RIGHTING THE TILTING VESTED WATER RIGHTS SHIP

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1. AUTHOR'S BACKGROUND

John E. Marvel is a partner in the law firm of Marvel & Marvel, Ltd., with offices in Elko and Reno, Nevada. Mr. Marvel has been practicing law in Nevada since 1978, with a focus on natural resources, mining law, water law and real estate law in his representation of mining and ranching clients and has dealt with vested water rights issues throughout his 43-year legal career. Mr. Marvel, a fourth generation Nevadan, was raised on cattle ranches in northern Nevada, with the family ranching headquarters in the Battle Mountain area.

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2. INTRODUCTION

This paper is prepared and submitted at the request of former Chief Justice Hardesty in connection with the study and review by the Commission to Study the Adjudication of Water Law Cases relating to water rights issues and concerns in the State of Nevada.

The Courts of the State of Nevada, including both the district courts and the Nevada Supreme Court (hereinafter both referred to as the "Court," unless otherwise stated), have concerningly misapplied pre-statutory law regarding fundamental principles of historic judicial holdings relating to vested water rights. Certain erroneous judicial interpretations are exemplified in the recent Nevada Supreme Court case addressing these issues in *Rand Properties, LLC v. Filippini et al*., No. 78319 (Apr. 9, 2021), upon appeal from the underlying district court decisions in the action *Daniel and Eddy Ann Filippini ("*Filippini*") v. Julian Tomera Ranches, Inc., Battle Mountain Division ("*Tomera*") v. Rand Properties, LLC* ("Rand") arising in the Eleventh Judicial District Court, Lander County, Nevada, as File No. CV0010122 (Jan. 31, 2019) (hereinafter "*Rand Case*"). In the *Rand Case*, Filippini brought suit against Tomera and Rand to quiet title to their respective vested irrigation and stock water rights, which water rights encompass all the waters of Trout Creek, south of Battle Mountain, Nevada.

This paper addresses the pre-1905 Court rulings relating to the requirement of the connection in interest between the claimant of a vested water right, and the transfer of that right to a third-party transferee. This legal doctrine is equally applicable to both irrigation and stock water uses, including stock water claims on public lands. The holdings of the cases cited herein firmly established the legal principles to be applied in the adjudication of vested water rights. However,

the Court has failed to properly apply and honor the holdings of the pre-1905 vested water rights decisions and has now embarked on a dangerous path which materially alters and adversely impacts public policy with respect to the law of vested water rights.

As a preliminary matter, vested water rights are generally defined as those rights which accrued and vested prior to the enactment of Nevada's statutory water law beginning in 1905. *Ormsby County v. Kearney*, 37 Nev. 314, 142 P. 803 (1914); *Application of Filippini*, 66 Nev. 17, 202 P.2d 535 (1949).

3. CONVEYANCE OF TITLE AND RULE OF CONNECTION IN INTEREST

In one of the earliest water right decisions, the Court held that a person who purchased a ditch from Native Americans and obtained from them a transfer of their claim to the use of the water, by parol, had the same right to operate and maintain the ditch as the Native Americans had established. *Lobdell v. Hall*, 3 Nev. 507, 517 (1868). Thereafter, in *Chiatovich v. Davis*, 17 Nev. 133, 136, 28 Pac. 239 (1882), the Court established the firm principle and rule of law that one who had not connected himself in interest with those who first appropriated water and cultivated land, that such later claimant then occupied and used, could not claim any priority to the use of the water that may have been established on that land by such subsequent use and, thus, the later owner's own appropriation was treated as the inception of that owner's right. In the language of the *Chiatovich* Court, "[t]he plaintiff testified that early in the year 1876 he appropriated all of the waters of the creek. Before that time these waters had been used to irrigate plaintiff's land, but as he has not in any wise connected himself in interest with those who first cultivated the land and appropriated the water, his own appropriation in 1876 must be treated as the inception of his right." Id., 136.

