

FILED

SEP 30 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

IN THE SUPREME COURT OF THE STATE OF NEVADA

J.W. BENTLEY AND MARYANN BENTLEY,
TRUSTEES OF THE BENTLEY FAMILY 1995
TRUST,

Petitioners,

vs.

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, Wheeler Creek
No. 2, Miller Creek, Beers Spring, Luther
Creek and Various Unnamed Sources in
Carson Valley, Douglas Valley, Nevada,

Respondents,

THE STATE OF NEVADA OFFICE OF THE
STATE ENGINEER,

Intervenors.

Case No. 56351

Dist. Court Case No. CV 0363

MOTION TO INTERVENE

Appeal from the Ninth Judicial District
of the State of Nevada
In and for Douglas County
The Honorable David R. Gamble,
District Judge

1 The State of Nevada, and Jason King, P.E., in his capacity as State Engineer of
2 Nevada, by and through their counsel, Attorney General Catherine Cortez Masto and Senior
3 Deputy Attorney General Bryan Stockton, and move the Court to allow the State Engineer to
4 intervene in this matter for purposes of defending the ongoing decree proceedings and the
5 waters of the State of Nevada.

6 The State Engineer is authorized by statute to be a party to any action that can have an
7 adverse affect to water rights in the State of Nevada. NRS 533.450 (11) provides that:

8 Whenever it appears to the State Engineer that any litigation,
9 whether now pending or hereafter brought, may adversely affect
10 the rights of the public in water, the State Engineer shall request
11 the Attorney General to appear and protect the interests of the
12 State.

12 The State Engineer hereby moves to intervene in this matter in the limited capacity to
13 defend his authority as an officer of the decree court to proceed with the adjudication and
14 enforce the decree that may be entered in the future.

15 **OPPOSITION TO VERIFIED PETITION FOR WRIT OF PROHIBITION**

16 **AND/OR WRIT OF MANDAMUS**

17 **1. State Engineer Takes No Position on the Diversion Agreement**

18 The main arguments put forth by Bentley concern the diversion agreement between the
19 water right holders on Sheridan Creek. The State Engineer will not take any position on the
20 diversion agreement. The State Engineer does not determine contested issues concerning
21 title to water. NRS 533.386 (4). The pond water agreement appears to be a dispute over an
22 issue related to title and therefore the State Engineer will not take a position on the
23 agreement. However, the jurisdiction of the decree court over the pond agreement is not
24 clearly proscribed by statute, but may properly be a subject of the adjudication.

25 **2. The State Engineer did not Impose the Rotation Schedule**

26 Bentley alleges that the "statute does not authorize the State Engineer to impose a
27 rotation schedule over objecting parties." Petition For Writ Of Prohibition And/Or Writ Of
28 Mandamus (Petition) at 24, II. 17-18. The State Engineer did not impose the rotation

1 schedule. The district court ordered the rotation schedule. Exhibit 1. The State Engineer
2 administers the rotation schedule in his role as water commissioner on behalf of the district
3 court. See, *South Fork Band of Te-Moak Tribe v. Sixth Judicial District Court*, 116 Nev. 805,
4 810, 7 P.3d 455, 458 (2000) ("The Sixth Judicial District Court has the authority to hold in
5 contempt those who interfere with or frustrate the actions of the state engineer or water
6 commissioners in the administration of the Humboldt Decree. " *Citing, State v. District Court*,
7 52 Nev. 270, 286 P. 418 (1930)). The district court, as decree court has jurisdiction to
8 administer the waters of Sheridan Creek. *State v. Sustacha*, 108 Nev. 223, 226, 826 P.2d
9 959, 961 (1992)("Because the Humboldt Decree adjudicates Humboldt Stream System water
10 rights and was issued by the Sixth Judicial District Court, we conclude that litigation
11 concerning Humboldt Stream System water rights should be carried out and resolved only in
12 the Sixth Judicial District Court.").

13 The rotation schedule is inextricably tied to the question of whether the pond is
14 consuming excessive amounts of surface water. The seepage test will answer the question of
15 fact concerning the alleged excessive losses from the Bentley pond and the Court must be
16 allowed to make factual determinations in regard to the waters of Sheridan Creek. The district
17 court has authority to order both the rotation schedule and the seepage test.

