IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE DETERMINATION OF THE RELATIVE 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, J.W. BENTLEY AND MARYANN BENTLEY, TRUSTEES OF THE BENTLEY FAMILY 1995 TRUST, Appellants, vs. 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, a Nevada limited liability company; DONALD S. FORRESTER; KRISTINA M. FORRESTER; RONALD R. MITCHELL; AND GINGER G. MITCHELL, Respondents.	Supreme Court Case No. 59188 District Court Case No. CV0363

OPPOSITION TO MOTION TO DISMISS

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THE STATE OF NEVADA, OFFICE OF THE STATE ENGINEER

COME NOW PETITIONERS J.W. BENTLEY and MARYANN BENTLEY, Trustees of the Bentley Family 1995 Trust ("Bentley") by and through their counsel of record, Michael L. Matuska, Brooke · Shaw · Zumpft, and hereby file this Opposition to the Motion to Dismiss filed by HALL RANCHES, LLC, DONALD S. FORRESTER and KRISTINA M. FORRESTER, THOMAS J. SCYPHERS and KATHLEEN M. SCYPHERS, FRANK SCHARO, SHERIDAN CREEK EQUESTRIAN CENTER, LLC, a Nevada limited liability company, RONALD R. MITCHELL and GINGER G. MITCHELL (collectively, "Respondents").

Respondents have moved to dismiss this appeal on the basis that it is or will be rendered moot when the subject matter of this appeal, to-wit, the rotation schedule required by the Order of 15 April 2011 ("Order"), expires on 15 October 2011. A copy of that Order is attached hereto as ***Exhibit 1*** and was amended slightly by the Order of 20 June 2011 (***Exhibit 2***). Respondents challenge that order as a form of restraining order which was entered without a hearing, a bond, or any form of due process, and which exceeds the jurisdiction of the lower court in a water rights adjudication matter as limited by NRS 533.090 *et seq.*

This is actually the second year the lower court has imposed a "temporary" rotation schedule. The first rotation schedule was imposed by Order dated 18 June 2010 ***(Exhibit 3)***. Bentley appealed from that order as Case No. 56551. Respondents moved to dismiss that appeal on 27 September 2010, on the basis that the rotation schedule was just temporary and would expire of its own accord on 15 October 2010. Bentley argued in its Opposition that Respondents' Motion to Dismiss should be denied unless and until they withdrew their request for a rotation schedule with prejudice. They did not do so. Regardless, the first appeal was dismissed by way of

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the order dated 18 January 2011, which order concluded, *inter alia,* that the appeal was moot, as the challenged order expired on 15 October 2010. That allowed Respondents to file another request for a rotation schedule this year.

In both appeals, Respondents waited until the temporary rotation schedule was set to expire to file their Motion(s) to Dismiss. Respondents are simply trying to manipulate the proceedings by filing repeated motions for the imposition of a temporary rotation schedule and then waiting until the temporary orders expire to file a motion to dismiss the appeal. The purpose of these shenanigans is to avoid having this Court decide the substantive issues concerning the authority of the lower court to impose a restraining order by way of a rotation schedule. It does not matter that the rotation schedules are temporary, as the issue will keep recurring.

Nevada has recognized an exception to the mootness doctrine for "cases capable of repetition, yet evading review." *State v. Washoe County Public Defender*, 775 P.2d 217, 105 Nev. 299 (*citing Cirac v. Lander*, 95 Nev 723, 602 P.2d 1012 (1979) and *NCAA v. University of Nevada*, 97 Nev. 56, 624 P.2d 11 (1981)), and *Langston v. State of Nevada, ex. Rel. Dep't. of Motor Vehicles*, 871 P.2d 362, 363, 110 Nev. 342 (1994) (citing *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310 (1911)). Because this appeal challenges the statutory authority for the rotation schedule, the issue of the rotation schedule will likely arise again next irrigation season, and will likely eventually arise in context of a permanent rotation schedule order. This appeal falls within the exception to the mootness doctrine.

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WHEREFORE, Bentley respectfully submits that this appeal is not moot and should proceed unless and until Respondents withdraw and pending and further requests for the imposition of a rotation schedule.

DATED this 10th day of October 2011.

BROOKE · SHAW · ZUMPFT

By: _____
MICHAEL L. MATUSKA

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CERTIFICATE OF SERVICE

I certify that on the 10th day of October 2011, I served a copy of this completed docketing statement upon all counsel of record:

☐ By personally serving it upon him/her; or

☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

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William E. Nork
825 West 12th Street
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Dated this 10th day of October 2011.

LIZ STERN, ALS

EXHIBIT 1

EXHIBIT 1

Case No. 08-CV-0363-D

Dept. No. I

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF DOUGLAS

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.

_____/

O R D E R

THIS MATTER comes before the Court upon a Motion For Extension of Time submitted by J.W. Bentley and MaryAnn Bentley, Trustees of the Bentley Family Trust 1995 Trust (hereinafter referred to as "Bentley"). The following have opposed the Motion: Donald S. Forrester and Kristina M. Forrester, Hall Ranches, LLC, Thomas J. Scyphers and Kathleen M. Scyphers, Frank Scharo, Sheridan Creek Equestrian Center, LLC, and Ronald R. Mitchell and Ginger G. Mitchell (hereinafter referred to collectively as "Intervenors").

