

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

ORIGINAL

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

Supreme Court No. 56551

District Case No. CV0363

11 J.W. Bentley and Maryann Bentley,
12 Trustees of the Bentley Family
13 1995 Trust,

14 Appellants,

15 vs.

16 The State of Nevada Office of the
17 State Engineer; Hall Ranches, LLC,
18 Thomas J. Scyphers; Kathleen M.
19 Scyphers; Frank Scharo; Sheridan
20 Creek Equestrian Center, LLC;
21 Donald S. Forrester; Kristina M.
22 Forrester; Ronald R. Mitchell;
23 and Ginger G. Mitchell,

24 Respondents.

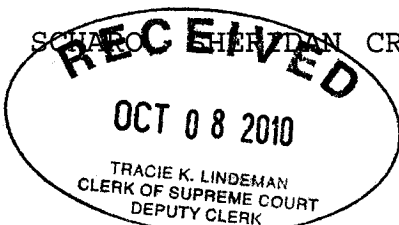
FILED

OCT 08 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

25 REPLY IN SUPPORT OF MOTION TO DISMISS

26 COME NOW, Respondents DONALD S. FORRESTER and KRISTINA M.
27 FORRESTER, HALL RANCHES, LLC, a Nevada Limited Liability
28 Company, 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 ("Respondents"), by and through their counsel, THOMAS J. HALL, ESQ., and file their Reply in Support of Motion to Dismiss as follows:

A. The Appellants And The Respondents Are Landowners And Water Right Holders.

J.W. Bentley and Maryann Bentley, as Trustees of the Bentley Family 1995 Trust, are landowners and water right holders as set forth in the Final Order of Determination, to wit (Exhibit 1, 114-117):

<u>Owner</u>	<u>APN</u>	<u>Acreage</u>	<u>Proofs</u>
J.W. Bentley			V-06305
Maryann Bentley,	1219-14-001-013	12.93	V-06306
Trustees			V-06307
			V-06308

The Respondents own ranch land located downstream from the Bentley Property. They also hold water rights in Sheridan Creek historically used to irrigate their ranch lands. They are obviously and necessarily interested in the excessive diversions made upstream by the Bentleys in violation of custom, practice, agreements and decrees. A tabulation of the Respondents' land and water rights holdings are set forth in the Final Order of Determination as follows (Exhibit 1, 109-112, 132-133 and 136-137):

<u>Real Party</u>	<u>APN</u>	<u>Acreage</u>	<u>Proofs</u>
Donald S. and	1219-14-001-012	59.620	V-06309
Kristina Forrester			V-06310

<u>Real Party</u>	<u>APN</u>	<u>Acreage</u>	<u>Proofs</u>
Hall Ranches, LLC	1219-14-001-003	23.800	V-06340 V-06341
Thomas J. Scyphers and Kathleen M. Scyphers	1219-14-001-004	13.010	V-06311 V-06312
Frank Scharo	1219-14-001-005	12.990	V-06311 V-06312
Sheridan Creek Equestrian Center Glenn Roberson	1219-14-001-008	35.960	V-06310
Ronald R. and Ginger G. Mitchell	1219-14-001-009 1219-14-001-010 1219-14-001-011	10.020 10.480 <u>10.370</u>	V-06336 V-06337
Total Acreage of Respondents		176.430	

B. Bentleys' Notice Of Exceptions.

In their Notice of Exceptions and Exceptions to Final Order of Determination filed with the District Court on December 11, 2008, ("Exceptions"), the Bentleys state in EXCEPTION NO. 1, DIVERSION SCHEDULE, PROOFS V-06307 and V-06308, that they believe the Office of the State Engineer has created a Diversion Schedule ("Diversion Schedule"), for the waters from Sheridan Creek, Stutler Creek and Gansberg Spring. Exhibit 2. The Bentleys contend they alone should not be subject to any Diversion Schedule because of a claimed preemptive Water Diversion and Use Agreement ("Diversion Agreement"), dated June 9, 1986. Exhibit 2. The Respondents believe that the claimed Diversion Agreement is unenforceable and, even if enforceable,

1 has been violated by the Bentleys and should be terminated
2 according to its terms.

3 The State Engineer lacks authority to resolve water right
4 title questions. Howell v. Ricci, 124 Nev. Adv. Op. 99, 197 P.3d
5 1044, 1047-1050 (2008). NRS 533.024(2). Therefore, the District
6 Court must resolve the title issues raised by Bentleys'
7 Exceptions in the first instance. However, the District Court
8 has yet to rule on those issues.

9
10 C. The Order For Division Of Water Was Specifically Authorized
11 By State Statute.

12 Almost a century ago in 1913, the Nevada Legislature
13 adopted the Nevada Water Code. Within this Water Code is NRS
14 533.230, which provides:

15 533.230. Division of water by State Engineer during
16 time order of determination is pending in district
17 court.

18 From and after the filing of the order of
19 determination, evidence and transcript with the county
20 clerk, and during the time the hearing of the order is
21 pending in the district court, the division of water
22 from the stream involved in such determination shall
23 be made by the State Engineer in accordance with the
24 order of determination. [Emphasis supplied.]

25 On January 8, 2010, the Respondents filed their Motion for
26 Division of Water and for Remand and Reference to State Engineer
27 for Further Evidence. Exhibit 4. The Motion was specifically
28 predicated upon NRS 533.230 providing that the Final Order of

1 Determination must be complied with pending resolution of any
2 exceptions or claims.

3 The findings of the State Engineer are entitled to the
4 presumption of correctness and that they support the decree.
5 Scossa v. Church, 46 Nev. 254, 259, 205 Pac. 518, 210 Pac. 563
6 (1923). Furthermore, NRS 533.450(9) provides:

7 9. The decision of the State Engineer shall be prima
8 facie correct, and the burden of proof shall be upon
9 the party attacking the same.

10 In Anderson Family Assocs v. State Engineer, 124 Nev. Adv.
11 Op. 17, 179 P.3d 1201, 1203 (2008), this Court held:

12 Still, because the appropriation of water in Nevada is
13 governed by statute, and the State Engineer is
14 authorized to regulate water appropriations, that
15 office has the implied power to construe the state's
16 water law provisions and great deference should be
17 given to the State Engineer's interpretation when it
18 is within the languages of those provisions.

19 In State Ex Rel. Hinckley v. District Court, 53 Nev. 343, 1
20 P.2d 105 (1931), this Court held that the waters of the Humboldt
21 River subject to an order of determination could only be
22 properly and legally distributed by the State Engineer when done
23 in accordance with the terms of the order. In the course of its
24 opinion, this Court stated (53 Nev. at 352-53):

25 In determining this question, we must look to the
26 intention of the legislature in enacting the water
27 law. In Vineyard Land & Stock Co. v. District Court,
28 42 Nev. 1, 171 Pac. 166, we held that the proceeding
under the water law is a quasi public proceeding,
wherein all claimants to the use of water of a stream
system may have their claims adjudicated, to the end
that the waters of the stream may be distributed under
public supervision without needless waste or

1 controversy. In other words, it was the intention of
2 the legislature that the people who are entitled to
3 the use of the waters of a stream system actually get
4 it without needless waste or controversy. The statute
5 must be interpreted in the light of that intention.
6 [Emphasis supplied.]

7 The Nevada Attorney General has offered the same opinion
8 that the State Engineer should distribute water of a river
9 subject to an order of determination according to that order of
10 determination until a court decree is filed. AGO 31-12 (3-10-
11 1931).

12 Here, the Bentleys have variously classified the
13 Respondents' request for the division of water according to the
14 Final Order of Determination as a request or motion for (1) a
15 temporary restraining order, (2) a preliminary injunction or (3)
16 a quiet title action. However, there has been full and exact
17 compliance with the provisions of the controlling statute, NRS
18 533.230. The non-water case of Number One Rent-A-Car v. Ramada
19 Inns, Inc., 94 Nev. 779, 587 P. 2d 1329 (1978), cited by the
20 Bentleys, has no application to this water right case. Stays may
21 only be requested pursuant to NRS 533.235.

22 The Order For Division Of Water was entered following an
23 extensive hearing on May 17, 2010. Exhibit 5. The District Court
24 specifically limited the time the Order would be in effect. See,
25 Exhibit 5, paragraph 3, which provides as follows:

26 The Court finds the 21 Day Rotation Schedule attached
27 hereto as Exhibit 1 is a fair and equitable Rotation
28 Schedule for the 2010 irrigation season. [Emphasis
supplied.]

1 Under the Final Order of Determination, the 2010 irrigation
2 season runs from April 1, 2010 to October 15, 2010. See Order of
3 Determination, Period of Use, Exhibit 1, page 94. Therefore, it
4 is unlikely that this Rotation Schedule will be in effect by the
5 time this Court hears this Interlocutory Appeal, rendering the
6 Appeal moot.
7

8 **D. The Rotation Schedule Is Authorized.**

9 As noted by the District Court in its Order, NRS 533.230
10 specifically provides as follows:

11 **NRS 533.230 Division of water by State Engineer**
12 **during time order of determination is pending in**
13 **district court.** From and after the filing of the
14 order of determination, evidence and transcript with
15 the county clerk, and during the time the hearing of
16 the order is 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.

17 The Final Order of Determination dated August 14, 2008,
18 provides as follows (Exhibit 1, pages 193-194):

19 The diversion rates for the north and south split of
20 Sheridan Creek are based on a spring and early summer
21 average stream flow of 3.5 c.f.s. Flow and diversion
22 rates during periods of drought and middle to late
23 irrigation season will generally be less than the
24 rates determined in the Preliminary Order of
25 Determination. Therefore, all parties will have to
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. [Emphasis supplied.]

26 NRS 533.075 provides as follows:

27 **NRS 533.075 Rotation in use of water.** To bring about
28 a more economical use of the available water supply,

1 it shall be lawful for water users owning lands to
2 which water is appurtenant to rotate in the use of the
3 supply to which they may be collectively entitled; or
4 a single water user, having lands to which water
5 rights of a different priority attach, may in like
6 manner rotate in use, when such rotation can be made
7 without injury to lands enjoying an earlier priority,
8 to the end that each user may have an irrigation head
9 of at least 2 cubic feet per second.

