

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

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

Electronically Filed
Dec 14 2012 11:19 a.m.
Tracie K. Lindeman
Clerk of Supreme Court
Supreme Court Case No. 60891
District Court Case No. 08-CV-0363-D

14 J.W. BENTLEY and MARYANN
15 BENTLEY, TRUSTEES OF THE
16 BENTLEY FAMILY 1995 TRUST.

17 Appellants.

18 vs.

19 STATE OF NEVADA, OFFICE OF THE
20 STATE ENGINEER; THOMAS J.
21 SCYPHERS; KAHTLEEN M.
22 SCYPHERS; FRANK SHARO;
23 SHERIDAN CREEK EQUESTRIAN
24 CENTER, LLC, a Nevada Limited Liability
25 Company; DONALD S. FORRESTER;
26 KRISTINA M. FORRESTER; HALL
27 RANCHES, LLC; RONALD R.
28 MITHCELL; and GINGER G.
29 MITHCELL.

30 Respondents.

31
32 **RESPONSE TO ORDER TO SHOW CAUSE**

33 COME NOW Appellants, J.W. BENTLEY and MARYANN BENTLEY, Trustees
34 of the Bentley Family 1995 Trust ("Bentleys"), by and through their counsel of record,
35 Michael L. Matuska, Matuska Law Offices, Ltd., and hereby respond to the
36 15 November 2012 Order to Show Cause as follows.

1 This is an appeal from the Findings of Fact, Conclusions of Law and Judgment that
2 was entered by the Hon. David R. Gamble in the Ninth Judicial District Court of Douglas
3 County, Nevada, Case No. 08-CV-0363-D on 5 April 2012 ("Judgment") pursuant to
4 which the lower court nullified a private diversion agreement that had been in place since
5 it was recorded in the Official Records of Douglas County, Nevada on 27 March 1987
6 ("Diversion Agreement") (Tr.Ex.10, *Exhibit 1* attached hereto) and ordered the Nevada
7 State Engineer to impose a rotation schedule which effectively enjoined the Bentleys from
8 diverting their adjudicated water rights except on a prescheduled 36-hour period during a
9 21-day rotation cycle.
10

11 The Judgment contained a Par. 14 which purported to certify the judgment as final.
12 As such, it was necessary for the Bentleys to notice this appeal and to assert jurisdiction in
13 this Court as a final judgment pursuant to NRAP 3A(b)(1). The Bentleys agree with the
14 observations contained in the Order to Show Cause and further assert that the certification
15 was improper. The Judgment will become final when it is incorporated into a final decree
16 in this water rights adjudication case. This certification was made sua sponte by
17 Hon. David R. Gamble. It was not made on a motion of any party and the parties were not
18 given an opportunity to object or to even question whether they wanted certification. It is
19 uncertain how long the parties will have to wait for the final decree.
20

21 However, the improper, sua sponte certification is only one of the oddities in the
22 Judgment and the jurisdiction of this Court to hear Bentleys' appeal should continue. The
23 Bentleys are specifically concerned about the following portions of the judgment:
24
25

26 ///
27
28

8. The Diversion Agreement is ineffective, invalid and unenforceable [Judgment at p.12, ll.24-25].

5. When the combined flow from the North Diversion of Sheridan Creek and tributaries drops below 2.0 cfs, the State Engineer shall impose a rotation schedule.

6. The rotation schedule shall be in effect from the time the North Diversion of Sheridan Creek drops below 2.0 cfs until superseded, until the flow rises to above 2.0 cfs or until the schedule is stayed or modified by this Court.

7. The rotation schedule shall be prepared at the beginning of the irrigation season to allow review by this Court, under NRS 533.450, if any party challenges the schedule.

