rights, but simply ordered the upstream user to turn down a sufficient quantity of water on a periodic basis to allow the other user to irrigate as usual. No reference was made to a rotation schedule, as such, nor do those cases concern the statutory adjudication proceedings under review in this case. Those cases do not address stock, wildlife, and recreation rights at all.

Bentley has not asked this Court to deliberate on the wisdom of rotation schedules and this Court should avoid Intervenors' invitation to do so. Bentley adopts the rationale in the Stanka Report and freely admits that a rotation system of irrigation can be useful when the irrigators are all located on a single ditch. However, the decision on how to irrigate is left up to the irrigators and cannot be imposed by the District Court or the State Engineer as part of a *Decree* in a statutory adjudication. A forced rotation schedule is incompatible with stock, wildlife, and recreation rights and is not efficient in cases such as the present case where the parties are not even located on the same ditch. Intervenors' segmented pipeline loses 5% at each lateral diversion. Allowing Sheridan Creek to run dry during rotation results in a 25% infiltration loss. This inefficiencies from the rotation scheduled produce a combined loss of 45% from the north/south diversion. [Stanka Report, Tr. Ex. 96, SA 8 at 1687-1689].

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Docket 64773 Document 2015-18382

D.1 Reply to Intervenors' Argument Regarding Substantial Evidence

Intervenors spent the next five (5) pages arguing about substantial evidence in favor of a rotation schedule. Intervenors specifically cited testimony from Frank Scharo, Don Forrester, and Tom Scyphers, all of whom irrigate from the same segmented pipe that causes extreme loss. The references to "an informal rotation agreement with surrounding neighbors" (*Answering Brief* at p.21, ll.4-5, citing testimony of Frank Scharo) means an informal rotation schedule with their immediate neighbors who irrigate from the same segmented pipe. This includes Forrester, Hall, Scharo, and Scyphers [See Stanka Report. Tr. Ex. 96, SA 8 at 1634, 1649]. Their informal rotation schedule never included Sapp, Pestana, Lodato, Bentley, Weber, Smith, or Barden. Likewise, the reference to "surrounding neighbors" does not include the Mitchells and Sheridan Creek Equestrian Center, who irrigate from Sheridan Creek. Tom Scyphers essentially admitted that these other parties did not participate in his informal rotation schedule when he testified about the historical, continuous flow, both down the Sheridan Creek channel that continued through the Weber/Bentley pond and the continuous flow through the four inch (4") lateral pipe to the Smith/Barden properties [Tr.Trans. 1/11/2012, 292:1-4, 295:20-24, SA 6 at 1128, 1129]. Donald Forrester also testified and confirmed the historical flow down the Sheridan Creek

channel that continued through the Weber/Bentley pond [Tr.Trans. 1/9/2012 129:16-20, 131, 12-15, SA 6 1060].

As explained *supra*, Intervenors should experience higher yields when they are allowed to misappropriate water from Gansberg Springs, as well as the vested rights of Bentley, Smith, Barden, Sapp, and Pestana. The fact that only three (3) of the Intervenors reported a benefit from the rotation schedule is proof that the rotation system is not economical for the parties, as a whole. Under NRS 533.075, the rotation system is supposed to be voluntary arrangement that increases the efficient use of water; it cannot be imposed on non-consenting parties in a manner that produces winners and losers.

Ultimately, Intervenors' testimony concerning higher yields was not adopted in the *Findings of Fact* or *Decree* and is irrelevant to this appeal. Forrester, Hall, Scharo, and Scyphers are free to rotate the use of their water rights. This was contemplated by the State Engineer in the FOD:

> **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, JA 2 189] [emphasis added]

However, there is no lawful basis upon which to force Bentley to participate in the rotation system or for the Intervenors to commandeer Bentley's stock, wildlife, and recreation rights as part of their irrigation rotation system.

V. REPLY TO DEFENDANTS' ARGUMENT REGARDING THE DIVERSION AGREEMENT

A-B Reply to Intervenors' Argument Regarding Their Pleading

Intervenors argue that the District Court allowed their *Response*. This is not a legal argument, but merely a recitation of the error committed by the District Court. As explained *supra*, Intervenors' *Response* was not an allowed pleading and the District Court lacked jurisdiction to hear Intervenors' Affirmative Defenses regarding the *Diversion Agreement*. In an abundance of caution, Bentley will address the Intervenors' other arguments regarding the *Diversion Agreement* below.

C. Reply to Intervenors' Argument Regarding Consumptive Use

Intervenors introduce their argument regarding consumptive use with a heading that claims Bentley's pond "Is Not Water Tight, Has Excess Seepage and Consumes and Wastes Water." (*Answering Brief* at p.28, ll.1-4). Intervenors dedicated over five (5) pages of their *Answering Brief* (pp.28-33) to a discussion of percolation and seepage tests. This is not a legal argument. There is no requirement in Nevada water law, the *Diversion Agreement*, or elsewhere for a water tight pond. A water tight pond would literally be a cement swimming pool.

