

EXHIBIT 2

EXHIBIT 2

**IN THE OFFICE OF THE STATE ENGINEER
OF THE STATE OF NEVADA**

**IN THE MATTER OF THE COURT
ORDER OF MAY 17, 2010, ISSUED BY
THE 9TH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND
FOR THE COUNTY OF DOUGLAS
UNDER CASE NO. 08-CV-0363-D FOR
SHERIDAN CREEK LOCATED WITHIN
CARSON VALLEY, DOUGLAS
COUNTY, NEVADA.**

**REPORT OF
FIELD INVESTIGATION
NO. 1130-A**

GENERAL

Sheridan Creek and tributaries is in the process of being adjudicated *IN THE MATTER OF THE DETERMINATION OF THE RELATIVE RIGHTS IN AND TO THE WATERS OF MOTT CREEK, CANYON CREEK, TAYLOR CANYON CREEK, CARY CREEK (AKA CAREY CREEK), MONUMENT CREEK, 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 COUNTY, NEVADA.*

A hearing was held on Monday, May 17, 2010, at 9:00 A.M. in the Ninth Judicial District Court of the State of Nevada In and For the County of Douglas before the Honorable David Gamble, District Court Judge, regarding the exceptions to the Order of Determination. The hearing was in regard to Subpart D, with respect to water distribution from the northern split of Sheridan Creek. In this hearing the court ordered the State Engineer's Office to conduct a 48 hour seepage test on both ponds located within the confines of the Bentley Property, Douglas County APN 1219-14-001-013.

FINDINGS

Staff¹ of the Nevada Division of Water Resources conducted a second pond seepage test beginning on Monday, August 16th at 8:15 A.M. and concluding on Wednesday, August 18th at 9:00 A.M. After arriving at 8:15 A.M. we met with Mr. Bentley and then proceeded with our preparation for the seepage test on the ponds described earlier in Report of Field Investigation No. 1130.

Prior to the second seepage test an Email was sent to all of the respective parties to the adjudication of the North Split of Sheridan Creek informing them of the dates and time of the seepage test.

¹ Steve Walmsley, Staff Engineer III, Reed Cozens, Engineering Technician III and Adam Sullivan, Hydrologist (Data Analysis).

Initially, we inspected the inlet to the pond to insure that the sluice gates had been closed and that no leakage to the upper and lower pond was occurring at the time of the investigation. Upon determining that these gates were secure, we proceeded with the securing of the pond outlets to assure that no leakage was occurring through the flash boards that would adversely affect our data.

The water level of the upper pond was just slightly below the crest of the flash boards at the time of our investigation. No leakage was noted, but we installed plastic sheeting and sand bags on the pond side of the flash boards as an added precaution.

The outlets and the corresponding flash boards to the lower ponds had been outfitted with an angle-iron crosspiece above the flash boards. The northern outlet had a single threaded rod with an inverted-T channel iron welded to the base that could be tightened with a nut on the threaded shaft causing down-force on the flash boards. This aided in the tightness of the seal. After adding another short (1" approximate) board to the outlet we tightened the clamping mechanism and sealed the north outlet with plastic sheeting and sand bags. No measureable leakage was detected through the northern outlet after the plastic sheeting and sand bags were put in place.

A similar clamping mechanism had been installed on the easterly outlet to the lower pond. Upon inspection of this outlet we determined that there was no detectable seepage from this gate. Therefore, we did not find it necessary to seal this outlet with plastic sheeting and sand bags as we had done to the lower ponds north outlet and the upper ponds single outlet.

Before taking our first pond level measurements we conducted a set of level measurements using the same Topcon AT-G3 Auto-Level paired with a Philadelphia rod as utilized prior to the June 2010 seepage test. A comparison of readings indicated that there were no elevation changes between the measuring point on the upper pond and any of the reference points.

We did not take any level measurements for the east outlet from the lower pond, since we did not see any relevance in these points. The east and west sides of the northern outlet of the lower pond were surveyed and found to have a change in elevation between the two sides. We noted that some concrete repair work had been completed between the two seepage tests. This had no adverse affect on the measurements for the August 2010 test.

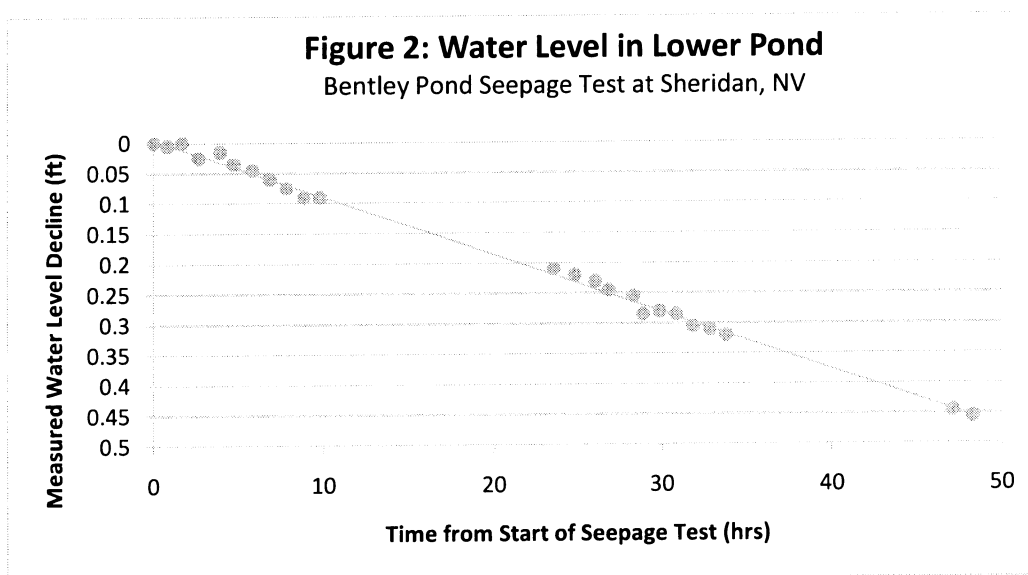
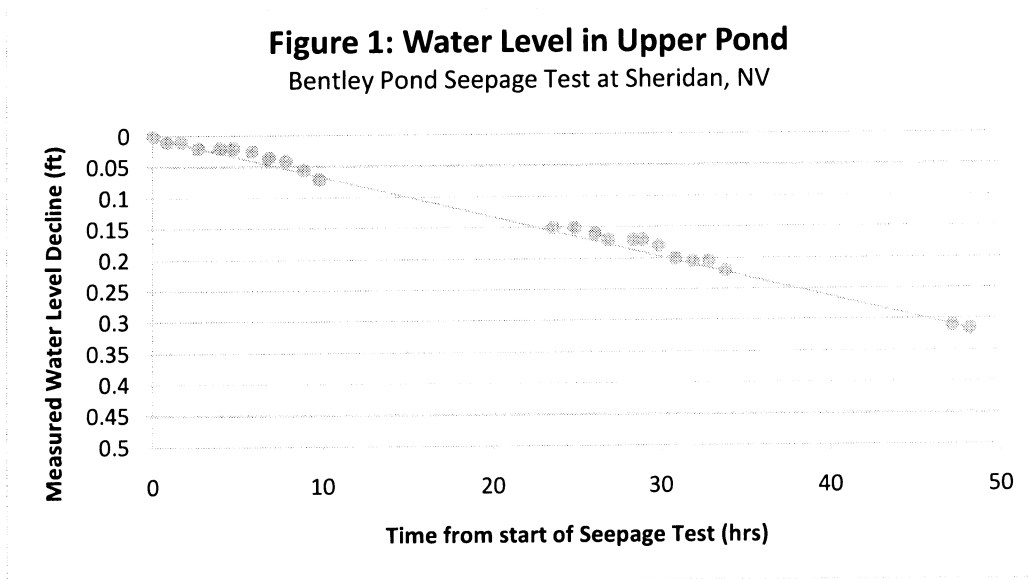
The initial measurements for the upper and lower ponds on the Bentley property were begun at 9:10 A.M. at and 9:13 A.M. on August 16, 2010, respectively. The initial water level for the upper pond was 1.880 feet below the measuring point located at the southwest corner of the deck and 1.885 feet below the top of the southwest corner of the north outlet of the lower pond.

Measurements were conducted on an hourly basis from the above-listed starting time through 7:00 P.M. on the evening of August 16, 2010. Measurements were resumed on August 17, 2010 at 8:43 A.M. and 8:46 A.M. for the upper and lower ponds, respectively. Again, we concluded measurements for the two ponds at 7:00 P.M. Water levels were resumed at 8:17 A.M. and 8:19 A.M. and concluded at 9:19 A.M. and 9:28 A.M., respectively, for the upper and lower ponds on August 18, 2010, thus concluding the 48-hour seepage test on the two ponds.

Final water level for the upper pond was 2.195 feet below the measuring point and 2.340 feet below the measuring point for the lower pond.

POND SEEPAGE TEST NO. 2.

Pond seepage tests were repeated on August 16-18, 2010. Methodology for the seepage test was the same as described for the June 1-3 test, including field methods, measuring points, and ET analysis. In the August seepage test, continuous data over a 48-hour period were collected for both ponds. Measured water level decline was roughly linear for both ponds, with a less rapid decline in the upper pond (Figure 1) than the lower pond (Figure 2).



Total loss in each pond was higher in the August test than the June test. Some of this is attributed to ET, because temperatures were higher and humidity was lower during the August test. Figure 3 shows computed open water evaporation during the August test. Table 1 shows loss fractions due to surface evaporation, plant transpiration and seepage. Table 2 shows consumptive use as computed from the August test.

