

IN THE SUPREME COURT OF THE STATE OF NEVADA

In Re: Rotation Schedule

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

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Supreme Court Case No: 64773

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

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

Appellants,

vs.

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

Respondents.

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

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NRAP 26.1 DISCLOSURE STATEMENT

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

Dated this 18th day of August, 2014

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SUMMATION

This Court has jurisdiction over the challenge to the State Engineer's administration of the FOD and the district court's previously entered interlocutory Adjudication Order. Smith & Barden's position is that the State Engineer was bound to administer the directives of the Adjudication Order within the confines of Nevada water law, which does not allow for compulsory rotation. When the State Engineer included Smith & Barden, non-consenting water users, in the scope of his rotation schedule, he acted arbitrarily and capriciously and contrary to Nevada's rotation statute.

The Respondents agree that the State Engineer's determinations leading to and his drafting of the rotation schedules are properly before this Court. They maintain that his rotation schedules correctly implemented the district court's order, thus, the appeal must be dismissed.

Intervenors opine that from a policy-perspective, rotation is an efficient way to irrigate. However, they concede that the only Nevada statute to address rotation is consent-based. They argue that the statute cannot be applied here because it will impair their vested water rights. They further argue that because their water rights are vested, that the common law at the time Nevada's water scheme was enacted, which purportedly supports forced rotation, governs.

Smith & Barden further assert that even if Nevada law allows for compulsory rotation, this Court should find that the State Engineer must make findings based on substantial evidence that the rotation ordered achieves a more economical and efficient use of the waters for *all* water users and does not impair *any* water right of equal or earlier priority, neither of which occurred here. The State Engineer disagrees that he should have to make such findings in the wake of the district court's Adjudication Order. Intervenors simply insist that substantial evidence supports the State Engineer's rotation schedule by relying

on snippets of testimony from a few of the water users during the trial leading to the issuance of the Adjudication Order.

ARGUMENT

I. Rotation of Water Rights in Nevada Must be Consensual.

Neither the State Engineer nor the Intervenor contest that the only statutory provision in Nevada's water law scheme which addresses rotation in the use of water is NRS 533.075. Neither do they contest that this statute only allows for rotation for irrigation purposes upon the agreement of the water users of a common source. What Intervenor argues is that because the water rights in question are vested water rights, the "consent" provisions of NRS 533.075 do not control, hence, this Court should look to the common law in existence prior to the adoption of the statutory water rights scheme in 1913. Inter. Ans. Br. at 12-17.

A. NRS 533.075 Does Not Impair Vested Water Rights.

When the Nevada Legislature enacted the water law scheme in 1913 it intended to "place the distribution of the waters of the streams or stream systems of the state to the person entitled thereto, under state control." *Ormsby County v. Kearney*, 37 Nev. 314, 336, 142 P. 803, 805 (1914). But in doing so, it ensured that vested rights would be protected from *impairment* as memorialized in NRS 533.085:

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

This protection was built into the water act by the Legislature as a due process measure to ensure that water rights established prior to its enactment would not be impaired, "that is, they shall not be diminished in quantity or value." *Ormsby County*, 37 Nev. at 352, 142 P. at 810. But the Legislature never intended to exempt vested rights from the purview of the statutory scheme.

1 The whole scope and purpose of the act show that it was intended
2 to apply to all water rights, whether acquired before or after its
3 adoption. There would be little or no use in attempting state control
over a stream or stream system unless all water rights were brought
under that control.

4 *Id.*; see also *Humboldt Land & Cattle Co. v. Allen*, 14 F.2d 650 (Nev. 1926) (“If
5 the Water Law can apply only to rights initiated after its enactment, then as to the
6 Humboldt River, and probably as to every other considerable stream in the state,
7 it is utterly useless.”).

8 Thus, the question in this case becomes whether NRS 533.075¹ is a statute
9 that impairs vested water rights:

10 To bring about a more economical use of the available water supply,
11 it shall be lawful for water users owning lands to which water is
12 appurtenant to rotate in the use of the supply to which they may be
13 collectively entitled; or a single water user, having lands to which
14 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 priority, to the end that each user may have an
irrigation head of at least 2 cubic feet per second.

