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

IN THE MATTER OF APPLICATION NUMBER 78726
FILED BY JackRabbit Properties LLC
ON July 9th, 20 09, TO APPROPRIATE THE
WATERS OF Smoke Creek and Tributaries

PROTEST

FILED
AUG 03 2009
STATE ENGINEER'S OFFICE

Comes now Bureau of Land Management, Eagle Lake Field Office
Printed or typed name of protestant

whose post office address is 2950 Riverside Drive, Susanville, CA 96130
Street No. or PO Box, City, State and ZIP Code

whose occupation is Federal Government and protests the granting

of Application Number 78726, filed on July 9th, 20 09

by JackRabbit Properties LLC to appropriate the

waters of Smoke Creek and Tributaries situated in Washoe
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:
Please see attached sheet

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
Agent or protestant

Dayne Barron, Field Office Manager
Printed or typed name, if agent

Address Bureau of Land Management, Eagle Lake Field Office
Street No. or PO Box

2950 Riverside Drive, Susanville CA 96130
City, State and ZIP Code

530-257-0456
Phone Number

State of California; County of Lassen
Subscribed and Sworn (or affirmed) before me
on this 31 day of July, 2009
by Dayne Barron
~~personally known to me or~~ proved to me on the basis of satisfactory evidence to be the person(s) who appeard before me.
Signature:

Subscribed and sworn to before me this day of , 20

Notary Public

R. FINK
COMM. # 1680101
NOTARY PUBLIC - CALIFORNIA
COUNTY OF LASSEN
MY COMM. EXP. AUG. 6, 2010

State of

County of

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

ALL COPIES MUST CONTAIN ORIGINAL SIGNATURE.

The Bureau of Land Management (BLM) has significant concerns with change applications 78722, 78723, 78724, 78725, 78726, 78727, and 78728, which, if approved, would result in the out-of-basin transfer of water from Smoke Creek, Rush Creek, and tributaries thereof for municipal purposes. All of the applications propose to move water through a ditch and reservoir associated with permit 2386. That ditch was constructed partially on lands of the United States, which are now administered by the BLM pursuant to the Federal Land Policy and Management Act (FLPMA) and applicable regulations. For the reasons stated more fully below, the BLM opposes the change applications 78722, 78723, 78724, 78725, 78726, 78727, and 78728.

The rights granted under permit 2386 have been forfeited.

The original applicants first applied for permit 2386 on March 25, 1912, and they were ultimately given that same priority date. However, in *United States v. Orr Ditch Co., et al.*, 256 F.3d 935, 941-44 (9th Cir. 2001), the Ninth Circuit concluded that the priority date is not necessarily the vesting date for purposes of determining whether a right falls under N.R.S. 533.085. *See also, United States v. Alpine Land & Reservoir Co.*, 965 F.2d 731 (9th Cir. 1992, *amended by* 983 F.2d 1487 (1993). Rather, "the water right must have vested, or an individual landowner must have 'initiated' appropriation of that right, before March 22, 1913." *Id.* at 943 (relying on *Alpine Land*). In this case, the State Engineer did not certify that the original applicants had put the water associated with permit 2386 to beneficial use until January 12, 1918 and did not certify that appropriation was complete until May 5, 1919. Additionally, appropriation was not initiated until May, 1913, when the original applicants filed proof of labor. As such, appropriation was not initiated or rights vested prior to March 22, 1913. For that reason, the rights granted under permit 2386 are not pre-1913 rights and they do not fall under the forfeiture protections of N.R.S. § 533.085.

The rights associated with permit 2386 were, therefore, subject to forfeiture pursuant to N.R.S. § 533.060. Prior to June 8, 1999, N.R.S. § 533.060 provided:

> Except as otherwise provided in subsection 4, if the owner or owners of any such ditch, canal, reservoir, or any other means of diverting any of the public water fail to use the water therefrom or thereby for beneficial purposes for which the right of use exists during any 5 successive years, the right to so use shall be deemed as having been abandoned, and any such owner or owners thereupon forfeit all water rights, easements and privileges appurtenant thereto theretofore acquired, and all the water so formerly appropriated by such owner or owners and their predecessors in interest may be again appropriated for beneficial use the same as if such ditch, canal, reservoir or other means of diversion had never been constructed, and any qualified person may appropriate any such water for beneficial use.

1999 Nev. ALS 515, *3 (June 8, 1999) (repealing the quoted language). Thus, prior to June 8, 1999, the water, ditch, and storage rights associated with permit 2386 were subject to forfeiture if they were not used for beneficial purposes for five consecutive years. To the best of the BLM's knowledge, the ditch

and reservoir has not been used or maintained for approximately 30 years, or since about 1979. Thus, prior to June 8, 1999, the water, ditch, and reservoir rights associated with permit 2386 had not been put to beneficial use for approximately 20 years. As such, those rights were forfeited pursuant to N.R.S. § 533.060.

Assuming *arguendo* that permit 2386 represents pre-1913 rights, they have been abandoned.

Nevada state law protects pre-March 22, 1913 rights from forfeiture. *See* N.R.S. 533.085. But any such rights can still be lost due to abandonment. *In Re Manse Spring & its Tributaries*, 60 Nev. 280, 108 P.2d 311 (Nev. 1940). Abandonment is "'the relinquishment of the right by the owner with the intention to forsake and desert it.'" *Orr Ditch*, 256 F.3d at 944 (citing *Manse Spring*, 108 P.2d at 315). Abandonment, therefore, "requires a showing of subjective intent." *Id.* Subject intent is difficult to prove, so indirect and circumstantial evidence must always be used to show abandonment. *Id.* at 945. In the State of Nevada, "a prolonged period of non-use may be taken into consideration in determining whether a water right has been abandoned" and non-use may infer an intent to abandon. *Id.* (citing *Manse Spring*, 108 P.2d at 316, and *In Re Franktown Creek v. Marlette Lake*, 364 P.2d 1069, 1072 (Nev. 1961)). And, "the longer the period of nonuse, the greater the likelihood of abandonment." *Id.* (citing *United States v. Alpine Land & Reservoir Co.*, 27 F.Supp.2d 1230, 1243 (D. Nev. 1998)).

