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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. FORRESTER; 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

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.

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APPELLANTS

J.W. BENTLEY AND MARYANN BENTLEY'S

OPENING BRIEF

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I. JURISDICTIONAL STATEMENT

This appeal involves four (4) separate orders from the District Court:

1. Final order on November 27, 2013 denying consolidated petitions for judicial review of the State Engineer's rotation schedule in District Court Case No. 08-CV-0363-D1 [Joint Appendix Volume 5 ("JA5"), 1046-1051]. This Court has jurisdiction over the appeal from that order pursuant to NRAP 3(b)(1). Notice of entry of order was provided on December 4, 2013 [JA5 1052-1062]. Bentley, Smith, and Barden filed their Joint Notice of Appeal on December 23, 2013. The appeal was docketed as Case No. 64773.

2. Order awarding costs in District Court Case No. 08-CV-0363-D1 on July 14, 2014 [Supplemental Appendix Vol. 9 ("SA9") 1701-1704]. This Court has jurisdiction over the appeal pursuant to NRAP 3(b)(8) as a special order following the entry of final judgment. Notice of entry of order was provided on July 15, 2014 [SA9 1705-1712]. Bentley, Smith, and Barden filed their Joint Notice of Appeal on August 12, 2014. That appeal was docketed as Case No. 66303. This Order for costs is not an issue in this Opening Brief, except to the extent the order has to be reversed if this case is reversed or remanded.

3. *Findings of Fact, Conclusions of Law, Judgment and Decree* ("Decree") on September 29, 2014 in Case No. 08-CV-0363 [SA5 840-1023]. This Court has jurisdiction over the appeal from the *Decree* pursuant to NRAP 3(b)(1). Notice of Entry of the *Decree* was provided on October 16, 2014 [SA5 1024-1026]. Bentley

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noticed its appeal on November 10, 2014. That appeal was docketed as Case No. 66932.

4. Case No. 66932 also involves the January 4, 2013 Order awarding attorney's fees and costs to the Intervenors in District Court Case No. 08-CV-0363-D [SA4, 825-830]. Notice of Entry of that order was provided on January 8, 2013 [SA5 831-839]. That Order was entered prior to the *Decree*. It was not mentioned in the *Decree* nor incorporated therein. It is not a final order for purposes of NRAP 3(b)(1), and it cannot be considered a special order after final judgment pursuant to NRAP 3(b)(8). Bentley appealed from that Order in an abundance of caution. Part IX of this Opening Brief addresses the multiple problems with this Order, including the apparent lack of finality.

II. ROUTING STATEMENT

This matter concerns a water rights adjudication proceeding and is presumptively retained by the Supreme Court pursuant to NRAP 17(a)(9).

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Intervenors' *Response and Objections to Notice of Exceptions and Exceptions to Final Order of Determination* ("Response") [SA1 85-88] is an allowed pleading in this water rights adjudication case pursuant to NRS 533.170(2); and if so, whether the affirmative defenses contained therein are sufficient to place their claim to quiet title to a *Water Use and Diversion Agreement* that was recorded

in 1987 [Tr.Ex. 10, JA7 1299-1306] at issue for trial. These are questions of law that reviewed de novo.

2. Whether Bentley's use of their vested, adjudicated water rights to maintain water levels in their ponds was a consumptive use of the water that violated the 1987 *Water Use and Diversion Agreement*. This is a question of contract interpretation that is reviewed de novo.

3. Whether the District Court exceeded its statutory authority by ordering the State Engineer to impose a rotation schedule based on the preference of a bare majority, in this case six (6) of eleven (11) claimants. This is a question of law that is reviewed de novo.

4. Whether the District Court committed reversible error by including water from Gansberg Springs in the rotation schedule, when some the Intervenors have no claim to that water. This is a question of law that is reviewed de novo.

5. Whether the District Court committed reversible error by denying the Bentley, Smith, and Barden petitions for judicial review of the rotation schedule on the basis of issue preclusion. This is a question of law that is reviewed de novo.

6. Whether the January 4, 2013 attorney's fees order [SA4 825-830] ever became a final order. This is a question of law that is reviewed de novo. If the January 4, 2013 attorney's fees order is a final order:

a. Whether the District Court committed reversible error by ruling that Bentley's defense of the 1987 *Water Use and Diversion Agreement* and Gansberg

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Spring was so lacking in merit that attorney's fees were awarded to Intervenors under NRS 18.010(2)(b). This is a mixed question of law and fact.

b. Whether the District Court committed reversible error by awarding attorney's fees when the obligation for fees was not actually incurred and by failing to apportion the attorney's fees between Bentley's exceptions and Intervenor's affirmative claims. These are questions of law that are reviewed de novo.

IV. STATEMENT OF THE CASE

This appeal arises from an adjudication of vested water rights pursuant to NRS 533.090-533.435. The State Engineer filed the *Final Order of Determination* ("FOD") of the relative rights with the District Court on August 14, 2008 [JA2 190-424]. Bentley filed certain exceptions thereto [JA1 190-491]. The FOD has the effect of a complaint in a civil case and Bentley's exceptions have the effect of an answer. No other pleadings are allowed. NRS 533.170(2). Despite this prohibition against further pleadings, the District Court allowed Intervenors to file a document entitled *Response and Objections to Notice of Exceptions and Exceptions to Final Order of Determination* ("Response") [SA1 85-88]. Intervenors' *Response* was styled as affirmative defenses, but included a claim to quiet title to a *Water Use and Diversion Agreement* that was recorded in March 1987 by Bentley's predecessor.

All of Bentley's exceptions were resolved by stipulations prior to the commencement of trial on January 9, 2012. Trial proceeded on Intervenors' claim to quiet title to the *Diversion Agreement*. Intervenors prevailed on that claim. The issue

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of the rotation schedule was not tried in Case No. 08-CV-0363-D. Rather, the District Court accepted the following stipulation prior to trial:

> 15. The parties made the following stipulations in relation to these Exceptions at the beginning of the trial, which were adopted by the Court:
>
> a. Exception 1, in part, was that the State Engineer would not attempt to include a rotation schedule in the Decree itself, but that the provisions of NRS 533.075 and the order of this Court would be used to determine when and if a rotation schedule is needed to efficiently use the waters of the State of Nevada. However, Bentley reserves all objections to the imposition of a rotation schedule, including objection about the statutory authority to do so. [*Findings of Fact* JA4 762]

Despite the foregoing, in his closing argument at the conclusion of trial on January 13, 2012, Senior Deputy Attorney General Bryan Stockton, who was representing the State Engineer, asked the District Court to give the State Engineer authority to impose a rotation schedule [Tr.Trans. 1/13/2012, SA6 1252]. Bentley's counsel asked to provide a rebuttal to that request, but was denied. The District Court granted the State Engineer's request. In its April 5, 2012 *Findings of Fact, Conclusion of Law and Judgment* ("Findings of Fact") [JA1 154-171], the District Court confirmed what it believed was already the State Engineer's statutory authority and ordered him to impose the rotation schedule. In fact, there is no such statutory authority. Bentley appealed the *Findings of Fact* as Case No. 60891. That appeal was dismissed because the *Findings of Fact* was not the final decree. The District Court also awarded attorney's fees to the Intervenors. Bentley appealed from that order as Case No. 62620. That appeal was also dismissed.

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Bentley also appealed from the *Decree* that was entered on September 29, 2014 [SA5 840-1023]. That appeal was docketed as Case No. 66932. In the meantime, Bentley, Smith, and Barden petitioned for judicial review of the various rotation schedules that were imposed by the State Engineer. Those petitions were consolidated in the District Court as Case No. 08-CV-0363-D1. Those petitions were denied in the Order entered on November 27, 2013 [JA5 1046-1051]. The District Court did not reach the merits of the petition. That appeal was docketed as Case No. 64773 and consolidated with this appeal.

V. STATEMENT OF FACTS

1. Sheridan Creek splits into the North Branch and the South Branch. The North Branch has approximately sixty percent (60%) of the flow, 2.1 cfs from a measured flow of 3.5 cfs. [FOD, JA2 338].

2. This case concerns the North Branch of Sheridan Creek. A list of the eleven (11) parties with decreed rights to the North Branch of Sheridan Creek is attached hereto as ***Appendix A***. ***Appendix A*** summarizes the approved acreage and the pro rata ownership. Bentley, Smith, and Barden are the Appellants herein. Bentley also leases Pestana's water rights and has purchased Sapp's water rights [Tr.Exs. 91-94, SA8 1599-1609]. Sapp has not appeared in these proceedings. Hall Ranches, LLC, Thomas J. Scyphers and Kathleen M. Scyphers, Frank Scharo, Sheridan Creek Equestrian Center, LLC, a Nevada limited liability company, Ronald Mitchell and Ginger Mitchell, and Donald S. Forrester and Kristina M. Forrester (collectively,

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"Intervenors") intervened in the proceedings below [JA1 113-116].

3. Flows in the North Branch of Sheridan Creek are supplemented by two (2) additional water sources, Stutler Creek and Gansberg Spring. The water from those sources is captured by collection boxes and piped into the North Branch of Sheridan Creek below the split with the South Branch. [FOD, JA2 89, 418-419; see also *Analysis of the Distribution System and the 2011 Rotation Schedule Pertaining to the Waters of the North Diversion of Sheridan Creek and its Tributaries* prepared by Michael Stanka, P.E. ("Stanka Report"), Tr.Ex. 96, SA8 at 1649].