Intervenors' reference to waste is a technical term that implies a criminal violation. See NRS 533.460, 533.463. Waste has never been alleged in this case and the suggestion of such is another one of Intervenors' inflammatory statements.

Intervenors failed to rebut the argument raised in Bentley's *Opening Brief*, that the prohibition against consumptive use in the *Diversion Agreement* must be interpreted as something different than a prohibition against seepage, such as a prohibition against the use of the water for irrigation.

The conduct of the parties is relevant to the interpretation of the *Diversion Agreement*. Intervenors accepted and allowed the continuous diversions and resulting seepage, at least through the first pond, since 1987. This demonstrates that either the Intervenors do not actually consider seepage to be a consumptive use or they are guilty of waiver and estoppel, in which case their claim is barred by the statute of limitations, discussed *infra*.

D. Reply to Intervenors' Argument Regarding Chain of Title

Intervenors dedicated almost nine (9) pages of their *Answering Brief* to the chain of title. Although that analysis might have been important if the Whitmires attempted to sell the subject water rights to Lodato, that analysis is unnecessary for the *Diversion Agreement*, which is a use agreement that did not affect title. The case regarding the *Diversion Agreement* should have proceeded through three (3) different levels of analysis:

1. Did Lodato need the *Diversion Agreement* to divert his own water? The answer to this question is simply no. Lodato did not need approval from the Rolphs or the Whitmires to divert and consume his own water rights and he cannot be accused of violating the *Diversion Agreement* by "consuming" his own water. Intervenors seem to think that Lodato was required to turn down his own water to be used for irrigation by the Whitmires. Lodato did not surrender his own water rights and there was no basis upon which the District Court could have voided the *Diversion Agreement* for the Lodato/Bentley rights.

2. Did Lodato need the Rolphs' signature to divert the Whitmires' water rights from the North Branch of Sheridan Creek? Intervenors did not contest the essential issues in Bentley's *Opening Brief*, including (i) the Rolphs never changed the place of use of the water rights they purported to reserve; (ii) the water rights remained with the land owned by the Whitmires; and (iii) the Whitmires enjoyed full use of the water rights. Although this Court would need to resolve the title issue if the Whitmires had attempted to sell their water rights, the *Diversion Agreement* is a use agreement, not a purchase and sale agreement. In this case, although the Rolphs reserved the water rights in their deeds to the Whitmires, they never changed the place of use. The water rights remained appurtenant to the Whitmires' property and the Whitmires continued to use those rights. See *Adaven Mgmt. v. Mountain Falls Acquisition*, 124 Nev. at 775, 191 P.3d at 1192

("Therefore, the term 'appurtenant' in NRS 533.040 refers to where the water right may be put to beneficial use, not ownership.") The Intervenors admitted that the water stayed with the Whitmires and that the Whitmires enjoyed full use of the water, if not actual ownership of the water rights [Tr.Trans. Jan 9, 2012 122:24-123:8, 128:22-129:1, SA 6 1058-1059]. There is no evidence that the Rolphs ever objected to the *Diversion Agreement* and they eventually deeded the water rights to the Whitmires on November 9, 1987, before the Intervenors (other than Forrester and Mitchell) acquired their property. The *Diversion Agreement* was fully enforceable on that date, if not before. Under no circumstance should the District Court have voided the use agreement to Lodato's use of the Whitmires' rights.

3. Did Lodato need the Rolphs' approval to divert water from the South Branch of Sheridan Creek? The answer to this question is yes. However, this is irrelevant, as neither Lodato nor the Webers or Bentleys, as his successors-in-interest, tried to divert the water from the South Branch of Sheridan Creek. Intervenors still have not explained why they continue to insist that the Rolphs needed to sign the *Diversion Agreement* to allow diversions from the North Branch of Sheridan Creek. The District Court should have limited the effect of the *Diversion Agreement* to the water from the North Branch of Sheridan Creek.

///

E. Reply to Intervenors' Argument Regarding No Meeting of the Minds

The Rolphs were the only people with standing to challenge the *Diversion Agreement*, and they never did so. Their signature was not necessary for an agreement that impacted the North Branch of Sheridan Creek only and not their rights to the South Branch of Sheridan Creek.

Intervenors were not parties to the *Diversion Agreement* and lack standing to argue "no meeting of the minds." Their predecessors-in-interest, Gerald and Pamela Whitmire, were parties to that agreement and never denied its enforceability. As parties, they would have been estopped from doing so. Intervenors, as the successors-in-interest to the Whitmires, are also estopped and precluded from challenging the *Diversion Agreement*. See *Noronha v. Stewart*, 199 Cal.App.3d 485 (1998); *Santa Monica Mountain Properties v. Simoneau*, 2002 Cal.App. Unpublished LEXIS 7872 (2002).