10 Since 1913, it has been the policy of Nevada Water Law to
11 encourage rotation as announced by the Nevada Legislature. It is
12 the basis upon which the Final Order of Determination was made
13 as cited above, and is entirely consistent with prudent and
14 practical water distribution practices in the arid west,
15 including Nevada.

16 In A. Tarlock, Law of Water Rights and Resources, § 5:34
17 (2010), it is stated:

18 **§ 5:34 Priority--Modification of Priority--Rotation**

19 Priorities may be subordinated by rotation. To
20 encourage the maximum use of water among the widest
21 class of users, the use of water may be rotated among
22 users. Under rotation one user may take all the
23 available water, regardless of senior priorities for a
24 limited period of time and the next user may do the
25 same. Rotation will allow a junior to use water
26 subjected to a senior right out of priority. Rotation
27 may be imposed by a court as part of a decree.
28 [Emphasis supplied.]

29 In Hufford v. Dye, 121 P. 400, 406 (Cal. 1912), the
30 California Supreme Court stated:

31 If there is not water enough (and this appears to be
32 the fact) to permit a diversion of the stream and a
33 simultaneous use of part by both parties without
34 injury, the court may by its decree fix the times
35 when, by rotation, the whole may be used by each at
36 different times in proportion to their respective

1 rights. In doing so, the court should recognize the
2 paramount and primary right of the respondent to the
3 first flow in a full ditch and the use of all of it,
4 or a lesser quantity, for given periods during the
5 irrigating season, as it may be required. If this can
6 be done so that by giving respondent the first flow
7 for a week or every other week, or on certain days in
8 the week, and the appellant the right thereto in the
9 intervals, the wants of respondent are fully supplied,
10 he obtains all he is entitled to and has no ground of
11 complaint. While this remedy of rotation and use of
12 waters for irrigation purposes has been more generally
13 applied as between riparian proprietors [citations],
14 in principle there is no reason why it should not be
15 made applicable as between claimants by appropriation.
16 It is applied as between riparian owners to permit the
17 beneficial use of the waters by all, and as by
18 appropriation only the right to a beneficial use is
19 acquired, there is no reason why, when it can be
20 justly made applicable, the same rule of rotation
21 should not be applied as between appropriators.

13 Contrary to these persuasive and long standing authorities,
14 the Bentleys have seen fit to make this a march of one
15 individual who owns a ranch with two ponds used for aesthetic
16 purposes, against the Respondents who live and work and earn
17 their income from ranching. The Bentleys, although certainly
18 allowed 1.6 days of water within the 21 day rotation, are not
19 entitled to priority over the other water right holders to
20 demand a continuous flow of water into their two ponds.

22 **E. The Exception To The Mootness Rule Does Not Prevail In This**
23 **Instance.**

24 The Bentleys invoke an exception to the mootness rule as
25 articulated by this Court in University of Nevada v. Tarkanian,
26 95 Nev. 389, 394-95, 594 P.2d 1159 (1979); Matter of
27 Guardianship of L.S. & H.S., 120 Nev. 157, 161-162, 87 P.3d 521
28

1 (2004); Stephens Media v. Dist. Ct., 125 Nev. Adv. Op. 63, 221
2 P.3d 1240, 1246-47 (2009). In the last cited case, this Court
3 noted:

4 Thus, we will exercise our discretion to adjudicate a
5 moot case when (1) the contested issue is likely to
6 arise again, and (2) the challenged action is "too
short in its duration to be fully litigated prior to
its natural expiration." [Emphasis added.]

7 Here, the contested issue is not likely to arise again
8 because the trial court will determine the issues at bar prior
9 to the start of the 2011 irrigation season. This is made more
10 evident by the fact that at the hearing held May 17, 2010, the
11 District Court ordered the parties to file full briefs on all
12 issues regarding the Diversion Agreement. In compliance, the
13 Respondents filed Intervenor's Opening Brief Regarding the
14 Diversion Agreement on June 16, 2010 and Intervenor's Reply
15 Regarding the Diversion Agreement on June 30, 2010, and the
16 Appellants filed Bentley's Opening Brief on June 17, 2010 and
17 Rebuttal to Intervenor's Opening Brief on June 24, 2010.

18 Furthermore, on September 27, 2010, the Respondents filed
19 their Motion for Summary Judgment on a dispositive issue
20 concerning the Diversion Agreement. See copy of which is
21 attached hereto as Exhibit A. The challenged action will be
22 fully heard and later subject to an appeal by either party upon
23 a full and complete record, not now existing before this Court.

24 To paraphrase this Court's decision in Garson v. Steamboat
25 Canal Co., 43 Nev. 298, 317, 185 Pac. 801 (1919), it was not
26

1 intended that the courts should interfere with the
2 administrative issues of the State Engineer, or review his
3 determinations, further than to keep him within the law and
4 protect the constitutional rights of the water rights holders
5 over which he had been given control. In view of the salutary
6 public policy of the act, and ample provision made for notice
7 and full hearing before the State Engineer, at which time the
8 water right claimants are entitled to appear by counsel, and the
9 ample provisions made for the production and presentation of
10 their proofs, it was competent for the legislature to prescribe
11 that the orders fixed by the State Engineer "should abide during
12 the temporary season of a trial to test their reasonableness".
13

14 So too here, the State Engineer issued the Preliminary
15 Order of Determination, the Final Order of Determination and a
16 hearing was held before the District Court pursuant to NRS
17 533.165-170, to allow all parties to present their exceptions or
18 claims. There is no provision in the statute which allows for
19 an interlocutory appeal to test the correctness of the Order
20 before final judgment has been entered. See NRS 533.185.
21

22 The supposed important question of law concerning the
23 District Court's Order for Division of Water to implement the
24 Final Order of Determination pending trial, is neither unique,
25 nor extraordinary, nor likely to arise again. The only issue
26 that seems special or unique is the Bentleys' claim for pre-
27 emptive rights under the Diversion Agreement, which alleged
28

1 rights were not and never have been acknowledged or accepted by
2 the State Engineer, by the District Court or by the Respondents.
3 The Diversion Agreement is simply not part of the Final Order of
4 Determination or Order for Division of Water. The important
5 issues of fact and law concerning the Diversion Agreement will
6 be decided by the District Court in due course and upon a full
7 and complete record, rather than by this Interlocutory Appeal
8 without such a record.
9

10 This Court should not invoke its discretion and decide this
11 Interlocutory Appeal without a full record being created in the
12 District Court, later reviewable by this Court, if necessary.

13 **F. Conclusion.**

14 The instant Interlocutory Appeal is not an exception to the
15 mootness rule inasmuch as the appellate issue is not likely to
16 repeat until such time as a final determination on the issues
17 surrounding the Diversion Agreement has been made by the
18 District Court. The Bentleys' appeal should be dismissed until a
19 full and complete record has been made.
20

21 Pursuant to NRS 239B.030, the undersigned affirms that the
22 preceding document does not contain the social security number
23 of any person.
24

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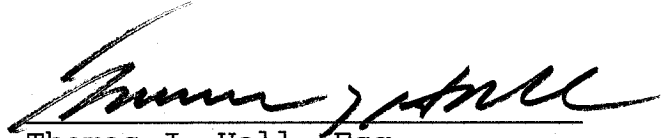
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1 Respectfully submitted this 8th day of October, 2010.

2 LAW OFFICES OF THOMAS J. HALL

3
4 

5 Thomas J. Hall, Esq.

6 Nevada State Bar No. 675

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CERTIFICATE OF SERVICE BY MAIL

I certify that I am an employee of Thomas J. Hall, Esq., and that on this date, pursuant to NRAP 25(d), I placed in the U.S. Mail, postage prepaid, a true and correct copy of the foregoing document addressed to:

William E. Nork, Esq.
Settlement Judge
825 West 12th Street
Reno, Nevada 89503

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Kathleen M. Scyphers
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Deputy Attorney General
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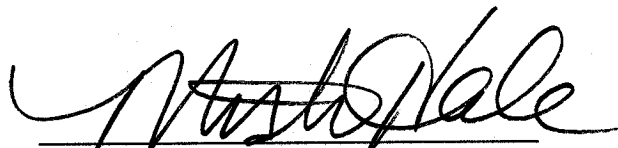
State of Nevada
Department of Conservation and
Natural Resources
Division of Water Resources
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Frank Scharo
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Hall Ranches, LLC
Post Office Box 3948
Reno, Nevada 89505

Sheridan Equestrian Center, LLC
Glenn A. Roberson, Jr.
281 Tiger Wood Court
Gardnerville, Nevada 89460

DATED this 8th day of October, 2010.


Misti Hale

LIST OF EXHIBITS

EXHIBIT A: Motion for Summary Judgment.

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SEP 27 2010

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Case No.: 08-CV-0363-D

Dept. No.: I

DOUGLAS COUNTY
DISTRICT COURT CLERK

2010 SEP 27 PM 1:28

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TED THRAN
CLERK
BY **S. WILLIAMS** DEPUTY

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
Creek, and Bulls Canyon, Stutler Creek
(aka Stattler Creek), Sheridan Creek,
Gansberg Spring, Sharpe Spring,
Wheeler Creek No., 1 Wheeler Creek
No. 2, Miller Creek, Beers Spring,
Luther Creek and Various Unnamed
Sources in Carson Valley, Douglas
Valley, Nevada.

MOTION FOR SUMMARY JUDGMENT

Come 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., and pursuant to
NRCP Rule 56(b), DCR 12 and 13 and NJDCR 6 and 7, move the
Court for Summary Judgment dismissing Bentleys' Exception No. 1

1 - Diversion Schedule, contained in their Notice of Exceptions
2 and Exceptions to the Final Order of Determination on the basis
3 that there is no genuine issue as to any material fact and that
4 they are entitled to a judgment as a matter of law.
5 Intervenor's Motion for Summary Judgment is made and based on
6 the following Memorandum of Points and Authorities and on all
7 the records and pleadings in this cause.

