IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

vs.

STATE OF NEVADA, OFFICE OF THE STATE ENGINEER; 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,

Respondents.
_____/

CASE NO. 64773

Dist. Court No. 08-cv-0363

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

Appellants,

vs.

HALL RANCES, 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,

Respondents.
_____/

CASE NO. 66303

J.W. BENTLEY; MARYANN BENTLEY, TRUSTEES OF THE BENTLEY FAMILY 1995 TRUST; JEARLD R. JACKSON, TRUSTEE OF THE JERALD R. JACKSON 1975 TRUST, AS AMENDED; AND IRENE M. WINDHOLZ, TRUSTEE OF THE WINDHOLZ TRUST DATED AGUST 11, 1992, Appellants, vs. THE STATE OF NEVADA STATE ENGINEER; HALL RANCHES, LLC; THOMAS J. SCYPHERS; KATHERLEEN M. SCYPHERS; FRANK SCHARO; SHERIDAN CREEK EQUESTRIAN CENTER, LLC; DONALD S. FORRESTER; KRISTINA M. FORRESTER; RONALD R. MITCHELL; AND GINGER G. MITCHELL, Respondents..	**CASE NO. 66932**

RESPONDENTS' ANSWERING BRIEF

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

STATUTES

OTHER AUTHORITIES

Respondent Jason King, P.E. State Engineer (State Engineer) by and through counsel, Nevada Attorney General Adam Paul Laxalt and Senior Deputy Attorney General Bryan L. Stockton, respectfully submit their Respondents' Answering Brief.

I. RULE 26.1 DISCLOSURE

a. Respondent is an agency of the State of Nevada

II. STATEMENT OF ISSUES

1. Did the District Court Have Authority to Impose Rotation Schedules?

2. Did the State Engineer Use His Own Authority to Impose Rotation Schedules?

3. Is the Use of Water in Bentley's Ponds a Consumptive Use?

4. Were Smith and Barden Parties to the Adjudication?

III. STATEMENT OF THE CASE

On June 5, 1987, a petition was filed in the Office of the State Engineer requesting a determination of the relative rights of the claimants to the waters of Sheridan Creek, Douglas County Nevada. This request was followed by an order dated June 17, 1987, from the Ninth Judicial District Court in and for Douglas County, State of Nevada, ordering the State Engineer to proceed with the same. Supplemental Appendix (SA) Bentley Vol. 5, p. 841. The State Engineer issued the Preliminary Order of Determination on May 22, 2006. SA Bentley Vol. 5, p. 842. The State Engineer held a hearing on Objections on March 5 and 7, 2007.

SA Bentley Vol. 5, p. 842–843. The State Engineer issued the Final Order of Determination on August 14, 2008. SA Bentley Vol. 7, p. 1396. The Final Order of Determination was filed on October 23, 2008 in the Ninth Judicial District Court. Supplemental Appendix State Engineer (SASE) pp. 1–2. The Court held a hearing on Exceptions April 1, 2009. SA Bentley Vol. 5, p. 842. The district court divided the proceeding into six groups of protests based on the common water source in each set of protests. SA Bentley Vol. 5, p. 843–844.

This appeal involves Case 08–CV–0363-D and involves the water of Sheridan Creek and its tributaries. The hearing was held on January 9, 11, 12, and 13, 2012. SA Bentley Vol 6, pp. 1027–1274. The district court issued its Findings of Fact, Conclusions of Law, Judgment and Decree October 16, 2014. SA Bentley Vol. 5, p. 840.

Bentley filed his Notice of Appeal on November 10, 2104. Smith and Barden do not appear to have filed an appeal from the final decree and should be precluded from arguments concerning the final decree.[1]

[1] *See Gen. Motors v. Jackson*, 111 Nev. 1026, 1029, 900 P.2d 345, 347 (1995). "SIIS is also inappropriately listed as a respondent. Because SIIS's interest in this matter coincides with GM's interest, SIIS attempts to align itself with GM. However, SIIS failed to file a notice of appeal with this court, and therefore it is not a party to the instant case. We therefore strike SIIS's brief and we direct the clerk of this court to correct the docket sheet to correspond to the caption on this opinion."