In this case, to the best of the BLM's knowledge, the subject ditch and reservoir have not been used or maintained for about 30 years. This is a significant amount of time that clearly infers an intent to abandon the water, ditch, and storage rights associated with permit 2386. Furthermore, part of the ditch lies within BLM-administered land, and the BLM has administered those lands as part of the Eagle Lake Field Office and managed a portion of the subject land as a wilderness study area for non-impairment of wilderness values. This extended period of non-use, prior to June 8, 1999, together with the BLM's administration of the area for non-irrigation purposes infers an intent to abandon.

Since 1999, N.R.S. § 533.060(4) has allowed a water right holder to establish a rebuttable presumption of non-abandonment

> upon the submission of records, photographs, receipts, contracts, affidavits or any other proof of the occurrence of any of the following events or actions within a 10-year period immediately preceding any claim that the right to use the water has been abandoned:
>
> **(a)** The delivery of water;
> **(b)** The payment of any costs of maintenance and other operational costs incurred in delivering the water;
> **(c)** The payment of any costs for capital improvements, including works of diversion and irrigation; or
> **(d)** The actual performance of maintenance related to the delivery of the water.

The BLM is unaware of any facts that would create a rebuttable presumption of non-abandonment. As such, even if N.R.S. § 533.060(4) applies to the rights associated with permit 2386, the BLM believes that those rights have been abandoned.

Any change in the size, location, or use of the ditch or reservoir from that permitted in 1919 must be authorized by the BLM.

As explained above, the applicants in all seven applications propose to utilize a ditch and reservoir associated with permit 2386. Construction of the ditch and reservoir occurred between 1913 and 1918, and appropriation was completed in 1919. Any rights to use the water, ditch, and reservoir associated with permit 2386 are limited to those confirmed in 1919. Any change in the size, location, or use of the ditch or reservoir, to the extent they lie within BLM-administered lands, must be authorized by the BLM. The ditch and reservoir, again to the extent they lie within BLM-administered lands, are subject to the reasonable regulation of the BLM, including permitting requirements. Thus, even if the State Engineer approves the seven change applications, the applicants cannot move forward on BLM-administered lands unless and until the BLM authorizes the project.

The change applications are inconsistent with BLM's management objectives.

BLM administers significant public lands within the Smoke Creek Desert in accordance with the FLPMA. Springs and shallow ground water sustain wildlife habitat and support public land uses such as livestock grazing and recreation; BLM holds public water reserve claims on 30 springs within the basin as well as 3 state appropriative permits. One of these permits (55489) is for in-stream use along Smoke Creek between the above listed applications. This riparian area is a important restoration project for BLM, which has had significant time and money dedicated to it over the last 20 years. Exportation of large quantities of water from Smoke Creek Desert under the subject applications may injure these existing rights, claims, and resources by reducing natural discharge and unreasonably lowering groundwater levels. The waters sought for export are currently used for irrigation and provide significant secondary recharge by percolation. Exportation of these waters would eliminate secondary recharge.

Existing interpretation of the groundwater flow system in the region (such as published in Reconnaissance Series Report 44 by Glancy and Rush) indicates Smoke Creek Desert is hydraulically connected to San Emidio Desert and Black Rock Desert. Existing evidence indicates groundwater flows from San Emidio Desert to Smoke Creek Desert. BLM manages the Black Rock Desert-High Rock Canyon Emigrant Trails National Conservation Area (NCA) within this region. The town of Gerlach is the gateway community to the NCA that provides services to visitors. Waters sought for export from Smoke Creek Desert are currently used for irrigation and provide significant secondary recharge by percolation. Exportation of these waters would eliminate secondary recharge and lower groundwater levels. This would steepen the hydraulic gradient between San Emidio Desert and Smoke Creek Desert and increase the rate of interbasin flow. This change in interbasin flow could impair Gerlach's water supply and its ability to function as a gateway community to the NCA.

The above applications may be speculative in nature. The specified places of use seemingly do not correspond with specific development projects with which the applicant is a proponent, but rather have been distributed according to needs for additional water supplies associated with future population

growth in Washoe County. The applicant has not indicated they are representing Washoe County or other appropriate water utility as a third-part agent. The estimated amount of time to put the water to beneficial use (30 years) seems excessively long for a private entity; previous rulings seem to provide precedent that this amount of time is only provided to municipalities.

Nevada Revised Statute 533.370 provides criteria that the State Engineer must consider when deciding whether to approve or deny an interbasin transfer of water. These criteria include 1) whether the proposed action is environmentally sound as it relates to the basin from which water is exported; and 2) whether the proposed action is an appropriate long-term use of water which will not unduly limit future growth and development in the basin from which water is exported. Exportation of almost the entire perennial yield of the basin as proposed under the subject applications and pending applications filed by Washoe County in 1989 would unduly hamper future growth and development in the basin. Potential changes in interbasin flow from San Emidio Desert, resulting impacts to the town of Gerlach's water supply, and injury to water-dependent ecosystems resulting from reduced natural discharge should be considered in decisions about environmental soundness of the proposed action.