

1  
2  
3 IN THE SUPREME COURT OF NEVADA  
4

5 J.W. BENTLEY and MARYANN  
6 BENTLEY, TRUSTEES OF THE  
7 BENTLEY FAMILY 1995 TRUST;  
8 JOY SMITH; DANIEL BARDEN;  
9 and ELAINE BARDEN,

10 Appellants,

11 v.

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

21 Respondents /

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

27 Appellants.

28 v.

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

37 Respondents /

Electronically Filed  
May 15 2015 08:43 a.m.  
Supreme Court Case No.  
64773 Tracie K. Lindeman  
(Consolidated with Clerk of Supreme Court  
Supreme Court Case Nos.  
66303 & 66932)

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

1 J.W. BENTLEY AND MARYANN  
2 BENTLEY, TRUSTEES OF THE  
3 BENTLEY FAMILY 1995 TRUST,

4 Appellants,

5 v.

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

14 Respondents /

## 15 **RESPONDENTS' ANSWERING BRIEF**

16 (In Response to Opening Brief filed by Jessica Prunty, Esq.)  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

TABLE OF CONTENTS

	<u>Page (s)</u>
TABLE OF CONTENTS .....	i-ii
TABLE OF AUTHORITIES .....	iii-iv
I. JURISDICTIONAL STATEMENT .....	1
II. ROUTING STATEMENT .....	1
III. ISSUES PRESENTED FOR REVIEW.....	1
IV. STATEMENT OF THE CASE .....	1
V. STATEMENT OF FACTS .....	2
VI. ARGUMENT .....	4
A. Standard of Review .....	3
B. Smith and Barden Were Parties To the Adjudication .....	5
C. The Parties Agreed That a Rotation Schedule May be Authorized in the Decree .....	7
1. The Rotation Schedule Allows All Parties the Ability to Receive Their Share of Water .....	9
2. The Pre-statutory Vested Water Rights Held by the Parties Can be Modified by Court-ordered Rotation .....	10
a) There are three types of water rights recognized in Nevada .....	11
b) Pre-statutory vested water rights are not impaired by later statutory provisions .....	13
D. Stutler Creek and Gansberg Spring Rotation is Included .....	14

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

E.	The Rotation Of The Scarce Water Resources During The Dry Season Has Been Properly Ordered .....	15
F.	Substantial Evidence Supports The District Court's Order For Rotation And The State Engineer's Implementation Of Same .....	21
VII.	INTERVENORS ARE ENTITLED TO COSTS .....	27
VIII.	CONCLUSION .....	28
IX.	NRAP 26.1 DISCLOSURE STATEMENT .....	30
X.	ATTORNEY'S CERTIFICATION .....	31

**TABLE OF AUTHORITIES**

**Cases**

**Page (s)**

Andersen Family Assocs. V. State Engineer, 124 Nev. 182, 179 P.3d 1201 (2008) .....	11, 14
Anderson v. Bassman, 140 Fed. 14 (N.D. Cal. 1905) .....	19
Arguello v. Sunset Station, Inc., 127 Nev.Adv.Op. 29, 252 P.3d 206 (2011) .....	3
Barnes v. Sabron, 10 Nev. 217 (1875) .....	16
Hufford v. Dye, 121 Pac. 400 (Cal. 1912) .....	18
Mimbres Valley Irrigation Co. v. Salopek, 140 P.3d 1117 (N.M.App. 2006) .....	20
Ormsby County v. Kearney, 37 Nev. 314, 142 Pac. 803 (1914) .....	12
State v. Twin Falls Canal Co., 121 Pac. 1039 (Idaho 1911) .....	16
State Engineer v. Curtis Park, 101 Nev. 30, 692 P.2d 495 (1985) .....	4
Town of Eureka v. State Engineer, 108 Nev. 163, 826 P.2d 948 (1992) .....	4
Weddell v. H2O, Inc., 128 Nev.Adv.Op. 9, 271 P.3d 743 (2012) .....	4

**Nevada Revised Statutes**

NRS 1.030 .....	13
NRS 533.075 .....	6, 7, 13, 14
NRS 533.085(1) .....	10, 13
NRS 533.090-533.435 .....	1

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

<u>Nevada Revised Statutes</u>	<u>Page(s)</u>
NRS 533.170 .....	3
NRS 533.200 .....	3
NRS 533.450(1) .....	4, 27
NRS 533.450(7) .....	27, 28
NRS 533.450(9) .....	3
 <u>Nevada Rules of Appellate Procedure</u>	
NRAP 28(i) .....	2
 <u>Nevada Rules of Civil Procedure</u>	
NRCP 52(a) .....	3
 <u>Other Authorities</u>	
J. Davenport, <u>Nevada Water Law</u> (2003) .....	11, 26, 32
W. Hutchins, <u>California Law of Water Rights</u> (1956) .....	8
C. Kinney, <u>A Treatise on the Law of Irrigation</u> <u>and Water Rights</u> , 2 <sup>nd</sup> Ed. (1912) .....	15
A. Tarlock, <u>Law of Water Rights and Resources</u> § 5:34 (2010) .....	8

1  
2 **I. JURISDICTIONAL STATEMENT.**

3 Respondents HALL RANCHES, LLC, a Nevada Limited  
4 Liability Company, THOMAS J. SCYPHERS, KATHLEEN M. SCYPHERS,  
5 FRANK SCHARO, SHERIDAN CREEK EQUESTRIAN CENTER, LLC, a Nevada  
6 Limited Liability Company, DONALD S. FORRESTER, KRISTINA M.  
7 FORRESTER, RONALD R. MITCHELL and GINGER G. MITCHELL,  
8 hereinafter Intervenor, agree with the Jurisdictional  
9 Statement submitted by Appellants Joy Smith, Daniel Barden  
10 and Elaine Barden ("Smith and Barden").

11  
12 **II. ROUTING STATEMENT.**

13 The Intervenor agree with the Routing Statement  
14 provided by the Smith and Barden.

15 **III. ISSUES PRESENTED FOR REVIEW.**

16 Intervenor agree with the Issues Presented for Review  
17 as this is the appeal of Smith and Barden.

18  
19 **IV. STATEMENT OF THE CASE.**

20 This appeal rises from the adjudication of multiple  
21 vested water rights located in Carson Valley pursuant to NRS  
22 533.090-533.435. On August 14, 2008, the State Engineer  
23 filed his Final Order of Determination ("FOD") of the  
24 relative water rights with the district court. 2 JA 190-424.  
25 The Bentleys filed certain exceptions thereto. Exceptions, 1  
26 JA 192-491. Intervenor filed their Response and Objection  
27

1 to Notice of Exceptions and Exceptions to Final Order of  
2 Determination. Response, 1 SA 85-88. The district court  
3 accepted the Response as a pleading and proceeded to hear  
4 the Bentleys' Exceptions as well as the Intervenor's  
5 Response at trial on January 9, 2012. Intervenor's prevailed  
6 on all matters set forth in their Response. On April 5,  
7 2012, the district court entered Findings of Fact,  
8 Conclusions of Law and Judgment, determining that under the  
9 specific facts and circumstances of the matters presented at  
10 trial, the State Engineer should impose a rotation schedule  
11 under certain terms and conditions. Finding of Fact, 1 JA  
12 154-171; 5 SA 974-990.

13 All current and remaining appeals have been  
14 consolidated by Order of this Court entered on January 22,  
15 2015.

16 **V. STATEMENT OF FACTS.**

17 The essential facts involving this matter are amply and  
18 fully set forth by Respondent State Engineer in his brief  
19 filed herein and are incorporated herein for brevity. See  
20 NRAP 28(i).

21 Intervenor's have no real issue with the Statement of  
22 Facts provided by Smith and Barden.



1  
2 On September 29, 2014, the Final Decree was entered  
3 which adopted and included the Findings of Fact, Conclusions  
4 of Law and Judgment as Appendix C. 5 SA 848-849.

