IN THE SUPREME COURT OF NEVADA

In Re: Rotation Schedule

In the Matter of the Determination of the Relative Rights in and to the Waters of Mott Creek, Taylor Creek, Cary Creek (aka Carey Creek), Monument Creek, and Bulls Canyon, Stutler Creek (aka Stattler Creek), Sheridan Creek, Gansberg Spring, Sharpe Spring, Wheeler Creek No. 1, Wheeler Creek No. 2, Miller Creek, Beers Spring, Luther Creek and Various Unnamed Sources in Carson Valley, Douglas County, Nevada.

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

Appellants,
v.

STATE OF NEVADA, OFFICE OF THE STATE ENGINEER,

Respondent.

AND RELATED CASES.

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

APPELLANTS' PETITION FOR REHEARING

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I. Petition for Rehearing Standard

NRAP 40(a)(2) provides that "the petition shall state briefly and with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present." This Court may consider rehearings "(A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or (B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case." NRAP 40(c)(2). The Court may make a final disposition of the petition without a hearing, restore the case to the calendar, or make any other appropriate order. NRAP 40(e). Other orders might include additional briefing on any of the issues presented herein.

II. The *Order of Affirmance* and Issues for Rehearing

A. Rehearing is Warranted on the Rotation Schedule

In its July 14, 2016 *Order of Affirmance*, this Court agreed with the Bentleys' argument on one of the central issues in the case and ruled inter alia that the water adjudication proceeding in the District Court below "is a statutory adjudication, not an equitable adjudication." (*Order of Affirmance* at p.6). The *Order of Affirmance* failed to cite any statute which authorizes the mandatory

rotation schedule at tissue in this case. No such statute exists in Nevada's water law. The mandatory rotation schedule impairs Bentleys' vested water rights and violates the non-impairment statute, NRS 533.085.

B. Rehearing is Warranted on the *Diversion Agreement*

The issues concerning the *Water Diversion and Use Agreement* that was recorded on March 27, 1987 ("*Diversion Agreement*") [Tr. Ex. 10, SA 7 1299-1306] are twofold: (1) Whether the Bentleys' use of water to maintain water levels in the ponds was a "consumptive use" that was prohibited by the *Diversion Agreement*; and (2) Whether the absence of signatures by the Rolphs rendered the *Diversion Agreement* ineffective between Lodato and the Whitmires. The *Order of Affirmance* adopted the Bentleys' interpretation of the *Diversion Agreement*, in part, and ruled it was not a breach of the *Diversion Agreement* to use the waters of North Sheridan Creek to maintain water levels in the original, lower pond. The *Order of Affirmance* failed to consider and/or misapprehended the fact that Bentley has more than enough water rights to maintain the ponds separate and apart from the *Diversion Agreement* and that it cannot be a breach of the *Diversion Agreement* for the Bentleys to use their own water rights to maintain the ponds.

This Court also failed to consider and/or misapprehended the facts and law concerning the lack of signature by the Rolphs. The *Diversion Agreement* is

separately enforceable against the Whitmires and their successors for the North Branch of Sheridan Creek, even if it is not enforceable against the Rolphs for the South Branch of Sheridan Creek.[1]

C. Attorney Fees

The District Court awarded attorney fees under NRS 18.010(2)(b) on the basis that the Bentleys maintained their defense without good cause. Aside from the fact that a party in Nevada should never be faced with a threat of attorney fees for defending their water rights, this Court rejected much of the analysis provided by the Respondents and adopted by the District Court as explained above, including the Respondents' characterization of the adjudication proceedings as equitable proceedings and the erroneous belief that any use of the water to maintain the ponds was a breach of the *Diversion Agreement*. The award of attorney fees was therefore based on an abuse of discretion and characterized by material errors of the controlling law.

In addition, this Court erred by placing the burden on the Bentleys to prove that the Intervenors were not genuinely obligated to pay attorney fees. The Bentleys do not have access to post-judgment discovery on that issue and the District Court failed to conduct an evidentiary hearing or make any findings on

[1] There is no legal relevance to the issue that the Bentleys did not know the specific document that granted the right to continuous flows. The right depends on whether the document is filed for record and gives notice to third parties, not whether the person claiming the benefit has read the document.

that issue. However, this Court failed to consider evidence presented with Intervenors' own *Motion for Attorney Fees*, which includes unpaid invoices and affidavits that omit any reference to a genuine obligation to pay. [SA 4 at 603-738].

