

**BEFORE THE STATE ENGINEER, STATE OF NEVADA
DEPARTMENT OF CONSERVATION AND NATURAL
RESOURCES, DIVISION OF WATER RESOURCES**

ORIGINAL

IN THE MATTER OF APPLICATION
73378 FILED BY A & B AQUA, LLC
TO APPROPRIATE THE WATERS
OF SMOKE CREEK

**PROTEST AND REQUEST
TO DENY APPLICATION
73378; PETITION FOR HEARING
PURSUANT TO N.R.S. 533.365;
PETITION FOR A HYDROLOGICAL
AND ENVIRONMENTAL STUDY
PURSUANT TO N.R.S. 533.368**

COMES NOW DAVID RUMSEY, MICHAEL S. MOORE AND JOHN G. BOGARD, as individuals, (hereafter "Protestants"), by and through their attorneys, and hereby protest the granting of application 73378, filed by A & B Aqua, LLC, a Limited Liability Company on October 21, 2005, to appropriate the waters of Smoke Creek, situated in the Smoke Creek Desert, Washoe County, Nevada. Mr. Rumsey's address is: David Rumsey, Parker Ranch, P.O. Box 232, Gerlach, NV 89412. Mr. Moore's address is: Michael S. Moore, Wall Spring Ranch, 71600 County Road 33, Gerlach, Nevada 89412. Mr. Bogard's address is: P.O. Box 4, Gerlach, Nevada 89412. Protestants are all residents, landowners, and water right owners in the vicinity of Gerlach, Nevada, in Smoke Creek Basin, where the subject Application seeks to appropriate waters.

Rumsey, Moore and Bogard protest the Application for the following reasons and on the grounds, to wit:

1. The Applicant seeks to appropriate 25.0 cfs - 6000 acre feet per annum to be used for municipal and domestic (aquifer storage and recovery) purposes. A & B Aqua, LLC proposes to divert Smoke Creek water, including flood flows, into a percolation basin for an aquifer

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storage and recovery (ASR) project with secondary applications to follow. Water rights within Basin 21 have not been adjudicated under N.R.S. § 533.090 et seq. Protestants and others have previously petitioned the State Engineer to adjudicate the water rights within Basin 21. There are numerous applications, permits and proofs which have been filed on the Smoke Creek and Tributaries which fully appropriate all flows from these sources; therefore, there is no unappropriated water available.

2. The State Engineer should adjudicate these water rights to address the interstate issues. Smoke Creek and Rush Creek have headwaters in Lassen County, California which further necessitates the need to adjudicate these water rights to address the interstate issues. Lassen County has joined in the request for an adjudication of the rights in Smoke Creek.

3. Based upon information and belief, the project proposed by A & B Aqua, LLC, will divert surface water flows into the groundwater and then pump the groundwater for municipal and domestic purposes. By changing the surface water to municipal and domestic purposes and then pumping the groundwater for those same uses, the Applicant is attempting to appropriate the water source twice, once at the surface and once underground.

4. The Applicant seeks to divert and store surface water in a percolation basin located in Sections 2, 10, 11, 14 & 15, T30N, R19E. This will negatively impact the natural water flow to the detriment of current users who depend on a consistent surface flow, especially in times of drought.

5. The floodwaters referred to in the remarks section of the Application are a natural component and contributor to the ground water resources of the basin. Capture of these 'surface waters' for an ASR project using percolation basins may include capture of surface water which

would have infiltrated and recharged the ground water aquifer naturally.

6. N.R.S. § 534.120 authorizes the State Engineer to designate a basin as a depleted groundwater basin. Protestants assert that Basin 21, Smoke Creek Basin, is a depleted groundwater basin and should be so designated by the State Engineer. In addition, pending applications filed by Washoe County seek to appropriate any unappropriated ground water resources in this basin.

7. Based upon information and belief, Protestants believe that the Application to Appropriate will conflict with existing water rights of Protestants.

8. If this Application is approved, the public interest will be violated in that there will be a negative impact on ground, spring & surface water sources relied upon by farmers, ranchers, wildlife and other landowners and will negatively impact flows to the wetlands, artesian wells and will adversely affect water quality.