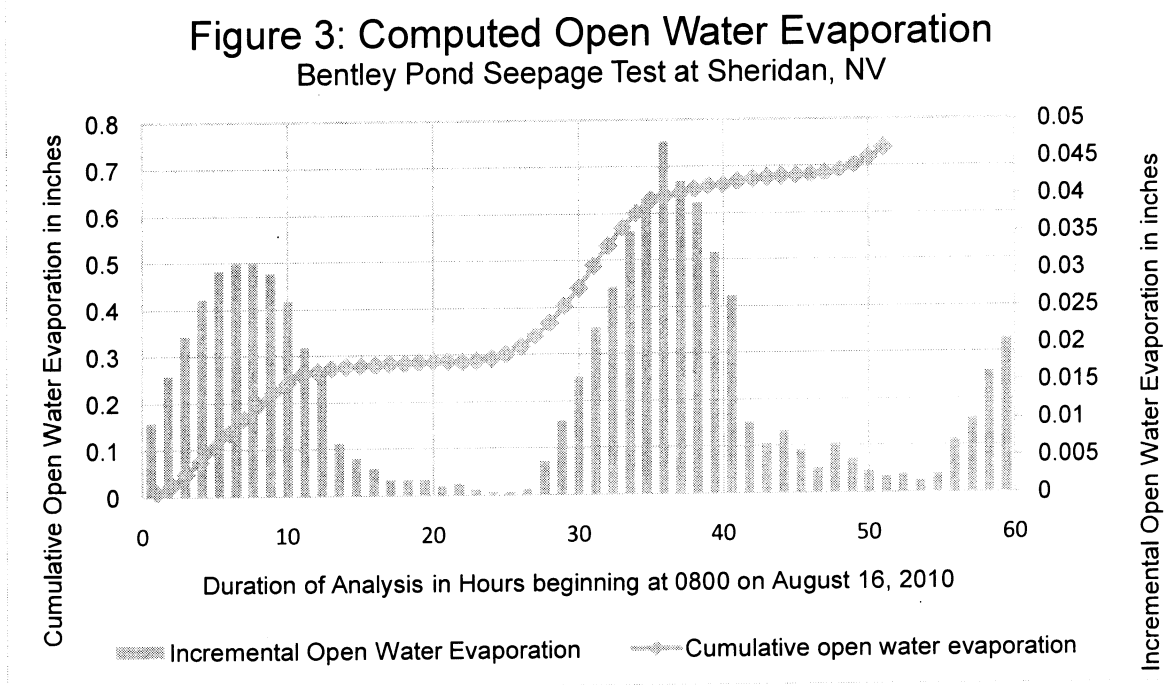


Table 1: Loss Rate Fractions							
Test #	Pond	Total Measured Loss (gpm)	Depth of Surface Evaporation (ft)	Loss due to Surface Evaporation (gpm)	Canopy area of vegetation dependent on pond water (ft ²)	Loss due to Transpiration (gpm)	Loss due to Seepage (gpm)
1	Lower	20.88	0.058	2.68	13000	1.87	16.333
2	Upper	19.79	0.058	3.64	1000	0.14	16.009

Table 2: Consumptive Use derived from August Test				
	Annual Seepage (Acre feet)	Annual Pond Evaporation (Acre feet)	Annual Transpiration of Pond Water (Acre feet)	Cumulative Annual Consumptive Use (Acre feet)
Lower Pond	26.3	1.9	0.9	29.1
Upper Pond	25.8	2.6	0.1	28.5

Cumulative annual consumptive use associated with each pond is consistently higher computed from the 48-hour August test results than from the 48-hour June test results. To a small extent the error may be attributed to assumptions about transpiration rates and atmospheric conditions driving pond evaporation during the test periods, however these elements represent a small percentage of the total loss rate and would have to be substantially erroneous to explain the difference. More likely, seepage rates during the August test period were higher than seepage rates during the June test period. This explanation would be supported by lower soil moisture and lower groundwater levels expected in late summer conditions.

For the purposes of this analysis and in the absence of further data, the June test results represent a “wet” condition characterized by a seasonally high water table and high soil moisture, and the August test results represent a “dry” condition with a seasonally low water table and low soil moisture. An average of the two is a fair approximation of mean annual conditions.

The period of use for irrigation is typically considered to be April 1st to October 15th. Cumulative consumptive use for the Bentley ponds during this period can be estimated in the same way as annual consumptive use by adding seepage, plant transpiration and pond surface evaporation. Seepage is estimated as an average of the rates computed in June, 2010 and August 2010 as described above, totaled for the 198-day period April 1st–October 15th. Pond surface evaporation and transpiration rates between April 1st and October 15th are obtained from stat files available in the report Evapotranspiration and Net Irrigation Water Requirements for Nevada. In this report, data from Minden (265191) is used for the Carson Valley basin average. Consumptive use estimates for period of use is summarized in Table 3, along with annual consumptive use for both ponds.

Table 3: Consumptive Use Computed from All Data

	Cumulative Annual Consumptive Use (Acre feet)	Cumulative Consumptive Use between April 1- October 15 (Acre feet)
Lower Pond	28.1	16.4
Upper Pond	26.2	15.2
TOTAL	54.3	31.6

Respectfully Submitted,


Steve Walmsley

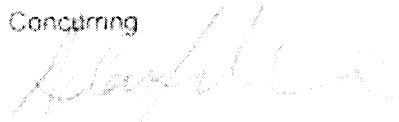
Hydraulic Engineer III

Concurring,


Reed Cozens

Engineering Technician III

Concurring


Adam Sullivan, P.E.

Hydrologist

Dated this 14th day of September, 2010.

SWRC/AS

EXHIBIT 1

EXHIBIT 1

**IN THE OFFICE OF THE STATE ENGINEER
OF THE STATE OF NEVADA**

**IN THE MATTER OF THE COURT
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THE 6TH JUDICIAL DISTRICT COURT
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UNDER CASE NO. 08-CV-0363-D FOR
SHERIDAN CREEK LOCATED WITHIN
CARSON VALLEY, DOUGLAS
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**REPORT OF
FIELD INVESTIGATION
NO. 1130**

GENERAL

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FINDINGS

Staff¹ of the Nevada Division of Water Resources conducted a reconnaissance investigation on May 22, 2010, in the matter regarding the water distribution from the north split of Sheridan Creek located in the Carson Valley. The meeting convened at 9:00 A.M. in the driveway of the Bentley residence. The purpose of the investigation was to gather preliminary information of the physical layout of the water distribution system that feeds the two (2) ponds on Douglas County APN 1219-14-001-013. After meeting with Mr. Bentley we proceeded to the north side of the driveway that enters his property from Sheridan Lane.

At this point we observed the original diversion constructed by the previous owner, Ted Weber, to the pond, hereafter "lower pond", located to the east of the Bentley residence. In the past this

¹ Steve Walmsley, Staff Engineer III, Reed Cozens, Engineering Technician III and Adam Sullivan, Hydrologist.

small ditch was observed to flow approximately 0.05 cfs, 22 gpm, continuously, to maintain the lower pond. The ditch appeared to be flowing at or about this rate at the time of the investigation.

From this point we proceeded north along the Sheridan Lane right-of-way to a new diversion box located at the northwest corner of the Bentley property. After Mr. Bentley explained the piping system in this box, as illustrated in the following photograph (Figure 1), we walked to the upper pond inlet located in the northwest corner of the pond.

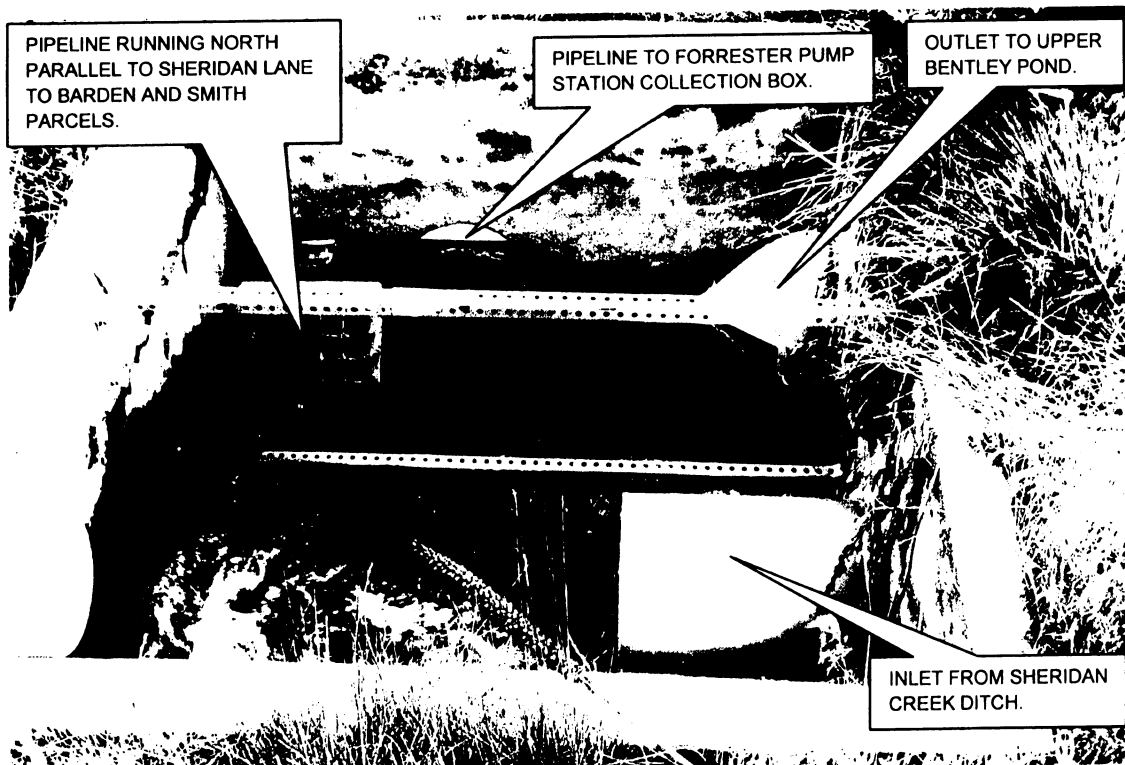


Figure 1. Northwest diversion box on the Bentley parcel. Photo looking east/northeast.