8
9 I. MEMORANDUM OF POINTS AND AUTHORITIES:

10 A. Statement of Facts.

11 This action arises from the filing by J.W. Bentley and
12 Maryann Bentley, as Trustees of the Bentley Family Trust 1995
13 Trust, of their Notice of Exceptions and Exceptions to Final
14 Order of Determination herein on December 11, 2008. The Bentleys
15 in EXCEPTION NO. 1, DIVERSION SCHEDULE, PROOFS V-06307 and V-
16 06308, state that they believe the Office of the State Engineer
17 has created a Diversion Schedule ("Diversion Schedule"), for the
18 waters from Sheridan Creek, Stutler Creek and Gansberg Springs.
19 The Bentleys contend they should not be subject to any Diversion
20 Schedule because of a Water Diversion and Use Agreement
21 ("Diversion Agreement"), dated June 9, 1986, and recorded on
22 March 27, 1987, in Book 387, at Page 2726, as Document 152147,
23 Douglas County Records. See copy attached hereto as Exhibit 1.
24 The Diversion Agreement has been violated by the Bentleys and
25 should be terminated according to its terms.
26
27
28

The Bentleys are landowners and water right holders as set forth in the Final Order of Determination, to wit (pages 106-109):

<u>Owner</u>	<u>APN</u>	<u>Acreage</u>	<u>Proofs</u>
J.W. Bentley			V-06305
Maryann Bentley,	1219-14-001-013	12.93	V-06306
Trustees			V-06307
			V-06308

The Intervenors own ranch land located downstream from the Bentley Property. They also hold water rights in Sheridan Creek and tributaries, historically used to irrigate their ranch lands. They are obviously and necessarily interested in the excessive diversions made upstream by the Bentleys in violation of custom, practice, agreements and decrees. A tabulation of Intervenors' land holdings and water rights as set forth in the Final Order of Determination follows (pages 109-112, 132-133 and 136-137):

<u>Intervenor</u>	<u>APN</u>	<u>Acreage</u>	<u>Proofs</u>
Donald S. and Kristina Forrester	1219-14-001-012	59.620	V-06309 V-06310
Hall Ranches, LLC	1219-14-001-003	23.800	V-06340 V-06341
Thomas J. Scyphers and Kathleen M. Scyphers	1219-14-001-004	13.010	V-06311 V-06312
Frank Scharo	1219-14-001-005	12.990	V-06311 V-06312
Sheridan Creek Equestrian Center Glenn Roberson	1219-14-001-008	35.960	V-06310

<u>Intervenor</u>	<u>APN</u>	<u>Acreage</u>	<u>Proofs</u>
Ronald R. and	1219-14-001-009	10.020	V-06336
Ginger G. Mitchell	1219-14-001-010	10.480	V-06337
	1219-14-001-011	<u>10.370</u>	
Total Acreage of Intervenor		176.430	

The Diversion Agreement specifically provides for non-consumptive use of water in the following terms and conditions:

WATER DIVERSION AND USE AGREEMENT

* * *

5. Grantee [Bentleys' predecessor] desires to divert some or all of the water from Sheridan Creek, onto his property, to be used in a non-consumptive manner to maintain water levels in ponds on Grantee's property, and thereafter to cause the water to be diverted back to the property of Grantors for irrigation purposes.

* * *

B. This grant is specifically made on the condition that the water will be used by Grantee in a non-consumptive fashion, to maintain water levels in a series of streams and ponds on the Exhibit "A" property, after which time it will be re-diverted to the irrigation ditches of Grantors.

* * *

H. This agreement may be terminated by Grantors in the event a Court of competent jurisdiction determines that the Grantee has been violating the terms hereof, to the detriment of Grantors.

II. SEEPAGE TEST FINDINGS OF THE STATE ENGINEER.

Pursuant to the Order of the Court made during a hearing held on May 17, 2010, the Office of the State Engineer, Division of Water Resources, conducted a seepage test on May 22, 2010, a

copy of which is attached hereto as Exhibit 2. The Summary of Findings was as follows:

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
TOTALS	45.6	4.5	1.0	51.0

The Annual Seepage of 45.6 AFA equals 14,858,805.6 gallons a year.

A second Seepage Test was performed on August 18, 2010, with like results (see Exhibit 3):

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	26.3	1.9	0.9	29.1
Upper Pond	25.8	2.6	0.1	28.5
TOTALS	52.1	4.5	1.0	57.6

The Annual Seepage of 52.1 AFA equals 16,976,837.1 gallons per year. The average Annual Seepage determined by the two tests is 48.85 AFA, or 15,917,821.35 gallons annually.

III. STANDARD OF REVIEW:

Nevada Rule of Civil Procedure 56(b) provides in pertinent part:

1 (b) For defending party. A party against whom a claim,
2 counterclaim, or cross-claim is asserted or a
3 declaratory judgment is sought may, at any time, move
4 with or without supporting affidavits for a summary
5 judgment in the party's favor as to all or any part
6 thereof.

7 A party opposing a motion for summary judgment must set
8 forth specific facts showing that there is a genuine issue for
9 trial and the opponent must show they can produce evidence at
10 the trial to support their claims. Van Cleave v. Kietz-Mill
11 Minit Mart, 97 Nev. 414, 415, 633 P.2d 1220 (1981). According
12 to Bird v. Casa Royale West, 97 Nev. 67, 70, 624 P.2d 17 (1981):

13 [W]hen a motion for summary judgment is made and
14 supported as provided by NRCP 56, the adverse party
15 may not rest upon the "mere allegations of his
16 pleading, but must, by affidavit or otherwise, set
17 forth facts demonstrating the existence of a genuine
18 issue for trial." [Citations omitted.]

19 Summary judgment is not a disfavored procedural shortcut,
20 but an integral part of the civil rules as a whole. Celotex
21 Corp. v. Catrett, 477 U.S. 317, 327, 106 S.Ct. 2548, 2555
22 (1986). Where the moving party has supported the motion as
23 required by NRCP 56, and the opposing party cannot set forth
24 specific facts showing that there is a genuine issue for trial,
25 summary judgment is mandatory. Without doubt, this Court has
26 legal authority to grant summary judgment dismissing Bentleys'
27 Exception No. 1.

28 IV. JURISDICTION OF THE DISTRICT COURT.

The District Court has jurisdiction to consider the action
on its merits even though an appeal has been taken by the

1 Bentleys to the Nevada Supreme Court in the nature of an
2 interlocutory appeal pertaining to the Rotation Schedule and
3 Order entered on June 18, 2010. This is made clear by counsel's
4 letter dated September 16, 2010, attached hereto as Exhibit 4,
5 which states as follows:

6 . . . although the general rule is that an appeal
7 typically divests the lower court of jurisdiction, the
8 lower court still retains jurisdiction over various
9 matters, and there is an exception to the general rule
10 for interlocutory appeals. This is recognized by
11 *Hanley v. Zenoff*, 81 Nev. 9, [13], 398 P.2d 241 (Nev.
12 1965)[(An appeal does not apply to divest a trial
13 court of jurisdiction to proceed in matters not
14 involved in the appeal)] and the citation to Am.Jur.2d
15 contained therein.

16 The taking of an interlocutory appeal generally
17 deprives the trial court of the authority to act
18 regarding the matter that is the subject of the
19 appeal. The court is not, however, barred from
20 acting in matters unrelated to the appeal. The
21 taking of an appeal from an order granting or
22 denying a preliminary injunction does not divest
23 the court of jurisdiction to proceed with the
24 action on its merits. 5 Am.Jr.2d, APPELLATE
25 REVIEW § 432.

26 V. LEGAL DISCUSSION AND ANALYSIS:

27 A. Bentleys Have Violated The Diversion Agreement By
28 Creating A Pond That Is Not Water Tight, Has Excess Seepage And
Consumes And Wastes Water.

29 The Bentleys contend that their alleged pre-emptive
30 diversion rights are set forth in a Diversion Agreement between
31 Bentleys' predecessors in interest and the Intervenor's
32 predecessors in interest identified in the Final Order, Tables 5
33 and 6.

1 However, the Bentleys have violated the Diversion Agreement
2 by creating a pond that is not water tight, has excess seepage
3 and consumes and wastes water. Diversion Agreement Recital B,
4 provides as follows:

5 B. This grant is specifically made on the condition
6 that the water will be used by the Grantee in a non-
7 consumptive fashion, to maintain water levels in a
8 series of streams and ponds on the Exhibit "A"
property, after which time it will be re-diverted to
the irrigation ditches of Grantors. [Emphasis added.]

9 Diversion Agreement Paragraph H provides for termination
10 upon violation in the following fashion:

11 H. This agreement may be terminated by Grantors in
12 the event a Court of competent jurisdiction determines
13 that the Grantee has been violating the terms hereof,
to the detriment of Grantors.

14 The Intervenors believe, which belief has now been
15 clarified by two Seepage Tests, that there is substantial
16 seepage and subterranean loss of water into the porous alluvial
17 fan and aquifer which is not recoverable for irrigation by the
18 downstream users. The State Engineer has conducted two Seepage
19 Tests which clearly show that the two Bentley ponds are in fact
20 consuming significant amounts of water in excess of 45 AFA. This
21 excessive consumptive use by the Bentleys violates the provision
22 of the Diversion Agreement which was specifically conditioned on
23 non-consumptive use of water. Once the water from the Bentleys'
24 ponds flows subterranean into the aquifer, it is lost to the
25 system and the downstream users do not have the ability to
26
27
28

1 recover the surface water for reuse. The total water system is
2 diminished by the water losses from the Bentleys' ponds.

3 The Bentleys should not be exempt from any proposed
4 Diversion or Rotation Schedule put in place by the State
5 Engineer or this Court as the diversion of water through the
6 Bentleys' ponds is a consumptive and wasteful use. Even if the
7 ponds did not consume Bentleys' entire share of water from
8 Sheridan Creek, such consumption would be in violation of the
9 Diversion Agreement as the allowed use is specifically required
10 to be "non-consumptive."
11

12 **B. The Court Should Terminate The Diversion Agreement And**
13 **Award Attorney Fees to Intervenors.**

14 Paragraph I of the Diversion Agreement provides as follows:

15 I. The interpretation and enforceability of this
16 agreement shall be determined by the laws of the State
17 of Nevada, and in the event a law suit is brought to
18 enforce or interpret this agreement, the prevailing
19 party shall be awarded reasonable attorney's fees
20 against the party not prevailing.