F. Reply to Intervenors' Argument Regarding Statute of Frauds

The statute of frauds is an affirmative defense, yet Intervenors allege statute of frauds as the main reason to quiet title. Intervenors argue that the *Diversion Agreement* violates the statute of frauds because it was "neither signed by putative Grantor June Irene Bartlett, who took title as June Irene Rolph, nor by putative Grantor Nancy Rolph Welch." (*Answering Brief* at p.43, ll.21-24). Intervenors'

argument on the statute of frauds is based on the same misconception that the Rolphs were Grantors and that they had to sign an agreement to allow Lodato to use the water from the North Branch of Sheridan Creek. Intervenors' statute of frauds argument also overlooks the fact that the Rolphs granted the water rights to the Whitmires.

G. Reply to Intervenors' Argument Regarding Bentley's Affirmative Defenses

Affirmative defenses are pled in answer to a complaint. NRCP 7. In this case, Intervenors never filed a complaint and Bentley never filed an answer. Bentley was not truly able to assert affirmative defenses. However, Bentley tried to raise the following issues.

1. Statute of Limitations

Intervenors do not deny the applicability of the five (5) year statute of limitations in NRS 11.080, which states:

> **NRS 11.080 Seisin within 5 years; when necessary in action for real property.** No action for the recovery of real property, or for the recovery of the possession thereof other than mining claims, shall be maintained, unless it appears that the plaintiff or the plaintiff's ancestor, predecessor or grantor was seized or possessed of the premises in question, within 5 years before the commencement thereof.

Instead, Intervenors argue, without foundation, that the statute of limitations began to run in 2008, when Bentley added a second pond, instead of 1987, when the *Diversion Agreement* was recorded. In fact, Intervenors have mounted a two

(2) pronged attack on the *Diversion Agreement*, alleging (i) the *Diversion Agreement* was void when recorded in 1987 [See *Response*, Fourth Affirmative Defense, SA 1 at 86]; and (ii) if the *Diversion Agreement* was not void when recorded, then Bentley violated the *Diversion Agreement* by adding a second pond in 2008 [See *Id.*]. Intervenors' focus on the 2008 date may be relevant for the second prong of Intervenors' argument. However, the primary act complained of is the recording of the *Diversion Agreement* in 1987 without the Rolphs' signatures.

Whether the Court applies the general rule or the discovery rule to the statute of limitations, Interevenors' claims are time barred. The recording of the *Diversion Agreement* was sufficient to impart notice to each of the Intervenors, who acquired their property after the *Diversion Agreement* was recorded. NRS 111.315, 111.320, 533.383.

> When an instrument involving real property is properly recorded, it becomes notice to all the world of its contents. [Citations omitted.] When the facts upon which the fraud is predicated are contained in a written instrument which is placed on the public record, there is constructive notice of its contents, and the statute of limitations begins to run at the date of the recording of the instrument. Allen v. Webb, 87 Nev. 261, ___, 485 P.2d 677, 684 (1971) (Batjer, J. concurring).

This Court relied on the date of recording as the operative date in *Lanigir v. Arden*, 82 Nev. 28, 36, 409 P.2d 891, 895 (1966) ("Nor does the fact that John conveyed away small parcels change our view, for the first of such conveyances

was on March 29, 1957, less than 5 years before this action was commenced. NRS 11.070; NRS 11.080"). Federal courts have given the same interpretation to Nevada's statute of limitations in quiet title actions. See *Hudnall v. Panola*, 2007 U.S. Dist. LEXIS 37802 (D. Nev. 2007); see also unpublished opinion of *Scott v. MERS*, 2015 U.S.App. LEXIS 2372 at p. 4 (9th Cir. 2015) ("The earliest date on which the Scotts could have filed this quiet title action was four years earlier, in November 2006, when Noble allegedly first recorded the property in her name using the forged deed.") California courts have given this same interpretation to CCP §318, which is virtually identical to NRS 11.080. See *Schaefer v. Berinstein*, 180 Cal.App.2d 107, 132, 4 Cal.Rptr. 236, 252 (Cal.App. 1960) ("The fact that the contracts . . . were illegal did not prevent the statute of limitations from running against an action to quiet title or recover possession.")

Intervenors admitted that the *Diversion Agreement* is part of their chain of title and was disclosed on their title reports prior to purchase. Donald Forrester testified that he had actual knowledge of the *Diversion Agreement* at the time he purchased his property. [Tr.Trans. Jan 9, 2012 126:19-127:2, SA 6 1058]. They admitted the same in response to request for admissions.

> **REQUEST FOR ADMISSION NO. 11:** Admit that at least one pond already existed on the Bentley property at the time you acquired your property.
>
> **RESPONSE TO REQUEST FOR ADMISSION NO. 11:** Admit.