8. The State Engineer has full authority to implement a rotation schedule if appropriate.

9. The rotation schedule shall reflect any agreements between the parties.

[Judgment p.15, l.17 - p.16, l.5]

The Nevada State Engineer imposed a rotation schedule for the 2012 irrigation season and it is believed that the Nevada State Engineer will again impose a rotation schedule for all future irrigation seasons. Likewise, the lower court previously ordered a rotation schedule for the 2010 and 2011 irrigation seasons. As a result of the Judgment nullifying the 1987 Diversion Agreement and imposing a rotation schedule, Bentleys are effectively enjoined from diverting their adjudicated water rights except on a prescheduled 36-hour period during a 21-day rotation cycle. In other words, Bentleys are enjoined from using their undisputed, adjudicated water rights the remaining 468 hours in a 21-day

1 rotation cycle, and during those 468 hours the Bentleys' adjudicated water rights must
2 continue down the irrigation system for use and appropriation by the Respondents.

3 Bentley's previously appealed the interim rotation schedule orders under NRAP
4 3(b)(3) as preliminary injunctions (*See* Case Nos. 56551 and 59188). Those appeals were
5 both dismissed. This Court should now hear Bentley's appeal regarding the rotation
6 schedule under NRAP 3(b)(3).
7

8 In addition, the parties stipulated and Hon. David R. Gamble ordered that the
9 rotation schedule would not be part of the final decree. It is therefore unclear why the
10 Judgment contains any reference to a rotation schedule.
11

12 6 THE COURT: Okay. So I'm going to restate the
13 7 stipulation, I'm going to ask counsel one more time. My
14 8 understanding is that the stipulation is that the -- that the
15 9 decree -- the final decree in this case will not itself
16 10 contain a permanent court imposed rotation schedule on these
17 11 water rights but will in fact retain or leave with the State
18 12 Engineer the State Engineer's statutory authority to impose a
19 13 rotation schedule in a given water year if the State -- if the
20 14 State Engineer deems that to be appropriate.
21 15 That entails with it of course everyone's right
22 16 to object to that rotation schedule, bring it back to the
23 17 District Court, bring it back to the Supreme Court if that
24 18 ends up being the appropriate action.
25 19 So, Mr. Hall, do I have your stipulation as to
26 20 that principle?
27 21 MR. HALL: Your Honor, you might clarify for me
28 22 the decree court is your court, this court --
29 23 THE COURT: Right.
30 24 MR. HALL: -- and if the State doesn't act for
31 25 rotation would the parties be entitled to move this court on

1 continuing jurisdiction basis to impose the rotation?
2 THE COURT: I believe so.
3 MR. HALL: With that clarification I'm fine with
4 that.
5 THE COURT: Mr. Stockton?
6 MR. STOCKTON: Your Honor, let me just explain
7 under NRS 533.450 the decree court retains jurisdiction, any
8 decisions of the State Engineer come to the decree court for
9 review.
10 THE COURT: Right. So, Mr. Stockton, does the
11 State agree to that stipulation?
12 MR. STOCKTON: Yes, Your Honor.
13 THE COURT: Mr. Matuska?
14 MR. MATUSKA: Yes, Your Honor.
15 THE COURT: Thank you. That's now a fact in the
16 case. Go ahead, Mr. Stockton.
17 MR. STOCKTON: Okay. So exception number 2 was
18 the Bentleys wanted the -- we have the map that's attached to
19 the final order of determination, and the Bentleys wanted
20 their stock water rights to be listed here. And we let them
21 know that nobody's stock water rights are on the map, they're
22 in the final order of determination and they agree that that's
23 acceptable to them. So they'll -- they're basically
24 dismissing exception number 2.
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1 trial statement. So without objection I believe it will be
2 the order that exception number 2 be and hereby is dismissed?
3 MR. MATUSKA: Yes, Your Honor.
4 THE COURT: That will be the order.

Page 16

(See *Exhibit 2*)

This stipulation and order was also contained in the Judgment.

