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)

APPELLANTS' REPLY BRIEF TO NEVADA STATE ENGINEER'S ANSWERING BRIEF

Matuska Law Offices, Ltd.
Michael L. Matuska, Esq. SBN 5711
2310 South Carson Street, Suite 6
Carson City NV 89701
Phone: (775) 350-7220
Fax: (775) 350-7222

Attorneys for Appellants, J.W. Bentley and MaryAnn Bentley, Trustees of The Bentley Family 1995 Trust

Attorney General
State of Nevada
Bryan L. Stockton, Esq. SBN 4764
Deputy Attorney General
100 North Carson Street
Carson City, Nevada 89701
Phone: (775) 684-1228
Fax: (775) 684-1103

Attorneys for Respondent, The State of Nevada, Office of the State Engineer

Dyer, Lawrence, Penrose, Flaherty, Donaldson & Prunty
Jessica C. Prunty, Esq. SBN 6926
2805 Mountain Street
Carson City NV 89703
Phone: (775) 885-1896
Fax: (775) 885-8728

Attorneys for Appellants, Joy Smith, Daniel Barden, and Elaine Barden

Law Office of Thomas J. Hall
Thomas J. Hall, Esq. SBN 675
305 South Arlington Avenue
P.O. Box 3948
Reno NV 89505
Phone: (775) 348-7011
Fax: (775) 348-7211

Attorneys for Intervenors, 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

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I. INTRODUCTION

The State Engineer's *Answering Brief* is predicated on the mistaken belief that the District Court, sitting as the decree court, has broad, equitable powers beyond those set forth in NRS 533.090 et seq. The State Engineer writes:

> The District Court fashioned what can only be called an equitable remedy . . .
>
> * * * *
>
> Bentley asserts that the adjudication process is statutory and that the district court has no equitable authority in distributing the waters under the decree. Bentley OB at 16. This assertion ignores the controlling preceding. *Bailey v. State*, 95 Nev. 378, 382, 594 P.2d 734, 736 (1979) (quoting *State Engineer v. American Nat'l Ins. Co.*, 88 Nev. 424, 426, 498 P.2d 1329, 1330 (1972). (*Answering Brief* at p.16).
>
> * * * *
>
> Thus, the court fashioned a remedy to help both parties to the extent it could . . . This court should affirm the equitable power of the decree courts to ensure that water is distributed fairly and affirm the decision. (Answering Brief at p. 18).

There is no room for a so-called "equitable" or "fair" distribution of vested water rights. Bentley is entitled to receive his water as determined by the *Final Order of Determination* ("FOD") as amended by the *Decree*. He does not have to share. The State Engineer must know that *Bailey v. State* and *State Engineer v. American Nat'l Ins. Co.* were not decree cases, did not concern vested rights, and are not controlling precedent. Rather, this Court has almost 100 years of precedent

in decree cases, all of which consistently state that adjudication proceedings are special, statutory proceedings that limit the scope of the proceedings and the power of the District Court.

II. EQUITABLE vs. STATUTORY DECREES

The State Engineer filed the FOD of the relative rights with the District Court on August 14, 2008 [JA 2 190-424]. The FOD did not contain a rotation schedule. Exceptions were due five (5) days in advance of the hearing on April 1, 2009. Bentley filed certain exceptions thereto [JA 1 190-491]. The scope of such an adjudication is to "determine the relative rights to the use of water . . . ." See NRS 533.090. The FOD has the effect of a complaint in a civil case and Bentley's exceptions have the effect of an answer. No other pleadings are allowed. NRS 533.170(2). Despite this prohibition against further pleadings, the District Court allowed Intervenors to file a document entitled *Response and Objections to Notice of Exceptions and Exceptions to Final Order of Determination* ("Response") [SA 1 85-88]. Intervenors' *Response* was styled as affirmative defenses, but included a claim to quiet title to a *Water Use and Diversion Agreement* that was recorded in March 1987, by Bentley's predecessor-in-interest, Joseph Lodato. The parties proceeded to trial on Intervenors' affirmative defenses in January 2012. At the conclusion of the trial on January 13, 2012, the District Court granted the State Engineer's oral motion to impose a rotation schedule,

which was in effect a late exception to amend his own FOD.