5 Other facts will be supplied to support the arguments  
6 made below as necessary.

7 **VI. ARGUMENT.**

8 **A. Standard of Review.**

9  
10 The district court reviews the State Engineer's FOD de  
11 novo. NRS 533.170. Appeals from the FOD are "taken to the  
12 appellate court of competent jurisdiction pursuant to the  
13 rules fixed by the Supreme Court pursuant to Section 4 of  
14 Article 6 of the Nevada Constitution by . . . any party in  
15 interest in the same manner and with the same effect as in  
16 civil cases . . . ." NRS 533.200. "Findings of fact shall  
17 not be set aside unless clearly erroneous, and due regard  
18 shall be given to the opportunity of the trial court to  
19 judge the credibility of the witnesses." NRCP 52(a).  
20 Questions of law are reviewed do novo. Arguello v. Sunset  
21 Station, Inc., 127 Nev.Adv.Op. 29, 252 P.3d 206, 207-208  
22 (2011).  
23

24  
25 The district court relied heavily on the State  
26 Engineer's FOD. To the extent the decision of the State  
27 Engineer is under review, NRS 533.450(9) provides that,

1  
2 "[t]he decision of the State Engineer shall be prima facie  
3 correct, and the burden of proof shall be upon the party  
4 attacking the same." Review of a decision of the State  
5 Engineer is in the nature of an appeal and is, consequently,  
6 limited in nature. NRS 533.450(1). On appeal, this Court is  
7 to review the evidence upon which the State Engineer based  
8 his decision to ascertain whether the evidence supports the  
9 decision, and if so, the Court is bound to sustain the State  
10 Engineer's decision. State Engineer v. Curtis Park, 101 Nev.  
11 30, 32, 692 P.2d 495 (1985). Purely legal issues or  
12 questions may be reviewed without deference to an agency  
13 determination. However, the agency's conclusions of law that  
14 are closely related to its view of the facts are entitled to  
15 deference and will not be disturbed if they are supported by  
16 substantial evidence. Town of Eureka v. State Engineer, 108  
17 Nev. 163, 165-166, 826 P.2d 948 (1992).

18  
19  
20 As generally discussed by this Court in Weddell v. H2O,  
21 Inc., 128 Nev.Adv.Op. 9, 271 P.3d 743, 748 (2012):

22 The issues on appeal require us to review the  
23 district court's factual findings, as well as  
24 interpret statutory and contractual provisions.  
25 "The district court's factual findings . . . are  
26 given deference and will be upheld if not clearly  
27 erroneous and if supported by substantial  
28 evidence." Ogawa v. Ogawa, 125 Nev. 660, 668, 221  
P.3d 699, 704 (2009). "Substantial evidence is  
evidence that a reasonable mind might accept as  
adequate to support a conclusion." Whitemaine v.

1  
2 Aniskovich, 124 Nev. 302, 308, 183 P.3d 137, 141  
3 (2008). Issues involving statutory and contractual  
4 interpretation are legal issues subject to our de  
5 novo review. See *Canarelli v. Dist. Ct.*, 127 Nev.  
6 \_\_\_, \_\_\_, 265 P.3d 673, 676 (2011) (declaring that  
7 "[w]e review the district court's conclusions of  
8 law, including statutory interpretations, de  
9 novo'" (quoting *Borger v. Dist. Ct.*, 1021, 1026,  
10 102 P.3d 600, 604 (2004))); *Benchmark Insurance*  
11 *Company v. Sparks*, 127 Nev. \_\_\_, \_\_\_, 254 P.3d  
12 617, 620 (2011) (providing that "[i]nterpretation  
13 of a contract is a question of law that we review  
14 de novo'" (quoting *Farmers Ins. Exch. V. Neal*, 119  
15 Nev. 62, 64 P.3d 472, 473 (2003))).

16 **B. Smith and Barden Were Parties to the Adjudication.**

17 Smith and Barden submitted proofs V-06346 and V-06347,  
18 2 JA 266. By so doing they became a part of the  
19 adjudication. They were not required to, and elected not to,  
20 participate in the exception process, but they are under the  
21 jurisdiction of the district court and are bound by the  
22 decisions thereof. "The decree entered by the court, as  
23 provided by NRS 533.185, shall be final and shall be  
24 conclusive upon all persons and rights lawfully embraced  
25 within the adjudication . . . ." NRS 533.210(1). Both Smith  
26 and Barden were present at some of the trial proceedings and  
27 Smith testified on the Bentleys' behalf at the hearing. 6 SA  
28 1184, 3 TR 412-440. Testimony at the hearing indicated that  
the four inch (4") pipe that leads to the Barden and Smith  
properties would take the entire flow of the North Split of  
Sheridan Creek during low-flow.

1  
2 The order of the district court was properly crafted to  
3 ensure all water users obtain their share in a way that  
4 makes that share useable. McCormick v. Sixth Judicial Dist.  
5 Court in & for Humboldt County, 69 Nev. 214, 226, 246 P.2d  
6 805 (1952) ("We think it abundantly clear that the district  
7 court sitting as a court of equity had full and complete  
8 authority, if it felt that the circumstances or the  
9 exigencies of the case warranted, to see that its decree was  
10 enforced . . . .") Smith and Barden may have chosen to act  
11 at their own peril by not formally entering the adjudication  
12 process; however, once the proofs of their claims were  
13 submitted, they were parties and are bound by the outcome.  
14 NRS 533.210(1).

15  
16 The Smith and Barden brief states, at page 12, lines  
17 19-26, as follows:  
18

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

1  
2 The problem of course with this statement is that NRS  
3 533.075 never "embodie[d] the common law." The cases are  
4 quite uniform that the common law required rotation during  
5 times of low flow, even over the objection of the water  
6 users, an equitable and fair way to distribute scarce water  
7 resources as discussed further below.

8  
9 C. The Parties Agreed That a Rotation Schedule May be  
10 Authorized in the Decree.

11 At the commencement of the trial in this matter, the  
12 parties in attendance stipulated and agreed that a rotation  
13 schedule would not be included in the Decree, and if later  
14 imposed by the State Engineer, the Bentleys reserved the  
15 right to contest the same. The transcript of this portion  
16 of the trial provides, 6 SA 1030-1031; 1 TR 10:1 - 13:10:

17  
18 MR. STOCKTON: So, we haven't actually put that  
19 into writing yet, but we worked out an agreement.

20 \* \* \*

21 And so what we've agreed is it was never our  
22 intention to put a rotation schedule in the  
23 decree. [S]o there won't be a rotation schedule in  
the decree, but State Engineer still retains his  
statutory flexibility to impose a rotation  
schedule if need be.

24 THE COURT: Which is going to happen in four  
25 months. I agree . . . that the Exceptors [the  
26 Bentleys] . . . have continually opposed the  
27 imposition of a rotation schedule. If it were not  
in the decree, and perhaps there could be a  
recitation in the decree that the State Engineer  
retains [the Bentleys'] right to oppose such a

1  
2 rotation schedule in a given water year it if  
3 became necessary.

4 MR. HALL: That's satisfactory.

5 \* \* \*

6 THE COURT: Okay. So with regard to exception  
7 number 1, I believe it's a stipulation of the  
8 parties that the final decree itself will not  
9 contain a rotation schedule, but that the State  
10 Engineer will retain [his] statutory authority to  
11 impose such a rotation schedule within [his]  
12 discretion in a given water year . . . . Is . . .  
13 that an accurate recitation of it, Mr. Stockton?

14 MR. STOCKTON: Yes, Your Honor.

15 THE COURT: Do you agree with that Mr. Hall?

16 MR. HALL: Yes, sir.

17 \* \* \*

18 THE COURT: And, Mr. Matuska, do you stipulate  
19 to the same?

20 MR. MATUSKA: Yes, except that we've opposed the  
21 - the legal authority of the State Engineer to  
22 impose a rotation schedule in the first place, but  
23 the way that the stipulation is being presented it  
24 isn't an immediate issue for us today. Ostensibly  
25 we would have the right to object to or oppose or  
26 even appeal an action from the State Engineer in  
27 the future.

28 THE COURT: Agreed.

The case proceeded on the basis of that stipulation and  
agreement. See Findings of Fact, ¶ 15(a), 5 SA 977.

\\\\\\

1  
2       1.   The Rotation Schedule Allows All Parties the  
3 Ability to Receive Their Share of Water.

4       In 2006, J. W. Bentley and Maryann Bentley, Trustees of  
5 the Bentley Family 1995 Trust ("Bentleys"), who are also  
6 Appellants in this matter, purchased their property and in  
7 2008, proceeded to dismantle the Intervenor's water  
8 diversion structures, pipes, ditches and water boxes, and  
9 thereafter built a second, larger, unlined, water consuming  
10 pond. Exhibit 29; 7 SA 1378-1379; 6 SA 1052-1053; 1 TR 98:20  
11 - 101:10.

13       Because of the geographic location of the Bentleys'  
14 property, being where Sheridan Creek and Stutler Creek first  
15 flow onto the Bentleys' property, above the Intervenor's  
16 properties, the Bentleys are able to divert the entire flow  
17 of water during times of scarcity, shortage and drought,  
18 thereby depriving the Intervenor's and Appellants Smith and  
19 Barden of all water during such periods of low flow. 6 SA  
20 1056; 1 TR 115:18 - 116:23.