IV. STATEMENT OF FACTS

a. Background

Bentley, Smith and Barden properties are located upstream of the other users on Sheridan Creek. Upstream users on a stream often attempt to use their position to gain advantage over users lower on the system. All of the users in this case have equal priority to the waters of Sheridan Creek.[2] Nevada's water law does not allow users to manipulate the system in a way that denies water to others of senior or equal priority and this court must reject these arguments. Water rights are adjudicated based on the practice in place when the water was appropriated. Bentley radically altered the system in 2008 and should not be allowed to utilize this artificial time construct to create a new image of historical irrigation practices. This court should affirm the district court's adjudication of the rights based on the original irrigation practices and not from the conditions unilaterally created by Bentley.

b. Historical Irrigation

The waters of Sheridan Creek were first put to beneficial use in 1852. SA Bentley 157. The water is divided at a splitter (actually a pile of rocks at a fork in the streambed) into a forty percent (40%) portion that serves property to the East and South of the split and sixty percent (60%) that serves the property to the East

[2] *See* Vol. 5, pp. 864, 871–873, 897, 900, 907, and 953–954.

and North of the split. SA Bentley Vol. 8, p. 1637. The matters at issue herein concern only the North Diversion. At the time the water was appropriated, all the properties currently claiming water rights from the North Split of Sheridan Creek and its tributaries were part of one parcel and all dates of priority for the water rights therein stem therefrom as the water appears to "have been put to beneficial use continuously to the present day." SA Bentley Vol. 5, p. 976.

The waters of Stutler Creek were appropriated in 1905 and are conveyed by a pipeline and co-mingled with the waters of the North Diversion and are administered with the North Split of Sheridan Creek. SA Bentley Vol. 5, p. 976. The waters of Gansberg Spring are the subject of State Engineer's Permit 7595. SA Bentley Vol. 5, p. 976. The waters of Gansberg Spring are also conveyed by a pipeline and co-mingled with the waters of the North Diversion and are administered therewith. Collectively, these waters are known simply as the North Diversion of Sheridan Creek. SA Bentley Vol. 5, p. 976

Evidence was produced that the place of use for Permit 7595 does not match exactly with the place of use for the vested waters of Sheridan Creek and Stutler Creek. SA Bentley Vol. 8, p. 1636. The color aerial image shows graphically the properties that are within and outside the place of use of Permit 7595. The image depicts that two of the smaller properties are not included in the place of use of the permit and are shown by the cross hatch area on the right and left side of the

image. SA Bentley 1636. The orange striped area is highlighted because it is included in the permit, but water cannot reach it as that property lies on the far side of the Park and Bull Ditch that is part of the Carson River system administered under the Alpine Decree. SASE pp. 3–4. However, because the waters are co-mingled with the waters of Stutler Creek in a pipeline prior to joining Sheridan Creek and because it would be difficult and expensive to administer the waters separately; the court determined that the waters would be administered with other waters of Sheridan Creek. SA BentleyVol. 5, p. 976. Gansberg Spring, like most springs in Nevada does not flow at the same rate at all times of the year, and generally contributes a small and variable percentage of the total 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 minimus advantage to the small properties that were not within the boundaries for Permit 7595. SA Bentley Vol. 5, p. 976.

c. Subdivision

At the time the original property began to be divided, a single pond, known in the record as lower pond was located on the property now owned by Bentley. SA Bentley Vol. 7, p. 1424. A diversion agreement was drafted, but not signed by all the affected parties, wherein Bentley's predecessor in interest was allowed continuous flow into the single pond. SA Bentley Vol. 7, p. 1299. June Irene

Bartlett (aka June Irene Rolph) and Nancy Rolph Welch (collectively Rolphs) held title to the water rights of the North Diversion of Sheridan Creek. SA Bentley Vol. 5, p. 982. The Rolphs did not sign the Water Use and Diversion Agreement. SA Bentley Vol. 5, p. 982. The district court found that the diversion agreement was invalid as it was not signed by all the parties. SA Bentley Vol. 5, p. 985.

