

EXHIBIT 2

EXHIBIT 2

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IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR DOUGLAS COUNTY

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 Case No.: 08-CV-0363-D
Creek, and Bulls Canyon, Stutler Creek
(aka Stattler Creek), Sheridan Creek, Dept. No.: I
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.

REPLY IN SUPPORT OF MOTION TO INTERVENE

Comes now, DONALD S. FORRESTER and KRISTINA M. FORRESTER,
HALL RANCHES, LLC, a Nevada Limited Liability Company, THOMAS J.
SCYPHERS and KATHLEEN M. SCYPHERS, FRANK SCHARO, SHERIDAN CREEK
EQUESTRIAN CENTER, LLC, a Nevada Limited Liability Company, and
RONALD R. MITCHELL and GINGER G. MITCHELL ("Intervenors"), by
and through their counsel, THOMAS J. HALL, ESQ., in their
support of their Motion to Intervene, filed herein on April 10,
2009, reply as follows:

1 A. The Court Has Already Indicated A Preference For
2 Intervention.

3 At the hearing held April 1, 2009, this Court noted that
4 all interested parties who sought to participate in the
5 adjudication procedure must file a Motion to Intervene, and
6 further, that the Court would liberally grant such Motions. For
7 that reason, the Intervenors filed an abbreviated Motion to
8 Intervene pursuant to NRS 533.170 and NRCP Rule 24. In addition,
9 they incorporated in their Motion the Reply to Exceptions by
10 Bentley to Final Order of Determinations filed herein on March
11 27, 2009. To the extent that Bentley now claims that Reply to be
12 a "rogue" document, a copy is attached hereto as Exhibit 1 and
13 incorporated herein by this reference.
14

15 In an attempt to conserve judicial resources, given this
16 Court's previous review and comments, a full brief was not
17 submitted and is not deemed essential to the Motion to
18 Intervene.
19

20 B. The Proposed Intervenors Are Landowners And
21 Water Right Holders.

22 The proposed Intervenors are landowners and water right
23 holders that own land downstream from the Bentley Property. They
24 also hold water rights in Sheridan Creek historically used to
25 irrigate their lands. They are obviously and necessarily
26 interested in the diversions made upstream by Bentley in
27
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violation of custom, practice and decrees. A tabulation of
Intervenors' land holdings are set forth next, to wit:

<u>Intervenor</u>	<u>APN</u>	<u>Acreage</u>
Hall Ranches, LLC	1219-14-001-003	23.800
Thomas J. Scyphers and Kathleen M. Scyphers	1219-14-001-004	13.010
Frank Scharo	1219-14-001-005	12.990
Sheridan Creek Equestrian Center Glenn Roberson	1219-14-001-008	35.960
Donald S. and Kristina Forrester	1219-14-001-012	59.620
Ronald R. and Ginger G. Mitchell	1219-14-001-009	10.020
	1219-14-001-010	10.480
	1219-14-001-011	<u>10.370</u>
Total Acreage of Intervenors		176.43

C. Legal Authorities Support Intervention.

The Nevada Civil Practice Manual discusses intervention
under Section 5.23 and includes the following:

Intervention of right has been allowed where the
applicant claimed ownership in land involved in the
action. *Bartlett v. Bishop of Nev.*, 59 Nev. 283, 91
P.2d 828 (1939). It has been denied where the claimant
would not gain or lose in a pecuniary sense. See,
Stephens v. First Nat'l Bank of Nev., 64 Nev. 292, 182
P.2d 146 (1947) (holding that the United States has no
right to intervene in action between private parties
to determine ownership of savings bonds). By contrast,
permissive intervention has been allowed, absent a
pecuniary interest, when the public interest can be
benefited. *Azbill v. Fisher*, 84 Nev. 414, 442 P.2d 916
(1968) (allowing newspaper reporter to intervene in
mandamus proceeding to determine the constitutionality
of a statute permitting exclusion of general public,

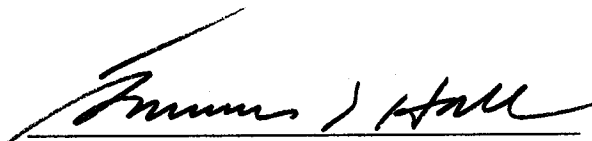
1 including reporters, from the courtroom, because the
2 "principle involved is in the public interest").