4. North Branch Sheridan Creek enters Bentley's Property, from where it can be split three (3) ways through a series of water boxes, pipes, and the original Sheridan Creek ditch/creek bed to reach the various claimants. The Stanka Report provides the best illustration of the 3-way split in the delivery system for the North Branch of Sheridan Creek [Stanka Report, SA8 1649].

5. All of the parties to these proceedings share a common chain of title [discussed infra]. As such, all of the claims of vested rights shown on ***Appendix A*** and referenced herein were submitted at the same time, by Milton Sharp, P.E., who acted as an agent for the parties, claimed the same priority date(s) and used the same report and the same map [See Tr.Exs. 49-55, SA7 1432-1461; JA4 643-662]. Donald Forrester testified that "We all decided . . . we all hired one water engineer to split his fee." [Tr.Trans. 1/9/2012, p. 113, ls.4-14, SA6 1056].

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6. Bentley purchased 12.93 acres of property on Sheridan Lane in Douglas County, Nevada, from Theadore and Kathleen Weber on May 6, 2006 [Tr.Ex. 29, SA7 1378-1379]. The Webers previously submitted four (4) proofs of claim for vested water rights in 1994, including: (i) V-06305 for irrigation rights from Sheridan Creek; (ii) V-06306 for overlapping irrigation rights from Stutler Creek; (iii) V-06307 for stock water and wildlife rights from Sheridan Creek; and (iv) V-06308 for stock water and wildlife rights from Stutler Creek [Tr.Exs.50-55, SA7 1435-1461].

7. The FOD confirmed the Bentley/Weber map, including the priority date (1852 and 1905), the manner of use (irrigation, domestic, stock water), the point of diversion, and the place of use (the 12.93 acres now owned by Bentley) [FOD, JA2 248-249, 302-304]. Bentley's irrigation rights have since been changed to recreation use (See *Request for Judicial Notice*). The place of use did not change.

8. Appellant Joy Smith is the owner of vested water rights, Proof V-06346, to the waters of the North Branch of Sheridan Creek and the commingled waters of Stutler Creek [JA4 643]. Joy Smith's claim also covers the Barden property.

9. Bentley, Smith, and Barden also have water rights to Gansberg Spring under permit 7595, Certificate 1760. Gansberg Spring is also commingled with North Sheridan Creek. Gansberg Spring is referenced in the FOD as a permitted right and was not part of the vested rights determined in the adjudication [JA2 282-283].

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10. Sheridan Creek Equestrian Center and Ronald and Ginger Mitchell have decreed rights to the North Branch of Sheridan Creek, but have no claim to Gansberg Spring [FOD, JA2 315, 445; *Stanka Report*, SA8 1630].

11. The State Engineer filed the FOD in Case No. 08-CV-0363 on August 14, 2008 [JA2 222-456]. The FOD determined vested rights for Sheridan Creek and other stream systems located on the east slope of the Carson Range of the Sierra Nevada Mountains located in Douglas County, Nevada. The FOD approved all of the vested claims listed on ***Appendix A***, including the Weber/Bentley proofs, without reference to a compulsory rotation schedule [FOD, JA2 248-249]. In fact, the FOD emphasized the voluntary nature of a rotation schedule under NRS 533.075:

> **3. Rotation and Use of Water**
>
> Claimants of vested water rights and those owners of water rights acquired through the appropriative process from a common supply **may** rotate the use of water to which they are collectively entitled based on an agreement, so as to not injure nonparticipants or infringe upon their water rights, which is subject to approval by the State Engineer. The purpose is to enable irrigators to exercise their water rights more efficiently, and this to bring about a more economical use of available water supplies in accordance with their dates of priority. NRS §533.075. [FOD, JA2 189) [emphasis added]

12. Claimants had five (5) days prior to the scheduled hearing on April 1, 2008 to notice any exceptions to the FOD [SA1 1-3]. Bentleys filed their *Notice of Exceptions* to the FOD in Case No. 08-CV00363 on December 10, 2008, after learning that the Intervenors were going to demand a rotation schedule [JA3 457-

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475]. Bentley requested in Exception No. 1 of the *Notice of Exceptions* to be exempt from any forthcoming rotation schedule, especially when doing so would have the effect of nullifying the *Water Diversion and Use Agreement* that was recorded in the Official Records of Douglas County, Nevada, on 27 March 1987, at Bk. 387 Pg. 2726, Doc. No. 152147 ("*Diversion Agreement*") [JA3 436-443]. The *Diversion Agreement* was specifically identified in the Bentley/Weber Proof Nos. V-06307 and V-06308 that were filed by the jointly hired water engineer, Milton Sharp, and formed part of the support for those proofs [Tr.Exs. 52, 53, SA7 1447, 1450].

13. Bentleys filed their *Amended Notice of Exceptions* on March 25, 2009 to correct errors regarding the approved acreage for Stutler Creek, which varied from 9.61 to 10.36 and did not match the actual 12.93 acres [JA4 476]. The parties stipulated to that change and that is not an issue on appeal [*See Decree*, SA5 849].

14. The proceedings on Bentley's exceptions were severed from the main adjudication case and proceeded as Case No. 08-CV-0363 subproceeding D [SA9 1713-1716]. On November 19, 2009, Intervenors filed a document in Case No. 08-CV-0363-D called *Response and Objections to Notice of Exceptions and Exceptions to Final Order of Determination* ("*Response*") [SA1 85-88]. Intervenors' *Response* was essentially a complaint, set forth as a series of affirmative defenses that sought to nullify the *Diversion Agreement.*

15. Trial on subproceeding D commenced on January 9, 2012. At the outset of trial, the parties stipulated and the Court clarified and ordered, that a rotation

schedule **would not** be imposed as part of the adjudication and order in Case No. 08-CV-0363.

> 15. The parties made the following stipulations in relation to these Exceptions at the beginning of the trial, which were adopted by the Court:
>
> > a. Exception 1, in part, was that the State Engineer would not attempt to include a rotation schedule in the Decree itself, but that the provisions of NRS 533.075 and the order of this Court would be used to determine when and if a rotation schedule is needed to efficiently use the waters of the State of Nevada. However, Bentley reserves all objections to the imposition of a rotation schedule, including objection about the statutory authority to do so. [*Findings of Fact* JA1 158]

This resolved Bentley's Exception No. 1. Bentley's other exceptions were also resolved by stipulations which were reflected in the April 5, 2012 *Findings of Fact* [JAl 158-160] and the *Decree* [SA1 849]. Only the stipulation on Bentley's Exception No. 1 is relevant to these proceedings.

16. Because all of Bentley's exceptions were resolved by stipulations at the outset of trial, there were no issues left to try regarding the FOD. However, the Court clarified that it wanted to proceed with trial on the claims contained in Intervenors' *Response* regarding the *Diversion Agreement* [Tr.Trans. 01/09/2012 p. 72-73, SA6 1045]. None of those claims and defenses involved a rotation schedule.

17. Despite the foregoing stipulation that the *Decree* **would not** impose a rotation schedule, Senior Deputy Attorney General Bryan Stockton, on behalf the State Engineer, requested in closing argument for the Court's direction on a rotation schedule. Bentley's counsel was denied an opportunity to respond [Tr.Trans.

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1/13/2012, p. 620, l. 19-621, l. 4, p. 622, ls. 16-18, SA 6 1253, 1254]. Consequently, the April 5, 2012 *Findings of Fact* ordered, in pertinent part, as follows:

> 5. When the combined flow from the North Diversion of Sheridan Creek and tributaries drops below 2.0 cfs, the State Engineer shall impose a rotation schedule.
>
> 6. The rotation schedule shall be in effect from the time the North Diversion of Sheridan Creek drops below 2.0 cfs until superseded, until the flow rises to above 2.0 cfs or until the schedule is stayed or modified by this Court.
>
> 7. The rotation schedule shall be prepared at the beginning of the irrigation season to allow review by this Court, under NRS 533.450, if any party challenges the schedule.
>
> 8. The State Engineer has full authority to implement a rotation schedule if appropriate.
>
> 9. The rotation schedule shall reflect any agreements between the parties.
>
> [*Findings of Fact* JA1 169:17-170:5]

18. The *Findings of Fact* do not include any findings that warranted a rotation schedule and the references to the rotation schedule contradict the stipulation that a rotation schedule would not be part of the later *Decree*.

19. On April 13, 2012, the State Engineer circulated an email which informed the parties that the measured flow had dropped below 2.0 cfs and that the rotation schedule was in effect [Letter, JA1 186; rotation schedule, JA1 173-184]. As of that date, the Bentleys were not allowed to use their water outside of the allotted time and their water, including stock and wildlife water, was sent downstream for the

other claimants to use for irrigation.

20. The State Engineer proceeded to impose rotation schedules for the entirety of the 2012 and 2013 irrigation seasons on all water rights users, including Smith and Barden, even though they were not parties to subproceeding 08-CV-0363-D [Rotation Schedules, JA1 173-184, JA5 917-927].