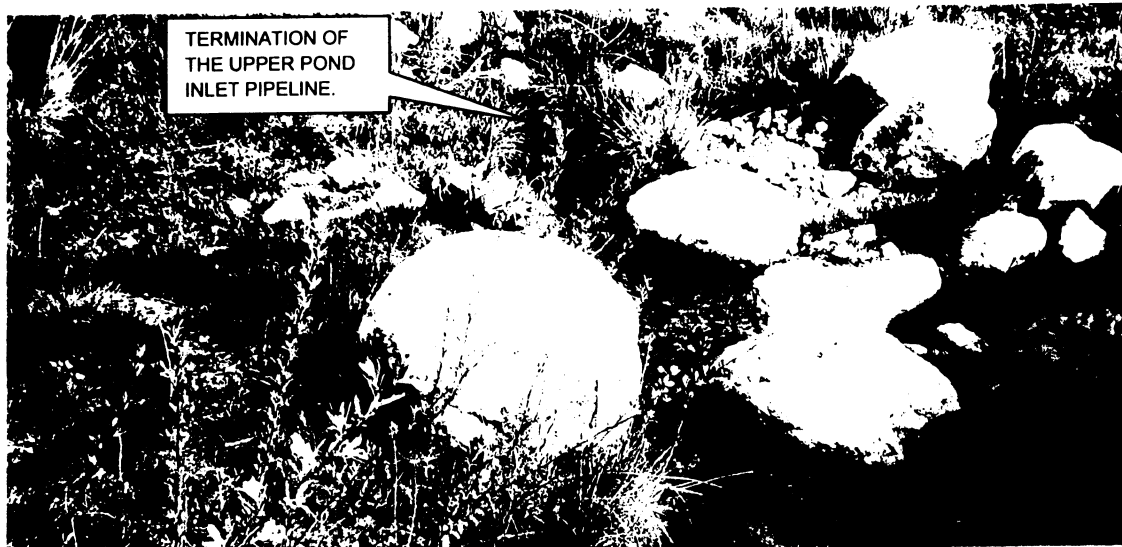


Figure 2. Looking north at the inlet to the upper Bentley pond.

At the outlet of the upper pond diversion we viewed the inlet to the pond. From here we walked around the north end of the upper pond and stopped in an area just north/northwest of the shop building. We noted that the diameter of the pond near a large ornamental boulder had decreased by approximately ten (10) feet at this location from the ponds maximum level. Mr. Bentley explained that he was better able to maintain the water level in the pond at this elevation, than at the original depth which was approximately one (1) foot higher in 2008. A grass and clover mix had been planted in the newly exposed (2008-09) bottom and currently forms a solid lawn/meadow area around the perimeter of the pond. Based on this observation we stated that the pond surface should be surveyed in conjunction to our upcoming water level measurements in order to come up with an accurate estimation of seepage.

The difference in pond diameter is not uniform around the perimeter of the pond. The slope of the bottom is gentle at the location that we observed to the northwest of the shop. The slope is vertical at the deck in front of the shop and the slope increases as one travels from the pond outlet in the southeast corner of the pond, around the south end and north up the west side to the inlet. The physical difference of the slope of the land around the perimeter of the pond makes it impossible to apply a uniform surface area reduction from the 2008 aerial photography.

Our next stop was at the outlet from the upper pond near the southwest corner of the shop building and at the southeast corner of the pond. Mr. Bentley pointed out the flashboards that are now being maintained at a lower level (approximately 1 foot) than when the pond was initially completed.



Figure 3. Looking northwest at the outlet of the upper pond.

The channel from the upper pond flows into the lower (easterly) pond near the lower ponds northwest corner. The original diversion (circa Ted Weber) to the lower pond begins on the north side of the Bentley driveway and flows parallel to the driveway and to the north of the Bentley residence through a curve to the south/southeast behind the house where it enters said pond near its southwest corner.

The lower pond is somewhat smaller than the upper pond and has two separate outlets. The northern outlet is comprised of a concrete drop inlet (Figure 4) that transfers water by pipeline to the north/northwest to a concrete diversion box located approximately 300 feet east of the northwest corner of APN 1219-14-001-013 along the north property line of said parcel. This box (Figure 5) directs water to a sub-grade storage tank and pump station on the Forrester parcel, Douglas County APN 1219-14-001-012. The diversion box to the Forrester pump station is located along the northern



Figure 4. Northern outlet from lower (eastern) pond on the Bentley property. Photo taken looking to the northeast.

boundary of the Bentley property at GPS location, NAD 83, N.38.90392°, W.119.82309° and approximately 200 feet south of the Forrester residence.

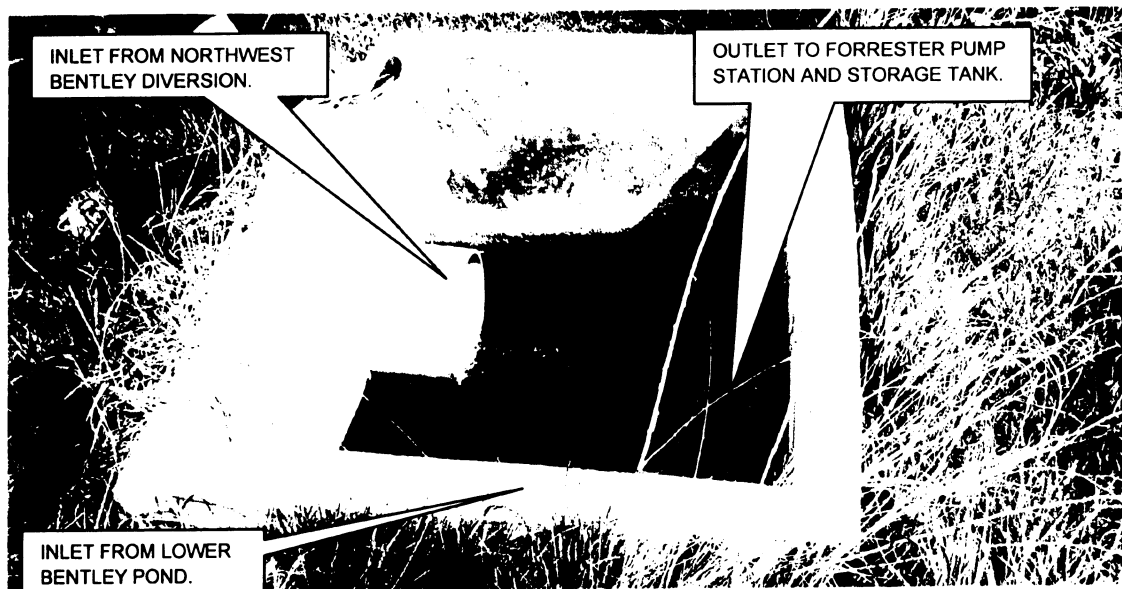


Figure 5. Diversion box on the Bentley that transfers water from the northwest Bentley diversion box and the northern outlet of the lower pond.

After viewing the northern outlet from the lower pond we walked to the easterly outlet from the pond. This second outlet is controlled by flashboards and is located at GPS location, NAD 83, N.38.90325°, W.119.82222°. Water from this outlet flows into a ditch (Figure 6) in an easterly direction toward the Park and Bull Ditch through the parcel owned by Forrester, APN 1219-14-001-012, and along the south boundary of the Mitchell parcel, APN 1219-14-001-011.



Figure 6. Looking east from the eastern diversion from the lower Bentley pond.

After viewing the eastern outlet of the pond and discussing the possible problems of sealing the outlet we walked around the remaining perimeter of the pond to a newly constructed (2008-09?) dock that extends into the pond from the west side. We determined that this would be the optimum location for a tape-down to the water surface for our seepage test.

From the lower pond we walked to the first diversion point below (east of) the Sapp parcel, APN 1219-14-002-003, and located to the north of the Bentley driveway from Sheridan Lane. We discussed possible sources for dark colored organic matter and the primary source of the water in Sheridan Creek.

At approximately 11:00 A.M. the field investigation was concluded.

POND SEEPAGE TEST

Three staff² members of the State Engineer's Office arrived at the Bentley property at approximately 8:15 a.m. on the morning of Tuesday, June 1, 2010. After assessing the current conditions we proceeded with our plan for conducting the seepage test on the two (2) ponds located within the confines of Douglas County APN 1219--14-001-013. The ponds are referenced as the "Upper Pond", located within the northwest corner of the parcel adjacent to Sheridan Lane and the "Lower Pond", located on the east side of the Bentley residence and down-gradient from the Upper Pond.

The inlet to the Upper Pond was blocked by closing the inlet to the sluice-gate equipped pipeline at 8:30 a.m. The direct diversion to the Lower Pond, located on the north side of the entrance of the paved driveway serving the residence, was closed shortly thereafter. At this point we began waiting for the inflow to cease and for both ponds to come to equilibrium with the lowest points on their outlet structures.

² Steve Walmsley, Staff Engineer III; Adam Sullivan, P.E., Hydrologist; and Reed Cozens, Engineering Technician III.

The first outlet to cease flowing water over its crest was the east outlet of the lower pond. Once water quit flowing over the top of this structure staff of the State Engineer's Office sealed the pond side of the flashboards with plastic sheeting and sand bags to prevent any leakage from this gate from affecting any probable decline of the relative level of the pond. The outlet on the north side of the lower pond was the next to be sealed with the plastic sheeting and sand bags.

The northern outlet proved to be more problematic in achieving an instantaneous water tight seal. After adding an additional section of 1" x 1½" board to the top of the flash boards and closing the sluice gates to the outlet pipes we were able to stem the leakage from this drop-outlet structure. Worst case scenario was that this outlet continued to leak less than a pint a minute throughout the seepage test. This would only yield a volume of 360 gallons over the entire 48-hour period of the test.

Discharge from the Upper Pond to the lower pond was noted to have diminished when observed at 9:05 a.m. At approximately 10:30 a.m. flow from the Upper Pond into the channel connecting the two ponds had ceased and this outlet was effectively sealed prior to our first measurement at 11:00 a.m.

The tape-down point to monitor the Upper Pond surface elevation was established at the southwest corner of the deck that overhangs the pond. The deck is located on the west side of the large shop building that resides on the east side of the pond.