3 Because Bentley is over-using the limited water resources
4 to the detriment of proposed Intervenor, it is clear they have
5 standing to petition this Court for intervention. Furthermore,
6 proposed Intervenor have not waived any objections to Bentley's
7 objections at all.

8 WHEREFORE, Intervenor request the Court grant their Motion
9 to Intervene and set the matter for a pre-trial conference as
10 indicated on April 1, 2009.

11 Respectfully submitted this 23rd day of April, 2009.
12
13

14 LAW OFFICES OF THOMAS J. HALL

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Sharon/HallRanches/C'ville/SheridanCr/SupportMotionIntervene.reply

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AFFIRMATION

(Pursuant to NRS 239B.030)

Case No. 08-CV-0363-D

The undersigned does hereby affirm that the preceding document, **Reply in Support of Motion to Intervene**, does not contain the social security number of any person.

DATED this 23rd day of April, 2009.

LAW OFFICES OF THOMAS J. HALL



THOMAS J. HALL, ESQ.

EXHIBIT 1

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1 Case No.: 08-CV-0363-D

2 Dept. No.: I

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DOUGLAS COUNTY
DISTRICT COURT CLERK

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4 IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
5
6 IN AND FOR DOUGLAS COUNTY

7 In the Matter of the Determination of
8 the Relative Rights in and to the
9 Waters of Mott Creek, Taylor Creek,
10 Cary Creek (aka Carey Creek), Monument
11 Creek, and Bulls Canyon, Stutler Creek
12 (aka Stattler Creek), Sheridan Creek,
13 Gansberg Spring, Sharpe Spring,
14 Wheeler Creek No., 1 Wheeler Creek
15 No. 2, Miller Creek, Beers Spring,
16 Luther Creek and Various Unnamed
17 Sources in Carson Valley, Douglas
18 Valley, Nevada.

19
20 ORDER FOR DIVISION OF WATER

21 Upon the Motion for Division of Water filed herein on
22 January 8, 2010, by DONALD S. FORRESTER and KRISTINA M.
23 FORRESTER, HALL RANCHES, LLC, a Nevada Limited Liability
24 Company, THOMAS J. SCYPHERS and KATHLEEN M. SCYPHERS, FRANK
25 SCHARO, SHERIDAN CREEK EQUESTRIAN CENTER, LLC, a Nevada Limited
26 Liability Company, and RONALD R. MITCHELL and GINGER G. MITCHELL
27 ("Intervenors"), and upon a hearing having been held in this
28 matter on May 17, 2010, with all parties and their counsel
present and following the presentation of evidence and argument
by counsel, the Court entered its oral order for the Division of
Water and the implementation of a Rotation Schedule, and good
cause appearing,

1 NOW THEREFOR, the Court finds and concludes as follows:

2 1. NRS 533.230 provides as follows:

3 533.230. Division of water by State Engineer during
4 time order of determination is pending in district
5 court.

6 From and after the filing of the order of
7 determination, evidence and transcript with the county
8 clerk, and during the time the hearing of the order is
9 pending in the district court, the division of water
from the stream involved in such determination shall
be made by the State Engineer in accordance with the
order of determination.

10 2. The Final Order of Determination dated August 14,
11 2008, on page 193 and 194, under Table 6 for Sheridan Creek -
12 North and South Diversions, states as follows:

13 The diversion rates for the north and south split of
14 Sheridan Creek are based on a spring and early summer
15 average stream flow of 3.5 c.f.s. Flow and diversion
16 rates during periods of drought and middle to late
17 irrigations season will generally be less than the
18 rates determined in the Preliminary Order of
19 Determination. Therefore, all parties will have to
20 share the water shortage during periods of low flow.
The total diversion from either the north or south
split can be used in its entirety in a rotation system
of irrigation.

