

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE
DETERMINATION OF THE RELATIVE
RIGHTS IN AND TO THE WATERS OF
MOTT CREEK, et al.

Case No.: 56551

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Tracie K. Lindeman

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

Appellants,

v.

THE STATE OF NEVADA, OFFICE OF
THE STATE ENGINEER; HALL
RANCHES, LLC; THOMAS J.
SCYPHERS; KATHLEEN M.
SCYPHERS; FRANK SCHARO;
SHERIDAN CREEK EQUESTRIAN
CENTER, LLC; DONALD S.
FORRESTER; KRISTINA M.
FORRESTER; RONALD R. MITCHELL;
AND GINGER G. MITCHELL,

Respondents.

PARTIAL OPPOSITION TO MOTION TO INTERVENE

BROOKE · SHAW · ZUMPF
Michael L. Matuska, Esq./SBN 5711
1590 Fourth Street/P.O. Box 2860
Minden, Nevada 89423
(775) 782-7171–Phone/(775) 782-3081–Fax

Thomas C. Hall, Esq.
305 South Arlington Avenue
P.O. Box 3948
Reno, Nevada 89505
(775) 348-7011 – Phone/(775) 348-7211-Fax

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

Attorneys for Respondents
HALL RANCHES, LLC; THOMAS J.
SCYPHERS; KATHLEEN M.
SCYPHERS; FRANK SCHARO;
SHERIDAN CREEK EQUESTRIAN
CENTER, LLC; DONALD S.
FORRESTER; KRISTINA M.
FORRESTER; RONALD R. MITCHELL;
AND GINGER G. MITCHELL

BROOKE · SHAW · ZUMPF
POST OFFICE BOX 2860
MINDEN, NEVADA 89423
(775) 782-7171

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ATTORNEY GENERAL, STATE OF NEVADA
Bryan L. Stockton, Deputy Attorney General
100 North Carson Street
Carson City, Nevada 89701
(775) 684-1228 - Phone/(775) 684-1103 – Fax

Attorneys for Respondents
THE STATE OF NEVADA,
OFFICE OF THE STATE ENGINEER

1 COME NOW J.W. BENTLEY and MARYANN BENTLEY, Trustees of the
2 Bentley Family 1995 Trust ("Bentley"), by and through their counsel of record,
3 Michael L. Matuska, Brooke · Shaw · Zumpft, and hereby file this Partial Opposition to the
4 Motion of the Nevada State Engineer to Intervene.
5

6 I. INTRODUCTION

7 This is an appeal from an interlocutory order in a water rights adjudication case.
8 Bentley contends that the Order has the effect of a temporary restraining order or
9 preliminary injunction. The Nevada State Engineer initiated the adjudication in
10 conformance with statutory procedures and is obviously an interested party. As such,
11 Bentley is not opposed to the Motion to Intervene filed the Nevada State Engineer. In fact,
12 as identified in the docketing statement, Bentley already considers the Nevada State
13 Engineer to be a party, even if not stated as such on the Case Appeal Statement.
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16 However, the Motion to Intervene is extremely confusing, but seems to request
17 intervention on issues that are not raised in this appeal. As such, Bentley opposes the
18 intervention to the extent the Nevada State Engineer seeks to raise new issues by way of
19 intervention.
20

21 II. BACKGROUND

22 The lower court entered an Order on 18 June 2010, which required the Nevada State
23 Engineer to implement a rotation schedule for the water of the North Branch of Sheridan
24 Creek ("Order"). Bentley contends on appeal that the Order is a form of temporary
25 restraining order or preliminary injunction in that it restrains Bentley's right to divert the
26 water allocated under the Final Order of Determination, as well as further diversion rights
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1 conveyed by way of a private Water Diversion and Use Agreement recorded in the Official
2 Records of Douglas County, Nevada on 27 March 1987 ("Diversion Agreement"). A copy
3 of that Order was provided with the Docketing Statement and by the Nevada State
4 Engineer as Exhibit 1 to its Motion to Intervene. The respondents, with the exception of
5 the Nevada State Engineer, have initiated a collateral attack on the Diversion Agreement.
6 They did so by way of "affirmative defenses" rather than an actual pleading. The lower
7 court's refusal to dismiss that collateral attack is the subject of the Bentley's original writ
8 proceeding now pending before this Court as Case No. 56351. The support for the writ
9 proceeding is found in the Nevada Revised Statutes, which limit the issues to be presented
10 to the lower court in a water rights adjudication proceeding, and in *Smith v. Eighth Judicial*
11 *Dist. Ct.*, 113 Nev. 1343, 950 P.2d 280, which confirms that "affirmative defenses" are not
12 a pleading.
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16 In contrast, this appeal concerns the improperly entered Order requiring the Nevada
17 State Engineer to implement a rotation schedule. Bentley's contentions concerning the
18 Order are clearly spelled out in the Docketing Statement:
19