21 Paragraph H of the Diversion Agreement states:

22 H. This agreement may be terminated by Grantors in
23 the event a Court of competent jurisdiction determines
24 that the Grantee has been violating the terms hereof,
25 to the detriment of Grantors.

26 Because the Bentleys have violated the Diversion Agreement,
27 this Court should terminate the Diversion Agreement under
28 Paragraph H and award attorney fees to Intervenors under
Paragraph I.

\\\\\\

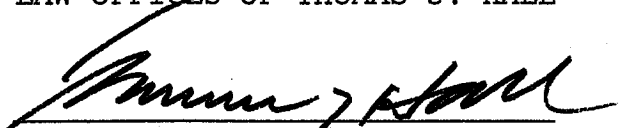
IV. CONCLUSION:

The Bentleys' claim exceptions to the Final Order of Determination based on the Diversion Agreement. However, for all of the reasons discussed above, the Diversion Agreement has been violated by the Bentleys and should be terminated. It is respectfully requested that the Court enter an order granting summary judgment in favor of the Intervenors, requiring the division of the water from Sheridan Creek by the State Engineer to be pursuant to the Final Order of Determination without consideration of any of the Bentleys' exemptions claimed under the Diversion Agreement.

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 22nd day of September, 2010.

LAW OFFICES OF THOMAS J. HALL


Thomas J. Hall, Esq.
Nevada State Bar No. 675
305 South Arlington Avenue
Post Office Box 3948
Reno, Nevada 89505
Telephone: 775-348-7011
Facsimile: 775-348-7211

CERTIFICATE OF SERVICE BY MAIL

I certify that I am an employee of Thomas J. Hall, Esq., and that on this date, pursuant to NRCP 5(b), I placed in the U.S. Mail, postage prepaid, a true and correct copy of the Motion for Summary Judgment, addressed to:

Michael L. Matuska, Esq.
Brooke, Shaw, Zumpft
Post Office Box 2860
Minden, Nevada 89423

Thomas J. Scyphers
Kathleen M. Scyphers
1304 S. Aylesbury Court
Gardnerville, Nevada 89460

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

Ronald R. Mitchell
Ginger G. Mitchell
Post Office Box 5607
Stateline, Nevada 89449

State of Nevada
Department of Conservation and
Natural Resources
Division of Water Resources
901 S. Stewart Street, Suite 2002
Carson City, Nevada 89701

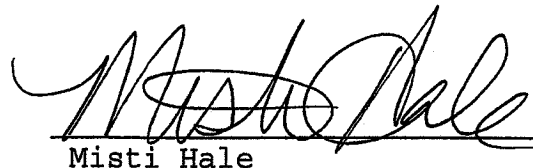
Donald S. Forrester
Kristina M. Forrester
913 Sheridan Lane
Gardnerville, Nevada 89460

Hall Ranches, LLC
Post Office Box 3948
Reno, Nevada 89505

Frank Scharo
Post Office Box 1225
Minden, Nevada 89423

Sheridan Equestrian Center, LLC
Glenn A. Roberson, Jr.
281 Tiger Wood Court
Gardnerville, Nevada 89460

DATED this 22nd day of September, 2010.


Misti Hale

LIST OF EXHIBITS

EXHIBIT 1: Water Diversion And Use Agreement.

EXHIBIT 2: Report of Field Investigation No. 1130.

EXHIBIT 3: Report of Field Investigation No. 1130-A.

EXHIBIT 4: Letter from Michael L. Matuska, Esq., dated September 16, 2010.

EXHIBIT 1

EXHIBIT 1

12- P.O. Box 1511
Sheridan, Wyo.
89423

WATER DIVERSION AND USE AGREEMENT

THIS AGREEMENT is entered into by and between JUNE IRENE BARTLETT, who took title as June Irene Rolph, NANCY ROLPH WELCH, GERALD F. WHITMIRE and PAMELA F. J. WHITMIRE, husband and wife as joint tenants, hereafter referred to as "Grantors" and JOSEPH S. LODATO, hereafter referred to as "Grantee", based upon the following facts:

1. Grantors are the owners of real property located in Douglas County, Nevada, as well as the owners of water rights which are appurtenant to, certificated or adjudicated to the benefit of the property owned by them in Douglas County, Nevada.
2. Grantee is the owner of real property located in Douglas County, Nevada, which was purchased heretofore from Grantors.
3. Grantors own and enjoy the right to use waters from Sheridan Creek.
4. There are no downstream users of water from these creeks, after this water is used by Grantors.
5. Grantee desires to divert some or all of the water from Sheridan Creek, onto his property, to be used in a non-consumptive manner to maintain water levels in ponds on Grantee's property, and thereafter to cause the water to be diverted back to the property of Grantors for irrigation purposes.

6. Grantors have agreed to such an arrangement, on the terms and conditions which follow.

THEREFORE, based upon the recital of facts set forth above, which are incorporated in the body of this agreement by reference, and the covenants and conditions which follow hereinafter, the parties do agree as follows:

A. For valuable consideration, receipt of which is hereby acknowledged by Grantors, Grantors do hereby give and grant to Grantee, as a covenant running to the benefit of the land described in Exhibit "A" attached hereto, the right to divert one hundred percent (100%) of the water from Sheridan Creek, onto the Exhibit "A" property, in perpetuity.

B. This grant is specifically made on the condition that the water will be used by Grantee in a non-consumptive fashion, to maintain water levels in a series of streams and ponds on the Exhibit "A" property, after which time it will be re-diverted to the irrigation ditches of Grantors.

C. Grantors are granted the right, upon reasonable notice, to have access to the Exhibit "A" property to ensure that the limitations set forth herein regarding use are being adhered to by Grantee.

D. Grantee is hereby given the right of access to other property of Grantors, in order to ensure that the water may be diverted to Grantee's property.

E. This grant of right to divert and use water includes the right of Grantee to divert the Sheridan Creek water from the natural creekbed or water course on the west side of Foothill Road and in an easement granted pursuant to Exhibit "B" which is attached hereto, and to return to the natural water course on property owned by Grantee just east of that 50-foot roadway and utility easement shown on Exhibit "C" which is attached hereto and incorporated herein by reference.

F. This promise to permit the use and diversion of water is intended to be and is made by Grantors to be a covenant running with the land, and the benefits thereof may be enjoyed by the heirs and assigns of Grantee, and subsequent owners of the Exhibit "A" property.

G. This agreement shall be binding upon and inure to the benefit of the heirs, administrators, executors and assigns of the parties hereto.

H. This agreement may be terminated by Grantors in the event a Court of competent jurisdiction determines that the Grantee has been violating the terms hereof, to the detriment of Grantors.

I. The interpretation and enforceability of this agreement shall be determined by the laws of the State of Nevada, and in the event a law suit is brought to enforce or

interpret this agreement, the prevailing party shall be awarded reasonable attorney's fees against the party not prevailing.

IN WITNESS WHEREOF, the parties have set their hands the day and year set forth below.

Date: _____

JUNE IRENE BARTLETT, who took
title as June Irene Rolph

Date: _____

NANCY ROLPH WELCH

Date: 6/9/86

Gerald F. Whitmire
GERALD F. WHITMIRE

Date: 6-9-86

Pamela F. J. Whitmire
PAMELA F. J. WHITMIRE

Date: _____

Joseph S. Lodato
JOSEPH S. LODATO

STATE OF _____)
COUNTY OF _____)

ss.

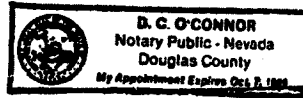
On _____, 1986, personally appeared before me, a notary public, JUNE IRENE BARTLETT, personally known to me to be the person who executed the above instrument, and acknowledged to me that she executed the same for the purposes therein stated.

Notary Public

STATE OF Nevada)
COUNTY OF Douglas) ss.

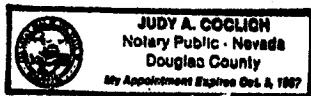
On June 9, 1986, personally appeared before me, a notary public, PAMELA F. J. WHITMIRE, personally known to me to be the person who executed the above instrument, and acknowledged to me that she executed the same for the purposes therein stated.

