IN THE SUPREME COURT OF NEVADA

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

Appellants,

v.

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

Respondents /

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

Appellants.

v.

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

Respondents /

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

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

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

Appellants,

v.

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

Respondents /

RESPONDENTS' ANSWERING BRIEF

(In Response to Opening Brief filed by Michael L. Matuska, Esq.)

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I. JURISDICTIONAL STATEMENT.

Respondents HALL RANCHES, LLC, a Nevada Limited Liability Company, THOMAS J. SCYPHERS, KATHLEEN M. SCYPHERS, FRANK SCHARO, SHERIDAN CREEK EQUESTRIAN CENTER, LLC, a Nevada Limited Liability Company, DONALD S. FORRESTER, KRISTINA M. FORRESTER, RONALD R. MITCHELL and GINGER G. MITCHELL, hereinafter Intervenors, agree with the Jurisdiction Statement contained in paragraphs 1, 2 and 3 of the Bentleys' Opening Brief. With respect to paragraph 4, Intervenors believe that the January 4, 2013, Order awarding attorney fees and costs to the Intervenors, 4 SA 825-830, has become merged into the Decree and may be reviewable under the cases hereinafter cited, infra, at pages 50-51.

II. ROUTING STATEMENT.

The Intervenors agree with the Routing Statement provided by the Bentleys.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW.

Intervenors agree with the Statement of Issues presented by the Bentleys for review as it is their appeal.

IV. STATEMENT OF THE CASE.

This appeal rises from the adjudication of multiple vested water rights located in Carson Valley pursuant to NRS 533.090-533.435. On August 14, 2008, the State Engineer

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filed his Final Order of Determination ("FOD") of the relative water rights with the district court. 2 JA 190-424. The Bentleys filed certain exceptions thereto. Exceptions, 1 JA 192-491. Intervenors filed their Response and Objection to Notice of Exceptions and Exceptions to Final Order of Determination. Response, 1 SA 85-88. The district court accepted the Response as a pleading and proceeded to hear the Bentleys' Exceptions as well as the Intervenors' Response at trial on January 9, 2012. Intervenors prevailed on all matters set forth in their Response.

On April 5, 2012, the district court entered Findings of Fact, Conclusions of Law and Judgment, determining that under the specific facts and circumstances of the matters presented at trial, the State Engineer should impose a rotation schedule under certain terms and conditions. Finding of Fact, 1 JA 154-171; 5 SA 974-990. The district court also made a partial award of attorney fees and costs to Intervenors. 5 SA 833-838.

Since the entry of the Findings of Fact, the Bentleys have taken several appeals and filed several Petitions before this Court, as follows:

Writ proceeding (Case No. 56531 - dismissed)
Appeal (Case NO. 56551 - dismissed)
Appeal (Case No. 59188 - dismissed)
Appeal (Case No. 60891 - dismissed)

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Appeal (Case NO. 64773 - pending)
Appeal (Case No. 66303 - pending)

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

V. STATEMENT OF FACTS.

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

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

Significantly, in its Findings of Fact, the district court also found and determined, 5 SA 984:

> 44. Mr. Bentley, through intimidation and threat, attempted to bully the Intervenors, acting in a manner to harass and financially exhaust the Intervenors.
>
> 45. Bentleys brought and maintained their Exception No. 1 relating to the Diversion Agreement without reasonable grounds.
>
> * * *
>
> 48. The Bentleys proceeded in this matter under an erroneous theory and under an erroneous thought process, and therefore, their action was maintained by them without reasonable grounds.

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limited in nature. NRS 533.450(1). On appeal, this Court is to review the evidence upon which the State Engineer based his decision to ascertain whether the evidence supports the decision, and if so, the Court is bound to sustain the State Engineer's decision. State Engineer v. Curtis Park, 101 Nev. 30, 32, 692 P.2d 495 (1985). Purely legal issues or questions may be reviewed without deference to an agency determination. However, the agency's conclusions of law that are closely related to its view of the facts are entitled to deference and will not be disturbed if they are supported by substantial evidence. Town of Eureka v. State Engineer, 108 Nev. 163, 165-166, 826 P.2d 948 (1992).

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

> The issues on appeal require us to review the district court's factual findings, as well as interpret statutory and contractual provisions. "The district court's factual findings . . . are given deference and will be upheld if not clearly erroneous and if supported by substantial 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. Aniskovich*, 124 Nev. 302, 308, 183 P.3d 137, 141 (2008). Issues involving statutory and contractual interpretation are legal issues subject to our de novo review. See *Canarelli v. Dist. Ct.*, 127 Nev. ___, ___, 265 P.3d 673, 676 (2011)(declaring that "[w]e review the district court's conclusions of law, including statutory interpretations, de novo'" (quoting *Borger v. Dist. Ct.*, 1021, 1026,

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> 102 P.3d 600, 604 (2004)); *Benchmark Insurance Company v. Sparks*, 127 Nev. ___, ___, 254 P.3d 617, 620 (2011)(providing that "'[i]nterpretation of a contract is a question of law that we review de novo'" (quoting *Farmers Ins. Exch. V. Neal*, 119 Nev. 62, 64 P.3d 472, 473 (2003))).

VII. OVERVIEW OF NEVADA STATUTORY WATER LAW.

Except as otherwise noted hereinafter, the Intervenors have no particular objection to or concerns with the Bentleys' description and presentation of Nevada Water Law.

VIII. ARGUMENT - ROTATION SCHEDULE.

A. The Parties Agreed That a Rotation Schedule May be Authorized in the Decree.

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

> MR. STOCKTON: So, we haven't actually put that into writing yet, but we worked out an agreement.
>
> * * *
>
> And so what we've agreed is it was never our intention to put a rotation schedule in the 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.

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THE COURT: Which is going to happen in four months. I agree . . . that the Exceptors [the Bentleys] . . . have continually opposed the 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 Bentley's] right to oppose such a rotation schedule in a given water year it if became necessary.

MR. HALL: That's satisfactory.

* * *

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

MR. STOCKTON: Yes, Your Honor.

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

MR. HALL: Yes, sir.

* * *

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

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

THE COURT: Agreed.

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

B. The Rotation Schedule Allows All Parties the Ability to Receive Their Share of Water.

In 2008, after their purchase, the Bentleys dismantled the Intervenors' water diversion structures, pipes, ditches and water boxes. They thereafter built a second larger and unlined, water-consuming pond. Exhibit 29; 7 SA 1378-1379; 6 SA 1052-1053; 1 TR 98:20 - 101:10.

Because of the geographic location of the Appellants' property, being where Sheridan Creek and Stutler Creek first flows onto the Appellants' property, above the Intervenors' properties, the Appellants are able to divert the entire flow of water during times of scarcity, shortage and drought, thereby depriving the Intervenors of all water during such periods of low flow. 6 SA 1056; 1 TR 115:18 - 116:23.

Within five (5) months, the Bentleys initiated hearings on the FOD by filing their Notice of Exceptions and Exceptions to Final Order of Determination on December 11, 2008, wherein they declared that their water rights were subject to a Diversion Agreement "and the Bentley property should be exempt from the rotation to the extent of

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diverting water through the ponds for stock watering and/or wildlife purposes." [Emphasis added.] 3 JA 427:7-11.