The State Engineer should know that there is no legal authority for him to impair Bentley's vested rights with a compulsory rotation schedule and his reliance on *Bailey v. State*, 95 Nev. 378, 382, 594 P.2d 734, 736 (1979), is badly misplaced. That case has limited effect and merely confirms that if a permittee does not receive actual notice of the cancellation of a permit the court can grant equitable relief to hear a petition for judicial review commenced outside of the thirty (30) day limit specified in NRS 533.450. *Bailey v. State* also relied on the earlier case of *State Engineer v. American Nat'l Ins. Co.*, 88 Nev. 424, 426, 498 P.2d 1329, 1330 (1972), in which the District Court granted equitable relief to avoid the cancellation of permit due solely to the failure to file the proof of beneficial use, when the required works had in fact been completed in a diligent manner. That case also addressed the related issue of substantial compliance.

In the present case, the State Engineer's argument that the District Court has the equitable power to impose a compulsory rotation schedule is different entirely from the equitable relief concerning permit deadlines granted to the permittees in *Bailey v. State* and *State Engineer v. American Nat'l Ins. Co.* Those cases do not concern a decree court or vested rights and cannot support the State Engineer's proposition that the District Court has equitable power in a statutory adjudication proceeding to impair vested water rights. The District Court does not have the

power, statutory, equitable, or otherwise, to impair vested rights.

The State Engineer also seems confused about the nature of the decree proceedings. Nevada Supreme Court opinions differentiate between statutory decrees and equitable decrees. For instance, the 1919 Quinn River decree at issue in *McCormick v. Sixth Judicial District Court*, 69 Nev. 214, 246 P.2d 805 (1952), was an equitable adjudication that did not proceed under the 1913 water law as amended. *Id.* at 807. *McCormick* explains that equitable adjudications and statutory adjudications are two different proceedings, notwithstanding the 1951 statutory amendments that created the office of the State Engineer and empowered him to administer equitable decrees along with statutory decrees. (See NRS 533.310).

This present case concerns the statutory adjudication process, not an equitable decree. The sole purpose of the proceedings is to determine the relative rights of the claimants. This Court declared in an earlier decree case under NRS Chapter 533 that: "It is . . . settled in this state that the water law and all proceedings thereunder are special in character and the provisions of such law not only lay down the method of procedure, **but strictly limit it to that provided**." *G and M Properties v. Second Judicial District Court*, 95 Nev. 301, 305, 594 P.2d 714, 716 (1979) [emphasis added] (quoting *In Application of Filippini*, 66 Nev. 17, 27, 202 P.2d 535, 540 (1949)) (holding that the District Court lacked jurisdiction to

consider late filed exceptions in a decree case). *G and M Properties* considered and rejected *State Engineer v. American Nat'l Ins. Co.* as the source of some extra-statutory equitable power in a statutory decree proceeding. This renders the State Engineer's reliance on *Bailey v. State* and *State Engineer v. American Nat'l Ins. Co.* frivolous.

G and M Properties cited earlier decree cases which reinforce the limited jurisdiction of the District Court in statutory adjudication cases. For instance, in the case of *In re Water Rights In Humboldt River Stream System*, 49 Nev. 357 (1926), the appellant filed a petition for an injunction to enjoin the allocation of water pursuant to the final order of determination while the decree was pending. The District Court denied the petition for lack of jurisdiction. The Supreme Court agreed and dismissed the appeal. In so doing, this Court rejected the "substantial compliance" analysis.