D.C. O'Connor
Notary Public

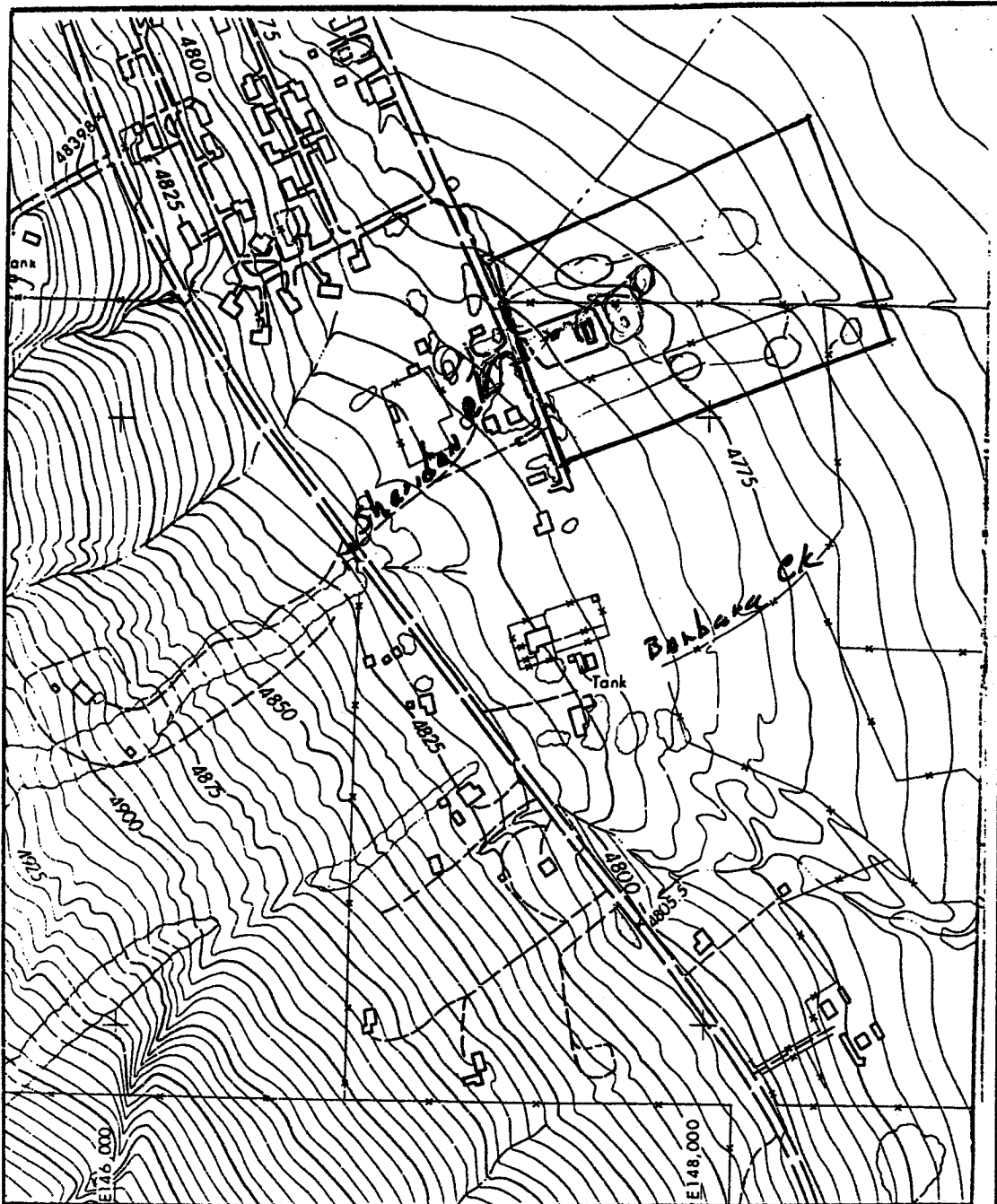


STATE OF Nevada)
COUNTY OF Douglas) ss.

On June 9th, 1986, personally appeared before me, a notary public, JOSEPH S. LODATO, personally known to me to be the person who executed the above instrument, and acknowledged to me that he executed the same for the purposes therein stated.



Judy A. Coglich
Notary Public



PROJECT

Scale: 1" = 400' 152147
Contour Interval: 5'
Date of Photography: 6-1-77
387 USE 2731

EXHIBIT "A"

4 A parcel of land lying in a portion of the South 1/2 of the Northwest 1/4 and the North 1/2 of the Southwest 1/4 of Section 14, Township 12 North, Range 19 East, M.D.B.&M., Douglas County, Nevada, further described as follows:

BEGINNING at the Southwest corner of Parcel 1 (Jones Ranch Survey) and the Southwest corner of a 1.246 acre parcel of the Rolph residence, which lies on an easterly 50 foot right-of-way extension of Sheridan Lane from which the North one-quarter corner of said Section 14, bears North 34°22'30" East, 3571.08 feet; thence South 24°49'00" East, 334.72 feet; thence North 70°37'51" East, 1120.70 feet; thence North 25°05'38" West 958.85 feet; thence South 64°05'08" West 1120.70 feet to the Easterly 50 foot easement of Sheridan Lane Extension; thence along said easement South 25°54'52" East, 496.34 feet to the Point of Beginning.

TOGETHER with an easement for ingress and egress fifty (50) feet wide along the westerly side of a line more particularly described as follows:

BEGINNING at the intersection of the easterly side of Sheridan Lane and the southerly side of Bolen Circle; thence running South 25°54'51" East, 728.00 feet, situate in the County of Douglas, State of Nevada.

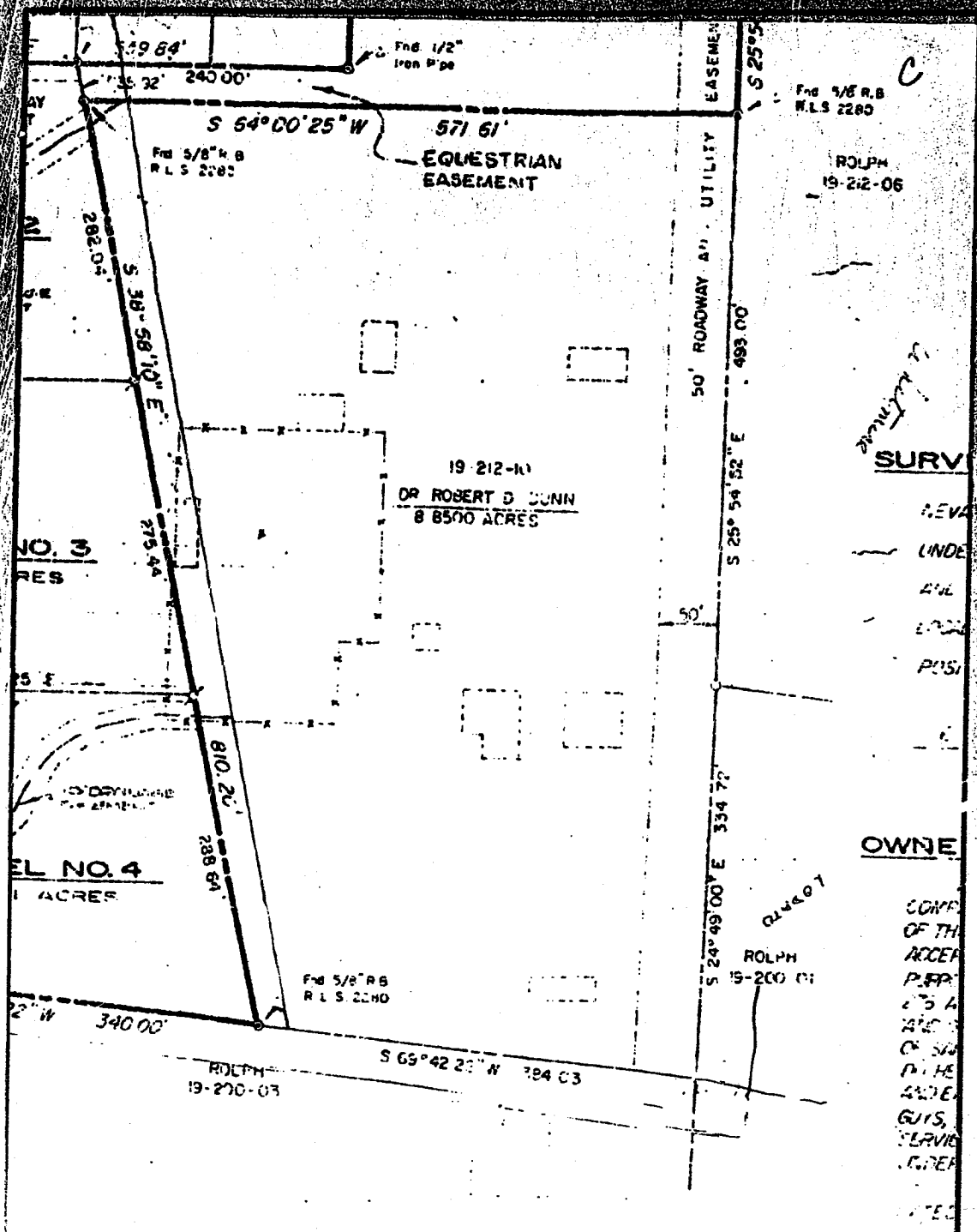
EXCEPTING THEREFROM an irrigation easement five (5) feet in width, located in the Northwest 1/4 of the Southwest 1/4 of Section 14, Township 12 North, Range 19 East M.D.B.&M., in Douglas County, Nevada, the centerline of an existing irrigation ditch being more particularly described as follows:

BEGINNING at a point from which the Southwest Corner of the parcel described in Document No. 64911, filed in the office of Douglas County Recorder bears South 25°54'52" East, a distance of 349.90 feet; said point being on the Easterly line of Sheridan Lane; thence North 89°45'00" East, a distance of 286.39 feet to a point on the Westerly line of an existing pond; thence North 88°39'49" East, a distance of 172.66 feet to a point on the Easterly side of said pond; thence North 81°56'51" East, a distance of 42.43 feet; thence South 06°12'18" West, a distance of 12.64 feet; thence North 83°28'21" East, a distance of 79.45 feet; thence South 89°50'46" East, a distance of 490.17 feet; thence South 24°36'11" East, a distance of 6.24 feet; thence North 89°37'20" East, a distance of 59.47 feet; thence North 89°59'01" East, a distance of 16.07 feet; thence South 47°29'25" East, a distance of 9.05 feet; thence North 89°20'58" East, a distance of 226.82 feet to the Point of Ending, from which the Southwest corner of the above mentioned parcel bears South 75°21'13" West, a distance of 1270.74 feet.

The side lines of the above described easement are to be forelengthened or foreshortened to meet the called beginning.

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BOOK 387 PAGE 2732



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152147

BOOK 387 PAGE 2733

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 6TH 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**

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 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.