Following extensive pre-trial discovery, motions, hearings, orders and a non-jury trial before District Judge David R. Gamble, he determined under the specific facts and circumstances presented in the record, that rotation shall be imposed by the State Engineer whenever water flows drop below 2.0 cfs, at the level the district court determined that all users would not be receiving their full complement and flow of their vested water rights. 6 SA 988, ¶ 5 and 6.

1. The Pre-statutory Vested Water Rights Held By The Parties Can Be Modified By Court-Ordered Rotation.

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

Throughout this nation, and apparently throughout the world, rotation of water rights has been imposed on non-consenting users. Here, solely by virtue of their superior geographic location and with their two existing ponds, the Appellants have no motive, incentive or reason to share scarce water in times of low flow. They have actually used

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the entire flow during times of scarcity contrary to the historic custom, common law and principles of equity, fairness and justice. 5 SA 1056; 1 TR 116:8-16.

a) <u>There are three types of water rights recognized in Nevada</u>.

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

> Generally, "[t]he term 'water right' means . . . the right to divert water by artificial means for beneficial use from a natural spring or stream. In Nevada, there are three different types of water rights: vested, permitted, and certificated. <u>First, "vested" rights are those that existed under Nevada's common law before the provisions currently codified in NRS Chapter 533 were enacted in 1913. These rights may not be impaired by statutory law</u> and may be used as granted in the original decree until modified by a later permit. Second, "permitted" rights refer to rights granted after the State Engineer approves a party's "application for water rights." Such permits grant the right to develop specific amounts of water for a designated purpose. Third, "certificated" rights are statutory rights granted after a party perfects his or her permitted water rights. In order to perfect permitted water rights, an applicant must file proof of beneficial use with the State Engineer. Once proof has been filed, the State Engineer will issue a certificate in place of the permit. [Emphasis added.]

In footnote 6, this Court noted:

> The Legislature enacted NRS 533.085(1) to avoid any unconstitutional impingements on water rights

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that were in existence at the time Nevada's statutory water law went into effect. *Manse Spring*, 60 Nev. at 288-89, 109 P.2d at 315.

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

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

> The greater portion of the water rights upon the streams of the state were acquired before any statute was passed prescribing a method of appropriation. Such rights have uniformly been recognized by the courts as being vested under the common law of the state. Nothing in the act shall be deemed to impair these vested rights; that is, they shall not be diminished in quantity or value. As they are all prior in time to water rights secured in accordance with later statutory provisions, such priorities must be recognized. [Emphasis added.]

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

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

> **1.030. Application of common law in courts.**
>
> The common law of England, so far as it is not repugnant to or in conflict with the Constitution and laws of the United States, or the constitution

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and laws of this state, shall be the rule of decision in all the courts of this state.

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

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

533.085. Vested rights to water not impaired.

1. Nothing contained in this chapter shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913.

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

533.075. Rotation in use of water.

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

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

C. Stutler Creek and Gansberg Spring Rotation is Included.

The district court found and determined, 5 SA 976:

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

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

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

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

Gansberg Spring, like most springs in Nevada, does not flow at the same rate at all time, and generally contributes a small and variable percentage of the total water flow. The district court found that the flow did not justify a water commissioner to regulate the flow separately and that the waters should be administered together despite the *de*

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minimus advantage to the small properties that were not within the boundaries for Permit 07595. ¶ 10; 5 SA 976.

D. <u>The Rotation Of The Scarce Water Resources During The Dry Season Has Been Properly Ordered</u>.

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

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

> As was said in a recent Idaho case[1]: "The use of water under the rotation system is approved by high engineering authorities." And the [Idaho Supreme] Court proceeds to quote from those great works by Robert B. Buckley and Sir Hanbury Brown, and we can do no better than to quote what these works say upon the subject: "The most wasteful system of irrigation possible is that under which all branch canals, distributaries and village channels are in use continuously and the available supply is slowly dribbling into the fields. For not only is the actual loss of water greater, but under this system there is also this further

[1] <u>State v. Twin Falls Canal Co.</u>, 121 Pac. 1039, 1049-1050 (Idaho 1911), "The rotation system is recognized by the leading writers on irrigation and irrigation engineering as a most efficient and desirable method and as producing the highest duty of water of any method in use."

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> disadvantage, that the velocities in all the distributaries and minor channels are reduced, and the silt in the water, which at these points of the system is nearly always advantageous to the fields, is largely deposited in the channels and not carried onto the cultivated ground. The system of irrigation by rotation or by tatils, as it is called in Upper India, is of great advantage, not only in checking the loss of water in the channel, but in teaching economical irrigation to the cultivators and in insuring an equitable division of the supply among the people.

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

> In a dry and arid country like Nevada, where the rains are insufficient to moisten the earth, and irrigation becomes necessary for the successful raising of crops, the rights of prior appropriators must be confined to a reasonable and necessary use. The agricultural resources of the State cannot be developed and our valley-lands cannot be cultivated without the use of water from the streams, to cause the earth to bring forth its precious fruits.
>
> * * *
>
> It was the duty of the defendants every fifteen days, or thereabouts, as plaintiff might need water, to turn down a sufficient quantity, within plaintiff's appropriation, required to irrigate his lands.

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

> And upon the question of the application of the principle without contract or statute the courts are gradually falling in line, and are granting the right of rotation upon the theory that it tends to extend the duty of water and the suppression of waste. And although the cases are somewhat scarce upon this subject, the general 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):

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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):

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

The case of Anderson v. Bassman, 140 Fed. 14, 29 (N.D. Cal. 1905), is interesting and instructive because it dealt with a court-ordered rotation of water from the West Fork of

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the Carson River in Douglas County, Nevada, between upstream and downstream appropriators, some with a priority of 1852:

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

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

> It appears that the objective of achieving the most economical use of the water will be served by 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.

In Mimbres Valley Irrigation Co. v. Salopek, 140 P.3d 1117, 1119 (N.M.App. 2006), the New Mexico Court was faced with a similar situation as presented here, where there was not sufficient water flows during the dry season to

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accommodate all demands. The New Mexico District Court authorized rotation if the parties could not agree.

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

Contrary to these persuasive and long-standing authorities, even recently approved, the Bentleys have seen fit to make this a march of one individual who owns a ranch with two ponds for aesthetic and fish-raising purposes, against the Intervenors, some who live and work and earn their income from ranching. The Bentleys, although certainly allowed 1.6 days of irrigation water within the 21-day rotation are not entitled to demand a continuous flow in preference to and in priority over the other downstream water right holders during the dry season. 5 JA 917-927.

As for Appellants Smith/Barden, they receive all the water they are entitled, but in rotation. However, they have never consented to rotation. ("6. Petitioners do not agree with or consent to the Rotation Seclude.") 1 JA 2. As

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demonstrated in the next section, they have received more than their fair share in the past, even to the exclusion of any use by Intervenors.

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

1. Substantial Evidence Supports The District Court's Order For Rotation And The State Engineer's Implementation Of Same.