REQUEST FOR ADMISSION NO. 12: Admit that the Water Diversion and Use Agreement ("*Diversion Agreement*") recorded in the Official Records of Douglas County, Nevada, on 27 March 1987, as Document No. 152147, was recorded in your chain of title at the time you acquired your property.

RESPONSE TO REQUEST FOR ADMISSION NO. 12: Admit.

[Response to Request for Admissions, Tr.Ex. 85, SA 8 at 1560-1567]

2-3. Laches and Estoppel

Intervenors failed to provide points and authorities in opposition to Bentley's *Opening Brief* regarding laches, except to claim that laches does not apply because "the Bentleys were never prejudiced by any actions or delays of the Intervenors." (*Answering Brief* at p.48, ll.18-19). Intervenors disregard obvious evidence of prejudice. Intervenors waited until after Bentley purchased the property in 2006 to challenge the *Diversion Agreement* that was recorded in 1987. The related doctrines of laches and estoppel apply. Laches should apply to bar Intervenors' claims because they waited until all of the parties to the disputed *Diversion Agreement* either left the area or died. It is not feasible to conduct a trial regarding the intent and effect of a disputed agreement without the benefit of testimony of parties to the agreement. In so doing, Intervenors' entire case was built on supposition.

///

VI. REPLY TO INTERVENORS' ARGUMENT REGARDING ATTORNEY'S FEES

A. Merger

Intervenors did not dispute the application of the merger doctrine in *In re Westinghouse Securities Litigation*, 90 F.3d 696 (3rd Cir. 1996) which explained that "prior interlocutory orders merge with final judgment in a case, and the interlocutory orders (to the extent that they affect the final judgment) may be reviewed on appeal from the final order." *Id.* at 706. The interlocutory order in that case affected the final judgment. In contrast, Intervenors made no attempt to argue that the attorney's fees order in this case affected the *Decree*. It did not.

Intervenors' reliance on *Consolidated Generator-Nevada v. Cummins Engine Co.*, 114 Nev. 1304, 971 P.2d 1251 (1998) is misplaced. That case addressed the question of whether three (3) pretrial orders on procedural and evidentiary matters were appealable with the final judgment.

> Fourth, CGN argues that the district court abused its discretion in its determination of three interlocutory orders. Although these orders are not independently appealable, since CGN is appealing from a final judgment the interlocutory orders entered prior to the final judgment may properly be heard by this court. See Summerfield v. Coca Cola Bottling Co., 113 Nev. 1291, 1293-94, 948 P.2d 704, 705 (1997). Consolidated Generator-Nevada v. Cummins Engine Co., 114 Nev. at 1312, 971 P.2d at 1256 (Nev., 1998)

Those orders were made prior to the entry of final judgment. They were not separately enforceable and had to be appealed with the final judgment. That is

very different from the interlocutory order for attorney's fees in this case. Under NRCP 54(b), a motion for attorney's fees should be made after the entry of final judgment. An attorney's fees order is separately appealable as a special order after judgment. NRAP 3A(8). The merger doctrine simply does not anticipate an interlocutory order for attorney's fees becoming a final, enforceable order when it is not even referenced in the final judgment.

Another way to explain the problems with Intervenors' merger theory is to ask how the attorney's fees order will be enforced. It is not a final order that would allow for recordation as a judgment lien (NRS 17.150), the issuance of writs of execution (NRS 21.020), or other post-judgment enforcement procedures. Because the attorney's fees order is not mentioned in the *Decree*, the *Decree* cannot serve as the basis for any enforcement action, either. There is no final, enforceable order on attorney's fees.

B. The District Court Failed to Apportion Attorney's Fees

Attorney's fees have to be apportioned. See *Franchise Tax Board of California v. Hyatt*, 130 Nev.Adv. 71, 335 P.3d 125, 155 (2014), citing *Bergmann v. Boyce*, 109 Nev. 670, 675-76, 856 P.2d 560, 563 (1993) (holding that the district court should apportion attorney fees between causes of action that were colorable and those that were groundless and award attorney fees for the groundless claims). Intervenors failed to rebut Bentley's argument that the District Court failed to

apportion the attorney's fees between Bentley's five (5) exceptions that were resolved in their favor prior to trial and Intervenors' six (6) affirmative claims for relief, three (3) of which were abandoned prior to trial. Rather, Intervenors admit that "the district court did not specifically apportion fees . . . ." (*Answering Brief* at p.55, ll.7-8).

C. The District Court Failed to Identify the Legal Basis for the Award of Attorney's Fees

Intervenors claim that "The district court made specific reference to NRS 18.010(2)(b) in its Order." (*Answering Brief* at p.55, ll.4-5). Intervenors failed to cite the portion of the record that supports this statement. The January 4, 2013 *Order* was provided as SA 5 at 825-830. Although the *Order* contains a reference to NRS 18.010(2)(b) on the next to last page, the *Order* is simply reciting the earlier *Findings of Fact*, which did not specify the basis for the attorney's fees award.

