

Electronically Filed
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Tracie K. Lindeman

IN THE SUPREME COURT OF THE STATE OF NEVADA

J.W. BENTLEY and MARYANN
BENTLEY, Trustees of the Bentley Family
1995 Trust,

Petitioners.

v.

THE NINTH JUDICIAL DISTRICT
COURT of the State of Nevada, In and For
the County of Douglas, and THE
HONORABLE DAVID R. GAMBLE,
District Court Judge,

Respondents,

AND

DONALD S. FORRESTER; KRISTINA
M. FORRESTER; HALL RANCHES,
LLC, a Nevada limited liability company;
THOMAS J. SCYPHERS; KATHLEEN M.
SCYPHERS; FRANK SCHARO;
SHERIDAN CREEK EQUESTRIAN
CENTER, LLC, a Nevada limited liability
company; RONALD R. MITCHELL; and
GINGER G. MITCHELL as Intervenors
In the Matter of the Determination of the
Relative Rights in and to the Waters of
Mott Creek, Taylor Creek, Cary Creek
(aka Carey Creek), Monument Creek, and
Bulls Canyon, Stutler Creek (aka Stattler
Creek), Sheridan Creek, Gansberg Spring,
Sharpe Spring, Wheeler Creek No. 1,

Supreme Court Case No. 56351

District Court Case No. 08-CV-0363-D

1 Wheeler Creek No. 2, Miller Creek, Beers)
2 Spring, Luther Creek, and Various)
3 Unnamed Sources in Carson Valley,)
4 Douglas Valley, Nevada,)
5 Real Parties-in-Interest)
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7 **REQUEST FOR LEAVE**
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24 **BROOKE · SHAW · ZUMPFT**
25 **MICHAEL L. MATUSKA, SBN 5711**
26 1590 Fourth Street, Suite 100
27 P.O. Box 2860
28 Minden, Nevada 89423
(775) 782-7171 – Phone
(775) 782-3081 – Fax
Attorneys for Petitioners

THOMAS J. HALL, ESQ.
State Bar No. 675
305 South Arlington Avenue
Reno NV 89509
(775) 348-7011 – Phone
(775) 348-7211 - Fax
Attorney for Real Parties-in-Interest

COME NOW PETITIONERS J.W. BENTLEY and MARYANN BENTLEY, Trustees of the Bentley Family 1995 Trust (“Bentley”) by and through their counsel of record, Michael L. Matuska, Brooke · Shaw · Zumpft, and hereby request leave to file a reply to the Answer to Verified Petition for Writ of Prohibition and/or Mandamus filed by Real Parties-in-Interest, HALL RANCHES, LLC, DONALD S. FORRESTER and KRISTINA M. FORRESTER, THOMAS J. SCYPHERS and KATHLEEN M. SCYPHERS, FRANK SCHARO, SHERIDAN CREEK EQUESTRIAN CENTER, LLC, a Nevada limited liability company, RONALD R. MITCHELL and GINGER G. MITCHELL (“Answer”).

Bentley respectfully submits that the Answer filed by Real Parties-in-Interest is misleading and that a reply is warranted on the following issues:

1. Real Parties-in-Interest falsely assert that Bentley is challenging their right to participate in the water rights adjudication that is the subject of the proceedings in the lower court (Answer at p. 8, lls 24-25). This is false. Real Parties-in-Interest have to be named as parties to the adjudication. They do not need to intervene or file any pleading to have that right. However, their rights have already been adjudicated (Answer at p. 5, lls 1-15), and they have not taken any exception to the adjudication of their rights or those of Bentley. Rather, they have used their intervention to try to quiet title to a Diversion Agreement that has been in their chain of title for over twenty (20) years and have done so through affirmative defenses (App. Vol. 3 at 479-482).¹ In the Motion to Dismiss, Bentley

¹ Real Parties-in-Interest admit that they think the Diversion Agreement “is unenforceable, and even if enforceable, has been violated by the Bentleys and should be terminated according to its terms” (Answer at p. 6, lls. 4-5). Defendants are therefore

1 does not challenge the right of the Real Parties-in-Interest to participate in the adjudication
2 process, which is complete, but rather, the right of the Real Parties-in-Interest to expand
3 the adjudication process to a quiet title action through the filing of their non-conforming
4 pleading. Bentley seeks leave to file a reply to address the scope of the participation of the
5 Real Parties-in-Interest.
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7 2. Real Parties-in-Interest alleged that Bentley's diversion are "excessive" and
8 made "in violation of custom, practice, agreements and decrees." Real Parties-in-Interest
9 failed to provide a citation to the record for this allegation, or to provide any decree,
10 agreement or other document to support this allegation. Real Parties-in-Interest know this
11 allegation to be false. Real Parties-in-Interest even admitted that the Final Order of
12 Determination adjudicates water rights in favor of Bentley appurtenant to 12.93 approved
13 acres (Answer at p. 12, lls. 9-16). Neither Bentley nor the Real Parties-in-Interest have
14 taken exception to this finding. Since the petition was filed, the State Engineer prepared a
15 report of Bentley's water useage which confirms that Bentley's diversions do not exceed
16 its allocation for 12.93 approved acres. Bentley therefore requests leave to supplement the
17 record with this report.
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21 3. Real Parties-in-Interest falsely suggest that the Order of Final Determination
22 contains findings that override or nullify the Diversion Agreement that is the subject of the
23 quiet title action that Real Parties-in-Interest are pursuing through their affirmative
24 defenses. These suggestions include multiple statements that "the findings of the state
25 engineer are entitled to the presumption of correctness . . ." (Answer at p. 13, lls 7-8; p. 17,
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28 seeking to quiet title by way of affirmative defenses (App. Vol. 3 at 479-482) without
filing an actual pleading.