Bentley falsely speaks repeatedly about historical irrigation practices throughout his brief. It is therefore necessary to discuss the historical irrigation practices as they were conducted by the original appropriators. The entire area in question was part of one ranch prior to when it was sold from the Rolph sisters to Jerald Whitmire. SA Bentley Vol. 6, p. 1034. The historical irrigation practice prior to that time was for the water to travel more or less diagonally across the property in stages through a segmented pipe. SA Bentley Vol. 6, p. 1052. The first segment of the pipe was blocked off and water flowed along the contour level of the property until that level was irrigated. SA Bentley Vol. 6, p. 1051. The water was then allowed to pass to subsequent segments, where the process was repeated at each segment. SA Bentley Vol. 6, p. 1051.

d. Bentley's Changes to the System

Whitmire subdivided the property into parcels for sale. At that time the irrigation practice changed somewhat, but was largely the same. The aerial photograph from 2004 shows the Bentley property labeled as 121914001013.

SA Bentley Vol. 7, p. 1424. The house and single pond are in the lower left portion of the parcel. The dark lines on the photograph are the irrigation laterals that receive water from the central segmented pipeline. Only this first pond was present at the time of the diversion agreement. *See* SA Bentley Vol. 7, p. 1447 (". . . *non-consumptive diversion of surface water rights for a pond* . . . ." (Emphasis added)). Bentley then drastically altered the irrigation system. Bentley removed the original distribution box that was located near the northwest corner of the current shop building and moved to its current location at the northwest corner of Douglas County Assessor's Parcel No. 1219-14-001-013. SA Bentley Vol. 7, p. 1406. Bentley also constructed a new, larger pond what is now known as the upper pond so that his property now had two ponds. The 2008 Aerial photograph shows the newly constructed upper pond. SA Bentley Vol. 7, p. 1426. Bentley installed a pipe from Northwest corner box to the new upper pond and a pipe or ditch from the new upper pond to the original pond. SA Bentley Vol. 8, p. 1699. Bentley then installed a pipe to another new distribution box on the northern edge of his property, which would return water to the original distribution system to allow overflow from his two ponds to reach his down gradient neighbors. SA Bentley Vol. 6, pp. 1203–1204, Transcript pp. 488–494.

The interveners claimed that the combined ponds used significantly more water. SJA Vol. 6, pp. 1203–1204, Transcript pp. 488–494. When Bentley refers

to historical practices, he refers to the conditions he created in 2008 when he made radical changes to the system to the detriment of his neighbors. SA Bentley, Vol. 6, p. 1051–1052 Transcript pp.93–94, 99–100. However, the true historical irrigation practice did not include the second pond or the four-inch pipe to Smith and Barden.

Smith and Barden also point to what they call the historical use of the four inch pipe that runs from Bentley's diversion box to a pond on Smith's parcel. Water from the pipe may only be diverted to the Smith and Barden's properties. SA Bentley Vol. 8, p. 1651. However, at the time the water right vested on the property in 1852, no pipeline existed and Smith and Barden's water rights are determined by reference to the original right, not by a use obtained to the detriment of others in the recent past. Mr. Forester testified that the four inch pipe serving Smith and Barden took "all of Sheridan Creek in 2010." SA Bentley Vol. 6, p. 1056. Mr. Roberson testified that the "four-inch pipe had such a fall to it that it created such a vacuum with head pressure, it would suck that water box dry . . . ." SA Bentley Vol. 6, p. 1030, Transcript p. 116. This testimony is substantial and supports a finding that the pipeline creates a situation wherein the other users are deprived of water in usable quantities during periods of flow below 2.0 cfs.

e. Hearing on Exceptions

Many of Bentley's exceptions to the Final Order of Determination were resolved by stipulation. Bentley repeatedly misstates the language of the

agreement to assert that no rotation schedule was contemplated. Bentley OB p. 21. The parties agreed 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 orders of the district court would be used to determine when and if a rotation schedule is needed to efficiently use the waters of the State of Nevada. SA Bentley Vol. 6, p. 1030, Transcript pp. 10–12.

The trial on case number 08–CV–0363–D was held on January 9, 11, 12, 13, 2012. SA Bentley Vol 6, pp. 1027-1274. The court heard testimony from the parties. Previously, at the direction of the district court, the State Engineer conducted two seepage tests in May and August 2010. SA Bentley Vol. 2, p. 340. The findings of the study were that when flow was above 2.0 cfs Bentley's ponds did not consume more than his proportional share of the waters. JA Bentley Vol. 6, p. 1135. The study did find however, that when flows were below 2.0 cfs, continuous flow to Bentley's two ponds consumed more than his share of the water. SA Bentley Vol. 7, p. 1421–1422.