22       Smith and Barden testified at trial. Their position was  
23 that the four inch (4") pipeline providing water to their  
24 properties should remain as in the past without  
25 interruption. Joy Smith merely testified that she wanted the  
26 same use as before to water her pastures and keep water in  
27

1  
2 her pond via a continuous flow. 6 SA 1186; 3 TR 419:2-  
3 420:8. Dan Barden testified he prefers the way things were.  
4 6 SA 1237; 4 TR 557:6-558:18.

5 Following extensive pre-trial discovery, motions,  
6 hearings and a non-jury trial before District Judge David R.  
7 Gamble, he determined under the specific facts and  
8 circumstances presented, that rotation shall be imposed by  
9 the State Engineer whenever water flows drop below 2.0 cfs,  
10 at the level the district court determined that all users  
11 would not be receiving the full complement and flow of their  
12 vested water rights. 6 SA 988, ¶ 5 and 6. In 2012 and 2013  
13 the State Engineer implemented the rotation schedule  
14 pursuant to the district court's order. 1 JA 7-18, 5 JA  
15 889-899.  
16

17  
18 **2. The Pre-statutory Vested Water Rights Held By The**  
19 **Parties Can Be Modified By Court-ordered Rotation.**

20 Because all the water rights considered in this case  
21 were vested in 1852 and 1905, before statutory provisions  
22 were later legislated, these pre-statutory vested water  
23 rights are not subject to the limitations contained in the  
24 rotation-by-consent only statute, NRS 533.075.  
25

26 Throughout this nation, and apparently throughout the  
27 world, rotation of water rights has been imposed on non-  
28



1  
2 consenting users. Here, Smith and Barden have superior  
3 geographic location from a water box and four inch (4") pipe  
4 that the water flows through before flowing downstream to  
5 the Intervenor. 6 SA 1054; 1 TR 103:24-106:3. Smith and  
6 Barden would have no motive, incentive or reason to share  
7 scarce water in times of low flow. Therefore, no agreement  
8 to rotate the water would ever be reached. While Smith and  
9 Barden appear to have an amicable relationship with the  
10 Bentleys, the Intervenor's rights would be impaired if  
11 court-ordered rotation of the water is not implemented.  
12 Previously, in 2008, the Bentleys have actually used the  
13 entire flow during times of scarcity contrary to the common  
14 law and customary principles of equity, fairness and  
15 justice. 5 SA 1056; 1 TR 116:8-16.  
16  
17

18 **a) There are three types of water rights recognized in**  
19 **Nevada.**

20 In the case of Andersen Family Assocs. v. State  
21 Engineer, 124 Nev. 182, 188-189, 179 P.3d 1201 (2008), this  
22 Court elucidated the classifications and attributes of the  
23 various water rights in Nevada stating:  
24

25 Generally, "[t]he term 'water right' means . . .  
26 the right to divert water by artificial means for  
27 beneficial use from a natural spring or stream.  
28 In Nevada, there are three different types of  
water rights: vested, permitted, and certificated.  
First, "vested" rights are those that existed

1  
2 under Nevada's common law before the provisions  
3 currently codified in NRS Chapter 533 were enacted  
4 in 1913. These rights may not be impaired by  
5 statutory law and may be used as granted in the  
6 original decree until modified by a later permit.  
7 Second, "permitted" rights refer to rights granted  
8 after the State Engineer approves a party's  
9 "application for water rights." Such permits grant  
10 the right to develop specific amounts of water for  
11 a designated purpose. Third, "certificated" rights  
12 are statutory rights granted after a party  
13 perfects his or her permitted water rights. In  
14 order to perfect permitted water rights, an  
15 applicant must file proof of beneficial use with  
16 the State Engineer. Once proof has been filed, the  
17 State Engineer will issue a certificate in place  
18 of the permit. [Emphasis added.]

19 In footnote 6, this Court noted:

20 The Legislature enacted NRS 533.085(1) to avoid  
21 any unconstitutional impingements on water rights  
22 that were in existence at the time Nevada's  
23 statutory water law went into effect. *Manse*  
24 *Spring*, 60 Nev. at 288-89, 109 P.2d at 315.

25 In the present case, all the parties' pre-statutory  
26 vested water rights have common dates of priority of 1852  
27 and 1905, and are classified as vested water rights. 8 SA  
28 1630.

29 Rights acquired before 1913 can only be lost or  
30 adjusted in accordance with the law in existence prior to  
31 the time of the enactment of Nevada statutory water right  
32 provisions. In Ormsby County v. Kearney, 37 Nev. 314, 352-  
33 353, 142 Pac. 803 (1914), this Court explained:

34 The greater portion of the water rights upon the  
35 streams of the state were acquired before any

1  
2 statute was passed prescribing a method of  
3 appropriation. Such rights have uniformly been  
4 recognized by the courts as being vested under the  
5 common law of the state. Nothing in the act shall  
6 be deemed to impair these vested rights; that is,  
7 they shall not be diminished in quantity or value.  
8 As they are all prior in time to water rights  
9 secured in accordance with later statutory  
10 provisions, such priorities must be recognized.  
11 [Emphasis added.]

12 See, J. Davenport, Nevada Water Law, at 13-14 (2003).

13 The common law is applicable to all the courts of the  
14 State of Nevada as set forth in NRS 1.030, as follows:

15 **1.030. Application of common law in courts.**

16 The common law of England, so far as it is not  
17 repugnant to or in conflict with the Constitution  
18 and laws of the United States, or the constitution  
19 and laws of this state, shall be the rule of  
20 decision in all the courts of this state.

21 **b) Pre-statutory vested water rights are not impaired**  
22 **by later statutory provisions.**

23 Furthermore, it is clearly provided in NRS 533.085(1):

24 **533.085. Vested rights to water not impaired.**

25 1. Nothing contained in this chapter shall  
26 impair the vested right of any person to the use  
27 of water, nor shall the right of any person to  
28 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.

Thus, it is clear the 1913 statutory rotation-by-  
consent-only provision of NRS 533.075 cannot control the  
pre-statutory 1852 and 1905 vested water rights under review

1  
2 here. That section relates to other, post-1913 statutorily  
3 created rights, to wit:

4       **533.075. Rotation in use of water.**

5       To bring about a more economical use of the  
6       available water supply, it shall be lawful for  
7       water users owning lands to which water is  
8       appurtenant to rotate in the use of the supply to  
9       which they may be collectively entitled . . . .

10       See generally, Andersen Family Assocs. v. State  
11       Engineer, 124 Nev. 182, 185-186, 179 P.3d 1201 (2008).

12       **D.   Stutler Creek and Gansberg Spring Rotation is**  
13       **Included.**

14       The district court found and determined, 5 SA 976:

15       8.   The matters at issue herein concern only the  
16       North Diversion.

17       9.   The waters of Stutler Creek were put to  
18       beneficial use in 1905 and are diverted by a  
19       pipeline and co-mingled with the waters of the  
20       North Diversion and are administered therewith.

21       10.  The waters of Gansberg Spring are the subject  
22       of State Engineer's Permit 07595, Certificate  
23       1760. The waters of Gansberg Spring are diverted  
24       by a pipeline and co-mingled with the waters of  
25       the North Diversion and are administered  
26       therewith.

27       11.  Collectively, these waters are known simply  
28       as the North Diversion of Sheridan Creek.       .

      Because the waters of Stutler Creek are co-mingled with  
the waters in a pipeline prior to joining Sheridan Creek,  
and because it would be difficult and expensive to

1 administer the waters separately, the district court  
2 determined that these waters would be administered with  
3 other waters of Sheridan Creek. 5 SA 976; 6 SA 1138-1139; 2  
4 TR 334:19-336:17.

5  
6 Gansberg Spring, like most springs in Nevada, does not  
7 flow at the same rate at all time, and generally contributes  
8 a small and variable percentage of the total water flow. The  
9 district court found that the flow did not justify a water  
10 commissioner to regulate the flow separately and that the  
11 waters should be administered together despite the de  
12 minimus advantage to the small properties that were not  
13 within the boundaries for Permit 07595. ¶10; 5 SA 976.

14  
15 **E. The Rotation Of The Scarce Water Resources During**  
16 **The Dry Season Has Been Properly Ordered.**

17  
18 Since long before 1913, it has been the policy of  
19 Nevada water law to encourage rotation during the dry  
20 season. It is also the basis upon which the FOD was made, as  
21 cited above, and is entirely consistent with prudent and  
22 practical irrigation water distribution practices.