Intervenors rely heavily on the inflammatory statements contained in the *Findings of Fact*, including:

> 44. Mr. Bentley, through intimidation and threat, attempted to bully the Intervenors, acting in manner to harass and financially exhaust the Intervenors. [*Findings of Fact*, SA 1 165, 168]

These are not *Findings of Fact* as such, but merely a recitation of Intervenors' inflammatory statements that served no evidentiary purpose and lack support in the record. No evidence has been provided of any intimidating

statements, nor would such statements serve as the basis for an award of attorney's fees under NRS 18.010. The District Court was so certain that the State Engineer had the legal authority to impose a rotation schedule that it considered Bentley's defense of the same to be frivolous. Hence, the entire premise of the award of attorney's fees was wrong.

D. Intervenors Did Not Actually Incur an Obligation for Attorney's Fees

Intervenors do not dispute that "an attorney proper person litigant must be genuinely obligated to pay attorney fees before he may recover those fees". *Sellers v. Fourth Judicial District Court*, 119 Nev. 256, 260, 71 P.3d 495, 498 (2003). "[A]n additional, indispensable requirement to an award of attorney's fees to *pro se* attorneys be a **genuine financial obligation** on the part of the litigants to pay such fees." *Lisa v. Strom*, 183 Az. 415, 419, 904 P.2d 1239, 1243 (Ariz. Ct. App. 1995) [emphasis added]. Intervenors failed to provide any evidence that the obligation for attorney's fees was actually incurred. Intervenors allege that "The obligation of Hall Ranches, LLC to pay attorney's fees has been certified in this case in the two Affidavits of Thomas J. Hall, Esq. . . ." (*Answering Brief* at p.57, ll.12-15). Intervenors did not cite to the record, nor would such a conclusory statement substitute for evidence that the obligation for attorney's fees was actually incurred. The undersigned was able to locate one of Mr. Hall's affidavits in the

record on appeal at SA 4, 62621-624. That affidavit mentions nothing about the obligation for attorney's fees being actually incurred.

VII. CONCLUSION

This appeal would have been unnecessary if the Respondents and the District Court applied the Nevada Revised Statutes, Rules of Civil Procedure and *Diversion Agreement* as written. Nothing in the Nevada Revised Statutes or any other rule of law authorized the District Court and the State Engineer to subject Bentley's vested rights to a mandatory rotation schedule for the benefit of "common good." The Bentleys' vested rights are theirs 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 historical flow and use of the water.

The *Diversion Agreement* is a covenant running with the land that allows the land owner to divert the North Branch of Sheridan Creek for the express purpose of maintaining levels in the ponds. The District Court ignored these express terms and the plain meaning of the *Diversion Agreement* when it ruled that Bentley's use of the water to maintain levels in the ponds is a consumptive use that violates the *Diversion Agreement*.

Although Bentley's predecessor, Joseph Lodato, may have needed the Rolphs' signatures on the *Diversion Agreement* to divert the South Branch of

Sheridan Creek, the diversions from the North Branch of Sheridan Creek were properly authorized by the Whitmires.

Intervenors' mislabeled affirmative defenses were insufficient to place their quiet title claim at issue in the proceedings in the District Court and their belated challenge to the *Diversion Agreement* is precluded by Bentley's affirmative defenses of statute of limitations, laches, and estoppel.

The District Court's award of attorney's fees emanates from the errors discussed above, including the misconception that NRS 533.075 authorizes a compulsory rotation schedule. The District Court also failed to apportion the attorney's fees and to ensure that the obligation for attorney's fees was actually incurred.

WHEREFORE, Bentley respectfully requests that this Court affirm the *Decree* to the extent that it affirms and modifies the *Final Order of Determination*; but reverse the *Decree* to the extent that it nullified the *Diversion Agreement*, mandated a rotation schedule, and awarded attorney's fees and costs to the Intervenors.

Dated this 15th day of June 2015.

MATUSKA LAW OFFICES, LTD.

By: _____

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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:

[**X**] Proportionately spaced, has a typeface of 14 points or more, and contains 6,913 words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

[ ] Does not exceed 30 pages.

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.

Dated this 15th day of June 2015.

MATUSKA LAW OFFICES, LTD.

By: _____

MICHAEL L. MATUSKA, SBN 5711

CERTIFICATE OF SERVICE

I certify that on the 15th day of June 2015, 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

X By mailing it by first class mail with sufficient postage prepaid to the following address(es):

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Dated this 15th day of June 2015.

LIZ STERN, ALS

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.

AND RELATED CASES.

Supreme Court Case No. 64773
(Consolidated with
Case Nos. 66303 & 66932)

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I. INTRODUCTION

The *Answering Brief* filed by Respondents/Intervenors repeats the mistakes contained in the State Engineer's *Answering Brief* regarding the equitable powers of the District Court and the allowed pleadings in a *Decree* case. Intervenors' *Answering Brief* failed to provide an adequate response to the other arguments raised in Bentley's *Opening Brief* as discussed below.

