

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

IN THE MATTER OF APPLICATION 72351 AND )  
CHANGE APPLICATIONS 75813T, 75814T, 75815, )  
75816, 76337T AND 76338 FILED TO )  
APPROPRIATE THE PUBLIC WATERS OF AN UN- )  
NAMED SPRING AND TO CHANGE WATER )  
PREVIOUSLY APPROPRIATED FROM SHAY )  
SPRING NOS. 3 AND 5, AND THE TRUCKEE )  
RIVER (STEAMBOAT DITCH) WITHIN THE )  
TRUCKEE MEADOWS SEGMENT )  
HYDROGRAPHIC BASIN (87) AND THE TRUCKEE )  
CANYON SEGMENT HYDROGRAPHIC BASIN )  
(91), WASHOE COUNTY, NEVADA. )

**RULING**  
**#5924-A**

**GENERAL**

**I.**

Application 72351 was filed on March 7, 2005, by Gary O. and Sandra Say Elrod and John and Nancy Flanigan, to appropriate 0.5 cubic feet per second (cfs) of water from an un-named spring for fish and wildlife propagation within a portion of the NE $\frac{1}{4}$  SW $\frac{1}{4}$ , SE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 12, T.18N., R.19E., M.D.B.&M. The proposed point of diversion is described as being located within the SW $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 12, T.18N., R.19E., M.D.B.&M.<sup>1</sup>

**II.**

Applications 75813T and 75815 were filed on May 29, 2007, by Peter B. and Gail D. Wilday, both to change the place and manner of use of 0.0156 cfs, not to exceed 11.30 acre-feet annually (afa), a portion of the waters from Shay Spring No. 5 previously appropriated under Permit 23378, Certificate 7484. The proposed point of diversion is described as being located within the SE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 12, T.18N., R.19E. M.D.B.&M. The proposed manner and place of use is for recreation upon Washoe County Assessor's Parcel Nos. 230-092-13 (old 230-092-11) and 230-092-14 (old 230-092-12), located within the SE $\frac{1}{4}$  SW $\frac{1}{4}$  and NE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 12, T. 18N., R. 19E., M.D.B.&M.<sup>2</sup>

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<sup>1</sup> File No. 72351, official records in the Office of the State Engineer.

<sup>2</sup> File Nos. 75813T and 75815, official records in the Office of the State Engineer.

### III.

Applications 75814T and 75816 were filed May 29, 2007, by Peter B. and Gail D. Wilday, both to change the place and manner of use of 0.0175 cfs, not to exceed 12.65 afa, a portion of the waters from Shay Spring No. 3 previously appropriated under Permit 23381, Certificate 7477. The proposed point of diversion is described as being located within the SE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 12, T.18N., R.19E., M.D.B.&M. The proposed manner and place of use is for recreation upon Washoe County Assessor's Parcel Nos. 230-092-11 and 230-092-12, located within the SE $\frac{1}{4}$  SW $\frac{1}{4}$  and NE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 12, T.18N., R.19 E., M.D.B.&M.<sup>3</sup>

### IV.

Applications 76337T and 76338 were filed October 2, 2007, by Peter B. and Gail D. Wilday to change the point of diversion and manner of use of .0024 cfs, not to exceed 1.0 afa, a portion of the waters of the Truckee River (Steamboat Ditch) previously appropriated under, Permit 25444, Certificate 7650. The proposed manner and place of use is for recreation upon Washoe County Assessor's Parcel Nos. 230-092-11 and 230-092-12, located within the SE $\frac{1}{4}$  SW $\frac{1}{4}$  and NE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 12, T.18N., R.19E., M.D.B.&M. The proposed point of diversion is described as being located within the NE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 31, T.19N., R.18E., M.D.B.&M.<sup>4</sup>

### V.

Applications 75813T, 75814, 75815, 75816, 76337T and 76338 were timely protested by Gary O. and Sandra Say Elrod<sup>5</sup> and John and Nancy Flanigan on June 18, 2007. The protest issues are summarized as follows:

- The Applicants are not in compliance with State Engineer's Order No. 1182 and are adversely impacting the Protestant's water rights;
- The State Engineer had to bring action in the Second Judicial District Court, case No. CV07-00340, so the applications should be rejected;
- The Protestants water rights deed has a restrictive conveyance that the water rights place of use and manner of use shall remain in perpetuity;
- The Applicants are trying to expand acreage, which is against policy;

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<sup>3</sup> File Nos. 75814T and 75816, official records in the Office of the State Engineer.

<sup>4</sup> File Nos. 76337T and 76338, official record in the Office of the State Engineer.

<sup>5</sup> Note, Gary O. and Sandra Say Elrod withdrew their protests on August 12, 2008. File Nos. 75813T, 75815, 75816, 76337T and 76338, official record in the Office of the State Engineer.

- There is no un-appropriated water at the source, conflicts with existing rights and is not in the public's interest; and
- The chain of title has not been resolved to show the Applicants as owner of the base water rights.

