

FILED

1 Case No. 79-8875

2 Dept. No. 1

'85 JAN -7 P4:43

JUDI BAILEY

BY C. Salas
DEP-JL

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

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IN AND FOR THE COUNTY OF WASHOE

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9 IN THE MATTER OF THE
10 DETERMINATION OF THE
11 RELATIVE RIGHTS IN AND
12 TO THE WATERS OF HORSE
13 SPRINGS IN WASHOE
14 COUNTY, NEVADA.

ORDER MODIFYING
JUDGMENT AND DECREE

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The Motion to Modify Judgment and Decree Consistent with Supreme Court Ruling having come on for hearing before the above-entitled Court on December 17, 1984, and Robert W. Marshall and Nanette Marshall and Robert E. Dickenson and Dorothy Dickenson (hereinafter Marshall) being represented by Robert W. Marshall, Esq., and W. Dalton LaRue, Sr. and Juanita S. LaRue (hereinafter LaRue) being represented by James W. Johnson, Jr., Esq., and the Nevada State Engineer, Peter G. Morros, (hereinafter State Engineer) being represented by George N. Benesch, Esq., and evidence having been presented to the Court and arguments having been presented to the Court, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED as follows:

1. Paragraph 2 of the Judgment and Decree is hereby modified to read as follows:

"LaRue shall pay the cost of installation of a watering trough on the Marshall side of the range fence of a size approximating the troughs which were on the Marshall side of the fence prior to 1969 (approximately 575 gallons). However, LaRue shall be given credit toward such

1 cost in the sum of ONE THOUSAND ONE HUNDRED FIFTY-THREE
2 DOLLARS (\$1,153.00), which was LaRue's cost for
3 installation of the pipe described below. LaRue has
4 offered a trough for such use that is located at the Horse
5 Springs site which is supported on either end by metal
6 "feet", but which has holes in it. Marshall has agreed to
7 use such trough if it can reasonably be repaired.

8 "LaRue has installed approximately two hundred (200)
9 feet of pipe leading southerly from the LaRue's trough at
10 the spring outlet toward the Marshall/LaRue division fence.
11 Marshall shall pay the cost of extending the pipe to the
12 watering trough on the Marshall side of the fence.

13 "Under the direction of the State Engineer, a valve
14 shall be installed at the bottom of LaRue's trough allowing
15 the amount of Marshall's decreed vested right water to flow
16 into the pipe leading to Marshall's trough.

17 "LaRue's trough has two (2) sections divided by a
18 concrete divider. Presently, the inlet pipe flows into the
19 top of one section and the outlet to Marshall's pipe is in
20 the other section. LaRue shall either move the inlet pipe
21 to the section containing Marshall's outlet pipe, or a hole
22 shall be created at the base of the divider, allowing water
23 to flow from the inlet portion of the trough to the portion
24 containing the outlet to Marshall's trough.

25 "The work on the LaRue's trough shall be done at a
26 time convenient to the parties or as directed by the State
27 Engineer, in time to allow for use of stock water by
28 Marshall for the summer grazing season of 1985, but in any
29 event, not later than May 15, 1985."

30 2. Paragraph 3 of the Judgment and Decree is hereby
31 modified to read as follows:

32 "Marshall and Dickenson and their successors shall

1 have access at all times over the NE 1/4 of the SE 1/4 of
2 Section 32, T 25 N, R 20 E, for the purpose of inspecting,
3 repairing and maintaining the water diversion facilities
4 providing stock water to the Marshall side of the
5 Marshall/LaRue range division fence located on the
6 southerly and easterly perimeter of the aforesaid forty
7 (40) acre parcel. Marshall has no easement over said
8 parcel for stock grazing purposes."

9 3. Paragraph 4 of the Judgment and Decree is hereby
10 modified to read as follows:

11 "The parties and their successors shall in the future,
12 divide equally all costs of maintenance of Horse Springs
13 and its diversion works, but each party shall be
14 responsible for maintenance of his respective watering
15 troughs, and Marshall/Dickenson shall be responsible for
16 maintenance of the water line from the LaRue trough to the
17 Marshall/Dickenson troughs."

18 4. Paragraph 5 of the Judgment and Decree is hereby
19 modified to read as follows:

20 "The parties and their successors are permanently
21 enjoined from interfering with the access rights of the
22 other to Horse Springs and related water diversion works
23 and from interfering with reasonable inspection and
24 maintenance of the spring and the water diversion works."

25 5. All costs heretofore incurred by LaRue for spring
26 maintenance and installation of the LaRue trough shall be borne
27 by LaRue.

