

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

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8                   J.W. BENTLEY AND MARYANN  
9                   BENTLEY TRUSTEES OF THE  
10                  BENTLEY FAMILY 1995 TRUST; JOY  
11                  SMITH; DANIEL BARDEN; AND  
12                  ELAINE BARDEN,

CASE NO.: 64773

13                                   Appellants

14                                   vs.

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

23                                   Respondents.

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25                   J.W. BENTLEY; MARYANN BENTLEY,  
26                   TRUSTEES OF THE BENTLEY FAMILY  
27                   1995 TRUST; JOY SMITH; DANIEL D. BARDEN;  
28                   AND ELAINE BARDEN,

CASE NO.: 66303

29                                   Appellants,

30                                   vs.

31                   HALL RANCHES, LLC; THOMAS J. SCYPHERS;  
32                   KATHLEEN M. SCYPHERS; FRANK SCHARO;  
33                   SHERIDAN CREEK EQUESTRIAN CENTER, LLC,  
34                   A NEVADA LIMITED LIABILITY COMPANY;  
35                   DONALD S. FORRESTER; KRISTINA M.  
36                   FORRESTER; RONALD R. MITCHELL; AND  
37                   GINGER G. MITCHELL,

38                                   Respondents.  
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J.W. BENTLEY; MARYANN BENTLEY,  
TRUSTEES OF THE BENTLEY FAMILY 1995  
TRUST; JERALD R. JACKSON, TRUSTEE OF  
THE JERALD R. JACKSON 1975 TRUST, AS  
AMENDED; AND IRENE M. WINDHOLZ,  
TRUSTEE OF THE WINDHOLZ TRUST DATED  
AUGUST 11, 1992,

CASE NO.: 66932

Appellants,

vs.

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

Respondents.

On Appeal from the Ninth Judicial District Court  
of the State of Nevada, in and for Douglas County  
Hon. Nathan Todd Young, District Judge

**REPLY BRIEF OF APPELLANTS**  
**JOY SMITH, DANIEL BARDEN AND ELAINE BARDEN**

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## INTRODUCTION

Smith & Barnes' position is straightforward - Nevada law does not allow for forced rotation. Hence, the State Engineer was required to implement the district court's Adjudication Order and Decree within those confines and exclude non-consenting users from the scope of the rotation schedule. Operating within these parameters does not strip the State Engineer of the ability to ensure that consenting water users still receive their share of the water by requiring the non-consenting users to reduce their usage of their water in times of shortages. Such a result complies with Nevada law and makes sense. Otherwise, the consenting users are given preferential treatment in how they want to use their water over the non-consenting users, when they all hold rights of equal priority.

## ARGUMENT

### **I. Rotation of Water Rights in Nevada Must be Consensual.**

Neither the State Engineer nor the Intervenor contest that the only statutory provision in Nevada's water law scheme which addresses rotation in the use of water is NRS 533.075. Neither do they contest that this statute only allows for rotation for irrigation purposes upon the agreement of the water users of a common source. What Intervenor argue is that because the water rights in question are vested water rights, Nevada's statutory water law scheme, including the provisions of NRS 533.075, cannot be applied to the administration of their water rights. Int. Ans. Brf. at 10-14. Therefore, Intervenor posit that the common law in existence prior to 1913 requires forced rotation of water rights and that common law governs the administration of the waters of North Sheridan Creek. Inter. Ans. Br. at 7, 10-12.

The State Engineer appears to agree that he does not have independent authority to order rotation. His position is that his hands were tied as the

1 Adjudication Order and Decree compelled him to include the non-consenting  
2 users within the rotation schedule he imposed. S.E. Ans. Brf. at 11-12.

3 A. NRS 533.075 Does Not Impair Vested Water Rights and Thus Controls.

4 When the Nevada Legislature enacted the water law scheme in 1913 it  
5 intended to “place the distribution of the waters of the streams or stream  
6 systems of the state to the person entitled thereto, under state control.” *Ormsby*  
7 *County v. Kearney*, 37 Nev. 314, 336, 142 P. 803, 805 (1914). But in doing so,  
8 it ensured that vested rights would be protected from *impairment* as  
9 memorialized in NRS 533.085:

10 [n]othing contained in this chapter shall impair the vested right  
11 of any person to the use of water, nor shall the right of any person  
12 to take and use water be impaired or affected by any of the  
provisions of this chapter where appropriations have been  
initiated in accordance with law prior to March 22, 1913.