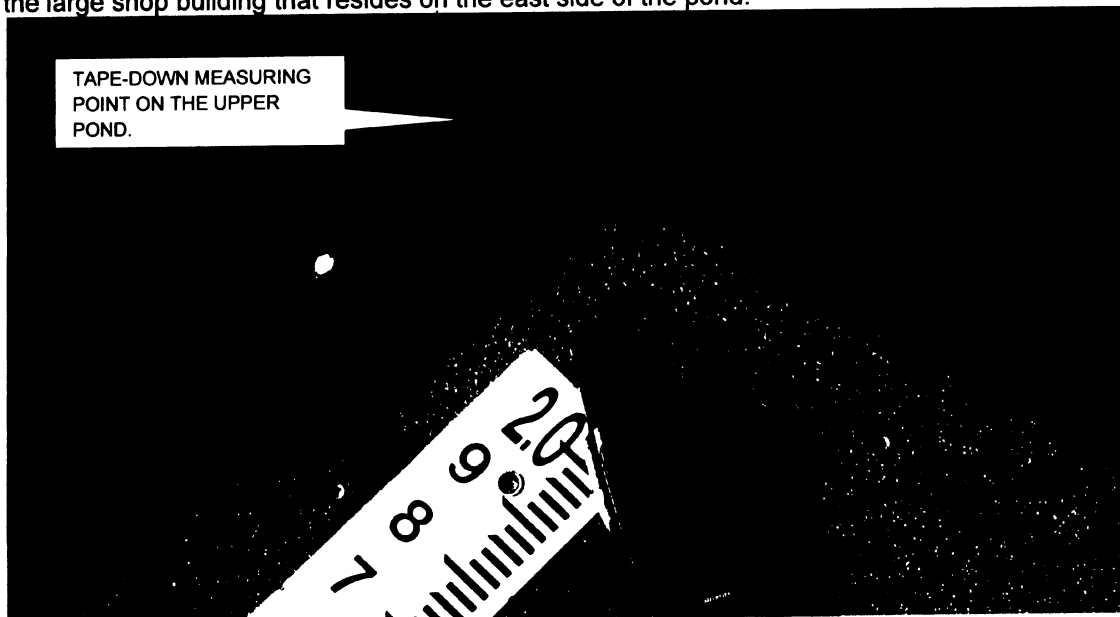


Figure 7. Southwest corner of the deck that overhangs the east side of the pond.

During this process we ran levels to reference points at the southwest corner of the shop driveway (Ref. 1)(6.492'), the high point of the large boulder on the east side of the Upper Pond outlet (Ref. 2)(4.795'), the east side of the outlet flash board (Ref. 3)(7.876'), the west side of the outlet flash board (Ref. 4)(7.889'), measuring point being the outside top corner of the southeast facing trim (M.P.)(6.008') and the top of the deck at the southwest corner of same (Ref. 5)(5.900'). All of the points were measured with a Topcon AT-G3 Auto-Level paired with a Philadelphia rod.

At 9:45 a.m. we moved the level to point within the roadway to the north of the Lower Pond. The first reference point is the bolt in the concrete on the south side of the east pond outlet (Ref. 1)(4.795"), the northwest outside corner of the north outlet box (Ref.2)(3.740'), the southwest outside corner of the north outlet box (Ref. 3)(3.709'), west end of the flash boards on the north outlet box (Ref. 4)(5.507'), east end of the flash boards on the north outlet box (Ref. 5)(5.485'), and the measuring point at the southwest corner of the north pond outlet (M.P.)(3.709')(Same as Ref. 3, Lower Pond). Refer to Figure 4 for a visual description of the measuring point for the lower pond.

These reference points will be used again during the late-July/early-August, 2010, measurements.

Measurements of the lower pond level began at 12:55 p.m. on June 1, 2010. The initial level was measured at 1.755 feet below the measuring point on the southwest outer corner of the concrete drop-inlet box (See Figure 4). The final measurement of the day was conducted at 6:55 p.m. with a level of 1.775 feet below the measuring point. At this point we suspended measurements for the evening.

The beginning measurement for Wednesday, June 2, 2010 for the lower pond was made at 8:17 a.m. and the final measurement for this day was made at 6:53 p.m. At 10:50 a.m. we began making back-up measurements from the pier that juts into the pond from its west bank. In general these water level declines measured off of the end of the pier paralleled our primary measuring point.

Our final set of measurements for the lower pond began at 8:31 a.m. on June 3, 2010 and concluded at 12:00 p.m. with a level of 2.090 feet below the measuring point, marking the end of the 48 hour seepage test for the lower pond. The actual hourly and half hour water levels are represented in the data and analysis section of this report.

The initial water level measurement for the upper pond was conducted at 11:00 a.m. on June 1, 2010. Water was measured at 1.822 feet below the measuring point, being the southwest corner of the deck that overhangs the pond (See Figure 7). The final level measurement for this day was made at 6:47 p.m. at 1.871 feet below the measuring point before ending data collection for the evening.

The first measurement for the upper pond on June 2, 2010 was conducted at 8:11 a.m. with a reading of 1.920 feet below the measuring point. We noted some variation in measurements during the morning of June 2nd. This was attributed to variations in wind speed and direction throughout the morning. Our measurement at 11:36 a.m. revealed a marked increase in water at 1.935 feet below the measuring point. We also noted that the water level had visibly risen along the south shore of the pond just west of the outlet. At this time we attributed the rise to high velocity winds from the west.

Later in the afternoon we noted that Don Forrester was walking in an easterly direction along the north boundary line of APN 1219-14-001-012 about 200 feet west of Sheridan Lane. We decided to talk to Mr. Forrester and let him know that we were in the process of conducting the court ordered seepage test. During our conversation Mr. Forrester went silent and then told us that he had opened the inlet gate to the upper pond sometime around noon on June 2nd. He said that Glenn Roberson, owner of APN 1219-12-001-008, had requested the delivery of water

in his rotation schedule. Mr. Forrester said that he had partially closed his diversion and fully opened the sluice-gate into Bentley's upper pond in order to transfer water through the upper and lower ponds and eventually down the east to west centerline of Section 14 ditch to the Roberson property. He said that he was unaware that we were conducting the seepage test. At this point we ended our conversation at set about closing the inlet to the upper pond.

The inlet to the upper pond was closed at 4:10 p.m. and the inlet pipe was posted with a Water Commissioner Notice from the State Engineer's Office. The final measurement of June 2nd was made at 6:51 p.m. with a level of 1.875 feet below the measuring point

The first measurement of the final day of measurements on the upper pond was conducted at 8:40 a.m. with a water level of 1.945 feet below the measuring point. The final measurement of the 48 hour test occurred at 11:08 a.m. with a level of 1.960 feet.

At 11:12 a.m. on June 3rd the headgate to the upper pond was opened along with the headgate to the lower pond shortly thereafter. Sandbags and plastic sheeting were removed from the outlets of both ponds by approximately 12:00 p.m. at the conclusion of the measurements.

In order to avoid measuring errors on both of the ponds water levels were measured with a tape measure in engineering scale and verified with a 2' length porcelain coated steel staff gage also marked in engineer's scale.

In order to confirm the surface area of the upper pond from 2008 aerial photography and obtain an accurate estimate of the surface area of the lower pond we returned to the Bentley property on the morning of Wednesday, June 9, 2010. The State Engineer had retained the services of Joe Cyphers, P.E., of the Division of State Parks to conduct a survey of both of the ponds using a Topcon GTS235W total station laser surveying instrument.

Upon completion of the survey and calculation of area we found that the area measured from the 2008 aerial photography for the upper pond was nearly identical to the surveyed area. The estimated acreage of the upper pond using one-foot-resolution aerial imagery was 0.568 acres; and the surveyed area of the upper pond was 0.571 acres.

The only way to obtain an accurate surface area for the lower pond was by the survey conducted on June 9th. The vegetation comprised of shrubs and trees around the ponds perimeter precluded our ability to precisely plot the ponds perimeter from the 2008 aerial photography. Using this same imagery as mentioned above the estimated acreage of the lower pond was 0.364 acres; while the surveyed area of the lower pond was found to be 0.419 acres.

The surface area for both the upper and lower ponds obtained by virtue of this survey is utilized in the hydrologic analysis section of this report.

Please refer to the attached schematic for a better understanding of the water delivery and distribution system.

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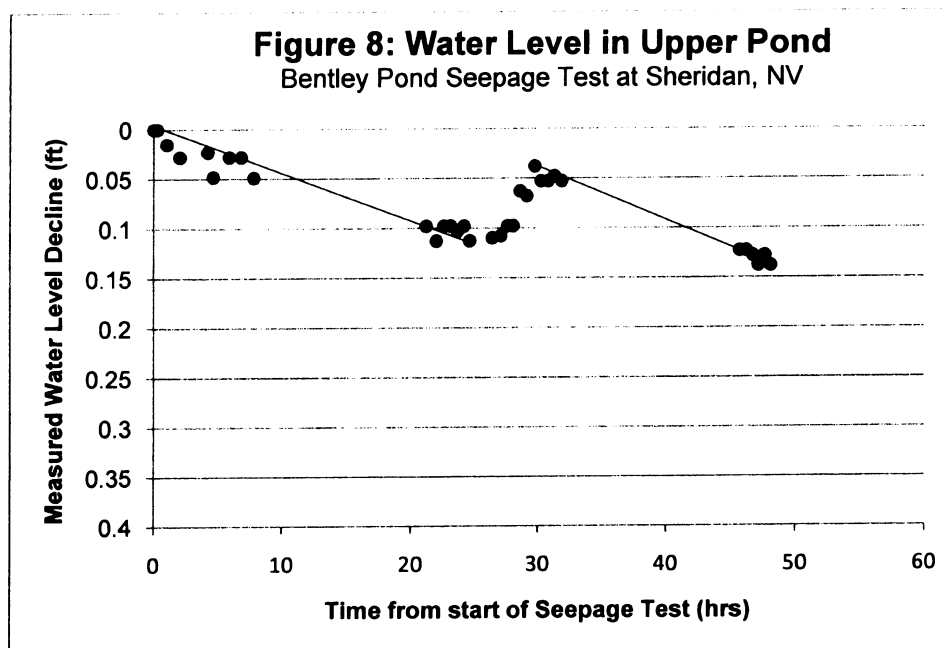


