

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

IN THE SUPREME COURT OF NEVADA

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

Appellants,

v.

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

Respondents /

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

Appellants.

v.

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

Respondents /

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

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

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

4 Appellants,

5 v.

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

14 Respondents /

15
16 **RESPONDENTS' ANSWERING BRIEF**

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

TABLE OF CONTENTS

	<u>Page (s)</u>
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	
TABLE OF CONTENTS	i-ii
TABLE OF AUTHORITIES	iii-iv
I. JURISDICTIONAL STATEMENT	1
II. ROUTING STATEMENT	1
III. ISSUES PRESENTED FOR REVIEW.....	1
IV. STATEMENT OF THE CASE	1
V. STATEMENT OF FACTS	2
VI. ARGUMENT	4
A. Standard of Review	3
B. Smith and Barden Were Parties To the Adjudication	5
C. The Parties Agreed That a Rotation Schedule May be Authorized in the Decree	7
1. The Rotation Schedule Allows All Parties the Ability to Receive Their Share of Water	9
2. The Pre-statutory Vested Water Rights Held by the Parties Can be Modified by Court-ordered Rotation	10
a) There are three types of water rights recognized in Nevada	11
b) Pre-statutory vested water rights are not impaired by later statutory provisions	13
D. Stutler Creek and Gansberg Spring Rotation is Included	14

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

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

F. Substantial Evidence Supports The District
Court's Order For Rotation And The State
Engineer's Implementation Of Same 21

VII. INTERVENORS ARE ENTITLED TO COSTS 27

VIII. CONCLUSION 28

IX. NRAP 26.1 DISCLOSURE STATEMENT 30

X. ATTORNEY'S CERTIFICATION 31

TABLE OF AUTHORITIES

Cases Page (s)

Andersen Family Assocs. V. State Engineer,
124 Nev. 182, 179 P.3d 1201 (2008) 11, 14

Anderson v. Bassman,
140 Fed. 14 (N.D. Cal. 1905) 19

Arguello v. Sunset Station, Inc.,
127 Nev.Adv.Op. 29, 252 P.3d 206 (2011) 3

Barnes v. Sabron,
10 Nev. 217 (1875) 16

Hufford v. Dye,
121 Pac. 400 (Cal. 1912) 18

Mimbres Valley Irrigation Co. v. Salopek,
140 P.3d 1117 (N.M.App. 2006) 20

Ormsby County v. Kearney,
37 Nev. 314, 142 Pac. 803 (1914) 12

State v. Twin Falls Canal Co.,
121 Pac. 1039 (Idaho 1911) 16

State Engineer v. Curtis Park,
101 Nev. 30, 692 P.2d 495 (1985) 4

Town of Eureka v. State Engineer,
108 Nev. 163, 826 P.2d 948 (1992) 4

Weddell v. H2O, Inc.,
128 Nev.Adv.Op. 9, 271 P.3d 743 (2012) 4

Nevada Revised Statutes

NRS 1.030 13

NRS 533.075 6, 7, 13, 14

NRS 533.085(1) 10, 13

NRS 533.090-533.435 1

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

Nevada Revised Statutes **Page(s)**

NRS 533.170 3
NRS 533.200 3
NRS 533.450(1) 4, 27
NRS 533.450(7) 27, 28
NRS 533.450(9) 3

Nevada Rules of Appellate Procedure

NRAP 28(i) 2

Nevada Rules of Civil Procedure

NRCP 52(a) 3

Other Authorities

J. Davenport, Nevada Water Law (2003) 11, 26, 32
W. Hutchins, California Law of Water Rights (1956) 8
C. Kinney, A Treatise on the Law of Irrigation
and Water Rights, 2nd Ed. (1912) 15
A. Tarlock, Law of Water Rights and Resources
§ 5:34 (2010) 8

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

I. JURISDICTIONAL STATEMENT.

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

II. ROUTING STATEMENT.

The Intervenors agree with the Routing Statement provided by the Smith and Barden.

III. ISSUES PRESENTED FOR REVIEW.

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

IV. STATEMENT OF THE CASE.

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

1
2 to Notice of Exceptions and Exceptions to Final Order of
3 Determination. Response, 1 SA 85-88. The district court
4 accepted the Response as a pleading and proceeded to hear
5 the Bentleys' Exceptions as well as the Intervenors'
6 Response at trial on January 9, 2012. Intervenors prevailed
7 on all matters set forth in their Response. On April 5,
8 2012, the district court entered Findings of Fact,
9 Conclusions of Law and Judgment, determining that under the
10 specific facts and circumstances of the matters presented at
11 trial, the State Engineer should impose a rotation schedule
12 under certain terms and conditions. Finding of Fact, 1 JA
13 154-171; 5 SA 974-990.