13 This protection was built into the water act by the Legislature as a due process  
14 measure to ensure that water rights established prior to its enactment would not  
15 be impaired by application of the statutory scheme, “that is, they shall not be  
16 diminished in quantity or value.” *Ormsby County*, 37 Nev. at 352, 142 P. at  
17 810. But the Legislature never intended to exempt vested rights from the  
18 purview of the statutory scheme as suggested by Intervenor.

19 The whole scope and purpose of the act show that it was intended  
20 to apply to *all water rights, whether acquired before or after its*  
21 *adoption*. There would be little or no use in attempting state  
control over a stream or stream system unless all water rights  
were brought under that control.

22 *Id.* (*emphasis added*); see also *Humboldt Land & Cattle Co. v. Allen*, 14 F.2d  
23 650 (Nev. 1926) (“If the Water Law can apply only to rights initiated after its  
24 enactment, then as to the Humboldt River, and probably as to every other  
25 considerable stream in the state, it is utterly useless.”).

26 ///

27 ///



1           Therefore, the question in this case becomes whether NRS 533.075<sup>1</sup> is  
2 a statute that impairs vested water rights:

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

12           NRS 533.075. This statute was enacted as part of the 1913 comprehensive  
13 water law scheme. Its plain and clear terms embody the policy of encouraging  
14 the common practice of agreed-upon rotation as an efficient use of a single  
15 source of water by its different irrigation users.<sup>2</sup>

16  
17           <sup>1</sup> It should be noted that only Intervenor advance the argument that NRS  
18 533.075 cannot apply to their vested water rights. Additionally, the State  
19 Engineer conceded in the proceedings below that rotation in the Carson Valley  
20 is done only upon consent of the water users when he stated that there are rotation  
21 schedules on other stream systems in the Carson Valley, but those were arrived  
22 at “without intervention by the State Engineer.” IV JA 674.

23           <sup>2</sup> The policy considerations articulated in the out-of-state cases and arcane  
24 treatises are cited by Intervenor in support of their argument that rotation in  
25 irrigations practices is a good thing. Inter. Ans. Br. at 12-17. That may be the  
26 case under certain circumstances, but regardless, in Nevada the practice of  
27 rotation is only statutorily sanctioned if bounded by consent parameters.

28           In fact, in this past legislative session, the Legislature reiterated that  
consensual rotation is the law in Nevada when it rejected a bill introduced by the  
Division of Water Resources, a provision of which would have given the State  
Engineer the authority to impose a rotation schedule. On December 20, 2014,  
Senate Bill No. 65 (S.B. 65) was prefiled on behalf of the Division of Water  
Resources. Nevada S.B. 65, 78th Reg. Session (December 20, 2014). Sec. Req.  
for Jud. Not., Ex. 1. As introduced, S.B. 65 sought to give the State Engineer the  
authority to impose a rotation schedule. *Id.* at Sec. 32. On April 20, 2015, the  
Senate Committee on Government Affairs (“Government Affairs Committee”) adopted  
an amendment, which entirely removed the language in Sec. 32 granting

1 The statute is an affirmative grant of authority to water users. Nothing  
2 in NRS 533.075 can be construed as a diminishment in “quantity or value” of  
3 vested water rights. *Cf. Anderson Family Associates v. Ricci*, 124 Nev. 182,  
4 179 P.3d 1201 (2008) (holding that neither the vested right itself, nor its  
5 *priority*, could be *lost* through the cancellation of a later, statutorily issued  
6 permit, which had changed the place and manner of use of the vested right); *In*  
7 *re Manse Spring*, 60 Nev. 280, 108 P.2d 311 (statute providing that water  
8 rights are *forfeited* after period of non-use inapplicable to vested water rights  
9 as forfeiture would “*impair*” the vested rights).

