

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants

vs.

STATE OF NEVADA, OFFICE OF THE  
STATE ENGINEER; DONALD S. FORRESTER,  
AND KRISTINA M. FORRESTER; HALL  
RANCHES, LLC; THOMAS J. SCYPHERS AND  
KATHLEEN M. SCYPHERS; FRANK SCHARO;  
SHERIDAN CREEK EQUESTRIAN CENTER, LLC;  
AND RONALD R. MITCHELL AND GINGER  
G. MITCHELL,

Respondents.

J.W. BENTLEY; MARYANN BENTLEY,  
TRUSTEES OF THE BENTLEY FAMILY  
1995 TRUST; JOY SMITH; DANIEL D. BARDEN;  
AND ELAINE BARDEN,

Appellants,

vs.

HALL RANCHES, LLC; THOMAS J. SCYPHERS;  
KATHLEEN M. SCYPHERS; FRANK SCHARO;  
SHERIDAN CREEK EQUESTRIAN CENTER, LLC,  
A NEVADA LIMITED LIABILITY COMPANY;  
DONALD S. FORRESTER; KRISTINA M.  
FORRESTER; RONALD R. MITCHELL; AND  
GINGER G. MITCHELL,

Respondents.

CASE NO.: 64773

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CASE NO.: 66303

1 J.W. BENTLEY; MARYANN BENTLEY,  
2 TRUSTEES OF THE BENTLEY FAMILY 1995  
3 TRUST; JERALD R. JACKSON, TRUSTEE OF  
4 THE JERALD R. JACKSON 1975 TRUST, AS  
5 AMENDED; AND IRENE M. WINDHOLZ,  
6 TRUSTEE OF THE WINDHOLZ TRUST DATED  
7 AUGUST 11, 1992,

CASE NO.: 66932

8 Appellants,

9 vs.

10 THE STATE OF NEVADA STATE ENGINEER;  
11 HALL RANCHES, LLC; THOMAS J. SCYPHERS;  
12 KATHLEEN M. SCYPHERS; FRANK SCHARO;  
13 SHERIDAN CREEK EQUESTRIAN CENTER, LLC;  
14 DONALD S. FORRESTER; KRISTINA M.  
15 FORRESTER; RONALD R. MITCHELL;  
16 AND GINGER G. MITCHELL,

17 Respondents.

18  
19 On Appeal from the Ninth Judicial District Court  
20 of the State of Nevada, in and for Douglas County  
21 Hon. Nathan Todd Young, District Judge

22 **OPENING BRIEF OF APPELLANTS**

23 **JOY SMITH, DANIEL BARDEN AND ELAINE BARDEN**

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1                                   **NRAP 26.1 DISCLOSURE STATEMENT**

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

8           Dated this 3<sup>rd</sup> day of April, 2015

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## JURISDICTIONAL STATEMENT

This is a consolidated appeal of the Ninth Judicial District Court's denial of petitions for judicial review and award of costs. The petitions for judicial review were brought pursuant to NRS 533.450(1) and challenged imposition of a forced rotation schedule by the State of Nevada, Office of the State Engineer ("State Engineer") upon the use of water by Appellants Joy Smith, Daniel Barden and Elaine Barden ("Smith & Barden"). The district court denied the petitions for judicial review and awarded costs to the Respondents. This Court has jurisdiction over this matter pursuant to NRAP 3(b) and NRS 533.450(9).<sup>1</sup> *See also* Order Regarding Jurisdiction, Consolidating Appeals and Setting Briefing Schedule, January 22, 2015.

## ROUTING STATEMENT

This matter is presumptively retained by the Supreme Court under NRAP 17(a)(9) as this is an "administrative agency appeal involving . . . water . . . determinations[.]"

## ISSUES PRESENTED FOR REVIEW

1. Did the State Engineer act arbitrarily and capriciously in forcing Smith & Barden, non-consenting vested water right users, to rotate their use of water in favor of other vested water right users whose water rights have the same priority as those of Smith & Barden?

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<sup>1</sup> While this Court raised the issue of whether it had jurisdiction given that the decree finally adjudicating the relative rights of water users involved in this dispute had not been issued at the time the appeals of these orders were taken, at this time that decree has been issued and jurisdiction over the appeal of the petitions for judicial review is no longer in question. Appellants J.W. Bentley and MaryAnn Bentley, Trustees of the Bentley Family 1995 Trust ("Bentley") appealed the decree, which has been consolidated with the appeal of the denial of the petitions for judicial review and order awarding costs. Smith & Barden's involvement in these proceedings is limited to the appeal of the orders denying the petitions for judicial review and awarding costs.

1           2.     Did the State Engineer act arbitrarily and capriciously in forcing  
2 Smith & Barden to rotate their use of water rights without making any findings  
3 that the rotation would not impair their use of their water rights or be the most  
4 economical and efficient use of the waters of the stream in question?