Bentley requests an extension of time to submit written opposition to Intervenors' Second Motion For Division of Water. Prior to Bentley's request being filed, the Court received a

DAVID R. GAMBLE
DISTRICT JUDGE
DOUGLAS COUNTY
P.O. BOX 218
MINDEN, NV 89423

Partial Opposition To Second Motion For Division Of Water filed by the State Engineer. That partial opposition supports the overall request to impose a rotation schedule for the 2011 irrigation season, pertaining to the waters of Sheridan Creek - North Division, but proposes a different rotation schedule than the one sought within Intervenors' Second Motion For Division of Water. According to the State Engineer, his "proposed rotation schedule allows for a more efficient distribution of water. In addition, the Pestana parcel should not be included at the present time as the property is not currently being actively irrigated and all water right holders should share equally in the excess created by the current non-use of water." Partial Opposition To Second Motion For Division Of Water, p. 2, lines 7-10.

Given the requested delay sought by Bentley, in briefing the pending motion, and having examined all relevant pleadings and papers on file herein, the Court now enters the following order, good cause appearing:

The deadline to file Bentley's written opposition to the Intervenors' Second Motion For Division of Water is hereby extended to May 2, 2011. In the meantime, given that the 2011 irrigation schedule has already begun, the schedule proposed by the State Engineer, as attached to the Partial Opposition, is to be implemented as of the date of this Order by the State Engineer until the pending motion has been fully briefed

DAVID R. GAMBLE
DISTRICT JUDGE
DOUGLAS COUNTY
P.O. BOX 218
MINDEN, NV 89423

and can be examined further by the Court.

IT IS SO ORDERED.

Dated this 15 day of April, 2011.

DAVID R. GAMBLE
District Judge

Copies served by mail and fax this 15th day of April, 2011 to:

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EXHIBIT 2

EXHIBIT 2

Case No.: 08-CV-0363-D

Dept. No.: I

This document does not contain personal information

IN THE NINTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF DOUGLAS

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.

ORDER

This matter comes before the Court on the *Ex Parte* Motion of J.W. BENTLEY and MARYANN BENTLEY, Trustees of the Bentley Family 1995 Trust ("Bentley") to shorten time for HALL RANCHES, LLC, THOMAS J. SCYPHERS and KATHLEEN M. SCYPHERS, FRANK SCHARO, SHERIDAN CREEK EQUESTRIAN CENTER, LLC, a Nevada Limited Liability Company, and DONALD S. FORRESTER and KRISTINA M. FORRESTER, RONALD R. MITCHELL and GINGER G. MITCHELL (collectively, "Intervenors") to file an opposition the Motion to Amend Division of Water filed by the Nevada State Engineer on 10 July 2011. Bentley further requests an interim order approving the amended rotation schedule pending any opposition from the Intervenors, as was done on Intervenors' previous Motion for Division of Water pending receipt of an opposition from Bentley.

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Based on the foregoing, and for good cause shown, IT IS HEREBY ORDERED that the Nevada State Engineer's Motion to Amend Division of Water is GRANTED. The rotation schedule set forth in that motion shall adopted effective immediately. This order may be reconsidered upon receipt of an opposition from Intervenors, if any. Any such opposition shall be filed on or before 6/24, 2011.

IT IS SO ORDERED.

DATED this 20 day of June 2011.

DISTRICT COURT JUDGE

Submitted by:

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S:\LITIGATE\Bentley\H20 Rts\Pldgs\Order (shorten time).doc

EXHIBIT 3

EXHIBIT 3

Case No.: 08-CV-0363-D

Dept. No.: I

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.

_____/

ORDER FOR DIVISION OF WATER

Upon the Motion for Division of Water filed herein on January 8, 2010, by 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"), and upon a hearing having been held in this matter on May 17, 2010, with all parties and their counsel present and following the presentation of evidence and argument by counsel, the Court entered its oral order for the Division of Water and the implementation of a Rotation Schedule, and good cause appearing,

NOW THEREFOR, the Court finds and concludes as follows:

1. NRS 533.230 provides as follows:

> **533.230. Division of water by State Engineer during time order of determination is pending in district court.**
>
> From and after the filing of the order of determination, evidence and transcript with the county clerk, and during the time the hearing of 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.

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

> The diversion rates for the north and south split of Sheridan Creek are based on a spring and early summer average stream flow of 3.5 c.f.s. Flow and diversion rates during periods of drought and middle to late irrigations season will generally be less than the rates determined in the Preliminary Order of 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.

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

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

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

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

DATED this 18 day of June, 2010.

District Judge

Submitted by:
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Attorney for Intervenors

EXHIBIT 1

EXHIBIT 1

SHERIDAN CREEK ADJUDICATION

21 DAY ROTATION SCHEDULE

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

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