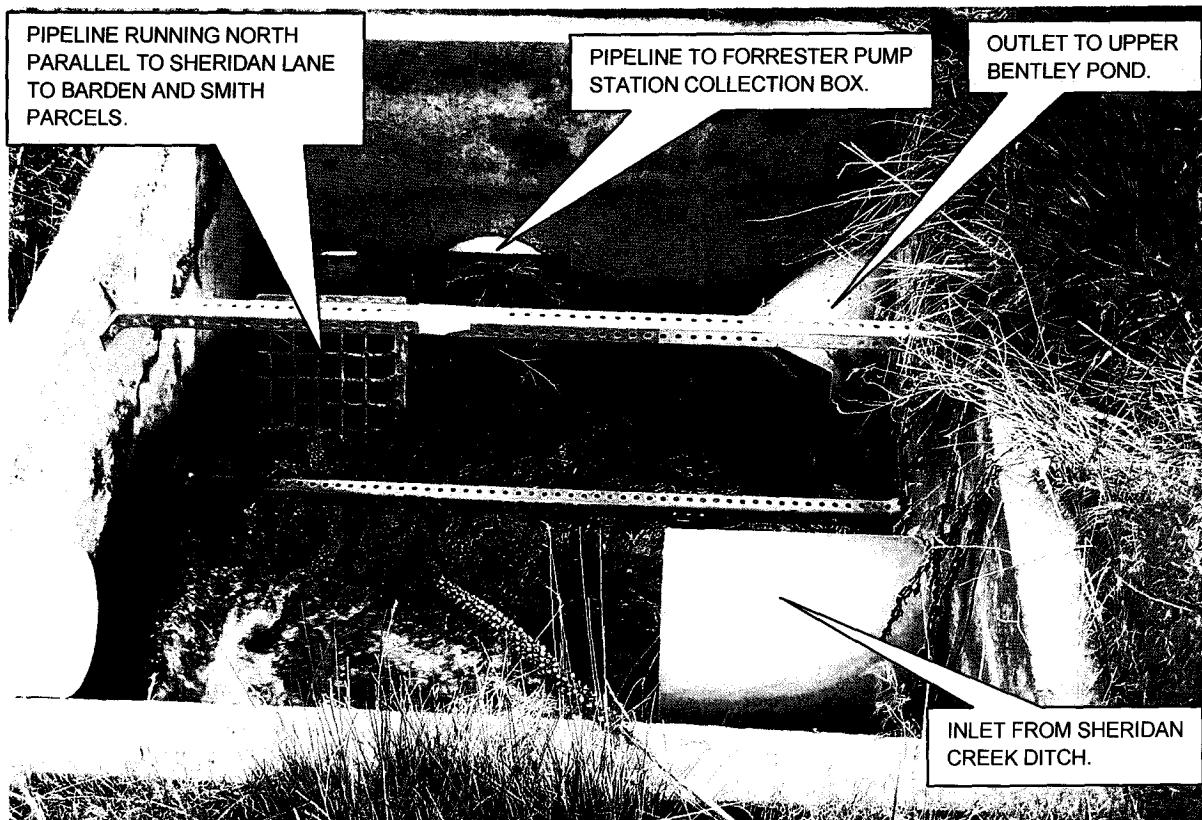


Figure 1. Northwest diversion box on the Bentley parcel. Photo looking east/northeast.

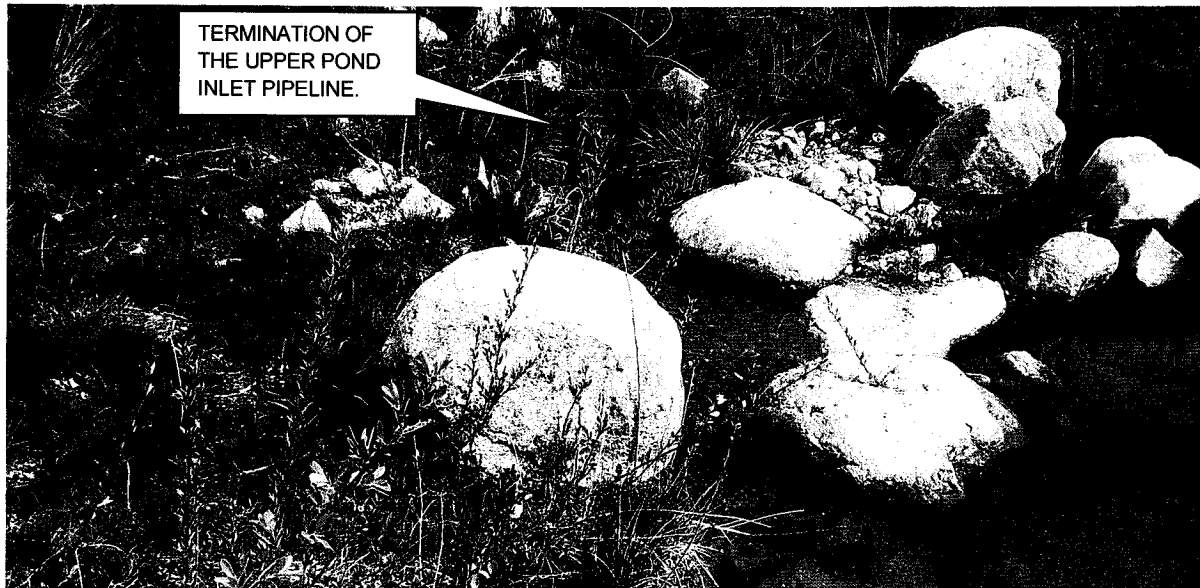


Figure 2. Looking north at the inlet to the upper Bentley pond.

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.

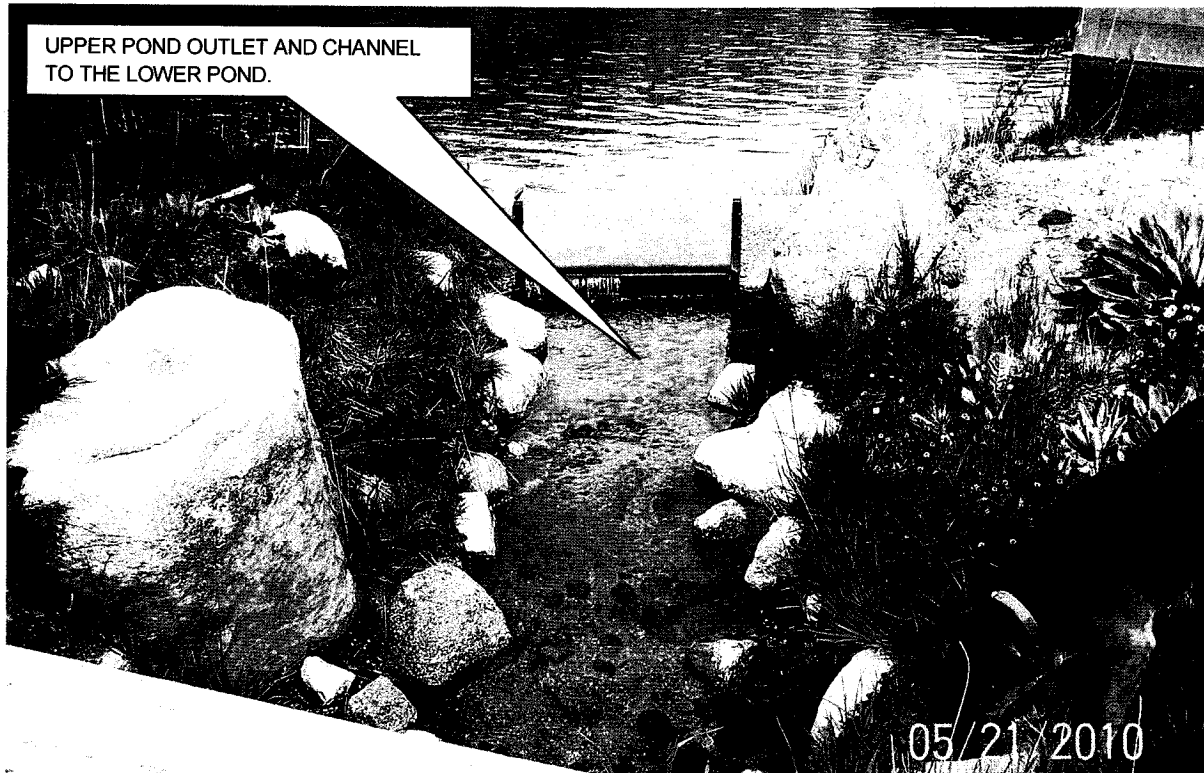


Figure 3. Looking northwest at the outlet of the upper pond.

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.

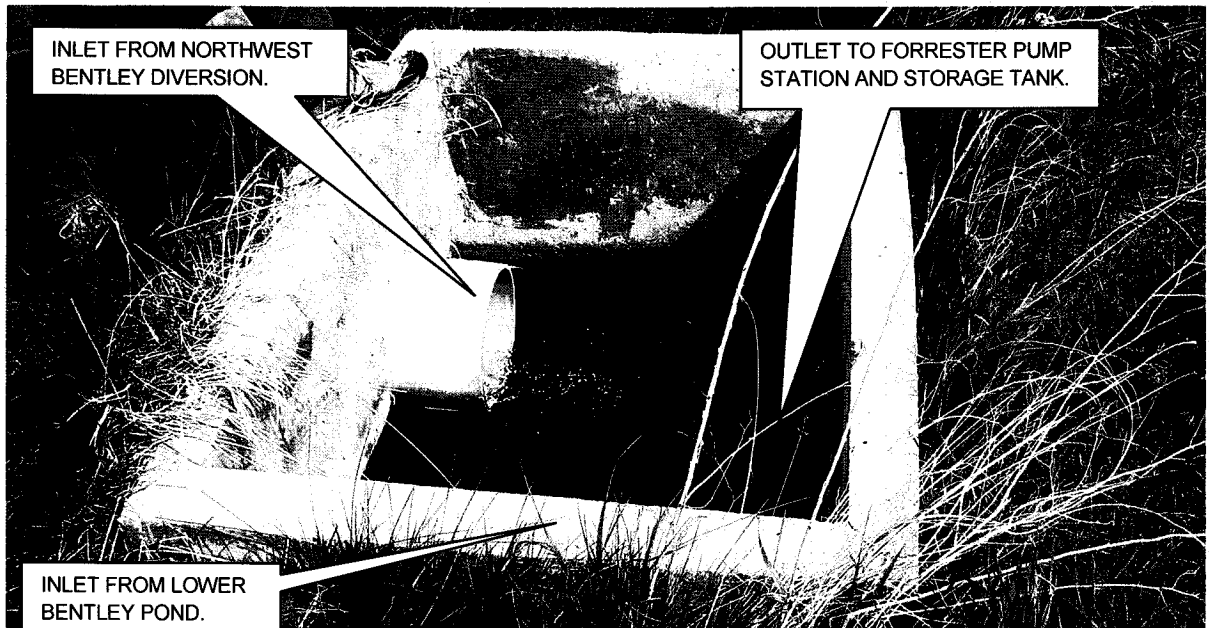


Figure 5. Diversion box on the Bentley that transfers water from the northwest Bentley diversion box and the northern outlet of the lower pond.

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.

