IN THE SUPREME COURT OF THE STATE OF NEVADA

JERALD R. JACKSON, TRUSTEE OF THE JERALD R. JACKSON 1975 TRUST, AS AMENDED; AND IRENE M. WINDHOLZ, TRUSTEE OF THE IRENE M. WINDHOLZ TRUST DATED AUGUST 11, 1992, Appellants, vs. THE STATE OF NEVADA STATE ENGINEER; EDWARD H. GROENENDYKE, TRUSTEE OF THE GROENENDYKE FAMILY TRUST, Respondents.	**Supreme Court No. 67289** Ninth Judicial District Court Case No. 08-CV-0363-E

REPLY BRIEF OF APPELLANTS JERALD R. JACKSON, TRUSTEE OF THE JERALD R. JACKSON 1975 TRUST, AS AMENDED; AND IRENE M. WINDHOLZ, TRUSTEE OF THE IRENE M. WINDHOLZ TRUST DATED AUGUST 11, 1992

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N.R.A.P. 26.1 DISCLOSURE STATEMENT

The undersigned certifies that Jerald R. Jackson, Trustee of the Jerald R. Jackson Trust, as amended, and Irene M. Windholz, Trustee of the Windholz Trust dated August 11, 1992, are Trustees of Intervivos Trusts with no parent corporations and with no publicly held companies that have an interest in them. Gordon H. DePaoli and Dale Ferguson, of Woodburn and Wedge, have been counsel to Appellants in the District Court since April 28, 2010, and are the only attorneys expected to appear in this Court. Appellants were initially represented in the District Court by George M. Keele, Esq., of Minden, Nevada. Appellants were represented before the Nevada State Engineer by Paul Taggart, of Taggart & Taggart, Carson City, Nevada.

WOODBURN AND WEDGE

Dated: August 27, 2015

By: / s / Gordon H. DePaoli
Gordon H. DePaoli

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I. INTRODUCTION.

Jackson recognizes that "the Green Acres properties[1] have vested rights" from Miller Creek, Unnamed Creek and Spring (D). 5AA 822; 825-831; 833-834; 872; 877-878; 882.[2] State Engineer's Answering Brief ("EAB") 1. But that is not the issue here. The issue is whether substantial evidence supports a conclusion that any predecessor-in-interest to the Green Acres Properties diverted water directly from Spring (A) at its source through the 6" Pipeline Diversion or some other conveyance facility before 1905. In effect, that is what the District Court determined. 5AA 943. There is no such evidence, and that is what motivates this appeal.[3]

Jackson also recognizes that, in a properly filed action, with appropriate pleadings and with joinder of all necessary parties, a district court has jurisdiction to determine rights of others to access the lands of third parties, and to decide whether applicable law allows such access. Groenendyke's Answering Brief

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[1] In this Reply Brief, "Green Acres" or "Green Acres Properties" includes those parcels labeled with Proof of Appropriation Nos. 06322, 06325, 06327, 06328, 06329, 06330, 06331, 06333, 06334, 07486, 09264, 09265, 09266 and 09270. Addendum to Jackson Opening Brief 4; 1 AA 218.

[2] All abbreviations in this Reply Brief are the same as those used in Jackson's Opening Brief. "AA: refers to Appellants' Appendix. "ADD" refers to the Addendum to Jackson's Opening Brief.

[3] Without any citations to the record, the State Engineer speculates about Jackson's motives for the position Jackson takes here. *See, e.g.*, EAB at 13-14. There is no motive here other than a correct decision under applicable Nevada law.

("GAB") 12-17. But that, too, is not the issue here. The issue is whether in a proceeding initiated under the special provisions of N.R.S. §§ 533.090, *et seq.*, to determine rights to water, a court may also determine rights to access to the lands of others.

II. THE CONCLUSION THAT WATER WAS DIVERTED DIRECTLY FROM SPRING (A) VIA THE 6" PIPELINE AND PLACED TO BENEFICIAL USE BY THE OWNER OF GREEN ACRES PRIOR TO 1905 IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

In asserting that Spring (A) is the "source of vested rights" for Green Acres, the State Engineer ignores the legal standard which must be met to establish a "vested" water right under the common law of Nevada. Under that law, the evidence must support a conclusion that prior to 1905[4] the owner of Green Acres diverted water at the source of Spring (A) into the 6" Pipeline Diversion or some other conveyance and applied that water to beneficial use on Green Acres. *Walsh v. Wallace*, 26 Nev. 299, 327, 67 P. 914 (1902).. The circumstantial evidence on which the State Engineer relies does not support that conclusion.