28 DATED: *January 4, 1985*
~~December 4, 1984~~

29 *Grant L. Bowen*
30 _____
31 DISTRICT JUDGE

32 ///

82 MAR 22 P 2: 31

1 Case No. 79-8875
2 Dept. No. 1

JULIA ...
BY ...
DEPUTY

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE
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10 IN THE MATTER OF THE)
11 DETERMINATION OF THE)
12 RELATIVE RIGHTS IN AND)
13 TO THE WATERS OF HORSE)
14 SPRINGS IN WASHOE)
15 COUNTY, NEVADA.)

16 NOTICE OF
17 ENTRY OF JUDGMENT

18 On February 24, 1982 the court entered its Findings of Fact,
19 Conclusions of Law, Judgment and Decree. A copy of the same is
20 attached to this notice. This decree is provided to the claimants
21 in lieu of a certificate pursuant to NRS 533.265(4).
22

23 Dated March 19, 1982.

24 RICHARD H. BRYAN
25 Attorney General

26 BY George Campbell
27 George Campbell
28 Deputy Attorney General

29 CERTIFICATE OF MAILING

30 On March 19, 1982, at Carson City, Nevada, I mailed a copy of
the Notice of Entry of Judgment to:

James Johnson
111 California St.
Reno, Nevada 89509
Attorney for W. Dalton
and Juanita S. Larue

John Bartlett
201 W. Liberty
Reno, Nevada 89501
Attorney for Robert and
Nanette Marshall and Robert
and Dorothy Dickenson

Berta Lane
Berta Lane, an Employee of
the State Engineer

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE DETERMINATION)
OF THE RELATIVE RIGHTS IN AND TO)
THE WATERS OF HORSE SPRINGS, W.)
DALTON LA RUE, SR. AND JUANITA S.)
LA RUE, d/b/a WINNEMUCCA RANCH,)

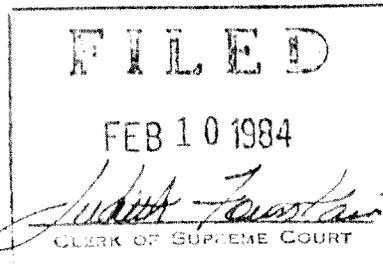
No. 14112

Appellants,)

vs.)

STATE ENGINEER, STATE OF NEVADA,)
ROBERT W. MARSHALL and NANETTE)
MARSHALL, ROBERT DICKENSON and)
DOROTHY DICKENSON, d/b/a)
INTERMOUNTAIN LAND CO.,)

Respondents.)

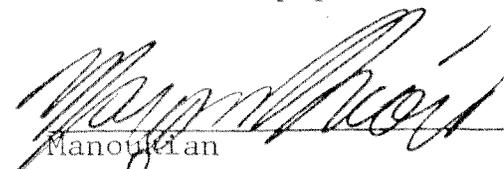
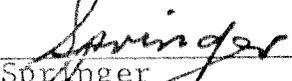
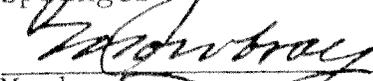
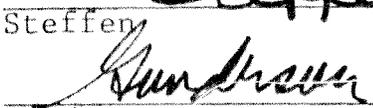


ORDER

Respondents have petitioned for a rehearing in this case. In response to the petition, we hereby delete the last sentence of the opinion filed in this case and substitute in its stead the following sentences:

We remand this case to the lower court, however, to determine whether a diversion works and pipeline will allow respondents to utilize their water rights. If this is possible, then respondents' access to appellants' property will be limited to that access necessary to construct and maintain the diversion works and pipeline.

It is so ORDERED.

 , C. J.
Manoukian
 , J.
Springer
 , J.
Mowbray
 , J.
Steffen
 , J.
Gunderson

cc: Hon. Grant L. Bowen, District Judge
Hon. Brian McKay, Attorney General
Johnson & Adams
Vargas & Bartlett
Judi Bailey, Clerk

1 No. 798875

FILED
'82 FEB 24 P2:18

2 Dept. No. 1

JUDGE BAILEY

BY: *[Signature]*
DEPUTY

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE

8 IN THE MATTER OF THE
9 DETERMINATION OF THE
10 RELATIVE RIGHTS IN AND
11 TO THE WATERS OF HORSE
12 SPRINGS IN WASHOE
13 COUNTY, NEVADA.