III. Argument

A. Lack of Statutory Authority for the Rotation Schedule

The District Court's *Findings of Fact, Conclusions of Law and Judgment* ("*Findings of Fact*") entered in Case No. 08-CV-0363-D on April 5, 2012 [JA1 155-171][2] was based on the faulty premise that NRS 533.075 provides the statutory authority for a compulsory rotation schedule. ("[t]he 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 this Court would be used to determine when and if a rotation schedule is needed . . . However, Bentley reserves all objections. . . including objection about the statutory authority . . . .) [*Findings of Fact* JA1 at 158]. The stipulation that was read into the record at trial was slightly different: "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 its statutory authority . . . ."

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2 The *Findings of Fact* are also included as Appendix C to the *Findings of Fact, Conclusions of Law, Judgment and Decree* that was entered on September 29, 2014 [SA 5 at 840-1023, 974-990].

[Tr.Trans. Vol. 1, SA 6 at 1030]. The *Order of Affirmance* explains that NRS 533.075 does not grant that authority. "It is . . . settled in this state that the water law and all proceedings thereunder are special in character and the provisions of such law not only lay down the method of procedure, but strictly limit it to that provided." (*Order of Affirmance* at 6) (quoting *G. & M. Props. v. Second Judicial Dist. Court*, 95 Nev. 301, 305, 594 P.2d 714, 716 (1979)).[3] Consequently, the remedies available to Judge Gamble and the State Engineer were limited by the Nevada Revised Statutes. The forced rotation is not a statutory remedy and is incompatible with vested rights and the non-impairment statute, NRS 533.085.

Moreover, the current rotation schedule is untenable for the long term for at least 3 reasons. First, as it now stands only 6 of 11 claimants to North Sheridan Creek supported the implementation of the rotation schedule. The number might actually be 5, because 1 of the Respondents, Glen Roberson of Sheridan Creek Equestrian Center, testified that he preferred the historical, continuous flow from

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[3] The majority opinion acknowledges the lack of statutory authority for the rotation schedule, but then concludes that the District Court had jurisdiction to impose it because "the rotation schedule was properly raised in the FOD and the Bentleys' exceptions . . . ." (*Order of Affirmance* at 7). This conclusion misses the point. There was no statutory basis for the State Engineer to impose a rotation schedule, whether it is mentioned in the FOD or not. In their exceptions, the Bentleys merely requested to be exempted from a possible rotation schedule. That request does not serve a substitute for the necessary statutory authority for the State Engineer and/or the District Court to impose a mandatory rotation schedule.

the outlet at the Weber/Bentley pond, which continued down the original channel for Sheridan Creek [Tr., App. Vol. 1 at 140:8-22; 141:2-10]. It is unclear what happens with the rotation schedule if support dwindles in the future and a majority of claimants oppose the rotation schedule. Likewise, it is unclear what happens if the manner of use of the water changes from agriculture to other uses. For example, will the State Engineer continue to impose the rotation schedule if only 1 person continues to use the water for agricultural use? What if no agricultural users remain?

Second, a rotation schedule should only address the time of use for irrigation rights, but the *Order of Affirmance* allows a rotation schedule to mix different uses. For example, the Bentleys' wildlife and recreation rights are now used for irrigation purposes by other users and the Bentleys then use Intervenors' stock and irrigation rights for recreation purposes.[4] This is a violation of the various proofs and permits involved and the parties might be subject to further lawsuits in the future.

Third, as the Dissenting opinion noted, there was no evidence presented regarding an efficient rotation schedule. Even if the rotation schedule were allowed to stand, there would still have be administrative proceedings, subject to judicial review, to determine the most efficient rotation schedule. There is no

[4] This Court took judicial notice of Bentleys' recreation permits, which were provided with their April 3, 2015 *Request for Judicial Notice.*

reason to assume that the current 21-day rotation schedule, which allows ditches to run dry, is the most efficient system. It remains unclear whether the Appellants retain the right to petition for judicial review concerning the specifics of the rotation schedule. To date, the District Court has denied all petitions for judicial review without consideration of the merits.