> 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. *Id.* at 361.
>
> * * * *
>
> Section 33 of the water law [as amended by Stats. 1921, p. 174, c. 106, sec. 5a) provides that, when such order of determination is filed

> with the clerk of the proper district court, it shall have the legal effect of a complaint in a civil action, and that a copy thereof shall be served on all interested parties. *Id.* at 362.
>
> * * * *
>
> The water law is a special statutory proceeding brought into effectual existence after much travail to meet a great public need. The law meets every demand for a full, fair, and just determination of the rights of every water user. It safeguards the rights of every water user by giving him the benefit of a stay of the order of determination until final decree and every advantage of a full judicial hearing and determination in the district court. Though these rights are secured to him, he must avail himself of them by proceeding in the manner outlined in the water law. *Id.* at 363-64.
>
> * * * *
>
> 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.

The Supreme Court reached a similar result in another case involving the Humboldt Decree, *Ruddell v. District Court*, 54 Nev. 363 (1933). In that case, Ruddell's vested rights were determined by the final order of determination, which served as the complaint in the decree case. No exceptions concerning Ruddell's rights were filed within the time allowed (April 2, 1923). After a hearing on February 1, 1926, the District Court entered the decree on June 17, 1931. In the meantime, a group including Taylor and others filed a petition for the determination of their rights on June 5, 1930. The District Court entered a

modified decree on October 20, 1931, which included the Taylor group's claims. Ruddell filed a petition for a writ of certiorari and the Taylor group moved to dismiss. This Court denied the motion.

> We pointed out In Re Water Rights in Humboldt River Stream System, 49 Nev. 357, 246 P. 692, the procedure under the water law, and that the order of determination of the state engineer, as filed with the clerk of the proper district court, has the legal effect of a complaint. *Id.* at 366-67.
>
> * * * *
>
> 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, 49 Nev. 357, 246 P. 692), hence, such must be held to be settled law. *Id.* at 367.
>
> * * * *
>
> If the petition of Taylor and others can be permitted, then what is to prevent the filing at some future date further petitions by water users upon the stream system? We can see no escape from the language of the law providing that "there shall be no other pleadings in the cause" than those therein provided for.
>
> The inquiry in this proceeding is limited to a determination of whether or not the inferior court has regularly pursued its authority. Section 9237 N.C.L.; Wilson v. Morse, 25 Nev. 375, 60 P. 832; Gilbert v. Board of Police Fire Com'rs., 11 Utah, 395, 40 P. 264. A consideration of the unambiguous language of the water law, and of the spirit thereof, leads us inevitably to the conclusion that the respondent court had no authority to entertain the petition of Taylor and others. It is ordered that the alternative writ be made permanent. *Id.* at 367-68.

The foregoing authorities settle the question at issue. The jurisdiction of the District Court when sitting as the decree court is limited by the adjudication statutes, NRS 533.090 to 533.320. The District Court lacked the broad equitable power advocated by the State Engineer or the jurisdiction to hear the Intervenors' claims in Case No. 08-CV-0363-D, which concerned an action to quiet title to the Water Use and Diversion Agreement. The District Court also lacked jurisdiction to entertain the State Engineer's oral motion to impose a rotation schedule, which was made at the conclusion of the trial in Case No. 08-CV-0363-D.

The State Engineer's oral motion for the rotation schedule was tantamount to a request to amend his own FOD to impose conditions on Bentley's vested water rights, which were determined without reference to a rotation schedule. There is no room for the State Engineer or the District Court to impose additional conditions in the FOD, especially when exceptions were due (5) days prior to the initial hearing on April 1, 2009. The FOD does not contain a rotation schedule and the District Court lacked jurisdiction to impose the rotation schedule at the conclusion of trial on January 13, 2012, upon oral motion from the State Engineer or any other party.