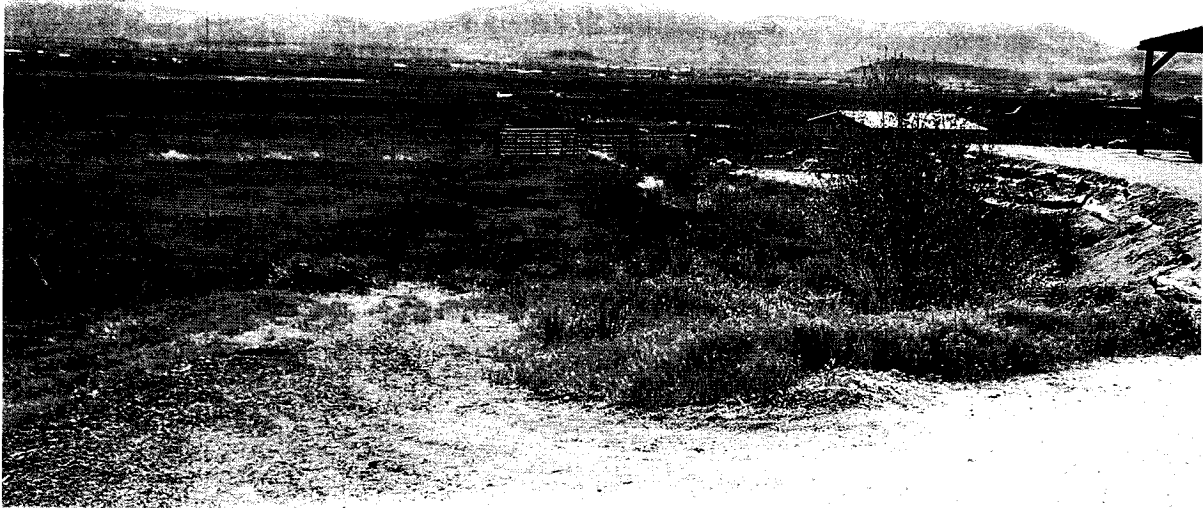


Figure 6. Looking east from the eastern diversion from the lower Bentley pond.

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.

NO. 2041-207
COPIED
ON 12/10/00
BY J. J. J.

100' SCALE
1" = 100'



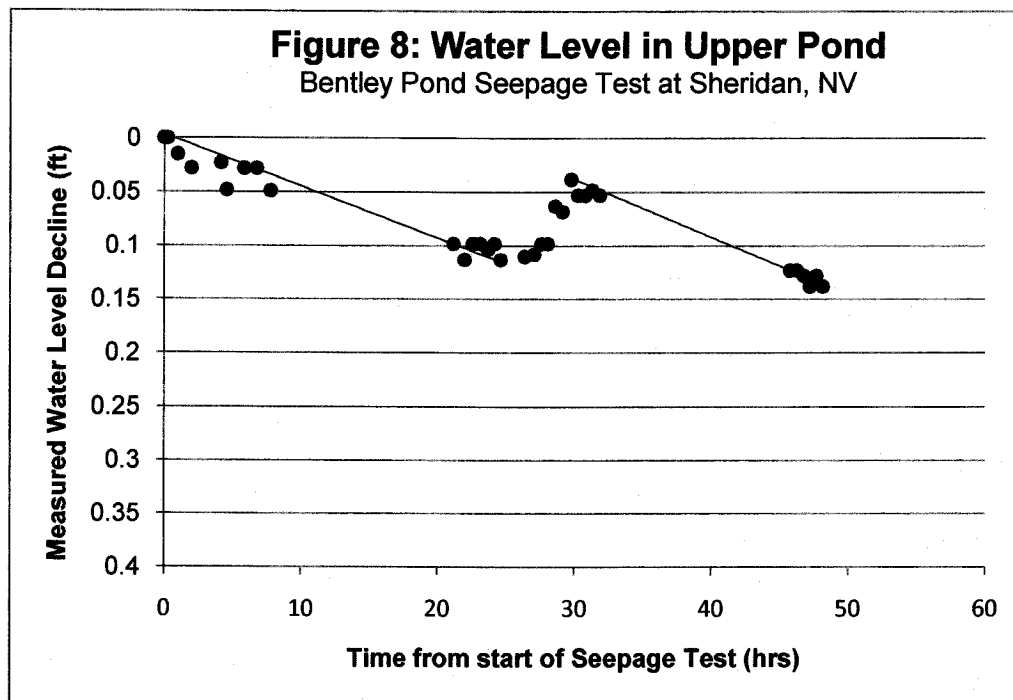
UPPER AND LOWER POND
SCHEMATIC 853 SHERIDAN LANE

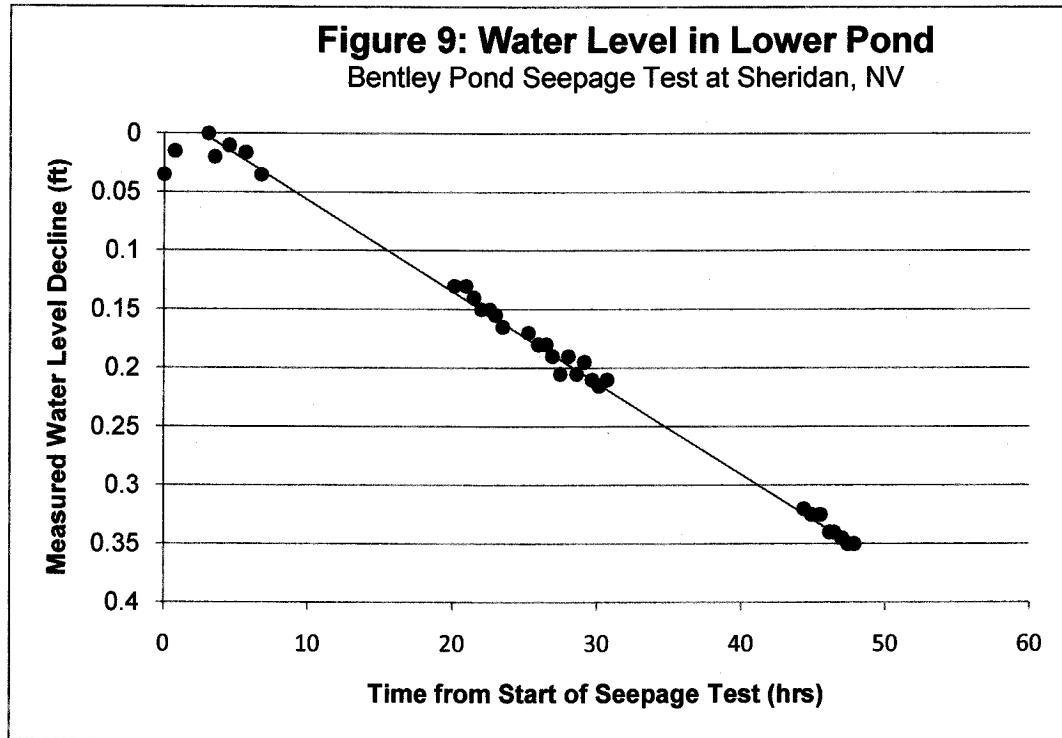
Water Level Measurement Data

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.





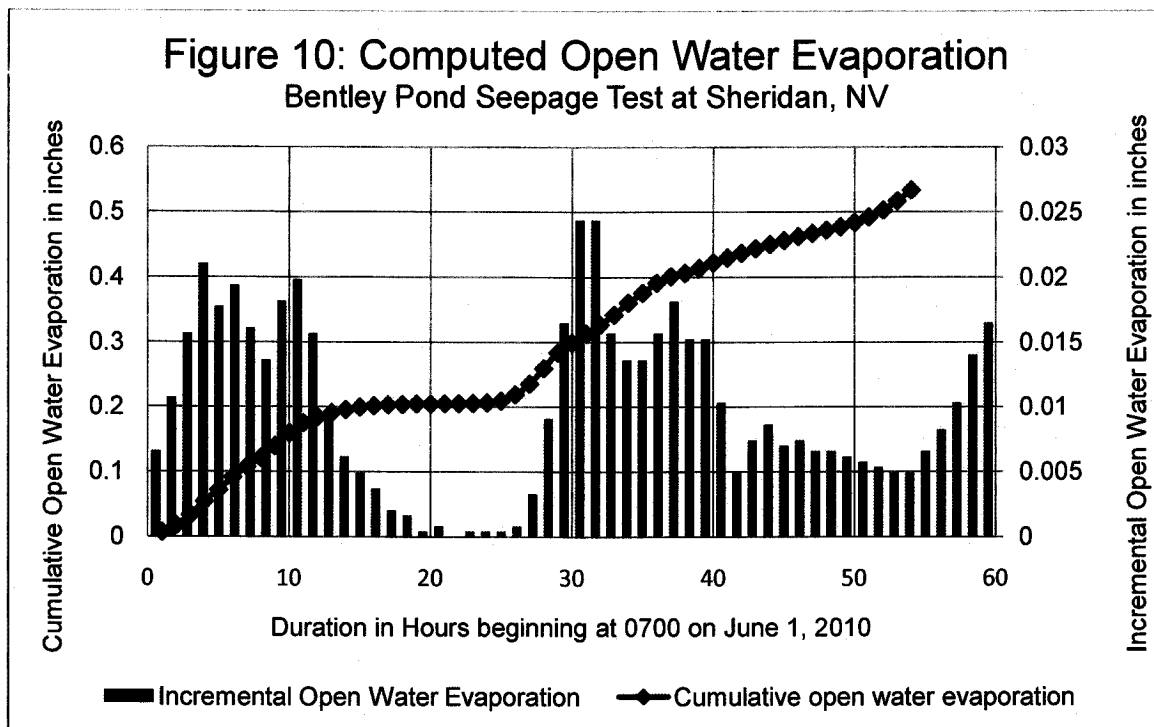
Scatter in the data that deviates from the trend line for both ponds may be caused by wind creating ripples and slight superelevation of the water surface from one side of the pond to the other, and/or precision in the data collection. For both ponds the diurnal pattern of evapotranspiration (ET) rates 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.

Table 1: Cumulative Loss from Ponds										
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.

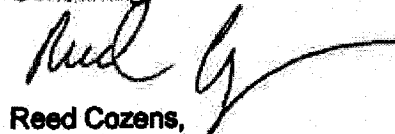
Respectfully Submitted,



Steve Walmsley,

Hydraulic Engineer III

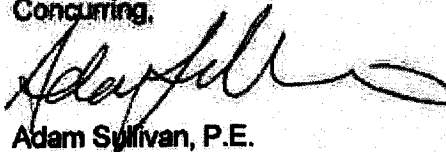
Concurring,



Reed Cozens,

Engineering Technician III

Concurring,



Adam Sullivan, P.E.