10 As opposed to the forfeiture of the right to use water or the loss of a  
11 water right’s priority date, requiring that rotation of any water rights, including  
12 vested rights, be based upon consent does not impair those vested water rights.  
13 Those water right users still receive their water, subject to a potential pro rata  
14 reduction in times of shortage, along with all the other users of the water  
15 source. There is also nothing preventing them from taking advantage of the  
16 flexibility that NRS 533.075 provides to use their water outside the terms of  
17 ///

18 \_\_\_\_\_  
19 the State Engineer the authority to impose a rotation schedule. Nevada S.B. 65,  
20 78th Reg. Session (reprinted with amendments adopted on April 20, 2015); Sec.  
21 Req. for Jud. Not., Exs. 2, 3 (S.B. 65 passed the Government Affairs Committee  
22 as amended, but failed to garner the two-thirds majority vote required to pass the  
23 Senate.). “Generally, the rejection of an amendment indicates that the legislature  
24 does not intend the bill to include the provisions embodied in the rejected  
25 amendment.” *Natchez v. State*, 102 Nev. 247, 250-51, 721 P.2d 361, 363 (1986)  
26 (stating that when the Legislature was presented with a bill allowing  
27 ophthalmologists to employ optometrists and then deleted that provision before  
28 ultimately passing the bill, it demonstrated that the Legislature’s intent was to  
prohibit that particular type of employment relationship). Clearly, the Nevada  
Legislature has no appetite to change the law in Nevada to allow for forced  
rotation.

1 the Decree in agreement with other users, even if not all users in the system  
2 participate. In such a case, the non-participating users cannot over-appropriate  
3 the resource to the rotating users' detriment in times of shortage. The State  
4 Engineer can safeguard against any such worry with the threat of curtailment  
5 orders or by otherwise regulating the quantity of water taken by non-  
6 participating users to ensure that they receive no more than their pro rata share  
7 in times of shortage. *See* NRS 533.305.

8 B. Common Law Does Not Contemplate Using Forced Rotation in the  
9 Administration of Water Rights.

10 Given that NRS 533.075 does not impair vested water rights, whatever  
11 the common law was in regards to rotation in 1913 is irrelevant. Nonetheless,  
12 contrary to Intervenor's position, there is no definitive common law authority  
13 in Nevada allowing for forced rotation in the *administration* of water rights.

14 Intervenor's mistakenly rely upon *Barnes v. Sabron*, 10 Nev. 217 (1875),  
15 for the proposition that the common law in Nevada prior to 1913 mandated  
16 forced rotation. Int. Ans. Brf. at 16-17. That case is not about forced rotation,  
17 rather it is a case that establishes the prior appropriation concept that the metes  
18 and bounds of the right to use water is beneficial use. 10 Nev. at 243. In other  
19 words, a water right user is not entitled to any more water than he can put to  
20 use.

21 In *Barnes*, the dispute was between two users of a creek, one senior to the  
22 other. The senior appropriator, who happened to be downstream from the junior  
23 appropriator, was insisting that the junior appropriate had to turn the water of the  
24 creek down to senior appropriator at all times, even when the senior appropriator  
25 could not put the water to use. *Id.* at 227-30. The Court disagreed and held that  
26 because the senior appropriator had made his use of water only during certain  
27 periods of time in the irrigation season, he only had the established right to use  
28

1 the water at those times, and the junior appropriator was entitled to use the water  
2 during the other times. *Id.* at 240-43.

3 The Court held that a user of water is only entitled to an amount of water  
4 which can actually be put to beneficial use, one of the foundational precepts of  
5 Nevada water.<sup>3</sup> *Id.* at 244-45 (cited in *Bacher v. State Engineer*, 122 Nev. 1110,  
6 1116 n.8, 146 P.3d 793, 795 n.8 (2006). Therefore, the Court held that the junior  
7 appropriator could obtain a right to use the water in the times that the senior  
8 appropriator could not put it to use. *Id.*

9 Smith & Barden do agree that the actual division of water in the *Barnes*  
10 case between the two appropriators of the stream in question was done on the  
11 basis of time, not quantity. But the waters at issue here were never divided  
12 amongst the users on the basis of time. The Decree and FOD makes the division  
13 of the waters of North Sheridan Creek in terms of quantity with an assigned rate  
14 and duty, not on the basis of the timing of the use. II JA 388; V SJA 961-63;  
15 NRS 533.070.

16 Here the question is whether the State Engineer may administer rights by  
17 mandated rotation that contradicts the division by quantity in the Decree and  
18 required by law. This is not an issue reached in *Barnes*, and the Court in that case  
19 did not adopt a compulsory rule of rotation in the administration of water rights  
20 that trumps the consent-based parameters of NRS 533.075.<sup>4</sup>

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21  
22 <sup>3</sup> Ultimately, the 1913 Nevada Legislature codified the principle  
23 articulated in *Barnes* in NRS 533.035, which states that “[b]eneficial use shall be  
24 the basis, the measure and the limit of the right to the use of water.”

