IN THE OFFICE OF THE STATE ENGINEER OF THE STATE OF NEVADA

IN THE MATTER OF APPLICATION NUMBER 75815,

FILED BY Peter B. Wilday and Gail D. Wilday,

ON May 29, 2007, TO APPROPRIATE THE

WATERS OF Shay Springs No. 5

} PROTEST

FILED
JUN 18 2007
STATE ENGINEER'S OFFICE

Comes now Gary O. Elrod, Sandra Say Elrod, John Flanigan and Nancy Flanigan
Printed or typed name of protestant

whose post office address is c/o Parsons, Behle & Latimer, 50 W. Liberty Street, Suite 750, Reno, NV 89501
Street No. Or P.O. Box, City, State and Zip Code.

whose occupation is ..... and protests the granting

of Application Number 75815, filed on May 29, 2007

by Peter B. Wilday and Gail D. Wilday to appropriate the

waters of Shay Springs No. 5 situated in Washoe County, NV
Underground or name of stream, lake, spring or other source

County, State of Nevada, for the following reasons and on the following grounds, to wit:

See, exhibit "A" attached hereto.

THEREFORE the Protestant requests that the application be denied
Denied, issued subject to prior rights, etc., as the case may be

and that an order be entered for such relief as the State Engineer deems just and proper.

Signed Ross de Lipkau

Ross de Lipkau
Printed or typed name, if agent

c/o Parsons Behle & Latimer

Address 50 W. Liberty Street, Suite 750
Street No. or P.O. Box No.

Reno, NV 89501
City, State and Zip Code

775-323-1601
Phone Number

Subscribed and sworn to before me this ..... day of June, 20 07

P. SONDROL
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 04-88083-2 - Expires October 3, 2007

Notary Public

State of Nevada

County of Washoe

2007 JUN 18 PM 1:55

✚ $25 FILING FEE MUST ACCOMPANY PROTEST. PROTEST MUST BE FILED IN DUPLICATE.

ALL COPIES MUST CONTAIN ORIGINAL SIGNATURE.

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EXHIBIT "A"

Protestants: John and Nancy Flanigan
Gary and Sandra Elrod

This Exhibit is the attachment to the Protest on behalf of Elrod, and John and Nancy Flannigan. The State Engineer should deny this application for the following specific reasons:

1. On September 27, 2006 the State Engineer issued Order 1182, which reads in part as follows:

> [T]he ditch conveying the flow of Shay Spring Number 3 and Shay Spring Number 5 had been permanently altered to provide water for a newly constructed landscape pond located within APN 230-092-12.
>
> [T]he natural drainage channel created by the flow of Shay Spring Number 3 and Shay Spring Number 5, had been obstructed by an earthen dam adjacent to and east of APN 230-092-12. [T]he surface flow traversing the natural drainage was being impounded by this structure, creating an adverse effect upon the right to use water granted to Elrod under Permit 23378, Certificate 7484 and Permit 23381, Certificate 7477, in addition to the Flanigan decreed water right.
>
> [Y]ou are hereby ordered to cease and desist immediately the use of water from Shay Spring Number 3 and Shay Spring Number 5. It is further ordered that said dam must be removed and the ditch currently serving the subject pond be returned to its preexisting condition within thirty days of the date of this order.

2. The party to whom the Order was sent ignored such Order and failed to appeal such order within the statutory time frame as set forth in NRS 533.450(1). Thus, the Order above stated (hereinafter "Order") became final, and is in full force and effect. No agreement between the parties has been reached, therefore, the Applicants are and continue to conduct themselves in direct violation of the Order.

3. As the State Engineer is aware, Gary and Sandra Elrod are the owners of record of an undivided one-half interest in the permits affected by the Applicants change applications. John and Nancy Flanigan own a portion of Truckee River Decree Claim No. 72/72A which right shares the same ditch that conveys the junior water rights issued under the subject permits. Further, the applicants are the owners of record of application 72351 which seeks to appropriate water from a portion of the subject springs.

4. The Applicants (hereinafter collectively referred to as "Wilday") by ignoring the ruling required the State Engineer to bring an action in the Second Judicial District Court, in the action now entitled Tracy Taylor, P.E., v. Rocklin/Redding LLC, Second Judicial District Court case No. CV07-00340. Protestants were required to seek leave to intervene and such request was granted. The matter is set for hearing before the Honorable Judge Kosach on July 6, 2007. The

State Engineer, based upon the reasons above stated should simply reject the applications outright.