FINDINGS OF FACT,
CONCLUSIONS OF LAW
JUDGMENT AND DECREE

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This matter was heard by the court on August 14, 1980, pursuant to the order of this court continuing the prior trial date of March 20, 1980. The previous trial date was set by order of this court upon application of the State Engineer made pursuant to NRS 533.165. The order was published and served on the parties as required by law. The parties stipulated to continue the trial until August 14, 1980. The parties in interest are W. Dalton LaRue, Sr. and Juanita S. LaRue, d.b.a. Winnemucca Ranch; and Robert W. Marshall, Nanette Marshall, Robert Dickenson and Dorothy Dickenson, d.b.a. Intermountain Land Co.

On August 14, 1980, the parties appeared in person or through their attorneys, Johnson, Belaustegui and Robison and James W. Johnson, Jr., representing the LaRues; Vargas and Bartlett and John C. Bartlett representing the Marshalls and Dickensons. The State Engineer appeared through James Perkins, Surface Water Engineer, L. Edward Parmenter, Adjudication Engineer and was represented by Richard H. Bryan, Attorney General of the State of Nevada through George Campbell, Deputy Attorney General.

The Attorney General offered, and there were received in evi-

1 dence in support of the rights of claimants named in the Final
2 Order of Determination, the sworn statements of claimants, veri-
3 fied affidavits, and other competent evidence together with the
4 files and records of the State Engineer's office respecting the
5 rights of each of the claimants and relating to the proof of ap-
6 propriation of each of the claimants which were obtained or filed
7 in the State Engineer's office under the provisions of the law
8 relating to the office of State Engineer.

9 LaRue, Marshall/Dickenson, and the State Engineer thereafter
10 stipulated with the court's approval to submit the cause on briefs
11 and the record and that the exhibits and appendicies to the briefs
12 will be admitted into evidence on the issues to be tried by the
13 court.

14 On November 10, 1980, LaRue filed an Opening Brief. On Dec-
15 ember 31, 1980, Marshall/Dickenson filed an Answering Brief. On
16 January 16, 1981, the State Engineer filed an Answering Brief.

17 On February 17, 1981, LaRue filed a Reply Brief.

18 The contests tendered by the exceptions to the Order of
19 Determination filed by LaRue, by the Petition to Fix Bond Staying
20 Operation of the Order of Determination filed by LaRue, by the
21 exceptions relating to access to Horse Springs filed by Marshall/
22 Dickenson, by the cross claim for access filed by Marshall/Dicken-
23 son, by the motion for preliminary injunction against interference
24 with access filed by Marshall/Dickenson, have been presented to
25 and considered by the court.

26 Competent evidence was offered and received, showing full
27 compliance by the State Engineer with each and every act required
28 by law for him to perform in the preparation and filing in court
29 of the Final Order of Determination.

30 The court having considered the entire record, the evidence

1 offered and received, and the briefs of counsel for the claimants,
2 and being fully advised, made, entered, and filed in this court on
3 June 30, 1981, a Decision and directed that Findings of Fact,
4 Conclusions of Law, and Judgment and Decree be entered accordingly.

5 From the evidence and in accordance with the Decision the
6 court finds the following facts, makes the following conclusions
7 of law and enters its final judgment and decree concerning all
8 matters submitted to the court:

9 FINDINGS OF FACT

10 1.

11 The persons named herein are claimants, appropriators and
12 users of the waters of the Horse Springs, and each of these per-
13 sons filed proof of their claims with the State Engineer, and each
14 appeared in court in person, or by attorneys, or by submitting to
15 the court evidence in support of his claims.

16 2.

17 The State Engineer and his assistants should be the adminis-
18 trators of the waters of Horse Springs as officers of the court
19 under such rules and regulations as he may make and as may be
20 necessary for the proper distribution of the waters, and which ar
21 in harmony with law and the provisions of this decree.

22 3.

23 The exceptions to the Order of Determination filed by LaRue
24 have not been sustained by the evidence and should therefore be
25 denied and the rights of Marshall/Dickenson and LaRue should be
26 allowed to stand as shown in the Order of Determination

27 4.

28 The Petition to Fix Bond Staying Operation of the Order of
29 Determination filed by LaRue is not sustained by the evidence.
30 The hardship and injury that would be suffered by Marshall/

1 Dickenson if the Petition were granted would be excessive and in-
2 equitable when compared to the hardship and injury that LaRue will
3 suffer by denial of the Petition. The hardship and injury to
4 LaRue caused by denial of the Petition is negligible. Use of the
5 water as allowed in the Order of Determination to Marshall/
6 Dickenson is essential to the economical and reasonable use of
7 Marshall/Dickenson's range allotment on the northwest slope of
8 Tule Peak. Granting the Petition would make that allotment vir-
9 tually worthless since Horse Springs is the sole source of stock-
10 water in that area. Denial of the Petition will not deny LaRue of
11 sufficient water for the economical and reasonable use of his
12 grazing land in the area.

