# IN THE OFFICE OF THE STATE ENGINEER ~~OF THE STATE~~ OF NEVADA

FILED
JUL 31 2009
STATE ENGINEER'S OFFICE

IN THE MATTER OF APPLICATION NUMBER 78596
FILED BY Cow Feathers, LLC c/o Bright Holland Corporation
ON May 29, 20 09, TO APPROPRIATE THE
WATERS OF Underground

PROTEST

Comes now John Espil Sheep Co.
Printed or typed name of protestant

whose post office address is 2889 Granville Drive, Sparks, Nevada 89436
Street No. or PO Box, City, State and ZIP Code

whose occupation is Ranching and protests the granting

of Application Number 78596, filed on May 29, 20 09

by Cow Feathers, LLC c/o Bright Holland Corporation (to change point of diversion, place and manner of use) to appropriate the

waters of Underground (Cert. 2301) situated in Washoe County
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 and by this reference incorporated herein

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 Gordon H. DePaoli
Agent or protestant

Gordon H. DePaoli
Printed or typed name, if agent

Address 6100 Neil Road, Suite 500
Street No. or PO Box

Reno, Nevada 89511
City, State and ZIP Code

775/688-3010
Phone Number

Subscribed and sworn to before me this 31st day of July, 20 09

JOANNE McMASTER
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 93-3411-2 - Expires May 10, 2013

Joanne McMaster
Notary Public

State of Nevada
County of Washoe

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

**EXHIBIT A TO PROTEST OF JOHN ESPIL SHEEP COMPANY**
**TO**
**APPLICATION NOS. 78588 THROUGH 78612 AND**
**APPLICATION NOS. 78722 THROUGH 78728**

## I. Introduction.

Although it is not entirely clear, it appears that a project for recharge, storage of water underground, and recovery of that water under the provisions of N.R.S. 533.250, et seq., will be an integral part of these Applications. However, it does not appear that an application for a permit to operate such a project has been filed, nor has notice of it been given as required by N.R.S. 534.270 These Applications should not be acted upon, except in conjunction with an application under N.R.S. 533.250, et seq., and any protests thereto.

Most of the protest grounds, which are set forth in more detail below, apply equally to all of the referenced Applications. However, there are some protest grounds which are unique to one or more of the Applications.

In general, the protest grounds are as follows:

1. The proposed changes under the Applications conflict with existing water rights.

2. The proposed changes under the Applications threaten to prove detrimental to the public interest.

3. The proposed changes would conflict with existing water rights and threaten to prove detrimental to the public interest because applicants seek to change the manner of use of the water rights at issue from irrigation to municipal and industrial, and seek to transfer the entire duty of such water rights, not merely the consumptive use component.

4. The Applicants cannot provide proof of their intention in good faith to construct any work necessary to apply the water to the intended beneficial use with reasonable diligence.

5. The Applicants cannot provide proof of their financial ability and reasonable expectation to actually construct the necessary works and apply the water to the intended beneficial use with reasonable diligence.

6. The Applicants seek an interbasin transfer of groundwater because the proposed points of diversion are in Basin 021 while the proposed places of use are in different basins, and the relevant statutory considerations of N.R.S. 533.370(6) determine that the State Engineer should reject the Applications.

7. The Applicants have not justified the need to import water to the hydrographic basins where the proposed places of use are located.

8. The proposed changes are not environmentally sound as they relate to basin 021 from which water is to be exported.

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9. The proposed changes are not an appropriate long term use, and will unduly limit future growth and development of Basin 021.

10. Through these changes, Applicants unlawfully seek to enlarge the historic use of water rights which have combined duties, or which are supplemental to other water rights, or which are appurtenant to the same land.

11. Protestant's investigation of these Applications is ongoing, and will continue in connection with the adjudication of the waters in Smoke Creek Desert Hydrographic Basin No. 2-021 as set forth in Order Granting Petition dated July 22, 2009. In connection with that adjudication, Protestant intends to review each of the underlying water rights for these Applications with respect to perfection, priority, duty, abandonment and forfeiture. By reason of that impending adjudication and of the amendments to N.R.S. Chapter 533 by Assembly Bill No. 416, effective July 1, 2009, the adjudication ordered by the July 22, 2009 Order must be final, including exhaustion of all appeals, before these Applications may be considered.