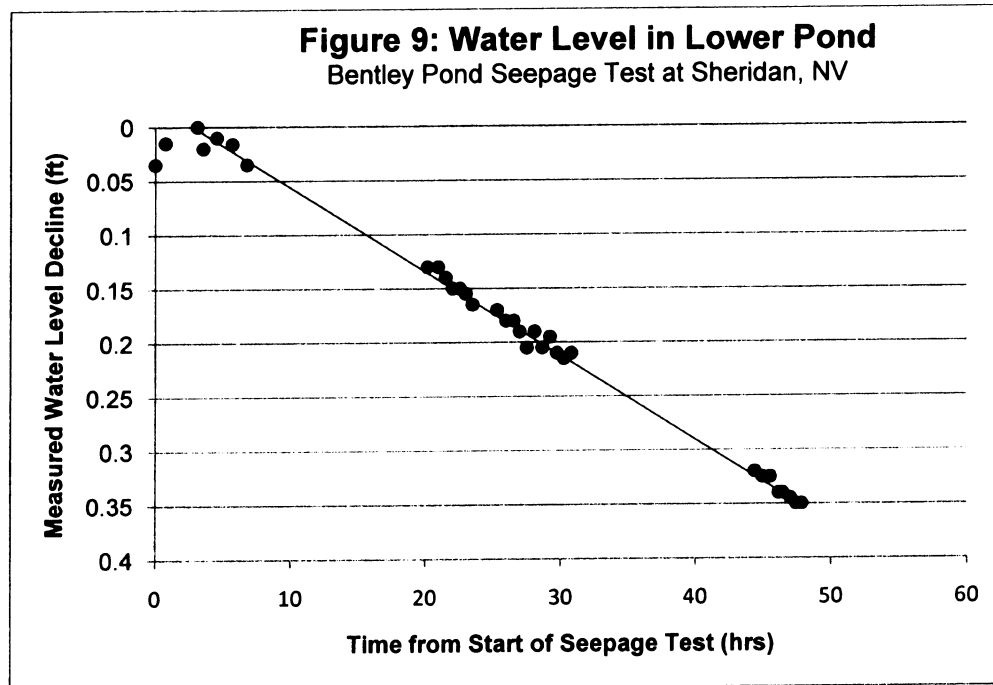
Water Level Measurement Data

Water level measurements over the period of measurement are shown in Figure 8 and Figure 9. Points represent actual measured values. Lines are drawn through the data points from the highest measured water surface to the lowest measured water surface to show cumulative loss rates for each test. These cumulative loss rates are summarized in Table 1.

In the upper pond two distinct periods of measurement were defined to account for a 4-hour period (approximately hr 25 to hr 29) during which the inflow gate to the pond was accidentally opened by a neighbor. Though this interruption prevented a constant 48-hour test, data from the two measurement periods is advantageous because the actual water surface during the test period is closer to where the pond surface is routinely maintained, and the measurements provide a replication of the analysis.

The lower pond shows a consistent decrease in water surface over the period of measurement with the exception of the first two data points. This initial rise in the measured water surface may be due to bank storage draining into the pond in response to the abrupt drop in water surface required to lower the pond elevation below the weir crest, or other initial adjustments to water surface as the pond came to an equilibrium state. Regardless of the actual cause, these two initial data points do not accurately represent seepage and were not included in the analysis. No water flowed into the lower pond during the four-hour period when the gate to the upper pond was accidentally opened.





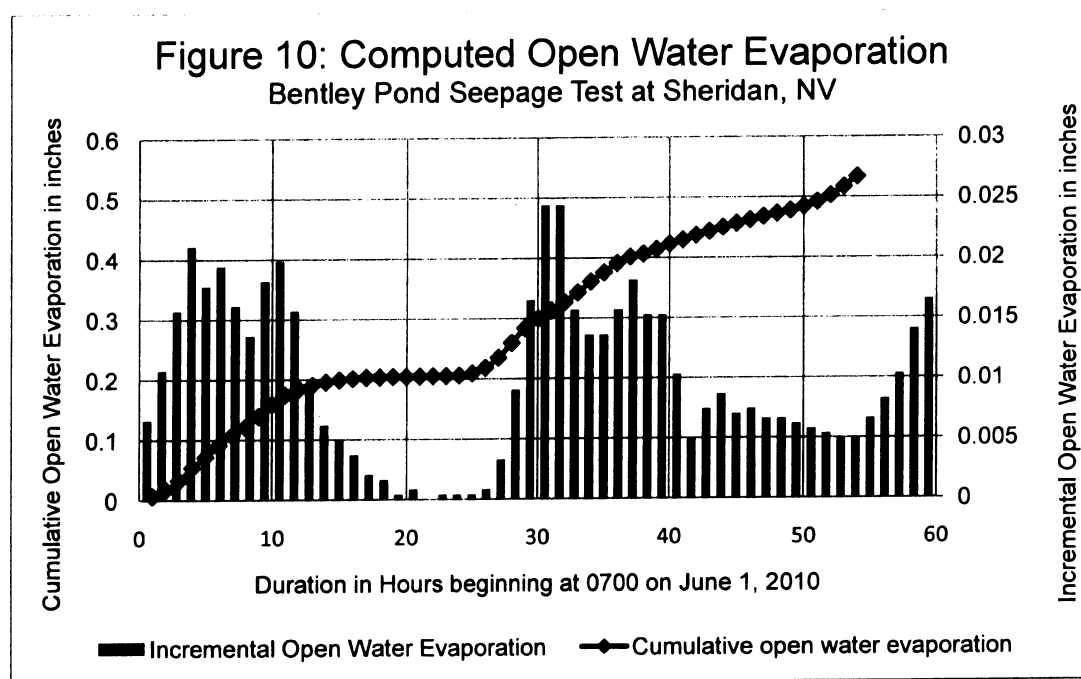
Scatter in the data that deviates from the trend line for both ponds may be caused by wind creating ripples and slight superelevation of the water surface from one side of the pond to the other, and/or precision in the data collection. For both ponds the diurnal pattern of evapotranspiration (ET) rates on cumulative loss is not apparent in the data, due to the relatively low proportion of ET losses and the precision of the measured data.

Test #	Pond	Initial Conditions			Final Conditions			Total Loss in Water Elevation (ft)	Duration of Test (hr)	Cumulative Loss (gpm)
		Time (hrs)	Pond Surface Area (sf)	Water Elevation below Reference (ft)	Time (hrs)	Pond Surface Area (sf)	Water Elevation below Reference (ft)			
1	Lower	3.08	18237	0	47.41	17511	0.35	0.35	44.33	17.59
2a	Upper	0	24911	0	24.6	24500	0.113	0.113	24.60	14.15
2b	Upper	29.75	24800	0.038	48.13	24383	0.138	0.1	18.38	16.68

Data Analysis

Water level decline measured in the ponds is attributed to seepage, evaporation from the surface of the ponds, and transpiration from vegetation growing along the banks of the pond. Evaporation and transpiration were quantified using weather data during the period of measurement, and seepage was determined by subtracting evaporation and transpiration from the total measured loss in pond volume. Seasonal and annual consumptive use was determined by assuming seepage rates to be constant, and by using published values of mean annual weather conditions and reference ET.

Evaporation from the surface of the ponds was calculated using the Penman-Monteith equation for grass reference evapotranspiration with an hourly time step, consistent with FAO Irrigation and Drainage Paper No. 56 (FAO 56). Shallow open water evaporation was determined by multiplying reference ET by 1.05 following recommendations in FAO 56. Mean hourly data for wind speed, temperature and relative humidity were obtained from a weather station at the Bentley property, with adjustments made for anemometer height also consistent with FAO 56 recommendations. Mean hourly data for solar radiation was obtained from pyranometer data at Western Nevada College in Carson City. This site is geographically comparable to the Bentley property with regard to elevation and horizon angle. Computed hourly evaporation is shown on Figure 10. Cumulative evaporation over the duration of the testing periods accounts for approximately 8% of total measured loss from the lower pond and 14% from the upper pond.



Transpiration during the testing period was approximated by assigning reference ET rates as described above to canopy area of trees and shrubs growing on the banks of each pond. The volume of pond water that is consumed through transpiration by vegetation along the banks of the pond is difficult to accurately measure because of the contribution from sprinklers on the property and the potential for trees on the lower pond to grow roots below the water table. Total estimated transpiration accounts for 9% of total measured loss in the lower pond and less than 1% in the upper pond.

Summary of Findings

Measured loss rates for each testing period are shown in Table 2, fractioned into pond surface evaporation, transpiration, and seepage. Seepage is determined by subtracting computed evaporation and transpiration from total measured loss.

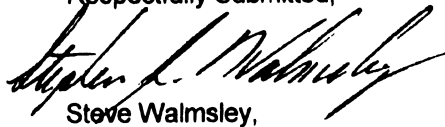
Table 2: Loss Rate Fractions							
Test #	Pond	Total Measured Loss (gpm)	Depth of Surface Evaporation (ft)	Loss due to Surface Evaporation (gpm)	Canopy area of vegetation dependent on pond water (ft ²)	Loss due to Transpiration (gpm)	Loss due to Seepage (gpm)
1	Lower	17.59	0.029219144	1.47	13000	1.02	15.107
2a	Upper	14.15	0.017894783	2.24	1000	0.09	11.821
2b	Upper	16.68	0.012469439	2.08	1000	0.08	14.519

Cumulative annual consumptive use is shown in Table 3. Annual seepage volumes are determined by extrapolating seepage rates from the test period to the entire year. The two seepage rates for the upper pond determined in test 2a and 2b are averaged for Table 3. Seasonal Pond evaporation and approximate consumptive use by trees were obtained from the report Evapotranspiration and Net Irrigation Water Requirements for Nevada, published by the Nevada State Engineers office in 2009. This report identifies average evaporation from shallow ponds in the Carson Valley to be 4.5 feet annually, and approximate consumptive use by vegetation to be 3 feet annually.

