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

IN THE MATTER OF APPLICATION NUMBER 76337T,
FILED BY Peter B. Wilday and Gail D. Wilday,
ON October 2, 20 07, TO APPROPRIATE THE
WATERS OF The Truckee River

FILED
PROTEST
JAN 09 2008 DY
STATE ENGINEER'S OFFICE

2008 JAN -9 PM 1:25

Comes now Gary O. Elrod, Sandra Say Elrod, John Flanigan and Nancy Flanigan, by Ross de Lipkau
Printed or typed name of protstant

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 attorney and protests the granting

of Application Number 76337T, filed on October 2, 20 07

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

waters of the Truckee River 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 [signature]
Agent or protestant

Ross de Lipkau
Printed or typed name, if agent

Address c/o Parsons, Behle & Latimer
50 W. Liberty Street, Suite 750
Street No. or P.O. Box No.

Reno, NV 89501
City, State and Zip Code No.

Subscribed and sworn to before me this 8th day of Jan, 20 08

[signature]
Notary Public

State of NV

County of WASHOE

LUCILLE BAGNALL
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 99-55314-2 - Expires September 9, 2008

$25 FILING FEE MUST ACCOMPANY PROTEST. PROTEST MUST BE FILED IN DUPLICATE. ALL COPIES MUST CONTAIN ORIGINAL SIGNATURE.

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EXHIBIT A

The application, the subject of this protest, is a "afterthought" to cure the construction of an illegal pond. The applicant constructed an unlined earthen ditch, moved a pre-existing channel or ditch and diverted water to the pond for the benefit of the applicant. The applicant had no permits whatsoever, but merely "did it." Now, after a State Engineer Ruling Number 1182,, and judicial action, attempts to remedy the problem, the applicant has filed this application.

The volume of water sought to be changed, which at this time, does not have Federal Water Master approval, is slightly more than one gallon per minute. The calculations indicate that in order to achieve 1.0 acre feet, 210 days of water discharge, at the continuous rate of 1.077 gpm will be required to flow. The average irrigation season is in the neighborhood of 150-155 days per year.

The real problem with the current situation is that the pond was built, by an unlicensed contractor, and has an outlet approximately 1 foot too high. This causes water to back up in the conveyance ditch approximately 260 feet. Additionally, the culvert which was recently installed to carry water to the pond is too high, which causes water to back up, become stagnant, and create a breeding place for mosquitoes. The historic water uses are therefore greatly impacted.

NRS 533.370, sub 5 states that the State Engineer shall deny an application if:

> (a) There is no unappropriated water in the proposed source of supply;
>
> (b) Where its proposed use or change conflicts with existing rights or with protectable interests ...or
>
> (c) Threatens to prove detrimental to the public interest, ..."

All of the above elements are present, as the proposed source of supply, being the Truckee River is not available 12 months per year. The right would conflict with the existing rights of protestants, as the poorly designed pond creates an extreme loss of water, through seepage, evaporation and phreatophyte loss. The outlet of the pond, as set forth above, is too high, which backs up the water into the conveyance ditch approximately 260 feet. It is readily discernible that water leaks from the conveyance system, as the banks are "wet." The effect is the use of the ditch as an extension of the pond. Water therefore is "stored" on real property not owned by the applicant.

The State Engineer is directed to enter his 533.085, which states that vested rights cannot be impaired. See proof of appropriation 09679. Rather than bring a multitude of actions to enforce the prior rights of protestants, the State Engineer must deny this application.

Incorporated herein are the reports of field investigation, and judicial papers previously filed.

Further, it is readily apparent that the applicant has flagrantly violated and flaunted the water law by changing the course of the historic ditch, creating a pond for aesthetic purposes. No permit was first obtained, but rather the construction of the pond, the moving of the prior ditch, and now an attempt to make such unlawful action lawful.

As a suggestion, why doesn't the applicant disconnect the conveyance ditch from the pond, restore it to the original source, and if the upper pond is absolutely required, fill it from other sources; i.e., groundwater, or Truckee River sources when the Truckee system is being diverted.

The State Engineer is aware that the restrictive covenants apply and such restrictive covenants are set forth as Exhibit A. Judge Kozach, in the action entitled Tracy Taylor, P.E. v.

Rockland/Redding LLC, Second Judicial District Court, Case No. CV07-00340, remanded the action to the State Engineer without deciding the issue. The State Engineer should, therefore, render an opinion based upon the enforceability of the restrictive covenants.

The State Engineer is requested to take administrative notice of application 23379, which was denied by his predecessor.

The State Engineer is, of course, required to act upon application 72351 filed by protestants. This application must be decided prior to any action whatsoever on application 76338.

In addition to the above, all judicial papers here involved, together with correspondence, reports of field investigation orders and records of the State Engineer are incorporated herein.

Based upon the foregoing, the State Engineer must enforce his Order No. 1182, deny the application, and order the applicant to reconnect the conveyance system to its original location thereby restoring the conveyance system to its original and historic fashion. The "lower pond" must similarly be removed as ordered in Order 1182.