The State Engineer relies on the fact that "at certain times in the past" Green Acres and the Berrum-Heritage Ranch were in common ownership. EAB 9. There was no such common ownership until 1916, after the date for establishing rights to

[4] To the extent that California law applies here, because Spring (A) is in California, the date is 1914. *Duckworth v. Watsonville Water and Light Co.*, 158 Cal. 206, 211, 110 P. 297 (1910)

the appropriation of water under the common law had passed. Jackson Opening Brief ("JOB") 11-12.

Under the heading "Green Acres Properties have vested water rights," the State Engineer points to "homogeneous vegetation" on Green Acres and the Berrum-Heritage Ranch based upon his witness's review of a 1904 cultural map and aerial photographs taken long after 1905. EAB 9-10. Homogeneous vegetation at a particular time shows nothing more than that at the time the parcels received similar amounts of water for irrigation purposes. It shows nothing about where the water was coming from. The evidence established that the Green Acres Properties had numerous water sources independent of Spring (A). *See* p. 1 above.

In an effort to establish Spring (A) as a direct source of water for Green Acres, the State Engineer argues that if water from Spring (A) is left in the natural channel, it "could be delivered in this manner." EAB 11. But Spring (A) was not left in its natural channel. It was diverted away from Green Acres by the 6" Pipeline Diversion to the Berrum-Heritage Ranch, and it could not reach that Ranch any other way. The State Engineer's witness testified that "the six-inch pipeline has effectively captured all the flow" from the spring area to the Hill property. 3AA 90:22-25.

The diversion away from the natural channel and Green Acres happened prior to 1904, at a time when the Berrum-Heritage Ranch and Green Acres Ranch

were in separate ownership. JOB 10; 11-13. It is not reasonable to conclude that the then owner of Green Acres, who, under the State Engineer's interpretation of the evidence, had long relied on water from Spring (A) to flow uninterrupted down its natural channel for diversion downstream to Green Acres, would not have acted when that water was diverted away from Green Acres and to the Berrum-Heritage Ranch.

When that happened, there would have been a "fight". But there is no evidence of a fight then, and there was no fight in the 1960s when the then owner of Green Acres Ranch filed an application to appropriate water from Unnamed Creek downstream of Spring (A) and the owner of the Berrum-Heritage Ranch filed an application to appropriate water directly from Spring (A) at its source.

The State Engineer argues that those filings and the then State Engineer's disposition of them are of limited relevance. EAB 6. They are very relevant. First, before either property was subdivided, the owner of Green Acres did not claim water directly from Spring (A), and the owner of the Berrum-Heritage Ranch did. Second, the Berrum-Heritage Ranch owner was applying for water to be directly diverted from Spring (A) by the 6" Pipeline Diversion, and the owner of Green Acres was applying for water downstream in Unnamed Creek. 4AA 669; 670-671.

The facts that water from the 6" Pipeline Diversion at Spring (A), after its use on the Berrum-Heritage Ranch on the west side of Foothill Road, comingles with water from Spring (D), and water from Spring (D) is used on the east side of Foothill Road and can be delivered to Green Acres for irrigation (EAB 12), does not create a vested right to water directly from Spring (A) any more than a vested right to water from the main stem of a river creates a vested right to water directly from an upstream tributary of the river. However, those facts explain why there was no "fight" when Spring (A) was diverted at its source. The owner of the Green Acres Ranch was receiving water from Unnamed Creek, Miller Creek and Spring (D).

The use of return flow after the irrigation of the 12.43 acres of Groenendyke property on the east side of Foothill Road with water from the 6" Pipeline Diversion on the Green Acres property (EAB 12), also does not establish a vested right to water directly from the 6" Pipeline Diversion from Spring (A). Under Nevada law, there is no right to return flow. It continues only for so long as such return flow exists. There is no obligation to continue to provide it. *See, Ryan v. Gallio*, 52 Nev. 330, 344-45, 286 P. 963 (1930); *In Re Bassett Creek*, 62 Nev. 461, 466, 155 P.2d 324 (1945); *see also* 1AA 54-55.

Even if combining water from the 6" Pipeline Diversion at Spring (A) with Spring (B) and Spring (D) results in "excess water that the early settlers could not

afford to waste" (EAB 12-13), that is not information which supports any conclusion that the Green Acres owner was diverting water directly from Spring (A). The State Engineer's measurements were taken in the wet years between 1996 and 1998. He had no measurements for multi-year droughts, like 1988 to 1994, or like the current one. 3AA 453-454.

