

FILED
MAR 26 2007
STATE ENGINEERS OFFICE

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

2007 MAR 26 AM 8:21
STATE ENGINEERS OFFICE

IN THE MATTER OF APPLICATION 75042 FILED BY JACKRABBIT PROPERTIES, LLC TO APPROPRIATE THE WATERS OF SMOKE CREEK	PROTEST AND REQUEST TO DENY APPLICATION 75042; 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 75042 (hereafter "Application"), filed by Jackrabbit Properties, a Limited Liability Company, on November 9, 2006, and again as a corrected Application on January 19, 2007, 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 (collectively referred to as "Protestants") protest the Application for the following reasons and on the grounds, to wit:

1. The Applicant seeks to appropriate 18,000 acre-feet a year (3,000 cfs) from Smoke Creek and its tributaries to store in a reservoir. The proposed dam site/point of diversion in the

Application, within the SW 1/4 Section 5 T31N, R18E, MDM, or at a point from which the NW corner of said Section 5 bears N 06 degrees 52 minutes 33 seconds W, a distance of 4,269.12 feet, proposes to capture Smoke Creek flows on a year round basis and provide carryover storage for secondary uses. The Application proposes to inundate the land surrounding a significant portion of Smoke Creek, from the point of diversion/proposed dam site to the California state line. The places of use to be inundated at full storage capacity are in portions of the following: Sections 5, 6, and 7, T31N, R18E, MDM; Sections 30 and 31, T32N, R18E, MDM; and Sections 25 and 26, T32N, R17E, MDM.

2. NRS § 533.370(c) requires Jackrabbit Properties to prove its intent to construct any work necessary to apply the water to beneficial use, and its financial ability and reasonable expectation to actually construct the work and apply the water to beneficial use. The “anti-speculation doctrine” precludes speculative water right acquisitions in which the purported appropriator does not intend to put water to use for its own benefit without a showing of beneficial use. *See e.g. Bacher v. Office of State Engineer of State of Nevada*, 146 P.3d 793, 799 (Nev. 2006). For example, the Nevada State Engineer recently denied White Pine County’s application to appropriate water from the Spring Valley Hydrographic Basin because the application was speculative and threatened to prove detrimental to the public interest. *See Nevada State Engineer Ruling 5615, Page 19 (citing N.R.S. § 533.370(5))*. White Pine County could not demonstrate any intent to actually build the power plant it proposed in its application, and likewise could not prove that it would put the water it applied to appropriate to beneficial use. *See Nevada State Engineer Ruling 5615, Page 19 (citing N.R.S. § 533.370(5))*. Jackrabbit Properties has not provided any evidence of its intent to construct the dam and reservoir project

in its Application or that it is financially able and intends to actually construct the work and apply the water to beneficial use. The Application refers to secondary permits for unspecified irrigation and other purposes that propose to define beneficial uses at a later date instead of identifying beneficial uses of the dam and reservoir project in the Application itself.

3. The Application indicates that the estimated cost of the works is two (2) million dollars, and that it will require eight (8) years to construct the works. The Application also indicates that water will be put to beneficial use pursuant to secondary permits that Jackrabbit Properties will file at a later date. The extended amount of time required to construct the works, file additional secondary beneficial use permits, and put the water in the project to a (currently unspecified) beneficial use indicates the speculative nature of this Application, and project. The Application provides no justification as to why this costly, time-intensive project is necessary, and what the full scope or purpose of the actual project is. Protestants object to the extended period of time to prove beneficial use, because this ties-up water rights for an extended period for speculative purposes. Since the purpose and scope of the project are unclear, the Protestants reserve the right to add or amend this Protest as more information becomes available.

4. Since this is a significant application for primary storage (3,000 cfs & 18,000 afa) and there has been no definitive description of the secondary uses, the State Engineer is justified in requesting additional information regarding the project under N.R.S. §§ 533.370, 533.375 and 533.340 to gain a better understanding of the project. The State Engineer should send a letter to Jackrabbit Properties similar to its recent letter to Regional Utilities (73685 & 73686 dated March 6, 2007 requesting this type of information. This information may provide additional

details and protest concerns. Accordingly, the Protestants reserve the right to amend their protest of the primary storage application as more information becomes available.

5. Because the nature and specifics of the secondary permits Jackrabbit Properties proposes to file for this project are unknown, it is impossible to exactly determine water rights that the Application and its secondary permits will affect. Based on information and belief, however, Protestants believe that the Application and its secondary permits will conflict with existing water rights of Protestants. Groundwater aquifers in the Smoke Creek Basin are intimately connected to surface water sources in the Basin, such as Smoke Creek. The flows of water in Smoke Creek and its tributaries and flood flows of Smoke Creek are a natural component and a source of recharge to the groundwater resources in Smoke Creek Basin. The Application proposes to divert and store 18,000 acre-feet of water from upstream portions of Smoke Creek near the Nevada/California border. This large-scale diversion and storage of Smoke Creek waters will have a negative impact on ground water and spring water sources relied upon by the Protestants and other farmers, ranchers and landowners in Basin 21, and will negatively impact flows to the wetlands and artesian wells throughout Basin 21. The Application's proposed diversion and storage will also adversely affect water quality in groundwater, spring water and surface water throughout the Basin that Protestants and other landowners rely on for water supply.