III. THE STATE ENGINEER CONCEDED MOST OF BENTLEY'S ARGUMENTS

The State Engineer admitted most of Bentley's case, the dispute over the District Court's "equitable powers" notwithstanding. These admissions include the

following:

1. The water rights in this case have equal dates of priority, 1852 for Sheridan Creek and 1905 for Stutler Creek (*Answering Brief*, pp.3-4);

2. The Mitchell and Sheridan Creek Equestrian Center properties have no claim to the water of Gansberg Spring (*Answering Brief*, pp.4-5);

3. Bentley had continuous flows to the first pond before the Whitmire parcels were subdivided and sold to the Intervenors (*Answering Brief*, p.5); and

4. The State Engineer did not apply NRS 533.075 when imposing the rotation schedule, does not have authority to impose a mandatory rotation schedule, but only followed the orders of the District Court (*Answering Brief*, p.19).

The State Engineer failed to address the other arguments in Bentley's *Opening Brief*, including:

1. The issue of a rotation schedule was not tried in District Court Case No. 08-CV-0363-D;

2. The District Court subsequently applied an incomplete analysis of issue preclusion/claim preclusion in Case No. 08-CV-0363-D1 when it declined to hear the Bentley/Smith/Barden Petitions for Judicial Review simply because the rotation schedule was authorized by the *Findings of Fact*.

3. Bentley's water rights have been changed from irrigation rights to

recreation rights and are not eligible to be used for irrigation, whether by Bentley or any other party;

4. The rotation schedule impairs Bentley's vested rights;

5. Mechanical diversion devices can be employed to prevent any concern about over appropriation and the remedy for alleged over appropriation is an injunction by the District Court; and

6. The District Court lacked jurisdiction to hear the Intervenors' challenge to the *Diversion Agreement*.

Rather than address these important issues, the State Engineer employs hyperbole, inflammatory statements, statements without citations to the record, and misrepresentations of the record. The various issues raised in the State Engineer's Statement of Facts (*Opening Brief* at pp.3–12) were not accepted in the *Decree* or its *Findings of Fact*. Because there is no legal authority for the State Engineer or the District Court to subject stock and wildlife and recreation rights to a rotation schedule for irrigation purposes, it is not necessary for Bentley to address the State Engineer's Statement of Facts in detail. Nevertheless, Bentley provides the following brief rebuttal in an abundance of caution.

IV. REBUTTAL TO STATE ENGINEER'S ASSERTIONS OF FACT

Statement of Fact No. 1:

"*The district court found that a rotation schedule was necessary to effectuate*

the ability for 'all parties . . . to share the water shortage during periods of low flow.'" (State Engineer's *Answering Brief* at p. 15, incorrectly quoting SA Vol. 5 at 963).

Rebuttal to Statement of Fact No. 1:

The district court did not make such a finding, because the trial concerned the *Diversion Agreement*, not the rotation schedule. The State Engineer's reference to SA 5 at 963 is not a finding, but a table, with a footnote which states: "Therefore, all parties will have to share the water shortage during periods of low flow. The total diversion from either the north or south split can be used in its entirety in a rotation system of irrigation." This footnote was simply extracted from the FOD [JA 2 at 388]. As explained in Bentley's *Opening Brief*, the FOD confirmed the voluntary nature of a rotation schedule in the following passage:

> **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 2 289] [emphasis added]

Statement of Fact No. 2:

"*Bentley radically altered the system in 2008 . . .*" (State Engineer's *Opening Brief*, p. 3) and "*Bentley then drastically altered the irrigation system.*" (*Id.* at 7)

Rebuttal to Statement of Fact No. 2:

The State Engineer goes on to explain that Bentley replaced the old, leaky corrugated pipe with new, larger ABS pipe and a series of water boxes with working headgates, all at his own cost. The water boxes, with fully functioning head gates, are depicted numerous times in the record, including the Field Investigation Reports that is the focus of the State Engineer's *Answering Brief* [Trial Exs. 33, SA 1397-1411]. Bentley is the only party who has invested money to upgrade the dilapidated water delivery system and should be commended for this effort. These changes are irrelevant to the case at hand, except to the extent that the infrastructure to properly divide the water is in place and fully functional. Consequently, these changes are not mentioned in the *Decree*. Rather, the *Decree* calls for additional infrastructure for the splitter for the North and South Branch of Sheridan Creek [*Decree*, SA 5 at 849].