II. EQUITABLE vs. STATUTORY DECREES

In their Statement of the Case, the Intervenors explain as follows:

> On August 14, 2008, the State Engineer filed his Final Order of Determination ("FOD") of the relative water rights with the district court. 2 JA 190-242. The Bentleys filed certain exceptions thereto. Exceptions 1 JA 192-491. Intervenors filed their Response and Objection to Notice of Exceptions and Exceptions to Final Order of Determination. Response, 1 SA 85-88. *The district court accepted the Response as a pleading and proceeded to hear Response at trial on January 9, 2012.* (*Answering Brief* at p.1, l.28 – p.2, l.12) [Italics added]

Intervenors argue at other times in their *Answering Brief* as follows:

> The district court approved and validated the Intervenors' proposed Response, filed on November 19, 2009, being the identical response as previously attached to their Reply in Support of Motion to Correct Order Allowing Intervention. (*Answering Brief* at p.25, l.23 – p.26, l.2)
>
> * * * *
>
> The Intervenors' Response complied with the spirit and intent of NRCP Rules 8 and 12 . . . (*Answering Brief* at p.25, l.23 – p.26, l.2)

Intervenors' statements ignore the prior opinions issued by this Court regarding the limited scope of an adjudication proceeding.

> These provisions of the law seem perfectly clear, and not only to lay down the method of procedure but strictly to limit it to that provided. We have held in three distinct cases that the water law and all proceedings thereunder are special in their character (Scossa v. Church, 46 Nev. 254, 205 P. 518, 210 P. 563; Humboldt L. C. Co. v. District Court, 47 Nev. 396, 224 P. 612; In Re Water Rights in Humboldt River Stream System, 49 Nev. 357, 246 P. 692), hence, such must be held to be settled law. Ruddell v. District Court, 54 Nev. 363, 367, 17 P.2d 695 (1933).

There is no room for substantial compliance in this water rights adjudication case. "The order of determination by the State Engineer and the statements or claims of claimants and exceptions made to the order of determination shall constitute the pleadings, and **there shall be no other pleadings in the cause**." (NRS 533.170(2)) [emphasis added]. The District Court lacked jurisdiction to try Intervenors' affirmative defenses regarding the *Diversion Agreement* and further lacked jurisdiction to consider the State Engineer's oral motion to impose a rotation schedule at the end of the trial.

Intervenors try to avoid this explicit prohibition against their non-conforming pleading by arguing that they would have been allowed to proceed to trial, anyway, because they are aligned with the State Engineer. (*Answering Brief* at p.26, ll.17-23). This is another argument for substantial compliance and is factually inaccurate. The State Engineer has declared multiple times that he "takes

no position on the validity of the *Diversion Agreement*." (State Engineer's *Answering Brief* at p.20). The FOD that the State Engineer submitted to the District Court did not contain a rotation schedule or any mention of the *Diversion Agreement*. The District Court impermissibly allowed the Intervenors to expand the scope of the adjudication proceedings by including the affirmative defenses regarding the *Diversion Agreement*.

III. STANDARD OF REVIEW

The Intervenors are confused about the standard of review in this case. They assert that:

> The district reviews the State Engineer's FOD de novo. Appeals from the FOD are "taken to the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court pursuant to Section 4 of Article 6 of the Nevada Constitution by . . . any party in interest in the same manner and with the same effect as in civil cases . . . ." NRS 533.200. (*Answering Brief* at p.4, ll.5-12).

Intervenors later argue that the standard of review is not de novo.

> NRS 533.450(9) provides that "the decision of the State Engineer shall be prima facie correct, and the burden of proof shall be upon the party attacking the same." (*Answering Brief* at p.4, ll.21-26).

Intervenors' reliance on NRS 533.450(9) is misplaced, as that is a statute of general applicability that is not part of the adjudication statutes. Intervenors misquoted NRS 533.200, which addresses appeals from the *Decree*. In contrast, objections to the FOD are filed as "exceptions" which are heard by the District Court, not as appeals. NRS 533.170(1).

Intervenors' reference to de novo review and burden of proof is also irrelevant, as the FOD made no findings regarding the rotation schedule or *Diversion Agreement*. Intervenors' arguments regarding the rotation schedule and the *Diversion Agreement* are entirely outside the scope of this adjudication and completely extraneous to the FOD.