The Nevada Federal District Court expressly acknowledged and followed the holding of the *Chiatovich* Court in the 1897 case of *Union Mill & Mining Co. v. Dangberg*, 81 Fed. 73, 103 (D. Nev. 1897) stating that the law was well settled that persons could not avail themselves of the rights of early settlers with whom they had in no manner connected themselves by title. It is interesting to note that the *Union Mill* Court adopted the dissent from the *Lobdell* case, supra, 522, and quoted the statute (Section 55, Laws 1861, p. 18) requiring a deed or conveyance in writing, and not merely by parol, to establish the connection in interest to the prior appropriator. The *Union Mill* Court further cited additional similar case law from surrounding jurisdictions, finding "to the same effect, see *Salina Creek Irr. Co. v. Salina Stock Co.*, 7 Utah, 456, 27 Pac. 578; *Smith v. O'Hara*, 43 Cal. 371; *Burnham v. Freeman*, 11 Colo. 601, 606, 19 Pac. 761; *Gould*, Waters, § 234; *Black's Pom*. Water Rights, § 60; *Kin. Irr.* § 253." *Id*. at 104.

Another early case, *Smith v. Logan*, 18 Nev. 149, 1 Pac. 678 (1883,) which did not involve the appurtenance section of the water rights statute (which had not then been enacted and was not enacted until many of Nevada's water law statutes were being enacted commencing in 1913), dealt with the relation of appurtenance to trespass. The holding of the *Smith* case was to the effect that one who obtained title to land formerly irrigated by a trespasser, but who had not connected in title or interest with the trespasser's right to the use of the water, had no ground for claiming that the water had become appurtenant to the land and passed with it when the trespasser lost possession and then that claimant acquired title to the land. See, *Hutchins*, "The Nevada Law of Water Rights," 19, 22 (1955, reprinted 1965).

Thus, it is critical to understand that prior to the enactment of Nevada's statutory water law, the law of the State of Nevada required a connection in interest between the transferor and the transferee of the water right being transferred, as established by the holdings in *Lobdell, Chiatovich, Union Mill* and *Smith*, supra. Without such connection, the date of first appropriation by the later claimant of the water was deemed to be the inception of the claimant's right, which thereupon established the date of priority of such claimant's right.

Upon a conveyance of land with an appurtenant water right owned by the claimant/transferor, the pre-1905 Courts historically recognized that it was unnecessary to specifically refer in the deed or conveyancing document to a water right which was appurtenant to the land. *See, Dalton v. Bowker*, 8 Nev. 190, 194, 200-201 (1873). It is further critical to understand that the appurtenance section of Nevada water rights statute, now embodied in NRS 533.040(1), was initially enacted in 1913 in Chapter 140, Section 4, of the Statutes of Nevada, and set forth the principle that water used for beneficial purposes would remain appurtenant to the place of use. However, that doctrine was not in effect prior to 1905 and thus the holdings of the above-cited cases embodied the pre-1905 law. The *Smith* Case, supra, clearly shows how the law was applied prior to 1905 where a party who acquired land previously irrigated by a trespasser, but had no connection in interest to the trespasser, could not claim the trespasser's priority or that the water had become appurtenant to the land and, therefore, the later claimant initiated a new priority when that party commenced beneficial use.

The *Rand Case* is demonstrative in showing how the *Rand* Court failed with respect to three specific issues to properly apply the connection in interest rule relating to both irrigation rights and stock water rights.

4. IRRIGATION ISSUE

A. McBeth Entry

The *Rand Case* illustrates two distinct examples of how the *Rand* Court misapplied or failed to apply the connection in interest rule to irrigation issues. The first illustration is referred to as the "McBeth Entry," and involves certain irrigation water rights on Trout Creek, located south of Battle Mountain.

In 1883, J. A. Blossom ("Blossom") acquired the water rights of William Pankey ("Pankey"), consisting of 16 acres. Then, in 1884, Blossom acquired the water rights of Robert McBeth ("McBeth"), consisting of over 200 acres. Blossom's acquisitions of Pankey's and McBeth's water rights merged the two separate chains of title into one title chain with combined water rights in Blossom's name. After Blossom's death, two (2) specific water rights were conveyed to Gottlieb Hoffman ("Hoffman") out of the Blossom chain, 16 acres of the Pankey right and 40 acres of the McBeth right, totaling 56 acres.

It should be noted, however, that while the initial appropriation of water rights by McBeth was in excess of 200 acres, there was never a conveyance out of the Blossom chain of title of any water rights in excess of the 56 acres. Accordingly, those additional, unconveyed water rights were never subject to further claims of ownership and essentially disappeared from record title.