Statement of Fact No. 3:

Discussion of "Historical Irrigation" (*Answering Brief* at pp.3-5) and "Subdivision" [*Answering Brief* at pp.5-6).

Rebuttal to Statement of Fact No. 3:

The State Engineer's recitation of "historical irrigation" at pp.3-5 of his *Answering Brief* and "subdivision" at pp.5-6 is irrelevant to the legal arguments presented and is also inaccurate and careless. The State Engineer's recitation of

"historical irrigation" cites only to the testimony of Donald Forrester [SA 8 at 1051-1053] and the *Findings of Fact* attached to the *Decree* [SA 5 at 976]. Mr. Forrester's testimony, and the *Findings of Fact*, only address the current delivery system. There was no testimony regarding the method of appropriation of Sheridan Creek in 1852 or Stutler Creek in 1905, nor would there have been any foundation for the parties to this case to offer such testimony.

The State Engineer seems confused when he refers to Stutler Creek as a "tributary" of Sheridan Creek (*Answering Brief* at p.2). It is not. Stutler Creek is a separate creek to the north of Sheridan Creek. [See Stanka Report, Trial Ex. 96, Figures 5.4.4, 6.1.1, 6.2.1, SA 5 at 1667, 1669, and 1673]. Presumably, Stutler Creek was used to irrigate the northerly properties, but was later captured at its source and diverted to Sheridan Creek. Sheridan Creek, in turn, runs through its natural creek bed, entering and exiting Bentley's lower pond and continues down to the Mitchell and Sheridan Creek Equestrian Center properties. In other words, Bentley does not need to divert water to the lower pond, but allows Sheridan Creek to run its natural course. [See Stanka Report, Trial Ex. 96, Figure 4.0.1 and 4.1.1].

The State Engineer further convolutes the discussion of the historical system when he mentions Gansberg Spring. Gansberg Spring was permitted in 1925. [FOD, JA2 at 370]. Gansberg Spring is not one of the vested rights at issue in this case.

Statement of Fact No. 4:

The State Engineer makes other allegations of "detriment of [Bentley's] neighbors," the Smith/Barden four (4) inch pipe that would "suck that water box dry . . ." and increased crop yields following the implementation of the rotation schedule (*Answering Brief* at pp.8, 12).

Rebuttal to Statement of Fact No. 4:

The *Findings of Fact* and *Decree* made no findings about over appropriation, detriment, or increased crop yields. This is for two (2) reasons. First, the District Court ordered the State Engineer to impose a rotation schedule under NRS 533.075 as a means of allocating the water, without regard to the allegations of over appropriation.

Second, none of this anecdotal evidence was substantial enough to be incorporated into the *Findings of Fact* or the *Decree*. Substantial evidence is defined "as that which a reasonable mind might accept as adequate to support a conclusion." *Bacher v. State Engineer*, 122 Nev. 1110, 1121, 146 P.3d 793 (2006). As for increased crop yields, the Intervenors never bothered to quantify their yields, either before or after the rotation schedule, nor is there any way to isolate multiple variables that would impact yields, including weather patterns, precipitation, or other factors. The State Engineer undermined his own argument about over appropriation when he conceded that "The findings of the study were

that when flow was above 2.0 cfs Bentley's ponds did not consume more than his proportional share of the waters." (*Answering Brief* at p.9). Bentley has consistently advocated for metering so that the parties could share proportionately in any shortfall when the flows drop below 2.0 cfs. The State Engineer's allegations of over appropriation are a distraction from the real issues concerning the illegal, forced rotation schedule.