Table 3: Consumptive Use				
	Annual Seepage (Acre feet)	Annual Pond Evaporation (Acre feet)	Annual Transpiration of Pond Water (Acre feet)	Cumulative Annual Consumptive Use (Acre feet)
Lower Pond	24.4	1.9	0.9	27.1
Upper Pond	21.2	2.6	0.1	23.9

The planned replication of this field investigation in August 2010 will help refine seepage rates reported for this analysis, and provide further data regarding other variables that may affect pond dynamics.

Respectfully Submitted,



Steve Walmsley,

Hydraulic Engineer III

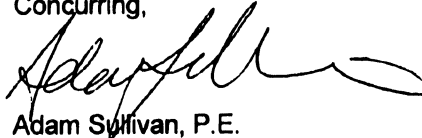
Concurring,



Reed Cozens,

Engineering Technician III

Concurring,



Adam Sullivan, P.E.

Hydrologist

SW/RC/AS

Attachments

Dated this 28th day of June, 2010.

Electronically Filed
Oct 26 2010 12:23 p.m.
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)
6

7 **REPLY TO ANSWERS**
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18

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COME NOW 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 file this Reply to the Answers filed by the 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 (collectively, “Real Parties”) and the Nevada State Engineer.

I. PROCEDURAL BACKGROUND

Bentley filed its Verified Petition for Writ of Prohibition and/or Mandamus (“Petition”) on 6 July 2010. This Court entered its Order Directing Real Parties to answer on 11 August 2010. Real Parties filed their Answer on 13 September 2010. Bentley requested leave to file a reply to Real Parties’ Answer on 17 September 2010. The Nevada State Engineer moved for leave to intervene on 30 September 2010. The motion for leave contained legal authorities and argument that were accepted as the State Engineer’s Answer in intervention by way of the Order of 8 October 2010. That same Order granted leave for Bentley to file a Reply to both Answers. This brief is therefore filed in Reply to the Answers filed by both the Nevada State Engineer and the Real Parties.

II. OVERVIEW

Bentley filed this Petition following the decision of the lower court to deny Bentley’s Motion to Dismiss Real Parties’ “Initial Pleading” [App. Vol. 3 at pp. 479-82].

///

1 The following is a verbatim recital of the main contentions in Bentley's Verified Petition
2 for Writ Prohibition and/or Mandamus ("Petition"):

3 (1) The "Initial Pleading" filed by the [Real Parties-in-Interest] is
4 not a pleading and must be dismissed pursuant to *Smith v. District Court*,
5 113 Nev. 1343, 1344, 950 P.2d 280, 281 (1997); and

6 (2) [Real Parties-in-Interest's] "Initial Pleading" raises matters
7 that are beyond the scope of the water rights adjudication process.

8 Bentley further requests a writ of mandate and/or prohibition to
9 prevent the implementation the rotation schedule that was ordered by the
10 lower court on the basis that:

11 (1) The rotation schedule alters Bentley's decreed water rights
12 and, although the affected parties can agree to a rotation schedule, a
13 rotation schedule cannot be imposed over objections (NRS 533.075); and

14 (2) The rotation schedule effectively restrains and enjoins
15 Bentley's right to divert water pursuant to a Water Diversion and Use
16 Agreement that was recorded in 1987 ("Diversion Agreement"), without
17 affording Bentley any due process, including an evidentiary hearing, or
18 requiring the [Real Parties In Interest] to post a bond.

19 (Petition at p.1, l.15 – p.2, l.5)

20 Neither Real Parties' Answer nor the Answer filed by the Nevada State Engineer in
21 intervention rebutted the main contentions in Bentley's Petition. In their Answer, Real
22 Parties seemed to acknowledge that their affirmative defenses [App. Vol. 3 at 479-82] are
23 not a recognized pleading. They did not even address *Smith v. District Court*, 113 Nev.
24 1343, 1344, 950 P.2d 280, 281 (1997), except to explain that consideration of Bentley's
25 writ is discretionary. (Answer, p.3, ll.1-4) The State Engineer does not contest Bentley's
26 argument that Real Parties' "Initial Pleading" must be dismissed.

27 ///

28 ///

III. STATUTORY PROVISIONS RELEVANT TO THE MOTION

1. The Nevada State Engineer may commence proceedings to determine the relative water rights of water users upon petition signed by two or more water users from any stream system (NRS 533.090(1)). In the absence of such petition, the State Engineer can enter an order for the determination of the relative rights (NRS 533.090(1)). The scope of such an adjudication is to “determine the relative rights to the use of water” See NRS 533.090; 533.100; 533.140; 533.160; 533.265.

2. The adjudication to determine the relative rights to the use of water commences when the State Engineer enters an order granting the petition or selecting the streams upon which the determination of rights is to begin and by preparing a notice which sets forth the date and time when the examination is to commence and the time by which all claimants are to submit proofs of claims. NRS 533.095.

3. The examination commences with “an investigation of the flow of the stream and of the ditches diverting water” NRS 533.100. The standard of measurement in terms of time and volume are cubic foot per second (cfs) and acre-foot annually (AFA). NRS 533.065. An acre-foot equals 43,560 cubic feet. *Id.*

4. After the expiration of the time for submitting proofs, the State Engineer shall assemble an abstract of proofs and a “preliminary order of determination establishing the several rights of the claimants to the waters of the stream.” NRS 533.140(1).

5. After a hearing on objections to the preliminary order of determination, the State Engineer shall prepare a [final] “order of determination, defining the several rights to the waters of the stream or stream system. The [final] order of determination, when filed

1 with the clerk of the district court as provided in NRS 533.165, has the legal effect of a
2 complaint in a civil action.” NRS 533.160(1).

3 6. NRS 533.170 sets forth the procedures for taking exceptions to the [final]
4 order of determination.
5

6 7. “The [final] order of determination by the State Engineer and the statement
7 of claimants and exception made to the [final] order of determination shall constitute the
8 pleadings, and there shall be no other pleadings filed in the cause.” NRS 533.170(2).
9 After a hearing on the exceptions, the court shall enter a decree affirming or modifying the
10 [final] order of determination. NRS 533.185.
11

12 8. The division of water from the streams involved in such determination shall
13 be made by the State Engineer in accordance with the [final] order of determination while
14 the exceptions and hearings thereon are pending. NRS 533.230. The effect of the [final]
15 order of determination can only be stayed upon the posting of a bond by the party
16 requesting the stay. NRS 533.235.
17

18 9. “In order to bring about a more economical use of the available water supply,
19 it shall be lawful for water users owning lands to which water is appurtenant to “rotate” in
20 the use of the supply to which they may collectively entitled” NRS 533.075. This
21 authorization allows water users to agree on a rotation schedule. Nothing in NRS 533.075
22 or elsewhere authorizes a court to enforce a rotation schedule over the objection of the
23 interested parties, especially when doing so creates waste and inefficiencies and damage to
24 lands to which the water rights are appurtenant. This statutory authorization for a rotation
25
26

27 ///
28

1 schedule is separate from the adjudication procedures, which are set forth in NRS 533.090
2 – 533.320 and summarized above.

3 **IV. REAL PARTIES' INITIAL PLEADING MUST BE DISMISSED**

4 **A. The Nevada Revised Statutes Preclude Real Parties' "Initial**
5 **Pleading**

6 The water rights adjudication proceeding now pending in the lower court is solely a
7 creature of statute. The purpose and scope of the water rights adjudication is to determine
8 the relative rights to the various stream and creek systems, not to enforce or quiet title to a
9 private diversion agreement. This point is reinforced throughout NRS Chapter 533.¹ The
10 State Engineer does not contest this point.
11

12 The Nevada Revised Statutes carefully identify the pleadings that are allowed in a
13 water rights adjudication proceeding. "The [final] order of determination, when filed with
14

15
16 ¹ "[D]etermination of the relative rights to the use of water of any stream."
17 NRS 533.090(1);

18 "[D]etermination of the relative rights to the use of water of any stream."
19 NRS 533.090(2);

20 "[D]etermination of the water rights in the stream." NRS 533.100(1);

21 "[A] preliminary order of determination establishing the several rights of claimants
22 to the waters of the stream." NRS 533.140(1);

23 "[Final] order of determination, defining the several rights to the waters of the
24 stream or stream system." NRS 533.160;

25 "Upon the final determination of the relative rights in and to the waters of any
26 stream system, the State Engineer shall issue to each person represented in such
determination a certificate" NRS 533.265(1);

27 "No certificate need be issued by the State Engineer when printed copies of any
28 decree of final determination of relative rights contain a listing of the individual rights so
determined." NRS 533.265(4).

1 the clerk of the district court as provided in NRS 533.165, has the legal effect of a
2 complaint in a civil action.” NRS 533.160(1) [emphasis added] “The order of
3 determination by the State Engineer and the statement of claimants and exceptions made to
4 the order of determination shall constitute the pleadings, and there shall be no other
5 pleading filed in the case.” NRS 533.170(2) [emphasis added]
6

7 The State Engineer filed the Final Order of Determination (“FOD”) on
8 14 August 2008 [App. Vol. 1 at pp. 1-235]. Bentley filed its *Notice of Exceptions* and
9 *Amended Notice of Exceptions* on 10 December 2008, and 25 March 2009, respectively.
10 [App. Vol. 2 at pp.239-257 and pp.258-305, respectively]. Despite this clear and
11 unambiguous language, excluding further pleadings, Real Parties filed an additional
12 pleading entitled *Response and Objections to Notice of Exceptions and Exceptions to Final*
13 *Order of Determination* (“Initial Pleading”) [App. Vol. 3 at 479-82]. The Initial Pleading
14 is not even a pleading, but solely a collection of “affirmative defenses.” The Initial
15 Pleading does not challenge the duty or the approved acreage determined in favor of
16 Bentley or any other party in the FOD, but instead, raises a host of issues that are outside
17 the scope of the FOD and Bentley’s exceptions thereto. Specifically, the Initial Pleading
18 seeks to quiet title to the Diversion Agreement that has been in the Real Parties’ chain of
19 title since 1987. That quiet title action is beyond the scope of the inquiry of the decree
20 court, which is intended solely to determine the relative rights of the claimants to the
21 water.
22
23
24
25

26 ///

27 ///

1 to intervene or file any pleading to have that right. Intervention is only necessary for an
2 interested party who did not receive notice of the action. NRS 533.130.

