FILED
MAY 25 2006
STATE ENGINEER'S OFFICE

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

IN THE MATTER OF APPLICATION 73940 FILED BY A & B AQUA, LLC TO APPROPRIATE THE WATERS OF SMOKE CREEK

PROTEST AND REQUEST TO DENY APPLICATION 73940; 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 73940, filed by B & A Aqua, LLC, a Limited Liability Company on March 2, 2006, 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 cfs to be used for irrigation. This Application is identical to other applications filed by B & A Aqua, LLC for the same water source located in Smoke Creek Basin, namely 73938 and 73939. 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. Based upon information and belief, there is no unappropriated water in the "Unnamed Spring" source identified in the Application or in the Miller Basin Creek which collects surface water from the designated point of diversion. Bright-Holland Corp., has filed claims V09292 and V09293 for a vested right for stock watering at the "Unnamed Spring" at the exact same point of diversion as the B & A Aqua Application. Further, Bright-Holland Corp., under application 67048 has applied for 2.5 cfs of water from the Miller Basin Creek for irrigation with a point of diversion in close proximity to the B & A Aqua Application. Moreover, Granite Fox Power, LLC has filed under application 72501 to change the point of diversion, manner of use and place of use of the waters under application 67048. Granite Fox proposes to use this water for industrial power generation and domestic.

3. Based upon information and belief, Applicant will not be able to beneficially use the requested water for irrigation at the proposed place of use. The Applicant has filed an application for a new appropriation, not a change request. The irrigation of 100 acres at the designated place of use under the Application has already been designated for irrigation under Bright-Holland Corp, application 67048. Under NRS 533.040 water rights are appurtenant to benefitted land. Here, two separate entities have requested water from the same point of diversion to be used on the same 100 acres of land. Both parties cannot beneficially use the same

water in this fashion. Moreover, there is no demonstration in the Application that the Applicant either owns or controls the proposed place of use. Further, as discussed above, Granite Fox Power, LLC under application 72501 proposes to change the manner of use of this water to power generation and domestic. If these applications are approved, the parties involved could irrigate 100 acres or 400 af under 67048, move it under 72501, then attempt to re-water the same land under 73938-73940 to generate another 400 af of water rights, which could be transferred at a later date. This kind of manipulation of water rights is detrimental to the public interest.

4. The Applicant does not demonstrate the feasability of using the existing ditch structure to transport the applied for water right.

5. The waters in Smoke Creek Basin should be adjudicated, and this Application is a prime example of the need for adjudication. Here, we have B & A Aqua filing a new appropriation supposedly for irrigation from an "Unnamed Spring" which has previously had filings for the same water for use in stock watering. Moreover, this Application proposes to irrigate land that is already proposed for irrigation by a different party from an allegedly different source of water. Finally, water from this "Unnamed Spring" is also subject to a change application from a third party who proposes to use the same water for power generation. There is no way to tell from this series of applications how much water exists, who owns the water, or how it will be beneficially used. This type of confusion can only lead to misuses of water causing injury to existing water right owners. The confusion caused by this one spring is indicative of the issues faced in the entire basin. In order to prevent exacerbating the current confusion over ownership and beneficial use of water, the Smoke Creek Basin should be adjudicated before allowing any new appropriations or changes in water use.

6. The flow of the surface water is hydrographically linked to underground water. If applications 67049 and 72501 are approved then this water will be changed to M&I water and lost to potential ground water recharge. 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. Upon information and belief, the Application conflicts with Granite Fox Power, LLC application 72501 which seek to transfer water rights based upon Application No. 67048, consisting of 2.5 cfs - not to exceed 400 acre-feet annually, supplemental to Permit 2091 for 36.65 acres, and used for irrigation purposes during the growing season. Granite Fox Power, LLC proposes to construct and operate a large coal fired electric power plant in the Smoke Creek Desert. The plan includes the use of 25,000 acre feet of water from surface and underground sources in Basin 21. Protestants believe the State Engineer should initiate the adjudication process before he approves any applications because Basin 21 is already over appropriated and the groundwater has been depleted.