Lest there be any doubt, 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. In fact, the State Engineer can only cite the testimony of two (2) of the Intervenors, Tom Scyphers and Frank Scharo, who testified that the rotation schedule improved their water condition. (*Answering Brief* at p.12). Mr. Scyphers and Mr. Scharo irrigate from the same segmented pipe. Other Intervenors, including Ronald Mitchell and Glen Roberson (Sheridan Creek Equestrian Center) irrigate from Sheridan Creek and testified that the rotation schedule makes it harder from them to irrigate because it allows the creek bed to run dry. Bentley, Smith, and Barden also testified about the difficulties they had with the rotation schedule. (See *Opening Brief* at 21-22, 41-42).

Ultimately, this argument over increased crop yields and the common good has no legal relevance. This case involves vested rights which may not be

impaired or conscripted for the common good or any other reason. Intervenors cannot use a claim of increased crop yields to justify the forced rotation of the vested rights of other claimants.

Statement of Fact No. 5:

The State Engineer included derisive comments about Bentley's use of his water rights. "*Bentley cares only about his two ponds and his fish and will selfishly force the other water right holders to let their hay crops die from lack of water.*" [*Answering Brief* at 16).

Rebuttal to Statement of Fact No. 5:

Bentley explained in his *Opening Brief* that there is no hierarchy of beneficial uses. His vested rights for recreation, stock, and wildlife enjoy the same priority and legal protection as the Intervenors' irrigation rights. Bentley does not have to submit to forced acts of charity to allow more water for Intervenors' irrigation, just as the Intervenors do not intend to voluntarily forego their irrigation for the benefit of Bentley's ponds.

V. REBUTTAL TO STATE ENGINEER'S ARGUMENT

A. Rebuttal to State Engineer's part "a. Authority to Impose Rotation Schedule" and part "b. Authority for State Engineer's Authority to Impose Rotation Schedules"

Bentley largely addressed the State Engineer's parts "a" and "b" above. The State Engineer cites NRS 533.230, which specifies that the division of water must

be made by the State Engineer in accordance with the FOD and NRS 533.320. That statute confirms that the State Engineer and his assistants "shall at all times be under the supervision and control of the district court." The State Engineer wants the Court to infer that he is simply a humble public servant dutifully following the orders of the District Court. This is false. The FOD did not contain a rotation schedule. Rather, the State Engineer requested the rotation schedule at the conclusion of trial on January 13, 2012.

B. Rebuttal to State Engineer's part "c. Consumptive Use of Water"

The State Engineer's part "c" is also badly misleading. The State Engineer argues about consumptive use without referring to the *Diversion Agreement*. Instead, the State Engineer refers to a technical definition in a *Water Words Dictionary*, 3d ed., Nevada Division of Water Planning, June 1994, p.30, and argues that seepage is consumptive use. There is no indication that the parties to the *Diversion Agreement* intended to adopt a technical definition. As such, the *Diversion Agreement* must be given its plain, ordinary meaning:

> 5. Grantee desires to divert some or all of the water from Sheridan Creek, onto his property, to be used in a non-consumptive manner to maintain water levels in ponds on Grantee's property, and thereafter to cause the water to be diverted back to the property of Grantors for irrigation purposes. [SA 7 1299-1300].

This Court must avoid an interpretation of the *Diversion Agreement* that would render performance impossible. See *Restatement (Second) of Contracts*

§202 (1979). These passages leave no doubt that use of the water to maintain the levels in the multiple ponds is a non-consumptive use. Adopting the definition advocated by the State Engineer would make it impossible for Bentley to divert water and would render the Diversion Agreement meaningless.

The State Engineer also wants this Court to infer that Bentley is guilty of over appropriation by adding the second pond. In fact, the *Diversion Agreement* consistently refers to ponds – plural – and depicts multiple ponds on the sketch attached thereto. As explained in Bentley's *Opening Brief*, the imposition of a rotation schedule, which impairs vested rights, is not a remedy for over appropriation. The State Engineer is responsible for administering the water and there should be no opportunity for over appropriation. The State Engineer is required by statute to divide the water according to the relative rights.