B. The Court Misapprehended the Relevance of the Seepage Tests and the Evidence Regarding Breach of the *Diversion Agreement*

Intervenors mounted a two (2) pronged attack on the *Water Diversion and Use Agreement* ("*Diversion Agreement*") that was recorded on March 27, 1987, alleging (i) the *Diversion Agreement* was void when recorded in 1987; and (ii) if the *Diversion Agreement* was not void when recorded, then the Bentleys violated the *Diversion Agreement* by adding a second pond in 2008 [See *Intervenors' Response*, Fourth and Fifth Affirmative Defenses, SA 1 at 86]. This Court misapprehended the extent to which the distinction between the upper and lower ponds changed the *Findings of Fact.*

Intervenors did not allege over-consumption, nor did the District Court make any findings concerning over-consumption. Intervenors are contesting the Bentleys' right to draw the water on a continuous basis outside of a mandatory rotation schedule in low flow periods:

> **REQUEST FOR ADMISSION NO. 8:** Admit that at according to the seepage report, Bentley's ponds **DO NOT** consume more than the amount of water allocated in the Final Order of Determination.

RESPONSE TO REQUEST FOR ADMISSION NO. 8: For the 2010 irrigation season, it appears that Bentleys' ponds do not consume more than the total amount of water allocated to the Bentleys under the Final Order of Determination, being an assumed amount of 12.93 AFA x 4.0 acres = 51.72 AFA. The Seepage Reports, showed on the average the Bentleys were wasting and consuming a little less than that. However, the Bentleys are not allowed to take water under the Diversion Agreement in preference to or in priority to the other water right holders, including the Intervenors. Their use must be in accordance with the Diversion Agreement.

[Tr.Ex. 85, SA 8 at 1560-1567]

The last portion of this answer is unclear, however, what is clear is that the Bentleys did not consume more than their allocated right; as such, they never consumed Intervenors' water rights. This fact is even more important in light of the distinction made in the *Order of Affirmance* between the original lower pond and the new upper pond.

Rather, Intervenors' theory of breach was that the loss of any water to maintain the ponds was a breach of the *Diversion Agreement* and this was one of the seminal findings in the *Findings of Fact*: "33. The Bentleys' use of water to fill and maintain the water level in their two ponds is a consumptive use." [JA1 at 163]. The *Order of Affirmance* distinguished between seepage to maintain the lower pond, which is not a consumptive use, and seepage to maintain the upper pond, which it concluded is consumptive use. That was a mistake that failed to consider Bentleys' own allocated water rights. This becomes a simple math problem.

The Bentleys do not need permission under the *Diversion Agreement* to consume their own water allocation.[5] The Bentleys have a base water right of 4 acre feet per 12.93 approved acres, for a total of 51.72 acre feet annually. In addition, during the time periods involved in this case the Bentleys leased Pestana's water rights, also at a duty of 4 acre feet per 23.76 approved acres, for a total of 95.04 AFA, for a combined total of 146.76 AFA [Tr. Exs. 90-94, SA 8 at 1595-1609; Appendix A to Bentleys' Opening Brief].

In a similar manner, the seepage tests were evidence of the amount of water required to maintain the ponds. The District Court found that:

> 41. The two ponds on the Bentleys' property consumed water in excess of 30.0 acre feet during the 2010 irrigation season, which the Court determines to be a consumptive use of the water in violation of the Diversion Agreement, even if valid. [JA1 at 164]

The seepage tests are not evidence of amounts that Bentley actually diverted during periods of low flow; hence they cannot be used as evidence of breach.

Even if the upper pond is assigned 60% of the combined loss from the seepage reports (18 AFA), the Bentleys have more than 8 times that water right. In other words, the Bentleys could not have consumed more than their

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[5] This point was stressed through questions and answers during closing argument. The reasonable interpretation of the transcript is that Judge Gamble agreed with this assertion, although there is no direct statement of such on the record. [Tr. Trans. Vol. 4, SA 6 at 1249-51]. However, the District Court did not find that the *Diversion Agreement* limited the Bentleys' consumption of their own allocation or required them to turn down their water rights.