14
15 All current and remaining appeals have been
16 consolidated by Order of this Court entered on January 22,
17 2015.

18
19 **V. STATEMENT OF FACTS.**

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

24 Intervenors have no real issue with the Statement of
25 Facts provided by Smith and Barden.
26
27
28

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

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

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

VI. ARGUMENT.

A. Standard of Review.

The district court reviews the State Engineer's FOD de novo. NRS 533.170. Appeals from the FOD 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 . . . 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 52(a). Questions of law are reviewed do novo. Arguello v. Sunset Station, Inc., 127 Nev.Adv.Op. 29, 252 P.3d 206, 207-208 (2011).

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

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

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

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

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

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

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

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

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 in & for Humboldt County, 69 Nev. 214, 226, 246 P.2d 805 (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 have chosen to act at their own peril by not formally entering the adjudication process; however, once the proofs of their claims were submitted, they were parties and are bound by the outcome. NRS 533.210(1).

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

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

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

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

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

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

20 * * *

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

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

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

rotation schedule in a given water year if became necessary.

MR. HALL: That's satisfactory.

* * *

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

MR. STOCKTON: Yes, Your Honor.

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

MR. HALL: Yes, sir.

* * *

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

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

THE COURT: Agreed.

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

\\\\\\

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

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

12
13 Because of the geographic location of the Bentleys'
14 property, being where Sheridan Creek and Stutler Creek first
15 flow onto the Bentleys' property, above the Intervenors'
16 properties, the Bentleys are able to divert the entire flow
17 of water during times of scarcity, shortage and drought,
18 thereby depriving the Intervenors and Appellants Smith and
19 Barden of all water during such periods of low flow. 6 SA
20 1056; 1 TR 115:18 - 116:23.

21
22 Smith and Barden testified at trial. Their position was
23 that the four inch (4") pipeline providing water to their
24 properties should remain as in the past without
25 interruption. Joy Smith merely testified that she wanted the
26 same use as before to water her pastures and keep water in
27

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

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

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

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

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

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

16
17
18 **a) There are three types of water rights recognized in**
19 **Nevada.**

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

24
25 Generally, "[t]he term 'water right' means . . .
26 the right to divert water by artificial means for
27 beneficial use from a natural spring or stream.
28 In Nevada, there are three different types of
water rights: vested, permitted, and certificated.
First, "vested" rights are those that existed

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

19 In footnote 6, this Court noted:

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

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

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

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

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

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

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

11 **1.030. Application of common law in courts.**

12 The common law of England, so far as it is not
13 repugnant to or in conflict with the Constitution
14 and laws of the United States, or the constitution
15 and laws of this state, shall be the rule of
decision in all the courts of this state.

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

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

19 **533.085. Vested rights to water not impaired.**

20
21 1. Nothing contained in this chapter shall
22 impair the vested right of any person to the use
23 of water, nor shall the right of any person to
24 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.

25 Thus, it is clear the 1913 statutory rotation-by-
26 consent-only provision of NRS 533.075 cannot control the
27 pre-statutory 1852 and 1905 vested water rights under review
28

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1
2 As was said in a recent Idaho case¹: "The use of
3 water under the rotation system is approved by
4 high engineering authorities." And the [Idaho
5 Supreme] Court proceeds to quote from those great
6 works by Robert B. Buckley and Sir Hanbury Brown,
7 and we can do no better than to quote what these
8 works say upon the subject: "The most wasteful
9 system of irrigation possible is that under which
10 all branch canals, distributaries and village
11 channels are in use continuously and the available
12 supply is slowly dribbling into the fields. For
13 not only is the actual loss of water greater, but
14 under this system there is also this further
15 disadvantage, that the velocities in all the
16 distributaries and minor channels are reduced, and
17 the silt in the water, which at these points of
18 the system is nearly always advantageous to the
19 fields, is largely deposited in the channels and
20 not carried onto the cultivated ground. The system
21 of irrigation by rotation or by tatils, as it is
22 called in Upper India, is of great advantage, not
23 only in checking the loss of water in the channel,
24 but in teaching economical irrigation to the
25 cultivators and in insuring an equitable division
26 of the supply among the people.
27
28

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

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

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

12 * * *

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

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

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

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

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

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

* * *

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

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

Rotation in Use of Water

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12
13 The district court-ordered rotation is sustained by
14 ample, substantial and persuasive legal authorities. It
15 should be confirmed.