23  
24 The concept of rotation of irrigation water is fairly  
25 ancient as discussed by C. Kinney, A Treatise on the Law of  
26 Irrigation and Water Rights, 2<sup>nd</sup> Ed., § 909, Rotation as a  
27 Matter of Economy, at 1607 (1912):

1  
2 As was said in a recent Idaho case<sup>1</sup>: "The use of  
3 water under the rotation system is approved by  
4 high engineering authorities." And the [Idaho  
5 Supreme] Court proceeds to quote from those great  
6 works by Robert B. Buckley and Sir Hanbury Brown,  
7 and we can do no better than to quote what these  
8 works say upon the subject: "The most wasteful  
9 system of irrigation possible is that under which  
10 all branch canals, distributaries and village  
11 channels are in use continuously and the available  
12 supply is slowly dribbling into the fields. For  
13 not only is the actual loss of water greater, but  
14 under this system there is also this further  
15 disadvantage, that the velocities in all the  
16 distributaries and minor channels are reduced, and  
17 the silt in the water, which at these points of  
18 the system is nearly always advantageous to the  
19 fields, is largely deposited in the channels and  
20 not carried onto the cultivated ground. The system  
21 of irrigation by rotation or by tatils, as it is  
22 called in Upper India, is of great advantage, not  
23 only in checking the loss of water in the channel,  
24 but in teaching economical irrigation to the  
25 cultivators and in insuring an equitable division  
26 of the supply among the people.

27  
28 More than a century ago, this Court, in the case of  
29 Barnes v. Sabron, 10 Nev. 217, 243-247 (1875), approved the  
30 common law doctrine of rotation for vested water rights.  
31 There, junior upstream appropriators intercepted and failed  
32 to rotate use of water from Currant Creek in Nye County,  
33 damaging the senior downstream appropriator's crops. This  
34 Court held:

35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50  
51  
52  
53  
54  
55  
56  
57  
58  
59  
60  
61  
62  
63  
64  
65  
66  
67  
68  
69  
70  
71  
72  
73  
74  
75  
76  
77  
78  
79  
80  
81  
82  
83  
84  
85  
86  
87  
88  
89  
90  
91  
92  
93  
94  
95  
96  
97  
98  
99  
100  
101  
102  
103  
104  
105  
106  
107  
108  
109  
110  
111  
112  
113  
114  
115  
116  
117  
118  
119  
120  
121  
122  
123  
124  
125  
126  
127  
128  
129  
130  
131  
132  
133  
134  
135  
136  
137  
138  
139  
140  
141  
142  
143  
144  
145  
146  
147  
148  
149  
150  
151  
152  
153  
154  
155  
156  
157  
158  
159  
160  
161  
162  
163  
164  
165  
166  
167  
168  
169  
170  
171  
172  
173  
174  
175  
176  
177  
178  
179  
180  
181  
182  
183  
184  
185  
186  
187  
188  
189  
190  
191  
192  
193  
194  
195  
196  
197  
198  
199  
200  
201  
202  
203  
204  
205  
206  
207  
208  
209  
210  
211  
212  
213  
214  
215  
216  
217  
218  
219  
220  
221  
222  
223  
224  
225  
226  
227  
228  
229  
230  
231  
232  
233  
234  
235  
236  
237  
238  
239  
240  
241  
242  
243  
244  
245  
246  
247  
248  
249  
250  
251  
252  
253  
254  
255  
256  
257  
258  
259  
260  
261  
262  
263  
264  
265  
266  
267  
268  
269  
270  
271  
272  
273  
274  
275  
276  
277  
278  
279  
280  
281  
282  
283  
284  
285  
286  
287  
288  
289  
290  
291  
292  
293  
294  
295  
296  
297  
298  
299  
300  
301  
302  
303  
304  
305  
306  
307  
308  
309  
310  
311  
312  
313  
314  
315  
316  
317  
318  
319  
320  
321  
322  
323  
324  
325  
326  
327  
328  
329  
330  
331  
332  
333  
334  
335  
336  
337  
338  
339  
340  
341  
342  
343  
344  
345  
346  
347  
348  
349  
350  
351  
352  
353  
354  
355  
356  
357  
358  
359  
360  
361  
362  
363  
364  
365  
366  
367  
368  
369  
370  
371  
372  
373  
374  
375  
376  
377  
378  
379  
380  
381  
382  
383  
384  
385  
386  
387  
388  
389  
390  
391  
392  
393  
394  
395  
396  
397  
398  
399  
400  
401  
402  
403  
404  
405  
406  
407  
408  
409  
410  
411  
412  
413  
414  
415  
416  
417  
418  
419  
420  
421  
422  
423  
424  
425  
426  
427  
428  
429  
430  
431  
432  
433  
434  
435  
436  
437  
438  
439  
440  
441  
442  
443  
444  
445  
446  
447  
448  
449  
450  
451  
452  
453  
454  
455  
456  
457  
458  
459  
460  
461  
462  
463  
464  
465  
466  
467  
468  
469  
470  
471  
472  
473  
474  
475  
476  
477  
478  
479  
480  
481  
482  
483  
484  
485  
486  
487  
488  
489  
490  
491  
492  
493  
494  
495  
496  
497  
498  
499  
500  
501  
502  
503  
504  
505  
506  
507  
508  
509  
510  
511  
512  
513  
514  
515  
516  
517  
518  
519  
520  
521  
522  
523  
524  
525  
526  
527  
528  
529  
530  
531  
532  
533  
534  
535  
536  
537  
538  
539  
540  
541  
542  
543  
544  
545  
546  
547  
548  
549  
550  
551  
552  
553  
554  
555  
556  
557  
558  
559  
560  
561  
562  
563  
564  
565  
566  
567  
568  
569  
570  
571  
572  
573  
574  
575  
576  
577  
578  
579  
580  
581  
582  
583  
584  
585  
586  
587  
588  
589  
590  
591  
592  
593  
594  
595  
596  
597  
598  
599  
600  
601  
602  
603  
604  
605  
606  
607  
608  
609  
610  
611  
612  
613  
614  
615  
616  
617  
618  
619  
620  
621  
622  
623  
624  
625  
626  
627  
628  
629  
630  
631  
632  
633  
634  
635  
636  
637  
638  
639  
640  
641  
642  
643  
644  
645  
646  
647  
648  
649  
650  
651  
652  
653  
654  
655  
656  
657  
658  
659  
660  
661  
662  
663  
664  
665  
666  
667  
668  
669  
670  
671  
672  
673  
674  
675  
676  
677  
678  
679  
680  
681  
682  
683  
684  
685  
686  
687  
688  
689  
690  
691  
692  
693  
694  
695  
696  
697  
698  
699  
700  
701  
702  
703  
704  
705  
706  
707  
708  
709  
710  
711  
712  
713  
714  
715  
716  
717  
718  
719  
720  
721  
722  
723  
724  
725  
726  
727  
728  
729  
730  
731  
732  
733  
734  
735  
736  
737  
738  
739  
740  
741  
742  
743  
744  
745  
746  
747  
748  
749  
750  
751  
752  
753  
754  
755  
756  
757  
758  
759  
760  
761  
762  
763  
764  
765  
766  
767  
768  
769  
770  
771  
772  
773  
774  
775  
776  
777  
778  
779  
780  
781  
782  
783  
784  
785  
786  
787  
788  
789  
790  
791  
792  
793  
794  
795  
796  
797  
798  
799  
800  
801  
802  
803  
804  
805  
806  
807  
808  
809  
810  
811  
812  
813  
814  
815  
816  
817  
818  
819  
820  
821  
822  
823  
824  
825  
826  
827  
828  
829  
830  
831  
832  
833  
834  
835  
836  
837  
838  
839  
840  
841  
842  
843  
844  
845  
846  
847  
848  
849  
850  
851  
852  
853  
854  
855  
856  
857  
858  
859  
860  
861  
862  
863  
864  
865  
866  
867  
868  
869  
870  
871  
872  
873  
874  
875  
876  
877  
878  
879  
880  
881  
882  
883  
884  
885  
886  
887  
888  
889  
890  
891  
892  
893  
894  
895  
896  
897  
898  
899  
900  
901  
902  
903  
904  
905  
906  
907  
908  
909  
910  
911  
912  
913  
914  
915  
916  
917  
918  
919  
920  
921  
922  
923  
924  
925  
926  
927  
928  
929  
930  
931  
932  
933  
934  
935  
936  
937  
938  
939  
940  
941  
942  
943  
944  
945  
946  
947  
948  
949  
950  
951  
952  
953  
954  
955  
956  
957  
958  
959  
960  
961  
962  
963  
964  
965  
966  
967  
968  
969  
970  
971  
972  
973  
974  
975  
976  
977  
978  
979  
980  
981  
982  
983  
984  
985  
986  
987  
988  
989  
990  
991  
992  
993  
994  
995  
996  
997  
998  
999  
1000  
1001  
1002  
1003  
1004  
1005  
1006  
1007  
1008  
1009  
1010  
1011  
1012  
1013  
1014  
1015  
1016  
1017  
1018  
1019  
1020  
1021  
1022  
1023  
1024  
1025  
1026  
1027  
1028  
1029  
1030  
1031  
1032  
1033  
1034  
1035  
1036  
1037  
1038  
1039  
1040  
1041  
1042  
1043  
1044  
1045  
1046  
1047  
1048  
1049  
1050  
1051  
1052  
1053  
1054  
1055  
1056  
1057  
1058  
1059  
1060  
1061  
1062  
1063  
1064  
1065  
1066  
1067  
1068  
1069  
1070  
1071  
1072  
1073  
1074  
1075  
1076  
1077  
1078  
1079  
1080  
1081  
1082  
1083  
1084  
1085  
1086  
1087  
1088  
1089  
1090  
1091  
1092  
1093  
1094  
1095  
1096  
1097  
1098  
1099  
1100  
1101  
1102  
1103  
1104  
1105  
1106  
1107  
1108  
1109  
1110  
1111  
1112  
1113  
1114  
1115  
1116  
1117  
1118  
1119  
1120  
1121  
1122  
1123  
1124  
1125  
1126  
1127  
1128  
1129  
1130  
1131  
1132  
1133  
1134  
1135  
1136  
1137  
1138  
1139  
1140  
1141  
1142  
1143  
1144  
1145  
1146  
1147  
1148  
1149  
1150  
1151  
1152  
1153  
1154  
1155  
1156  
1157  
1158  
1159  
1160  
1161  
1162  
1163  
1164  
1165  
1166  
1167  
1168  
1169  
1170  
1171  
1172  
1173  
1174  
1175  
1176  
1177  
1178  
1179  
1180  
1181  
1182  
1183  
1184  
1185  
1186  
1187  
1188  
1189  
1190  
1191  
1192  
1193  
1194  
1195  
1196  
1197  
1198  
1199  
1200  
1201  
1202  
1203  
1204  
1205  
1206  
1207  
1208  
1209  
1210  
1211  
1212  
1213  
1214  
1215  
1216  
1217  
1218  
1219  
1220  
1221  
1222  
1223  
1224  
1225  
1226  
1227  
1228  
1229  
1230  
1231  
1232  
1233  
1234  
1235  
1236  
1237  
1238  
1239  
1240  
1241  
1242  
1243  
1244  
1245  
1246  
1247  
1248  
1249  
1250  
1251  
1252  
1253  
1254  
1255  
1256  
1257  
1258  
1259  
1260  
1261  
1262  
1263  
1264  
1265  
1266  
1267  
1268  
1269  
1270  
1271  
1272  
1273  
1274  
1275  
1276  
1277  
1278  
1279  
1280  
1281  
1282  
1283  
1284  
1285  
1286  
1287  
1288  
1289  
1290  
1291  
1292  
1293  
1294  
1295  
1296  
1297  
1298  
1299  
1300  
1301  
1302  
1303  
1304  
1305  
1306  
1307  
1308  
1309  
1310  
1311  
1312  
1313  
1314  
1315  
1316  
1317  
1318  
1319  
1320  
1321  
1322  
1323  
1324  
1325  
1326  
1327  
1328  
1329  
1330  
1331  
1332  
1333  
1334  
1335  
1336  
1337  
1338  
1339  
1340  
1341  
1342  
1343  
1344  
1345  
1346  
1347  
1348  
1349  
1350  
1351  
1352  
1353  
1354  
1355  
1356  
1357  
1358  
1359  
1360  
1361  
1362  
1363  
1364  
1365  
1366  
1367  
1368  
1369  
1370  
1371  
1372  
1373  
1374  
1375  
1376  
1377  
1378  
1379  
1380  
1381  
1382  
1383  
1384  
1385  
1386  
1387  
1388  
1389  
1390  
1391  
1392  
1393  
1394  
1395  
1396  
1397  
1398  
1399  
1400  
1401  
1402  
1403  
1404  
1405  
1406  
1407  
1408  
1409  
1410  
1411  
1412  
1413  
1414  
1415  
1416  
1417  
1418  
1419  
1420  
1421  
1422  
1423  
1424  
1425  
1426  
1427  
1428  
1429  
1430  
1431  
1432  
1433  
1434  
1435  
1436  
1437  
1438  
1439  
1440  
1441  
1442  
1443  
1444  
1445  
1446  
1447  
1448  
1449  
1450  
1451  
1452  
1453  
1454  
1455  
1456  
1457  
1458  
1459  
1460  
1461  
1462  
1463  
1464  
1465  
1466  
1467  
1468  
1469  
1470  
1471  
1472  
1473  
1474  
1475  
1476  
1477  
1478  
1479  
1480  
1481  
1482  
1483  
1484  
1485  
1486  
1487  
1488  
1489  
1490  
1491  
1492  
1493  
1494  
1495  
1496  
1497  
1498  
1499  
1500  
1501  
1502  
1503  
1504  
1505  
1506  
1507  
1508  
1509  
1510  
1511  
1512  
1513  
1514  
1515  
1516  
1517  
1518  
1519  
1520  
1521  
1522  
1523  
1524  
1525  
1526  
1527  
1528  
1529  
1530  
1531  
1532  
1533  
1534  
1535  
1536  
1537  
1538  
1539  
1540  
1541  
1542  
1543  
1544  
1545  
1546  
1547  
1548  
1549  
1550  
1551  
1552  
1553  
1554  
1555  
1556  
1557  
1558  
1559  
1560  
1561  
1562  
1563  
1564  
1565  
1566  
1567  
1568  
1569  
1570  
1571  
1572  
1573  
1574  
1575  
1576  
1577  
1578  
1579  
1580  
1581  
1582  
1583  
1584  
1585  
1586  
1587  
1588  
1589  
1590  
1591  
1592  
1593  
1594  
1595  
1596  
1597  
1598  
1599  
1600  
1601  
1602  
1603  
1604  
1605  
1606  
1607  
1608  
1609  
1610  
1611  
1612  
1613  
1614  
1615  
1616  
1617  
1618  
1619  
1620  
1621  
1622  
1623  
1624  
1625  
1626  
1627  
1628  
1629  
1630  
1631  
1632  
1633  
1634  
1635  
1636  
1637  
1638  
1639  
1640  
1641  
1642  
1643  
1644  
1645  
1646  
1647  
1648  
1649  
1650  
1651  
1652  
1653  
1654  
1655  
1656  
1657  
1658  
1659  
1660  
1661  
1662  
1663  
1664  
1665  
1666  
1667  
1668  
1669  
1670  
1671  
1672  
1673  
1674  
1675  
1676  
1677  
1678  
1679  
1680  
1681  
1682  
1683  
1684  
1685  
1686  
1687  
1688  
1689  
1690  
1691  
1692  
1693  
1694  
1695  
1696  
1697  
1698  
1699  
1700  
1701  
1702  
1703  
1704  
1705  
1706  
1707  
1708  
1709  
1710  
1711  
1712  
1713  
1714  
1715  
1716  
1717  
1718  
1719  
1720  
1721  
1722  
1723  
1724  
1725  
1726  
1727  
1728  
1729  
1730  
1731  
1732  
1733  
1734  
1735  
1736  
1737  
1738  
1739  
1740  
1741  
1742  
1743  
1744  
1745  
1746  
1747  
1748  
1749  
1750  
1751  
1752  
1753  
1754  
1755  
1756  
1757  
1758  
1759  
1760  
1761  
1762  
1763  
1764  
1765  
1766  
1767  
1768  
1769  
1770  
1771  
1772  
1773  
1774  
1775  
1776  
1777  
1778  
1779  
1780  
1781  
1782  
1783  
1784  
1785  
1786  
1787  
1788  
1789  
1790  
1791  
1792  
1793  
1794  
1795  
1796  
1797  
1798  
1799  
1800  
1801  
1802  
1803  
1804  
1805  
1806  
1807  
1808  
1809  
1810  
1811  
1812  
1813  
1814  
1815  
1816  
1817  
1818  
1819  
1820  
1821  
1822  
1823  
1824  
1825  
1826  
1827  
1828  
1829  
1830  
1831  
1832  
1833  
1834  
1835  
1836  
1837  
1838  
1839  
1840  
1841  
1842  
1843  
1844  
1845  
1846  
1847  
1848  
1849  
1850  
1851  
1852  
1853  
1854  
1855  
1856  
1857  
1858  
1859  
1860  
1861  
1862  
1863  
1864  
1865  
1866  
1867  
1868  
1869  
1870  
1871  
1872  
1873  
1874  
1875  
1876  
1877  
1878  
1879  
1880  
1881  
1882  
1883  
1884  
1885  
1886  
1887  
1888  
1889  
1890  
1891  
1892  
1893  
1894  
1895  
1896  
1897  
1898  
1899  
1900  
1901  
1902  
1903  
1904  
1905  
1906  
1907  
1908  
1909  
1910  
1911  
1912  
1913  
1914  
1915  
1916  
1917  
1918  
1919  
1920  
1921  
1922  
1923  
1924  
1925  
1926  
1927  
1928  
1929  
1930  
1931  
1932  
1933  
1934  
1935  
1936  
1937  
1938  
1939  
1940  
1941  
1942  
1943  
1944  
1945  
1946  
1947  
1948  
1949  
1950  
1951  
1952  
1953  
1954  
1955  
1956  
1957  
1958  
1959  
1960  
1961  
1962  
1963  
1964  
1965  
1966  
1967  
1968  
1969  
1970  
1971  
1972  
1973  
1974  
1975  
1976  
1977  
1978  
1979  
1980  
1981  
1982  
1983  
1984  
1985  
1986  
1987  
1988  
1989  
1990  
1991  
1992  
1993  
1994  
1995  
1996  
1997  
1998  
1999  
2000  
2001  
2002  
2003  
2004  
2005  
2006  
2007  
2008  
2009  
2010  
2011  
2012  
2013  
2014  
2015  
2016  
2017  
2018  
2019  
2020  
2021  
2022  
2023  
2024  
2025  
2026  
2027  
2028  
2029  
2030  
2031  
2032  
2033  
2034  
2035  
2036  
2037  
2038  
2039  
2040  
2041  
2042  
2043  
2044  
2045  
2046  
2047  
2048  
2049  
2050  
2051  
2052  
2053  
2054  
2055  
2056  
2057  
2058  
2059  
2060  
2061  
2062  
2063  
2064  
2065  
2066  
2067  
2068  
2069  
2070  
2071  
2072  
2073  
2074  
2075  
2076  
2077  
2078  
2079  
2080  
2081  
2082  
2083  
2084  
2085  
2086  
2087  
2088  
2089  
2090  
2091  
2092  
2093  
2094  
2095  
2096  
2097  
2098  
2099  
2100  
2101  
2102  
2103  
2104  
2105  
2106  
2107  
2108  
2109  
2110  
2111  
2112  
2113  
2114  
2115  
2116  
2117  
2118  
2119  
2120  
2121  
2122  
2123  
2124  
2125  
2126  
2127  
2128  
2129  
2130  
2131  
2132  
2133  
2134  
2135  
2136  
2137  
2138  
2139  
2140  
2141  
2142  
2143  
2144  
2145  
2146  
2147  
2148  
2149  
2150  
2151  
2152  
2153  
2154  
2155  
2156  
2157  
2158  
2159  
2160  
2161  
2162  
2163  
2164  
2165  
2166  
2167  
2168  
2169  
2170  
2171  
2172  
2173  
2174  
2175  
2176  
217