13 5.

14 The exception filed by Marshall/Dickenson pertaining to
15 access and the cross-claim for access have been sustained by the
16 evidence.

17 6.

18 The predecessors of LaRue and Marshall/Dickenson each ini-
19 tiated and perfected the vested water rights described in the
20 Order of Determination. The vested water rights of the parties
21 described in terms of proof number, claimant, source, use, means
22 of diversion, point of diversion, period of use, priority, amount
23 of appropriation, description of works of diversion, manner and
24 place of use, are as follows:

25 PROOF NO: Amended 02731
26 CLAIMANT: Robert W. Marshall and Nanette Marshall,
27 Robert Dickenson and Dorothy Dickenson,
28 dba Intermountain Land Co.
29 SOURCE: Horse Springs
30 USE: Stock Watering
MEANS OF DIVERSION: Collection Box, Pipeline, and Troughs

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POINT OF DIVERSION: NE1/4 SE1/4 Section 32, T.25N., R.20E.,
M.D.B.&M., or at a point from which the
NE corner of Section 28, T.25N., R.20E.,
M.D.B.&M., bears N. 35° 23' E., a dis-
tance of 10.713 feet.

PERIOD OF USE: March 15th through December 15th of each
year.

PRIORITY: 1860

AMOUNT OF APPROPRIATION: 0.00156 c.f.s. or sufficient to water
50 head of cattle.

DESCRIPTION OF WORKS OF DIVERSION, MANNER, AND PLACE OF USE:
A pipe conveys water from a collection
box at the spring, under the range fence,
to two troughs located in the SE1/4
SE1/4 Section 32, T.25N., R.20E.,
M.D.B.&M., where cattle are watered.

PROOF NO: 02829

CLAIMANT: W. Dalton LaRue, Sr., and Juanita S.
LaRue, dba Winnemucca Ranch.

SOURCE: Horse Springs

USE: Stock Watering

MEANS OF DIVERSION: Collection Box, Pipeline, and Trough

POINT OF DIVERSION: NE1/4 SE1/4 Section 32, T.25N., R.20E.,
M.D.B.&M., or at a point from which the
NE corner of Section 28, T.25N., R.20E.,
M.D.B.&M., bears N. 35° 23' E., a dis-
tance of 10,713 feet.

PERIOD OF USE: March 15th through December 15th of each
year.

PRIORITY: 1860

AMOUNT OF APPROPRIATION: 0.00156 c.f.s. or sufficient to water 50
head of cattle.

DESCRIPTION OF WORKS OF DIVERSION, MANNER, AND PLACE OF USE:
A pipe conveys water from a collection
box at the spring to a nearby trough
where cattle are watered in the same sub-
division as the point of diversion.

7.

Horse Springs, also known as Horse Spring, is located at an
elevation of about 7,720 feet above mean sea level on the west

1 slopes of the Virginia Mountains in Washoe County, Nevada, about
2 one mile northwest of Tule Peak. The predecessors of the LaRue
3 ranch and the Marshall/Dickenson ranch agreed in 1957 to the loca-
4 tion of a range division fence in the vicinity of Horse Springs.
5 This agreement was expressed in writing as to its general intent
6 but was not recorded. The agreement provided for the predecessors
7 of the Marshall/Dickenson ranch (Matley) to transfer their entire
8 interest in 1,400 AUMs to the predecessors of LaRue (Hill). The
9 transfer was made by Matley but was not approved by the Bureau of
10 Land Management, although Hill was thereafter allowed by the
11 Bureau of Land Management to increase his cattle numbers on his
12 range. The same agreement provided for the "waters to be divided"
13 to allow the parties to better utilize their respective ranges.

14 The validity of the agreement has never been questioned in
15 any prior court proceeding. The terms of the agreement respecting
16 location of the range division fence and division of the waters
17 were fully carried out in 1958 by the predecessors of the parties
18 by actual construction of the fence and division of the waters.
19 The predecessors of the parties and their agents flagged the fence
20 and agreed to its actual location on the ground at the time of
21 construction. The water was divided by the placement of a three-
22 barrel trough on the LaRue side of the fence with all of the
23 overflow going to the Marshall/Dickenson side of the fence, where
24 there was located a trough of 4 1/2-barrel capacity and a six-
25 barrel trough. The predecessors of the parties to this dispute
26 were entirely satisfied with this arrangement, as it allowed for
27 better utilization of their respective ranges and prevented drift
28 of cattle from one range to another.