- 20 1. Whether the Order for a rotation schedule is a form of temporary
21 restraining order or preliminary injunction;
- 22 2. Whether the Appellant should have been granted the due process and
23 procedural safeguards required by NRCP 65 prior to the issuance of the
24 order;
- 25 3. Whether there is any statutory basis for the Order;

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1 4. Whether Respondent failed to join necessary parties to this sub-
2 proceeding;

3 5. Whether the preliminary injunction alters the status quo.
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5 **III. ANALYSIS**

6 **1. ISSUE NO. 1: "State Engineer Takes No Position on the Diversion**
7 **Agreement."**

8 In its Issue No. 1, the Nevada State Engineer concedes that it is not taking sides in
9 the collateral attack over the Diversion Agreement. Accordingly, because the collateral
10 attack on the Diversion Agreement is not part of this appeal and the Nevada State Engineer
11 is not taking sides on that issue, the Nevada State Engineer is not entitled to intervene on
12 that issue.
13

14 **2. ISSUE NO. 2: "The State Engineer Did Not Impose the Rotation Schedule."**

15 In its Issue No. 2, the Nevada State Engineer argues that "The State Engineer did
16 Not Impose the Rotation Schedule." This is only partially correct, but is a distinction
17 without a difference. The State Engineer even attached a copy of the 18 June 2010 Order
18 that is the subject of this appeal as its Exhibit 1. ("IT IS HEREBY ORDERED, that the
19 State Engineer make division of the water of Sheridan Creek in accordance with the Final
20 Order of Determination dated August 14, 2008 and specifically in accordance with the
21 21 Day Rotation Schedule commencing immediately and continuing until further order of
22 this Court." (Order at p.2, l.26 – p.3, l.2) It does not matter whether the rotation schedule
23 was imposed by the lower court or by the Nevada State Engineer upon order from the
24 lower court. In this appeal, Bentley challenges the Order as exceeding the limited
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1 jurisdiction of the lower court in a water rights adjudication and as an improper temporary
2 restraining order and preliminary injunction.

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4 The Nevada State Engineer raises a number of additional points under the heading
5 of its Issue No. 2, and seems concerned that this appeal will interfere with its enforcement
6 powers or powers to administer the Final Order of Determination. In fact, this appeal does
7 not challenge the State Engineer's enforcement powers regarding the Final Order of
8 Determination or even the need for the State Engineer to implement the rotation schedule
9 that is the subject of the Order and this appeal. Accordingly, the State Engineer's
10 arguments on these points, suggestion of contempt, and citations to *South Fork Bank of Te-*
11 *Moak Tribe v. Sixth Judicial Dist. Ct.*, 116 Nev. 805, 7 P.3d 455 (2000), *State v. Sixth*
12 *Judicial Dist. Ct.*, 52 Nev. 270, 286 P.418 (1930), and *State Engineer v. Sustacha*,
13 108 Nev. 223, 826 P.2d 959 (1992) are gratuitous and do not create a need for intervention
14 on those issues.^{1, 2, 3}

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20 ¹ *South Fork Bank of Te-Moak Tribe v. Sixth Judicial Dist. Ct.* concerned contempt
21 proceedings brought against the tribe, a peace offer, and a tribal chairman, following
22 arrests of the water commissioners by tribal police. That case is irrelevant to the present
23 appeal of an order directing the Nevada State Engineer to impose a rotation schedule and
24 overriding a private diversion agreement.

25 ² *State v. Sixth Judicial Dist. Ct.* concerned an original writ petition brought by the
26 Nevada State Engineer against the Sixth Judicial District Court to compel the court to
27 pursue contempt proceedings against two water rights holders who blew up a diversion
28 dam on the Humboldt River system that was part of the Humboldt Decree.

³ *State v. Sustacha* concerned an appeal from an order entered by the Fourth Judicial
District Court involving waters subject to the Humboldt Decree. Part of the order reversed
an order of contempt entered by the Sixth Judicial District Court, which was the decree
court for the Humboldt Decree.

1 In contrast, Bentley's contentions concerning the Order are clearly spelled out in the
2 Docketing Statement and recited above. Nowhere has Bentley challenged the
3 administrative authority of the Nevada State Engineer; nor is there any suggestion of
4 contempt. Therefore, it is impossible for Bentley to be frustrating the State Engineer's
5 enforcement powers as suggested by the reference to contempt.
6

7 However, this appeal challenges the assertion of the lower court and repeated by the
8 State Engineer, that "the district court has authority to order both the rotation schedule and
9 the seepage test." (Motion at p.3, lls.11-12) The limited scope of a water rights
10 adjudication proceeding is set by statute. It is noteworthy that the Nevada State Engineer
11 did not cite any statutes to support its argument that a seepage report or rotation schedule
12 can or should be part of the adjudication. There simply is no statutory basis for the lower
13 court to make a rotation schedule or seepage report part of the Final Order of
14 Determination. Regardless, the Nevada State Engineer does not need to intervene to
15 address the scope of the lower court's statutory authority. To the extent this Court feels
16 that intervention is appropriate, intervention should be limited to this issue.
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20 **3. ISSUE NO. 3: "Excessive Consumption of Water, if Any, is**
21 **Within the Jurisdiction of the Decree Court."**