5. The Applicants' real property is subject to a certain document dated March 27, 1987 entitled Water Rights Deed. A true copy of that document is attached hereto and incorporated herein. The restrictive covenant is valid, enforceable, and binding on the Applicants. Such restrictive covenants absolutely prevent the action herein contemplated by the Applicants. Simply stated, William Shay, the owner of all real property here involved, except the Flanigan property, created a system by collecting the various water sources as evidence by Permits 23378, 23381 in an area upstream of the "Shay Pond." All or a portion of the Shay Pond is located upon real property now owned by Applicants. The concept, clearly established for many years was for the various sources of water to flow to the upper "Shay Pond", and thence to be used beneficially on what is now the Elrod and Flanigan Ponds. The purpose of the applications filed by Wilday is to create a new use, which to find water to an apparently aesthetically pleasing pond north and nearly adjacent to the newly constructed home south of the Wilday property. The purpose set forth on the applications is not actually "recreation", but instead is clearly for aesthetic purposes only. See Empire Water and Power Co. v. Cascade Town Co. 205 F.123 (8th Cir. 1913). Therefore, ponds, for ulterior motives, being aesthetically pleasing, are not beneficial uses of water. As is readily apparent, the existing and unlawful "Pond" the subject of the order is simply a breeding ground for mosquitoes and other insects of that type. An inspection of such Pond will show that the channel constructed under Permits 23378 and 23381, with the source being Shay Springs Nos. 5 and 3, has been altered, and the outlet of such illegal Pond has also been altered, both of which have been to the extreme detriment of protestants.

6. In addition, the Applicants are attempting to expand the place of use of Permits 23378 and 23381 from 11.43 and 10.77 acres respectively to 19.2 acres. Such a request is in violation of the policy prohibiting expansion of acreage.

7. The State Engineer is guided by NRS 533.370(5) which reads in part as follows:

> . . . where there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights or with protectible interests in existing domestic wells . . . or threatens to prove detrimental to the public interest, the State Engineer shall reject the application and refuse to issue the requested permit.

As set forth below each of the above elements are present.

a. Clearly there is no unappropriated water in the proposed source of supply, as such water is fully appropriated. The filing of the application styles such applications as permission to change the "place and manner of use of a portion." This is simply incorrect, as protestants are attempting to add another pond in the system. The additional pond consumes, by reason of its design and the altering of the previously constructed channel, a great deal of water. Additionally, the outlet of such illegal pond similarly causes less water, or no water, to flow to the Elrod or Flanigan places of use. Thus, there is no unappropriated water in the proposed

source of supply. The filing of the application the subject of this protest represents an "expansion of acreage" which is prohibited by law.

b. The illegal pond as set forth above, certainly conflicts with existing rights, being the rights held by Elrod and Flanigan. The Applicants are simply attempting to acquire new appropriations in any and all senses of that word, or phrase. The illegal pond represents a wasteful and unlawful use because the pond and the elevation at which the inlet and outlet are constructed create a consumptive use of water. Moreover, stagnant water, as set forth above, is abundantly visible at various times of the year.

c. The applications should be denied as the granting of such applications are clearly detrimental to the public interest. Otherwise, the precedent being set is that a person can simply, if he/she lives adjacent to flowing water, create a pond for aesthetic purposes. The pond intercepts and consumes water which is lawfully owned and duly permitted by downstream users. One can only imagine what would happen if the "upstream" landowner to the existing illegal pond chose to create another pond. Obviously, water would simply cease flowing to the lawful downstream owners. Thus, granting the applications would essentially create a new water right.

d. Additionally, the chain of title to the base rights, being Certificated Permits 23381 and 23378 is not yet resolved. The record shows such rights to be in the name of Gary and Sandra Elrod.

Based upon the foregoing, and the fact that the matter is currently in litigation, the State Engineer should simply deny the two temporary applications and applications to change being numbers 75813T, 75814T, 75815 and 75816.