5           3.     Did the State Engineer exceed his statutory authority and act in  
6 violation of statutes when he issued a rotation schedule which included Smith &  
7 Barden?

8           4.     Did the district court err as a matter of law in concluding that the  
9 court has the independent authority to order the rotation of water rights in the  
10 absence of a consensual and statutorily authorized agreement amongst the  
11 common water users of a source of water?

12          5.     Did the district court err as a matter of law in concluding that the  
13 rotation schedules imposed upon Smith & Barden were not “illegal.”

14          6.     Did the State Engineer have any evidence that forcing Smith &  
15 Barden to rotate their usage of their water rights would not conflict with or impair  
16 their water rights?

17          7.     Did the State Engineer have any evidence that forcing Smith &  
18 Barden to rotate their usage of their water rights and is the most economical and  
19 efficient use of the resource?

20          8.     Did the district court err as a matter of law in awarding Respondents  
21 costs as the prevailing party in the petition for judicial review actions?

## 22                                   **STATEMENT OF THE CASE**

23           The State Engineer issued rotation schedules in 2012 and in 2013,  
24 requiring Smith & Barden, along with all other users holding water rights to the  
25 stream in question, to rotate the usage of their water rights during the irrigation  
26 season on a schedule dictated by him. Smith & Barden filed a petition for judicial  
27 review in 2012 challenging the rotation schedule in the Ninth Judicial District  
28 Court, Douglas County, before the Honorable Nathan Tod Young, District Judge,



1 as did Appellants Bentley. Smith & Barden and Bentley jointly filed a petition  
2 for judicial review of the 2013 rotation schedule.

3 The three petitions for judicial review were consolidated into one action  
4 before the district court. In the district court proceedings, Smith & Barden argued  
5 that Nevada water law does not allow for compulsory rotation and that the State  
6 Engineer acted arbitrarily and capriciously, in excess of his statutory authority,  
7 and in violation of Nevada water law in issuing rotation schedules which forced  
8 them, over their objection, to rotate their use of water, along with water users who  
9 consented to the rotation.

10 The district court did not agree and denied the petitions for judicial review.  
11 The district court also ordered an award of costs to Respondent Interveners as the  
12 prevailing parties in the petition for judicial review proceeding. Appeals of those  
13 orders were taken pursuant to NRS 533.450(9) and NRAP 3(b).

#### 14 STATEMENT OF FACTS

15 **The water and its users.** Sheridan Creek is a discrete stream system  
16 that arises in the Carson Range of the Eastern Sierra and flows into the Carson  
17 Valley, but does not reach the Carson River. I JA 157, II JA 235–38. It  
18 branches into a North and South Division. I JA 157. The North Division is the  
19 branch that is the subject of these proceedings. I JA 1-3, V JA 884-86. The  
20 waters of Stutler Creek and Gangsberg Springs are commingled with the North  
21 Division of Sheridan Creek and are administered together (these commingled  
22 waters are at times collectively referred to herein as “North Sheridan Creek”).  
23 I JA 157. North Sheridan Creek water is used for irrigation, stock-watering and  
24 domestic purposes. *See* II JA 244-45, 247-49, 262-64, 266.

25 Smith & Barden are the joint owners of vested water rights, Proofs V-  
26 06346 and V-06347, to the waters of the North Sheridan Creek and the  
27 commingled waters of Stutler Creek. II JA 266. Smith & Barden also have an  
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1 interest in Permit 7595, Certificate 1760, to the waters of Gansberg Springs. II  
2 JA 283.

3 Appellants Bentley<sup>2</sup> and Respondents Hall Ranches, LLC., Thomas  
4 Scyphers, Kathleen Scyphers, Frank Scharo, Sheridan Creek Equestrian Center,  
5 LLC., Donald Forrester, Kristina Forrester, Ronald Mitchell and Ginger  
6 Mitchell are the other current users of North Sheridan Creek.<sup>3</sup> I JA 7-18. The  
7 water rights to North Sheridan Creek are vested and of equal priority,<sup>4</sup> except  
8 those of Gansberg Springs, which is a statutorily permitted water right with a  
9 later priority date.<sup>5</sup> I JA 157.

10 **The adjudication proceeding.** The adjudication of Sheridan Creek and  
11 of several other various discrete stream systems flowing into the Carson Valley  
12 from the Carson Range began in 1987 when a petition was filed with the State  
13 Engineer requesting a determination of the relative rights of claimants of those  
14 different waters. II JA 195. The State Engineer proceeded with its statutory  
15 adjudication pursuant to NRS Chapter 533 by giving notice, investigating the  
16 historic practices, taking proofs of claims, issuing his preliminary order of

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18  
19 <sup>2</sup> Bentley uses his own rights, as well as leased rights from the Pestana  
20 Family Trust. I JA 7-8, V JA 848.