### **FINDING OF FACTS**

#### **I.**

It is within the State Engineer's discretion to determine whether a hearing is necessary on a protested application.<sup>6</sup> The State Engineer finds that he has full understanding of the issues involved in Applications 75813T, 75814T, 75815, 75816, 76337T and 76338, and that an administrative hearing is not required.

#### **II.**

Application 72351 was filed to appropriate water from an un-named spring located in close proximity to Shay Spring No. 5. On May 9, 2006, an informal field investigation was conducted to investigate a complaint of water being diverted into two newly constructed ponds. The investigators visited Shay Spring Nos. 3 and 5 to get an understanding of how the spring flows were collected and diverted. The investigators found that in addition to the springs there are drain pipes located in fill material from the up-gradient property that were discharging a small amount of drain water. At the time of the investigation no other spring sources were found in the proximity of the proposed point of diversion described as being located within the SW $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 12, T.18N., R.19E., M.D.B.&M. under Application 72351.

One of the protest issues to the approval of Applications 75813T, 75814T, 75815, 75816, 76337T and 76338 is that there is no un-appropriated water available at the proposed source and the State Engineer agrees. Shay Spring No. 5 is located in an area composed of multiple spring systems and the un-named spring identified in Application 72351, if found, would be considered part of the flow contributing to Shay Spring No. 5. The State Engineer finds that there is no un-appropriated water at the proposed source.

#### **III.**

The Protestants contend that the approval of the change applications would expand the acreage issued under the base right permits. Applications 75813T, 75814T,

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<sup>6</sup> NRS § 533.365(3).

75815, 75816, 76337T and 76338 were all filed to change water already appropriated under Permit 23378, Certificate 7484, Permit 23381, Certificate 7477 and Permit 25444, Certificate 7650. The State Engineer agrees that it is the policy of the Office of the State Engineer not to allow the expansion of acreage and he will not allow this to occur under these change applications. Application 76338 proposes to strip 0.13 acres from Permit 25444, which is outside the proposed place of use of Applications 75813T, 75814T, 75815, 75816, 76337T and 76338. The approximate area of the pond outside of the existing place of use is 0.15 acres, which for all intent and purposes is the same acreage as the area being stripped and with the extension of the access road to the new home will more than offset the 0.02 acres difference. The State Engineer finds that the applications are changing water already appropriated and that there will be no expansion of acreage.

#### IV.

The conflict over the diversion of water from Shay Spring Nos. 3 and 5, has been an on-going issue since early 2006. On February 1, 2006, Gary and Sandy Elrod and John and Nancy Flanigan filed a complaint, through their counsel, with the Office of the State Engineer. The complaint alleged that the flows from the springs were being diminished because of the construction of an ornamental pond, which intercepted the ditch that conveys the spring flows to the Wilday and Elrod properties and by a dam recently constructed spanning the natural drainage of the spring area on Washoe County Assessor Parcel No. (APN) 230-92-14, in the name of Rocklin Redding, LLC.

Informal field investigations were conducted on February 3 and May 9, 2006, by staff of the Office of the State Engineer. Prior to the field investigations the records in the Office of the State Engineer were researched and it was determined that no water rights existed in the name of Rocklin Redding, LLC, nor were there any other water rights appurtenant to APN 230-92-14.<sup>7,8,9</sup> There were two subsequent field investigations with all the parties involved in order to resolve the conflict. The field investigations confirmed that the ornamental pond and dam had been constructed. It was observed that water was flowing from the pond into a diversion structure that had

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<sup>7</sup> File Nos. 23378 and 23381, Informal Field Investigation 1074, dated November 16, 2006, official records in the Office of the State Engineer.

<sup>8</sup> File Nos. 23378 and 23381, Addendum 1074A to the Report of Informal Field Investigation of May 9, 2006, official records in the Office of the State Engineer.

<sup>9</sup> File Nos. 23378 and 23381, Second Addendum 1077 to the Report of Informal Field Investigation of May 9, 2006, official records in the Office of the State Engineer.

dual pipes that allowed water to be diverted to irrigate the Wilday property and then collected in the Wilday pond, which subsequently discharged into a channel that had a 4 inch and 1½ or 2 inch pipe that ultimately diverted the water to the Elrod pond.

The State Engineer issued Order No. 1182, on September 29, 2006, instructing Rocklin Redding, LLC, to cease and desist the use of water from Shay Spring Nos. 3 and 5 unless it could provide ownership or lease agreement for the use of water from the springs.

On April 11, 2007, a report of conveyance was filed in the names of Peter B. Wilday and Gail D. Wilday, the developers of APN 230-93-12, conveying a 50% undivided interest under Permit 23378, Certificate 7484, Permit 23381, Certificate 7477 and Permit 25444, Certificate 7650, from William Shay, the original owner of the permits to the Wildays. The Office of the State Engineer confirmed the title transfer by letter dated April 26, 2007.

Applications 75813T, 75814T, 75815 and 75816 were filed on May 27, 2007, to change the place and manner of use of Permits 23378 and 23381. Application 76338, which proposed to change the place and manner of use of Permit 25444 was filed on October 2, 2007.

The State Engineer finds that Rocklin Redding LLC (a.k.a. Wildays), at a very lethargic pace, has complied with State Engineer's Order No. 1182.