The *Rand* Court misapplied the rule of "connection in interest" with respect to its affirmance of the award to Filippini of 217.6 acres of water rights from the 1873 McBeth entry. Although McBeth had initially appropriated said 217.6 acres of water rights, the only deed, conveyance of title, or connection in interest between McBeth, Blossom and Hoffman was contained in the one deed conveyance of 40 acres. At the time of that conveyance, Blossom held title to all of the water rights previously appropriated by Pankey and McBeth. There was never another conveyance of water rights from Blossom to anyone else.

Furthermore, Blossom's title and ownership of any additional water appropriation by McBeth never appeared again in the Lander County tax rolls or in the records of the Lander County Recorder after the above-described conveyance from Blossom to Hoffman. Any remaining interest of Blossom to the McBeth water rights had entirely disappeared from the Lander County records. It should also be noted that Blossom's tax records prior to the conveyance to Hoffman only vaguely referenced two parcels of land on Trout Creek, the Pankey land and water and the McBeth land and water, but there was never a description of the number of acres claimed by Blossom other than as finally identified in the deed to Hoffman, being 56 acres.

Accordingly, the *Rand* Court and the district court below totally misconstrued the facts relating to the conveyance of the McBeth appropriation and, as a matter of law, completely misapplied the pre-statutory law of the State of Nevada by failing to apply the holdings of *Lobdell, Chiatovich, Union Mill* and *Smith* which all required a connection in interest to the claim of the original appropriator. At most, Hoffman acquired only 40 acres of the McBeth appropriation from Blossom, and any additional appropriation by Hoffman on the original McBeth lands commenced the inception of a new water right. This fact was confirmed by Hoffman's wife, Lisette Hoffman, when Mrs. Hoffman, then Mrs. Schwinn, filed her proof of appropriation with the Nevada State Engineer in 1918 stating that irrigation first commenced on the subject Badger Meadows (formerly McBeth) lands in 1896 when she and her then deceased first husband, Fred Rufli ("Rufli"), started their farming operations at the Badger Ranch.

It is clear that the district court could not properly award the 217 acres of McBeth water rights to Filippini under any theory of law, including a quiet title decree, without directly and improperly violating the holdings of *Lobdell*, *Chiatovich*, *Union Mill* and *Smith*, which unequivocally required a connection in interest to all of those water rights. Thus, the award of the McBeth water rights to Filippini should have only decreed, at most, 40 acres of water rights, with the balance of the water rights being assigned a new priority commencing as of the inception of the irrigation by Rufli of the lands in 1896.[1]

The district court relied upon the chain of title to the lands allegedly possessed by Filippini's predecessors in order to attempt to justify the same chain of title to the water rights. However, the chain of title to the land, without having the chain of title to the water rights, is ineffective under pre-statutory water law to pass the ownership of the water claimant (Blossom). This was a fundamental and fatal flaw decreed by the district court and affirmed by the *Rand* Court.

[1] It should also be noted, but without further analysis hereunder, that Rand properly claimed all of the Blossom to Hoffman water rights which were transferred to Walter Dobbs ("Dobbs"). The Hoffman deed conveying the Pankey rights to Dobbs stated "together with sufficient additional water to irrigate all land, whether cultivated or uncultivated, within the fences of the property conveyed." At that time, based upon Dobb's Homestead Application, Dobbs was irrigating up to 70 acres of land within the 160 acres of fenced property. Thus, the 16 acres of the Pankey rights and sufficient additional water rights from the 40-acre McBeth appropriation would have entirely been conveyed to Dobbs. The Rand Court questionably and improperly concluded that Rand failed to show a connection in interest to McBeth. The simple (and correct) analysis is that Blossom acquired all of the Pankey and McBeth water rights; Blossom conveyed a portion of those rights to Hoffman; Hoffman conveyed water rights to Dobbs (16 acres from the Pankey right and all 40 of the acres of the McBeth right) sufficient to irrigate all the lands, cultivated and uncultivated, within the 160 acres of cultivated and uncultivated fenced land, being up to 70 acres. Therefore, as a matter of fact and of law, Rand (not Filippini) connected in interest to those McBeth water rights through Blossom and Hoffman.