29 8.

30 The fence and the water troughs and diversion works were

1 plainly visible on inspection. The LaRues had actual knowledge of
2 the location of the fence and existence of the diversion works
3 when they acquired the Winnemucca Ranch in 1967.

4 9.

5 In 1969 LaRue removed the troughs used by cattle on the
6 Marshall/Dickenson ranch and relocated the fence to the approxi-
7 mate boundary of the 40 acres owned by LaRue.

8 10.

9 The predecessors of LaRue and Marshall/Dickenson ran their
10 cattle in common over the area and watered their cattle in common
11 at Horse Spring as early as 1860 and continued to do so until the
12 Marshall/Dickenson troughs were removed by LaRue in 1969.

13 11.

14 The predecessors of LaRue consented to and granted a right of
15 access to the springs to the predecessors of Marshall/Dickenson as
16 early as 1860 and recognized and respected the right of access.

17 12.

18 That portion of the Marshall/Dickenson range on the northwest
19 slope of Tule Peak cannot be used for livestock grazing without
20 the water of Horse Springs.

21 13.

22 On February 18, 1972, a petition was filed by M. S. Land and
23 Livestock (Marshall/Dickenson) with the State Engineer requesting
24 the determination of the relative rights of the users in and to
25 the use of the water of Horse Springs in Washoe County, Nevada.

26 Representatives of the State Engineer made a field investiga-
27 tion of Horse Springs on July 2, 1972. The investigation showed
28 that at that time the waters of Horse Springs were being used
29 beneficially for stock watering purposes. The spring flow was
30 measured and found to be 0.00535 c.f.s. (2.4 g.p.m.).

1 Pursuant to NRS 533.090, on July 7, 1972, the State Engineer
2 entered an Order granting the petition and made arrangements to
3 proceed with the determination of the relative rights of the water
4 users of Horse Springs in accordance with Nevada Revised Statutes
5 533.090.

6 On July 7, 1972, the State Engineer issued, pursuant to NRS
7 533.095, a Notice of Order and Proceedings to Determine Water
8 Rights. The Notice was served on all claimants and was published
9 once a week for five consecutive weekly issues in the Nevada State
10 Journal, a newspaper of general circulation in the area.

11 Pursuant to NRS 533.110, on October 13, 1972, the State Engi-
12 neer issued a Notice of Order for Taking Proofs to Determine Water
13 Rights and therein ordered all claimants to file their Proofs of
14 Appropriation beginning on December 4, 1972. The notice was
15 served on all claimants and was published the same as was the
16 previous notice.

17 Proof of Appropriation 02731 was filed February 18, 1972, by
18 M.S. Land and Livestock claiming vested rights to water for stock
19 watering purposes from Horse Springs. Amended Proof 02731 was
20 filed on September 24, 1973, by Robert W. Marshall and Nanette
21 Marshall, and Robert Dickenson and Dorothy Dickenson, dba Inter-
22 mountain Land Co., successors in interest to M.S. Land and Live-
23 stock.

24 Proof of Appropriation 02829 was filed on February 2, 1973,
25 by W. Dalton LaRue, Sr., and Juanita S. LaRue, dba Winnemucca
26 Ranch, claiming vested rights to water for stock watering purposes
27 from Horse Springs.

28 14.

29 An abstract of proofs, a Preliminary Order of Determination
30 and a Notice and Order Fixing and Setting Time and Place of In-

1 the order together with the original evidence and transcript of
2 testimony filed with, or taken before, the State Engineer. A copy
3 of the order was served on all claimants and interested persons in
4 accordance with NRS 533.160.

5 16.

6 The State Engineer duly made all orders necessary and proper
7 in connection with these proceedings and entered the same in his
8 office as required by Chapter 533 of the NRS. Every notice re-
9 quired by law to be given to the claimants and appropriators was
10 duly served by the State Engineer in the manner and within the
11 time required by statute. The notices contained all of the state-
12 ments required by law, and the claimants and appropriators re-
13 ceived all required information and notices. The State Engineer
14 has performed all acts required by law for him to perform in the
15 preparation and filing in court of the Order of Determination.

16 17.

