

IN THE SUPREME COURT OF THE STATE OF NEVADA

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.

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

Appellants,

vs.

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,

Respondents.

Electronically Filed
Oct 07 2016 09:02 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

CASE NO. 64773

Dist. Court No. 08-CV-0363

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 AUGUST
11, 1992,

Appellants,

vs.

THE STATE OF NEVADA STATE
ENGINEER; HALL RANCHES, LLC;
THOMAS J. SCYPHERS; KATHELEEN
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

STATE ENGINEER'S OPPOSITION TO PETITION FOR REHEARING

ADAM PAUL LAXALT
Attorney General
Bryan L. Stockton
Senior Deputy Attorney General
Nevada Bar No. 4764
100 North Carson Street
Carson City, NV 89701-4717
bstockton@ag.nv.gov
Tel. (775) 684-1228
Attorneys for Respondents

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii-iii
STATEMENT OF ISSUES	1
1. ARE BENTLEY’S ARGUMENTS ON THE ROTATION SCHEDULE IDENTICAL TO THOSE REJECTED BY THIS COURT?	1
2. SHOULD THE COURT REFUSE TO RECONSIDER BASED ON HYPOTHETICAL FACTUAL SCENARIOS?	1
3. SHOULD THIS COURT REWEIGH THE FACTUAL FINDINGS OF THE DISTRICT COURT?.....	1
STANDARD FOR PETITIONS FOR REHEARING.....	1
ARGUMENT.....	2
A. BENTLEY’S ARGUMENTS ON THE ROTATION SCHEDULE ARE IDENTICAL TO THOSE ALREADY REJECTED BY THIS COURT.	2
B. THE COURT SHOULD REFUSE TO RECONSIDER BASED ON HYPOTHETICAL FACTS.	3
C. THE COURT SHOULD NOT REWEIGH THE FACTUAL FINDINGS OF THE DISTRICT COURT IN CONSIDERING REHEARING.	5
CONCLUSION.....	8
CERTIFICATE OF SERVICE	9
CERTIFICATE OF COMPLIANCE	10

TABLE OF AUTHORITIES

PAGE

CASES

<i>Bentley v. Office of State Eng'r,</i> Order of Affirmance, 2016 WL 3856572, fn. 1 (July 14, 2016).....	3, 4, 8
<i>Cannon v. Taylor,</i> 88 Nev. 89, 493 P.2d 1313 (1972)	2
<i>Doe v. Bryan,</i> 102 Nev. 523, 525, 728 P.2d 443, 444 (1986).	4
<i>Donoghue v. Tonopah Oriental Mining Co.,</i> 45 Nev. 110, 198 P. 553 (1921).....	3
<i>Eureka Cnty v. State Eng'r,</i> 131 Nev. Adv. Op. 84, 359 P.3d 1114, 1117 (2015).....	7
<i>Gershenhorn v. Stutz,</i> 72 Nev. 312, 306 P.2d 121 (1957).....	2,3
<i>In re Lorrington,</i> 75 Nev. 330, 334, 349 P.2d 156 (1960)	2
<i>Matter of Estate of Herrmann,</i> 100 Nev. 149, 151, 679 P.2d 246, 247 (1984)	2, 3, 5
<i>State Engineer v. American Nat. Ins. Co.</i> 88 Nev. 424, 426, 498 P.2d 1329, 1330 (1972)	3

STATUTES

NRS 533.075.....	2, 3
NRS 533.370	7

RULES

NRAP 40(a).....	9
NRAP 40(a)(1).....	1, 4
NRAP 40(a)(2).....	1
NRAP 40(c)(1).....	2, 3
NRAP 40(c)(2).....	2

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 the State Engineer's Opposition to the Petition for Rehearing.

STATEMENT OF ISSUES

1. Are Bentley's arguments on the Rotation Schedule identical to those rejected by this Court?
2. Should the court refuse to reconsider based on hypothetical factual scenarios?
3. Should this Court reweigh the factual findings of the District Court?

STANDARD FOR PETITIONS FOR REHEARING

In his petition for rehearing, Bentley cites NRAP 40 (a)(2), and ignores NRAP 40 (a)(1), which states: "Matters presented in the briefs and oral arguments may not be reargued in the petition for rehearing, and no point may be raised for the first time on rehearing." The only logical reason Bentley omitted this part of the rule is that all of the arguments made by Bentley in his petition for rehearing are identical to those made in the briefs on the merits, and identical to those that have been made since the start of this litigation, or made for the first time. This Court has been clear that:

Rehearings are not granted to review matters that are of no practical consequence. Rather, a petition for rehearing will be entertained only when the court has overlooked or misapprehended some material matter, or when otherwise

necessary to promote substantial justice. NRAP 40 (c)(2). A petition for rehearing may not be utilized as a vehicle to reargue matters considered and decided in the court's initial opinion. NRAP 40(c)(1); *Gershenhorn v. Stutz*, 72 Nev. 312, 306 P.2d 121 (1957). Nor may a litigant raise new legal points for the first time on rehearing. NRAP 40(c)(1); *Cannon v. Taylor*, 88 Nev. 89, 493 P.2d 1313 (1972); *In re Lorrington*, 75 Nev. 330, 334, 349 P.2d 156 (1960).