10. The water right at issue, if it exists, is stated to be an irrigation water right, and as such it is subject to a period of use that extends for the growing season, April through October. The Applicant has incorrectly designated use for irrigation from January 1 through December 31.

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 B & A Aqua Applications 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. Based upon information and belief, the water right as described in the Application over states the amount of water to be diverted, the amount of irrigated acreage, the diversion rates, the annual duties, and the water duty in acre feet.

13. The proposed Application is 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 will cause the detrimental impacts to wetlands and riparian areas;

e. The proposed use of water will cause the water table to drop, preventing subsurface irrigation of vegetation;

f. The proposed use of water will remove surface water from the water basin, thus altering the geology and appearance of the area forever;

g. The proposed use of water will lower the water table, causing existing wells to dry up or requiring wells to be drilled deeper;

h. The proposed use of water will cause a violation of the Migratory Bird Treaty Act;

i. The proposed use of water will prevent the appropriation of existing water rights for domestic purposes in times of drought;

j. The proposed use of water will have a detrimental effect on wildlife refuges and protected habitats.

k. The proposed use of water will adversely impact water use in adjoining water basins.

l. The proposed use of water will increase the cost of obtaining water for beneficial use in Washoe County;

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 24th day of May, 2006.

Respectfully submitted,

MICHAEL J. VAN ZANDT, Esq.
Nevada State Bar No. 7199
McQUAID BEDFORD & VAN ZANDT, LLP
221 Main Street, 16th Floor
San Francisco, CA 94105
Telephone: 415-905-0200
Fax: 415-905-0202
Attorneys for Protestants David Rumsey,
Michael S. Moore and John G. Bogard

Subscribed and sworn to before me this 24th day of May, 2006.

TERESA BECHELLI
Comm. # 1379760
NOTARY PUBLIC - CALIFORNIA
City & County of San Francisco
My Comm. Expires Oct. 12, 2006

Teresa Bechelli

Notary Public

CERTIFICATE OF MAILING

I hereby certify that on May 24, 2006, I served a copy of the attached **PROTEST AND REQUEST TO DENY APPLICATION NO. 73940; PETITION FOR HEARING PURSUANT TO N.R.S. 533.365; PETITION FOR A HYDROLOGICAL AND ENVIRONMENTAL STUDY PURSUANT TO N.R.S. 533.368** via United United States first class mail, postage pre-paid, on the parties listed below:

John Jackson, Director
Department of Water Resources
Pyramid Lake Paiute Tribe
P.O. Box 256
Nixon, NV 89424

Jon Wellington, Esq.
Beckley, Singleton et al.
530 Las Vegas Boulevard South
Las Vegas, NV 89101

Susan B. Lynn
Public Resource Associates, Inc.
1755 E. Plumb Lane, #170
Reno, NV 89502

Sharon Netherton
Friends of Nevada Wilderness
P.O. Box 9754
Reno, NV 89507

Ross E. de Lipkau
Marshall Hill Cassas & de Lipkau
333 Holcomb Avenue
Suite 300
Reno, NV 89502

Bob Fulkerson
Progressive Leadership Alliance of Nevada
821 Riverside Drive
Reno, NV 89503

Toiyabe Chapter of the Sierra Club
P.O. Box 8096
Reno, NV 89507

Dayne Barron
U.S. Department of the Interior
Bureau of Land Management
Eagle Lake Field Office
2950 Riverside Drive
Susanville, CA 96130

Gail G. Givens
U.S. Department of the Interior
Bureau of Land Management
Winnemucca Field Office
5100 East Winnemucca Boulevard
Winnemucca, NV 89445

Vahid Behmaram
Water Rights Supervisor, Washoe County
4930 Energy Way
Reno, NV 89502

William D. Bixby
Lassen County CAO
707 Nevada Street
Susanville, CA 96130

Gerlach GID
Box 209
Gerlach, NV 89412

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct. Dated this 24th day of May, 2006 in San Francisco, California.

Dené W. Tatmon