (App. Vol. 5 at 880-883), which sought to quiet title to the Diversion Agreement. It did not concern a rotation schedule. Intervenors' comments were completely self-serving, gratuitous, and extraneous to the issues presented at trial. Judge Gamble recognized such and did not even reference Intervenors' testimony in the Interlocutory Order. Intervenors' testimony was not adopted by the District Court or the State Engineer and has no preclusive effect on these Petitions for Judicial Review. See *Frei v. Goodsell*, 129 Nev.Adv.Op. 43 at p.5 (2013) (citing *Kahn v. Morse & Mowbray,* 121 Nev. 464, 474, 117 P.3d 227, 234-35 (2005) (noting that "a litigant must show that an issue of fact or law was necessarily and actually litigated in a prior proceeding").

Third, Bentley is not surprised that Intervenors testified that they experienced an increased flow when the rotation system was implemented. The six (6) Intervenors enjoyed the benefit of the water rights from all eleven (11) claimants, including the vested rights of Bentley, Smith, and Barden who petitioned for judicial review, Pestana, whose rights are leased by Bentley, and Sapp, who has not

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supported the Intervenors in their water grab. To the extent Intervenors' testimony is reliable for any purpose, it only demonstrates that their flows increased when they were able to commandeer the entire flow of Sheridan Creek. It is difficult to understand how Intervenors think that is an endorsement for the rotation system.

Fourth, Intervenors' Answering Brief portrayed the testimony in a very misleading fashion. The repeated statements that "we've had an informal rotation agreement with the surrounding neighbors . . ." (Answering Brief at p.25, ll.6-7) (quoting Scharo testimony), does not refer to an agreement with Bentley, Smith, Barden, or their predecessors. That simply means that six (6) Intervenors had an informal agreement amongst themselves to rotate in the use of their water. Bentley has no complaint about that. The FOD even contemplates that there may be participants and nonparticipants in a rotation schedule from the same stream system.

3. Rotation and Use of Water

> Claimants of vested water rights and those owners of water rights acquired through the appropriative process from a common supply **may** rotate the use of water to which they are collectively entitled based on an agreement, so as to not injure nonparticipants or infringe upon their water rights, which is subject to approval by the State Engineer. The purpose is to enable irrigators to exercise their water rights more efficiently, and this to bring about a more economical use of available water supplies in accordance with their dates of priority. NRS §533.075. (FOD, App. Vol. 2 at 189) [emphasis added]

Intervenors are free to rotate the use of their water, but there is no equitable or legal basis for the State Engineer to impose their preference on the other five (5) claimants.

At some point, Intervenors decided that their water was not sufficient to

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irrigate during a drought and decided that they needed the Bentley, Smith, Barden, Pestana, and Sapp water, as well. As explained in the Opening Brief and again herein, Bentley filed the Exceptions and Amended Notice of Exception to the FOD out of concern that the Intervenors were going to try to have the State Engineer impose a rotation schedule on the entire stream system. Bentley's fears have proven to be true.

4. Gansberg Springs

Bentley explained in his Opening Brief that some of the Intervenors, including Ronald and Ginger Mitchell and Sheridan Creek Equestrian Center, have no rights to Gansberg Spring, Permit 7595 (See Opening Brief at pp.7, 22-24). The State Engineer conceded this fact in his Answering Brief (See Answering Brief at p.6). Intervenors failed to address this issue at all. Nevertheless, Gansberg Spring water is not distributed according to the permit, but rather, is commingled with the water used in rotation, thereby allowing and encouraging Sheridan Creek Equestrian Center and the Mitchells to unlawfully use the water.

5. Conclusion

Nothing in the Nevada Revised Statutes or any other rule of law authorized the State Engineer to subject Bentley's vested rights to a mandatory rotation schedule for the perceived benefit of the "common good." Bentley's vested rights are his alone and may not be appropriated or commandeered for the "common good" under NRS 533.075 or any other statute, especially when doing so alters the

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historical flow and use of the water.

The authority of the State Engineer and the District Court administering a water rights adjudication proceeding are defined by the Nevada Revised Statutes. The only mention of a rotation schedule in the Nevada Revised Statutes is found in NRS 533.075. That section clarifies that water users may agree to rotate the use of water if doing so would bring about a more economical use of the water. Neither the District Court nor the State Engineer made any findings that the mandatory rotation schedule is the best or only way to achieve "the common good" or bring about a more economical use of the water.

As a matter of fact, there is no evidence, let alone substantial evidence, that the rotation schedule produced a more economical use of the water. In the case of the Mitchells and Sheridan Creek Equestrian Center, the rotation schedule leads to illegal use of water of Gansberg Spring by persons without any right to that water.

Bentley should be allowed to draw his pro-rata share of water from the North Branch of Sheridan Creek, however abundant or meager that share may be, without the restriction of a rotation schedule. Bentley must be allowed to draw his stockwater rights on a continual basis.

Dated this 18th day of August 2014.

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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:

[X] 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:

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[X] Does not exceed 20 pages, per Order dated 08/15/14.

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.

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CERTIFICATE OF SERVICE

I certify that on the 18th day of August 2014, I served a copy of this **APPELLANTS' REPLY BRIEF TO INTERVENORS' ANSWERING 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):

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