Similarly, a quiet title decree could not legally accomplish the result obtained by the district court as to the water rights held by Blossom. Except for the 40 acres of the McBeth water rights transferred by Blossom to Hoffman, the remaining McBeth water rights were never transferred out of Blossom and no further claim to the Blossom rights existed without such transfer. As a matter of pre-statutory water law, the appropriation of water rights by the Hoffman/Rufli interests on lands previously held by Blossom, without a connection in interest to Blossom's water claims, are deemed to be the inception of the later claimant's right, which thereupon established the date of priority of such claimant. Consequently, the legal effect of a quiet title decree could, at most, award to Filippini a priority date commencing from the 1896 date Filippini's predecessors began their appropriation of water on those lands, as documented and proven by the Proof of Appropriation filed by Lisette Schwin/Hoffman/Rufli.

B. Hughes Entry

The second illustration of how the *Rand* Court misapplied or failed to apply the connection in interest rule to irrigation issues is demonstrated by the "Hughes Entry." In this instance, the *Rand* Court failed to recognize the tenuous nature of possessory claims on federal lands. Rather than giving due analysis to the fact that possessory claims on federal land were frequently abandoned for a variety of different reasons, including the inability of settlers to make a living on the land, the hardships of cultivating crops on lands questionable for sustaining crops, and weather factors which limited sufficient water for irrigation on an annual basis, the *Rand* Court leaped to the conclusion that a six year gap in deed record or tax record ownership of the land entitled a subsequent claimant to connect in interest to the last owner of record, using the county as a conduit, with no evidence of county foreclosure for delinquent property taxes or any other evidence of how the county became a conduit sufficient to maintain a legal chain of title or other connection in interest.

In relation to the Hughes land entry by James Hughes ("Hughes"), and a claim of an 1871 water right as affirmed by the *Rand* Court, the district court failed to understand and apply the nature of possessory interests on public lands arising from homestead laws and various additional congressional legislation enacted prior to the implementation of Nevada's statutory water law.

The Hughes Ranch was merely a possessory claim on federal land until such time as a patent was issued by the federal government. In analyzing the Hughes water right's chain of title, the district court entirely disregarded, without any consideration whatsoever, the nature of possessory interests on public lands. Federal homestead acts granted to settlers the right of possession of specified acreages of land which, upon the possession and cultivation of the land, entitled the settlers the right to apply for a patent. Any such settler could occupy and lay claim to the land by actual possession or actual bona fide occupation, which could include a substantial enclosure and/or cultivation.

Most of the early settlements of land in Nevada occurred through possessory claims. As explained by the court in *Stainginger v. Andrews*, 4 Nev. 59, 66, 67 (1868) title to public land which had not been surveyed or brought into the market by the State or Federal government could be acquired by compliance with the requirements of the statutes relating to possessory actions, or by actual possession or occupation of such land. However, if the settler ceased possession or was not in actual possession or actual bona fide occupation or otherwise abandoned or forfeited the possessory claim, the possessory right terminated and the land thereupon reopened to entry and occupation by a new settler. *See, Sankey v. Noyes*, 1 Nev. 68 (1865); *Robinson v. Imperial Silver Mining Co*., 5 Nev. 44 (1869). Numerous possessory claims in the 1800s were abandoned when settlers failed to successfully cultivate the land or the physical, financial and economic hardships became too difficult to justify the continued occupation thereof.

The facts regarding the Hughes water entry showed a series of failed occupations of the Hughes Ranch, commencing with Hughes himself, who lost the property through a Sheriff's sale to B. F. Wilson ("Wilson") in 1885. Wilson later conveyed the Hughes property to A. G. Higbee ("Higbee") in 1890, who quickly lost the property (consisting of only 80 acres, not 100 acres as erroneously found by the district court and affirmed by the *Rand* Court) in a tax sale of several delinquent Higbee properties by the Lander County Treasurer in 1891. Lemaire acquired the Hughes property at the tax sale, together with several additional delinquent tax parcels of lands held by Higbee, but Lemaire never appeared again in the Lander County tax records (or deed records) on the Higbee property after Lemaire's 1891 acquisition.

Significantly, however, Lemaire appeared in the tax records on the remaining Higbee tax sale parcels continuously thereafter or until Lemaire transferred the same. In other words, Lemaire abandoned his interest in the Hughes property immediately after Lemaire's acquisition of the numerous Higbee delinquent tax parcels.