Matter of Estate of Herrmann, 100 Nev. 149, 151, 679 P.2d 246, 247 (1984). The petition for rehearing should be dismissed as it is repetitive and does not add anything that has not already been briefed and decided by this Court.

ARGUMENT

A. Bentley's Arguments on the Rotation Schedule are Identical to Those Already Rejected by This Court

Bentley argues that rehearing is warranted because the court used a “faulty premise that NRS 533.075 provided the statutory authority for a compulsory rotation schedule.” Petition for Rehearing (Petition) at 4. This issue was argued by Bentley in his Opening Brief from page 14 to page 22. He again addressed the issue in his Reply Brief from page 5 to page 10. Bentley may not rely on the same points already made prior to the decision to support rehearing. “A petition for rehearing may not be utilized as a vehicle to reargue matters considered and decided in the court's initial opinion.” *Matter of Estate of Herrmann*, 100 Nev. at 151, 679 P.2d at 247, citing, NRAP 40 (c)(1); *Gershenhorn v. Stutz*, 72 Nev. 312, 306 P.2d 121 (1957).

The Order of Affirmance directly addressed this issue: “However, while it is true that NRS 533.075 only explicitly authorizes voluntary rotation schedules, it also does not limit the power of the district court to impose an otherwise involuntary rotation schedule after the jurisdiction of the district court has been properly invoked.” *Bentley v. State, Office of State Eng’r*, Order of Affirmance at 10, 2016 WL 3856572, 4 (July 14, 2016). *See also*, *State Engineer v. American Nat. Ins. Co.* 88 Nev. 424, 426, 498 P.2d 1329, 1330 (1972) (citing, *Donoghue v. Tonopah Oriental Mining Co.*, 45 Nev. 110, 198 P. 553 (1921)), (“The statute . . . does not, however, affect the power of the district court to grant equitable relief to the permittee when warranted.”). As these arguments repeat those already made, the court cannot entertain them on rehearing and should dismiss the Petition. NRAP 40(c)(1).

B. The Court Should Refuse to Reconsider Based on Hypothetical Facts

In addition, Bentley asks this Court to rule on factual situations that are not before the court in this appeal. He argues on pages 5–8 of the Petition that this Court should rule on what should happen if more water users change their current position. However, “no point may be raised for the first time on rehearing.” NRAP 40(a)(1). This Court should decide the case before it and not rule based on factual changes that may or may not occur in the future. “Nevada has a long history of requiring an actual justiciable controversy as a predicate to judicial

relief. Moreover, litigated matters must present an existing controversy, not merely the prospect of a future problem.” *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986).

The Order of Affirmance correctly places emphasis on the actual content of the district court’s order to impose the rotation schedule. The dissent and Bentley emphasize that “the State Engineer's lawyer orally asked, in closing argument, that the court direct the State Engineer to impose rotation schedules on persons holding vested water rights in North Diversion of Sheridan Creek when the flow drops below 2.0 cfs” *Bentley v. Office of State Eng'r*, 2016 WL 3856572, at 15 (Pickering, J. Dissenting). What both Bentley and the dissent fail to note was that counsel’s suggestion was based on the evidence presented at the *de novo* trial on the merits before the district court. As noted by the majority, the seepage test and testimony of the other water users demonstrated that Bentley’s ponds consumed more than his share at flows below 2.0 cfs. State Engineer Supplemental JA (SJA) at 146. The evidence also showed that Bentley’s ponds did not consume more than his proportional share at flows above 2.0 cfs. SJA at 146. The suggestion of the attorney for the State Engineer requested that the district court adjudicate the water rights in a way that did not impair Bentley’s rights when flows were above that level, but also that it would not impair the other rights at flows below that level.