3 In this case, Real Parties not only received notice, but submitted proofs of their
4 claims. Their rights have already been adjudicated in the FOD (*See Answer at p.5,*
5 *ll.1-15*), and they have not taken any exception to the adjudication of their rights. Rather,
6 they have used their intervention to try to quiet title to a Diversion Agreement which has
7 been in their chain of title for over twenty (20) years and have done so through affirmative
8 defenses [App. Vol. 3 at pp.479-482].²
9

10 Bentley does not challenge the right of the Real Parties to participate in the
11 adjudication process, but rather, the right of the Real Parties to expand the adjudication
12 process to a quiet-title action through an improper intervention and the filing of their non-
13 conforming Initial Pleading.
14

15 **D. Real Parties Have Misrepresented Bentley's Exceptions to the FOD**

16 Real Parties wrongfully assert that Bentley's Exception No. 1 seeks "to avoid the
17 proposed Rotation Schedule based on the Diversion Agreement" (*Answer at p.11, l.24*).
18 Real Parties would have this Court believe that Bentley's Exception No. 1 somehow
19 invited Real Parties to file a new pleading to quiet title based on their argument that "the
20 claimed Diversion Agreement is unenforceable, has been violated by the Bentleys and
21 should be terminated according to its terms" (*Answer at p.6, ll.4-5*). In Exception No. 1,
22 Bentley merely seeks to point out that any rotation schedule would be subject to the
23
24
25

26 ² Real Parties admit that they think the Diversion Agreement "is unenforceable, and
27 even if enforceable, has been violated by the Bentleys and should be terminated according
28 to its terms" (*Answer at p.6, ll.4-5*). Defendants are therefore seeking to quiet title by way
of affirmative defenses (App. Vol. 3 at pp.479-482) without filing an actual pleading.

1 Diversion Agreement that has been recorded in the chain of title of the Real Parties for
2 over twenty (20) years. That did not invite additional, unauthorized pleadings by the Real
3 Parties or authorize the lower court to turn this adjudication proceeding into a quiet title
4 action.
5

6 **V. THE LOWER COURT LACKED AUTHORITY TO IMPOSE THE**
7 **ROTATION SCHEDULE**

8 In addition to allowing Real Parties to proceed on a pleading that is precluded by
9 NRS 533.160(1) and 533.170(2), the lower court entered an Order requiring parties to
10 rotate in the use of their water rights. [App. Vol. 3 at pp.753-757]. As a result of this
11 Order, Bentley only has the use of its decreed water rights six (6) days out of every twenty-
12 one (21) days and is enjoined from any further diversions under the Diversion Agreement.
13 The lower court entered this Order upon request of the Real Parties in a confusing brief
14 entitled *Motion for Division of Water and for Remand and Reference to State Engineer for*
15 *Further Evidence* [App. Vol. 3 at pp.581-94] wherein Real Parties requested the following
16 relief:
17
18

19 Therefore, the Intervenor hereby request that the Court order the
20 division of water from Sheridan Creek to be made by the State
21 Engineer ***in rotation without reference to the Diversion Agreement***
22 (or the Pond Water Agreement), in accordance with the Final Order
23 of Determination dated August 14, 2008, until final judgment in this
24 matter. [App. Vol. 3 at p.556] [Emphasis added]

25 It is respectfully requested that the Court enter an order requiring the
26 division of the water from Sheridan Creek by the State Engineer be
27 pursuant to the Final Order of Determination during the time this
28 action is pending and not otherwise, and to specifically refer the case
to the State Engineer to perform a Seepage Test and Seepage Report
concerning the Bentleys' Old Pond and New Pond [App. Vol. 3 at
p.588, ll.6-13].

///

1 The Order effectively nullified the Diversion Agreement.

2 In fact, there is no authority for the imposition of a rotation schedule over the
3 objections of the interested parties.³ Rather than cite any statutory authority [there is
4 none], Real Parties try to create the false impression that the Diversion Agreement
5 somehow violates the FOD, and that a restraining order (i.e., the Rotation Schedule) was
6 needed to preserve the status quo to prevent Bentleys' "excessive" diversion. Real Parties'
7 arguments in this regard are knowingly false and misleading.
8

9
10 A. **There is No Statutory Authority for the Imposition of a Rotation
Schedule**

11 The water rights adjudication process is solely a creature of statute. The relevant
12 sections are found at NRS 533.090 – 533.320. The only mention of a rotation schedule in
13 the Nevada Revised Statutes occurs in NRS 533.075. This is not part of the statutory
14 scheme for a water rights adjudication.
15

16 **NRS 533.075 Rotation in use of water.** To bring about a more
17 economical use of the available water supply, it shall be lawful for
18 water users owning lands to which water is appurtenant to rotate in
19 the use of the supply to which they may be collectively entitled; or a
20 single water user, having lands to which water rights of a different
21 priority attach, may in like manner rotate in use, when such rotation
22 can be made without injury to lands enjoying an earlier priority, to
the end that each user may have an irrigation head of at least 2 cubic
feet per second.

23 NRS 533.075 allows water users to agree on a rotation schedule in order to "bring
24 about a more economical use of the available water supply." Nothing in NRS 533.075 or
25

26 ³ Bentley is not the only interested party who objected to the imposition of a rotation
27 schedule. Dan and Elaine Barden and Joy Smith also objected. [App. Vol. 3 at p.760] and
28 Ernest Pestana never joined Real Parties' efforts. Real Parties failed to join the Bardens,
Smith, and Pestana in their quiet title action or efforts to impose a rotation schedule.

1 elsewhere authorized the lower court to enforce a rotation schedule over the objection of
2 the interested parties, especially when doing so creates waste and inefficiencies and
3 damage to lands to which the water rights are appurtenant.
4

5 **B. There is No Authority in the FOD for a Rotation Schedule**

6 Real Parties attempt to give the impression that the Diversion Agreement somehow
7 conflicts with the FOD, which they also suggest requires a rotation schedule. This is false.
8 The FOD did not impose a rotation schedule for the waters from the North Branch of
9 Sheridan, nor could it do so without explicit statutory authority. There is no statutory
10 authority for such. Rather, the FOD was compiled in accordance with the authority vested
11 in the State Engineer and the lower court by the Nevada Revised Statutes to determine the
12 relative claims to Sheridan Creek.
13
14

15 The State Engineer investigated the flow of Sheridan Creek as required by
16 NRS 533.100 and reported the flow at 3.5 cfs, including 2.1 cfs to the South Branch of
17 Sheridan Creek and 1.4 cfs to the North Branch of Sheridan Creek. [See FOD at Tables
18 5 & 6, App. Vol. 1 at pp.198-199]
19

20 The FOD establishes the approved acreage of all claimants to Sheridan Creek, with
21 a specified duty of four (4) acre-feet of water annually ["AFA"] per approved acre
22 [See FOD at Tables 5 & 6, App. Vol. 1 at pp.198-199]. According thereto, Bentley is
23 allocated a duty of four (4) AFA from the North Branch of Sheridan Creek for each of its
24 12.93 approved acres under Proof No. V-06306, for a total of 51.57 AFA.
25

26 The FOD properly explains that the parties may agree to a rotation schedule, and
27 roughly tracks the language and spirit of NRS 533.075 on that issue.
28

3. Rotation and Use of Water

Claimants of vested water rights and those owners of water rights acquired through the appropriative process from a common supply may rotate the use of water to which they are collectively entitled based on an agreement, so as to not injure nonparticipants or infringe upon their water rights, which is subject to approval by the State Engineer. The purpose is to enable irrigators to exercise their water rights more efficiently, and thus to bring about a more economical use of available water supplies in accordance with their dates of priority. NRS §533.075

[FOD Part XIV(3), App. Vol. 1 at p.100]

Despite the foregoing, the lower court entered an order for the imposition of a rotation schedule [App. Vol. 3 at pp.753-757] without a hearing or finding that it would even produce a more economical use of water. Bentley's Petition challenges the authority of the lower court to do so.⁴

C. Real Parties Have No Evidence of "Excessive Diversions"

Real Parties alleged that Bentley's diversions are "excessive" and made "in violation of custom, practice, agreements and decrees." (Answer at p.4, ll. 21-23) Real Parties failed to provide a citation to the record for this allegation, or to provide any decree, agreement, or other document to support this allegation. Real Parties know this allegation to be false. Real Parties even admitted that the FOD adjudicates water rights in favor of Bentley appurtenant to 12.93 approved acres. (Answer at p.12, ll.9-16)

Bentley further enjoys the right to divert (but not consume) additional water from the North Branch of Sheridan Creek pursuant to the Diversion Agreement that was recorded in the Official Records of Douglas County, Nevada, on 27 March 1987, at

⁴ Bentley also appealed the Order as a form of restraining order or preliminary injunction. That appeal is pending in Case No. 56551.