The District Court erroneously concluded that the "continued use of . . . Spring (A) water to supplement . . . Spring (D) constitutes a waste of water that is not allowed under Chapter 533 of the Nevada Water Law, specifically N.R.S. 533.070, among others." 5AA 942. There is no waste of water resulting from the diversion of substantially all of the surface flow of Spring (A) into the 6" Pipeline Diversion, irrigating with it on the Berrum-Heritage Ranch on the west side of Foothill Road and allowing water to flow into, or be comingled with, Spring (D) water. The Berrum-Heritage Ranch appropriations from Spring (A) have been limited to their appropriate duty of water. The fact that some of the water returns to another source of water, here, Spring (D), does not, under any provision of Nevada law constitute waste. JOB 23-24.

Water from Spring (A) comingled with Spring (D) would find its way to the very same place, even if it were allowed to flow down Unnamed Creek, rather than being diverted to the south and comingled with Spring (D). JOB 23-24. Diversion to the south was the historic practice in place when these rights were established.

3AA 436-437. The District Court's Decree alters that historic practice by awarding a direct diversion right in Spring (A) at its source to Green Acres, and in then allowing the State Engineer to impose a "rotation schedule" on . . . Spring (A) by requiring Jackson and Groenendyke to allow water from the 6" Pipeline to be discharged directly into Unnamed Creek for use by Green Acres. *See, e.g.*, 5AA 822; 825-831; 833-834; 841; 872-873; 877-878; 882.

III. THE DISTRICT COURT DID NOT HAVE JURISDICTION TO DECIDE QUESTIONS OF ACCESS TO LANDS OF OTHERS.

The provisions of N.R.S. §§ 533.090, *et seq.*, establish a special set of procedures intended "to bring about a speedy, summary and effectual determination of the relative rights of various claimants to the use of water of a [water source] for administrative and regulative purposes." *Pitt v. Scrugham*, 44 Nev. 418, 427-28, 195 P. 1101, 1103 (1921). Those provisions and their purposes do not provide or allow for the simultaneous litigation of access to land issues.

The State Engineer makes such investigation as "may be essential to the proper determination of the water rights in the [source]." N.R.S. 533.100. Claimants present evidence necessary for a determination of their rights to water. N.R.S. 533.115. The State Engineer prepares a "preliminary order of determination establishing the several rights of claimants to the waters." N.R.S. 533.140. Claimants may object to it. N.R.S. 533.145. After hearing objections to the preliminary order, the State Engineer enters a final order of determination,

"defining the several rights to the waters of the [source]." N.R.S. 533.160. Under those provisions, there is no opportunity to either assert or object to easement rights, and the State Engineer does not determine them.

The State Engineer's final order is filed with the clerk of the court. N.R.S. 533.165. It "operates as and has the force and effect of a complaint." *Vineyard*, 42 Nev. 1, 25, 171 P. 166, 172 (1918). Parties in interest may file "exceptions to the order of determination of the State Engineer" five days prior to the date set by the court for the hearing. N.R.S. 533.170.

Involving the State Engineer and the Court in issues not related to the determination of water rights is inconsistent with the plain language of N.R.S. §§ 533.090, *et seq.*, and with its purpose of a speedy, summary and effectual determination of the relative rights to the use of water. This proceeding began in 1987, and ended with a judgment and decree in 2014. One can only imagine how long it would have taken had it involved issues unrelated to claims to water, like easements.

Pursuant to N.R.S. 533.170, the District Court set five days before April 1, 2009, as the date for filing exceptions to the State Engineer Order. 1AA 238-239. Groenendyke did not file exceptions to the State Engineer's Order based upon claimed easement rights. 2AA 240-247. More than three years later, on September 21, 2012, Groenendyke filed a "Supplement to Notice of Exceptions."

2AA 311-338. In that "Supplement," Groenendyke included a "Motion to Allow Repair of Facilities and to Allocate Costs." 2AA 313-314. Groenendyke asked the Court to require repair of the 6" Pipeline, and sought access to it. *Id.* at 314, 320. Jackson opposed the Motion, noting that the portion sought to be repaired was on National Forest lands, and that other portions of the Pipeline were on land owned by the Hills. 2AA 351-358. Jackson also argued that access rights were not properly before the Court in this adjudication proceeding. *Id.* 340-344

Assuming, arguendo, that easement issues can be raised before the District Court, because Groenendyke did not raise them at least 5 days before the April 1, 2009 hearing, he could not raise them thereafter. N.R.S. 533.170(2) expressly provides that "the order of determination by the State Engineer and the statements or claims of claimants and exceptions made to the order of determination shall constitute the pleadings, and there shall be no other pleadings in the cause."