The district court issued its Findings of Fact, Conclusions of Law, Order and Judgment in sub-proceeding D of the Mott Creek, et al. Decree in case number 08–CV–0363–D on April 5, 2012. SA Bentley Vol. 5, p. 977. The district court determined that "When the combined flow from the North Diversion of Sheridan Creek and tributaries drops below 2.0 cfs (cubic feet per second), the State

Engineer shall impose a rotation schedule." SA Bentley Vol. 5, p. 988. As agreed, a rotation schedule was not included in the decree to allow the parties to make arrangements amongst themselves so as to make maximum beneficial use of the water. SA Bentley Vo. 5, p. 977. The order declared that "[t]he rotation schedule shall reflect any agreements between the parties." SA Bentley Vol. 5, p. 989.

In this light, the court should note that when conditions changed on the system due to Bentley's lease of the Pestaña water rights, the State Engineer filed a motion with the district court to approve a change to the rotation schedule to accommodate the lease of the water by Bentley. SA Bentley Vol. 8, p. 1595, *See also* SA Bentley Vol. 8, p. 1609 (State Engineer Order 6123). The rotation schedule at that time was under an interim order of the district court to impose a rotation schedule. SASE p. 5. The State Engineer did not take it upon himself to alter the order of the district court, but moved the court to allow him to change the court-ordered rotation schedule.

Bentley repeatedly asserts that there was no evidence to support the district court's finding that a rotation schedule should be imposed. However, he ignores the fact that the seepage study showed that Bentley's two ponds consume less than or equal to his share of the water when the flows of the North diversion are above 2.0 cubic feet per second (cfs). SA Bentley Vol. 2, pp. 340–361. Evidence also showed that at flows below 2.0 cfs, Bentley's ponds consume more than his

proportional share of the water. SA Bentley Vol. 2, pp. 340–361. Thus, there was evidence in the record that the court could rely upon to make this finding. Bentley refuses to even acknowledge the evidence and has made no effort to show that the evidence was not the type that a reasonable mind could rely upon to come to the conclusion that water should be rotated during periods of low flow.

The district court issued the decree on September 29, 2014. SA Bentley Vol. 5, p. 1026. The order in case number 08–CV–0363–D is now final and on review before this court. The district court fashioned what can only be called an equitable remedy wherein when the flow of the creek is above 2.0 cfs, Bentley is allowed to take continuous flow to his ponds. When the creek drops below 2.0 cfs, the rotation schedule goes into effect so that all users can receive their share of the water.

f. Rotation Schedule

Bentley and especially Smith attempt to convince this court that the State Engineer implemented the rotation schedules under his own authority. These assertions are false. The State Engineer did not use his authority to impose the rotation schedule over the objections of the Appellants. The State Engineer only issued rotation schedules in response to orders from the district court in each and every case. *See* SA Bentley Vol 8 p. 1559; SASE pp. 4-6; SA Bentley Vol. 5 p 988. "From and after the filing of the order of determination in the district court,

the distribution of water by the State Engineer or by any of the State Engineer's assistants or by the water commissioners or their assistants shall, at all times, be under the *supervision and control of the district court*." NRS 533.220(1) (emphasis added). The State Engineer implemented the orders of the district court sitting as the decree court to issue a rotation schedule as specified by the district court.

Prior to issuing the order in Subpart D, the district court issued interim orders to implement rotation schedules. The court heard testimony from Mr. Forester that after Bentley's new pond was constructed, he ". . . immediately saw, especially in the summer, in the late summer less water coming down our pipe." SA Bentley Vol. 6, p. 1053. In contrast, Mr. Scyphers testified that under the rotation schedules imposed by the interim order of the district court, he could finally "water everything well within the 1.2 days" he was allotted under the rotation schedule. SA Bentley Vol. 6, pp. 1125–1126. Mr. Scharo also testified that there was a "very substantial increase in water to the back southern portion of our land and we had a very good year." SA Bentley Vol. 6, p. 1072. The testimony obviously provides substantial evidence to support the findings of the district court that the rotation schedule will allow all users to beneficially use their water.

All rotation schedules issued since the district court issued its Order have been done in compliance with the order of the district court in 08–CV–0363–D. SA

Bentley Vol. 5, p. 984. As the State Engineer argued in the consolidated case, Supreme Court Case No. 64773, the State Engineer must only make a factual finding that the flow of the North Diversion of Sheridan Creek is below 2.0 cfs and then he must carry out the order of the District Court and issue a rotation schedule. The rotation schedule itself is only subject to challenge if the flow of the Creek is above 2.0 cfs or that the State Engineer did not properly divide the water based on ownership shares.