IV. REPLY TO INTERVENORS' ARGUMENT CONCERNING THE ROTATION SCHEDULE

A. The Parties Agreed That a Rotation Schedule Would Not be Part of the *Decree*

Intervenors also misquoted the trial transcript wherein the parties stipulated that a rotation schedule would not be included in the *Decree*. Admittedly, there seems to be an error in the transcription; however, Intervenors made the wrong edits. The transcript provides as follows:

> THE COURT: …the State Engineer retains as Mr. Stockton said his right to oppose such a rotation schedule in a given water year if it became necessary. [SA 6 at 1030:2-3]

The correct transcription should be:

> THE COURT: …the State Engineer retains as Mr. Stockton said his right to [impose] such a rotation schedule in a given water year if it became necessary.

Intervenors, in contrast, misquoted this passage as follows:

> THE COURT: . . . the State Engineer retains as Mr. Stockton said [the Bentley's] right to oppose such a rotation schedule. (*Answering Brief* at p.7, ll.5-6)

> This passage affirms the argument presented in Bentley's Opening Brief – the District Court assumed that NRS 533.075 authorized the State Engineer to impose a rotation schedule. It does not. That section merely allows the claimants to agree to share their water on rotation.

Intervenors correctly quoted the portion of the transcript whereby the Bentleys reserved the right to challenge the legal basis for the rotation schedule.

> THE COURT: And, Mr. Matuska, do you stipulate to the same?
>
> MR. MATUSKA: Yes, except that we've opposed the – the legal authority of the State Engineer to impose a rotation schedule in the first place, but the way that the stipulation is being presented, it isn't an immediate issue for us today. Ostensibly, we would have the right to object to or oppose or even appeal an action from the State Engineer in the future.
>
> THE COURT: Agreed.

(*Answering Brief* at p.7, ll.19-26, quoting SA 6 at 1031:1-10).

This stipulation was accurately set forth in the April 5, 2012 *Findings of Fact*.

> 15. The parties made the following stipulations in relation to these Exceptions at the beginning of the trial, which were adopted by the Court:
>
> > a. Exception 1, in part, was that the State Engineer would not attempt to include a rotation schedule in the Decree itself, but that the provisions of NRS 533.075 and the 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. [*Findings of Fact* JA1 158]

In a similar manner, Hon. David R. Gamble confirmed at the outset of trial that the rotation schedule was not the issue to be tried.

> THE COURT: We're proceeding on the Intervenors' claim and defenses, if I can say it that way.
>
> [Tr. January 9, 2012, 71: 3-8, SA 6 1045]
>
> MR. MATUSKA: Right. I appreciate that, and thank you for the clarification, I'm just trying to clarify the operative pleading that the Intervenors are proceeding on. My understanding would be that is [ed.] the Intervenors' response and objections to notice of exceptions -- and exceptions to Final Order of Determination dated November 19th of 2009.
>
> THE COURT: Is that your position also, Mr. Hall?
>
> MR. HALL: Yes, that is, Your Honor.
>
> THE COURT: Okay. I agree with that.
>
> [Tr. January 9, 2012, 71:25-72:8, SA 6 1045]

As such, the trial proceeded on Intervenors' challenge to the *Diversion Agreement* as alleged in the affirmative defenses contained in Intervenors' *Response* [JA 5 880-883]. That document only refers to Bentley's ponds and the disputed *Diversion Agreement* that was the subject of trial. That is a separate issue from the rotation schedule that was the subject of the petitions for judicial review. Even if the topic of the rotation schedule arose during the trial on Intervenors' *Response* or made its way into the *Findings of Fact* or *Decree*, the issue of a

rotation schedule was separate from the issues tried in Case No. 08-CV-0363-D and was not a necessary part of the *Decree*.

Consistent with the foregoing stipulations, Bentley petitioned for judicial review of the rotation schedules that were subsequently imposed by the State Engineer. Those petitions were consolidated with the Smith/Barden petitions and proceeded as Case No. 08-CV-0363-D-1. Hon. Nathan Tod Young even confirmed in a later order that Bentley had reserved the right to petition for judicial review [JA 5 1069: 1-13]. However, for reasons that are not clear on the record, Judge Young simply deferred to the earlier *Findings of Fact* and failed to address the petitions for judicial review on their merits. The November 27, 2013 Order did not specifically mention issue preclusion and did not fully explain why the *Findings of Fact* would be controlling, especially in light of the stipulation that Bentley reserved the right to petition for judicial review [JA 5 1057-1062]. Neither the Intervenors nor the State Engineer rebutted Bentley's argument that the related doctrines of issue preclusion and claim preclusion should not have precluded a decision on the merits of the petitions for judicial review. (See *Opening Brief* at 25-28).

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B-D. Reply to Intervenors' Arguments About the Common Law of Rotation Schedules

1. Intervenors' Argument Regarding Common Law Was Not Raised in the Court Below

Intervenors dedicate approximately thirteen (13) pages of their *Answering Brief* (pp.8-20) to arguments about the use of rotation schedules under the common law. This is an admission that NRS 533.075 does not authorize the State Engineer to impose a rotation schedule; however, NRS 533.075 was the only authority cited by the State Engineer, the Intervenors, and the District Court in the case below.