The Intervenors are water users downstream from the Bentleys' two ponds and the Smith & Barden pipe diversion. The principal diversion, on the uphill side of the collective properties, also delivers a four-inch water pipeline full of water to the Smith & Barden properties. 6 SA 1051; 1 TR 95:13-96:1. Abundant proof was offered at trial that during the implementation of a rotation schedule, the Intervenors' irrigation water supply was greatly enhanced.

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

> Q. How do you irrigate your property?
>
> A. [I]irrigate the property through the Park and Bull Ditch to the north and from Sheridan Creek waters to the south.

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

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

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

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

Q. What happened in 2010?

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

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

A. Court-ordered rotation.

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

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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.
>
> Q. Was there cooperation between the various water users?
>
> A. Yes.

Mr. Forrester further discussed the Smith/Barden four-inch pipeline, 6 SA 1054; 1 TR 105:8-11; 6 SA 1056-1057; 1 TR 115:9-116:24:

> THE WITNESS: The four-inch pipe was taking a substantial amount of water and the rest of it was going our way. And so the whole rest of the ranch

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had to try to irrigate out of what was going down our pipe.

* * *

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

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

* * *

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

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

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

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

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

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

* * *

Q. How much more water would you estimate?

A. Double or triple.

Q. Double or triple the water?

A. Yes.

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

A. Yes.

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

A. I think it was a medium year.

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

A. Yes.

Intervenor Tom Scyphers testified that there was an informal rotation method in place to irrigate the Intervenors' property and that "We strictly were on an informal rotation ever since I've owned the property." 6 SA 1127; 2 TR 287:7-10.

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

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IX. ARGUMENT - DIVERSION AGREEMENT.

A. Bentleys' Notice of Exceptions.

In their Notice of Exceptions and Exceptions to Final Order of Determination filed herein on December 11, 2008, (the Amended Notice of Exceptions having been stricken, 3 JA 524-443, but nevertheless was considered by the Court, 1 SA 163), the Bentleys in EXCEPTION NO. 1, DIVERSION SCHEDULE, PROOFS V-06307 and V-06308, declare that they believe the Office of the State Engineer has created a Diversion Schedule, for the waters from Sheridan Creek, Stutler Creek and Gansberg Springs. The Bentleys contended they should not be subject to any Diversion Schedule because of a Water Diversion and Use Agreement ("Diversion Agreement"). 3 JA 426-427. See Exhibit 10, 7 SA 1299-1306. The Intervenors proved that the Diversion Agreement is unenforceable and, even if enforceable, had been violated by the Bentleys and should be terminated according to its terms.

B. The District Court Approved The Intervenors' Response.

The district court approved and validated the Intervenors' proposed Response, filed on November 19, 2009, being the identical response as previously attached to their

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Reply in Support of Motion to Correct Order Allowing Intervention. 1 SA 82-83, 1 SA 85-88.

It is noted by the Bentleys that the special statutory proceedings for the review of the FOD are quite limited under NRS 533.170(2):

> 2. The order of determination by the State Engineer and the statements or claims of claimants and exceptions made to the order of determination shall constitute the pleadings, and there shall be no other pleadings in the cause.

As set forth in NRS 533.160, "the final order of determination when filed with the clerk of the district court as provided in NRS 533.165, has the legal effect of a complaint in a civil action." See, J. H. Davenport, Nevada Water Law, 101 - 117 (2003).

Because the Intervenors' rights are aligned with the State Engineer as set forth in the FOD, no further pleadings appear to be necessary, desirable or allowed. The Affirmative Defenses contained in the Intervenors' Response were adequate statements under the Nevada Rules of Civil Procedure to alert the Bentleys as to the Intervenors' defenses to the Bentleys' various claims and exceptions.

Even if the Intervenors had not specifically set forth these defenses, as non-excepting claimants their rights would necessarily be influenced by the FOD and they would

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have standing as real parties in interest in all of these proceedings. The Nevada Supreme Court in In Re Silver Creek, 57 Nev. 232, 237-38, 61 P.2d 987 (1936), discussed this topic as follows:

> However, the character of an adjudication, under the water code, forbids the idea of separate controversies being involved. It is a proceeding put in motion by an agent of the state to determine the relative rights of water claimants on a stream or stream system. Necessarily such interrelated rights must be adjusted as a whole in order to reach an equitable settlement of the controversy. This conclusion has been heretofore declared by this court. In *Humboldt Land & Cattle Company v. Sixth Judicial District Court*, 47 Nev. 396, P. 612, 613, we said: "There is nothing in the context or in the subject-matter to require such construction for [separable controversies], but the entire scope of the legislation is persuasively to the contrary. As said in one of the cases quoted from in Re Chewaucan River, 89 Or. 659 [171 P. 402], 175 P. 421: 'It is a case where diverse and sundry parties are entitled to use so much of the waters of a stream as they have put to beneficial use and the purpose is to ascertain their respective rights by a simple, economical, effective, and comprehensive proceeding, and is not a separable controversy between different claimants.'"

The Intervenors' Response complied with the spirit and intent of NRCP Rules 8 and 12 and case law, by giving general and specific notice to the Bentleys of the Intervenors' defenses to Bentleys' claims and exceptions. 1 SA 102-105.

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C. Bentleys Have Violated The Diversion Agreement By Creating A Pond That Is Not Water Tight, Has Excess Seepage And Consumes And Wastes Water.

In fact, nowhere in Bentleys' Opening Brief have they denied the assertion that the newly created upper pond is consuming substantial quantities of water in violation of the Diversion Agreement. The Bentleys resolutely and steadfastly refused to allow seepage tests, have objected to every overture of resolution based on a seepage test and have not addressed the seepage issue. Even if the upper pond consumed Bentleys' entire share of water from Sheridan Creek, such consumption would be in violation of the Diversion Agreement as the allowed use is specifically required to be "non-consumptive."

Diversion Agreement Recital B, provides as follows, Exhibit 10; 7 SA 1300:

> B. This grant is specifically made on the condition that the water will be used by the Grantee in a non-consumptive fashion, to maintain water levels in a series of streams and ponds on the Exhibit "A" property, after which time it will be re-diverted to the irrigation ditches of Grantors. [Emphasis added.]

Diversion Agreement Paragraph H provides for termination upon violation in the following fashion, 7 SA 1301:

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H. This agreement may be terminated by Grantors in the event a Court of competent jurisdiction determines that the Grantee has been violating the terms hereof, to the detriment of Grantors.

A Seepage Test or a Percolation Test is a mechanism which measures differences in the water level of a pond over time. The flow of the water is cut off for a period of time, such as two days, and after the elapsed time, the pond level is re-measured. The Intervenors knew that there was substantial seepage and subterranean loss of water into the porous alluvial fan and aquifer which was not recoverable for irrigation by the downstream users. Seepage Tests and Reports were necessary to show the consumptive use and water loss from the upper pond. Once the water from the upper pond flows subterranean into the aquifer, it is lost to the system and the downstream users do not have the ability to recover the surface water for reuse. The total water system is and was diminished by the water losses from the unlined upper pond. Findings 35-41; 5 SA 982-983.