V. STANDARD OF REVIEW

The district court reviewed the Final Order of Determination by the State Engineer *de novo*. NRS 533.170. The Findings of Fact, Conclusions of Law, Judgment and Decree is an order issued by the district court. Appeals from the decree are "taken to the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court pursuant to Section 4 of Article 6 of the Nevada Constitution by the State Engineer or any party in interest in the same manner and with the same effect as in civil cases . . . ." NRS 533.200. "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." NRCP Rule 52(a). Questions of law are reviewed *de novo*. *Arguello v. Sunset Station, Inc*., 127 Nev. Adv. Op. 29, 252 P.3d 206, 208 (2011).

The district court relied heavily on the State Engineer's Final Order of Determination. To the extent the court finds that a decision of the State Engineer is under review, NRS 533.450(9) provides that, "[t]he decision of the State Engineer shall be prima facie correct, and the burden of proof shall be upon the party attacking the same." On appeal, the Court is to review the evidence on 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, 497 (1985). Review of a decision of the State Engineer is in the nature of an appeal and is, consequently, limited in nature. NRS 533.450(1). 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, 826 P.2d 948 (1992).

VI. ARGUMENT

a. Authority to Impose Rotation Schedule

In order to ensure that the water right holders on the lower portion of the property are able to get their water in useable quantities, a rotation schedule is necessary. A rotation schedule allows a water right holder to have the full flow of the water source for a period of time proportional to the percentage of acreage they

own to the total acreage to be irrigated. This creates "head" which is the difference between the water at ground level and the top of the surface of the water. The extra water helps to push the water across the land so that it may water the crops more effectively. The soil in this area is primarily decomposed granite, which is similar to sand in terms of water retention. *See* SA Bentley Vol. 6, p. 1054. Unsaturated sands soak up water and slow down flow. Thus, the full force of the water allows it to move more quickly across the surface and lessens the seepage loss in pastures such as those at issue herein.

The district court found that a rotation schedule was necessary to effectuate the ability for "all parties . . . to share the water shortage during periods of low flow." SA Bentley Vol. 5, p. 963. The legislature encourages this practice in NRS 533.075:

> 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.

The resolution of the case herein will determine the court's power to help users on the lower end of a system to obtain water in useable quantities when the users on the higher end care only about themselves and attempt to block the "economical

use of the available water supply. . . ." *Id*. Bentley cares only about his two ponds and his fish and will selfishly force the other water right holders to let their hay crops die from lack of water. SA Bentley Vol. 6, p. 1116, Transcript p 246.

Bentley asserts that the adjudication process is statutory and that the district court has no equitable authority in distributing the waters under the decree. Bentley OB at 16. This assertion ignores controlling precedent. *Bailey v. State*, 95 Nev. 378, 382, 594 P.2d 734, 736 (1979) (*quoting State Engineer v. American Nat'l Ins. Co*., 88 Nev. 424, 426, 498 P.2d 1329, 1330 (1972)) ("However, we have also ruled that a determination that the State Engineer has correctly cancelled a permit, under his statutory mandate, 'does not, however, affect the power of the district court to grant equitable relief to the permittee when warranted.'"). In this case, the district court found that the rotation schedule was necessary "[w]henever the flow in the North Diversion is 2.0 cubic feet per second . . . to avoid injury to the water users." SA Bentley Vol. 5, p. 984. The court's ruling in this regard was supported by substantial evidence in the State Engineer's Report of Field Investigation 1130 which showed that the changed conditions created by Bentley in 2008 increased the consumptive use of water by construction of the second pond. SA Bentley Vol. 6, p. 1410; Vol. 2, p. 361.

The State Engineer's position herein is entirely consistent with the holding of *Andersen Family Associates v. Ricci*, 124 Nev. 182, 179 P.3d 1201, (2008). In

that case, the "State Engineer replied that, because the rights at issue were part of an 1885 court decree and NRS 533.085(1) specifically provides that Nevada's water law statutes cannot impair rights that vested before the state's statutory scheme was enacted, the priority of the rights in question had not been lost. *Id*. at 185–186, 179 P.3d at 1203. However, the footnote to that statement showed that "specifically, the State Engineer suggested that 'only the decree court can [make] the decision as to whether a decreed right can lose its priority when this decreed right is changed under the provisions of NRS 533 and cancelled.'" *Id*. Herein, the district court, sitting as the decree court, has full authority to issue orders for the "supervision and control" of the waters under its jurisdiction. NRS 533.220(1).