18 **3. Excessive Consumption of Water, if any, is Within the Jurisdiction**
19 **of the Decree Court.**

20 The interveners made allegations in the adjudication that the Bentley pond was
21 consuming up to one-quarter of the flow of Sheridan Creek. Exhibit 2. The agreement itself
22 calls for the diversion to be a non-consumptive use. The State Engineer is conducting factual
23 investigations to determine whether the pond is consuming more than the amount of water
24 allotted to Bentley under his proofs of claims. The investigation currently shows that the
25 amount of water consumed by the ponds may be in excess of Bentley's water rights.
26 However, this is a question of fact that must be finally determined by the decree court. This
27 Court has generally stated that material questions of fact will preclude relief in the form
28 of a writ.

1 Although we reaffirm the general rule of [*State ex rel. Dep't Transp.*
2 *v. Thompson*,] [99 Nev. 358, 662 P.2d 1338 (1983);] this court will
3 continue to exercise its discretion with respect to certain petitions
4 where no disputed factual issues exist and, pursuant to clear
5 authority under a statute or rule, the district court is obligated to
6 dismiss an action.

7 *Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997). Thus,
8 Mandamus or Prohibition will not lie where material questions of fact must be decided by the
9 district court. In effect, the grant of Mandamus or Prohibition would allow Bentley to divert
10 water without regard to whether that diversion causes excessive consumption of the waters of
11 Sheridan Creek without regard to the rights of the other water right holders. This Court held
12 that:

13 Mandamus will lie to compel entry of a summary judgment where
14 the law and the facts so require. However, the legal right of a
15 petitioner to the entry of a summary judgment must be clear,
16 complete and not open to reasonable doubt. It will lie only where
17 there remains no genuine issues of fact to be resolved and where it
18 is compelled as a matter of law.

19 *Hoffman v. Eighth Judicial Dist. Court*, 90 Nev. 267, 269, 523 P.2d 848, 849 (1974)(Citations
20 omitted). In this case, there remains a material question of fact as to whether the ponds
21 consume excessive amounts of water. Assuming the validity of the diversion agreement, and
22 granting the extraordinary relief requested herein would prevent adjudication of those material
23 questions of fact. This Court must deny the Petition and allow the adjudication to move
24 forward.

25 **4. Interveners are Already Parties to the Adjudication**

26 NRS 533.240 Provides that "In any suit brought in the district court for the
27 determination of a right or rights to the use of water of any stream, all persons who claim the
28 right to use the waters of such stream and the stream system of which it is a part shall be
made parties." Thus, the interveners are already parties to the adjudication by statute and
were provided notice of the final order of determination by the State Engineer just like all other
claimants. The position of the State Engineer is that all water right claimants are parties to the
adjudication and must be allowed to defend their water rights if they feel that Bentley's claims
infringe upon those water rights.

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CONCLUSION

The decree court takes jurisdiction over the waters which are the subject of the adjudication. Although the diversion agreement presents a title issue, the issue in this proceeding is whether Bentley is making consumptive use of more water than he is entitled to. This presents a material question of fact which must be answered by the decree court before this Court issues an order which could allow Bentley to consumptively use the water of the other parties.

Submitted this 30th day of September 2010.

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1 **CERTIFICATE OF COMPLIANCE**

2 I hereby certify that I have read this Motion to Intervene, and to the best of my
3 knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I
4 further certify that this document complies with all applicable Nevada Rules of Appellate
5 Procedure; in particular, N.R.A.P. 28(e), which requires every assertion in the reply regarding
6 matters in the record to be supported by a reference to the page of the transcript or appendix
7 where the matter relied on is to be found. I understand that I may be subject to sanctions in
8 the event that the accompanying reply is not in conformity with the requirements of the
9 Nevada Rules of Appellate Procedure.

10 Dated this 30th day of September, 2010.

11 CATHERINE CORTEZ MASTO
12 Attorney General

13 By:


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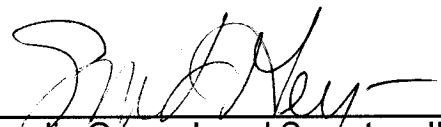
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CERTIFICATE OF MAILING

I, Sandie Geyer, certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 30th day of September, 2010, I filed and served the foregoing **MOTION TO INTERVENE**, postage prepaid via US Mail in Carson City to the following address:

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Ginger G. Mitchell



Sandie Geyer, Legal Secretary II
Employee of the Nevada Attorney General