The Intervenors proved that the Bentleys should not be exempt from any proposed Rotation Schedule authorized by the district court and put in place by the State Engineer as the diversion of water through the Bentleys' two ponds is a consumptive and wasteful use. The gross consumptive use by the Bentleys violates the provision of the Diversion

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Agreement which was specifically conditioned on non-consumptive use of water.

The district court made certain Findings of Fact that the Bentleys' ponds use water in a consumptive way. Specifically, the district court found and concluded as follows, 5 SA 982-983, Findings 31 - 41; Conclusion of Law 18; 5 SA 987:

> 31. A pond, known as the lower pond, has existed on the Bentleys' Property from some time prior to the initiation of this adjudication.
>
> 32. The Bentleys built a second and larger pond, known as the upper pond, on their Property in or about 2008.
>
> 33. The Bentleys' use of water to fill and maintain the water level in their two ponds is a consumptive use.
>
> 34. The two ponds existing on the Bentleys' Property use water from Sheridan Creek in a consumptive manner.
>
> 35. The Bentleys have diverted water into their ponds and the water is not thereafter entirely diverted back to the irrigation ditches for the irrigation of the Intervenors' Properties.
>
> 36. The water that seeps into the ground as a result of flowing into the Bentleys' ponds is not re-diverted to the irrigation ditches of the Intervenors.
>
> 37. Once the water from the Bentleys' ponds flows into the common aquifer it is lost to the irrigation system used by the Intervenors.
>
> 38. The parties' total water irrigation system is diminished by the water losses from the Bentleys' ponds.

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39. The Intervenors objected that the Bentleys consumed water in violation of the Diversion Agreement and that they were not able to get their full and complete allocated portion of water.

40. Under Order of this Court, the State Engineer conducted two seepage tests in May and August 2010. The seepage tests revealed that the ponds did consume water through seepage, evaporation and transpiration. (Exhibits 33 and 35.)

41. The two ponds on the Bentleys' Property consumed water in excess of 30.0 acre-feet during the 2010 irrigation season, which the Court determines to be a consumptive use of water in violation of the Diversion Agreement, even if valid.

* * *

18. The Bentleys have violated the Diversion Agreement, even if valid, by creating a pond that is not water tight, has excess seepage and consumes and wastes water.

The evidence at trial fully supported the Findings and Conclusions issued by the district court. That evidence is largely found in the testimony of Steven Walmsley, Water Resources Specialist, who had conducted numerous flow measurements primarily of Sheridan Creek and also flow measurements of Gansberg Spring and Stutler Creek, 6 SA 1133-1137; 2 TR 313-327. The reports of his investigations were contained his field investigations. Exhibits 33 and 35.

Pursuant to the Order of the district court made during a hearing held on May 17, 2010, the Office of the State

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Engineer, Division of Water Resources, conducted a seepage test on May 22, 2010, Report No. 1130. Exhibit 33; 7 SA 1397-1411.

A second Seepage Test, Report No. 1130-A, was performed on August 18, 2010, with like results, Exhibit 35; 7 SA 1418-1423. The Cumulative Annual Consumptive Use is set forth in Exhibit 35, Table 3, 7 SA 1429:

Table 3: Consumptive Use Computed from All Data		
	Cumulative Annual Consumptive Use (Acre feet)	Cumulative Consumptive Use between April 1-October 15 (Acre feet)
Lower Pond	28.1	16.4
Upper Pond	26.2	15.2
TOTALS	54.3	31.6

The Cumulative Annual Consumptive Use determined by the two seepage tests is 54.3 acre-feet, or 17,693,709 gallons annually.[2] 7 SA 1421-1423.

The Findings of Fact entered by the district court were based on substantial evidence of consumptive use in violation of the Diversion Agreement, and those Findings may not be set aside on appeal. See, NRCP Rule 52(a), to wit:

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the trial court to judge the credibility of the witnesses.

[2] An acre-foot of water equals 43,560 cubic feet or 325,581 gallons. NRS 533.065(2) and J.H. Davenport, Nevada Water Law, at 254 (2003).

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Findings of Fact 33 and 34 set for the above are amply sustained by the record. 5 SA 982.

D. Chain Of Title And Other Defenses.

The Intervenors in their Third Affirmative Defense stated "the Water Diversion and Use Agreement is unenforceable." 1 SA 86. The Bentleys have included in their Opening Brief a partial chain of title which actually demonstrates the unenforceability of the Diversion Agreement as hereinafter set forth.

The Bentleys' remarkably state that the Rolphs were not required to sign the Diversion Agreement. Exhibit 10, 7 SA 1299-1306. However, an examination of the Diversion Agreement and particularly the recitals contained therein shows the fallacy of such assertion, as follows, 7 SA 1299:

> WATER DIVERSION AND USE AGREEMENT
>
> THIS AGREEMENT is entered into by and between JUNE IRENE BARTLETT, who took title as June Irene Rolph, NANCY ROLPH WELCH, GERALD F. WHITMIRE and PAMELA F.J. WHITMIRE, husband and wife as joint tenants, hereafter referred to as "Grantors" and JOSEPH S. LODATO, hereafter referred to as "Grantee", based upon the following facts:

No such agreement was entered into by either June Irene Rolph Bartlett or Nancy Rolph Welch (the "Rolphs"). The Rolphs simply failed or refused to sign the document. 7 SA 1302. Furthermore, the "following facts" were untrue.

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First Recital:

> 1. Grantors are the owners of real property located in Douglas County, Nevada, as well as the owners of water rights which are appurtenant to, certificated or adjudicated to the benefit of the property owned by them in Douglas County, Nevada.

Recital 1 fails as incomplete inasmuch as the Grantors at the time of recordation did not own all the affected real property. Previously, Grantors Gerald F. Whitmire and Pamela F. J. Whitmire (the "Whitmires"), sold a piece of the subject property to Intervenors Mitchells on March 17, 1987. Exhibit 29, 7 SA 1378-1379. The Mitchell Deed is dated February 6, 1986, and was recorded March 17, 1987, a week before the Diversion Agreement was recorded on March 27, 1987. Trial Exhibit 9, 7 SA 1297-1298. Any supposed rights accruing after March 17, 1987, or later, could not affect the Mitchells. Findings 25 and 26, 5 SA 981.

Third Recital:

> 3. Grantors own and enjoy the right to use waters from Sheridan Creek.

The putative Grantors June Irene Bartlett and Nancy Rolph Welch, owners of all the water rights germane to the Diversion Agreement, refused to sign the Diversion Agreement. Findings 28 and 28, 5 SA 982. The Whitmires only owned the land. They owned no water rights. Finding 30, 5 SA

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982. Specifically, in the two land-only Deeds, Exhibit 4, 7 SA 1283 and Exhibit 5, 7 SA 1286, it is stated:

> RESERVING UNTO THE GRANTOR [the Rolphs] herein all water rights appurtenant to the herein described real property.[3]

In sum, the Rolphs owned the water rights but did not sign the Diversion Agreement. The Rolphs were necessary and indispensable parties to the Diversion Agreement. Conclusion 5; 5 SA 985. After all, the Diversion Agreement dealt with the division of water, not with the use of land. The Whitmires owned land but no water rights. Exhibits 4 and 5. Because the Diversion Agreement dealt exclusively with water, the lack of concurrence, consent and signature of the water right owners is fatal to the validity and enforceability of the Diversion Agreement. Conclusions 6-9, 5 SA 985.