Bentley's argues that most systems "do not have mandatory rotation schedules." Bentley OB at 23. This statement is unsupported by any citation to the record. However, if it is true, it is because no other users in the stream systems under adjudication have built extra ponds to consume excessive quantities of water to sustain fish for private recreational fishing. Bentley is the only one that appears in the record of the entire adjudication to have done this. This behavior alone justifies the district court's order to implement a rotation schedule at flows of less than 2.0 cfs.

Smith and Barden argue that they are relegated to the status of junior users. SB OB at 15. However, they are given their allotted time in rotation and receive

their full share of the water. SA Bentley Vol. 8, p. 1610. Smith and Barden seek to completely deprive the lower water users of water in usable quantities during periods of low flow by taking continuous flow from the source. SA Bentley Vol. 6, p. 1056. Greedy parties should not be allowed to take water in a manner that deprives others of water and the remedy fashioned by the district court does exactly that.

Smith and Barden further argue that their vested rights cannot be impaired. However, at the time the rights were vested, they were used in rotation. The sectional diagonal ditch was blocked to allow water to flow on the contours of the property to irrigate the whole of it. SA Bentley Vol. 6, p. 1051. The four-inch pipe is a new construct to give water to the parcels belonging to Smith and Barden and they cannot claim a vested right in excess of the original right applied to the property.

Thus, the court fashioned a remedy to help both parties to the extent it could. SA Bentley Vol. 5, p. 988. Bentley is allowed to use continuous flow for his two during times when flow is above 2.0 cfs. However, the remedy also allows the other users obtain a share of water during low flows. This court should affirm the equitable power of decree courts to ensure that water is distributed fairly and affirm the decision herein.

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b. State Engineer's Authority to Impose Rotation Schedules

Smith and Barden argue throughout their brief that the State Engineer imposed the rotation schedules by this own authority. However, as outlined in the discussion of the facts above, the State Engineer only implemented rotation schedules in compliance with orders of the decree court. SA Bentley Vol. 8 p. 1559; SASE pp. 4-6; SA Bentley Vol. 5 p. 988.

Incredibly, Smith and Barden argue that the State Engineer "cannot rely on the district court's order requiring the implementation of a rotation schedule. . . ." Smith and Barden OB at 12. They cite no authority for the preposterous proposition that the State Engineer must ignore orders of the district courts of Nevada. This is probably because there is no authority to support his argument. Smith and Barden correctly note that "the division of water from the stream involved in such determination shall be made by the State Engineer in accordance with the order of determination." NRS 533.230. They ignore the fact that "after the filing of the order of determination in the district court, the distribution of water by the State Engineer or by any of the State Engineer's assistants or by the water commissioners or their assistants shall, at all times, *be under the supervision and control of the district court*." NRS 533.220(1) (Emphasis added). Thus, the State Engineer properly complied with the orders of the district court to impose rotation schedules on the water source when the flow dropped below 2.0 cfs.

c. Consumptive Use of Water in Ponds

The State Engineer takes no position on the validity of the diversion agreement. However, the State Engineer does take the position that the water loss from the ponds is a consumptive use of water. The seepage study showed that when the flow of the North Split of Sheridan Creek falls below 2.0 cfs, the ponds consume more than Bentley's share of the water right and that they, in essence, steal water from the other users. SA Bentley Vol. 2, pp. 340 *et seq*. Bentley argues that the diversion agreement exempts him from any limits on his water right.

The diversion agreement was for a non-consumptive use that would be the case for a small, lined pond that loses very little water to seepage and evaporation. By contrast, the first pond loses 16.4 acre-feet per irrigation season to seepage and evaporation. SA Bentley Vol. 2, p. 361. By adding the second pond, Bentley nearly doubled the amount of water consumed by his ponds to a total of 31.6 acre-feet per irrigation season. SA Bentley Vol. 2, p. 360. Bentley's assertion that the agreement allows him to call the seepage non-consumptive is disingenuous. The diversion agreement did not specify that Bentley could allow large amounts of water to be lost to the surface water system and still call it non-consumptive.