21. The rotation schedules made no distinction between the vested claims to North Sheridan Creek that were adjudicated in the FOD and Case No. 08-CV-0363, and water rights from Gansberg Spring rights, Permit 7595, Certificate 1760. As such, Sheridan Creek Equestrian Center and Ronald and Ginger Mitchell have been able to use the water from Gansberg Spring on rotation, even though they have no rights to Gansberg Spring.

22. Smith and Barden petitioned for judicial review of the 2012 rotation schedule on April 30, 2012 [JA1 1-18]. Bentley also petitioned for judicial review of the 2012 rotation schedule on May 3, 2012 [JA1 19-38]. Smith, Barden, and Bentley filed a joint petition for judicial review of the 2013 rotation schedule on April 25, 2013 [JA5 884-899]. All petitions were consolidated and designated as District Court Case No. 08-CV-0363, subproceeding D-1. These same Intervenors intervened in those cases [See Motions, JA1 39-48, 49-58; Order, JA1 113-116].

23. The petitions for judicial review proceeded to a hearing on October 17, 2013 before Hon. Nathan Tod Young. Judge Young entered a ruling from the bench in which he declined to address the merits of the petitions because the rotation

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schedule was authorized by the *Findings of Fact* [JA5 1039-1043]. The written *Order* followed on November 27, 2013 [JA5 1046-1051]. Smith, Barden, and Bentley filed their *Notice of Joint Appeal* on December 23, 2013 [JA5 1063].

24. Judge Young issued another Order on April 10, 2014, in which he denied Intervenors' *Motion to Amend Order to Include an Award of Costs* [JA5 1066-1071]. In this Order, Judge Young confirmed his understanding that the *Findings of Fact* in Case No. 08-CV-0363-D preserved Bentley's right to petition for judicial review regarding the imposition of a rotation schedule.[1] He did not explain, however, why he simply deferred to the *Findings of Fact* and declined to hear the petitions for judicial review on their merits.

25. Judge Young entered another Order on July 14, 2014, this one awarding costs in Case No. 08-CVD-0363-D1 [SA9 1701-1704].

26. The final *Decree* was entered on September 29, 2014 [SA 840-1026]. The *Decree* affirms the FOD except as otherwise noted.

VI. OVERVIEW OF NEVADA'S STATUTORY WATER LAW

Water rights in Nevada are identified by priority date, place of diversion, place of use, and manner of use (i.e., stockwater, irrigation, municipal, recreation, etc.). "Beneficial use shall be the basis, the measure and the limit of the right to the use of water." NRS 533.035. There is no hierarchy of these different, beneficial uses.

[1] "For instance, the potential for judicial review regarding the imposition of a rotation schedule was specifically referenced within the court's judgment dated April 5, 2012, page 5, lines 25-27 . . ." (Order, App. Vol. 5 at 1069:11-13).

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These principals are fundamental to this case and are the same for permitted water rights and for vested water rights. Permitted rights are rights, such as Gansberg Spring, that are permitted in conformance with Nevada's 1913 statutes codified at NRS 533.324 et seq. In contrast, "vested rights are those that existed under Nevada's common law before the provisions currently codified in NRS Chapter 533 were enacted in 1913." *Andersen Family Associates v. Ricci*, 124 Nev. 182, 188, 179 P.3d 1201, 1204-05 (2008) (quoting *Ormsby County v. Kearney*, 37 Nev. 314, 352-353, 142 P. 803, 810 (1914)). The State Engineer is vested with statutory authority to determine the relative claims of vested rights subject to court confirmation and decree through the statutory adjudication process (See NRS 533.090 et seq.). However, neither the State Engineer nor the District Court can impair vested rights. The non-impairment rule was codified in Nevada's original 1913 statutes:

> **NRS 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.
>
> 2. Any and all appropriations based upon applications and permits on file in the Office of the State Engineer on March 22, 1913, shall be perfected in accordance with the laws in force at the time of their filing.

Andersen v. Ricci is the clearest judicial pronouncement of the non-impairment rule. In that case, the Court concluded that although applications for permits to

change the type, manner, or place of use of vested rights had to be made in conformance with NRS Chapter 533, the statutory penalty of a loss of priority for a cancelled permit cannot be enforced against vested rights. *Andersen v. Ricci* relied heavily on the non-impairment statute:

> *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. In this sense, although *Ormsby* makes clear that vested water rights are subject to regulation under Nevada's statutory system, such regulation may not impair the quantity or value of those rights. (*Andersen v. Ricci*, 124 Nev. at 190) (quoting *Ormsby County v. Kearney*, 37 Nev. 314, 142 P. 803 (1914)) [italics in original]

In this case, the District Court and the State Engineer exceeded their statutory authority and impaired Bentley's vested water rights by subjecting those rights to a rotation schedule for the benefit of other claimants. The rotation schedule limits Bentley's use of those rights and, as demonstrated by restrictions placed on the recent change of use to recreational, effectively prevents a transfer or change in the place or manner of use of those rights. Although the State Engineer might acknowledge such transfer on paper, in fact, the Intervenors will still be allowed to use Bentley's water for their irrigation purposes.

The District Court further exceeded its statutory jurisdiction by quieting title to a *Diversion Agreement* that had been a matter of public record since 1987, allowing parties without rights to Gansberg Spring to use the water and declaring Bentley's defense of these actions to be frivolous and awarding attorney's fees.

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VII. ARGUMENT – ROTATION SCHEDULE

A. The Rotation Schedule is Not Authorized by the Nevada Revised Statutes

The mandatory rotation schedule is not authorized by the Nevada Revised Statutes. Accordingly, the Intervenors, the State Engineer, and the District Court use different and conflicting justifications for the illegal rotation schedule. Their various arguments are reviewed and refuted as follows.

1. The Rationale Used By The District Court

The only authority cited by the District Court to support mandatory rotation was NRS 533.075:

> 15. The parties made the following stipulations in relation to these Exceptions at the beginning of the trial, which were adopted by the Court:
>
> a. Exception 1, in part, was that the State Engineer would not attempt to include a rotation schedule in the Decree itself, but that the provisions of NRS 533.075 and the order of this Court would be used to determine when and if a rotation schedule is needed to efficiently use the waters of the State of Nevada. However, Bentley reserves all objections to the imposition of a rotation schedule, including objection about the statutory authority to do so. [*Findings of Fact* JA1 158]
>
> * * * *
>
> With regards to Mr. Stockton's request for a decision regarding an implementation of a rotation schedule, the Court finds the State Engineer has full authority to implement a rotation schedule for fair distribution of the water of the State of Nevada when they deem it appropriate [*Minutes of the Court*, SA9 1724]
>
> *** * * ***
>
> **1.) Diversion/Rotation Schedule:** It was stipulated at the beginning of the trial that the decree would not include a rotation schedule. However,

> under the provisions of NRS § 533.075 and the orders of this Court, when the combined flow of Sheridan Creek falls below 2.0 cubic feet per second (cfs), the State Engineer shall impose a rotation schedule . . . [*Decree* SA5 849]

NRS 533.075 is not part of the statutory scheme for water rights adjudication. That section provides as follows:

> **NRS 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; or a single water user, having lands to which water rights of a different priority attach, may in like manner rotate in use, when such rotation can be made without injury to lands enjoying an earlier priority, to the end that each user may have an irrigation head of at least 2 cubic feet per second.

NRS 533.075 is clear on its face and should be given its plain meaning. (*Nevada State Democratic Party v. Nev. Republican Party*, 127 Nev. ___, 256 P.3d 1, 4-5 (2011). That statute allows water users to agree on a rotation schedule in order to "bring about a more economical use of the available water supply" without regard to priorities and without violating restrictions on the place of use. Nothing in NRS 533.075 or elsewhere authorizes the State Engineer or the District Court to impose a rotation schedule over the objection of the interested parties, especially when doing so alters the historical diversion patterns and creates waste, inefficiency, and damage to lands to which the water rights are appurtenant.

2. <u>The Rationale Used By The Intervenors</u>

The Intervenors represent 6 of 11 claimants to the waters from North Sheridan

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Creek. Intervenors' do not claim that the State Engineer has statutory authority to impose the rotation schedule. Rather, they argue that the Court has inherent, equitable power to impose a rotation schedule over vested rights as a remedy for over-appropriation. This was never a case of over-appropriation and the District Court never made any findings of over-appropriation. Although the maintenance of Bentley's ponds during a drought may require greater rights than have been adjudicated in their favor, Bentley would simply have to curtail its usage in that event. In addition, Bentley leases Pestana's water rights and has recently acquired additional water rights from Sapp [See Tr.Exs. 90-93, SA6 1599-1604].

Moreover, the proceedings in the District Court concerned a statutory adjudication, not an equitable adjudication. The Nevada Revised Statutes specify that the remedy for over-appropriation is a petition to show cause and an injunction from the District Court. NRS 533.220(2). The imposition of a rotation schedule simply is not an available remedy.

3. The Rationale Used By The State Engineer

The State Engineer never made any findings that the rotation schedule would bring about a more economical use of the water as required by NRS 533.075, presumably because he does not contend that NRS 533.075 authorizes him to impose the rotation schedule. Rather, the State Engineer contends that he is simply deferring to the orders of the Court. This argument is not made in good faith for a number of reasons.