12. To the extent that any of these Applications involve water rights with points of diversion and/or places of use in and/or permits or licenses issued by the State of California, such Applications request authorizations which are not properly within the jurisdiction of Nevada and the State Engineer to grant. By indicating on the Protest form that a source of water is situate in Nevada, Protestant is not waiving this protest ground or in any way conceding that a water source is not in California.

13. The State Engineer should require hydrological, environmental and other studies pursuant to N.R.S. 533.368 before acting on these Applications.

14. The Protestant reserves the right to supplement this Protest as additional information becomes available concerning the Applications.

## II. Conflict With Existing Rights.

The proposed changes under the Applications would conflict with Protestant's use of water under its numerous existing water rights in Basin 021. The Protestant, John Espil Sheep Co., has numerous water rights in Basin 021, including Permit No. 11443 (Certificate No. 4594), Permit No. 16523 (Certificate No. 5389), Permit No. 16810 (Certificate No. 5840), Permit No. 38125 (Certificate No. 13069), Permit No. 48156 (Certificate No. 13076), Permit No. 7142 (Certificate No. 2168), Permit No. 2705 (Certificate No. 1974), as well as Proof No. 0511, Proof No. 05108, and Permit No. 60585. They also include vested water right V09784 and vested rights in the Sheephead Springs field.

The proposed changes will adversely impact the numerous area wells and springs that are the source of many of Protestant's vested and permitted water rights, and conflict with Protestant's use of those existing rights.

In addition, Applicants' proposed changes, if approved, are likely to result in a draw-down of the local water table that would adversely impact the surface flow of nearby Smoke Creek and conflict with Protestant's use of existing rights to the surface flow of Smoke Creek for stock-watering, including stock-watering under Protestant's vested water right No. V09784.

## III. Threatens to Prove Detrimental to the Public Interest.

Applicants' proposed changes threaten to prove detrimental to the public interest for numerous reasons, including, but not limited to: (i) there is no justified need to import water to the proposed places of use; (ii) the proposed changes will have significant adverse impacts in the Smoke Creek Desert; (iii) the proposed changes are not an appropriate long term use and will unduly limit future growth and development in the Smoke Creek Desert; and (iv) the proposed changes involve speculation. There are numerous springs and flowing wells in the area. The changes threaten to prove detrimental to the public interest because local water tables and existing flowing wells and springs in the area will be harmed.

## IV. Applicants' Proposed Action Would Conflict With Existing Rights and Threaten to Prove Detrimental to the Public Interest Because They Seek to Transfer the Entire Duty of Water Rights Currently Permitted for Irrigation Without Regard to the Consumptive Use Portion of Such Irrigation Rights.

Applicants seek to change the manner of use of the water rights at issue from irrigation to municipal and industrial, and seek to transfer the entire duty of such water rights for use outside of Basin 021. The State Engineer is authorized by N.R.S. 533.3703 to consider the consumptive use of a water right and the consumptive use of a proposed beneficial use of water in determining whether a proposed change complies with the provisions of N.R.S. 533.370(5). Consideration of these factors clearly shows that Applicants' proposed changes would violate the provisions of that section by conflicting with existing rights and threatening to prove detrimental to the public interest. The water rights proposed to be changed have an asserted existing irrigation use. Water not consumed by such irrigation use returns to either the surface waters or groundwater of Basin 021, and is thus available for use by other appropriators. Applicants seek to change the manner of use of the water rights to municipal and domestic, and to transfer the entire duty of those rights without regard to consumptive use.

Applicants' proposed changes would conflict with existing rights. The existing consumptive use of the water rights for irrigation results in the return of the non-consumptive use component of such water rights to the waters of Basin 021 where they are available to other appropriators. Applicants' proposed changes in manner of use and place of use would make the non-consumptive use portion of the irrigation water rights unavailable. Applicants' proposed changes in place of use would conflict with existing rights by removing the entire duty of the irrigation water rights at issue from Basin 021 so that the non-consumptive use component of such water would no longer be available for use by other appropriators.