The foregoing facts and conclusions are substantiated by the tax laws in effect during the relevant time period from 1890 and thereafter through that decade as compiled in the General Statutes of Nevada ("Statutes"). These property tax laws specifically addressed the taxation of possessory claims to land on the public domain and the corresponding obligations of the County Assessor to identify and tax the same. *See, Central Pacific Railroad Company v. State of Nevada*, 162 U.S. 512, 521 (1896).

Section 1080 of the Statutes provided "that nothing in this section shall be so construed as to exempt from taxation possessory claims to the public lands of the United States, or of this state…" Section 1081 of the Statutes defined the term real estate when used in this statutory scheme, "shall be deemed to mean and include…the ownership of, or claim to, or possession of, or right of possession to any lands within the state, and the claim by or the possession of any person, firm, or corporation, association, or company to any land, and the same shall be listed under the head of 'real estate.'"

Section 1082 of the Statutes required the County Assessor to annually "ascertain by diligent inquiry and examination all property in his county, real or personal, subject to taxation, and also the names of all persons, corporations, associations, companies or firms owning the same; and he shall then determine the true cash value of all such property, and he shall then list and assess the same to the person, firm, corporation, association or company owning it for the purpose of enabling the Assessor to make such assessment."

Section 1083 of the Statutes made the Assessor "liable for the taxes on all taxable property within the county which is not assessed through the Assessor's willful or inexcusable neglect; and proof of the non-assessment of any taxable property within the county shall be prima facie evidence of such neglect."

Additionally, Section 1088 of the Statutes required the Assessor to prepare a tax list or assessment roll in the books provided by the Board of County Commissioners in which "all the real estate, improvements on real estate, including improvements on public lands…" shall be listed. Then, the Assessor was mandated to identify the taxpayers and put them "in alphabetical order, if known; if unknown, the property shall be assessed to unknown owners…"

These property tax statutes clearly demonstrate that the Hughes possessory claim had been abandoned by Lemaire as evidenced by the fact that the Hughes property totally disappeared from the tax roll and was never again mentioned after 1891 when Lemaire received the Treasurer's Deed to the Hughes property and several other unrelated parcels of land. The other parcels continued to be assessed to Lemaire (or to successors to Lemaire on certain of those parcels), but the Hughes property completely fell off the Assessor's tax roll as to Lemaire or as to any "unknown owner" as required to be identified by the tax statutes cited above. *See*, General Statutes of Nevada, Sections 1080-1083, 1088. Further, the Hughes property never appeared again in the deed records.

The Hughes property subsequently and suddenly reappeared in 1897 when Rufli claimed occupation thereof as a new possessory claim on public land and the Hughes property was then again shown on the tax rolls some six years after disappearing from the tax and deed records.

The *Rand* Court failed to apply the facts to the particular circumstances surrounding the unique attributes of a possessory claim on federal land. It is indisputable that, after acquiring the Hughes possessory claim in 1891, there was absolutely no mention of Lemaire again in connection with this one particular parcel of land, being the James "Pap" Hughes Ranch. More particularly, there was no evidence:

a. That any tax assessments were assessed to Lemaire on the Hughes property after 1891;

b. that any notations were made by the Assessor on any tax records involving the Hughes property after 1891;

c. that any assessments to Lemaire for the Hughes property were noted by the Assessor on the delinquent tax roll after 1891;

d. that the Hughes property had been the subject of a county tax sale after Lemaire's acquisition of the Hughes property;

e. that any deed was ever recorded from Lemaire to any party after Lemaire's acquisition from the county in 1891;

f. that Lemaire had actually possessed or occupied the Hughes property after Lemaire's acquisition of the property in 1891;

g. that any deed relating to the Hughes property was ever recorded from the county to any third party after Lemaire's acquisition of the property in 1891; and,

h. that the Hughes property had been irrigated by any party between 1891 and 1897 when a third party ("Rufli") is suddenly shown as being in possession of the Hughes property.

Moreover, there was no evidence that Rufli ever irrigated the Hughes property as evidenced by the sworn Proof of Appropriation filed by Rufli's widow, Lisette Schwin, which Proof sets forth the specific property Rufli and his wife, Lisette, irrigated beginning in 1896 through the time of filing the Proof in 1918 and which makes no mention or description whatsoever of the Hughes property of ever having been irrigated by Lisette Schwin or any of Lisette Schwin's successive husbands (Rufli/Hoffman/Schwin).