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First, the State Engineer's arguments about a rotation schedule contradict what is contained in the FOD, which was filed by the State Engineer as the Complaint in Case No. 08-CV-0363. The FOD follows NRS 533.075 and states in pertinent part as follows:

> **3. Rotation and Use of Water**
>
> Claimants of vested water rights and those owners of water rights acquired through the appropriative process from a common supply **may** rotate the use of water to which they are collectively entitled based on an agreement, so as to not injure nonparticipants or infringe upon their water rights, which is subject to approval by the State Engineer. The purpose is to enable irrigators to exercise their water rights more efficiently, and this to bring about a more economical use of available water supplies in accordance with their dates of priority. NRS §533.075. [FOD, JA2 189) [emphasis added]

This passage from the FOD contemplates that there may be participants and nonparticipants in the rotation schedule from the same stream system. This is consistent with Bentley's position. Intervenors are free to rotate in the use of their water if they want, but they cannot compel Bentley, Smith, and Barden to submit their water to a compulsory rotation. This same passage emphasizes that a rotation schedule is for irrigation purposes. The rotation schedule is incompatible with Appellants' stock and wildlife rights, recreation rights, or any other uses of the water which require a constant flow.

Second, the State Engineer requested the rotation schedule at the close of trial in contradiction of the earlier stipulation [Tr.Trans. 1/13/2012, p. 620, l. 19-621, l. 4, p. 622, ls. 16-18, SA 6 1253, 1254]. The State Engineer should not be allowed to

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legitimize his illegal conduct based on erroneous orders from the District Court when he invited those errors.

Third, the *Decree* directed the State Engineer to follow NRS 533.075, which requires a finding about a more economical use of the water. The State Engineer never made such findings and the rotation schedule is not efficient. In fact, the parties are not even located on a single ditch where it is feasible to use the water in rotation. Rather, the North Branch of Sheridan Creek enters Bentley's property from where it is divided three (3) ways, and is effectively three (3) different systems. Smith and Barden irrigate through a 4-inch lateral pipe. Forrester, Hall Ranches, Scyphers, and Sharo irrigate through a variegated, segmented pipe. Mitchell and Sheridan Creek Equestrian Center irrigate from the original creek bed that runs through Bentley's original pond [Stanka Report, Tr.Ex. 96, SA8 at 1649-1655].

Intervenors' testimony confirmed that the rotation schedule disrupted the historical flow, allowed the original Sheridan Creek channel to run dry, and that it takes a substantial length of time to recharge that channel. Glenn Robison testified on behalf of the Sheridan Creek Equestrian Center that he prefers to maintain a constant flow down the original ditch. When the water is rotated out of the ditch, the ditch runs dry and Mr. Roberson has to use a substantial portion of his allotted 1.4 days in the rotation to rehydrate thousands of feet of ditch before he receives irrigation water. He preferred the historical, continuous flow from the outlet at the Weber/Bentley pond, which continued down the original channel for Sheridan Creek

[Tr.Trans 1/11/2012 256:13-24, 262:8-22; 268:2-9, SA6 1119-1122].

Joy Smith has likewise maintained that the rotation schedule is not efficient for getting water to her alpacas and that her allotted time in the rotation is too short to allow her to effectively irrigate her pastures. She would rather have her proportionate share of water on a continuous basis [Tr.Trans 1/12/2012 414:7-25, 417:18-418:2, SA6 1184-1185]. Daniel Barden made this same point. [Tr.Trans 1/12/2012 556:2-18, SA6 1237]. Mr. Bentley testified about various inefficiencies with the rotation schedule, in that it results in additional losses through the segmented, lateral pipe and actually delivers too much water and floods the Hall Ranches property [Tr.Trans. 1/12/2012, 470:19-22, 47220:23, SA6 1198, 1199].

No evidence was presented at the trial in Case No. 08-CV-0363-D to support a finding that the rotation schedule brought about a more economical use of the water, even though that is the main consideration under NRS 533.075. All parties testified that the rotation schedule altered the historical irrigation practices.

B. The Rotation Schedule Does Not Divide The Water

The State Engineer may also try and bootstrap his defense of the rotation schedule to his duties to divide the water. The State Engineer is required by statute to divide the water according to the relative rights.

> **NRS 533.305 Division of water among ditches and reservoirs; regulation of distribution among users; notice of regulation by water commissioner; duties of district attorney.**
>
> 1. The State Engineer shall divide or cause to be divided the waters of the natural streams or other sources of supply in the State

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> among the several ditches and reservoirs taking water therefrom, according to the rights of each, respectively, in whole or in part, and shall shut or fasten, or cause to be shut or fastened, the headgates or ditches, and shall regulate, or cause to be regulated, the controlling works of reservoirs, as may be necessary to insure a proper distribution of the waters thereof.

NRS 533.220(1) confirms that the distribution of adjudicated water rights remains under the jurisdiction of the District Court, which has the power to enjoin violations of the FOD and *Decree*. The State Engineer also has the authority to appoint an engineer to monitor the diversions and to charge the users for that cost. NRS 533.275, 533.305(2).

The State Engineer wants this Court to infer that a rotation schedule mandated by the Court and/or the State Engineer is the best or only way to administer adjudicated water rights. This is not the case. Most of the stream systems identified in the FOD, including the South Branch of Sheridan Creek, **do not** have mandatory rotation schedules, if they have any rotation schedules.[2] Moreover, a mandatory rotation schedule does not divide or distribute the water. Rather, a rotation schedule results in a single, combined flow that Bentley can only draw at scheduled times. The rotation schedule compels Bentley to cease using his stock, wildlife, and recreation rights, except during specified periods, so the water can be sent

[2] Compare to the rotation schedules set forth in the FOD for Mott Creek (JA2 at 384) and Unnamed Spring "A" (JA2 at 396). The rotation schedules appear to be consensual and based on historical use. With regard to Mott Creek, the dispute was not whether a rotation schedule should be allowed, but the length of the rotation schedule (i.e., 7 days v. 14 days) (FOD, JA2 at 234).

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downstream to be used at other locations for irrigation purposes, thereby violating the restrictions on the decreed place and manner of use. There simply is no legal authority to support the Intervenors' argument that the State Engineer can impose a rotation in lieu of dividing the water according to the adjudicated, vested rights.

Water is easily be divided with mechanical devices. Dams and diversion boxes have been utilized in various cases on the Humboldt River. See *South Fork Bank of Te-Moak Tribe v. Sixth Judicial Dist. Ct.*, 116 Nev. 805, 7 P.3d 455 (2000), *State v. Sixth Judicial Dist. Ct.*, 52 Nev. 270, 286 P.418 (1930), and *State Engineer v. Sustacha*, 108 Nev. 223, 826 P.2d 959 (1992). *State Engineer v. Sustacha* and *State v. Sixth Judicial Dist. Ct.* confirm that the remedy for an alleged over-appropriation of water is to install diversion devices (i.e., a dam) and a tamper-proof measuring device – not to impair vested rights by imposing a rotation schedule.

There is no indication that the State Engineer analyzed the relative benefit of a mechanical diversion structure, meters, some combination thereof, or simply continuing the historical flow patterns. There is no evidence that a rotation schedule is the only or best way to divide or otherwise administer the water. Even if the parties were inclined to implement a rotation schedule, there are many different rotations available. There is no indication that the State Engineer considered any variations of the rotation schedule, including a block rotation, a 14-day rotation, or other options. The Stanka Report addresses these other options and the inefficiency with the 2,000-foot long segmented pipe and allowing the 4,250-foot long ditch to

dry out [Stanka Report, SA8 1677-1685].

C. The Rotation Schedule Enables Unlawful Use of Gansberg Spring

The rotation schedule violates Gansberg Spring Permit 7595, Certificate 1760. Under the rotation system, Mitchell and Sheridan Creek Equestrian Center are allowed to use the commingled water from Gansberg Spring when they have no right to that water. Gansberg Spring rights were appropriated and certificated pursuant to NRS 533.324, et seq., also without reference to a rotation schedule. Although listed in the FOD, these rights were not part of the adjudication [JA2 at 282-283].

In summary, the mandatory rotation schedule does not fulfill the State Engineer's duty to divide and distribute the water according the FOD; rather it allows him to abdicate his responsibility and encourages use in violation of vested rights, the FOD, and the permit for Gansberg Springs.

D. Bentley Was Entitled to Judicial Review

The State Engineer argued below that "The question of whether a rotation schedule should be implemented was fully litigated in this Court as subpart D of the Mott Creek Decree adjudication" [*Answering Brief*, JA4 671, ll.20-21]. That is essentially a mislabeled argument of issue preclusion. Unfortunately, the State Engineer failed to cite any portion of the record to support this statement. The record supports the opposite conclusion.

In order for issue preclusion to apply, each of the following elements must be

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met: "(1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; . . . (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation"; and (4) the issue was actually and necessarily litigated. *Frei v. Goodsell*, 129 Nev.Adv.Op. 43 at p.5 (2013)[3] (citing *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (alteration in original).