Applicants' proposed changes would threaten to prove detrimental to the public interest. As noted above, Applicants' proposed changes would remove the entire duty of the irrigation water rights at issue from Basin 021. The non-consumptive use component of those water rights would no longer return to the waters of Basin 021. Applicants' proposed changes would threaten to prove detrimental to the public interest because the non-consumptive use portion of the water would no longer be available to riparian habitats and wildlife or for groundwater recharge in Basin 021.

## IV. Applicants' Proposed Action is Speculative.

Applicants have not provided proof of their intention in good faith to construct facilities necessary to apply the water at issue to the intended beneficial municipal use within a reasonable time period.

Applicants have not provided proof of their reasonable expectation to construct the necessary works and apply the water at issue to the intended beneficial municipal use with reasonable diligence.

Applicants fail to specify the intended beneficial use, stating only that such use is to be for municipal purposes within the proposed place of use. Under the Nevada Supreme Court's decision in *Bacher v. State Engineer*, 146 P.3d 793, 799 (Nev. 2006), to avoid violating Nevada's anti-speculation doctrine, an applicant must have an agency or contractual relationship with the party intending to put the water to beneficial use. Applicants have not shown any requisite formal relationship with a party intending to put the water to beneficial use.

Applicants fail to specify exactly what party intends to put the water to beneficial use, and fail to specifically identify projects requiring the additional water indicating only that proposed usage is related to Washoe County planning studies showing a demand for additional municipal water resources to supply existing and projected growth. Although an applicant need not be the party putting the water to beneficial use, it must have a formal relationship with the party intending to put the water to beneficial use. Applicants fail to indicate any such formal relationship with whatever parties intend to put the water to use for, as Applicants specify, municipal purposes to supply existing and projected growth.

## V. Applicants Have Not Justified the Need to Import Water to the Hydrographic Basins Where the Proposed Places of Use Are Located.

Applicants fail to justify the need to import water to the hydrographic basins where the proposed places of use are located. Applicants do not specify the hydrographic basins where their proposed places of use are located. Applicants do not specifically identify any project for which a specific quantity of water is needed, nor do Applicants show how any such quantity of needed water would be reduced by existing water rights. Without such specificity, under N.R.S. 533.370(6)(a) and the decision of the Nevada Supreme Court in *Bacher v. State Engineer*, 146 P.3d 793 (Nev. 2006), a reasonable mind cannot accept as adequate, and the State Engineer

cannot reach a valid conclusion supported by substantial evidence, that Applicants have demonstrated the need to import water to the hydrographic basins where Applicants' proposed places of use are located.

## VI. Applicants' Proposed Action is Not Environmentally Sound.

The environmental impact of a water exportation scheme of the relative magnitude proposed here will have significant adverse environmental impacts within Basin 021 and the Smoke Creek Desert. The scale and severity of the environmental impact upon Basin 021 is apparent. Basin 021 currently contains numerous springs and flowing artesian wells that are the source of water for riparian environments and wildlife within Basin 021.

## VII. Applicants' Proposed Action is Not an Appropriate Long-Term Use and Will Unduly Limit Future Growth and Development of Hydrographic Basin 021.

The export of such a substantial portion of the total water Basin 021 will unduly limit future growth and development of Basin 021 by greatly reducing the amount of water available within Basin 021 for such future growth and development. Such large scale exportation is not an appropriate long-term use because Applicants have not demonstrated a need for such water for specific beneficial purposes at the proposed places of use.

## VIII. Enlargement of Use.

Application Nos. 78609, 78610, 78611, 78612, 78722, 78723, 78726 and 78727 are based upon underlying water rights which have a combined and limited duty which those Applications seek to enlarge. Application Nos. 78588 through 78595 involve underlying water rights which are appurtenant to the same land, and those Applications seek to enlarge the use of the underlying water rights.

## IX. Abrogated Permit.

Application Nos. 78609 and 78610 seek to change an underlying water right which has been totally abrogated.

## X. Required Change to California Permit 21019.

Application Nos. 78722, 78724, 78725, 78726 and 78728 cannot be implemented with a corresponding and necessary change to California Permit 21019 and compliance with California law, including without limitation, the California Environmental Quality Act, Cal. Pub. Res. Code § 21000, et seq.