6. The Application proposes to inundate and store water in a large portion of land surrounding Smoke Creek from the point of diversion, up stream to the California border. However, the Application fails to provide any evidence that Jackrabbit Properties has control of the property the Application proposes to inundate. If Jackrabbit Properties inundates property

that it does not control, the Application will injure existing water rights and the rights of property owners in the proposed area of use of the project.

7. NRS § 533.340(6) specifies additional requirements for applications proposing the storage of water. The application must state the purpose, the dimensions and location of the proposed dam, the capacity of the proposed reservoir, and a description of the land to be submerged by the impounded waters. Jackrabbit Properties' Application does not state the purpose of the project, and does not clearly specify the dimensions of the proposed dam beyond "notes" on the map attached to the Application. Jackrabbit Properties' Application also does not specify whether it has control over all of the land it proposes will be submerged by its storage project. Jackrabbit Properties must submit additional information to the State Engineer thoroughly describing these aspects of the proposed project.

8. Jackrabbit Properties has not provided sufficient information to demonstrate that there are sufficient flows in Smoke Creek to store 18,000 acre-feet of water a year and satisfy the 3,000 cfs diversion right that the Application proposes. If sufficient flows in Smoke Creek do not exist to satisfy the storage project the Application proposes, the State Engineer should deny the Application. Upon information and belief, the annual flows in Smoke Creek may not exceed 1,300 acre-feet or result in total water of 4,300 acre-feet. This means that the total flow of Smoke Creek must be captured over four years to fill one reservoir.

9. Protestant 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 surface and underground waters in the Smoke Creek Hydrographic Basin, including the Smoke Creek, which fully appropriate all flows from these sources, therefore there

is no unappropriated water. See attached table, Exhibit 1, showing pending change applications and existing rights on the Smoke Creek source, many of which have been protested by Rumsey, Pyramid Lake Indian Tribe, Washoe County and others. Although the State Engineer has denied the adjudication petition, applications such as this one clearly demonstrates the pressing need for such adjudication.

10. In light of the appropriation activity in Basin 21, and the 18,000 acre- feet this application proposes to appropriate per year from Basin 21, the State Engineer should adjudicate water rights in the Smoke Creek Basin.

11. The Application seeks to appropriate 18,000 acre-feet of water per year from Smoke Creek. According to the "Nevada's Water Resources," Bruce R. Scott *et al.*, the perennial yield for Smoke Creek Desert/Basin 21 is 16,000 af/a, and the groundwater in storage is 20,000 acre-feet. The Nevada Division of Water Resources Water Rights Database, Hydrographic Abstract for Basin 21, provides that there are over 12,000 af/a of permitted, certificated, and vested underground water rights in Basin 21. This does not include the numerous pending applications to appropriate underground waters in Smoke Creek Basin. Because the flows of water in Smoke Creek and its tributaries and flood flows of Smoke Creek are a natural component and a source of recharge to the groundwater resources in Smoke Creek Basin, approval of the instant application for 18,000 acre-feet of water per year from Smoke Creek will further deplete the groundwater and continue to place the basin in overdraft.

12. 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 already seek to appropriate any unappropriated ground water resources in this basin.

13. The State Engineer should also adjudicate these water rights to settle potential interstate water allocation issues. Smoke Creek has headwaters in Lassen County, California. Many surface water sources are intimately connected to groundwater aquifers in the Smoke Creek headwaters in Lassen County. Lassen County has also joined in previous requests for an adjudication of water rights in the Smoke Creek Basin.

14. Potential interstate water allocation issues also arise because the Application proposes places of use, inundated areas, surrounding Smoke Creek and encroaching on the California state line. Given the sheer volume of water the Application proposes to divert into the stretch of Smoke Creek bordering Lassen County, California, it is highly probable that, if the Nevada State Engineer grants the Application, the land Jackrabbit Properties will inundate may include land bordering Smoke Creek in California.

15. Due to the large quantity of water this Application proposes to appropriate and potential inter-basin transfers that could be associated with the secondary applications proposed in connection with this Application, Jackrabbit Properties should conduct a hydrological study and environmental impact study 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. Recent (2006) USGS studies have identified a N-S trending Mid-valley fault that may convey water to the southern portion of the valley and the Pyramid Lake Valley.

16. The Application's proposed upstream diversion and storage of Smoke Creek water will negatively impact Smoke Creek's natural water flow to the detriment of current users who depend on consistent surface flow from Smoke Creek, especially in times of drought.