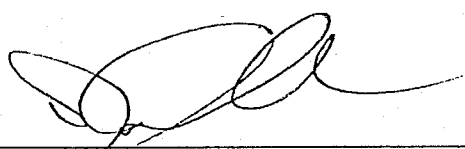
21 3. The Court finds the 21 Day Rotation Schedule attached
22 hereto as Exhibit 1 is a fair and equitable Rotation Schedule *for*
the 2010 irrigation season.

23 4. The Court finds the parties should be ordered to
24 adhere to the 21 Day Rotation Schedule until further order of
25 this Court.

26 IT IS HEREBY ORDERED, that the State Engineer make division
27 of the water of Sheridan Creek in accordance with the Final
28 Order of Determination dated August 14, 2008 and specifically in

1 accordance with the attached 21 Day Rotation Schedule commencing
2 immediately and continuing until further order of this Court.

3 DATED this 18 day of June, 2010.

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6 _____
7 District Judge
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14 Submitted by:
15 Thomas J. Hall, Esq.
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21 Attorney for Intervenors
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SHERIDAN CREEK ADJUDICATION

21 DAY ROTATION SCHEDULE

The following property owners are entitled to receive water from Sheridan Creek in rotation. The list shows acreage to be supplied water from Sheridan Creek and may not include total acreage owned due to other rights from Park & Bull Ditch.

Group	Owner's Name	Acreage	Percentage of Total	21 Day Rotation	Group Combined
A	J.W. Bentley	12.93	7.67%	1.6	<u>1.6</u>
B	Hall Ranches, LLC	22.03	13.06%	2.7	
B	Thomas Scyphers	9.63	5.54%	1.2	
B	Frank Scharo	7.26	4.28%	0.9	<u>4.8</u>
C	Sheridan Equestrian, LLC	11.31	6.64%	1.4	
C	Ronald Mitchell	10.37	6.15%	1.3	<u>2.7</u>
D	Donald Forrester	49.56	29.40%	6.2	
D	Ernest Pestana	23.76	13.66%	2.9	
D	Allan D. Sapp (currently not in rotation)	5.10			
D	Daniel Barden (currently not in rotation)	7.23	4.29%	0.9	
D	Joy Smith a/k/a Joy Whipple (currently not in rotation)	<u>17.71</u>	<u>9.31%</u>	1.9	<u>11.9</u>
	Total acreage	176.61	100.00%	21.0	21.0
	with water rights (not including Lodato)				

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3 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

Electronically Filed
Sep 22 2010 04:38 p.m.
Tracie K. Lindeman

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5 In the Matter of the Determination of the)
6 Relative rights in and to the Waters of Mott)
7 Creek, Taylor Creek, Cary Creek (AKA Carey)
8 Creek), Monument Creek, and Bulls Canyon,)
9 Stutler Creek (AKA Stattler Creek), Sheridan)
10 Creek, Gansberg Spring, Sharpe Spring,)
11 Wheeler Creek No. 1, Wheeler Creek No. 2,)
12 Miller Creek, Beers Spring, Luther Creek and)
13 Various Unnamed Sources in Carson Valley,)
14 Douglas County, Nevada,)

Case No. 56551

Dist. Court Case No. CV 0363

11 J.W. BENTLEY AND MARYANN BENTLEY,)
12 TRUSTEES OF THE BENTLEY FAMILY 1995)
13 TRUST,)

Appellants,)

14 vs.)