Trial in Case No. 08-CV-0363-D commenced on January 9, 2012. Smith and Barden were not parties to that sub-proceeding. At the outset of trial, the parties stipulated, and the Court clarified and ordered, that a rotation scheduled **would not** be imposed as part of the adjudication and order in Case No. 08-CV-0363. This stipulation was reflected in the April 5, 2012 *Findings of Fact*:

> 15. The parties made the following stipulations in relation to these Exceptions at the beginning of the trial, which were adopted by the Court:
>
> a. Exception 1, in part, was that the State Engineer would not attempt to include a rotation schedule in the Decree itself, but that the provisions of NRS 533.075 and the order of this Court would be used to determine when and if a rotation schedule is needed to efficiently use the waters of the State of Nevada. However, Bentley reserves all objections to the imposition of a rotation schedule, including objection about the statutory authority to do so [*Findings of Fact*, JA4 at 158].

---

[3] *Frei v. Goodsell* focused on the final factor – whether the issue was actually or necessarily litigated - and concluded that the issue of an attorney client relationship was not actually and necessarily litigated as part of a motion to disqualify an attorney in the underlying case such that the attorney would be precluded from denying an attorney client relationship in a subsequent attorney malpractice action.

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

> THE COURT: We're proceeding on the Intervenors' claim and defenses, if I can say it that way.
>
> [Tr. January 9, 2012, 71: 3-8, SA6 1045]
>
> MR. MATUSKA: Right. I appreciate that, and thank you for the clarification, I'm just trying to clarify the operative pleading that the Intervenors are proceeding on. My understanding would be that is [ed.] the Intervenors' response and objections to notice of exceptions -- and exceptions to final order of determination dated November 19th of 2009.
>
> THE COURT: Is that your position also, Mr. Hall?
>
> MR. HALL: Yes, that is, Your Honor.
>
> THE COURT: Okay. I agree with that.
>
> [Tr. January 9, 2012, 71:25-72:8, SA6 1045]

The trial was based on the affirmative defenses contained in Intervenors' *Response* [JA5 880-883]. That document only refers to Bentley's ponds and the disputed *Diversion Agreement* that was the subject of trial. That is a separate issue from the rotation schedule that was the subject of the petitions for judicial review. Even if the topic of the rotation schedule arose during the trial on Intervenors' *Response* or made its way into the *Findings of Fact* or *Decree*, the issue of a rotation schedule was separate from the issues tried in Case No. 08-CV-0363-D and was not a necessary part of the *Decree*. Judge Young's Order did not specifically mention issue preclusion and it did not fully explain why he refused to reach a decision on

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the merits of the petitions for judicial review [JA5 1046-1051]. Judge Young even confirmed in a later order that Bentley had reserved the right to petition for judicial review [JA5 1069: 1-13].

VIII. ARGUMENT – DIVERSION AGREEMENT

The relevant passages of the *Diversion Agreement* include the following:

> 5. Grantee desires to divert some or all of the water from Sheridan Creek, onto his property, to be used in a non-consumptive manner to maintain water levels in ponds on Grantee's property, and thereafter to cause the water to be diverted back to the property of Grantors for irrigation purposes.
>
> 6. Grantors have agreed to such an arrangement, on the terms and conditions which follow:
>
> * * * *
>
> A. . . . Grantors do hereby give and grant to Grantee, as a covenant running to the benefit of the land described in Exhibit "A" attached hereto, the right to divert one hundred percent (100%) of the water from Sheridan Creek, onto the Exhibit "A" property, in perpetuity.
>
> B. This grant is specifically made on the condition that the water will be used by 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. [SA7 1299-1300].

These passages leave no doubt that use of the water to maintain the levels in the ponds is a non-consumptive use. Nevertheless, in the *Decree*, the District Court declared that "The 'diversion agreements' are unenforceable, invalid and ineffective." [SA5 849]. No reason was given. As such, there are no findings of fact to support this portion of the *Decree*. Intervenors will likely argue that the *Decree* incorporated and affirmed the April 5, 2012 *Findings of Fact*.

The April 5, 2012 *Findings of Fact* concluded that the *Diversion Agreement*

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was void for two (2) basic reasons: (i) it was not executed by June and Irene Rolph; and (ii) Bentley violated the terms thereof by using the water to maintain the levels in his ponds, which the District Court described as a consumptive use. The question of who needed to execute the *Diversion Agreement* is a question of law that requires a review of the chain of title. The question of whether Bentley violated the terms of the *Diversion Agreement* by using the water to maintain the levels in his ponds, which is the expressed intent of the *Diversion Agreement*, is a question of contract interpretation.

The *Findings of Fact* were not incorporated into the *Decree*. The closest the *Decree* comes to incorporating the *Findings of Fact* are the following passages:

> **Subpart D: Order and Judgment**
>
> The District Court issued an order dated April 5, 2012 (Appendix C), and determined that the Final Order of Determination issued by the State Engineer on August 14, 2008, as it pertains to the Ninth Judicial District Court (subpart D), is affirmed, confirmed and approved in all aspects except as specifically provided herein . . . [SA5 849]
>
> * * * *
>
> N.) In all other respects, and subject to this Court's Orders that are attached hereto, the Court hereby affirms each and every conclusion of law made by the State Engineer in his Final Order of Determination . . . [SA5 858]

These passages affirm the FOD, subject to modification by the *Findings of Fact*, but not the *Findings of Fact* itself or the other issues addressed therein. Regardless, in an abundance of caution, Bentley addresses the defects in the proceedings leading up to the *Findings of Fact*.

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A. The Limited Scope of a Water Adjudication Case is to Determine the Relative Rights of the Claimants

The first question the District Court should have considered is whether it could hear Intervenors' case on the *Diversion Agreement* as part of the adjudication proceedings. The scope of such an adjudication is to "determine the relative rights to the use of water . . . ." *See* NRS 533.090; 533.100; 533.140; 533.160; 533.265. After a hearing on objections to the preliminary order of determination, the State Engineer shall prepare a [final] "order of determination, defining the several rights to the waters of the stream or stream system. 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." NRS 533.160(1). See also NRS 533.090(1) ("[D]etermination of the relative rights to the use of water of any stream." NRS 533.090(2) ("[D]etermination of the relative rights to the use of water of any stream"); NRS 533.100(1) ("[D]etermination of the water rights in the stream"); NRS 533.140(1) ("[A] preliminary order of determination establishing the several rights of claimants to the waters of the stream"); NRS 533.160 ("[O]rder of determination, defining the several rights to the waters of the stream or stream system"); NRS 533.265(1) ("Upon the final determination of the relative rights in and to the waters of any stream system, the State Engineer shall issue to each person represented in such determination a certificate . . . ."); NRS 533.265(4) ("No certificate need be issued by the State Engineer when printed copies of any decree of

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final determination of relative rights contain a listing of the individual rights so determined").

Based on the foregoing, the object of a statutory adjudication proceeding in the District Court is to determine the relative rights of the various claimants and ultimately, document the final determination by certificates or a decree. There simply is no opportunity for the court to expand the adjudication process to hear a claim to quiet title to a twenty-five (25) year old *Diversion Agreement*, especially when the claim is initiated by affirmative defenses that are not a recognized pleading.

B. Intervenors' Response Is Not An Allowed Pleading

NRS 533.170(2) prohibits pleadings other than the FOD and exceptions thereto. Proceedings under Chapter 533 are to conform to the Nevada Rules of Civil Procedure. NRS 533.170(5). Notwithstanding, Intervenors filed an additional pleading entitled *Response and Objections to Notice of Exceptions and Exceptions to Final Order of Determination* ("Response") [JA3 479-82]. That pleading is not a pleading, but only affirmative defenses. Intervenors' *Response* is not a recognized pleading under NRCP 7, which recognizes a complaint, answer, reply to a counterclaim, answer to cross-claim, a third party complaint and an answer thereto.

The District Court denied Bentley's Motion to Dismiss Intervenors' *Response* [SA1 89-100]. Bentley petitioned this Court for a writ of prohibition and/or mandamus (See Case No. 56351). Bentley cited *Smith v. District Court*, 113 Nev.

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1343, 1344-45, 950 P.2d 280, 281 (1997) as controlling authority for seeking a writ to compel the dismissal of a non-conforming pleading. The *Smith* court concluded that the stand alone cross claims in that case were not a recognized pleading and had to be dismissed. A writ of mandate was appropriate to compel this result. The court noted that this result did not turn on a technical construction or enforcement of the pleading requirements. Rather, the cross-claims were not a pleading and did not put the matter at issue.

In this case, Intervenors' *Response* was insufficient to place their quiet title action at issue for trial. Nevertheless, Bentley's writ petition was dismissed due to a defect in the proof of service without first directing Bentley to either complete service or correct the proof of service to demonstrate that service was completed.

C. Bentley's Use of the Water to Maintain His Pond Levels Is Not a Consumptive Use

Intervenors argue that the water used to maintain Bentley's ponds is lost through "seepage" and is thereby a consumptive use, which violates the *Diversion Agreement*. The District Court even had the State Engineer perform "seepage studies" which it used to support the conclusion that seepage is a consumptive use [Tr.Exs. 33, 35, SA7 1397-1411; 1418-1423].