Fourth Recital:

> 4. There are no downstream users of water from these creeks, after this water is used by Grantors.

\\\\

[3] "Nevada law is clear that appurtenant water rights are a separate stick in the bundle of rights attendant to real property." Dermody v. City of Reno, 113 Nev. 207, 212, 931 P.2d 1354 (1997). No severance under NRS 533.040(2) was involved. The Rolphs may have reserved all water rights as security for payment of the purchase price, for lease or for some other reason.

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This statement is incomplete inasmuch as the Whitmires had sold a portion of their land to the Mitchells, downstream water users, prior to the execution and recording of the Diversion Agreement. 7 SA 1297. To the extent that the Whitmires had any right to use the water, they promised and sold part of that right to the Mitchells. Exhibit 9, 7 SA 1297-1298.

Sixth Recital:

> 6. Grantors have agreed to such an arrangement, on the terms and conditions which follow.

7 SA 1300.

The Rolphs did not agree to and did not sign the Diversion Agreement. 7 SA 1305; Conclusion 4, 5 SA 985.

Lastly, the Diversion Agreement specifically states, 7 SA 1300:

> THEREFORE, based on the recital of facts set forth above, which are incorporated in the body of this agreement by reference, and the covenants and conditions which follow hereinafter, the parties do agree as follows . . . .

The recitals' conditions precedent in the Diversion Agreement failed and did not occur. Findings 28-29, 5 SA 982.

It was not until November 9, 1987, long after recordation of the Diversion Agreement, that the Rolphs

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conveyed the reserved water rights to the Whitmires. See Exhibit 16, 7 SA 1328-1330, which states in part:

> THIS DOCUMENT IS BEING RECORDED FOR THE SOLE PURPOSE OF TRANSFERRING ANY AND ALL WATER RIGHTS APPURTENANT TO THE HEREIN DESCRIBED PROPERTY, THAT WERE RESERVED OUT IN DEED RECORDED JANUARY 6, 1986, IN BOOK 186, PAGE 217, DOCUMENT NO. 129026.

Under the circumstances here presented, the after-acquired title doctrine has no application to cure the fatal defects in the Diversion Agreement. Statutorily, the after-acquired title doctrine has been codified in NRS 111.160, which provides as follows:

> **111.160. After-acquired title passes to grantee.**
>
> If any person shall convey any real property, by conveyance purporting to convey the same in fee simple absolute, and shall not at the time of such conveyance have the legal estate in such real property but shall afterward acquire the same, the legal estate subsequently acquired shall immediately pass to the grantee, and such conveyance shall be valid as if such legal estate had been in the grantor at the time of the conveyance. [Emphasis added.]

The two land-only Deeds from the Rolphs to the Whitmires, reserving all water rights (Exhibits 4 and 5, 7 SA 1283-1288), did not purport to convey any water rights and clearly reserved all such water rights. The water rights later conveyed by the Rolphs to the Whitmires on November 9, 1987, did not pass via the after-acquired titled doctrine, but as a matter of direct conveyance. Exhibit 16, 7 SA 1328-

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1330. As those rights did not pass under the after-acquired title doctrine, they did not and could not validate the Diversion Agreement. This conclusion is made absolute by simple reference to the November 9, 1987 grant of water rights to Whitmires (Exhibit 12, 7 SA 1314), which completes the chain of title for the water rights to Whitmires' grantees including Forrester (Exhibit 14, 7 SA 1323-1324) and Hettrick (Exhibit 15, 7 SA 1325-1327). The Whitmires' sale to Hall (Exhibit 17, 7 SA 1331-1332), occurred just after the Whitmires received title to the water rights from the Rolphs (Exhibit 16, 7 SA 1328-1330), and included a specific recital to include all appurtenant water rights. The after-acquired title doctrine codified in NRS 111.160 speaks to a purported conveyance of real property in fee simple absolute, but it does not speak to making an incomplete contract whole.

See, R. Powell and R. Rohan, 14 Powell on Real Property, § 84.02 (1999):

> **§ 84.02 Acquisition by After-Acquired Title**
>
> **[1] — After-Acquired Title Requires a Representation, Conveyance of Less Than Represented, and Subsequent Acquisition of Title by the Conveyor**
>
> The doctrine of after-acquired title results in transfer of legal title as the result of the following events:

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1. a putative conveyor represents in a deed to a putative conveyee that the conveyor has title to property;
2. the putative conveyor in fact has no title, or at least has less than he represents; and

3. the putative conveyor later acquires some or all of the title he represented he had.

If all three events occur, the putative conveyor's newly acquired title passes instantaneously to the conveyee. So even though the conveyee did not receive the expected ownership at deed delivery, later events can pass title to that conveyee.

Contrary to the Bentleys' position here, there was no misrepresentation in any legal instrument ever signed by the Rolphs. Apparently the Rolphs refused to sign the Diversion Agreement and held the water rights as security for payment by the Whitmires of the purchase price of both the land and the water. There can be no estoppel against the Rolphs inasmuch the Rolphs made no misrepresentation. The record is clear under their two land-only Deeds, Exhibits 4 and 5, that the Rolphs withheld all water rights and made no representation to the contrary. Consequently, they never agreed to the Diversion Agreement and never signed it. Findings of Fact 28 and 29 are sustained by the record. 5 SA 982.

Neither does the common law doctrine of estoppel by deed apply. The Nevada Supreme Court has considered the

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common law estoppel by deed doctrine in the case of Lanigir v. Arden, 82 Nev. 28, 37, 409 P.2d 891 (1966), as follows:

> *(C) Estoppel by deed.* The lower court concluded that the plaintiffs, by reason "of the execution and delivery of the deed dated February 6, 1937, are estopped to deny its validity." By definition the doctrine of estoppel by deed does not touch this case. That doctrine, sometimes referred to as the doctrine of after acquired title, estops a grantor from asserting that he acquired title after and not before the conveyance. It forbids the grantor from denying his misrepresentation as to title contained in the deed.
>
> * * *
>
> No one contends that there was a misrepresentation as to title. Clearly the doctrine of estoppel by deed is not involved. [Emphasis added.]

Likewise, no one has ever suggested that the Rolphs made a misrepresentation to the Whitmires.

The case of Noronha v. Stewart, 245 Cal.Rptr. 94, 97 (Cal.App. 1988), does not help the Bentleys. There is no evidence that any grantee such as the Whitmires received less than they were led to believe was being conveyed. There simply was no evidence giving rise to an estoppel.

In Noronha, the California Appellate Court observed the applicable law to be (245 Cal.Rptr. at 97):

> When the grantee has knowledge or notice that his grantor does not have full title to the land conveyed, he is not misled to his prejudice and the general rule of estoppel is not applied."(1 Ogden's Revised Cal. Real Property Law, *op. cit. supra*, § 4.22(b), p. 145.) "Because the common-law

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> rule is based upon estoppel, it does not apply in favor of a grantee who has notice or knowledge that the grantor does not have the full title which he purportedly conveyed." (2 Miller & Starr, Current Law of Cal. Real Estate, *op. cit. supra*, Deeds. § 14:56, p. 588, fn. Omitted.)