#### V.

In review of the issue of the restrictive covenant the State Engineer has examined said water rights deeds selling the Elrod's and the Wildays their water rights in separate actions. In Document 2086425, recorded April 4, 1997, granting a half interest in Permit 23378, Certificate 7484, and Permit 23381, Certificate 7477, from Alfred H. and Sandra Osborne to Gary and Sandra Say Elrod, a restrictive covenant was set in place that stated:

...that they will not change nor attempt to change the manner or place of use of the Water Rights nor sell of [sic] 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 any attempt to do so will be void.

In the Wilday transfer, the water right deed, Document 1869145, recorded February 6, 1995, granting half interest in Permit 23378, Certificate 7484, and Permit

23381, Certificate 7477, there was no restrictive covenant set forth by the Grantor, who was also the original permit holder, limiting the manner and place of use of that portion when granted to the Wildays.<sup>10</sup> The State Engineer finds that he is not bound to enforce restriction set forth in the water right deeds as that it is a civil matter between the parties.

## VI.

The protests filed by the Elrods and the Flanigans state that the Flanigans are owners of a portion of Truckee River Claims 72 and 72A. The records of the State Engineer indicate that the Flanigans are only owners of a portion of Truckee River Claim 72; Truckee River Claim 72A is still in the name of the original decreed owner L.D. Maddalina and does not include the Flanigan property in its decreed place of use. The Flanigans filed change Application 59048, which changes the point of diversion from the Steamboat Ditch to the Last Chance Ditch. This application was approved by the State Engineer and a permit was issued on June 26, 1997. Since that date the Flanigans have been getting their Truckee River water through the Last Chance Ditch, not the ditch conveying water from either Shay Spring No. 3 or 5. According to documents on file with the State Engineer's office, the second protesting party, the Flanigans, do not own any of the Shay Springs water rights nor should they be using the previously constructed ditch to transport their current water rights to their parcel. The Flanigans should be receiving their permitted rights directly from the Last Chance Ditch through a headgate and lateral ditch. The Flanigans' interest in these applications is third-party only and should not be affected by the continuation of Applications 75813T, 75814T, 75815, 75816, 76337T and 76338 through the permitting process.

## CONCLUSIONS

### I.

The State Engineer has jurisdiction over the parties and the subject matter of this determination.<sup>11</sup>

### II.

The State Engineer is prohibited by law from granting an application to appropriate or change the public waters where:<sup>12</sup>

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<sup>10</sup> Documents filed in File No. 23378, official records in the Office of the State Engineer.

<sup>11</sup> NRS chapter 533.

<sup>12</sup> NRS § 533.370(5).

- A. there is no unappropriated water at the proposed source;
- B. the proposed use or change conflicts with existing rights;
- C. the proposed use or change conflicts with protectable interests in existing domestic wells as set forth in NRS § 533.024; or
- D. the proposed use or change threatens to prove detrimental to the public interest.

### III.

Application 72351 was filed to appropriate additional water from a proposed point of diversion that lies in close proximity to Shay Spring No. 5. Observations made during an informal field investigation determined that the water generated in this area is limited to that emanating from Shay Spring No. 5 and drain water from an up gradient residential development. Having been fully committed under Permit 23378, the State Engineer concludes that there is no unappropriated water available at the source described under Application 72351.

### IV.

The Flanigans have no interest in Shay Spring Nos. 3 and 5 and have moved their Orr Ditch Decreed water rights under Truckee River Claim 72 from the Steamboat Ditch to the Last Chance Ditch under Permit 59048. The records of the State Engineer do not reflect the Flanigans as owners of Truckee River Claim 72A and that the place of use of Truckee River Claim 72A does not include the Flaingans' property. The State Engineer concludes that the Flanigans have no claim to any water rights at issue in this ruling and that they are only beneficiaries of drain and waste water from the Elrod pond.

### V.

The State Engineer concludes that the amount of water being removed from Permit 25444, Certificate 7650, and that the additional road area removed from irrigation will offset the surface area of the upper pond and thus will not result in any expansion of acreage. The State Engineer further concludes that Applications 75813T, 75814T, 75815, 75816, 76337T and 76338 are changing water already appropriated under Permit 23378, Certificate 7484, Permit 23381, Certificate 7477 and Permit 25444, Certificate 7650 so the issue of no un-appropriated water is moot.

### VI.

The State Engineer concludes that he is not bound by deed restrictions to the Elrod's acquisition of water rights from Shay Springs.

**RULING**

Application 72351 is hereby denied on the grounds that its approval would threaten to prove detrimental to the public interest, that there is no un-appropriated water at the source and it conflicts with existing rights.

The protest to Applications 75815, 75816 and 76338 is hereby overruled and said applications are approved subject to:

1. Existing rights;
2. Installation of measuring devices at locations approved by the State Engineer;
3. Payment of Statutory Permit fees; and
4. The withdrawal of Temporary Applications 75813T, 75814T and 75337T.

Respectfully submitted,

  
Tracy Taylor, P.E.  
State Engineer

TT/KWH/jm

Dated this 9th day of

February, 2009.