proportionate share of the water from the North Branch of Sheridan Creek and breached the *Diversion Agreement* unless they continued to draw their entire allotment when Sheridan Creek dropped to .25 cfs ($1/8^{th}$ of its full flow of 2.0 c.f.s.). There is no evidence that Sheridan Creek dropped to .25 cfs or that the Bentleys continued to take their full allocation during low flow periods. Accordingly, there is no evidence to support a theory of breach of the *Diversion Agreement* by overconsumption of Bentleys' water rights and corresponding consumptive use of Intervenors' water rights.[6]

C. The Court Misapprehended the Facts and the Law Regarding the Lack of Signature From the Rolphs

Judge Gamble assumed that the *Diversion Agreement* was invalid due to the lack of the signature of the Rolphs and erroneously applied a meeting of the minds analysis. This Court did the same in its *Order of Affirmance*. The meeting of the minds analysis is inapposite, as neither the Bentleys nor their predecessors, the Webers or Lodato, ever claimed that the Rolphs were bound by the *Diversion Agreement*. The correct analysis involves the question of whether the *Diversion*

[6] Although the *Order of Affirmance* fn. 1 refers to testimony from one of the Intervenors who reported a drop in streamflow when the Bentleys' upper pond went on-line, that testimony was not accepted in the District Court's *Findings of Fact*, nor is it relevant. This statement is anecdotal evidence, only, that did not account for seasonal fluctuations in the streamflows and, at best, simply means that the owners of the lower properties could no longer count on Bentleys' rights and Pestana's rights flowing through. That does not constitute a breach of the *Diversion Agreement.*

Agreement is separately enforceable against the Whitmires and their successors.

"When the instrument is severable and represents different rights or obligations, it can be cancelled in part and remain valid and enforceable as to the remainder." 12 Miller & Starr, *California Real Estate* § 40:114 (4th ed.) at § 40.113.[7] See also *Reina v. Erassarret*, 203 P.2d 72, 77 (Cal.App. 1949) (discussing rescission as to particular matters or parties); *Pitts v. Highland Const.*, 252 P.2d 14, 18 (Cal.App 1953) (canceling note and deed of trust in part due to overcharges).

The District Court failed to address the separate interest of the Rolphs and the Whitmires. At one point in time, the Rolphs owned all of the Sheridan Creek property. They sold 22.93 acres along North Sheridan Creek to Lodato, 12.93 acres of which was later granted to the Webers and then to the Bentleys. They sold the remainder of the North Sheridan Creek property to the Whitmires and retained the property along South Sheridan Creek. These records were provided as trial exhibits and with the Supplemental Appendix in this case [SA 7 1275-1306]. To complete the chain of title, the Rolphs granted the water rights deed to the Whitmires, which was recorded on November 9, 1987. [SA 7 1328-1330].[8]

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[7] A related analysis concerns void v. voidable instruments. 12 Miller & Starr, *California Real Estate* § 40:114 (4th ed.). That analysis would require a separate brief.

[8] The water rights deed from the Rolphs to the Whitmires came after the Whitmires had already executed a grant bargain sale deed to the Forresters. [SA 7 1323-

Lodato's property was located on the North Branch of Sheridan Creek and there was no means for him to use the Rolphs' water from the South Branch without mechanical devices and pipes, which were not used. As such, the legal description provided with the *Diversion Agreement* is over inclusive to the extent it includes the Rolphs' South Sheridan Creek property. With this in mind, the question is not why the Rolphs did not sign the *Diversion Agreement*, but why they were mentioned at all. As a matter of fact and law, the *Diversion Agreement* should not be cancelled in its entirety because it included too much property in the legal description and provided a signature line for the Rolphs, who were not necessary parties to the agreement between the Whitmires and Lodato. The *Diversion Agreement* should be cancelled as to the Rolphs, only, and not as to the Whitmires.

Relevant cases support this result. In *Hockett v. Larson*, 742 F.2d 1123 (8th Cir. 1984) the court upheld in part a deed wherein a joint tenant had purported to convey the entire joint tenancy, but in fact had forged the signature of the other joint tenant.

> It is clear that a forged deed is void and will transfer no title, even to subsequent purchasers without notice, unless the grantor or the grantor's successors are estopped to claim the invalidity. [internal

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1324]. The later water rights deed completed the chain of title for the Forresters and the Whitmires. See *Noronha v. Stewart*, 199 Cal.App.3d 485 (1998); *Santa Monica Mountain Properties v. Simoneau*, 2002 Cal.App. Unpublished LEXIS 7872 (2002).