Hydrologist

SW/RC/AS

Attachments

Dated this 16th day of June, 2010.

EXHIBIT 3

EXHIBIT 3

**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.

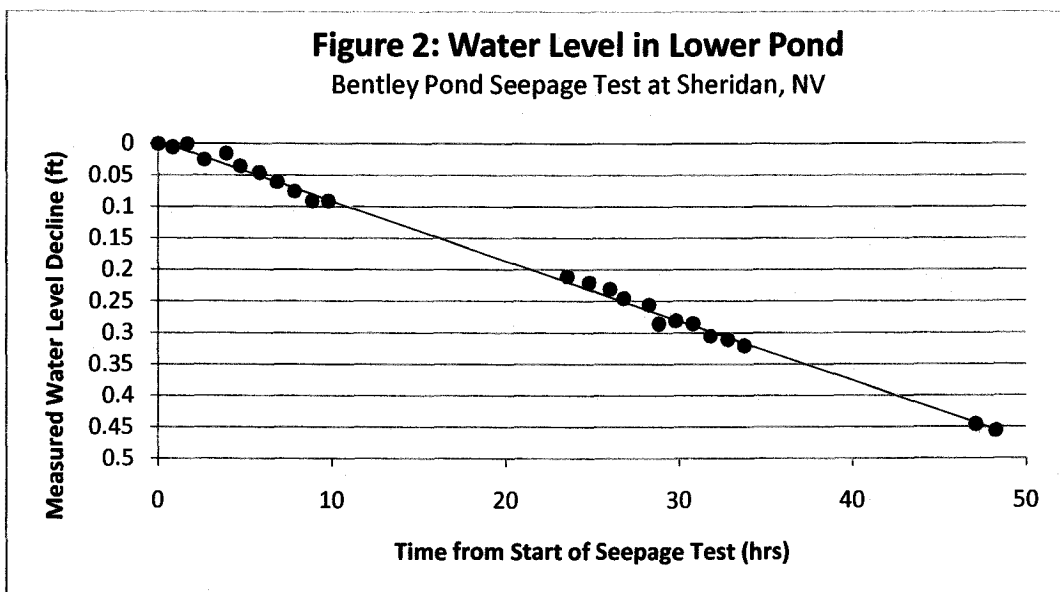
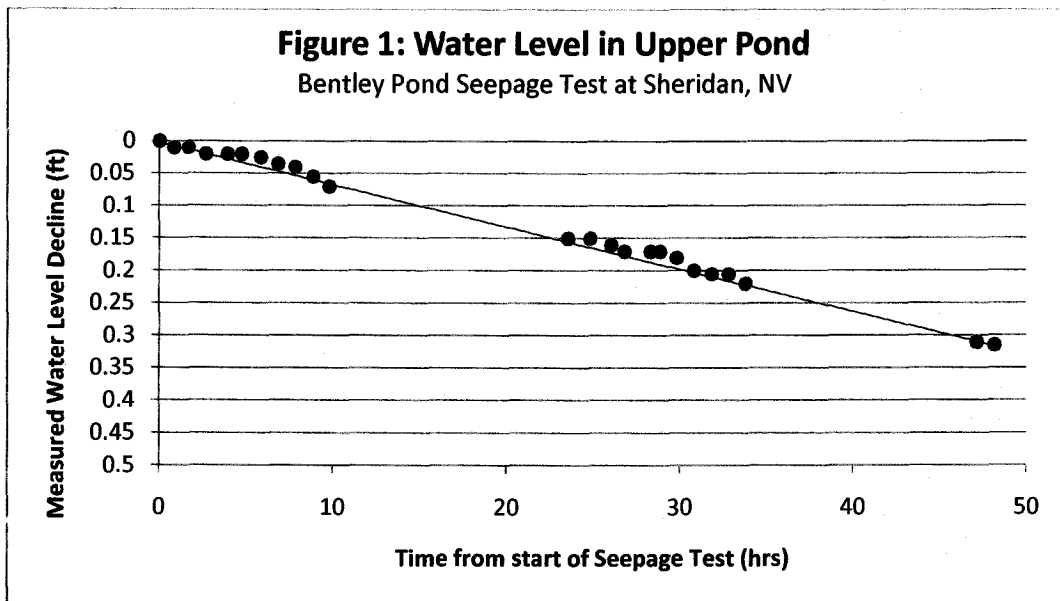
The initial measurements for the upper and lower ponds on the Bentley property were begun at 9:10 A.M. at and 9:13 A.M. on August 16, 2010, respectively. The initial water level for the upper pond was 1.880 feet below the measuring point located at the southwest corner of the deck and 1.885 feet below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

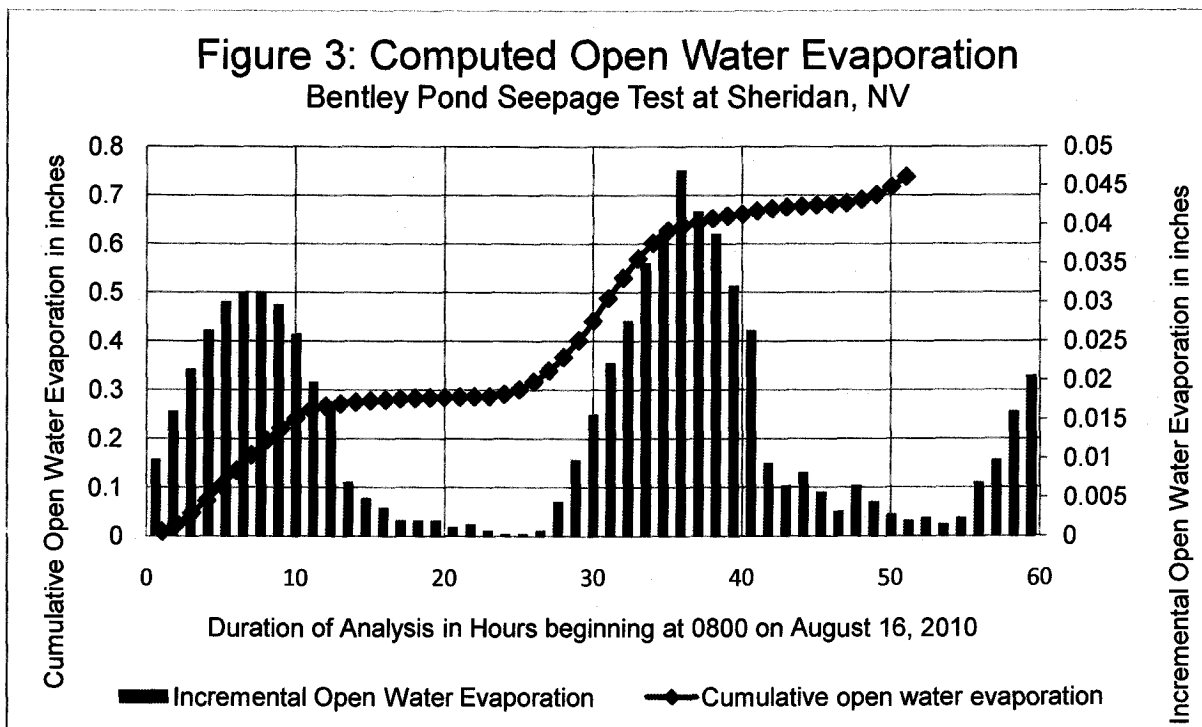


Table 1: Loss Rate Fractions							
Test #	Pond	Total Measured Loss (gpm)	Depth of Surface Evaporation (ft)	Loss due to Surface Evaporation (gpm)	Canopy area of vegetation dependent on pond water (ft ²)	Loss due to Transpiration (gpm)	Loss due to Seepage (gpm)
1	Lower	20.88	0.058	2.68	13000	1.87	16.333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

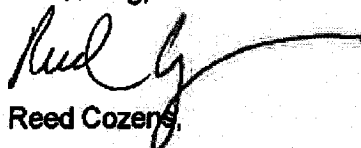
Respectfully Submitted,



Steve Walmsley,

Hydraulic Engineer III

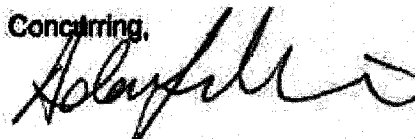
Concurring,



Reed Cozens,

Engineering Technician III

Concurring,



Adam Sullivan, P.E.

Hydrologist

Dated this 14th day of September, 2010.

SWRC/AS

EXHIBIT 4

EXHIBIT 4

BROOKE · SHAW · ZUMPF

Licensed to Practice in:
Nevada
California

Michael L. Matuska
mmatuska@brooke-shaw.com

16 September 2010

Via Facsimile (775) 348-7211 and U.S. Mail

Thomas J. Hall
305 S. Arlington Avenue
P. O. Box 3948
Reno, Nevada 89505

Re: *In the Matter of the Determination of the Relative Rights
in and to the Water of Mott Creek et al.*

Dear Mr. Hall:

In response to your request, although the general rule is that an appeal typically divests the lower court of jurisdiction, the lower court still retains jurisdiction over various matters, and there is an exceptions to the general rule for interlocutory appeals. This is recognized by *Hanley v. Zenoff*, 81 Nev. 9, 398 P.2d 241 (Nev. 1965) and the citation to *Am.Jur.2d* contained therein.

The taking of an interlocutory appeal generally deprives the trial court of the authority to act regarding the matter that is the subject of the appeal. The court is not, however, barred from acting in matters unrelated to the appeal. The taking of an appeal from an order granting or denying a preliminary injunction does not divest the court of jurisdiction to proceed with the action on its merits. 5 *Am.Jur.2d*, APPELLATE REVIEW § 432.

If I do not have the discovery responses tomorrow, I will proceed with the motion to compel and I will further have the sheriff issue subpoenas to compel attendance of you and your clients at depositions. The choice is yours on how to proceed.

As for your inquiry on settlement offers, further offers cannot be evaluated without the benefit of the outstanding discovery responses. You are inhibiting not only the litigation, but any chance of settlement.

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