17 On November 27, 1979, pursuant to NRS 533.165, this court
18 entered an order setting as the time for hearing January 10, 1980.
19 On December 5, 1979 this court ordered the January 10, 1980
20 hearing date be vacated and reset the hearing for March 20, 1980.
21 Notice of the March 20, 1980 hearing was served on all claimants
22 and was published once a week for 5 consecutive weeks in the
23 Nevada State Journal, a newspaper having a general circulation in
24 the area. The state engineer filed with the clerk of this court,
25 proof of such service and publication. On March 19, 1980, LaRue,
26 Marshall/Dickenson and the State Engineer stipulated, and this
27 court ordered, that the March 20th hearing be vacated and con-
28 tinued without date until a future time to be set by the parties
29 or this court.

30 /

1
2 On March 11, 1980, the LaRues timely filed with this court
3 exceptions to the Order of Determination and served a copy on
4 the State Engineer in accordance with NRS 533.170.

5 On March 14, 1980 LaRue filed Amended exceptions and served a
6 copy on the State Engineer in accordance with NRS 533.170.

7 LaRue took exception to that part of the Order of Determina-
8 tion which granted vested rights to Marshall/Dickenson, dba
9 Intermountain Land Co. upon the following grounds:

10 "1. That the Order of Determination is against the law and
11 the evidence as presented in the above-entitled matter.

12 2. That in the Preliminary Order of Determination, it was
13 determined that a vested right in and to the water of Horse
14 Springs has not been established by Robert W. Marshall, etal,
15 under Proof No. 02731 or Amended Proof No. 02731; that
16 Amended Proof No. 02731 is still incomplete as evidenced on
17 Page 7 of the Order of Determination of the State Engineer
18 in that no map in support of the Amended Proof had been re-
19 ceived by the State Engineer's Office.

20 3. That as a matter of law, W. Dalton LaRue, Sr. and
21 Juanita S. LaRue cannot be bound by any unrecorded document
22 by predecessors in interest to the said W. Dalton LaRue, Sr.,
23 and Juanita S. LaRue.

24 4. That there has been no use made of the waters under
25 Proof No. 02731 by the Marshalls or any other party for a
26 period in excess of three years.

27 WHEREFORE, claimants, W. Dalton LaRue, Sr. and Juanita S.
28 LaRue pray that the above-entitled Court hear said exeptions
29 in accordance with Nevada Revised Statutes 533.170.

30 That Claimants further pray that the Order of Determination

1 of the State Engineer be reversed and that the Claimants
2 under Proof No. 02829 be granted a vested and exclusive right
3 to the use of the waters of Horse Springs, said Springs being
4 solely upon the deeded, privately owned property of the
5 claimants herein, all in accordance with the map and proof
6 heretofore filed."

7 19.

8 On March 14, 1980, Marshall/Dickenson timely filed an excep-
9 tion to the Order of Determination "only insofar as the same fails
10 to clarify the access of these Claimants to Horse Springs for the
11 purpose of installing and maintaining pipes and watering troughs
12 and for livestock access over land alleged to belong to W. Dalton
13 LaRue and Juanita S. LaRue (LaRues)". The Marshall/Dickenson
14 exceptions alleged the existence of contract rights providing for
15 construction of a range division fence and division of the waters
16 and alleged rights arising under the authority of Snow v. Pioneer
17 Title Ins. Co., 84 Nev. 480 (1968). The Marshall/Dickenson excep-
18 tions alleged a cross claim for access to Horse Springs against
19 the LaRues based on prior agreements between their respective
20 predecessors.

21 20.

22 On April 1, 1980, LaRue filed a Reply to Cross-Claim for
23 Access denying the allegations of Marshall/Dickenson and requested
24 that the Cross-Claim for Access be dismissed, that the Order of
25 Determination be reversed, and that LaRue be "granted a vested
26 and exclusive right to the use of the waters of Horse Springs,
27 said springs being solely upon the deeded, privately owned pro-
28 perty of claimants, LaRues, all in accordance with the proof and
29 map of said claimants heretofore filed".
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21.

On May 15, 1980, Marshall/Dickenson filed a motion for preliminary injunction during the pendency of this action to prevent LaRue from interfering with access to Horse Springs for the purpose of enabling the State Engineer to divide the waters of the spring in accordance with the Order of Determination pursuant to NRS 533.230.

22.

On May 23, 1980, LaRue filed written opposition to the motion and filed a Petition to Fix Bond Staying Operation of the Order of Determination pursuant to NRS 533.235(1).

23.

With respect to LaRue exception no. 1, the Order of Determination is sustained by the evidence as presented in this matter.

24.