1  
2 In a dry and arid country like Nevada, where the  
3 rains are insufficient to moisten the earth, and  
4 irrigation becomes necessary for the successful  
5 raising of crops, the rights of prior  
6 appropriators must be confined to a reasonable and  
7 necessary use. The agricultural resources of the  
8 State cannot be developed and our valley-lands  
9 cannot be cultivated without the use of water from  
10 the streams, to cause the earth to bring forth its  
11 precious fruits.

12 \* \* \*

13 It was the duty of the defendants every fifteen  
14 days, or thereabouts, as plaintiff might need  
15 water, to turn down a sufficient quantity, within  
16 plaintiff's appropriation, required to irrigate  
17 his lands.

18 Further, continuing, in C. Kinney, supra, § 910,  
19 Rotation as a Matter of Economy - The law as applied to the  
20 subject, at 1608:

21 And upon the question of the application of the  
22 principle without contract or statute the courts  
23 are gradually falling in line, and are granting  
24 the right of rotation upon the theory that it  
25 tends to extend the duty of water and the  
26 suppression of waste. And although the cases are  
27 somewhat scarce upon this subject, the general  
28 tendency is to enforce rotation, where it can be  
done, without infringing upon the rights of  
others, even in cases of prior and subsequent  
appropriators upon the same stream on the ground  
that it tends toward a more economical use of a  
given quantity of water and the suppression of  
waste.

In McCoy v. Huntley, 119 Pac. 481, 481-482 (Ore. 1911),  
the Oregon Supreme Court observed:

[W]ater, in the arid parts of the state, is the  
life of the land . . . .

\* \* \*

We see no reason why, even in cases involving prior and subsequent appropriations of water, the courts cannot require the appropriators to alternate in the use of the water. The time when water may be used recklessly or carelessly has passed in this state. With increasing settlement water has become too scarce and too precious to justify any but an economical use of it.

See, W. Hutchins, California Law of Water Rights, at 173 (1956):

#### **Rotation in Use of Water**

In a controversy over the use of water between appropriators, the court by its decree may fix the times when, by rotation, the quantity of water to which they are collectively entitled may be used by each exclusively at different times in proportion to their respective rights.

Also, in A. Tarlock, Law of Water Rights and Resources, § 5:34 (2010) it is stated:

#### **§ 5:34 Priority--Modification of Priority--Rotation**

Priorities may be subordinated by rotation. To encourage the maximum use of water among the widest class of users, the use of water may be rotated among users. Under rotation one user may take all the available water, regardless of senior priorities for a limited period of time and the next user may do the same. Rotation will allow a junior to use water subjected to a senior right out of priority. Rotation may be imposed by a court as part of a decree. (Citing *Hufford v. Dye*, 121 Pac. 400 (Cal. 1912).) [Emphasis supplied.]

Over a century ago, the California Supreme Court stated in Hufford v. Dye, 121 Pac. 400, 406 (Cal. 1912):



1  
2 If there is not water enough (and this appears to  
3 be the fact) to permit a diversion of the stream  
4 and a simultaneous use of part by both parties  
5 without injury, the court may by its decree fix  
6 the times when, by rotation, the whole may be used  
7 by each at different times in proportion to their  
8 respective rights. [Emphasis added.]

9 The case of Anderson v. Bassman, 140 Fed. 14, 29 (N.D.  
10 Cal. 1905), is interesting and instructive because it dealt  
11 with a court-ordered rotation of water from the West Fork of  
12 the Carson River in Douglas County, Nevada, between upstream  
13 and downstream appropriators, some with a priority of 1852:

14 The right of each is to have a reasonable  
15 apportionment of the water of the stream during  
16 the season of the year when it is scarce. But to  
17 divide the water so as to allow a certain number  
18 of inches to the complainants and a certain number  
19 of inches to the defendants is plainly  
20 impracticable. The only method that appears to  
21 provide a just and equitable division is some fair  
22 and appropriate division in time by which the  
23 complainants and defendants shall have the use of  
24 the water alternately during the dry season. It  
25 shall therefore direct that a decree be entered  
26 restraining the defendants from diverting the  
27 waters of the West Fork of the Carson River in  
28 excess of five days in every ten days during the  
months of June, July, August, September, and  
October in each year . . . .

29 In the more recent case of Crawford v. Lehi Irrigation  
30 Company, 350 P.2d 147, 168-169 (Utah 1960), where a water  
31 user held a state issued permit, the Utah Trial Court  
32 imposed and the Utah Supreme Court sustained rotation, and  
33 concluded:

1  
2 It appears that the objective of achieving the  
3 most economical use of the water will be served by  
4 the order made directing that it be used under a  
rotation system, and that it will result neither  
in hardship nor injustice to the plaintiff.