15 NRS 533.075. This statute was enacted as part of the 1913 comprehensive water
16 law scheme. It embodies the policy in existence at that time of encouraging the
17 common practice of agreed-upon rotation as an efficient use of a single source of
18 water by its different irrigation users.²

19
20 ¹ It should be noted that only Intervenor advance the argument that NRS
21 533.075 cannot apply to their vested water rights. Both the district court in its
22 Adjudication Order and the State Engineer in his FOD reference this consent-
23 based statute as the basis for a rotation schedule. Additionally, the State Engineer
24 conceded in the proceedings below that rotation in the Carson Valley is done only
25 upon consent of the water users when he stated that there are rotation schedules
on other stream systems in the Carson Valley, but those were arrived at “without
intervention by the State Engineer.” IV JA 674.

26 ² The policy considerations articulated in the out-of-state cases and arcane
27 treatises are cited by Intervenor in support of their argument that rotation in
28 irrigations practices is a good thing. Inter. Ans. Br. at 12-17. That may be the
case under certain circumstances, but regardless, in Nevada, the practice of

1 The statute is an affirmative grant of authority to water users. Nothing in
2 NRS 533.075 can be construed as a diminishment in “quantity or value” of vested
3 water rights. *Cf. Anderson Family Associates v. Ricci*, 124 Nev. 182, 179 P.3d
4 1201 (2008) (holding that neither the vested right itself, nor its *priority*, could be
5 *lost* through the cancellation of a later, statutorily issued permit, which had
6 changed the place and manner of use of the vested right); *In re Manse Spring*, 60
7 Nev. 280, 108 P.2d 311 (statute providing that water rights are *forfeited* after
8 period of non-use inapplicable to vested water rights as forfeiture would “*impair*”
9 the vested rights).

10 As opposed to the forfeiture of the right to use water or the loss of a water
11 right’s priority date, requiring that rotation of any water rights, including vested
12 rights, be based upon consent does not impair those vested water rights. Those
13 water right users still receive their water, subject to a potential pro rata reduction
14 in times of shortage, along with all the other users of the water source. There is
15 also nothing preventing them from taking advantage of the flexibility that NRS
16 533.075 provides to use their water outside the terms of the FOD or final decree
17 in agreement with other users, even if not all users. In such a case, the non-
18 participating users cannot over-appropriate the resource to the rotating users’
19 detriment in times of shortage. The State Engineer can safeguard against any
20 such worry with the threat of curtailment orders or by otherwise regulating the
21 quantity of water taken by non-participating users to ensure that they receive no
22 more than their pro rata share in times of shortage. *See* NRS 533.305.

23 ///

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27 _____
28 rotation is only statutorily sanctioned if bounded by consent parameters.

1 B. Common Law Does Not Contemplate Using Forced Rotation in the
2 Administration of Water Rights.

3 Given that NRS 533.075 does not impair vested water rights, whatever the
4 common law was in regards to rotation in 1913 is irrelevant. But if this Court is
5 curious, there is no definitive common law authority in Nevada allowing for
6 forced rotation in the *administration* of water rights.

7 Intervenors mistakenly rely upon *Barnes v. Sabron*, 10 Nev. 217 (1875),
8 for the proposition that the common law in Nevada prior to 1913 mandated
9 rotation. That case dealt with adjudication of the relative rights of two users
10 arguing over the waters of a creek. *Id.* at 227-30. In *Barnes*, the Court confirmed
11 that the senior appropriator had made his use of water only during certain periods
12 of time in the irrigation season, and thus, had the established right to use the
13 water at those times. In confirming his water right, the Court reached the greater
14 question of whether the senior appropriator could require the upstream junior user
15 to continue to turn the water downstream to him during the times he did not need
16 it, precluding use by the junior appropriator. *Id.* at 240-43. The Court held that
17 a user of water is only entitled to an amount of water which can actually be put
18 to beneficial use, one of the foundational precepts of Nevada water.³ *Id.* at 244-
19 45 (cited in *Bacher v. State Engineer*, 122 Nev. 1110, 1116 n.8, 146 P.3d 793,
20 795 n.8 (2006)). Therefore, the Court held that the junior appropriator could
21 obtain a right to use the water in the times that the senior appropriator could not
22 put it to use, *i.e.*, in rotation with the senior appropriator. *Id.*