15 THE STATE OF NEVADA OFFICE OF THE)
16 STATE ENGINEER, HALL RANCHES, LLC;)
17 THOMAS J. SCYPHERS; KATHLEEN M.)
18 SCYPHERS; FRANK SCHARO; SHERIDAN)
19 CREEK EQUESTRIAN CENTER, LLC;)
20 DONALD S. FORRESTER; KRISTINA M.)
21 FORRESTER; RONALD R. MITCHELL; AND)
22 GINER G. MITCHELL,)

23 Respondents.)

24
25 **Appeal from the Ninth Judicial District of the State of Nevada**
26 **In and for Douglas County**
27 **The Honorable David R. Gamble, District Judge**
28

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

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

3 Whenever it appears to the State Engineer that any litigation,
4 whether now pending or hereafter brought, may adversely affect
5 the rights of the public in water, the State Engineer shall request
6 the Attorney General to appear and protect the interests of the
7 State.

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

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

12 **AND/OR WRIT OF MANDAMUS**

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

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

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

22 Bentley alleges that the “statute does not authorize the State Engineer to impose a
23 rotation schedule over objecting parties.” Petition For Writ Of Prohibition And/Or Writ Of
24 Mandamus (Petition) at 24, ll. 17-18. The State Engineer did not impose the rotation
25 schedule. The district court ordered the rotation schedule. Exhibit 1. The State Engineer
26 administers the rotation schedule in his role as water commissioner on behalf of the district
27 court. See, *South Fork Band of Te-Moak Tribe v. Sixth Judicial District Court*, 116 Nev. 805,
28 810, 7 P.3d 455, 458 (2000) (“The Sixth Judicial District Court has the authority to hold in
contempt those who interfere with or frustrate the actions of the state engineer or water

commissioners in the administration of the Humboldt Decree. ” *Citing, State v. District Court*, 52 Nev. 270, 286 P. 418 (1930)). The district court, as decree court has jurisdiction to administer the waters of Sheridan Creek. *State v. Sustacha*, 108 Nev. 223, 226, 826 P.2d 959, 961 (1992)(“Because the Humboldt Decree adjudicates Humboldt Stream System water rights and was issued by the Sixth Judicial District Court, we conclude that litigation concerning Humboldt Stream System water rights should be carried out and resolved only in the Sixth Judicial District Court.”).

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

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

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

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

///

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

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

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

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

17 NRS 533.240 Provides that “In any suit brought in the district court for the
18 determination of a right or rights to the use of water of any stream, all persons who claim the
19 right to use the waters of such stream and the stream system of which it is a part shall be
20 made parties.” Thus, the interveners are already parties to the adjudication by statute and
21 were provided notice of the final order of determination by the State Engineer just like all other
22 claimants. The position of the State Engineer is that all water right claimants are parties to the
23 adjudication and must be allowed to defend their water rights if they feel that Bentley’s claims
24 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 can allow Bentley to consumptively use the water of the other parties.

Submitted this 22nd day of September 2010.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ Bryan L. Stockton
BRYAN L. STOCKTON
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Senior Deputy Attorney General
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Fax: (775) 684-1103
Attorneys for Respondent

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 22nd day of September, 2010.

11 CATHERINE CORTEZ MASTO
12 Attorney General

13 By: /s/ Bryan L. Stockton
14 BRYAN L. STOCKTON
15 Nevada State Bar #4764
16 Senior Deputy Attorney General
17 100 North Carson Street
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19 (775) 684-1228
20 *Attorneys for Respondent*

1 **CERTIFICATE OF MAILING**

2 I, Sandie Geyer, certify that I am an employee of the Office of the Attorney General,
3 State of Nevada, and that on this 22nd day of September, 2010, I filed and served the
4 foregoing **MOTION TO INTERVENE**, through the e-filing system at nvcourts:

5 Brook Shaw Zumpft
6 Michael Matuska, Esq.
7 P.O. Box 2860
8 Minden, Nevada 89423
9 *Attorneys for Appellants*
10 *J.W. Bentley and Maryann Bentley*
11 *Trustees of the Bentley Family Trust 1995 Trust*

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Frank Scharo; Sheridan Creek
Equestrian Center, LLC;
Donald S. Forrester; Kristina M.
Forrester; Ronald R. Mitchell; and
Ginger G. Mitchell

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15 /s/ Sandie Geyer
16 Sandie Geyer, Legal Secretary II
17 Employee of the Nevada Attorney General
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