21 <sup>3</sup> For ease of reference, the private party Respondents will be referred to  
22 as “Intervenors”, as so identified by the district court below. V JA 1066-67.

23 <sup>4</sup> The waters rights of the North Division of Sheridan Creek have a priority  
24 date of 1852; the waters of Stutler Creek have a priority date of 1905. I JA 157.

25 <sup>5</sup> The water rights to Gansberg Springs have a priority date of 1925 and the  
26 use of the water is supplemental to that of several vested North Sheridan Creek  
27 water rights, including Smith & Barden’s. II JA 370. Supplemental water rights  
28 may augment or replace other water rights with the same place of use when that  
other water is unavailable, but do not expand upon the maximum amount of water  
that can be appropriated by the user. II JA 289.

1 determination, and hearing and resolving any objections thereto. II JA 195-97,  
2 239-43. In August 2008, the State Engineer issued his Final Order of  
3 Determination (“FOD”), which was filed with the district court in November  
4 2008 with the assigned case number 08-CV-0363. I JA 155, II JA 190. Given  
5 that the adjudication involved stream systems that were separate and distinct,  
6 the district court broke the adjudication into sub-parts.

7 Sub-part D, district court case number 08-CV-0363-D, involved the  
8 determination of the relative rights of the users of the waters of North Sheridan  
9 Creek and resolution of any exceptions to the State Engineer’s FOD filed by  
10 interested parties. *See generally* I JA 155-70. Smith & Barden did not file any  
11 exceptions to the FOD as the State Engineer found their proofs of claim to be  
12 valid for the requested acreage and they had no dispute with the State  
13 Engineer’s determination of their relative rights to North Sheridan Creek set  
14 forth in the FOD.<sup>6</sup>

15 Bentley, however, did file exceptions to the FOD and the district court  
16 proceeded with resolution of those exceptions and entered its Findings of Fact,  
17 Conclusions of Law, Order and Judgment (“Adjudication Order”) affirming, for  
18 the most part, the FOD and settling the relative rights of users of the waters of  
19 the North Sheridan Creek. *Id.*

20 The participating parties to the adjudication sub-proceeding D included  
21 Interveners, who were allowed to intervene in the adjudication action to  
22 challenge Bentley’s right to use water under a diversion agreement mentioned  
23 in one of Bentley’s exceptions. *Id.*, III JA 445-46. That diversion agreement  
24 required that water be diverted and continuously flow through ponds on  
25 Bentley’s property. I JA 160-61. Bentley filed the exception to request that any  
26

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27 <sup>6</sup> Notably, the FOD did not mandate Smith & Barden to rotate the usage  
28 of their rights. II JA 266.

1 rotation schedule be subject to that diversion agreement. III JA 445-46. The  
2 district court allowed Interveners to file claims and defenses regarding the  
3 validity and alleged violation of the diversion agreement in the adjudication  
4 action. I JA 161. At the onset of trial, the State Engineer, Interveners and  
5 Bentley stipulated to resolve all of the exceptions, except the issue of the  
6 diversion agreement, including the following stipulation:<sup>7</sup>

7 [T]he State Engineer would not attempt to include a rotation  
8 schedule in the Decree itself, but that *the provisions of NRS*  
9 *533.075 and the orders of this Court* would be used to determine  
10 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.

11 I JA 158-60 (emphasis added). The district court adopted all of the stipulations  
12 and found that the FOD, with the stipulated modifications, “is proper and may  
13 be included in the Decree.” I JA 160. He then ordered:

14 5. When the combined flow from the North Diversion of Sheridan  
15 Creek and tributaries drops below 2.0 [cubic feet per second  
“cfs”], the State Engineer shall impose a rotation schedule.

16 6. The rotation schedule shall be in effect from the time the North  
17 Diversion of Sheridan Creek drops below 2.0 cfs or until the  
schedule is stayed or modified by this Court.

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

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

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

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

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27 <sup>7</sup> The trial centered around the issues of the validity of a diversion  
28 agreement running to the benefit of Bentley’s property and whether Bentley was  
violating the agreement, which was the focus of the Adjudication Order. *See* I JA  
160-68.

1 I JA 169-70; V Supp JA 849, 989 (emphasis added). The Adjudication Order  
2 did not specify the scope, content or manner of implementation of any rotation  
3 schedule imposed. See I JA 155-70; V Supp JA 849, 974-89.

4 Bentley appealed the Adjudication Order, but that appeal was dismissed  
5 by this Court. See *Bentley v. State Engineer*, Docket No. 60891 (Order  
6 Dismissing Appeal, February 15, 2013). The district court had not yet finished  
7 its adjudication of other stream systems subject to the adjudication and no final  
8 decree had been issued. Therefore, that appeal was dismissed as premature.