1 Book 387, Page 2726, as Document No. 152147, and which has been in Real Parties' chain
2 of title for over twenty (20) years [App. Vol. 2 at pp.250-257]. Pursuant to that Diversion
3 Agreement, Bentley has the right to divert the entire flow of the North Branch of Sheridan
4 Creek through a series of ponds and then return it to the ditch and creek systems for use by
5 the other claimants.
6

7 Real Parties conclude that Bentley's ponds consume more than its allocated amount
8 of water, and consumes water of the other claimants, and therefore the Diversion
9 Agreement should be cancelled. Unfortunately, the reports upon which Real Parties rely
10 do not reach this conclusion. Copies of the reports ("Reports") are provided herewith as
11 *Exhibits 1 and 2*. This conclusion is solely the unsupported conclusion of Real Parties and
12 their attorney, Tom Hall.
13
14

15 The Reports estimate the annual pond seepage at approximately 48.85 AFA.
16 Bentley believes this estimate is high, but this is irrelevant, as Bentley's allocation is
17 51.72 AFA. Bentley has this right, regardless of whether it uses the water for stock and
18 wildlife ponds, irrigation (if it changes the manner of use), or other approved use. Real
19 Parties cannot stop Bentley's diversions or consumption. To the extent Real Parties
20 challenge either the approved acreage (12.93) or the duty (4 AFA), they failed to file any
21 exceptions and are interfering with Bentley's rights and the obligation of the State
22 Engineer to deliver that quantity of water.
23
24

25 **D. The Remedy for Excessive Diversions Would be Monitoring –**
26 **Not a Rotation Schedule**

27 The State Engineer cites a trio of cases to support a confusing argument that the
28 lower court can impose a rotation schedule to prevent excessive diversions which he

1 suggests is a form of contempt. The State Engineer's arguments on these points,
2 suggestion of contempt, and citations to *South Fork Band of Te-Moak Tribe v. Sixth*
3 *Judicial Dist. Ct.*, 116 Nev. 805, 7 P.3d 455 (2000), *State v. Sixth Judicial Dist. Ct.*,
4 52 Nev. 270, 286 P.418 (1930), and *State Engineer v. Sustacha*, 108 Nev. 223, 826 P.2d
5 959 (1992), are gratuitous and do not create a need for intervention on those issues.^{5, 6, 7, 8}

7 In contrast, Bentley's contentions concerning the Order are clearly spelled out in the
8 Petition and recited above. Nowhere has Bentley challenged the administrative authority
9 of the Nevada State Engineer; nor is there any suggestion of contempt. Therefore, it is
10 impossible for Bentley to be frustrating the State Engineer's enforcement powers as
11 suggested by the reference to contempt.

13 Rather, this appeal challenges the authority of the lower court to order a rotation
14 schedule. The limited scope of a water rights adjudication proceeding is set by statute. It

16 ⁵ *South Fork Band of Te-Moak Tribe v. Sixth Judicial Dist. Ct.* concerned contempt
17 proceedings brought against the tribe, a peace offer, and a tribal chairman, following
18 arrests of the water commissioners by tribal police. That case is irrelevant to the present
19 appeal of an order directing the Nevada State Engineer to impose a rotation schedule and
overriding a private diversion agreement.

20 ⁶ *State v. Sixth Judicial Dist. Ct.* concerned an original writ petition brought by the
21 Nevada State Engineer against the Sixth Judicial District Court to compel the court to
22 pursue contempt proceedings against two water rights holders who blew up a diversion
dam on the Humboldt River system that was part of the Humboldt Decree.

23 ⁷ *State v. Sustacha* concerned an appeal from an order entered by the Fourth Judicial
24 District Court involving waters subject to the Humboldt Decree. Part of the order reversed
25 an order of contempt entered by the Sixth Judicial District Court, which was the decree
court for the Humboldt Decree.

26 ⁸ It is not even clear that the Humboldt Decree that was the subject of *South Fork*
27 *Band of Te-Moak Tribe v. Sixth Judicial Dist. Ct.*, and *State v. Sixth Judicial Dist. Ct.*, and
28 *State v. Sustacha* was the product of the adjudication procedures (NRS 533.090 – 533.320)
that are the subject of this case.

1 is noteworthy that the State Engineer did not cite any statutes to support its argument that a
2 rotation schedule can or should be part of the adjudication. There simply is no statutory
3 basis for the lower court to make a rotation schedule part of the FOD.
4

5 The relevant cases to the State Engineer's arguments are the trio of cases concerning
6 the Humboldt River decree that were cited in the preceding section. Those cases resolve
7 two (2) of the disputed issues in this case in favor of Bentley. First, *State Engineer v.*
8 *Sustacha* and *State v. Sixth Judicial Dist. Ct.* confirm that the remedy for an alleged
9 overuse or misappropriation of water is to install diversion devices (i.e., a dam) and a
10 tamper-proof measuring device – not to impose a rotation schedule.
11

12 Second, *South Fork Band of Te-Moak Tribe v. Sixth Judicial Dist. Ct.*,
13 *State Engineer v. Sustacha*, and *State v. Sixth Judicial Dist. Ct.* confirm that although the
14 decree court retains jurisdiction over subsequent disputes, including contempt proceedings
15 and disputes about the overuse of water, such disputes are not part of the original
16 adjudication. There is simply no basis for any of the Respondents to argue that every
17 future dispute that directly or indirectly involves the waters of Sheridan Creek must be
18 brought before the Honorable David Gamble in Department I of the Ninth Judicial District
19 Court as part of the adjudication, Case No. 08-CV-0363. Those matters are prosecuted as
20 separate cases.
21
22

23 In other words, Bentley does not challenge the proposition that disputes about the
24 Diversion Agreement or overuse of water from the North Branch of Sheridan Creek should
25 be brought in the Ninth Judicial District Court. However, the sole purpose of the
26 pending adjudication is to determine the relative rights of the respective claimants.
27
28

1 NRS 533.090(1). Once that adjudication is completed, any further disputes should be
2 commenced as separate proceedings, not as part of a never-ending adjudication process.

3 **E. Real Parties Cannot Stop Bentley's Diversions**

4 The division of water from the streams involved in a water rights adjudication shall
5 be made by the State Engineer in accordance with the [final] order of determination while
6 the exceptions and hearings thereon are pending. NRS 533.230. The effect of the [final]
7 order of determination can only be stayed upon the posting of a bond by the party
8 requesting the stay. NRS 533.235. Bentley has previously characterized Real Parties'
9 efforts to enjoin its diversions as a form of request for preliminary injunction, while
10 avoiding the requirement to post a bond. The lower court proceeded to enjoin Bentley's
11 diversions, anyway. That is the issue on appeal in Case No. 56551. Now, there is
12 evidence that the seepage from Bentley's ponds is well within its allocated amount; thus,
13 there is no support for Real Parties' request or basis to further enjoin Bentley's further
14 diversion. Real Parties are simply wrong when they argue that Bentley's diversions violate
15 the FOD. The FOD specifically grants Bentley water rights appurtenant to 12.93 approved
16 acres, at a duty of 4 AFA per acre. The rotation schedule being advocated by the Real
17 Parties interferes with these diversions, frustrates the FOD, and changes the status quo.

18 **F. The Diversion Agreement Does Not Conflict With the FOD**

19 Real Parties suggest that the FOD contains findings that override or nullify the
20 Diversion Agreement which is the subject of the quiet title action that Real Parties are
21 pursuing through their affirmative defenses. These suggestions include multiple
22 statements that "the findings of the state engineer are entitled to the presumption of
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1 correctness . . .” (Answer at p.13, ll.7-8; p.17, ll.26-27). Real Parties go so far as to
2 suggest that Bentley has to “post a bond to stay the Final Order of Determination”
3 (Answer at p.1, ll.17-18). Real Parties do so as a sort of inchoate argument in favor of
4 ancillary jurisdiction -- essentially, that the lower court should be able to decide all matters
5 that impact the FOD. In fact, the FOD does not address the subject Diversion Agreement
6 in any way, shape, or form, and does not preclude such private agreement. Rather, Real
7 Parties are attempting to deny Bentley’s authorized diversions in violation of the FOD.
8

9
10 **G. Real Parties Are Not Aligned With the State Engineer**

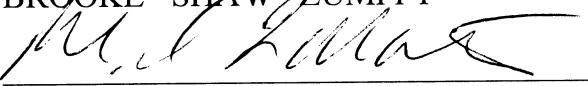
11 Real Parties repeat multiple times that they “are aligned with the State Engineer and
12 support the Final Order of Determination . . .” (Answer at p.6, ll.11-13; p.7, ll.7-8).
13 Real Parties make this argument to suggest that the State Engineer is opposed to the
14 Diversion Agreement and that because the FOD constitutes the complaint, their affirmative
15 defenses can relate back to the FOD. This is patently false. The FOD does not address the
16 Diversion Agreement in any way, shape, or form, and the State Engineer has gone out of
17 his way to explain that he views this dispute as a private dispute between Bentley and the
18 Real Parties. The State Engineer acknowledges that the Diversion Agreement “may be
19 beyond the scope of the adjudication” (App. Vol. 3 at 541:3-7). The State Engineer even
20 acknowledged in his Motion to Intervene that he “will not take a position on the
21 Agreement” or “determine contested issues concerning title to water” (Motion at p.2, ll.19-
22 23). As such, the affirmative defenses filed by the Real Parties concerning the
23 enforceability the Diversion Agreement, the pond permits, and the other issues, do not
24 have the support of the State Engineer. Real Parties are not and cannot be aligned with the
25
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1 State Engineer in their efforts to prevent diversions that the State Engineer already
2 approved in the FOD.

3 **VI. CONCLUSION**

4 In conclusion, this Court should enter the writ mandating the lower court to grant
5 Bentley's Motion to Dismiss Real Parties' Initial Pleading and prohibiting the lower court
6 from proposing a rotation schedule.
7

8 DATED this 26th day of October 2010.

9
10 BROOKE · SHAW · ZUMPFT
11 By: 
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15 (775) 782-7171/(775) 782-3081 (Fax)
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VERIFICATION

STATE OF NEVADA)
) ss.
COUNTY OF DOUGLAS)

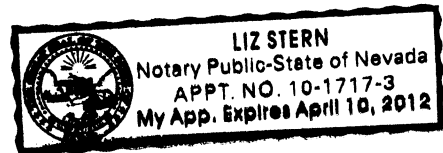
MICHAEL L. MATUSKA, being first duly sworn, deposes and says:

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 26th day of October 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 20th day of October 2010, I served a true and correct copy of the preceding document entitled **REPLY TO ANSWERS** addressed to:

William E. Nork 825 West 12 th Street Reno, NV 89503	Thomas J. Hall, Esq. 305 South Arlington Avenue P.O. Box 3948 Reno NV 89505-3948
Bryan L. Stockton, Esq. Senior Deputy Attorney General 100 North Carson Street Carson City NV 89701	

☒ **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