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1 15. The parties made the following stipulations in relation to these
2 Exceptions at the beginning of the trial, which were adopted by the
3 Court:

4
5 a. Exception 1, in part, was that the State Engineer would not attempt
6 to include a rotation schedule in the Decree itself, but that the provisions
7 of NRS 533.075 and the order of this Court would be used to determine
8 when and if a rotation schedule is needed to efficiently use the waters of
9 the State of Nevada. However, Bentley reserves all objections to the
10 imposition of a rotation schedule, including objection about the
11 statutory authority to do so. [Judgment at p.4, lls.15-27]

12 Due to this stipulation and order, there was no trial on the rotation schedule and the
13 Judgment contradicts the stipulation by mandating the rotation schedule. Because the
14 Judgment regarding the rotation schedule will not be part of the final decree, it does not
15 appear that there will ever be a final judgment regarding the rotation schedule. As a result,
16 these issues will never be heard on appeal unless and until they are heard as an
17 interlocutory appeal. NRAP 3(b)(3).
18

19 Dated this 13th day of December 2012.

20
21 MATUSKA LAW OFFICES, LTD.

22
23 By:

24 
MICHAEL L. MATUSKA, SBN 5711
Attorneys for PETITIONERS,
25
26
27
28

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Matuska Law Offices and that on the 14th day of December 2012, I served a true and correct copy of the preceding document entitled **RESPONSE TO ORDER TO SHOW CAUSE** as follows:

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

Thomas J. Hall, Esq.
305 South Arlington Avenue
P.O. Box 3948
Reno NV 89505-3948

Jessica Prunty, Esq.
DYER LAWRENCE, et al.
2805 Mountain Street
Carson City NV 89703

☒ **BY U.S. MAIL:** I deposited for mailing in the United States mail, with postage fully prepaid, an envelope containing the above-identified document(s) at Carson City, Nevada, in the ordinary course of business.

☐ **BY PERSONAL SERVICE:** I personally delivered the above-identified document(s) by hand delivery to the office(s) of the person(s) named above.

☐ **BY FACSIMILE:**

☐ **BY FEDERAL EXPRESS ONE-DAY DELIVERY.**

☐ **BY MESSENGER SERVICE:** I delivered the above-identified document(s) to Reno-Carson Messenger Service for delivery.


LIZ STERN, ALS

EXHIBIT 1

EXHIBIT 1

12- P.O. Box 1511
Nevada 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. Whitmore
GERALD F. WHITMORE

Date: 6-9-86

Pamela F. J. Whitmore
PAMELA F. J. WHITMORE

Date: _____

Joseph V. Lodato
JOSEPH V. 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

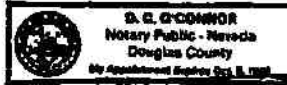
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STATE OF Nevada)
COUNTY OF Douglas) ss.

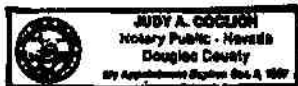
On June 9, 1986, personally appeared before me, a notary public, **PAMELA P. J. WHITMIRE**, personally known to me to be the person who executed the above instrument, and acknowledged to me that she executed the same for the purposes therein stated.