9 The district court has since entered its Findings of Fact, Conclusions of  
10 Law, Judgement [sic] and Decree (“Decree”) on September 29, 2014, which  
11 incorporated the Adjudication Order. V Supp. JA 840, 846-49, 858, 974-990.  
12 Bentley appealed the Decree.

13 **State Engineer’s rotation schedules.** In 2012 and 2013, the State  
14 Engineer issued rotation schedules as directed by the district court when stream  
15 flows fell below 2.0 cfs. I JA 7-18, V JA 889-899. The rotation schedules  
16 issued required all users of the commingled waters of North Sheridan Creek to  
17 rotate their use of those waters on a 21-day cycle during the irrigation season,  
18 including Smith & Barden. *Id.* However, no agreement amongst all the water  
19 users of North Sheridan Creek to rotate their use of water exists.<sup>8</sup> The State  
20 Engineer provided no information or documentation with his rotation decisions  
21 that the particular rotation imposed would accomplish a more efficient and  
22 economic use of the waters by all water users or that the rotation would not  
23 impair any of the water rights. *Id.*

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26 <sup>8</sup> Accounting for the Bentley’s lease of Pestana’s water rights, the water  
27 rights of the non-consenting users, Bentley and Smith & Barden comprise  
28 approximately 35% of the total waters of North Sheridan Creek. I JA 7-8, 133.

1       **The petition for judicial review proceedings.** Upon receipt of notice of  
2 the 2012 rotation, Smith & Barden brought a petition for judicial review  
3 challenging their inclusion in the rotation schedule. I JA 1-4. Bentley also filed  
4 a petition for judicial review in 2012. I JA 19-21. In 2013, Smith & Barden and  
5 Bentley filed a joint petition for judicial review. V JA 884-86. The three  
6 petitions were formally consolidated together pursuant to NRCP 42, and then  
7 brought under the adjudication case, with a designated sub-case number, 08-CV-  
8 0363-D1, by orders of the district court on October 11, 2012, and November 27,  
9 2013. I JA 113-15, V JA 1058, 1067.

10       Intervenors participated in the judicial review proceeding in support of the  
11 State Engineer. V JA 1057-58. The district court rejected Smith & Barden's  
12 arguments, finding that forced rotation is authorized in Nevada, that the rotation  
13 schedules at issue were not "illegal," that substantial evidence supported the  
14 State Engineer's decision to require Smith & Barden to rotate their use of the  
15 water, and that the district court and the State Engineer had full authority to  
16 order the rotation. V JA 1059-61. The petitions were denied and this appeal  
17 was taken. V JA 1063. The district court further ordered that Intervenors be  
18 awarded costs pursuant to NRS 18.050 as the prevailing party in the petition for  
19 judicial review proceeding, which was also appealed. IX Supp. JA 1701-04.

## 20                                   **ARGUMENT SUMMARY**

21       The very premise of rotation is grounded in its voluntary nature, which is  
22 iterated in NRS 533.075. The concept is that a group of irrigators using a  
23 common source can agree to rotate their use of the water so that each irrigator  
24 will have the full flow of the water source for certain times in order to build  
25 enough irrigation head to force the water to the fields. The rotation schedules  
26 at issue here were not creatures of such an agreement.

27       While the State Engineer was ordered to impose a rotation schedule to  
28 achieve a more efficient use of the waters of North Sheridan Creek by the district

1 court under certain flow conditions, the scope and manner of rotation was left  
2 up to the discretion of the State Engineer. Any such discretion must be exercised  
3 within the bounds of NRS 533.075. A rotation schedule which inures only to the  
4 benefit of certain water users, while impairing the water rights of other users, all  
5 of whom have rights that are vested and of equal priority, cannot be imposed in  
6 Nevada. Accordingly, the district court's directive to the State Engineer to order  
7 rotation must be read within this constraint and the State Engineer is not  
8 statutorily authorized to require non-consenting water users to rotate their use  
9 of their vested water rights. If he does so, as he did here, his actions are arbitrary  
10 and capricious and cannot be sustained.

11 Moreover, even if water users could be ordered to rotate their use of water  
12 over their objection, the State Engineer must have substantial evidence that the  
13 particular rotation ordered achieves a more economical and efficient use of the  
14 waters for *all* water users and does not impair *any* water right of equal or earlier  
15 priority. There is no evidence of such findings in this case; therefore, the  
16 rotation schedules cannot be upheld.

17 In light of the lack of authority or substantial evidence to support the State  
18 Engineer's decision, the district court should not have denied the petitions for  
19 judicial review, nor should it have awarded costs to the Interveners. The cost  
20 order should also be reversed.