Respectfully submitted,

Ross E. de Lipkau

Hand-Delivered to:

Tracy Taylor, P.E., State Engineer

142392-BKP

AFTER RECORDING RETURN TO:

Grantees
125 Southridge Drive
Reno, Nevada 89509

1150363

RPTT. $-0-

WATER RIGHTS DEED

THIS INDENTURE, made and entered into this 25th day of March, 1987, by and between WILLIAM SHAY and SHEILA SHAY, Husband and Wife, "Grantors", and RILEY McHUGH and LESLIE McHUGH, Husband and Wife, as joint tenants with the right of survivorship, "Grantees";

B2519P0458

W I T N E S S E T H:

That Grantors, in consideration of the sum of Ten Dollars ($10.00), lawful money of the United States of America, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell and convey unto Grantees and to their heirs, devisees, legatees, personal representatives, successors and assigns forever, an undivided one-half (1/2) interest in and to those certain certificated water rights described as Application No. 23378, Certificate No. 7484 and Application No. 23381, Certificate No. 7477, Official Records, Nevada State Engineer's Office (the "Water Rights"), TOGETHER WITH an interest in all easements across Parcel 3 of Second Parcel Map No. 639 for WILLIAM SHAY, according to the map thereof filed in the office of the County Recorder of Washoe County, Nevada on August 16, 1978 as File No. 551712, Official Records, and amended by Boundary Line Adjustment Record of Survey No. 1564

filed for record October 26, 1982, as File No. 821166 which were reserved by Grantors in their conveyance of Parcel 3 for the purpose of beneficially using the water and Water Rights.

The Grantors are the present owners of Parcel 1, 2 and 3, Third Parcel Map No. 980 for WILLIAM SHAY, according to the map thereof filed for record in the Official Records of Washoe County, Nevada as File No. 641438 (collectively referred to herein as "Parcel 1") and the Grantees are the present owners of Parcel 2, Second Parcel Map No. 639 ("Parcel 2"). It is the desire of the Grantors and Grantees that the manner and place of use of the water and Water Rights remain as they were when the Water Rights were certificated. It is therefore the mutual covenant and agreement of Grantors in conveying the Water Rights and the Grantees in accepting the conveyance of the Water Rights that the manner and place of use for which the Water Rights were certificated shall remain in perpetuity. Grantors and Grantees further covenant and agree for themselves and their heirs, devisees, legatees, personal representatives, successors and assigns, that they will not change nor attempt to change the manner or place of use of the Water Rights nor sell or lease nor attempt to sell or lease the Water Rights for a manner or place of use different than that for which the Water Rights were certificated and any attempt to do so will be void. In the event the foregoing covenant shall be deemed to be in violation of the rule against perpetuities or an unlawful restraint on alienation, then in that event the covenant shall be in full force and effect for the maximum term permitted by law.

B2519P0459

Grantors reserve unto themselves and their successors and assigns the right to the beneficial use on Parcel 1 of all of the water available under the Water Rights, as the water traverses Parcel 1; provided, however, the water remaining after use will be returned to the appropriate ditches as the water leaves Parcel 1 in order that it may be beneficially used on Parcel 2.

Grantors do hereby grant to Grantees an easement across Parcel 1, for the purpose of beneficially using the water and Water Rights on Parcel 2.

Grantors make no representations, warranties or guarantees as to the amount of water which flows from the springs which are the source of the water.

IN WITNESS WHEREOF, the parties hereto have caused their names to be hereunto subscribed the day and year first above written.

GRANTEES:

RILEY McHUGH

LESLIE McHUGH

GRANTORS:

WILLIAM SHAY

SHEILA SHAY

B2519P0460

MAR 27 1987

STATE OF NEVADA,
County of Washoe } ss.

On March 25, 1987 personally appeared before me,
DATE

a Notary Public (or judge or other officer, as the case may be), RILEY McHUGH,

LESLIE McHUGH, WILLIAM SHAY and SHEILA SHAY

who acknowledged that they executed the above instrument.

BETTY KAREN POWERS
Notary Public - State of Nevada
Appointment Recorded In Washoe County
MY APPOINTMENT EXPIRES SEPT 20, 1987

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official stamp at my office in the County of Washoe the day and year in this certificate first above written.

Betty Karen Powers
Signature of Notary

CARLISLE'S FORM NO. 36 N (ACKNOWLEDGMENT GENERAL) — B16355

B2519P0461

MAR 27 1987
OFFICIAL RECORDS, WASHOE COUNTY, NEVADA
Record Requested by
FIRST AMERICAN TITLE COMPANY OF NEVADA
COUNTY RECORDER
FEE 8.00 DEPUTY

1150363

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