P.C. O'Connor
Notary Public

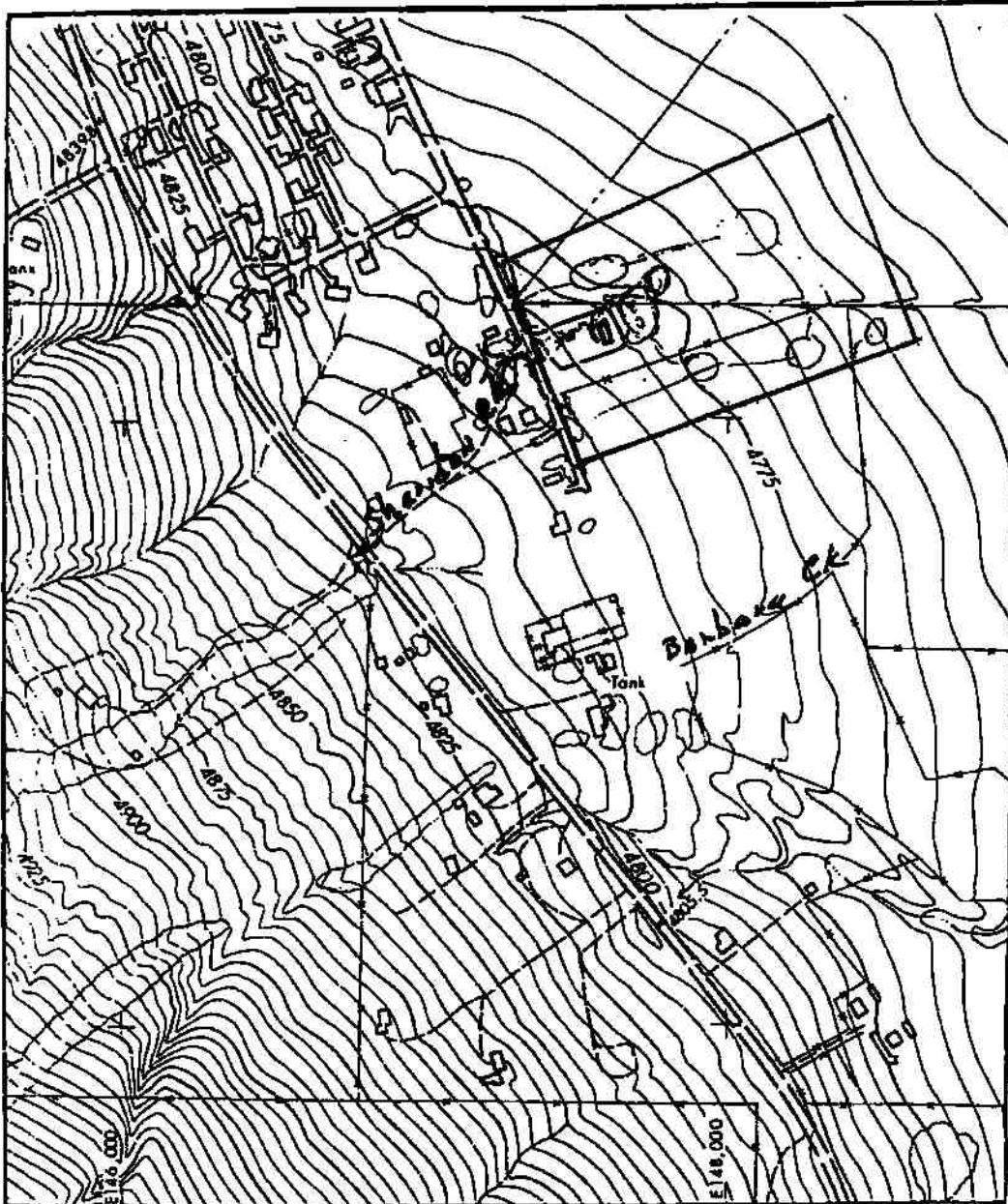


STATE OF Nevada)
COUNTY OF Nevada) ss.

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. Cochran
Notary Public



PROJECT

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

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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 Polph 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°54'52" 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:

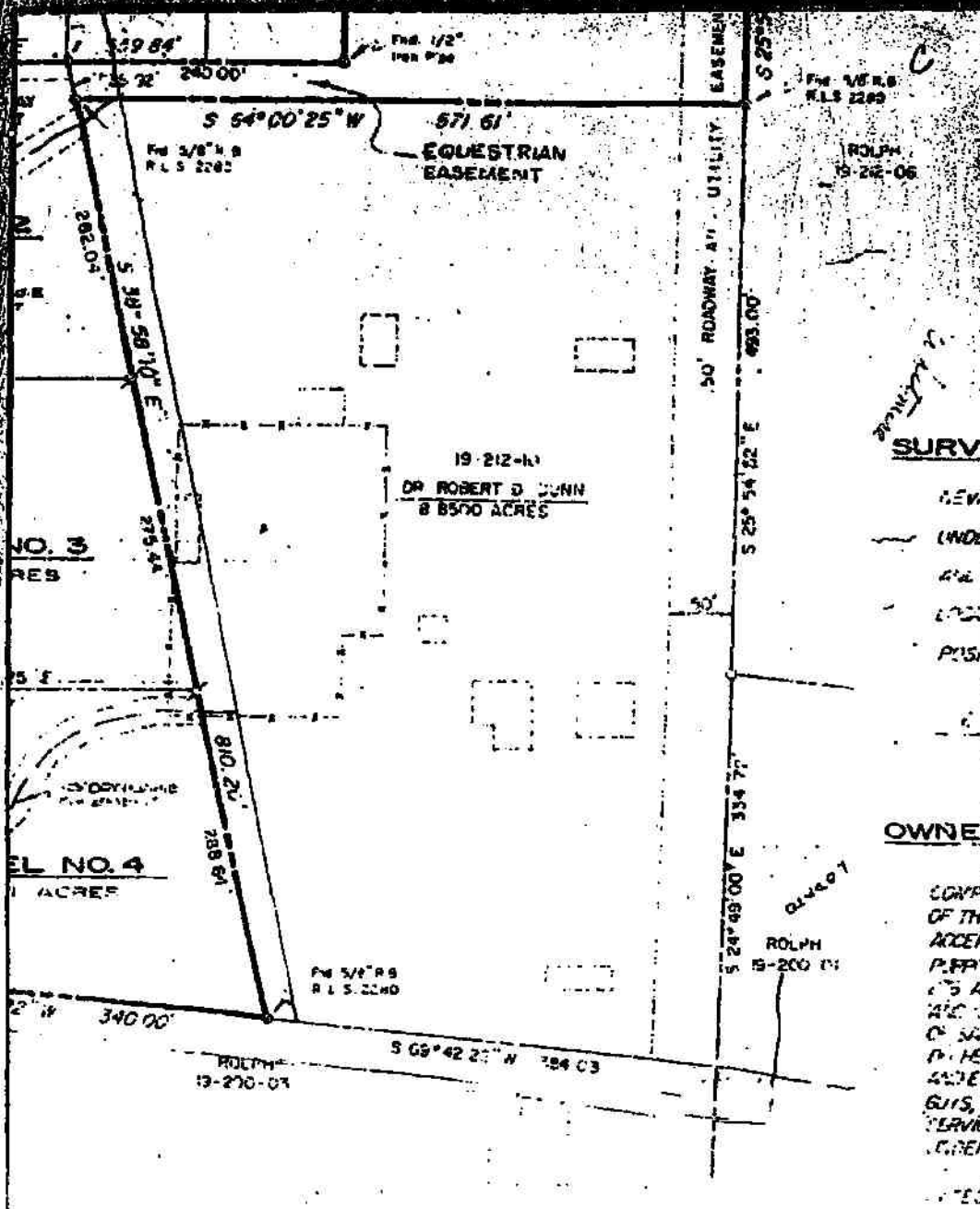
BEGINNING at a point from which the Southwest Corner of the parcel described in Document No. 64911, filed in the office of Douglas County Recorder bears South 25°54'52" East, a distance of 349.90 feet; said point being on the Easterly line of Sheridan Lane; thence North 89°45'00" East, a distance of 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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OFFICIAL RECORDS IN
CLERK'S OFFICE, NEVADA

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RECORDER
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In The Matter Of:

*Determination of Relative Rights in and to Waters of
Mott Creek, Taylor Creek, Carey Creek, etc.*