## 21 ARGUMENT

### 22 I. Standard of Review

23 Judicial review of the State Engineer's decisions or order is brought  
24 pursuant to NRS 533.450 and is in "the nature of an appeal." NRS 533.450(1).  
25 Any aggrieved party may bring such a petition. This Court "is free to decide  
26 purely legal questions . . . without deference to the [State Engineer's] decision."  
27 *Town of Eureka v. State Engineer*, 108 Nev. 163, 165, 826 P.2d 948 (1992).  
28 However, "[w]ith questions of fact, the reviewing court must limit itself to a

determination of whether substantial evidence in the record supports the State Engineer's decision." *Id.* The matter at hand presents both questions of law and fact.

## II. Rotation of Vested Water Rights of Equal Priority in Nevada must Be Consensual

The State Engineer issued rotation schedules requiring *all* users of the commingled waters of North Sheridan Creek to rotate their use of those waters, including Smith & Barden, during the 2012 and 2013 irrigation seasons, regardless if they objected to the rotation. But there is no statutory authority in Nevada that allows for the State Engineer to impose a rotation schedule upon non-consenting water users.

### A. Rotation of Water in Nevada Must be Conducted Pursuant to NRS 533.075, Which is a Grant of Authority to Water Users of a Common Source to Agree to Use their Water on a Rotation Basis.

The only Nevada water law statute that provides for implementation of a rotation schedule is NRS 533.075, which provides:

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

Emphasis added.

"[I]t is well established that when the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it." *United States v. State Engineer*, 117 Nev. 585, 589-90, 27 P.3d 51 (2001) (internal citations, quotations and brackets omitted). NRS 533.075 is not ambiguous. To be considered ambiguous, a statute must be capable of two or more reasonable, but inconsistent interpretations. *Id.*

///



1        There is only one possible interpretation of the plain language of NRS  
2 533.075. It *allows* users of a single source of water to agree to use their water  
3 outside the terms and conditions of their water rights to bring about a more  
4 economical use of the water. It is a *grant* of authority, not a dictate, to water  
5 right users of a common source to alter the amount and timing of water used for  
6 irrigation outside of any dictate of the State Engineer to achieve a more efficient  
7 use of a scarce resource. A plain reading of the statute clearly reveals the  
8 legislative intent that a rotation schedule cannot be imposed upon non-  
9 consenting water-users and cannot impair users rights.<sup>9</sup>

10        In construing water law statutes, the State Engineer's "interpretation of its  
11 own regulation or statute is entitled to consideration and respect[.]" so long as  
12 it does not contravene the plain language of the statute. *Id.* Here, the State  
13 Engineer's interpretation of NRS 533.075 is consistent with that articulated  
14 herein. As he set forth in the FOD, citing to NRS 533.075:

15 \_\_\_\_\_  
16        <sup>9</sup> NRS 533.075 is similar to rotation statutes in other states. Oregon,  
17 Washington and Wyoming all permit water users of a single source to agree upon  
18 a rotation schedule. *See* Or. Rev. Stat. §§ 540.150 ("To bring about a more  
19 economical use of the available water supply, water users owning lands to which  
20 are attached water rights may rotate in the use of the supply to which they may be  
21 collectively entitled."); Rev. Code Wash. § 90.03.390 ("Water users owning lands  
22 to which water rights are attached may rotate in the use of water to which they are  
23 collectively entitled, . . . when such rotation can be made without detriment to  
24 other existing water rights, and has the approval of the water master or  
25 department."); Wyo. Stat. § 41-3-612(a) ("To bring about a more economical use  
26 of the available water supply, it is lawful for water users owning lands to which  
27 are attached water rights, to rotate in the use of supply to which they may be  
28 collectively entitled[.] . . . Rotation of water will only be allowed only if it can be  
accomplished without injury to other appropriators."). The common thread  
amongst NRS 533.075 and these statutes is that rotation is premised upon the  
water users' agreement and that rotation achieves, in the opinion of those water  
users, a more economical use of the water and cause no injury to other water  
rights of equal or earlier priority.

1 claimants of vested water rights and those owners of water rights  
2 acquired through the appropriative process from a common supply  
3 may rotate the use of water to which they are collectively entitled  
4 *based on an agreement*, so as to not *injure nonparticipants* or  
5 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 thus, to bring about a more*  
*economical use* of available water supplies in accordance with their  
dates of priority.