23 While the pre-statutory *Barnes* contemplates that water can be divided on
24 the basis of time, not quantity, the water at issue in this case was not divided in
25 such a manner. The FOD here properly makes a division of water in terms of

26 ³ Ultimately, the 1913 Nevada Legislature codified the common law
27 principle articulated in *Barnes* in NRS 533.035, which states that “[b]eneficial use
28 shall be the basis, the measure and the limit of the right to the use of water.”

1 quantity with an assigned rate and duty, not on the basis of the timing of the use.
2 II JA 388; NRS 533.070. Here the question is whether the State Engineer may
3 administer rights by mandated rotation that contradicts the division by quantity
4 in the FOD and required by law. This is not an issue reached in Barnes, and in
5 short, the Court in that case did not adopt a compulsory rule of rotation in the
6 administration of water rights that trumps the consent-based parameters of NRS
7 533.075.⁴

8 **II. The State Engineer Did Not Properly Implement the District Court’s**
9 **Adjudication Order.**

10 The State Engineer is charged to *administer* the rights of the water law
11 claimants in accordance with the FOD and under the adjudicating district court’s
12 “supervision and control.” NRS 533.220(1); NRS 533.230. Here, the issue of the
13 ability to force rotation upon non-consenting water users of the same water
14 source was not litigated as part of the North Sheridan Creek adjudication
15 proceeding. All the Adjudication Order provides is that when the flow of North
16 Sheridan Creek drops below 2.0 cubic feet per second (cfs), “the State Engineer
17 shall impose a rotation schedule . . . [and] shall monitor the system and *make*
18 *changes as required by law* or by the request of the parties.” I JA 169-170
19 (emphasis added).

20 ///

21
22 ⁴ If this Court is convinced that threads of the common law regarding
23 rotation existed in Nevada prior to the enactment of NRS 533.075, NRS 533.075
24 cut those threads short. The “common law is the rule of decision in our courts
25 *unless* in conflict with constitutional or *statutory* commands.” *Hamm v. Carson*
26 *City Nugget*, 85 Nev. 99, 100, 450 P.2d 358 (1969) (emphasis added); NRS
27 1.030. In other words, if the common law is contrary to a statutory enactment,
28 that common law must give way to the statute. *Davenport v. State Farm Auto Ins.*
Co., 81 Nev. 361, 404 P.2d. 10 (1965). Here, even if there was some pre-1913
support for the concept of authorized compulsory rotation, that law has been
abrogated by the enactment of the consent-based provisions of NRS 533.075.

1 In tacit acknowledgment of the confines of NRS 533.075, the district court
2 did not specify the content, manner or scope of any such rotation schedule and
3 granted the State Engineer the authority to “make changes required by law” in
4 monitoring the system.⁵ *See generally* I JA 155-170, I JA 170. Hence, the State
5 Engineer’s authority in administering the Adjudication Order is much broader
6 than he has argued. The district court expressly stated that the State Engineer
7 was vested with the authority to make changes “as required by law.” *Id.* at 170.

8 Therefore, on the face of the Adjudication Order, the State Engineer was
9 charged to implement rotations schedules in compliance with Nevada law and
10 reflecting any agreement of the users. If the State Engineer had excluded the
11 non-consenting users from the purview of the rotation schedule, he would not
12 have violated the Adjudication Order as that exclusion was “required by law.”