5 In Mimbres Valley Irrigation Co. v. Salopek, 140 P.3d  
6 1117, 1119 (N.M.App. 2006), the New Mexico Court was faced  
7 with a similar situation as presented here, where there was  
8 not sufficient water flows during the dry season to  
9 accommodate all demands. The New Mexico District Court  
10 authorized rotation if the parties could not agree.  
11

12 When all water users with the same priority cannot  
13 agree to rotation because one or more users have a physical  
14 geographic advantage as by intercepting the entire stream  
15 flow first, the only practical and equitable remedy is  
16 rotation. Why should three water right owners get all the  
17 water and five others with equal vested rights and  
18 priorities get none during the dry season?  
19

20 Contrary to these persuasive and long-standing  
21 authorities, even recently approved, the Bentleys have seen  
22 fit to make this a march of one individual who owns a ranch  
23 with two ponds for aesthetic and fish-raising purposes,  
24 against the Intervenor, some who live and work and earn  
25 their income from ranching. The Bentleys, although certainly  
26 allowed 1.6 days of irrigation water within the 21-day  
27  
28

1  
2 rotation are not entitled to demand a continuous flow in  
3 preference to and in priority over the other downstream  
4 water right holders during the dry season. 5 JA 917-927.

5 As for Appellants Smith and Barden, they receive all  
6 the water they are entitled, but in rotation. However, they  
7 have never consented to rotation. ("6. Petitioners do not  
8 agree with or consent to the Rotation Seclude.") 1 JA 2. As  
9 demonstrated in the next section, they have received more  
10 than their fair share in the past, even to the exclusion of  
11 any use by Intervenor.

13 The district court-ordered rotation is sustained by  
14 ample, substantial and persuasive legal authorities. It  
15 should be confirmed.

17 **F. Substantial Evidence Supports The District Court's**  
18 **Order For Rotation And The State Engineer's Implementation**  
19 **Of Same.**

20 The Intervenor are water users downstream from the  
21 Bentleys' two ponds and the Smith and Barden pipe diversion.  
22 The principal diversion, on the uphill side of the  
23 collective properties, also delivers a four-inch water  
24 pipeline full of water to the Smith and Barden properties. 6  
25 SA 1051; 1 TR 95:13-96:1. Abundant proof was offered at  
26 trial that during the implementation of a rotation schedule,  
27  
28

1  
2 the Intervenor's irrigation water supply was greatly  
3 enhanced.

4 Intervenor Frank Scharo, a downstream water user,  
5 testified, 6 SA 1070; 1 TR 172:13-21:

6 Q. How do you irrigate your property?

7 A. [I]rrigate the property through the Park and  
8 Bull Ditch to the north and from Sheridan Creek  
9 waters to the south.

10 Q. What is the history of irrigating your  
11 property as you know it? How does the water get  
to your property?

12 A. Well, we've had an informal rotation  
13 agreement with the surrounding neighbors and water  
14 flows up to the southern portion from the  
Forrester's ranch.

15 On June 18, 2010, a formal Rotation Schedule was  
16 implemented by district court Order. 8 SA 1559. See Case No.  
17 56531, filed July 6, 2010, appeal denied March 18, 2011. 6  
18 SA 1057; 1 TR 117:5-25.

19 Intervenor Frank Scharo went on to testify, 6 SA 1072;  
20 1 TR 177:9-15:

21 Q. What happened in 2010?

22 A. A significant difference, there was a very  
23 substantial increase in water to the back southern  
24 portion of our land and we had a very good year.

25 Q. And what do you attribute the very good year  
26 in 2010?

27 A. Court-ordered rotation.

28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Finally, Mr. Scharo asked the district court to impose a future rotation schedule, as follows, 6 SA 1072-1073; 1 TR 180:22-181:5:

Q. So what are you asking the court to do for you, Mr. Scharo?

A. I would ask the court to bring this to a conclusion by either going back to a rotation agreement or by having some other fair distribution of the water that we all have water rights to, and to not allow a preference to any one user or more than one user to have water being they're [located] upstream, that's what I would like to see.

Intervenor Don Forrester testified as to his experience and observations regarding over fifteen years irrigating his ranch, specifically the informal system of rotation practiced for many years, 6 SA 1052; 1 TR 98:4-19:

Q: Did you have a habit and custom of rotating the water between the different parcels?

A. Yes, as the parcels were fenced off and other people came in buying them we went into an informal rotation that's similar to the court-imposed rotation where Mr. Weber's [now Bentleys'] property would start for a couple of days, then when he got done it would go to me and then it would go on down and it would just - and if it was low on water we'd take a little longer and the rotation could take almost a month. And if it was a lot of water we could do it in two weeks.

Q. When Mr. Whitmire [the prior common owner] owned the property was that the method he used to irrigate the property?

A. Yes.

1  
2 Q. Was there cooperation between the various  
3 water users?

4 A. Yes.

5 Intervenor Forrester further discussed the Smith and  
6 Barden four-inch pipeline, 6 SA 1054; 1 TR 105:8-11; 6 SA  
7 1056-1057; 1 TR 115:9-116:24:

8 THE WITNESS: The four-inch pipe was taking a  
9 substantial amount of water and the rest of it was  
10 going our way. And so the whole rest of the ranch  
11 had to try to irrigate out of what was going down  
12 our pipe.

11 \* \* \*

12 Q. Okay. So then in 2010, what happened in the  
13 2010 irrigation season?

14 A. Well, 2010 we got the first court order  
15 diversion - I mean, rotation. And the rotation is  
16 good for me most of the time, and then sometimes  
17 it's not good for me. The best part about it is  
18 was the four-inch pipe being shut off, the Bentley  
19 pond being shut off.

18 \* \* \*

19 THE WITNESS: That [four-inch pipe] used to run  
20 all the time, except I felt over the years they  
21 were getting too much water down that pipe on a  
22 low [water] year. And it has a large drop so there  
23 would be a lot of pressure in that pipe. And we  
24 didn't realize how much that pipe could take until  
25 2010, because one time when it was their time to  
26 rotate and that little four-inch pipe took all of  
27 Sheridan Creek in 2010. It took the whole thing.  
28 So it was amazing how much water could go in a  
four-inch pipe with pressure on it. [Emphasis  
added.]

29 Q. So rotation then actually limited that four-  
30 inch draw of the four-inch pipe to the point of  
31 rotation that they were entitled under the decree?

1  
2 A. Right. And so then for the first time ever we  
3 were able to block off the Bentley pipe and the  
4 [Smith and Barden] four-inch pipe, we've never  
5 been able to do that.

6 Intervenor Forrester further discussed the rotation  
7 schedule, 6 SA 1057; 1 TR 117:5-9; 1 TR 117:24-118:12:

8 Q. So [in] 2010 the court imposed a rotation  
9 schedule by court order and you're describing what  
10 the changes were effective?

11 A. It was a huge change, I had enough water to  
12 ditch irrigate, to be able to flood the ditches.

13 \* \* \*

14 Q. How much more water would you estimate?

15 A. Double or triple.

16 Q. Double or triple the water?

17 A. Yes.

18 Q. On rotation as opposed to the previous year  
19 with no rotation?

20 A. Yes.

21 Q. Okay. Was 2010 a real wet year, a dry year, a  
22 medium year?

23 A. I think it was a medium year.

24 Q. So you had two to three times amount of water  
25 coming through your irrigation system on rotation  
26 on an average year, average water year?

27 A. Yes.

28 Intervenor Tom Scyphers testified that there was an  
informal rotation method in place to irrigate the

1  
2 Intervenor's property and that "We strictly were on an  
3 informal rotation ever since I've owned the property." 6 SA  
4 1127; 2 TR 287:7-10.

5 The factual record established below, fully sustains  
6 the need for a court-ordered rotation system of water  
7 diversion during periods of low flow.

8  
9 Smith and Barden also argue that the State Engineer did  
10 not have substantial evidence to justify the rotation  
11 schedule as being more economical and efficient. To the  
12 contrary, there was substantial evidence, as shown above,  
13 that the parties actually and historically used an informal  
14 rotation, Smith and Barden did not offer any evidence that  
15 would show that the rights of downstream water right holders  
16 would remain intact and uninjured if a rotation schedule was  
17 NOT implemented. Joy Smith merely testified that she wanted  
18 the same use as before to water her pastures and keep water  
19 in her pond via a continuous flow. 6 SA 1186; 3 TR 419:2-  
20 420:8. Dan Barden testified he prefers the way things were.  
21 6 SA 1237; 4 TR 557:6-558:18.