> citations omitted, ed.] In these cases there was no possibility of partial validity. For example, in First National Bank v. Enriquez, the defendant forged the signatures of both grantors. 634 P.2d at 1268. In each of the Iowa cases there was only one grantor and no question of forgery; each deed was held void because of nondelivery, a defect that affected the entire instrument. Watts v. Archer, 107 N.W.2d at 551; Jackson v. Lynn, 62 N.W. at 705.
>
> Here, the signature of one grantor was genuine, but the signature of the other grantor was a forgery. Under these circumstances we think that the Iowa courts would hold that such a deed was partially valid and effective to convey only the interest of the grantor whose signature was genuine, but void and ineffective to convey the interest of the grantor whose signature was forged.
>
> *Id.* at 1125-26.

Hockett v. Larson has been cited with favor in a number of unpublished opinions, including *Papadelos v. Lambraki*, 2003 Mass. LCR Lexis 96 (2003). *Lane v. Spriggs*, 71 S.W.3d 286 (Tn. Ct. App. 2001) concerns a missing signature and is also relevant. In that case, the grantor had 4 deeds notarized at the same time, but only signed 3. The court nevertheless enforced the deed based on the circumstances, despite the lack of signature.

These cases are similar to the extent the law treats a forged signature the same as no signature. However, the *Diversion Agreement* at issue in this case is more clearly divisible than the joint tenancies at issue in *Hockett v. Larson*. Joint tenancy by definition is an undivided interest. In contrast, the Rolphs and the Whitmires owned separate property, entirely. The meeting of minds analysis in the

Order of Affirmance does not address the issue that the *Diversion Agreement* is still valid between Lodato and the Whitmires.

D. This Court Misapprehended the Facts and the Law Regarding the Award of Attorney Fees, Especially in Light of the Legal Issues Addressed in the *Order of Affirmance*

The award of attorney fees was faulty from the outset and should not be affirmed. Judge Gamble announced his decision to award attorney fees sua sponte at the conclusion of trial without waiting for a motion and authorized the Intervenors to file a memorandum of costs and fees. [See *Decision*, Tr. Trans. Vol. 4, SA 6 at 1255]. His stated reason was the belief that Intervenors were entitled to an award of attorney fees pursuant to the attorney fees clause in the *Diversion Agreement.* Intervenors did not file a memorandum of costs and fees; rather they filed a *Motion for Attorney Fees* in which they requested attorney fees under NRS 18.010(2)(b) [SA 4 at 603-738]. The Bentleys filed an opposition [741-770] and Intervenors filed a reply in which they conceded that they cannot invoke an attorney fees clause in a contract that was declared null and void. [See *Reply In Support of Motion for Attorney Fees*, SA 4 779-810 at 784-785]. The January 4, 2013 Order awarding attorney fees [SA 4 at 825-830] is vague on the basis for the award, but cites NRS 18.010(2)(b) and does not seem to rely on the attorney fees clause in the *Diversion Agreement.*

To support this new theory of attorney fees, Intervenors included various self-serving, inflammatory statements in their proposed *Findings of Fact, Conclusion of Law and Judgment*, which were repeated in the later Order, including:

> 44. Mr. Bentley, through intimidation and threat, attempted to bully the Intervenors, acting in manner to harass and financially exhaust the Intervenors.
>
> 45. Bentley brought and maintained their Exception No. 1 relating to the Diversion Agreement without reasonable grounds.
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> 46. The Diversion Agreement contains a clause that allows attorney fees to the prevailing party in the even a lawsuit is brought to enforce or interpret the Agreement.
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> 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.
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> 48. The Bentleys proceeded in this matter under an erroneous theory and under an erroneous thought process, and therefore, their action was maintained by them without reasonable grounds.