1 lls. 26-27). Real Parties-in-Interest go so far as to suggest that Bentley has to “post a bond
2 to stay the Final Order of Determination.” (Answer at p. 1, lls. 17-18). In fact, the Final
3 Order of Determination does not address the subject Diversion Agreement in any way,
4 shape, or form, and does not preclude such private agreement. Bentley requests leave to
5 file a reply brief to address this misstatement of fact and the issue of a bond.
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7 4. Real Parties-in-Interest repeat multiple times that they “are aligned with the
8 State Engineer and support the Final Order of Determination . . .” (Answer at p. 6, lls. 11-
9 13; p. 7, lls. 7-8). Real Parties-in-Interest make this argument to suggest that the State
10 Engineer is opposed to the Diversion Agreement and that because the Final Order of
11 Determination constitutes the pleading, their affirmative defenses can relate back to the
12 Final Order of Determination. This is patently false. The Final Order of Determination
13 does not address the Diversion Agreement in any way, shape, or form, and the State
14 Engineer has gone out of his way to explain that he views this dispute as a private dispute
15 between Bentley and the Real Parties-in-Interest and that the Diversion Agreement “may
16 be beyond the scope of the adjudication” (App. Vol. 3 at 541:3-7). As such, the
17 affirmative defenses filed by the Real Parties-in-Interest concerning the enforceability the
18 Diversion Agreement, the pond permits, and the other issues, must be seen as the Initial
19 Pleading. Bentley requests leave to supplement the record with the clarifications from the
20 State Engineer on this allegation.
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22 5. Real Parties-in-Interest wrongfully assert that Bentley’s Exception No. 1
23 seeks “to avoid the proposed Diversion Schedule based on the Diversion Agreement”
24 (Answer at p. 11, lls. 24). The implication is that Bentley’s Exception No. 1 somehow
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1 invited Real Parties-in-Interest to file a new pleading to quiet title on the basis that “the
2 claimed Diversion Agreement is unenforceable, has been violated by the Bentleys and
3 should be terminated according to its terms” (Answer at p. 6, lls. 4-5). In Exception No. 1,
4 Bentley merely seeks to point out that any Diversion Schedule would be subject to the
5 Diversion Agreement that has been recorded in the chain of title of the Real Parties-in-
6 Interest for over twenty (20) years. Bentley never asked the Court to declare the effect of
7 the Diversion Agreement and never asserted that it precluded a Diversion Schedule.
8 Moreover, the affirmative defenses contained in the Initial Pleading filed by Real Parties-
9 in-Interest contain allegations about pond permits and other matters that are not mentioned
10 at all in Bentley’s exception or the Final Order of Determination. There should be no
11 doubt that the Initial Pleading is trying to raise new matters by way of affirmative
12 defenses.
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16 6. Bentley would like to further explain in a reply brief that none of the factual
17 issues raised by Real Parties-in-Interest address the merits of the Petition for Writ of
18 Mandamus and/or Prohibition. If Real Parties-in-Interest think the lower court lacks
19 jurisdiction over any or all of Bentley’s exceptions, then they should have intervened to
20 move for dismissal. But they did not do that. Rather, they intervened to initiate a quiet
21 title action and a complaint about pond permits by way of affirmative defenses without
22 filing a conforming pleading that placed the matters at issue.
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1 Wherefore, Bentley requests leave to address these issues in a reply brief and to
2 supplement the record accordingly.

3 DATED this 17th day of September 2010.

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5 BROOKE · SHAW · ZUMPFT

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7 By:


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MICHAEL L. MATUSKA

VERIFICATION

STATE OF NEVADA)
) ss.
COUNTY OF DOUGLAS)

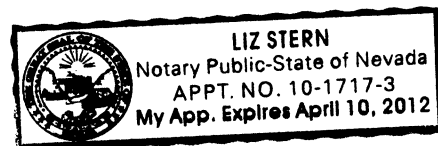
MICHAEL L. MATUSKA, being first duly sworn, deposes and says:

That he is the Attorney for Petitioners in the above-entitled action; that he has read the foregoing instrument and knows the contents thereof and that the same is true of his own knowledge except for those matters stated on information and belief, and as to those matters, he believes them to be true.


MICHAEL L. MATUSKA

SUBSCRIBED AND SWORN to before me,
this 17th day of September 2010,
by MICHAEL L. MATUSKA.


NOTARY PUBLIC



CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of BROOKE · SHAW · ZUMPFT and that on the 17th day of September 2010, I served a true and correct copy of the preceding document entitled **REQUEST FOR LEAVE** addressed to:

STATE OF NEVADA
Department of Conservation and Natural Resources
Division of Water Resources
Office of the State Engineer
901 South Stewart Street, Suite 2002
Carson City NV 89701

Thomas J. Hall, Esq.
305 South Arlington Avenue
P.O. Box 3948
Reno NV 89505-3948

Bryan L. Stockton
Deputy Attorney General
100 North Carson Street
Carson City, NV 89701

The Honorable David Gamble
NINTH JUDICIAL DISTRICT COURT
P.O. Box 218
Minden NV 89423

☒ **BY U.S. MAIL:** I deposited for mailing in the United States mail, with postage fully prepaid, an envelope containing the above-identified document at Minden, Nevada, in the ordinary course of business.

☐ **BY FACSIMILE:** I transmitted via facsimile from the offices of Brooke · Shaw · Zumpft the above-identified document in the ordinary course of business to the individual and facsimile numbers indicated.


LIZ STERN, ALS