22 The State Engineer argues in its Issue No. 3 that "[Bentley's] excessive consumption
23 of water, if any, is within the jurisdiction of the decree court." Ironically, the State
24 Engineer makes this argument by reference to *Smith v. Eighth Judicial District Court*, 113
25 Nev. 1343, 950 P.2d 280 (1997), which is the case that most forcefully militates in favor of
26 granting Bentley's Petition in Case No. 56351 and dismissing the collateral attack on the
27 Diversion Agreement. Moreover, Issue No. 3 is irrelevant as neither this appeal nor the
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1 related Petition concern an allegation of excessive consumption of water. Likewise,
2 Bentley is not challenging the jurisdiction of the decree court to hear such a challenge.
3 Rather, this appeal concerns the jurisdiction of the decree court to order a rotation schedule
4 as part of the adjudication process, especially when doing so overrides a private Diversion
5 Agreement. The Petition concerns the jurisdiction of the decree court to hear a quiet title,
6 collateral attack on the Diversion Agreement as part of the adjudication process, especially
7 when the action was commenced by “affirmative defenses.”
8

9
10 The relevant cases to the State Engineer’s arguments are the trio of cases concerning
11 the Humboldt River decree that were cited in the preceding section. Those cases resolve
12 two (2) of the disputed issues in this case in favor of Bentley. First, *State Engineer v.*
13 *Sustacha* and *State v. Sixth Judicial Dist. Ct.* confirm that the remedy for an alleged
14 overuse or misappropriation of water is to install diversion devices (i.e., a dam) and a
15 tamper-proof measuring device – not to impose a rotation schedule.
16

17 Second, *South Fork Band of Te-Moak Tribe v. Sixth Judicial Dist. Ct.*, *State*
18 *Engineer v. Sustacha*, and *State v. Sixth Judicial Dist. Ct.* confirm that although the decree
19 court retains jurisdiction over subsequent disputes, including contempt proceedings and
20 disputes about the overuse of water, such disputes are not part of the original adjudication.
21 There is simply no basis for any of the Respondents to argue that every future dispute that
22 directly or indirectly involves the waters of Sheridan Creek must be brought in Dept. I of
23 the Ninth Judicial District Court as part of the adjudication, Case No. 08-CV-0363.
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26 In other words, Bentley does not challenge the proposition that disputes about the
27 Diversion Agreement or overuse of water from the North Branch of Sheridan Creek should
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1 be brought in the Ninth Judicial District Court. However, the sole purpose of the pending
2 adjudication is to determine the relative rights of the respective claimants. NRS 533.090(1)
3 Once that adjudication is completed, any further disputes should be commenced as separate
4 proceedings, not as part of a never-ending adjudication process.
5

6 **4. ISSUE NO. 4: “Interveners Are Already Parties to the Adjudication.”**

7 Bentley agrees with the State Engineer’s Issue No. 4. The other named
8 Respondents (Intervenor in the case below) were already parties to the adjudication by
9 operation of the Nevada Revised Statutes and were served and noticed like all other water
10 rights claimants. Accordingly, there was no need for them to intervene to defend their
11 rights in adjudication.
12

13 In fact, the Intervenor did not contest the water rights adjudicated to them or to
14 Bentley in the Final Order of Determination. Rather, they intervened to try to quiet title to
15 the Diversion Agreement by way of affirmative defenses (that dispute is the subject of the
16 Petition) and to have the lower court impose a rotation schedule which effectively nullified
17 the Diversion Agreement. That dispute is the subject of this appeal. Those issues are
18 simply not part of the adjudication process.
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21 **5. Other**

22 The State Engineer attached a document entitled “Reply in Support of Motion to
23 Intervene” as Exhibit 2 to its Motion to Intervene. Bentley does not understand the
24 purpose of that document, as it was not referenced in the State Engineer’s Motion.
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1 IV. CONCLUSION

2 In conclusion, this Court should deny the State Engineer's Motion to Intervene to
3 the extent it seeks intervention on issues that are not raised in this appeal.

4 DATED this 29th day of September 2010.

6 BROOKE · SHAW · ZUMPFET

7 By: 

8 Michael L. Matuska, Esq.

9 State Bar No. 5711

10 1590 4th Street/P.O. Box 2860

11 Minden NV 89423

12 (775) 782-7171

13 (775) 782-3081 (Fax)

BROOKE · SHAW · ZUMPF
POST OFFICE BOX 2860
MINDEN, NEVADA 89423
(775) 782-7171

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 29th day of September 2010,
by MICHAEL L. MATUSKA.


NOTARY PUBLIC



CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of BROOKE · SHAW · ZUMPF and that on the 29th day of September 2010, I served a true and correct copy of the preceding document entitled **PARTIAL OPPOSITION TO MOTION TO INTERVENE** addressed to:

William E. Nork
825 West 12th 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