The only logical conclusion regarding the status of the Hughes property after Lemaire's acquisition in 1891 was that Lemaire abandoned his possessory claim to the property. Thereupon, the Hughes property became open to a new possessory claim, which new possessory claim Rufli initiated in 1897, as shown on the Lander County tax records.

It is unreasonable to conclude that Lander County somehow took title to the Hughes property between Lemaire's acquisition and Rufli's inception of a new possessory claim when there was not one piece of evidence supporting such conclusion. Further, as stated above, there was not one piece of evidence that the Hughes property was irrigated during that timeframe. The Court wholly failed to recognize the legal and practical nature of possessory claims on federal land and failed to accurately observe that the Hughes possessory interest disappeared immediately following Lemaire's acquisition of the property, which was just one of the parcels Lemaire acquired at the Higbee tax sale.

Based upon the chain of title requirements of Nevada law pre-1905, as enunciated in *Chiatovich, Union Mill* and *Lobdell,* there was no, and there could not be, a chain of title from Lemaire through Lander County to Rufli under the facts presented to the *Rand* Court. Upon Lemaire's abandonment of the Hughes possessory claim, Rufli's possession and occupation of the

Hughes property can logically only be deemed the inception of a new irrigation right on the prior Hughes possessory claim, assuming that Rufli actually irrigated this land. Consequently, the priority date of the inception of the new right, at best, would have been 1896, not the 1871 priority initially claimed by Hughes.

5. STOCK WATER ISSUE – BRADLEY ENTRY

The *Rand Case* further illustrates a distinct example of how the *Rand* Court misapplied, or failed to apply, the connection in interest rule to stock water issues. This illustration is referred to as the "Bradley Entry." The district court found that J. R. Bradley ("Bradley") grazed cattle in the Reese River Valley, between Austin and Battle Mountain, in 1862, and speculated that livestock grazing by Bradley occurred at Trout Creek. However, the district court made no findings connecting Bradley to any party in the *Rand Case,* but still strangely concluded that each of the parties possessed a stock watering right of 1862 based upon Bradley's purported use.

Although a stock water claimant could not transfer an interest in the public land owned by the federal government, stock water on public land is a property right acquired by the grazing use of the public rangelands and is subject to transfer between the successors in interest to the original claimant. *See, Steptoe Live Stock Co. v. Gulley,* 53 Nev. 163, 295 P. 772 (1931).

The *Rand* Court and the district court fundamentally erred in awarding each of the parties an 1862 Trout Creek stock water right on public lands. The district court's reliance on each party's current BLM grazing permit being an interpretation of priority stock water rights was nothing but a red herring and a fundamental error of law. The BLM's issuance of grazing permits, beginning with the passage of the Taylor Grazing Act in 1934, had absolutely no bearing on priority determinations of Nevada's vested stock water rights arising pre-1905. The BLM, under the Federal Range Code, accepted applications under the Taylor Grazing Act of 1934. In those applications the grazer set forth base priority and/or water rights previously used by the grazer in connection with the grazers prior grazing use. *See, Eason v. Bureau of Land Management,* IBLA 94-526 (1998) and Part 501 of *The Federal Range Code,* as amended Aug. 19, 1938. There was no BLM adjudication of priority of historical water rights use. The U. S. Supreme Court, in *Public Lands Council v. Babbitt,* 529 U. S. 728 (2000) discussed this issue and explained the implementation of the Taylor Grazing Act of 1934.

The Court explained:

> "By 1937 the Department had set the basic rules for allocation of grazing privileges. Those rules recognized that many ranchers had long maintained herds on their own private lands during part of the year, while allowing their herds to graze farther afield on public land at other times. The rules consequently gave a first preference

> to owners of stock who also owned "base property," i.e., private land (or water rights) sufficient to support their herds, ***and*** **who had grazed the public range during the five years just prior to the Taylor Act's enactment.** See 2 App. 818-819 (Rules for Administration of Grazing Districts (June 14, 1937). They gave a second preference to other owners of nearby "base" property lacking prior use. *Ibid*. And they gave a third preference to stock owners without base property, like the nomadic sheep herder. *Ibid*." *Public Lands Council v. Babbit*, at 735. (*Emphasis added*).