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The now-defunct Division of Water Planning published a Water Words Dictionary in 1994. The Division of Water Planning defined consumptive use as, "The portion of water withdrawn from a surface or groundwater source that is consumed for a particular use . . . and does not return to its original source or another body of water." *Water Words Dictionary*, 3d ed., Nevada Division of Water Planning, June, 1994, p. 30.

Water lost from Bentley's pond to evaporation and seepage is surely a consumptive use of water as the water is not returned to the surface water source. However, when the flows are above 2.0 cfs, Bentley's ponds consume less than his share of the water. Thus, the district court's equitable remedy for Bentley was to allow him continuous flow to the two ponds. SA Bentley Vol. 5, p. 988. When the flow drops below 2.0 cfs during the irrigation season, the water goes on a rotation schedule and Bentley is allotted his time in rotation to fill the two ponds so that the other water users can be kept whole and receive their water in usable quantities. SA Bentley Vol. 5, p. 988.

Bentley's argument is essentially that he can dig as many ponds and use as much water as he pleases based on the diversion agreement. The diversion agreement is not a license to steal water from other users and the remedy of the district court was the most appropriate way to distribute the water so that all parties are treated equally.

d. Smith and Barden were Parties to the Adjudication

Smith and Barden submitted proofs V–06346 and V–06347. By so doing they became a part of the adjudication. They were not required to participate in the exception process, but they are under the jurisdiction of the decree court and are bound by the decisions thereof. "The decree entered by the court, as provided by NRS 533.185, shall be final and shall be conclusive upon all persons and rights lawfully embraced within the adjudication . . . ." NRS 533.210(1). Both Smith and Barden were present at some of the proceedings and testified on Bentley's behalf at the hearing. SA Bentley Vol. 6, pp. 1184, Transcript p. 412; Vol. 6, p. 1236. Testimony at the hearing indicated that the four-inch pipe that leads to the Barden and Smith properties would take the entire flow of the North Split of Sheridan Creek during low-flow. SA Bentley Vol 6, pp. 1056, Transcript p. 116.

In this regard, Bentley also argues that the Intervenors cannot assert any of their claims because they did not file exceptions to the Final Order of Determination. Bentley OB at 31. For the court to accept this proposition would be to exclude the real parties in interest from the case in chief. The State Engineer does not own any water rights in the system and serves only to enforce Nevada's water laws and determine water rights. NRS 532.110. All water users are parties to the adjudication and all claims both for and against the Order of Determination must be heard by the court. NRS 533.090.

As claimants to water rights, Smith and Barden may not simply pretend the adjudication is not happening and then claim to be somehow above the law and not subject to the jurisdiction of the district court. The order of the district court was properly crafted to ensure all water users obtain their share in a way that makes that share useable. *McCormick v. Sixth Judicial Dist. Court*, 69 Nev. 214, 226, 246 P.2d 805, 811 (1952) ("We think it abundantly clear that the district court sitting as a court of equity had full and complete authority, if it felt that the circumstances or the exigencies of the case warranted, to see that its decree was enforced . . . ."). Smith and Barden may not hide and wait for the outcome of the adjudication and then pretend that they did not participate in the adjudication. Once the proofs of claim were submitted, they were parties and are bound by the outcome. NRS 533.210(1).

VII. CONCLUSION

The decision of the Ninth Judicial District Court, sitting as the Mott Creek, et al. decree court was supported by substantial evidence. The court properly and equitably ordered the State Engineer to implement a rotation schedule for the North Diversion of Sheridan Creek whenever the flow drops below 2.0 cfs during the irrigation season. The Appellants herein seek to block that order to allow them

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to receive more water than the down gradient water right holders and deprive those users of water in usable quantity. The decisions of the district court must, therefore, be affirmed.

Respectfully submitted this 14th day of May 2015.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on May 14, 2015.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Sandra Geyer
Sandra Geyer, an employee of the office
of the Nevada Attorney General

CERTIFICATE OF COMPLIANCE

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 proportionally spaced typeface using Microsoft Word 2010 14 pt. Times New Roman type style.

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 proportionately spaced, has a typeface of 14 points or more and contains 5,995 words.

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

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sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 14th day of May 2015.

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