22  
23 Smith and Barden claim the State Engineer may only  
24 "order non-consenting users to take a pro-rata reduced share  
25 of available water." It is not clear under what authority  
26 or statute that requirement can be found.  
27  
28



1  
2 **VII. INTERVENORS ARE ENTITLED TO COSTS.**

3 The district court properly awarded Intervenor's their  
4 Costs. NRS 533.450(7) provides in relevant part:

5 Costs must be paid as in civil cases brought in  
6 district court, except by the State Engineer or  
7 the State.

8 Intervenor's claimed that costs must be awarded as a  
9 matter of course in special proceedings pursuant to NRS  
10 18.020. The district court analyzed the situation somewhat  
11 differently and relied on NRS 18.050, setting forth as  
12 follows, 9 SA 1703:

13 Except as limited by this section, in other  
14 actions in the district court, part or all of the  
15 prevailing party's costs may be allowed and may be  
16 apportioned between the parties, or on the same or  
17 adverse sides. If, in the judgment of the court,  
18 the plaintiff believes he or she was justified in  
19 bringing the action in the district court, and the  
20 plaintiff recovers at least \$700 in money or  
21 damages, or personal property of that value, the  
22 court may allow the plaintiff part or all of his  
23 or her court costs.

24 The district court correctly determined that a  
25 successful intervenor is entitled to costs after entering in  
26 an action and making his/her claim against the initiating  
27 party. Accordingly, the court held the "Intervenor's are  
28 party to the action and entitled to request an award of  
costs." 9 SA 1704. The court determined the adjusted award  
to be \$2,882.13.

1  
2 VIII. CONCLUSION.

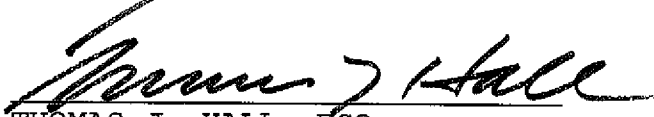
3       The district court ordered and the State Engineer, upon  
4 certain flows and proper measurements, implemented the  
5 rotation schedules. The district court had clear legal  
6 authority to order rotation of scarce and limited irrigation  
7 water during the dry season for the early non-statutory  
8 vested water rights held by the parties. There was  
9 substantial evidence before the district court authorizing  
10 its Order for Rotation. The State Engineer merely  
11 implemented the district court's Order under the flow  
12 measurements as determined by his staff.  
13

14       The award of costs to the Intervenor was properly  
15 ordered and authorized under NRS 18.050 as incorporated  
16 through NRS 533.450(7). Even though Smith and Barden are  
17 recently new to this matter, this litigation has carried on  
18 for nearly seven (7) years. The court-ordered rotation and  
19 implementation by the State Engineer is the most economical  
20 and efficient way to allow all parties their fair share of  
21 water during times of low flow. Informally, the Intervenor  
22 historically shared the water by rotation without issue or  
23 problem. The Bentleys' demands require a formal rotation  
24 schedule to ensure the other parties' water rights are not  
25 injured or impaired.  
26  
27  
28

1  
2 injured or impaired.

3 Respectfully submitted this 14<sup>th</sup> day of May, 2015.

4 LAW OFFICES OF THOMAS J. HALL

5  
6   
THOMAS J. HALL, ESQ.

7 Nevada Bar No. 675

8 305 South Arlington Avenue

9 Post Office Box 3948

10 Reno, Nevada 89505

11 Telephone: (775) 348-7011

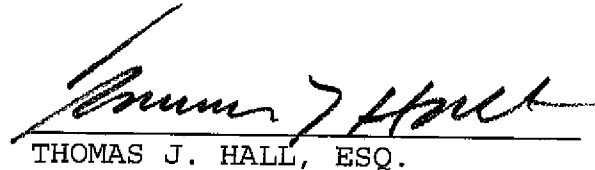
12 Facsimile: (775) 348-7211

1  
2 **IX. NRAP 26.1 DISCLOSURE STATEMENT.**

3 The undersigned hereby certifies that Intervenor Donald  
4 S. Forrester and Kristina M. Forrester, Hall Ranches, LLC,  
5 Thomas J. Scyphers and Kathleen M. Scyphers, Frank Scharo,  
6 Sheridan Creek Equestrian Center, LLC, and Ronald R. Mitchell  
7 and Ginger G. Mitchell are individuals or limited liability  
8 companies with no parent corporations and with no publicly  
9 held companies that have an interest in them. Thomas J. Hall,  
10 Esq., has been the Respondents' and Intervenor's only  
11 attorney in the district court proceedings below and no other  
12 attorney is expected to appear on their behalf in this  
13 matter.  
14

15 Respectfully submitted this 14<sup>th</sup> day of May, 2015  
16

17 LAW OFFICES OF THOMAS J. HALL

18  
19 

20 THOMAS J. HALL, ESQ.  
21 Nevada Bar No. 675  
22 305 South Arlington Avenue  
23 Post Office Box 3948  
24 Reno, Nevada 89505  
25 Telephone: (775) 348-7011  
26 Facsimile: (775) 348-7211  
27  
28

1  
2 **IX. ATTORNEY'S CERTIFICATE.**

3 I hereby certify that this brief complies with the  
4 formatting requirements of NRAP 32(a)(4), the typeface  
5 requirements of NRAP 32(a)(5) and the type style  
6 requirements of NRAP 32(a)(6) because this brief has been  
7 prepared in a monospaced typeface in 12 point Courier New  
8 font.  
9

10 I further certify that this brief complies with the  
11 page limitation of NRAP 32(a)(7) because, excluding the  
12 parts of the brief exempted by NRAP 32(a)(7)(C), it does not  
13 exceed 14,000 words.

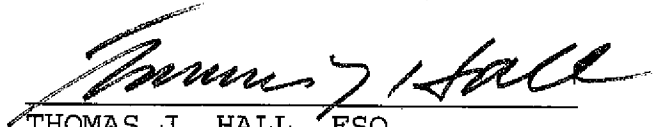
14 Finally, I hereby certify that I have read this brief,  
15 and to the best of my knowledge, information and belief, it  
16 is not frivolous or interposed for any improper purpose. I  
17 further certify that this brief complies with all applicable  
18 Nevada Rules of Appellate Procedure, in particular NRAP  
19 28(e)(1), which requires every assertion in the brief  
20 regarding matters in the record to be supported by a  
21 reference to the page and volume number, if any, of the  
22 transcript or appendix where the matter relied on is to be  
23 found.  
24  
25

26 \\\

27 \\\

1  
2 DATED this 14<sup>th</sup> day of May, 2015.

3 LAW OFFICES OF THOMAS J. HALL

4   
5 THOMAS J. HALL, ESQ.

6 Nevada Bar No. 675  
7 305 South Arlington Avenue  
8 Post Office Box 3948  
9 Reno, Nevada 89505  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1  
2 **CERTIFICATE OF SERVICE**

3 I certify that I am an employee of Thomas J. Hall,  
4 Esq., and that on this date, pursuant to NRAP 25(b), I  
5 electronically filed the foregoing with the Clerk of the  
6 Court by using the ECF system and placed in the U.S. Mail,  
7 postage prepaid and, a true and correct copy of the  
8 preceding document addressed to:  
9

10 Matuska Law Offices, Ltd.  
11 Michael L. Matuska, Esq.  
12 2310 S. Carson St., Ste. 6  
Carson City, Nevada 89705

Sheridan Creek Equestrian  
Glenn A. Roberson, Jr.  
281 Tiger Wood Court  
Gardnerville, Nevada 89460

13 Bryan L. Stockton, Esq.  
14 Senior Deputy Attorney General  
15 100 North Carson Street  
Carson City, Nevada 89701

Donald S. Forrester  
Kristina M. Forrester  
913 Sheridan Lane  
Gardnerville, Nevada 89460

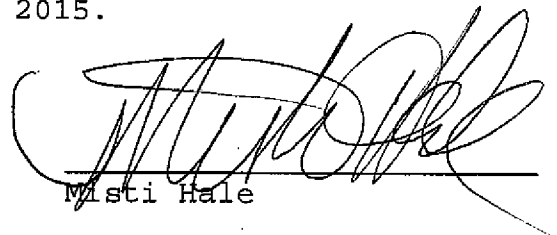
16 Jessica C. Prunty, Esq.  
17 Dyer, Lawrence, Penrose,  
18 Flaherty, Donaldson & Prunty  
2805 Mountain Street  
Carson City, Nevada 89703

Frank Scharo  
Post Office Box 1225  
Minden, Nevada 89423

19 Ronald R. Mitchell  
20 Ginger G. Mitchell  
21 Post Office Box 5607  
Stateline, Nevada 89449

Hall Ranches, LLC  
Post Office Box 3690  
Stateline, Nevada 89449

22 DATED this 14<sup>th</sup> day of May, 2015.  
23  
24  
25  
26  
27  
28

  
Misti Hale