With respect to LaRue exception no. 2, while the Preliminary Order of Determination did not recognize a water right for Marshall/Dickenson, and while no map in support of Proof 02731 was ever prepared, such facts do not disprove the existence of the water right decreed herein to Marshall/Dickenson. The State Engineer found and this court likewise finds that the map filed in support of Proof 02829 is adequate to describe and illustrate the point of diversion and place of use of both water rights claimed under Proofs 02731 and 02829.

25.

With respect to LaRue exception no. 3, being presented as a matter of law, no findings of fact are necessary.

26.

Evidence tending to prove exception no. 4 is insufficient. Any non-use of the water right claimed under Proof 02731 was the

1 direct result of destruction by LaRue of the water troughs and
2 pipes used by Marshall/Dickenson and by the construction of a
3 livestock-proof fence by LaRue in such a manner as to exclude the
4 livestock of Marshall/Dickenson which would have watered at the
5 spring but for the new fence.

6 27.

7 Additional findings of fact contained in the Decision of this
8 court dated June 30, 1981, are incorporated by reference.

9 28.

10 If any of the above findings constitute conclusions of law,
11 then the court so concludes.

12 CONCLUSIONS OF LAW

13 1.

14 With respect to LaRue exception no. 1, the Order of Determi-
15 nation is sustained by the law.

16 2.

17 With respect to LaRue exception no. 2, the facts alleged,
18 even if true, do not establish as a matter of law that the water
19 right decree herein to Marshall/Dickenson was not perfected in
20 accordance with the law applicable to the appropriation of water,
21 nor do such facts establish as a matter of law that the water
22 right so perfected may not be decreed to Marshall/Dickenson.

23 3.

24 With respect to LaRue exception no. 3, the LaRues are bound
25 by the executed agreements embodied in the unrecorded document in
26 question. This document, an agreement between Matley and Hill, is
27 consistent with and recognized and confirmed the existing right
28 of access and water right obtained and held by their predecessors.
29 The agreements embodied in this document were valid and binding on
30 Matley and Hill, and were executed by the actual construction of

1 the range division fence and installation of water diversion works
2 and stock watering troughs. This document is valid and binding on
3 LaRue and Marshall/Dickenson to the extent it was executed by the
4 construction of the range division fence, the water diversion works
5 and the stock watering troughs.

6 4.

7 In violation of the rights of Marshall/Dickenson, LaRue
8 wrongfully destroyed the water diversion works and troughs, wrong-
9 fully removed the range division fence, and wrongfully constructed
10 a new fence in such a manner and location as to prevent access to
11 the spring by the livestock of Marshall/Dickenson.

12 5.

13 Legal remedies for these wrongful acts are inadequate, im-
14 practical and ineffective to compensate Marshall/Dickenson for the
15 past and prospective loss of use of their water right and would be
16 ineffective to restore Marshall/Dickenson to the access to and use
17 of the spring in the manner to which they are entitled. Mandatory
18 and prohibitory injunctive relief is necessary and appropriate in
19 these circumstances and should, therefore, be granted.

20 6.

21 The injunctive relief granted in this case is in the public
22 interest in that the general public welfare is served by ensuring
23 peaceable use and enjoyment of water rights free from threat of
24 unilateral destructive acts directed at other water users on the
25 same source.

26 7.

27 Upon balancing the relative equities, hardships, rights,
28 interests and conduct of the parties to reach a fair and just re-
29 sult, the court concludes that LaRue should be required at his
30 expense to restore the range division fence and water troughs,

1 water diversion works and water troughs as they existed prior to
2 1969, with such restoration to commence immediately and to be
3 completed within 60 days so as to enable the Marshall/Dickenson
4 ranch to utilize their range and their water rights.

5 8.

6 Marshall/Dickenson should immediately have access over and
7 across the 40 acres owned by LaRue for stock grazing and related
8 purposes up to the original location of the range division fence,
9 and should have access to Horse Springs itself for inspection and
10 maintenance purposes. Marshall/Dickenson are entitled to a decree
11 adjudicating and confirming their right of access.

12 9.

13 The parties should in the future, after the initial cost of
14 restoration is borne by LaRue, divide equally all costs of main-
15 tenance of Horse Springs and its diversion works, but each should
16 be responsible for maintenance of his respective watering troughs,
17 and Marshall/Dickenson shall be responsible for maintenance of the
18 water line from the LaRue trough to the Marshall/Dickenson
19 troughs.

20 10.

21 With respect to LaRue exception No. 4, it fails to state a
22 claim upon which relief can be granted.

23 11.

24 LaRue purchased the land upon which Horse Spring exists with
25 actual and constructive notice of the existence of the range divi-
26 sion fence, the water diversion works and water troughs used by
27 Marshall/Dickenson in accordance with their vested water right in
28 the spring.