6 II JA 289 (emphasis added). This interpretation is further buttressed by an  
7 informational report issued by the office of the State Engineer in 1974, wherein  
8 the State Engineer described NRS 533.075 as follows:

9 A unique feature permitted in Chapter 533 of the Nevada Water  
10 Law is the principle of rotation to bring about a more economical  
11 use of the available water supply. An example of rotation is when  
12 *users on a stream agree* that when the natural flow has reached a  
13 minimum, they can combine their rights to develop a larger head  
14 and rotate this larger head among the individual users on an agreed  
upon schedule. The practice can give larger heads for shorter  
periods of time, with resultant increases in irrigation efficiency and  
lower operating costs.

15 *Water for Nevada, Special Information Report, Water - Legal and*  
16 *Administrative Aspects*, Division of Water Resources, 1974, at 17, *available at*  
17 [http://images.water.nv.gov/images/publications/water%20planning%20reports/](http://images.water.nv.gov/images/publications/water%20planning%20reports/wfn_special_admin.pdf)  
18 [wfn\\_special\\_admin.pdf](http://images.water.nv.gov/images/publications/water%20planning%20reports/wfn_special_admin.pdf). See Req. Jud. Not., Ex. 1 (emphasis added).

19 NRS 533.075 was enacted as part of the 1913 comprehensive statutory  
20 water law scheme. It embodies the common law policy in existence at that time  
21 of encouraging the practice of agreed-upon rotation as an efficient use of a single  
22 source of water by its different users. Neither the State Engineer nor Interveners  
23 have disputed that NRS 533.075 is a consent-based statute. Therefore in the  
24 absence of a clear grant of statutory authority, which admittedly does not exist,  
25 the State Engineer may not use rotation as an administrative tool to force rotation  
26 upon non-consenting users.

27 Contrary to his likely argument, the State Engineer cannot rely upon the  
28 district court's order requiring the implementation of a rotation schedule as

1 vesting himself with statutory authority broader than that granted to him in  
2 Nevada's water law statutes. During an adjudication proceeding, NRS 533.230  
3 provides that the State Engineer is to *administer* water in accordance with the  
4 FOD pending issuance of a final decree. In regards to the waters of North  
5 Sheridan Creek, all the FOD states is that in times of low flow, all users will  
6 have to share in the water shortage. II JA 388. This is due to the fact that all  
7 North Sheridan Creek water users rights are of equal priority and why the FOD  
8 suggests, but does not mandate, that "[t]he total diversion from either the north  
9 or south split *can* be used in its entirety in a rotation system of irrigation." II JA  
10 387-88 (Emphasis added).

11 The district court affirmed the FOD as to the determination of the relative  
12 rights of claimants to use the waters of North Sheridan Creek, with a few minor  
13 modifications in the Adjudication Order and Decree. I JA 160, 169 V Supp JA  
14 844, 974-89. The district court also ordered that the State Engineer would  
15 impose a rotation schedule under certain flow conditions, but that no such  
16 rotation schedule would be included in the decree nor was a specific schedule  
17 included in the Decree, nor was it. I JA 158, 169-70; V Supp JA 849, 974-89.  
18 The Adjudication Order and Decree are equally silent as to the scope and manner  
19 of the rotation imposed. *See* I JA 155-70; V Supp JA. 840, 846-49, 858, 974-  
20 990. Thus, the State Engineer's discretion in formulating a particular rotation  
21 schedule must be exercised within the bounds of Nevada's statutes and the State  
22 Engineer may not reach beyond the plain language of the statutes, the FOD or  
23 Decree to force *non-consenting* water users to rotate their usage of their water.  
24 *See State ex rel. Hinckley v. Sixth Judicial District Court*, 53 Nev. 343, 353-54,  
25 1 P.2d 105 (1931) (water "could be properly and legally distributed by the [State  
26 Engineer's] officers . . . only when done in accordance with the terms of the  
27 order of determination"); *see also G & M Properties .v District Court*, 95 Nev.  
28 ///

1 301, 594 P.2d 714 (court's authority in statutory adjudication is limited to that  
2 set forth in adjudication statutes).

3 In the case at hand, it is undisputed that there is no agreement amongst all  
4 the users of North Sheridan Creek to rotate their usage of those waters and that  
5 Smith & Barden do not consent to the rotation schedules imposed. Smith and  
6 Barden's rights cannot be subjected to a rotation schedule, and the State  
7 Engineer acted arbitrarily and capriciously and in excess of his statutory  
8 authority in including them in the rotation. Thus, the district court erred as a  
9 matter of law in holding that the the challenged rotation schedules were not  
10 "illegal" and were within the bounds of the court's and the State Engineer's  
11 authority to order.

12 B. The State Engineer Acted Arbitrarily and Capriciously in Forcing Smith  
13 & Barden, Non-Consenting Vested Water Right Users, to Rotate the Use  
14 of Their Water in Favor of Other Vested Water Right Users Whose Water  
15 Rights Have the Same Priority as Those of Smith & Barden.