As a general rule, courts will construe an unambiguous contract according to its plain language. *See Sheehan & Sheehan v. Nelson Malley & Co.*, 117 P.3d 219 (Nev. 2005). "In interpreting a contract, 'the court shall effectuate the intent of the parties,

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which may be determined in light of the surrounding circumstances if not clear from the contract itself . . .'" *NGA #2 Ltd. Liab. Co. v. Rains*, 113 Nev. 1151, 1158, 946 P.2d 163, 167 (1997) (quoting *Davis v. Nevada Nat'l Bank*, 103 Nev. 220, 223, 737 P.2d 503, 505 (1987)). Thus, if the meaning of the term "non-consumptive use," as used in the water diversion agreement, is unambiguous, it should be given its plain meaning. Although the term "consumptive use' is not defined in the *Diversion Agreement*, there is no indication that the parties intended to adopt a technical or statutory definition of consumptive use and no relevant statutory definition has been cited in this case.

If the court determines that the *Diversion Agreement* is ambiguous, then the court should interpret the *Diversion Agreement* according to the intent of the parties and the circumstances surrounding its execution. The court must avoid a construction of the *Diversion Agreement* that would create an absurd result or render performance impossible. *See Vosburg Equip. v. Zupanic*, 103 Nev. 266, 268, 737 P.2d 522, 523 (1987); *Reno Club v. Young Inv. Co.*, 64 Nev. 312, 325, 182 P.2d at 1017 (1947). The intent may be determined by the *Diversion Agreement* itself and the subsequent conduct of the parties to this subproceeding. "The court can use both words and actions to interpret the contract." *Fox v. First Western Sav. & Loan Ass'n.*, 86 Nev. 469, 473, 470 P.2d 424, 426 (1970). These same principles are also expressed in the Restatement (Second) of Contracts:

> (1) Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight.
>
> * * * *
>
> (4) Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.
>
> (Restatement (Second) of Contracts §202 (1979))

The stated intent of the *Diversion Agreement* is to allow diversions through Lodato's ponds to maintain the water levels in the ponds. Seepage is the natural consequence of these diversions. In fact, seepage was anticipated in the *Diversion Agreement* and is the reason why diversions were necessary to maintain the pond levels. It would create an absurd result and render performance impossible if the *Diversion Agreement* were interpreted to allow diversions through a series of ponds to maintain the pond levels, but that any resulting loss from seepage is a violation of the *Diversion Agreement*. Viewed in this light, the prohibition against consumptive use must be interpreted as something different than a prohibition against seepage, such as a prohibition against the use of the water for irrigation.

The conduct of the parties is relevant to the interpretation of the *Diversion Agreement*. Intervenors accepted and allowed the continuous diversions and resulting seepage, at least through the first pond, since 1987. This demonstrates that either the Intervenors do not actually consider seepage to be consumptive use or they

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are guilty of waiver and estoppel, in which case their claim is barred by the statute of limitations, discussed *infra*.

D. Chain of Title

Applicable page limitations do not allow a comprehensive review of the chain of title that was presented at trial. A more detailed recitation of the chain of title was provided in the pretrial statements [SA 503-580]. The following summary demonstrates why the Rolphs were not required to execute the *Diversion Agreement*.

The Rolphs owned all 322.01 acres on Sheridan Creek, including 177.74 on the North Branch and 144.27 on the South Branch. In 1984, they conveyed 22.93 acres on the North Branch to Joseph Lodato [Tr.Exs. 1-3, SA7 1275-1282]. Lodato parceled off two (2) parcels of five (5) acres each, which are now owned by Sapp, and one (1) parcel of 12.93 acres, which was sold to the Webers in 1992, and then to Bentley in 2006 [Tr.Exs. 19-21, 29, SA7 1341-1346, 1378-1379]. The Rolphs sold the remaining acreage on the North Branch to Gerald and Pamela Whitmire in 1986 [Tr.Exs. 4, 5, SA 7 1283-1288]. The Rolphs retained the property on the South Branch. The Whitmires parceled their property and sold the parcels that are now owned by the Intervenors [Tr.Exs. 9, 13, 14, 15, 17, SA7 1297-1298, 1315-1327, 1331-1332].

The *Diversion Agreement* was executed between Lodato and the Whitmires and recorded on March 27, 1987 [Tr.Ex.10 SA7 1299-1306]. That was before the Whitmires sold their parcels, with the exception of the parcel acquired by Ronald

and Ginger Mitchell, whose deed was recorded ten (10) days earlier on March 17, 1987 [Tr.Ex. 9 1297-1298]. The Intervenors' title reports, title insurance policies, and abstracts of title all acknowledge the *Diversion Agreement* [Tr.Exs. 18, 25-27, SA 1333-1340, 1350-1374]. All of the Intervenors acquired their property prior to Bentley's purchase in 2006 [Tr.Ex.29 SA7 1378-1379].

E. The Rolphs Were Not Required to Sign the Diversion Agreement

The *Diversion Agreement* is over inclusive in that it gives Lodato (now Bentley) the right to divert all of Sheridan Creek for the purpose of maintaining ponds located on property described in Exhibit A attached thereto in perpetuity. The Exhibit A property is the 22.93 acre Lodato property, now the Bentley and Sapp parcels. The *Diversion Agreement* did not limit the diversions from just the North Branch (owned by Whitmire), but included the South Branch (retained by Rolphs). The *Diversion Agreement* contained a signature line for June and Irene Rolph, who never signed [Tr.Ex. 10, SA8 1302]. Admittedly, the *Diversion Agreement* would need to be signed by the Rolphs to grant Lodato the right to divert the South Branch; however the Whitmires' signatures were effective to grant Lodato (and Bentley, as his successor) the right to divert the North Branch, which is all that is at issue in this case. The District Court could have limited the *Diversion Agreement* to the North Branch. There was no need for the District Court to nullify it entirely.

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F. The Reservation of Water Rights Was Ineffective

Intervenors focus on the fact that the 1986 deeds from Rolphs to Whitmires purport to reserve the water rights [Tr.Exs. 4, 5, SA 7 1283-1288]. They conclude, therefore, that the Whitmires did not own the water when they signed the *Diversion Agreement*. The reservation of water rights is irrelevant at this point. Under NRS 533.040, the reservation of water rights, without more, was never effective.

> **NRS 533.040 Water used for beneficial purposes to remain appurtenant to place of use; exceptions.**
>
> 1. Except as otherwise provided in this section, any water used in this State for beneficial purposes shall be deemed to remain appurtenant to the place of use.
>
> 2. If at any time it is impracticable to use water beneficially or economically at the place to which it is appurtenant, the right may be severed from the place of use and be simultaneously transferred and become appurtenant to another place of use, in the manner provided in this chapter, without losing priority of right.

In order to sever water rights from the place of use, the water rights must "be simultaneously transferred and become appurtenant to another place of use." NRS 533.040(2). In other words, a reservation of water rights without a corresponding application to change the place of use does not sever the water as an appurtenance to the land.

In this case, although the Rolphs purported to reserve the water rights in their deeds to the Whitmires, they never changed the place of use. As such, the water rights remained appurtenant to the Whitmires' Property and the Whitmires continued to use those rights. The Intervenors admitted that the water stayed with

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the Whitmires and that the Whitmires enjoyed full use of the water, if not actual ownership of the water rights [Tr.Trans. Jan 9, 2012 122:24-123:8, 128:22-129:1, SA6 1058-1059].

More importantly, the Whitmires did not attempt to transfer ownership of the water rights to Lodato; hence, there is no reason to challenge the Whitmires' ownership of those rights. *The Diversion Agreement* is merely a use agreement that allowed Lodato to divert the water through his ponds and return it to the ditches. They did not need the Rolphs signature to allow Lodato to use those rights.

G. Intervenors are Estopped From Challenging the Diversion Agreement

The Rolphs executed a separate water rights deed, which conveyed the previously reserved water rights to the Whitmires on October 29, 1987 [Tr.Ex.16, SA7 1328-1330]. It does not matter that this deed was recorded after the *Diversion Agreement* was recorded, as it completed the chain of title to the water rights at that point, if the chain was not already complete. Pursuant to the after-acquired title doctrine, the after-acquired deed cured any defects in the chain of title. If not, this same defect would permeate the Intervenors' chain of title, including specifically, Mitchell's and Forrester's water rights, as they received their deeds prior to October 29, 1987 [Tr.Exs. 9, 14, SA7 1297-1298, 1323-1324]. Intervenors relied on that after acquired deed to complete their Abstract of Title with the State Engineer's office [Tr.Ex. 25, SA7 1350].

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According to the doctrine of "after-acquired title," once the Whitmires acquired the water rights from the Rolphs, the Whitmires and their successors-in-interest (including the Intervenors) were estopped from contesting the effect of the *Diversion Agreement* that was executed by the Whitmires. This situation is almost identical to the case of *Santa Monica Mountain Properties v. Simoneau*, 220 Cal.App. 7585 (2002), which, in turn, is based on *Noronha v. Stewart* 199 Cal.App.3d 485 (1998). *Santa Monica Mountain Properties* expands *Noronha* and confirms that estoppel applies not just to the original grantor (in this case, the Whitmires), but also to the successors-in-interest of the grantor (in this case, the Intervenors). The doctrine of after-acquired title is known in Nevada as "estoppel by deed."[4, 5] The Whitmires were parties to the *Diversion Agreement* and would be estopped from challenging that agreement. Intervenors, as the successors-in-interest to the Whitmires, are also estopped and precluded from challenging earlier documents executed by the Whitmires. The *Diversion Agreement* is enforceable against the Intervenors, just as it would be enforceable against the Whitmires.