Because it was clearly understood at all times that Whitmires did not receive title to the reserved water rights until long after the Diversion Agreement was recorded, and because there was no evidence giving rise to an estoppel by anyone associated therewith, the two doctrines announced by Bentley simply do not apply.

E. <u>There Was No Meeting Of The Minds</u>.

Clearly, there was no meeting of the minds of all parties to the Diversion Agreement. The Rolphs, owners of the water rights, did not agree to it, did not sign it and did not perform under it. In order to be a valid contract there must be a meeting of the minds, consideration and signatures -- none of which are present here. Findings 4-9, 5 SA 985.

In <u>Clarke v. Lyon County</u>, 7 Nev. 75, 80 (1871), the Court acknowledged that it is essential to the validity of every contract that the minds of the contracting party meet in harmonious understanding as to the contract's tenor and provisions. Here the Rolphs did not execute the Diversion Agreement, therefore there could not be a harmonious

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understanding on the contract's tenor and provisions. The concepts presented are well stated by the Nevada Supreme Court in Morrill v. Tehama M. & M. Co., 10 Nev. 125, 134 (1875), as follows:

> [T]he legal presumption is, that the signing thereof was to be concurrent, and as the plaintiff failed thus to sign it, no reciprocal assent thereto can be implied. "There is no contract unless the parties thereto assent; and they must assent to the same thing, in the same sense." (1 Parsons on Con. 475.) It is essential to the existence of every contract that there should be a reciprocal assent to a definite proposition, and when the parties to a proposed contract have themselves fixed the manner in which their assent is to be manifested, an assent thereto, in any other or different mode, will not be presumed. Notwithstanding the instrument declared upon was fully executed on the part of defendant, the contract was still incomplete, and neither party bound thereby.
>
> "A contract purporting to be made between several parties, containing mutual covenants, of which those of one party are the consideration of the others, must, to be valid, be executed by all, and cannot be enforced against one executing, by another who fails to execute." [Emphasis added.]

In Shetakis v. Centel Communications, 104 Nev. 258, 261, 756 P.2d 1186 (1988), the Court reviewed a purported sales agreement for the purchase of electronic equipment and held that no contract had been formed, observing:

> [W]here the circumstances indicate that a particular manner of contract formation is contemplated by the parties, a binding contract is not formed in the absence of compliance with the contemplated procedure . . . .

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Because the Diversion Agreement speaks solely about the use and diversion of water, without the signature of the the water right holders and owners, the Rolphs, an essential and indispensable ingredient of the Agreement is missing, and a binding contract was never formed.

Because the recitals to the Diversion Agreement are incomplete, inaccurate or in error, because the Rolphs did not sign the contract as owners of the water rights pertaining to the diversion of that water and because the subject matter of the contract fails, there was never a valid contract. Conclusions of Law 4 - 9 are sustained by the record. 5 SA 985.

F. The Diversion Agreement Is Unenforceable Under The Statute Of Frauds.

The district court found in its Conclusions of Law, 5 SA 989:

> 9. The Diversion Agreement is unenforceable under the Nevada Statute of Frauds.

The Diversion Agreement was neither signed by putative Grantor June Irene Bartlett, who took title as June Irene Rolph, nor by putative Grantor Nancy Rolph Welch. In recital number 3 of the Diversion Agreement, 7 SA 1299, it is stated:

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3. Grantors own and enjoy the right to use waters from Sheridan Creek.

Because the Diversion Agreement was not signed by the Rolphs, holders of the water right, it is unenforceable under the Nevada Statute of Frauds.

"It is well settled that a water right is realty." Netzel v. Rochester Silver Corporation, 50 Nev. 352, 357, 259 Pac. 632 (1927); Carson City v. Estate of Lompa, 88 Nev. 541, 542, 501 P.2d 662 (1972). Inasmuch as water rights are treated as realty in Nevada, all agreements involving water rights are subject to the Nevada Statute of Frauds. See NRS 111.205(1), which provides:

> **111.205. No estate created in land unless by operation of law or written conveyance; leases for terms not exceeding 1 year.**
>
> 1. No estate or interest in lands, other than for leases for a term not exceeding 1 year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared after December 2, 1861, unless by act or operation of law, or by deed or conveyance, in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized in writing. [Emphasis added.]

For example, the recordation of a parcel map does not satisfy the Statute of Frauds where the map is not subscribed by the servient landowner. See, Jim Marsh America

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v. Century Construction, 106 Nev. 727, 728, 802 P.2d 1 (1990), in pertinent part:

> The creation of an easement is subject to the statute of frauds. NRS 111.205(1). The existence of an easement may not be established through parol evidence. [I]n the absence of any writing subscribed to by the servient estate owner, the alleged easement was never created.

So too here, the right to divert water under the Diversion Agreement was never created as the Diversion Agreement was not signed by all parties and is consequently invalid and unenforceable.

G. Bentleys' Affirmative Defenses.

1. The Statute Of Limitation Does Not Validate The Diversion Agreement.

The Diversion Agreement was never a completed and binding agreement because of the absence of a material and important ingredient, i.e., the assets of the water right holders. Exhibits 4 and 5, 7 SA 1283-1288. Furthermore, the parties always used the limited supply of water in rotation. The prior owner of the Bentleys' Property, the Webers, never insisted on enforcing the Diversion Agreement and never mentioned it. 6 SA 1052; 1 TR 97:4-9.

Intervenor Scyphers testified, 6 SA 1127, 2 TR 287:7-19:

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Q. Was anyone enforcing that [diversion] agreement, was anyone taking water a hundred percent through a pond for –

A. No, never. We strictly were on an informal rotation ever since I've owned the property.

Q. So you found the document in your own search, but you knew that no one was enforcing that agreement?

A. That's correct.

Q. And when was the first time that you learned that someone was going to enforce that agreement?

A. Until we weren't getting any water at all. The pond had gone in and there was – our water was closed off and it was all going through the two ponds and out through the Sheridan Creek fence line.

The Intervenors were surprised to read Bentleys' Exceptions based on the Diversion Agreement. 6 SA 1056; 1 TR 113:23-115:8.

Inasmuch as water rights are treated as realty in Nevada, the statute of limitations set forth in NRS 11.070 only begins to run within 5 years before said action is prosecuted or defense made.

The single act that caused the current conflict was the Bentleys construction of the upper pond in 2008 into which they diverted a substantial amount of water from Sheridan Creek. Prior to that, the parties were cooperating under an informal rotation system. 6 SA 1127, 2 TR 287:7-19. The

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statute does not run until an event triggers the commencement of the statute. 6 SA 1056; 1 TR 114:8-115:8. The statute of limitation will not commence to run until the aggrieved party knew, or reasonably should have known, of the facts giving rise to a breach. Nevada State Bank v. Jamison Partnership, 106 Nev. 792, 799-800, 801 P.2d 1377 (1990), substantial evidence supported the district court's conclusion that the buyers' complaint was timely filed when filed 18 months after the conversation with the former owner about minor flooding. Mackintosh v. California Fed. Sav., 113 Nev. 393, 403, 935 P.2d 1154 (1997). See, Horgan v. Felton, 123 Nev. 577, 581-582, 170 P.3d 982 (2007), holding that lack of adversity and notice prevented extinguishment of a recreational easement.