16 Nevada's water rights are administered on a "first in time, first in right"  
17 prior appropriation scheme. The importance of being "first in time" is  
18 demonstrated in times of water shortage where the priority of rights dictates who  
19 will receive water and who will not. In other words, the holders of junior rights  
20 will be cut off from their water to protect the rights of senior users. *See Ophir*  
21 *Silver Mining Co. v. Carpenter*, 4 Nev. 534, 543 (1869) ("priority of  
22 appropriation gives the superior right").

23 The water users of North Sheridan Creek all hold vested water rights of  
24 *equal* priority. Thus, the question becomes, how to deal with shortages if there  
25 is no junior appropriator whose supply of water can be curtailed to satisfy the  
26 needs of the senior appropriator? Respondents are likely to argue that the only  
27 way for holders of equal priority water rights to share the water of the same  
28 source in times of shortage is on a rotational basis. That is simply not the case.

///

1       The State Engineer is relegating Smith and Barden's water rights to a  
2 status that is junior to interveners. Individuals that enjoy the use of water rights  
3 on an equal par and priority with other users of the same source are entitled to  
4 expect the State Engineer to administer and protect those rights in a non-  
5 arbitrary and non-discriminatory matter. Water users of a common source of  
6 water may always agree to rotate the use of their water, but such an agreement  
7 cannot bind the non-consenting users. In such times, those non-consenting users  
8 will have to share in the shortage by taking their reduced pro-rata share based  
9 upon available supply. *See Richlands Irr. Co. v. Westview Irr. Co.*, 80 P.2d 458,  
10 466 (Utah 1938) ("those of equal right and priority must prorate the shortage  
11 between them"); *see also Artemas Holman v. Pleasant Grove City*, 30 P. 72  
12 (Utah 1892)(distribution of water to city residents could not be unequal and  
13 when there is not enough water to furnish all users with what they need, the city  
14 should make a pro rata reduction).

15       Otherwise, forcing objecting users to rotate their water in favor of  
16 consenting users that hold rights of the same priority is discriminatory and  
17 impairs their water rights. *See Neubert v. Yakima-Tieton Irr. Dist.*, 814 P.2d 199  
18 (Wash. 1991)(irrigation district improperly discriminated against water users by  
19 giving preference to users who signed up for frost protection service over the  
20 users who did not, and all of whom shared the same priority of their water  
21 rights). By including non-consenting users in a rotation schedule, the State  
22 Engineer is effectively and inappropriately relegating those users to a "junior"  
23 appropriator status, contrary to the long-held mandates of Nevada water law.

24       Furthermore, the State Engineer's duty to equally administer rights of  
25 equal priority is heightened when it comes to vested water rights. When the  
26 Nevada Legislature enacted the water law scheme in 1913, it intended to "place  
27 the distribution of the waters of the streams or stream systems of the state to the  
28 person entitle thereto, under state control." *Ormsby County v. Kearney*, 37 Nev.

1 314, 336, 142 P. 803 (1914). But in doing so, it ensured that vested rights, *i.e.*,  
2 rights that were initiated prior to adoption of the statutory scheme, would be  
3 protected from *impairment* as memorialized in NRS 533.085:

4 [n]othing contained in this chapter shall impair the vested right of  
5 any person to the use of water, nor shall the right of any person to  
6 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.

7 This protection was built into the water act by the Legislature as a due process  
8 measure to ensure that vested rights would not be impaired, “that is, they shall  
9 not be diminished in quantity or value,” by the administration of the statutes or  
10 the State Engineer’s exercise of his authority thereunder. *See Ormsby County*,  
11 37 Nev. at 352, 142 P. at 806. The Nevada Supreme Court has consistently  
12 affirmed and applied this mandate. *Anderson Family Associates v. Kicei*, 124  
13 Nev. 182, 186-88, 179 P.3d 1201 (2008); *Filipini v. State Engineer*, 66 Nev. 17,  
14 22-23, 202 P.2d 535 (1949).

15 Historical usage is what defines the extent and terms of vested water  
16 rights. *See generally Steptoe Livestock Co. v. Gulley et al.*, 53 Nev. 163, 295 P.  
17 772 (1931). Throughout the adjudication process, after conducting a stream  
18 flow investigation pursuant to NRS 535.100, taking proofs pursuant to NRS  
19 533.110-533.125, and preparing the preliminary and final orders of  
20 determination pursuant to NRS 533.140-533.165, the State Engineer never made  
21 any findings that Smith and Barden’s water rights were historically used in  
22 rotation. II JA 195-97, 235, 266, 289, 386-87. In sum, the determination of the  
23 extent and terms of use of Smith & Barden’s water rights did not include rotation  
24 of those rights.