29 12.

30 The Petition to Fix Bond Staying Operation of the Order of

1 Determination should be denied.

2 13.

3 The parties are entitled to a decree adjudicating and con-
4 firming the vested water rights set forth above in findings of
5 fact no. 6.

6 14.

7 The State Engineer had the jurisdiction to make the investi-
8 gations made by him, conduct the hearings had by him, receive the
9 evidence received by him, hear the evidence presented to him, and
10 to prepare, make, enter and file in his office the original of the
11 Final Order of Determination and a certified copy thereof in this
12 court, and to determine in the Final Order of Determination the
13 relative rights of the water users of Horse Springs. The State
14 Engineer duly made all orders necessary and proper in this connec-
15 tion and entered the same in his office as required by law. Each
16 and every notice required by law to be given to claimants and
17 appropriators was duly given by the State Engineer in the manner
18 and at the time required by law, and said notices contained the
19 statements required by law. All claimants and appropriators of
20 the waters of Horse Springs duly received the information and
21 notices required by law in such cases. Each and all of said
22 claimants duly appeared in these proceedings.

23 15.

24 This Court had jurisdiction to hear and try this matter and
25 has jurisdiction to find, make, and enter these Findings of Fact
26 and Conclusions of Law and this Judgment and Decree.

27 16.

28 The water rights recognized in this Decree are appurtenant to
29 the place of use described. Any user desiring to change the point
30 of diversion, manner of use or place of use must make application

1 for permission to make the change pursuant to Chapter 533 of the
2 NRS.

3 17.

4 Additional conclusions of law contained in the Decision of
5 this court dated June 30, 1981 are incorporated by reference.

6 18.

7 If any of the above conclusions of law constitute findings of
8 fact, the the court so finds.

9 From the foregoing findings of fact and conclusions of law,
10 the court makes the following:

11 JUDGMENT AND DECREE

12 1.

13 The Order of Determination is affirmed.

14 The water rights of the parties in Horse Springs are as set
15 forth above in finding of fact no. 6.

16 2.

17 LaRue and their successors are enjoined to restore at their
18 expense the range division fence and watering troughs and water
19 diversion works as they existed prior to 1969, with such restora-
20 tion to commence immediately and to be completed within 60 days so
21 as to enable the Marshall/Dickenson ranch to utilize their range
22 and the water rights decreed herein.

23 3.

24 Marshall/Dickenson and their successors shall have access
25 over and across the 40 acres owned by LaRue for stock grazing and
26 related purposes up to the original location of the range division
27 fence, and shall have access to Horse Springs itself for inspection
28 and maintenance purposes.

29 4.

30 The parties and their successors shall in the future, after

1 the initial cost of restoration is borne by LaRue, divide equally
2 all costs of maintenance of Horse Springs and its diversion works,
3 but each party shall be responsible for maintenance of his re-
4 spective watering troughs, and Marshall/Dickenson shall be respon-
5 sible for maintenance of the water line from the LaRue trough to
6 the Marshall/Dickenson troughs.

7 5.

8 The parties and their successors are permanently enjoined
9 from interfering with the access rights of the other to Horse
10 Springs and related water diversion works; from interfering with
11 the range division fence as restored; and from interfering with
12 reasonable inspection and maintenance of the spring, the water
13 diversion works and range division fence.

14 6.

15 The parties and their successors are permanently enjoined
16 from taking, diverting or otherwise using or claiming any of the
17 water right decreed to the other. Under this decree the priori-
18 ties and uses are equal. Accordingly, in times when the flow of
19 the spring is insufficient to satisfy all rights decreed herein,
20 the parties and their successors are permanently enjoined from
21 taking, diverting, using or otherwise claiming more than one half
22 of the flow of the spring. As the administrator of this decree
23 the State Engineer may require rotation from one party to the
24 other of the entire flow of the spring for a period of time to the
25 exclusion of the other party during that time.

26 7.

27 The parties and their successors are permanently enjoined
28 from interfering with access to the spring and related works by
29 the State Engineer and his assistants for the purpose of adminis-
30 tering this Decree. Grievances relating to the division of the

1 water of the spring must first be presented to the State Engineer
2 for resolution. The State Engineer shall administer this decree
3 and shall have the right of ingress and egress across the lands of
4 the parties at all times in the exercise of these duties. Parties
5 aggrieved by actions or inaction of the State Engineer in this
6 regard may petition the court in the manner provided by law.

7 Dated February 9, 1981.

8
9 Erant L. Bower
10 District Judge