[*Findings of Fact*, JA 1 at 165]

Finding 44 is not a finding of fact, but merely an inflammatory statement that served no evidentiary purpose and lacks support in the record. No evidence has been provided of any intimidating statements, nor would such statements serve as the basis for an award of attorney fees under NRS 18.010(2)(b). Finding 46 erroneously refers to the attorney fees clause, which Intervenors conceded was invalid and is not the basis for the award of attorney fees. The remaining Findings 45, 47, and presumably 48, relate solely to the debate over the *Diversion*

Agreement. These findings follow the District Court's erroneous finding that "33. The Bentleys' use of water to fill and maintain the water level in their two ponds is a consumptive use." [*Findings of Fact*, JA 1 at 163]. Those findings are no longer valid and the award of attorney fees should be reversed in light of the *Order of Affirmance*, which explains that diversions to maintain the original lower pond were not a breach of the *Diversion Agreement*. At the very least, the District Court was required to apportion attorney fees between claims that were colorable and those that were groundless. 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). The award of attorney fees should not stand when some of the conclusions supporting the award were rejected by this Court on appeal.

E. The Record Demonstrates that Intervenors Did Not Actually Incur an Obligation for Attorney Fees

Intervenors never incurred an actual obligation for Mr. Hall's fees. Mr. Hall provided his invoices with the *Motion for Attorney Fees* [SA 4 603-738]. The Bentleys explained in their opposition [SA 4 741-778 at 751] that Mr. Hall's invoices demonstrate that Intervenors paid the costs and payroll burden for Mr. Hall's son/law clerk, but Mr. Hall's fees in the amount of $133,420.52 were not paid. The reasonable inference is that the Intervenors were obligated to pay for the costs and overhead related to their case, but not Mr. Hall's fees. Although Mr. Hall provided a new affidavit with *Intervenors' Reply In Support of Motion for*

Attorney Fees [SA 4 779-810], he did not rebut this fact. The closest he came to addressing Intervenors' obligation to pay for his fees was in the text of the Reply:

> The Affidavit of Thomas J. Hall, Esq., attached to the Fee Motion complies precisely with the requirements of the rule [NRCP 54(d)(2)(B), ed.] The fact that only a portion of the fees have been actually paid by Intervenors merely indicates that the Intervenors have been hard pressed to keep up with the onslaught of legal maneuverings and pleadings thrown at them by the Bentleys who have undertaken a course of conduct to financially embarrass and stress-out the Intervenors. [SA 4 at 791].

Mr. Hall's statement is misleading. As explained above, Intervenors paid the overhead and the costs for Mr. Hall's son/law clerk. They paid little and arguably nothing toward Mr. Hall's attorney fees. By referring blindly to NRCP 54(2)(2)(B), Mr. Hall largely conceded the Bentleys' argument on this issue. Although the fees were incurred, there is no evidence that the Intervenors incurred a corresponding obligation to pay; rather the evidence is that they were to pay Mr. Hall's overhead and payroll burden related to their case and that Mr. Hall was to get paid from the Bentleys.

Intervenors' other inflammatory statements are also misplaced. Judge Gamble did not identify a single brief that was filed in bad faith or to exhaust the Intervenors. Rather, as explained above, the Bentleys incurred substantial fees to defend against Intervenors' theories, many of which they considered to be frivolous, including such arguments as (1) NRS 533.075 vests the State Engineer

with authority to implement a rotation schedule; (2) that the adjudication proceedings below were equitable proceedings; and (3) that the Bentleys violated the *Diversion Agreement* by using the water to maintain the lower pond, even though the *Diversion Agreement* expressly allows that result. Under no circumstance should Intervenors be awarded attorney fees related to those arguments that have been rejected by this Court.

IV. Conclusion

In conclusion, the Bentleys respectfully submit that the Order of Affirmance should be reconsidered and the Decree should be remanded back to the District Court and/or the State Engineer as it relates to Case 08-CV-0363 subproceeding D and North Sheridan Creek. Even if the Decree is not remanded, the Bentleys prevailed on substantial legal issues involved in the case and there is no basis for an award of attorney fees under NRS 18.010(2)(b) or any other theory of the case.

Dated this 28th day of July 2016.

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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 4,649 words; or

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[ ] 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 28th day of July 2016.

MATUSKA LAW OFFICES, LTD.

By: _____

MICHAEL L. MATUSKA, SBN 5711

CERTIFICATE OF SERVICE

I certify that on the 28th day of July 2016, I served a copy of this **APPELLANTS' PETITION FOR REHEARING**, upon all counsel of record:

□ By personally serving it upon him/her; or

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

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LIZ STERN, ALS