25 Therefore, the only way the State Engineer could order Smith & Barden  
26 to rotate their water rights in administering the vested rights of North Sheridan  
27 Creek was to ensure that the rotation schedule equally benefits all water users  
28 of North Sheridan Creek, which of course would mean that the users would need

1 to consent to the rotation. If not, he can only order non-consenting users to take  
2 a pro-rata reduced share of available water. Otherwise, the rotation will  
3 effectively diminish the quantity and value of the vested water rights, but will  
4 purportedly improve the quantity and value of vested rights with the same  
5 priority. This discriminatory administration smacks of arbitrariness and is not  
6 countenanced by Nevada law.<sup>10</sup>

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

9 Assuming *arguendo*, that the State Engineer did not act contrary to  
10 Nevada law, in excess of his authority, or arbitrarily and capriciously in  
11 imposing a rotation schedule upon Smith and Barden, his decision to do so is not  
12 supported by substantial evidence. Substantial evidence is defined “as that  
13 which a reasonable mind might accept as adequate to support a conclusion.”  
14 *Bacher v. State Engineer*, 122 Nev. 1110, 1121, 146 P.3d 793 (2006).

15 In this case, the State Engineer must have made some conscious decision  
16 to include Smith & Barden in the rotation, which could only be justified if he  
17 determined that the rotation would achieve a more economical and efficient use  
18 of their water rights, the entire purpose of rotation. *See* NRS 533.075; *Water for*  
19 *Nevada, supra*, Req. Jud. Not, Ex. 1. Moreover, in subjecting Smith & Barden  
20 to the rotation, he must also have had evidence that the rotation would not impair  
21 their rights to the benefit of rights of equal priority, which is a parameter that  
22 guards against discriminatory, arbitrary or capricious actions. In the absence of

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23  
24 <sup>10</sup> Water rights in Nevada can be changed as to place and type of use upon  
25 approval by the State Engineer. They are also freely alienable. Yet, mandated  
26 rotation circumscribes any attempt by Smith and Barden to change the type of use  
27 of their water rights from irrigation or to sell or lease such rights to a third party  
28 for a different type of use. This significant curtailment of their property interest  
in their water rights by virtue of a forced rotation schedule was not contemplated  
by the Legislature, nor can it be sustained by this Court.

1 such evidence, how can a decision to include Smith & Barden in a rotation  
2 schedule over their objection be justified?

3 Nonetheless, the State Engineer's rotation orders are devoid of any  
4 reference that he had any evidence to support his decision to impose the rotation  
5 upon Smith & Barden in a manner that did not impair their rights or achieve a  
6 more economical use of their water. I JA 5-18, V JA 847-857.<sup>11</sup> Neither did the  
7 State Engineer produce any such evidence in the proceedings before the district  
8 court. A reasonable mind could not possibly accept that no evidence equates to  
9 adequate evidence. Therefore, the district court erred in finding that substantial  
10 evidence supported the State Engineer's imposition of the rotation schedule.

#### 11 **IV. The District Court Erred In Awarding Interveners Costs.**

12 The District Court abused its discretion in ordering that Appellants must  
13 pay Interveners' costs. NRS 18.050 does not allow the District Court to exercise  
14 its discretion in determining whether to award costs to a prevailing party in a  
15 Civil Action. Here, that order cannot be sustained if the district court's order  
16 denying the petitioners for judicial review is not upheld.

### 17 **CONCLUSION**

18 The State Engineer's authority is not unlimited. He must act within the  
19 bounds of the statutes in his administration of water rights pursuant to a FOD or  
20 adjudicating court order or decree. In Nevada, rotation of water rights of a  
21 common source must be consensual and the State Engineer cannot impose  
22 rotation upon non-consenting users whose rights are of equal priority to those  
23 users who consent to rotation.

24 ///

25 ///

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26  
27 <sup>11</sup> The rotation schedules issued in 2012 and 2013 are virtually identical  
28 as to parties included and dictated timing of the use of their rights. *Id.*



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

8 Respectfully submitted this 3<sup>rd</sup> day of April, 2015.

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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  
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10 (a) proportionately spaced, has a typeface of 14 points or more, and  
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12 3. Finally, I hereby certify that I have read this appellate brief, and to the  
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15 applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1),  
16 which requires every assertion in the brief regarding matters in the record to be  
17 supported by a reference to the page and volume number, if any, of the transcript  
18 or appendix where the matter relied on is to be found. I understand that I may be  
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20 with the requirements of the Nevada Rules of Appellate Procedure.

21 Dated this 3<sup>rd</sup> day of April, 2015.

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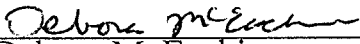
**CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of Dyer, Lawrence, Flaherty, Donaldson & Prunty, and that on the 3<sup>rd</sup> day of April, 2015, I caused a true and correct copy of the within **OPENING 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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