17. 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, other landowners and wildlife. This Application, if approved, will also negatively impact flows to the wetlands, artesian wells and will adversely affect water quality.

18. The Application has a designated use of irrigation, to be further defined by secondary permits. The Application also indicates that use will begin January 1st and end December 31st of each year. If granted, use for irrigation in the Application should be limited to the irrigation season and water should not be provided for the stated purpose year round.

19. The Application and referenced subsequent secondary applications require easements for rights of way over private and federally administered lands. The Applicant has made no demonstration that it is feasible for it to obtain said easements. See attached map, Exhibit 2, showing the location of the proposed reservoir and area of inundation with land ownership overlaid. The applicant does not own all of the area of inundation.

20. The Application also proposes to inundate areas of federal property managed by the Bureau of Land Management ("BLM") as wilderness study areas to retain their wilderness character. Wilderness study area uses include protection of air and watersheds, fish and wildlife habitat, maintenance of soil and water quality, ecological stability, plant and animal gene pools, protection of archaeological and historical sites, habitat for wildlife, livestock grazing, and recreation. Inundating portions of federally administered wilderness study areas runs contrary to

these specified uses and allows a man-made structure to intrude into the wilderness in violation of 43 U.S.C. § 1782 *et seq.*

21. The future demand on the Smoke Creek Basin is unknown. In 2005, Granite Fox Power, LLC proposed 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. Some of the water required to be stored in the reservoir on Smoke Creek is also water rights proposed to be transferred for the Granite Fox Power Project. These transfer applications have not been withdrawn. While Granite Fox Power, LLC has dropped its proposal for a coal fired electric power plant, Sempra Generation, Granite Fox Power's parent corporation, is attempting to convey all of its rights and interest in the power plant project. Accordingly, the effects of the Jackrabbit Properties Application must be considered in conjunction with the former Granite Fox Power applications, as the power plant project could be implemented in the future by a purchaser of Granite Fox Power's rights in the project. A hydrological study and environmental impact study should also be conducted pursuant to N.R.S. § 533.368 in view of the fact that the former Granite Fox Power applications will affect the entire perennial yield in the Smoke Creek Basin.

22. A project of this magnitude will require NEPA compliance as well as an Environmental Impact Report. The State Engineer should withhold hearings and actions on these applications until these studies / processes are completed.

23. The State Engineer must ensure that the provisions of N.R.S. § 533.370(6)(a) – (e) are fulfilled and addressed. This Application will limit the future growth and development to the detriment of rural communities in Basin 21. This is a violation of N.R.S. § 533.370(6)(d).

24. The proposed application is detrimental to the public interest for the following reasons:

- 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 detrimental impacts to wetlands and riparian areas;
- f. The proposed use of water will likely impact the water supply in adjacent basins including 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 well 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;

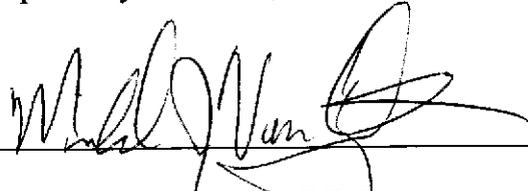
- k. The proposed use of water will have a detrimental effect on wildlife refuges and protected habitats;
- l. The proposed use of the water will cause an increase in dust and particulates and will cause exceedances of air quality standards for the basin;
- m. The proposed use conflicts with protectable interests in existing domestic wells as set forth in N.R.S. § 533.024.

25. Since the full scope of this project is unknown and speculative in nature, the protestant reserves the right to add or amend this protest as more information becomes available.

26. THEREFORE, Protestant 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 23rd day of March, 2007.

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 (or affirmed) before me on this 23rd day of March, 2007 by

Teresa Bechelli personally known to me or proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.



Teresa Bechelli

Notary Public

CERTIFICATE OF MAILING

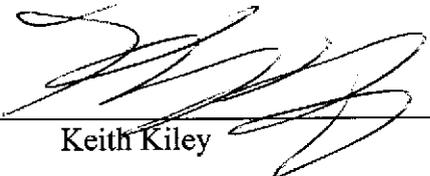
I hereby certify that on March 23, 2007, I served a copy of the attached PROTEST AND REQUEST TO DENY APPLICATION 75042; PETITION FOR HEARING PURSUANT TO N.R.S. 533.365; PETITION FOR A HYDROLOGICAL AND ENVIRONMENTAL STUDY PURSUANT TO N.R.S 533.368 via United States first class mail, postage pre-paid, on the parties listed below:

Jackrabbit Properties, LLC
James G. Sanford
100 West Liberty Street
Suite 900
Reno, NV 89501

Bright-Holland Co.
James G. Sanford
100 West Liberty Street
Suite 900
Reno, NV 89501

Michael D. Buschelman
PO Box 51371
Sparks, NV 89435

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct. Dated this 23rd day of March, 2007 in San Francisco, California.



Keith Kiley