9. Due to the large magnitude of this Application and potential inter-basin transfers associated with the referenced secondary applications, a hydrological study and environmental impact study should be conducted pursuant to N.R.S. 533.368. These studies are especially critical since previous USGS studies have identified the potential for inter-basin flow between Smoke Creek and adjacent basins.

10. The proposed Application and referenced subsequent secondary applications require easements for rights of way over private and federally administered lands and the Applicant has made no demonstration that it is feasible for it to obtain said easements.

11. The future demand on the Smoke Creek Basin is unknown. Granite Fox Power, LLC proposes to construct and operate a large coal fired electric power plant in the Smoke Creek

Desert and use 25,000 acre feet of water from surface and underground sources in Basin 21. The effects of the A & B Aqua Application to Appropriate waters in Smoke Creek must be considered in conjunction with the Granite Fox Power applications. The United States Bureau of Land Management is currently in the scoping process to prepare an environmental impact statement (EIS) for the Granite Fox Power, LLC proposed project. A significant portion of this EIS will address the water resources and water rights. Not only may this EIS provide important information concerning the project, it will also assist the State Engineer's Office in considering both the water rights adjudication and this application to appropriate more water from the Smoke Creek basin. A hydrological study and environmental impact study should be conducted pursuant to N.R.S. 533.368, particularly in view of the fact that the Granite Fox Power applications will affect the entire perennial yield in the Smoke Creek Basin.

12. The proposed Application and referenced subsequent secondary recovery applications are detrimental to the public interest for the following reasons, to wit:

- a. There is no unappropriated water available for the stated purpose;
- b. The amount of water to be appropriated would cause further depletion to the groundwater and continue to place the basin in overdraft;
- c. The proposed use of the water would have a detrimental effect on wildlife and on native vegetation;
- d. The proposed use of the water will cause the soil to subside, causing cracks in foundations and roadbeds;
- e. The proposed use will cause the detrimental impacts to wetlands and riparian areas;

- f. The proposed use of water will impact the water supply in Pyramid Lake, potentially causing harm to listed endangered and/or threatened species;
- g. The proposed use of water will cause the water table to drop, preventing subsurface irrigation of vegetation;
- h. The proposed use of water will remove surface water from the water basin, thus altering the geology and appearance of the area forever;
- i. The proposed use of water will lower the water table, causing existing wells to dry up or requiring wells to be drilled deeper;
- j. The proposed use of water will interfere with artesian water sources, springs and seeps, preventing them from reaching the surface;
- k. The proposed use of water will prevent the beneficial use of water for irrigation, thus interfering with existing prior vested and certificated water rights;
- l. The proposed use of water will cause a violation of the Migratory Bird Treaty Act;
- m. The proposed use of water will prevent the appropriation of existing water rights for domestic purposes in times of drought;
- n. The proposed use of water will have a detrimental effect on wildlife refuges and protected habitats.
- o. The proposed use of water will adversely impact water use in adjoining water basins.

13. The proposed Application is speculative as it fails to adequately identify the beneficial use of the water or the place of beneficial use.

14. Since the full scope of this project is unknown and referenced subsequent secondary recovery applications will be filed which are not published, the Protestants reserve the right to add or amend this Protest as more information becomes available.

THEREFORE, Protestants respectfully requests that the State Engineer require hydrological and environmental impact studies to be conducted pursuant to N.R.S. 533.368, that the State Engineer hold a hearing on the Application, and that the Application be denied and an order be entered by the State Engineer denying said Application.

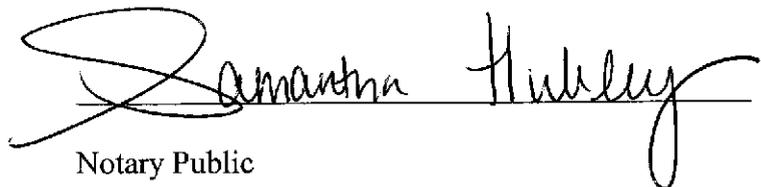
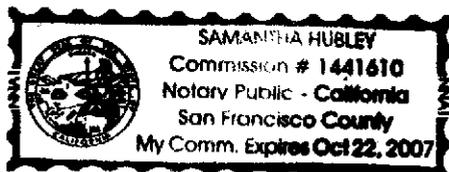
Dated this 15th day of March, 2006.

Respectfully submitted,



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Subscribed and sworn to before me this 5th day of March, 2006.



Notary Public