> 15. The parties made the following stipulations in relation to these Exceptions at the beginning of the trial, which were adopted by the Court:
>
> a. Exception 1, in part, was that the State Engineer would not attempt to include a rotation schedule in the Decree itself, but that the provisions of NRS 533.075 and the 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. [*Findings of Fact* JA 1 158]

* * * *

> With regards to Mr. Stockton's request for a decision regarding an implementation of a rotation schedule, the Court finds the State Engineer has full authority to implement a rotation schedule for fair distribution of the water of the State of Nevada when they deem it appropriate [*Minutes of the Court*, SA 9 1724]

* * * *

> 1.) Diversion/Rotation Schedule: It was stipulated at the beginning of the trial that the Decree would not include a rotation schedule. However, under the provisions of NRS § 533.075 and the orders of this Court, when the combined flow of Sheridan Creek falls below 2.0 cubic feet per second (cfs), the State Engineer shall impose a rotation schedule . . . . [*Decree* SA 5 849]

Intervenors' failure to raise the issue of a rotation schedule as an exception to the FOD in a conforming pleading is not merely a matter of form. Their argument about equitable powers available under the common law is an entirely new argument that was not raised in the District Court, which is raised for the first time on appeal. Intervenors' argument about the common law of rotation was not mentioned at all in their *Pretrial Statement* because the rotation schedule was not the issue for trial [See *Pretrial Statement*, SA 3 at 531-580].

2. Intervenors Failed to File Exceptions and/or a Conforming Pleading

Intervenors' argument about the common law of rotation schedules is irrelevant to these proceedings. The rotation schedule was not part of the FOD. Intervenors were required to bring any exceptions to the FOD five (5) days prior to the April 1, 2008 hearing. They failed to do so. "**[T]here shall be no other pleadings in the cause.**" (NRS 533.170(2)) [emphasis added]. Any other pleading requesting an amendment to the FOD is strictly precluded. This includes Intervenors' *Response*/affirmative defenses [JA 5 880-883], as well as the State Engineer's oral motion at the conclusion of trial.

As discussed above and in the *Reply* to the State Engineer's *Answering Brief*, Intervenors' argument in favor of further pleadings and broad, unspecified equitable powers available under common law has been repeatedly rejected by this Court.

> It is asserted by the respondents that the proceeding in which the application for an injunction was made is a special proceeding, and that the district court had no jurisdiction to issue an injunction, and hence the appeal should be dismissed. It is contended on the part of appellants that the district court is a court of general jurisdiction, with general equity powers, and pursuant thereto had jurisdiction to issue an injunction in this matter.
>
> We are clearly convinced that the view taken by counsel for the respondents is the correct one. In re Water Rights In Humboldt River Stream System, 49 Nev. 357, 361 (1926).
>
> * * * *
>
> But it is said that the application made for an injunction is in substantial compliance with the spirit of the statute, and hence they have a right to appeal. This being a special statutory proceeding, no right to appeal exists unless it is expressly conferred by the statute. Coffin v. Coffin, 40 Nev. 345, 163 P. 731. *Id.* 364.

3. Intervenors' Argument Regarding Common Law Does Not Address the Impairment Issue

Water rights are freely alienable property interests separate from the land to which they are appurtenant. This Court has previously explained that "water rights are a separate 'stick' in the bundle of property rights." *Adaven Mgmt. v. Mountain Falls Acquisition*, 24 Nev. 770, 774, 91 P.3d 1189, 1192 (2008) (citing *Dermody v. City of Reno*, 113 Nev. 207, 212, 931 P.2d 1354, 1358 (1997)). In *Adaven Mgmt.*,

this Court held that "water rights are freely alienable without regard to the land to which the water rights are appurtenant or the ability of the transferee to put the water to beneficial use." *Id.* By tying Bentley's water rights to a mandatory rotation schedule for the benefit of Intervenors' irrigation needs, the District Court and the State Engineer impaired the alienability of the water rights and essentially eliminated the possibility that Bentley can ever change the manner of use or sell the water rights to be used at a different location. Intervenors' elaborate discussion of common law does not resolve this fundamental conflict.

4. Intervenors' Analysis of the Common Law is Not Accurate

Intervenors' argument about the common law of rotation schedules is unpersuasive. They rely exclusively on cases from other jurisdictions and secondary sources which have not been adopted as learned treatises in this state and which do not even reference Nevada's statutory adjudication proceedings. 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.15, ll.9-12) is only loosely accurate. *Barnes v. Sabron*, *Hufford v. Dye*, 162 Cal. 147, 160-61, 121 P. 400, 406, (Cal. 1912), and *McCoy v. Huntley*, 60 Or. 372, 119 P. 481 (Or. 1911) all concerned only two (2) users, where the lower user held the prior rights and the upstream user interfered with the delivery of water. The courts in those cases did not attempt to adjudicate the water