25 <sup>4</sup> Furthermore, given the Legislature’s enactment of NRS 533.075, any  
26 common law to the contrary does not control. The “common law is the rule of  
27 decision in our courts *unless* in conflict with constitutional or *statutory*  
28 commands.” *Hamm v. Carson City Nugget*, 85 Nev. 99, 100, 450 P.2d 358  
(1969) (emphasis added); NRS 1.030. If the common law is contrary to a

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1     **II.     The State Engineer Did Not Properly Implement the District Court’s**  
2     **Adjudication Order.**

3             The State Engineer is charged to *administer* the rights of the water law  
4     claimants in accordance with the FOD and under the adjudicating district court’s  
5     “supervision and control.” NRS 533.220(1); NRS 533.230. Of course the State  
6     Engineer is not free to disregard the dictates of the decree court, converse to the  
7     State Engineer’s mischaracterization of Smith & Barden’s position. SE Ans. Brf.  
8     at 19. What the State Engineer does not discuss is the actual language of the  
9     Adjudication Order and the Decree. The Decree, which referred to and reiterated  
10    portions of the Adjudication Order,<sup>5</sup> provides:

11            [U]nder the provisions of NRS 533.075 and the orders of this Court,  
12            when the combined flow of Sheridan Creek falls below 2.0 cubic  
13            feet per second (cfs), the State Engineer shall impose a rotation  
14            schedule and the rotation schedule shall be in effect from the time  
15            the North Diversion of Sheridan Creek drops below 2.0 cfs until the  
16            flow rises above 2.0 cfs or until the schedule is modified by the  
17            Court. The rotation schedule shall be prepared at the beginning of  
18            the irrigation season to *allow review by this Court, under NRS §*  
19            *533.450, if any party challenges the schedule.* The State Engineer  
20            has full authority to implement a rotation schedule, *if appropriate.*  
21            The rotation schedule shall reflect any agreements between the  
22            parties. The State Engineer shall monitor the system and *make*  
23            *changes as required by law or by the request* of the parties, which  
24            changes are subject to review in this Court.

19     V SJA 849 (emphasis added); *see also* I JA 169-170.

20            \_\_\_\_\_

21     statutory enactment, that common law must give way to the statute. *Davenport*  
22     *v. State Farm Auto Ins. Co.*, 81 Nev. 361, 404 P.2d. 10 (1965). Here, even if  
23     there was some pre-1913 support for the concept of authorized compulsory  
24     rotation, that law has been abrogated by the enactment of the consent-based  
25     provisions of NRS 533.075.

25            <sup>5</sup> While Smith & Barden did not appeal the Decree, given the Decree’s  
26     integration of the Adjudication Order’s dictates under which the State Engineer  
27     was operating when Smith & Barden petitioned for judicial review upon being  
28     included in his rotation schedule, for ease of reference, Smith & Barden cite to  
   the Decree and Adjudication Order. *See* V SJA 848, 974-989.

1 In crafting its order, the district court referred to NRS 533.075 and stated  
2 that the State Engineer had the authority to implement rotation, “if appropriate.”  
3 He left the specificity of the content, manner or scope of any such rotation  
4 schedule to the discretion of the State Engineer, as well as directed the State  
5 Engineer to “make changes required by law” in monitoring the system.<sup>6</sup> V SJA  
6 849; *see also* I JA 169-170. The Court also ensured that any party objecting to  
7 the rotation schedules or changes made thereto, could petition the Court for  
8 review. *Id.* Plainly, the State Engineer’s hands were not tied. His authority  
9 under the Adjudication Order and Decree must therefore be exercised in  
10 accordance with NRS 533.075.

11 In administering North Sheridan Creek water, the State Engineer is limited  
12 by the very statutes he is charged with administering, including NRS 533.075.  
13 Given the district court’s express grant of authority to the State Engineer to make  
14 changes to any rotation schedule “as required by law,” the State Engineer cannot  
15 use the mandates of the Adjudication Order and Decree as a shield to excuse his  
16 actions in forcing non-consenting water users to rotate their use of their water.  
17 *Id.* If the State Engineer had excluded the non-consenting users from the purview  
18 of the rotation schedule, he would not have violated the Adjudication Order as  
19 that exclusion was “required by law.” Yet, the State Engineer abdicated his duty  
20 and perfunctorily compiled a schedule including all users, consenting or not.  
21 Those administrative actions were contrary to Nevada law and arbitrarily and  
22 capriciously singled out some users in favor of other users, all of equal priority.