Vol. 1

January 09, 2012

CAPITOL REPORTERS

(775) 882-5322

515 W. Fourth Street

Carson City, NV 89703

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1 THE COURT: And, Mr. Matuska, do you stipulate to
2 the same?
3 MR. MATUSKA: Yes, except that we've opposed
4 the -- the legal authority of the State Engineer to impose a
5 rotation schedule in the first place, but the way that the
6 stipulation is being presented it isn't an immediate issue for
7 us today. Ostensibly we would have the right to object to or
8 oppose or even appeal an action from the State Engineer in the
9 future.
10 THE COURT: Agreed.
11 MR. MATUSKA: So, I think that stipulation
12 actually changes the posture of the case we were going to
13 present today. I know we talked about this on October 26th.
14 I'm pleased to hear it, frankly, but I wasn't really aware
15 that -- that it -- that it was settled in everybody's minds.
16 So I think that this is a development that maybe sounds like
17 Mr. Hall was a little surprised by --
18 THE COURT: I'm just -- Mr. Matuska, did you
19 hear -- you want me to restate this, I'm just trying to get to
20 the chase here.
21 MR. MATUSKA: The stipulation is acceptable.
22 THE COURT: It's fine, isn't it?
23 MR. MATUSKA: Yes, Your Honor, but I'm just
24 saying I think that changes the posture of what we're
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2 THE COURT: I believe so.
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7 under NRS 533.450 the decree court retains jurisdiction, any
8 decisions of the State Engineer come to the decree court for
9 review.
10 THE COURT: Right. So, Mr. Stockton, does the
11 State agree to that stipulation?
12 MR. STOCKTON: Yes, Your Honor.
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16 case. Go ahead, Mr. Stockton.
17 MR. STOCKTON: Okay. So exception number 2 was
18 the Bentleys wanted the -- we have the map that's attached to
19 the final order of determination, and the Bentleys wanted
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21 know that nobody's stock water rights are on the map, they're
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2 doesn't, but if it becomes a fact in the case then perhaps it
3 might even shorten the trial which would be good for
4 everybody.
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7 stipulation, I'm going to ask counsel one more time. My
8 understanding is that the stipulation is that the -- that the
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20 that principle?
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22 the decree court is your court, this court --
23 THE COURT: Right.
24 MR. HALL: -- and if the State doesn't act for
25 rotation would the parties be entitled to move this court on

1 trial statement. So without objection I believe it will be
2 the order that exception number 2 be and hereby is dismissed?
3 MR. MATUSKA: Yes, Your Honor.
4 THE COURT: That will be the order.
5 MR. STOCKTON: Okay. As to exception number 3 we
6 agree that there is a typographical error and that we will fix
7 that in the final decree.
8 THE COURT: And are you all three agreed as to
9 the content of the typo and the changes that are necessary? I
10 think we were last time.
11 MR. STOCKTON: It's just one digit instead of
12 Victor, which stands for vested rights 06505 it should be
13 Victor 06305.
14 THE COURT: You agree with that, Mr. Matuska?
15 MR. MATUSKA: Yes, Your Honor.
16 THE COURT: Mr. Hall?
17 MR. HALL: Yes, sir.
18 THE COURT: Okay. So that will be the order that
19 in the final decree that typographical error be corrected.
20 MR. STOCKTON: And then exception number 4, we
21 agree that the acreage needs to be adjusted based on the
22 adjustment in the property lines between Mr. Bentley and I
23 can't remember if it was Mr. Lodato or Mr. Sap, but they
24 exchanged some property and so the State Engineer agrees that
25 we should correct the acreage in the -- in the final decree.

EXHIBIT 2

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25 rotation would the parties be entitled to move this court on

1 trial statement. So without objection I believe it will be
2 the order that exception number 2 be and hereby is dismissed?

3 MR. MATUSKA: Yes, Your Honor.

4 THE COURT: That will be the order.

5 MR. STOCKTON: Okay. As to exception number 3 we
6 agree that there is a typographical error and that we will fix
7 that in the final decree.

8 THE COURT: And are you all three agreed as to
9 the content of the typo and the changes that are necessary? I
10 think we were last time.

11 MR. STOCKTON: It's just one digit instead of
12 Victor, which stands for vested rights 06505 it should be
13 Victor 06305.

14 THE COURT: You agree with that, Mr. Matuska?

15 MR. MATUSKA: Yes, Your Honor.

16 THE COURT: Mr. Hall?

17 MR. HALL: Yes, sir.

18 THE COURT: Okay. So that will be the order that
19 in the final decree that typographical error be corrected.

20 MR. STOCKTON: And then exception number 4, we
21 agree that the acreage needs to be adjusted based on the
22 adjustment in the property lines between Mr. Bentley and I
23 can't remember if it was Mr. Lodato or Mr. Sap, but they
24 exchanged some property and so the State Engineer agrees that
25 we should correct the acreage in the -- in the final decree.