The district court held that Filippini currently holds valid grazing permits which were "adjudicated, issued and administered by the U. S. Department of the Interior, Bureau of Land Management" and that the "Court can take judicial notice that the BLM adjudicated the grazing rights based on first use, a possessory claim, and awarded Filippini's predecessor the right to graze in the Argenta Allotment."

Those findings are totally unsupported by any facts and wrong as a matter of law. There was no evidence of any connection between any of Filippini's predecessors and Bradley; there was no evidence of public lands grazing and water use by any of Filippini's predecessors; there was no evidence of any adjudications made by the BLM and its predecessor agencies as to the historical grazing use by Filippini or its predecessors during the five year look back period discussed in *Public Lands Council v. Babbit*, supra; there was no evidence of what the grazing permit contained when first issued under the Taylor Grazing Act; and, it is absurd, as a matter of law, to tie a post 1934 grazing permit to events occurring over 70 years prior to the issuance of the grazing permit.

The Nevada Supreme Court in *Ansolabehere v. Laborde*, 73 Nev. 93, 107, 310 P.2d 842, 849 (1957), summarized the respective rights of the federal and state governments in range matters pertaining to grazing permits and water rights on public lands. The *Ansolabehere* Court recognized that, "…with the complete administration and control of the range vested in the Bureau of Land Management, the use of the public domain and the protection of one or more stock owners in such use was no longer within the power, authority or jurisdiction of the state authorities. There remained to them only the determination, protection and adjudication of water rights." *Id*., 107. Thus, the *Ansolabehere* decision confirmed the sole right to the administration and control of the public grazing lands in the Bureau of Land Management, but further confirmed the sole right to the determination, protection and adjudication of water rights belonging to the State of Nevada.

There is no dispute with the *Rand* Court's decision affirming the district court's recognition of the concept of "priority of possession" of public rangelands and water rights for determining the initial priority of vested stock water use on public lands. However, upon the initial exercise of beneficial stock water use by the original appropriator under the priority of possession doctrine,

the requirement of "connection in interest" by subsequent claimants to the original appropriator remained an absolute requirement under the *Chiatovich, Union Mill* and *Lobdell* line of cases. It is unequivocally clear, under all Nevada Supreme Court decisions involving stock water, whether on public or private lands, that each stock water claimant must connect to the claimant's predecessor(s) in interest in order to succeed to the priority of the earlier stock water appropriation. *See, Steptoe Live Stock Co. v. Gulley,* 53 Nev. 163, 295 P. 772 (1931); *Itcaina v. Marble,* 56 Nev. 420, 55 P.2d 625 (1936); *Robison v. Bate,* 78 Nev. 501, 376 P.2d 763 (1962).

In *Itcaina*, the Court found that "Plaintiff acquired considerable land adjacent to the Hanks creek basin by purchase from the receiver of the Union land & Cattle Company in the latter part of the year 1925, and there engaged in the business of cattle raising. Substantially the same lands have been owned in turn by plaintiff's predecessors in interest extending back to the firm of Mason & Bradley, whose ownership dates to about 1882. These owners were engaged extensively in the cattle-raising business, and all of them throughout their ownership used said Hanks creek basin and other adjacent public lands for summer and fall range for the grazing of large numbers of their cattle. This use was contemporaneous with the use of the waters of Hanks creek basin for the watering of such stock." *Id,* 427.

The *Itcaina* Court further noted that "[t]his court is satisfied, from the evidence, that Hanks Creek Basin was used exclusively for cattle from 1882 to 1909 by plaintiff's predecessors in interest, and stock watering right for cattle was established in Hanks Creek Basin over that period of years... This is supported by the evidence. This right was acquired by plaintiff." *Id.,* 431.

Likewise, the *Steptoe* Court reviewed the factual findings regarding the use of the waters and public range lands by plaintiff and its predecessors in interest for a successive period of more than forty years and affirmed the holding of the district court that there was a well-established, well-recognized custom existing under Nevada law (of over forty years in this case by plaintiff and its predecessors in interest) of appropriating waters in the manner shown for the watering of livestock. *Steptoe,* 53 Nev., at 169, 175; 295 P., at 773, 775.