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25 <sup>6</sup> The district court’s authority in a statutory adjudication is not the broad,  
26 equitable power espoused by Intervenor, but is limited in scope that granted the  
27 adjudication provisions of NRS Chapter 533. *G & M Properties .v District Court*,  
28 95 Nev. 301, 594 P.2d 714 (court’s authority in statutory adjudication is limited  
to that set forth in adjudication statutes).

1 Therefore, the district court erred below in concluding the State Engineer acted  
2 appropriately and in conformity with Nevada law.

3  
4 **III. Smith & Barden Are Entitled to Petition the District Court for**  
5 **Judicial Review of the State Engineer's Rotation Schedule.**

6 Both the State Engineer and Intervenor state that Smith & Barden were  
7 parties to the adjudication proceeding and are bound by the Decree. Int. Ans. Brf.  
8 at 6; SE Ans. Brf. at 22-23. Smith & Barden agree that as users of the waters  
9 adjudicated by the Decree, they are bound by its terms. Nor do they posit that  
10 they are somehow "above the law." What the State Engineer and Intervenor  
11 ignore is that Smith & Barden have the right, just as "any person feeling  
12 aggrieved by any order or decision of the State Engineer," to petition for judicial  
13 review of the State Engineer's decision to include them in the rotation schedule  
14 under NRS 533.450. This right was specifically affirmed by the District Court  
15 in both the Adjudication Order and the Decree.

16  
17 **IV. The State Engineer Did Not Have Substantial Evidence to Support His**  
18 **Rotation Schedules.**

19 The State Engineer deflects responsibility to monitor the North Sheridan  
20 Creek system when implementing rotation schedules to the district court's  
21 Adjudication Order. He opines that in the wake of that order, he is not required  
22 to make any findings that rotation of the waters is the most efficient use of the  
23 resource and does not impair any one user's right to the water, given their equal  
24 priority standing. However, that order contained no such findings, and those are  
25 findings that must be made if this Court is going to accept the proposition that  
26 forced rotation is permissible in Nevada.

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1 Further, Intervenor's bald assertion that Appellants were using *all* of the  
2 water and Intervenor received *no* water have no support in the record. Inter.  
3 Ans. Br. at 23. Intervenor's support are pieces of testimony from two of the  
4 water users who favored rotation to the effect that their water usage increased  
5 after the rotation schedules were issued. *Id.* at 24-29. Of course, Smith & Barden  
6 could also pull bits of testimony from the record that demonstrate that their rights  
7 have been diminished and otherwise impaired as a result of the rotation. *See* IJA  
8 145-50. In either case, there were no findings made one way or the other by the  
9 district court. And it is upon that shaky evidentiary base, that this Court is urged  
10 to find that substantial evidence supports forcing Appellants, as highland water  
11 users, to subjugate the usage of their rights in favor of their lowland neighbors,  
12 even though they all hold rights of equal priority.

13 Nevada water law provides for no such distinction and in the absence of  
14 substantial evidence of consent, efficiency and non-impairment, Smith & Barden  
15 cannot be forced to rotate their water. Therefore, the district court erred in  
16 finding that substantial evidence supported the State Engineer's imposition of the  
17 rotation schedule.

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## CONCLUSION

The district court erred in concluding that forced rotation is condoned by Nevada law and that the rotation schedules imposed that did not carve out Smith & Barden from their purview were valid, legal and supported by substantial evidence. Accordingly, and for the foregoing reasons, the order of the district court denying Smith & Barden's petitions for judicial review must be reversed and the matter remanded with instructions that the State Engineer must structure his rotation schedules for North Sheridan Creek in such a manner that non-consenting water users are exempted from their scope.

Respectfully submitted this 22<sup>nd</sup> day of June, 2015.

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## CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using WordPerfect, Times New Roman 14 point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is:

(a) proportionately spaced, has a typeface of 14 points or more, and contains 3864 words; and (2) does not exceed 15 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 22<sup>nd</sup> day of June, 2015.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 22<sup>nd</sup> day of June, 2015, I caused a true and correct copy of the within **REPLY BRIEF OF APPELLANTS JOY SMITH, DANIEL BARDEN AND ELAINE BARDEN** to be deposited in the U.S. Mail, first-class postage prepaid, addressed to the persons listed below:

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