13 In administering North Sheridan Creek water, the State Engineer is limited
14 by the very statutes he is charged with administering, including NRS 533.075.
15 *See State ex rel. Hinckley v. Sixth Judicial District Court*, 53 Nev. 343, 353-54,
16 1 P.2d 105 (1931) (water “could be properly and legally distributed by the [State
17 Engineer’s] officers . . . only when done in accordance with the terms of the order
18 of determination”).⁶ The district court acknowledged this. Yet, the State

19
20 ⁵ The district court likely did not do so because it knew its authority in a
21 statutory adjudication was limited in scope. *G & M Properties .v District Court*,
22 95 Nev. 301, 594 P.2d 714 (court’s authority in statutory adjudication is limited
23 to that set forth in adjudication statutes).

24 ⁶ During an ongoing adjudication proceeding, NRS 533.230 provides that
25 the State Engineer is to *administer* water in accordance with the FOD pending
26 issuance of a final decree. In regards to the waters of North Sheridan Creek, all
27 the FOD does is refer to NRS 533.075 and state that in times of low flow, all
28 users will have to share in the water shortage. II JA 289, 388. This is due to the
fact that all North Sheridan Creek water users rights are of equal priority and why
the FOD suggests, but does not mandate, that “[t]he total diversion from either the
north or south split *can* be used in its entirety in a rotation system of irrigation.”

1 Engineer abdicated his duty and perfunctorily compiled a schedule including all
2 users, consenting or not. Those administrative actions were contrary to Nevada
3 law and arbitrarily and capriciously singled out some users in favor of other
4 users, all of equal priority.

5 **III. The State Engineer Did Not Have Substantial Evidence to Support His**
6 **Rotation Schedules.**

7 The State Engineer deflects responsibility to monitor the North Sheridan
8 Creek system when implementing rotation schedules to the district court's
9 Adjudication Order. He opines that in the wake of that order, he is not required
10 to make any findings that rotation of the waters is the most efficient use of the
11 resource and does not impair any one user's right to the water, given their equal
12 priority standing. However, that order contained no such findings, and those are
13 findings that must be made if this Court is going to accept the proposition that
14 forced rotation is permissible in Nevada.

15 Further, Intervenor's bald assertion that Appellants were using *all* of the
16 water and Intervenor received *no* water have no support in the record. Inter.
17 Ans. Br. at 23. Intervenor's support are pieces of testimony from two of the
18 water users who favored rotation to the effect that their water usage increased
19 after the rotation schedules were issued. *Id.* at 24-29. Of course, Smith & Barden
20 could also pull bits of testimony from the record that demonstrate that their rights
21 have been diminished and otherwise impaired as a result of the rotation. *See* I JA
22 145-50. In either case, there were no findings made one way or the other by the
23 district court. And it is upon that shaky evidentiary base, that this Court is urged

24 II JA 387-88 (Emphasis added). The State Engineer never had any intention of
25 independently imposing a rotation schedule on non-consenting users when he
26 issued the FOD and there is no plausible reason why he did so here in light of the
27 discretion granted to him by the district court to regarding the terms and scope of
28 rotation.

1 to find that substantial evidence supports forcing Appellants, as highland water
2 users, to subjugate the usage of their rights in favor of their lowland neighbors,
3 even though they all hold rights of equal priority.

4 Nevada water law provides for no such distinction and in the absence of
5 substantial evidence of consent, efficiency and non-impairment, Smith & Barden
6 cannot be forced to rotate their water. Therefore, the district court erred in
7 finding that substantial evidence supported the State Engineer's imposition of the
8 rotation schedule.

9 CONCLUSION

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

17 Respectfully submitted this 18th day of August, 2014.

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CERTIFICATE OF COMPLIANCE

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

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

10 (a) proportionately spaced, has a typeface of 14 points or more, and contains
11 2976 words; and (2) does not exceed 15 pages.

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

21 Dated this 18th day of August, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of August, 2014, I caused a true and correct copy of the within **REPLY BRIEF OF APPELLANTS JOY SMITH, DANIEL BARDEN AND ELAINE BARDEN** to be deposited in the U.S. Mail, first-class postage prepaid, addressed to the persons listed below:

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