Until Intervenors' rights were violated and invaded, they had no reason for alarm or concern.

2. The Doctrine Of Laches Does Not Preclude The Intervenors' Objections To The Diversion Agreement.

Again, the FOD by the State Engineer is dated August 14, 2008. Judicial proceedings under the FOD began on October 30, 2008. The Bentleys' filed their first Notice of Exceptions and Exceptions to the Final Order of Determination on December 11, 2008, noting the Diversion

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Agreement as an exception. 3 JA 426-427. The Intervenors timely filed their Motion to Intervene on April 10, 2009, to address their objections to the Bentleys' exceptions, which Motion was granted by the district court. 1 SA 57-58. The Bentleys only initiated their issues relating to the Diversion Agreement by filing their exceptions on December 11, 2008, shortly after the upper pond was constructed. The Intervenors are in agreement with the FOD and have promptly and always timely objected to the enforceability of the Diversion Agreement based on Bentleys' exceptions filed with the district court. Laches simply does not apply.

Until the Bentleys created a second water consuming pond, the parties got along under a system of rotation. 6 SA 1051; 1 TR 93:2-94:18; 6 SA 1052; 1 TR 97:4-9. The doctrine of laches does not apply because the Bentleys were never prejudiced by any actions or delay of the Intervenors. In Lanigir v. Arden, 82 Nev. 28, 36, 409 P.2d 891 (1966), this Court observed:

> Each case must be examined with care. *Cooney v. Pedroli*, 49 Nev. 55, 235 P. 637 (1925). Perhaps the most important inquiry is whether the party urging laches has been prejudiced by his opponent's delay in asserting rights.

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There was no reason for Intervenors to litigate the efficacy of a document that was never enforced or utilized, and to most Intervenors, unknown.

The district court determined, on the facts and law presented at trial, as follows, 5 SA 989:

> 13. The Bentleys' arguments of laches, estoppel and limitation of action are overruled as not supported by an extraordinary measure of evidence.

3. <u>An Absurd Result Has Been Avoided</u>.

The results of the two Seepage Tests showed that the two Bentley ponds were consuming substantial quantities of water. The evidence also showed that during periods of low-flow, the Bentleys' two ponds, together with the Smith-Barden four inch (4") pipe, diverted <u>all</u> of the water from this source. The Intervenors agree that the Court must avoid a construction of the Diversion Agreement that would create an absurd result, or render performance impossible. The contention by Bentley that they have the right to divert the entire and whole stream of water into one or more ponds, itself creates an absurd result in that there would be no water left for the other vested water rights' holders. That simply would be the absurd result.

Intervenors do not contest that a contract should be construed, if logically and legally permissible, so as to

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effectuate valid and contractual relations, rather than in a manner that would render the agreement invalid, or render performance impossible. Reno Club, Inc. v. Young Investment Co., 64 Nev. 312, 325-26, 182 P.2d. 1011 (1947). See, for comparison Desert Valley Water Co. v State Engineer, 104 Nev. 718, 720, 766 P.2d 886 (1988). However, a fair reading of the district court's interpretation of the Diversion Agreement to allow Bentley to receive all waters from Sheridan Creek during low flows, would itself result in an absurd result.

X. ARGUMENT -- ATTORNEY FEES.

A. The Award Of Fees Merged Into The Decree.

On January 4, 2013, the district court entered its Order granting Intervenors a portion of the $171,814 of attorney fees they sought post-trial, by awarding them fees in the amount of $90,000 and costs in the amount of $7,127.05. 4 SA 825.

The award of attorney fees was authorized by the April 5, 2012, Findings of Fact, which document was included in the Decree. Findings of Fact, 5 SA 987, ¶ 19 and ¶ 20; 5 SA 848; 974-990.

Nevada allows merger of the interlocutory order and a review upon appeal. An interlocutory order awarding fees is

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merged into the final judgment and fully enforceable when the final judgment is entered (if not before). It is also appealable from the final judgment without need for reference in the judgment, just like any other interlocutory order. For example, a final judgment does not need to reference the denial of a motion for summary judgment or the granting of a motion for partial summary judgment in order for those interlocutory orders to be appealable from the final judgment.

In Consolidated Generator v. Cummins Engine, 114 Nev. 1304, 1312, 971 P.2d 1251 (1998), this Court stated:

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

The January 4, 2013, Order for fees and costs automatically merged into the Decree. Under the merger rule discussed in In re Westinghouse Securities Litigation, 90 F.3D 696, 706 (3rd Cir. 1996), "prior interlocutory orders merge with final judgment in a case, and the interlocutory orders (to the extent that they affect the final judgment) may be reviewed on appeal from the final order." So too

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here, the interlocutory Order for fees and costs merged into the Decree and is entirely reviewable by this Court.

B. The Intervenors Were The Prevailing Party And Entitled To Attorney Fees.

On April 25, 2012, Intervenors filed their Motion for Attorney Fees. 4 SA 603-738. The Motion, filed post-trial, fully and completely supplied all the necessary legal authorities and factual information necessary to support an award. The district court having attended to too many pre-trial motions, procedures, schedules and trial was amply and fully aware of the conduct of the Bentleys and their counsel in recklessly persevering to establish a right to take all water from the Sheridan Creek source in violation of the Intervenors' vested water rights. The four day trial in this matter clearly showed that the Bentleys had acted improperly. In fact, Finding 44 specifically stated: "Mr. Bentley, through intimidation and threat, attempted to bully the Intervenors acting in a manner to harass and financially exhaust the Intervenors." 5 SA 984.

The Findings of Fact correctly recited that Intervenors were the prevailing parties: "19. The Intervenors are the prevailing parties and are entitled to

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their costs and a reasonable attorney fee." Findings of Fact, 5 SA 987.

In its Order awarding attorney fees, the district court properly analyzed the various components of an attorney fee award under Brunzell v. Golden Gate Nat'l Bank, 85 Nev. 345, 349, 455 P.2d 31 (1969), and found, 5 SA 836: 17-25:

> 4. The Result Obtained: As reflected within the written judgment entered on April 5, 2012, the result of trial was determined to be in favor of the Intervenors.
>
> However, although the amount of attorney's fees requested is reasonable and justified as reflected above, considering the purpose of the award as stated within NRS 18.010(2)(b), the Court hereby determines that an award of $90,000 is appropriate to accomplish the statutory purpose as stated therein.

The award of attorney fees is within the discretion of the district court and when the court exercises its discretion according to the rules and procedures contained in Brunzell, an award will not be set aside by the appellate court. "A district court's award of attorney's fees will not be disturbed on appeal absent a manifest abuse of discretion." Nelson v. Peckham Plaza Partnerships, 110 Nev. 23, 26, 866 P.2d 1138 (1994); *accord* Hornwood v. Smith's Food King No. 1, 107 Nev. 80, 87, 807 P.2d 208 (1991) ($50,000 fee award affirmed despite affidavits and time sheets, demonstrating over $130,000 in fees paid). The

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Intervenors sought a total of $171,814 in fees, 4 SA 796, but only $90,000 was awarded. 4 SA 828.