The requirement of connection in interest for public land grazing and stock water rights acquired thereon has absolutely nothing to do with the fact that public lands are involved. There was never an argument made by Rand in the *Rand Case* suggesting otherwise. However, there is an absolute requirement under Nevada law, and the "well-established" and "well-recognized" customs for the acquisition of stock water rights on public land, that title to these stock water rights must be proven by a connection in interest to the beneficial use of such stock water by the claimant and its predecessors in interest.

The term "predecessor in interest" is a legal term of art and is defined under the *Merriam-Webster.com Legal Dictionary* as "a person who previously held the rights or interests currently held by another; a party with whom another is in privity." In the *Rand Case* there was absolutely no connection in interest or privity between Bradley and any party in that case.

It is nonsensical to suggest that merely because Bradley purportedly grazed livestock on the public lands adjacent to Trout Creek, that each of the parties to the *Rand* action would be entitled to claim a stock water priority on public lands commencing with Bradley's use. The decision of the *Rand* Court affirming the district court's decree of public land stock water rights based on the doctrine of priority of possession, without including the requirement of a connection in interest under the holdings of *Chiatovich, Union Mill, Lobdell, Itcaina, Steptoe*, etc., is clearly wrong and contrary to all principles of Nevada law and the well-established and well-recognized customs of the livestock industry for such stock water appropriations and the priority claims thereto.

The undisputed and historical custom of acquiring stock water rights on public lands has always involved the fundamental requirement of each successive livestock owner grazing livestock on public lands to either acquire all or part of the ranching operation of the prior owner/claimant; acquire all or part of the livestock of the prior owner/claimant; or, acquire the water rights of the prior claimant to the surface water sources beneficially used by the prior claimant for such livestock grazing. *See, Adams-McGill Co. v. Hendrix*, 22 F. Supp. 789 (D. Nev. 1938); *Steptoe*, supra. None of these actions occurred in the *Rand Case*.

The concept of "predecessor in interest" as historically used by the Nevada Supreme Court has no meaning or substance if the connection in interest requirement is not met. There is absolutely no historical nor legal precedent supporting an argument that a party could have entered upon public rangelands, commenced livestock grazing with the corresponding stock water use of water sources on public lands never previously used by that party or its predecessors, and then legitimately claim an earlier priority of possession and appropriation of a historical third-party grazer and stock water claimant without the requisite connection in interest.

The district court in the *Rand Case* had no evidence of Bradley's possession of Trout Creek public rangelands and water, and there was absolutely no evidence of any party in that case succeeding to the purported possession and use made by Bradley. Bradley had completely disappeared from grazing in the Reese River Valley, purportedly including the public lands in the Trout Creek area, at the time Hughes, Pankey and McBeth commenced their farming operations on Trout Creek. Tomera had no connection whatsoever to these farm settlers and there is zero evidence of any purported connection. Filippini provided no evidence whatsoever that its alleged predecessors, either Hughes or McBeth, engaged in any public land grazing. Those settlers had a mere handful of livestock on their possessory farm claims on private lands as shown by the tax

records relied on by the district court. The *only* evidence of Trout Creek public lands range use was made by Pankey, Rand's predecessor.

The *Rand* Court adopted the vested stock water right decree of the district court relating to public rangeland grazing under the concept of "priority of possession," but then improperly ignored the long-standing case authority and historical custom regarding the requirement that the parties must be successors in interest to the purported possession by Bradley, the alleged initial claimant. The *Rand* Court's holding was totally inconsistent with the language in both the *Steptoe* and *Itcaina* decisions (noting that the "predecessors" or "predecessors-in-interest" of the parties in those cases had a connection to the possessory use first established). There was no evidence whatsoever before the district court establishing any possible connection in interest between the Rand parties and Bradley's purported use. The district court's decision was wrong as a matter of law and was further unsupported by the uncontroverted facts.

6. CONCLUSION

The *Rand* Court's affirmance of the district court's decision presents grave public policy concerns which will arise from the misinterpretation of vested irrigation and stock water priority determinations relating to pre-statutory water law. The Nevada Supreme Court must fix this potential nightmare to future water adjudications and title opinions relating to vested irrigation and stock water rights, including public rangeland water rights in the State of Nevada. Vested irrigation, stock water and public rangeland water rights will hereafter be fraught with uncertainty and potential chaos in the absence of the Court's correction of legal holdings of this flawed decision.