---

[4] *See Lanigir v. Arden*, 82 Nev. 28, 37, 409 P.2d 891, 896 (1966).

[5] This application of the doctrine of after-acquired title should not be confused with the completely distinct doctrine with the same name, whereby a claimant must have title to the real property that is the subject of the dispute at the time the case is filed and is denied standing in court if the claimant acquires title to the disputed real property after the case is filed. *See e.g., Ahmadi v. Alford,* E042369 (Cal.App. 2009).

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H. Bentley's Affirmative Defenses[6]

Intervenors' quiet title action is barred by the statute of limitations. No action or defense to quiet title is valid unless it is brought by the current owner or the owner's predecessor within five (5) years after the act complained of. NRS 11.070. In this case, Intervenors and/or their predecessors would have needed to file their complaint to quiet title five (5) years after the *Diversion Agreement* was recorded, which would have been March 26, 1992. The recording of the *Diversion Agreement* was sufficient to impart notice to each of the Intervenors, who acquired their property after the *Diversion Agreement* was recorded. NRS 111.315, 111.320, 533.383. Donald Forrester testified that he had actual knowledge of the *Diversion Agreement* at the time he purchased his property. [Tr.Trans. Jan 9, 2012 126:19-127:2, SA6 1058].

Even if Intervenors' quiet title action is not precluded by the statute of limitations, it should still be dismissed based on the doctrine of laches. Laches applies in cases where the defense has been prejudiced by the delay in bringing the action. *See Lanigir v. Arden*, 82 Nev. 28, 36, 409 P.2d 891, 896 (1966). Laches is particularly important where persons essential to the defense cannot be located. *Id.* Intervenors' case was based entirely on supposition and presumptions about why the Rolphs did not sign the *Diversion Agreement*. None of the parties who signed the *Diversion Agreement* were available to testify at the time of trial. The Rolphs were

[6] It is misleading to refer to Bentley's affirmative defenses. Intervenors never filed a pleading to which Bentley could answer. Nevertheless, the doctrines of statute of limitations, laches, and estoppel apply to bar Intervenors' claims.

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not known to these parties. The District Court took judicial notice of Joseph Lodato's obituary from June 27, 2000 [Tr.Trans. January 12, 2012, SA6 1182]. Although the Whitmires were known, no one had contact with them for many years. Mr. Mitchell testified that he presumed them to be dead [Tr.Trans. January 13, 2012, SA6 1248-1249]. It was inequitable for the District Court to force Bentley to defend an agreement that was recorded twenty-five (25) years earlier without the benefit of testimony from the parties to that agreement.

At the very least, Intervenors should have brought their quiet title action prior to the Bentleys' purchase in 2006 and should be estopped from challenging the *Diversion Agreement* at this late date. Mr. Bentley testified that there was a continuous flow through the original pond when he purchased the property from Theodore and Katherine Weber in 2006, and that the discharge continued down the historical channel for Sheridan Creek [Tr.Trans. 1/12/2012, 480:8-16, SA6 1201]. Although he did not specifically research the source of this right, the continuous flow through the pond was an important factor in the Bentleys' decision to purchase the property. *Id.*

Daniel Barden and Joy Smith also testified about the historical continuous flow through the four inch (4") lateral pipe to their properties and how it was difficult for them to irrigate on a rotation schedule [Tr.Trans. SA6 1185. 1186. 1237] ("I would like to have the 24-hour historical usage restored").

Tom Scyphers also testified and confirmed the historical, continuous flow, both

down the Sheridan Creek channel that continued through the Weber/Bentley pond and the continuous flow through the four inch (4") lateral to the Smith/Barden properties [Tr.Trans. 1/11/2012, 292:1-4, 295:20-24, SA6 1128, 1129].

Donald Forrester also testified and confirmed the historical flow down the Sheridan Creek channel that continued through the Weber/Bentley pond [Tr.Trans. 1/9/2012 129:16-20, 131, 12-15, SA6 1060].

Intervenors even cooperated with the Webers in jointly hiring Milton Sharp, P.E. to submit the proofs in 1994 [See Maps to Accompany Proofs of Claim Nos. 06305-03612, 06336-06341, 06346-06347, Tr.Ex. 49, SA7 1432-1434]. These are the same proofs listed in the FOD and ***Appendix A*** attached hereto and include Intervenors' proofs. The *Diversion Agreement* is specifically referenced in the Weber proofs [Tr.Exs. 52, 53 SA7 1447, 1450]. This should be an admission, by Intervenors' agent, on the validity of the *Diversion Agreement* in 1994.

Estoppel is also established by the signature of the Intervenors on a new easement agreement [Tr.Ex.57, SA7 1463-1486], their failure to object when the pond was being constructed, and their use of the water rights deed from the Rolphs to the Whitmires to complete their Abstracts of Title and Summary of Ownership [Tr.Exs. 25, 62, 63, SA7 1350, 1505-1513]. They cannot now deny the validity of that deed or the *Diversion Agreement*.

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IX. ARGUMENT – ATTORNEY'S FEES

Intervenors' claim for attorney's fees is based on an Order that was entered on January 4, 2013 which awarded $90,000 in attorney's fees and $7,127.05 in costs [SA4 825]. That Order was entered approximately twenty-one (21) months prior to the entry of the final *Decree* on September 29, 2014.

A. The Order For Attorney's Fees Was Not Incorporated Into the *Decree*

Intervenors can cite no rule which allows the January 4, 2013 Order to be recorded as a judgment lien under NRS 17.150 or enforced as a final judgment. Although an order for attorney's fees and costs may be appealed under NRAP 3A as "A special order entered after final judgment . . . ," the order upon which Intervenors rely was entered prior the entry of the final *Decree*. The *Decree* makes no reference to attorney's fees, costs, or the January 4, 2013 Order, and precludes any argument that the order somehow became final upon entry of the *Decree*.

Intervenors will likely argue that the January 4, 2013 Order for attorney's fees was authorized by the April 5, 2012 *Findings of Fact*. That argument is beside the point, as the *Findings of Fact* was also an interlocutory order. (See Case No. 62620). As explained above, the *Findings of Fact* were incorporated into the *Decree* only to the extent they modified the FOD. The January 4, 2013 Order did not modify the *Decree*, is not essential to the *Decree*, and is not even mentioned in the *Decree*.

It would be an error for Intervenors to assume that the January 4, 2013 Order

automatically merged into the *Decree*. Under the merger rule discussed in *In re Westinghouse Securities Litigation*, 90 F.3d 696 (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." *Id.* at 706. The interlocutory order in that case affected the final judgment.

In re Westinghouse concerned multiple class action securities complaints. The cases were consolidated in the Consolidated Amended Class Action Complaint in June 1992 (the "First Amended Complaint" or "FAC"). Defendants moved to dismiss the FAC under FRCP 9(b) and 12(b)(6). That motion was granted as to Counts II-VI, which were dismissed with prejudice. Count I was dismissed without prejudice and Plaintiffs were granted leave to amend. See *In re Westinghouse Securities Litigation*, 832 F.Supp. 948 (W.D. Pa. 1993) ("Order No. 1").

Plaintiffs filed the Second Amended Complaint regarding Count I ("SAC") in September 1993. Defendants again moved to dismiss. The court granted the motion and dismissed most of the claims in Count I with prejudice. In January 1995, the court dismissed the remaining claims in Count I without prejudice and granted leave to amend ("Order No. 2"). Plaintiffs elected not to amend and to stand on the SAC. The court then dismissed the remaining claims from Count I with prejudice on March 1, 1995 ("Order No. 3"). Plaintiffs appealed.

Under the merger rule, Order No. 1 and Order No. 2 were subject to review on appeal, along with the final order dismissing the remainder of the case, Order No.

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3. Those prior orders were necessary steps toward Order No. 3. Order No. 3 would not have been complete without consideration of those prior orders.

The question in the present case is whether the January 4, 2013 Order affected the *Decree*. This case is different from *In re Westinghouse*. The *Decree* is the entire, complete, final disposition of the case. It is final and appealable without reference to the earlier order for attorney's fees. Intervenors should have asked the District Court to incorporate the attorney's fees order into the *Decree.* They failed to do so.

Alternatively, Intervenors could have filed a new motion for attorney's fees after the entry of the *Decree,* as provided by NRCP 54 ("Unless a statute provides otherwise, the motion must be filed no later than 20 days **after** notice of entry of judgment is served . . ."**)** [emphasis added]. They failed to do so. Intervenors' pre-judgment motion for attorney's fees and the order granting the same were premature under every rule, including NRS 17.150, NRAP 3A, and NRCP 54(d) and likely void. Consequently, the January 4, 2013 Order remains an interlocutory order that was not incorporated into the *Decree* and never became final. In an abundance of caution, however, Bentley addresses the other defects with the January 4, 2013 Order for attorney's fees.