C. The District Court Properly Awarded Fees Under The Rules.

The Intervenors' filed their Motion for Attorney Fees and cited all the special rules, authorities and supporting evidence pursuant to NRS 18.010 and NRCP 54(d). Appellants seem to quibble that specific reference was not made in the Motion to NRS 18.010(2)(a) and (b). They are in error as a quick examination of the Motion, specifically pages 7-11 will show. 4 SA 609-616.

NRS 18.010 provides that courts are to liberally construe NRS 18.010(2)(b) in favor of awarding attorney's fees in all appropriate situations. The legislature expressed an intent that the court award attorney's fees and impose sanctions in all appropriate situations in order to punish and deter frivolous or vexatious claims and defenses due to the burden such claims and defenses place on judicial resources. The district court specifically found and determined, 4 SA 828:

> 4. The Result Obtained: As reflected within the written judgment entered on April 5, 2012, the result of trial was determined to be in favor of the Intervenors. However, although the amount of attorney's fees requested is reasonable and justified as reflected above, considering the

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purpose of the award as stated within NRS 18.010(2)(b), the Court hereby determines that an award of $90,000 is appropriate to accomplish the statutory purpose as stated therein.

The district court made specific reference to NRS 18.010(2)(b) in its Order.

While the district court did not specifically apportion fees, the court did, in essence, discount the fees from the amount requested by Intervenors of $171,814, with an award of approximately one-half or $90,000, giving justification for its award made an apparent "apportionment."[4]

D. The Obligation For Fees Has Been Incurred.

The procedures for filing a motion for attorney fees are set forth in NRCP 54(d)(2)(B) which require the motion "to be supported by counsel's affidavit swearing that the fees were actually and necessarily incurred and were reasonable [and include] documentation concerning the amount of fees claimed." The two Affidavits of Thomas J. Hall, Esq., attached to the Fee Motion complies precisely with the requirements of the rule. 4 SA 621-624; 4 SA 798-801. The fact that only a portion of the fees have been actually paid by Intervenors merely indicates that the Intervenors have

[4] If the Diversion Agreement is held to be valid but violated, Intervenors would be entitled to an award of all their fees. See, Diversion Agreement, Exhibit 10, ¶ I, 7 SA 1301-1302.

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been financially distressed by this action and have been hard-pressed to keep up with the onslaught of legal maneuverings and pleadings thrown at them by the Bentleys who have undertaken a course of conduct to financially embarrass, burden, harass and stress-out the Intervenors. In fact, the Court made a remarkable Finding in this regard:

> 44. Mr. Bentley, through intimidation and threat, attempted to bully the Intervenors, acting in a manner to harass and financially exhaust the Intervenors.

1. Thomas J. Hall, Esq., Never Acted In Proper Person.

At no time did Thomas J. Hall, Esq., represent himself herein in proper person, but rather represents a Nevada company in which he indirectly owns a minor interest. The pleadings in this case are replete with recitations that Respondent Hall Ranches, LLC, was and is an existing and valid Nevada limited liability company, holding water rights V-06340 and V-06341. 1 SA 20-56; 8 SA 1629, V-06340 and V-06341.

As an officer of the court, Thomas J. Hall, Esq., did disclose to the district court that he was a small fractional and indirect owner of Hall Ranches, LLC, which ownership is actually represented by and vested in another company, Hall Bonanza Investments, LLC, a Nevada limited

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liability company, of which he owns a fractional interest. 4 SA 792: 1-10. None of the cases cited by the Bentleys prohibit an attorney from representing a company where the majority of the company is owned by others. Thomas J. Hall, Esq., never entered this action in a pro per capacity. 4 SA 621-624; 4SA 798-801.

The case of Sellers v. Dist. Ct., 119 Nev. 256, 258-59, 71 P.3d 495 (2003), does not assist the Bentleys argument that Intervenors' counsel, is attempting to create an "illusory fee obligation". The obligation of Hall Ranches, LLC, to pay attorney's fees has been certified in this case in the two Affidavits of Thomas J. Hall, Esq., and cannot be discounted and overruled because of Bentleys' sheer speculation. The award of attorney fees in Sellers was set aside only because attorney Mathews represented himself, pro per, and did not pay or incur any obligation to pay attorney's fees. Here, the obligation of Hall Ranches, LLC, has been substantiated as an obligation of the company to pay attorney fees in the defense of Bentleys' frivolous claims.

XI. CONCLUSION.

The district court ordered and the State Engineer, upon certain flows and proper measurements, implemented the

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rotation schedules. The district court had clear legal authority to order rotation of scarce and limited irrigation water during the dry season for the early non-statutory vested water rights held by the parties. There was substantial evidence before the district court authorizing its Order for Rotation. The State Engineer merely implemented the district court's Order under the flow measurements as found by his staff.

The award of attorney fees was properly ordered by the district court and was merged into the Decree. The Bentleys have fruitlessly carried the issues of this case on for nearly seven (7) years, against prevailing law and despite substantial evidence as to the error of their ways.

Respectfully submitted this 14th day of May, 2015.

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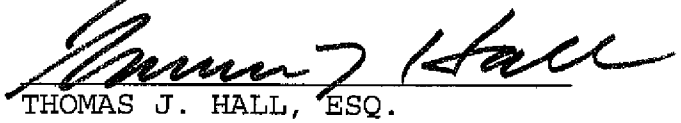

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XII. NRAP 26.1 DISCLOSURE STATEMENT.

The undersigned hereby certifies that Respondents and 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 are individuals or limited liability companies with no parent corporations and with no publicly held companies that have an interest in them. Thomas J. Hall, Esq., has been the Respondents' and Intervenors' only attorney in the district court proceedings below and no other attorney is expected to appear on their behalf in this matter.

Respectfully submitted this 14th day of May, 2015.

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XIII. ATTORNEY'S CERTIFICATION.

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 this brief has been prepared in a monospaced typeface in 12 point Courier New font.

I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7)(A) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not contain more than 14,000 words.

Finally, I hereby certify that I have read this 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.

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DATED this 14th day of May, 2015.

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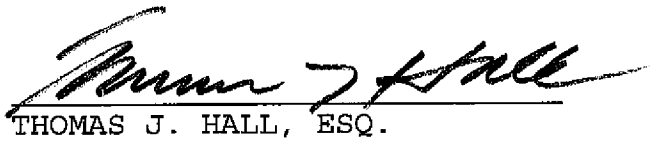

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CERTIFICATE OF SERVICE

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

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Carson City, Nevada 89705

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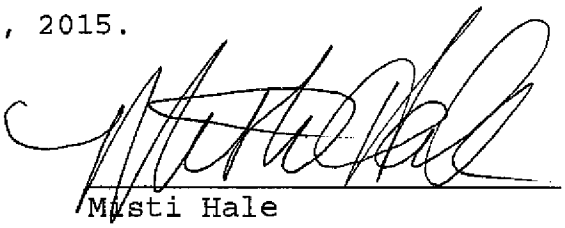
DATED this 14th day of May, 2015.



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