16
17 **F. Substantial Evidence Supports The District Court's**
18 **Order For Rotation And The State Engineer's Implementation**
19 **Of Same.**

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

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

the Intervenors' irrigation water supply was greatly enhanced.

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

Q. How do you irrigate your property?

A. [I]irrigate the property through the Park and Bull Ditch to the north and from Sheridan Creek waters to the south.

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

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

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

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

Q. What happened in 2010?

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

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

A. Court-ordered rotation.

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

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

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

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

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

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

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

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

A. Yes.

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

Q. Was there cooperation between the various water users?

A. Yes.

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

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

* * *

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

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

* * *

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

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

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

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

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

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

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

* * *

Q. How much more water would you estimate?

A. Double or triple.

Q. Double or triple the water?

A. Yes.

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

A. Yes.

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

A. I think it was a medium year.

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

A. Yes.

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

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

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

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

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

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

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

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

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

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

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

1
2 **VIII. CONCLUSION.**

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

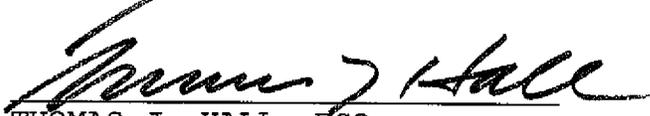
14 The award of costs to the Intervenors was properly
15 ordered and authorized under NRS 18.050 as incorporated
16 through NRS 533.450(7). Even though Smith and Barden are
17 recently new to this matter, this litigation has carried on
18 for nearly seven (7) years. The court-ordered rotation and
19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

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

injured or impaired.

Respectfully submitted this 14th day of May, 2015.

LAW OFFICES OF THOMAS J. HALL



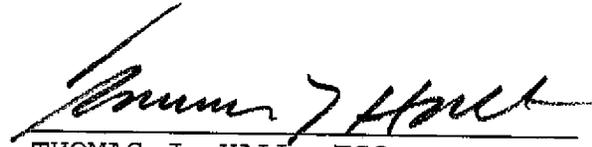
THOMAS J. HALL, ESQ.
Nevada Bar No. 675
305 South Arlington Avenue
Post Office Box 3948
Reno, Nevada 89505
Telephone: (775) 348-7011
Facsimile: (775) 348-7211

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

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

15 Respectfully submitted this 14th day of May, 2015

16 LAW OFFICES OF THOMAS J. HALL
17

18 
19

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

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

IX. ATTORNEY'S CERTIFICATE.

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

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

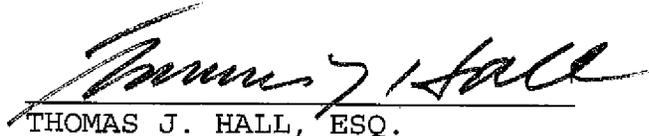
Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1),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

\\\\\\
\\\\\\

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

DATED this 14th day of May, 2015.

LAW OFFICES OF THOMAS J. HALL



THOMAS J. HALL, ESQ.
Nevada Bar No. 675
305 South Arlington Avenue
Post Office Box 3948
Reno, Nevada 89505

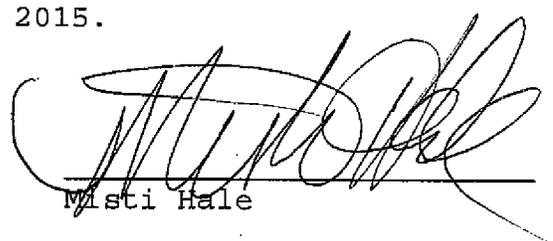
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

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

- | | |
|--|---|
| Matuska Law Offices, Ltd.
Michael L. Matuska, Esq.
2310 S. Carson St., Ste. 6
Carson City, Nevada 89705 | Sheridan Creek Equestrian
Glenn A. Roberson, Jr.
281 Tiger Wood Court
Gardnerville, Nevada 89460 |
| Bryan L. Stockton, Esq.
Senior Deputy Attorney General
100 North Carson Street
Carson City, Nevada 89701 | Donald S. Forrester
Kristina M. Forrester
913 Sheridan Lane
Gardnerville, Nevada 89460 |
| Jessica C. Prunty, Esq.
Dyer, Lawrence, Penrose,
Flaherty, Donaldson & Prunty
2805 Mountain Street
Carson City, Nevada 89703 | Frank Scharo
Post Office Box 1225
Minden, Nevada 89423 |
| Ronald R. Mitchell
Ginger G. Mitchell
Post Office Box 5607
Stateline, Nevada 89449 | Hall Ranches, LLC
Post Office Box 3690
Stateline, Nevada 89449 |

DATED this 14th day of May, 2015.


Misti Hale