B. Intervenors Were Not Entitled to Attorney's Fees

The District Court declared Intervenors to be the prevailing parties entitled to recover their attorney's fees in the April 5, 2012 *Findings of Fact*. The amount of the attorney's award was to be determined after Intervenors filed a memorandum of

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costs and fees [JA1, 165-170]. The following passages served as the basis for the award of attorney's fees:

> 44. Mr. Bentley, through intimidation and threat, attempted to bully the Intervenors, acting in 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.
>
> 46. The Diversion Agreement contains a clause that allows attorney's fees to the prevailing party in the event a lawsuit is brought to enforce or interpret the Agreement.
>
> 47. Bentleys asserted that the Agreement dated August 5, 1986, and the letter recorded August 6, 1986, granted an additional right to divert the flow of Sheridan Creek through the ponds. (Exhibit 7.) However, those documents did not grant any additional rights and are invalid.
>
> 48. The Bentleys proceeded in this matter under an erroneous legal theory and under an erroneous thought process and therefore, their action was maintained by them without reasonable grounds.
>
> * * * *
>
> 20. The Intervenors are adjudged to be the prevailing parties for purposes of an award of attorney fees to be supported by a separate motion or memorandum for the same pursuant to NRCP 54(d) and NRS 18.010.
>
> [*Findings of Fact*, SA1 165, 168]

These are not findings of fact as such, but merely a recitation of Intervenors' inflammatory statements that served no evidentiary purpose and lack support in the record. Moreover, these inflammatory statements do not constitute the basis for an award of attorney's fees. The District Court seemed to forget that the trial was on Intervenor's affirmative defenses, not Bentley's Exceptions, and seemed to equate losing the case with a per se violation of NRS 18.010. The District Court was apparently so assured that NRS 533.075 authorized the rotation schedule that it

considered Bentley's defense to be frivolous from the outset. As explained above, NRS 533.075 does not authorize a compulsory rotation schedule.

The only authority for attorney's fees cited in the *Findings of Fact* was NRS 18.010.

> **NRS 18.010 Award of attorney's fees.**
>
> 1. The compensation of an attorney and counselor for his or her services is governed by agreement, express or implied, which is not restrained by law.
>
> 2. In addition to the cases where an allowance is authorized by specific statute, the court may make an allowance of attorney's fees to a prevailing party:
>
> (a) When the prevailing party has not recovered more than $20,000; or
>
> (b) Without regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party. The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations. It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public.

The District Court failed to specify whether the award was based on subpart 1, 2(a), 2(b) or all three (3) subparts.

Intervenors filed their Motion for Attorney's Fees on April 25, 2012 [SA4, 603-738]. They claimed $165,049 in fees and $13,072.85 in costs. Intervenors acknowledged that they were not entitled to attorney's fees under NRS 18.010(1)

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because the attorney's fees clause in the *Diversion Agreement* could not serve as the basis for an award of attorney's fees after the *Diversion Agreement* was declared invalid [SA4, 608]. Intervenors did not mention NRS 18.010(2)(a), and based their motion on NRS 18.010(2)(b). Bentleys' defense of Intervenors' attack on the *Diversion Agreement* was maintained with reasonable grounds for the purpose of defending their water rights, not to harass the Intervenors. To the extent the attorney's fees award was based on NRS 18.010(2)(b), the District Court abused its discretion in awarding attorney's fees.

C. Intervenors Were Not the Prevailing Parties; and Attorney's Fees Have to Be Apportioned

In its January 4, 2013 Order, the District Court reduced the award to $90,000 in fees and $7,127.05 in costs, which it deemed reasonable; however, the District Court did not apportion the fees and costs [SA4, 825-830]. The District Court repeated its prior Findings of Fact, but this time cited NRS 18.010(2)(a) and (2)(b) as the basis for its decision, even though NRS 18.010(2)(a) had never been raised. The District Court did not consider other arguments raised in Bentley's Opposition [SA4, 741-778], including the argument that attorney fees had to be apportioned. See *Franchise Tax Board v. Hyatt*, 130 Nev.Adv. 71 (2014), citing *Bergmann v. Boyce*, 109 Nev. 670, 675-76, 856 P.2d 560, 563 (1993) (holding that the district court should apportion attorney fees between causes of action that were colorable and those that were groundless and award attorney fees for the groundless claims).

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All five (5) of Bentley's exceptions were resolved in their favor prior to trial. Intervenors filed six (6) affirmative claims for relief on November 19, 2009 [SA5, 85-88]. Those claims were mischaracterized as affirmative defenses. Intervenors abandoned three (3) of those claims and only proceeded to trial on the Third, Fourth, and Fifth claims concerning the *Diversion Agreement*. In other words, out of eleven (11) different claims in this case, Intervenors only prevailed on their three (3) claims concerning the *Diversion Agreement*. Bentley believes he was the prevailing party; and to the extent Intervenors were the prevailing party, the attorney's fees award should have been apportioned accordingly.

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

The District Court did not consider Bentley's argument that Intervenors' obligation for attorney's fees was illusory and was not actually incurred. Hall Ranches was a self-represented entity, with Tom Hall as its owner and attorney. Hall Ranches was therefore not entitled to an award of fees. *See Sellers v. Fourth Judicial District Court*, 119 Nev. 256, 260, 71 P.3d 495 (2003) ("an attorney proper person litigant must be genuinely obligated to pay attorney fees before he may recover those fees"); *Lisa v. Strom*, 904 P.2d 1239, 1243 (Ariz. Ct. App. 1995) ("an additional, indispensable requirement to an award of attorney's fees to *pro se* attorneys be a **genuine financial obligation** on the part of the litigants to pay such fees") [emphasis added].

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This issue of a "genuine financial obligation" permeates Intervenors' entire claim for attorney's fees, as the other Intervenors barely participated in the case and cannot demonstrate either that they paid for Mr. Hall's legal services or that they even have a genuine obligation to do so. Rather, Mr. Hall basically just named the other Intervenors as parties to the case in order to increase the numbers on his side of the caption to have a bare majority of six (6) of eleven (11) claimants.

X. CONCLUSION

This appeal would have been unnecessary if the Respondents and the District Court applied the Nevada Revised Statutes, Rules of Civil Procedure and *Diversion Agreement* as written. Nothing in the Nevada Revised Statutes or any other rule of law authorized the District Court and the State Engineer to subject Bentley's vested rights to a mandatory rotation schedule for the benefit of "common good." The Bentleys' vested rights are theirs alone and may not be appropriated or commandeered for the "common good" under NRS 533.075 or any other statute, especially when doing so alters the historical flow and use of the water.

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

Although Bentley's predecessor, Joseph Lodato, may have needed the Rolphs' signatures on the *Diversion Agreement* to divert the South Branch of Sheridan Creek, the diversions from the North Branch of Sheridan Creek were properly authorized by the Whitmires.

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

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

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

Dated this 3rd day of April 2014.

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By: _____

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

The Bentley Family 1995 Trust
James W. Bentley, Trustee
MaryAnn Bentley, Trustee

Dated this 3rd day of April 2015.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because:

[**X**] This brief has been prepared in a proportionally spaced typeface using Word [state name and version of word-processing program] in 14 Times New Roman; or

[ ] This brief has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of type style].

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[**X**] Proportionately spaced, has a typeface of 14 points or more, and contains 13,113 words; or

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

[ ] Does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 5 day of April 2015.

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By: _____
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CERTIFICATE OF SERVICE

I certify that on the 3rd day of April 2015, I served a copy of this **APPELLANTS J.W. BENTLEY AND MARYANN BENTLEY'S OPENING BRIEF**, upon all counsel of record:

☐ By personally serving it upon him/her; or

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

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Jessica C. Prunty
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Dated this 3rd day of April 205.

LIZ STERN, ALS

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APPENDIX A

NAME	APN	APPROVED ACREAGE	PERCENTAGE	21-DAY ROTATION	PROOFS
J.W. and MaryAnn Bentley	1219-14-001-013	12.93	7.67%	1.6	V-06305 V-06306 V-06307 V-06308
Ernest Pestana	1219-14-001-014	23.76	13.66%	2.9	V-06339
Joy Smith f/k/a Joy Whipple	1219-14-001-002	17.71	9.31%	1.9	V-06346 (part) V-06347 (part)
Dan and Elaine Barden	1219-14-001-001	7.23	4.29%	.9	V-06346 (part) V-06347 (part)
Alan Sapp	1219-14-002-005	1.13 5.10	0%	0	V-04594 V-06356
Donald S. and Kristina Forrester	1219-14-001-012	60.87	29.40%	6.2	V-06309 V-06310 (part)
Hall Ranches, LLC	1219-14-001-003	22.03	13.06%	2.7	V-06340 V-06341
Thomas J. and Kathleen M. Scyphers	1219-14-001-004	16.61	5.54%	1.2	V-06311 (part) V-06312 (part)
Frank and Camille Scharo	1219-14-001-005	*	4.28%	.9	V-06311 (part) V-06312 (part)
Sheridan Creek Equestrian Center (Glenn Roberson)	1219-14-001-008	*	6.64%	1.4	V-06310 (part)
Ronald and Ginger Mitchell	1219-14-001-011	10.37	6.15%	1.3	V-06336 V-06337
		177.74	100%	21	