> **NRS 533.305 Division of water among ditches and reservoirs; regulation of distribution among users; notice of regulation by water commissioner; duties of district attorney.**
>
> 1. The State Engineer shall divide or cause to be divided the waters of the natural streams or other sources of supply in the State among the several ditches and reservoirs taking water therefrom, according to the rights of each, respectively, in whole or in part, and shall shut or fasten, or cause to be shut or fastened, the headgates or ditches, and shall regulate, or cause to be regulated, the controlling works of reservoirs, as may be necessary to insure a proper distribution of the waters thereof.

NRS 533.220(1) confirms that the distribution of adjudicated water rights remains under the jurisdiction of the District Court, which has the power to enjoin

violations of the FOD and Decree. The State Engineer also has the authority to appoint an engineer to monitor the diversions and to charge the users for that cost. NRS 533.275, 533.305(2). The State Engineer has resorted to a rotation schedule instead of dividing the water as required by the FOD, as amended by the *Decree*.

C. Gansberg Spring

Although the State Engineer admits that the place of use for Permit 7595 is not identical to the place of use of Sheridan Creek water rights, he has chosen not to administer Gansberg Spring because "it would be difficult and expensive." (*Answering Brief* at p.5). The State Engineer further refers to "de minimus advantage." That is a legal argument that was stated in a conclusory manner in part "b" of the State Engineer's Statement of Facts (*Answering Brief* at pp.4-5). Although the concept of "de minimus advantage" may appear in other areas of the law, it has no place in this special, statutory proceeding. This is another example of how the State Engineer has abdicated his responsibility to divide the water to the detriment of Bentley.

VI. CONCLUSION

The only authorities cited by the State Engineer to support his argument that the District Court has additional equitable powers in a decree case are *Bailey v. State*, 95 Nev. 378, 594 P.2d 734, and *State Engineer v. American Nat'l Ins. Co.*, 88 Nev. 424, 498 P.2d 1329. Those cases are not decree cases and *State Engineer*

v. American Nat'l Ins. Co. was rejected by *G and M Properties v. Second Judicial District Court*, 95 Nev. 301, 594 P.2d 714, which was a decree case. The State Engineer's argument is frivolous in light of *In re Water Rights In Humboldt River Stream System*, 49 Nev. 357, *Ruddell v. District Court*, 54 Nev. 363, and *McCormick v. Sixth Judicial District Court*, 69 Nev. 214, 246 P.2d 805, which explain that adjudication proceedings under NRS 533.090 et seq. are limited, special, statutory proceedings, not equitable proceedings.

Although the State Engineer argues about over appropriation, there were no findings of over appropriation, nor is a compulsory rotation schedule a remedy for alleged over appropriation. Rather, the State Engineer needs to allocate the water in accordance with the decreed rights. Over appropriation can be enjoined by the District Court and prevented with mechanical devices, many of which have already been installed by Bentley at his own cost.

The rotation schedule is also objectionable in that it nullifies the *Diversion Agreement* and encourages parties without rights to Gansberg Spring to illegally use the water.

WHEREFORE, Bentley respectfully requests that this Court affirm the *Decree* to the extent it affirms and modifies the Final Order of Determination; but reverse the *Decree* to the extent 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: _____
MICHAEL L. MATUSKA, SBN 5711
Attorneys for PETITIONERS,
J.W. BENTLEY and MARYANN
BENTLEY

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:

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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 NEVADA STATE ENGINEER'S 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):

Bryan L. Stockton
Deputy Attorney General
100 North Carson Street
Carson City, NV 89701

Thomas J. Hall
305 South Arlington Avenue
P.O. Box 3948
Reno NV 89505-3948

Jessica C. Prunty
Dyer, Lawrence, Penrose, Flaherty,
Donaldson & Prunty
2805 Mountain Street
Carson City NV 89703

Dated this 15th day of June 2015.

Liz Stern

LIZ STERN, ALS