C. The Court Should Not Reweigh the Factual Findings of the District Court in Considering Rehearing

In a similar manner, Bentley puts forth what he calls a “simple math problem” on pages 8–9 of the Petition. However, the math is an attempt at deception that should not be tolerated by this Court. *See Matter of Estate of Herrmann*, 100 Nev. at 151, 679 P.2d at 247 (“it appears that said petition has been filed for purposes of delay, and with the improper result, if not the intent, of subjecting appellants to further public odium.”). In reality, Bentley owns 12.93 acres out of 177.74 acres that have water rights of equal priority in common with him. Bentley Supplemental Appendix Vol. 5, p. 962. Bentley states that he is entitled to 51.72 acre-feet annually for his own property. Bentley Supplemental Appendix Vol. 5, p. 962. However, that is only if the entire water right is satisfied for all users. The North Branch of Sheridan Creek would have to produce 710.96 acre-feet of water during the 198-day irrigation season, which runs from April 1 to October 15, of each year for all the water rights to receive the full 4.0 acre-feet per acre annually. Bentley Supplemental Appendix Vol. 5, p. 962-3. Bentley must share in the shortfall with all the other users. Bentley Supplemental Appendix Vol. 5, p. 963. The court should also keep in mind that the rotation schedule only applies during the 198-day irrigation season and when the flow is below 2.0 cfs, and that Bentley gets continuous flow outside the irrigation season. Bentley Supplemental Appendix Vol. 5, p. 963.

To use another simple mathematical example, consistent water delivery during the 2016 irrigation season would have been approximately 0.7 cfs of water delivered from the flow splitter on the west side of Foothill Road.¹ There will be transportation losses from the splitter to the distribution box of which Bentley must bear a proportionate share. This flow rate over a 198-day growing season would yield approximately two hundred eighty (280) acre-feet of water. Two hundred eighty (280) acre-feet divided by 177.74 irrigated acres yields a duty of approximately 1.6 acre-feet of water per irrigated acre rather than the full 4.0 acre-feet annually that Bentley asserts he is entitled to every year.

Again, Bentley also receives continuous flow from the North Branch of Sheridan Creek after the current irrigation season and prior to the beginning of the start of the subsequent irrigation season. *See* State Engineer Permit Nos. 81985 (Sheridan Creek), 81986 (Stutler Creek) and 81987 (Gansberg Spring)².

Bentley points out that his water rights now have the manner of use for wildlife and recreation purposes. While this is true, in order to approve Bentley's Change Application from irrigation to wildlife and recreation purposes the State Engineer was required to protect the other users from "conflicts with existing

¹ <http://water.nv.gov/data/streamflow/site.cfm?ID=156> ; Note that the North Split receives 60% of the total flow listed in the measurements on this chart.

² <http://water.nv.gov/data/permit/permit.cfm?page=1&app=81985>;
<http://water.nv.gov/data/permit/permit.cfm?page=1&app=81986>;
<http://water.nv.gov/data/permit/permit.cfm?page=1&app=81987>

rights” NRS 533.370(2). The State Engineer did so by requiring Bentley to continue to comply with the order of the district court concerning the rotation schedule when flows are below 2.0 cfs during the irrigation season. If the State Engineer had not so conditioned Bentley’s water rights, there would be no way of “ensuring that the new or changed appropriation does not conflict with existing rights, in accordance with NRS 533.370(2).” *Eureka Cnty v. State Eng’r*, 131 Nev. Adv. Op. 84, 359 P.3d 1114, 1117 (2015).

A decree proceeding is heard de novo before the district court. The State Engineer’s Final Order of Determination serves as the complaint and the district court hears testimony and makes the final determination. In this case, the district court heard testimony, conducted a site visit in the presence of the parties, and ordered the seepage test to be done by the State Engineer. The evidence of any one year, such as that of 2010 argued by Bentley should not be re-weighed by this Court on appeal. The function of this Court is to determine whether the district court had substantial evidence before it to determine that a rotation schedule was necessary to protect the water rights of the parties downstream from Bentley. As noted by the court in footnote 1, all the small users at the bottom of the system testified that they were not getting their water after Bentley built the second pond, and that they were only able to get water in usable quantities once the rotation

schedule was implemented in 2010. *Bentley v. Office of State Eng'r*, Order of Affirmance at 10, 2016 WL 3856572, fn. 1 (July 14, 2016).

CONCLUSION

Bentley's Petition for Rehearing improperly asks this Court to look at the same arguments he made previously and re-decide the case. He also requests that the court make this revised ruling based on speculative facts that may or may not occur in the future. Finally, he asks this Court to reweigh the evidence heard by the district court. None of these can support a rehearing under NRAP 40(a). For these reasons, the State Engineer respectfully requests that the court dismiss or deny the Petition for Rehearing.

Respectfully submitted this 7th day of October, 2016.

ADAM PAUL LAXALT
Attorney General
By: s/ Bryan L. Stockton
BRYAN L. STOCKTON
Senior Deputy Attorney General
Nevada Bar No. 4764
100 North Carson Street
Carson City, NV 89701-4717
bstockton@ag.nv.gov
Tel. (775) 684-1228
Attorneys for Respondents

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 this 7th day of October, 2016.

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

s/ Marissa Houk
Marissa Houk, 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 1,915 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

///

///

///

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

Dated this 7th day of October, 2016.

ADAM PAUL LAXALT

Attorney General

By: s/Bryan L. Stockton

BRYAN L. STOCKTON

Senior Deputy Attorney General