This Court considered N.R.S. 533.170 in *Carpenter v. District Court*, 59 Nev. 42, 73 P.2d 1310 (1937), *reh'g granted*, 59 Nev. 42, 84. P.2d 489 (1938). *Carpenter* was an original proceeding seeking a writ of prohibition to prevent the district court from allowing parties to assert exceptions after the time for filing exceptions had expired. The court issued the writ, ruling that the district court had no jurisdiction to consider matters not raised in timely filed exceptions. 73 P.2d at 1311-12.

On rehearing, the Court concluded that the provisions of N.R.S. 533.170 indicate that the legislature intended that the pleadings be limited, and that the purpose of the pleadings was to define the issues. *Carpenter*, 84 P.2d at 491. The Court stated that any other construction was contrary to the purposes of the law to "provide a method whereby unappropriated water might be appropriated or whereby the relative rights of appropriators of the waters of the public streams of the state might be determined without great delay and expense to such appropriators . . . ." *Id.*

In *G AND M Properties v. District Court*, 95 Nev. 301, 594 P.2d 714 (1979), this Court again considered whether a district court should be prohibited from hearing late filed exceptions to the order of determination. This Court described "the language in N.R.S. 533.170 plain and unambiguous [citation]" and interpreted the statutory notice requirements "as mandatory, requiring strict compliance." 95 Nev. at 305. The Court found *Carpenter* controlling, and held that the district court was without jurisdiction to consider exceptions filed some 15 months after the required date. *Id.*

The "pleadings" here were limited to issues related to claims to water. As a result, there is nothing in the record which shows or describes the facilities to which Groenendyke is to have access. There is nothing in the record which shows that those unidentified facilities are in fact on land owned by Jackson at the present

time, or owned by Jackson at the time of the hearing before the District Court. The record does show that the spring box and portions of the 6" Pipeline are located on National Forest lands owned by the United States. They show that much, if not all, of the 6" Pipeline is located on lands owned by David T. Hill and Sheila R. Hill, persons who were not parties to the water adjudication before the State Engineer or before the District Court. JOB 30-31.

In a properly filed action, and with all interested parties joined, a district court has jurisdiction to determine the extent to which a party has rights to access lands of another party for purposes related to repair, maintenance and replacement of water facilities. But that is not this proceeding.[5]

IV. CONCLUSION.

There is no evidence which reasonably supports a conclusion that, prior to 1905, the owner of Green Acres directly diverted water from Spring (A) at its

[5] For the same reasons that access issues were not properly before the District Court, under the provisions of N.R.S. 533.090 through 533.200, the issues related to prescription raised by Jackson in the Opening Brief were not before the District Court, and are not before this Court on appeal. *See*, EAB 16-18. Depending on the outcome of this appeal, such issues may need to be adjudicated in a separate proceeding with all interested parties, including Green Acres parties directly involved.

source.[6] The District Court's Order on that issue must be reversed, with instructions to modify the Decree accordingly. The District Court had no jurisdiction to determine access rights to any property, and should be directed to modify the Decree accordingly.

WOODBURN AND WEDGE

Dated: August 27, 2015

By: / s / Gordon H. DePaoli
Gordon H. DePaoli
Attorneys for Appellants Jerald 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

[6]The State Engineer suggests that the Court find "that a decision of the State Engineer is under review" in order to take advantage of the provisions in 533.450(9) that a decision of the State Engineer "shall be prima facie correct, and the burden of proof shall be on the party attacking the same." The provisions of N.R.S. 533.170 and N.R.S. 533.185 and decisions of this Court make it clear that the findings here are the findings of the Court, and the conclusions are the conclusions of the Court. This Court is not reviewing a decision of the Nevada State Engineer, and N.R.S. 533.450(9) does not apply. *See, e.g., Vineyard Land and Stock Co. v. District Court*, 42 Nev. 1, 171 P. 166, 172-74 (1918); *Scossa v. Church*, 43 Nev. 407, 409, 187 P. 1004, 1005-06 (1920).

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 this brief has been prepared in a proportionally spaced typeface using Times New Roman 14 point font.

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 proportionately spaced, has a typeface of 14 points or more, and contains 4,123 words.

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.

WOODBURN AND WEDGE

Dated: August 27, 2015

By: / s / Gordon H. DePaoli
Gordon H. DePaoli

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Woodburn and Wedge and that on the 27th day of August, 2015, I electronically filed the foregoing with the Clerk of the Court using the Supreme Court of Nevada Electronic Filing system, which will send notification of such filing to the following attorneys of record via their email addresses:

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