# NEVADA LEGISLATURE

**Twenty-sixth Special Session, 2010**

# SENATE DAILY JOURNAL

## THE FIFTH DAY

CARSON CITY (Saturday), February 27, 2010

Senate called to order at 10:06 a.m.
President Krolicki presiding.
Roll called.
All present.
Prayer by the Senator Maurice Washington.

Dear Lord, we thank you for this great day that you have blessed and given. We thank you for this glorious opportunity just to be here on this day. We pray that you would give us your divine wisdom and your insight. We know that you are not a bipartisan God, so those that are absent, we pray that you would just look on them and bring them back so we could be a bipartisan legislature. In Jesus' name, we pray.

AMEN.

Pledge of Allegiance to the Flag.

Senator Horsford moved that further reading of the Journal be dispensed with, and the President and Secretary be authorized to make the necessary corrections and additions.
Motion carried.

Mr. President announced that if there were no objections, the Senate would recess subject to the call of the Chair.

Senate in recess at 10:09 a.m.

SENATE IN SESSION

At 12:02 p.m.
President Krolicki presiding.
Quorum present.

MESSAGES FROM THE ASSEMBLY

ASSEMBLY CHAMBER, Carson City, February 27, 2010

*To the Honorable the Senate:*

I have the honor to inform your honorable body that the Assembly on this day passed Assembly Bills Nos. 4, 5.

Also, I have the honor to inform your honorable body that the Assembly on this day adopted Assembly Concurrent Resolution No. 2.

LUCINDA BENJAMIN
*Assistant Chief Clerk of the Assembly*

MOTIONS, RESOLUTIONS AND NOTICES

Assembly Concurrent Resolution No. 2.

Senator Care moved that the resolution be referred to the Committee of the Whole.

Motion carried.

INTRODUCTION, FIRST READING AND REFERENCE

Assembly Bill No. 4.

Senator Care moved that the bill be referred to the Committee of the Whole.

Motion carried.

Assembly Bill No. 5.

Senator Care moved that the bill be referred to the Committee of the Whole.

Motion carried.

MOTIONS, RESOLUTIONS AND NOTICES

Senator Care moved that the Senate resolve itself into a Committee of the Whole for the purpose of considering issues relating to the State's budget shortfall, with Senator Care as Vice Chair of the Committee of the Whole.

Motion carried.

Mr. President announced that if there were no objections, the Senate would recess subject to the call of the Chair.

Senate in recess at 12:04 p.m.

IN COMMITTEE OF THE WHOLE

At 12:05 p.m.

Senator Care presiding.

Considering issues relating to the State's budget shortfall.

The Committee of the Whole was addressed by Senator Care; Senator Woodhouse; Joyce Haldeman, Clark County School District; Craig Hulse, Washoe County School District; Senator Cegavske; Senator Carlton; Senator Lee; Senator McGinness; Senator Schneider; Senator Washington; Senator Coffin; Dotty Merrill, Nevada Association of School Boards; Bryn Lapenta,

Washoe County School District; Senator Townsend; Charles Duarte, Department of Health Care and Human Services and Senator Wiener.

SENATOR CARE:
You should have Assembly Bills Nos. 4 and 5; Assembly Concurrent Resolution No. 2 and BDR 38-11 which revises provisions governing a list of preferred prescription drugs to be used for the Medicaid program.

Senator Woodhouse, I understand that you are probably familiar with the order of the witnesses and the testimony we are about to hear. Would it be your preference that we go to the resolution first or the Assembly bills first?

SENATOR WOODHOUSE:
I believe that the persons who are testifying are ready for Assembly Bills Nos. 4 and 5 and Assembly Concurrent Resolution No. 2 after that.

SENATOR CARE:
We will take Assembly Bill No. 4 first; Assembly Concurrent Resolution No. 2 and Assembly Bill No. 5 will be following that. We will then go to the bill draft.

JOYCE HALDEMAN (Clark County School District):
I am here in support of Assembly Bill No. 4. It is almost with reluctance that we support this bill because we are such strong advocates of class-size reduction. We know it makes a difference in the lives of children. We know it makes a difference in their ability to learn in the early grades. However, these are extraordinary times and we know that there are sacrifices that must be made. The temporary nature of this bill appeals to us so that as we are working through our budget issues, we could temporarily increase grades 1, 2 and 3 by two students. For the Clark County School District, every time we increase a class size in grades 1, 2 and 3 by one student, we save $15 million, so that would be a savings of $30 million to us. Under these conditions, and with the understanding that this is a temporary action that we would take, we are in full support of this bill.

CRAIG HULSE (Washoe County School District):
I am in agreement with my colleague from Clark County. This is something we deem necessary because of the economic times we are in. We are in full support of class-size reduction as well. For every year as a student, we increase our class-sizes grades 1-3, Washoe County saves $2.8 million. This will allow us flexibility with $5.4 million.

SENATOR CEGAVSKE:
If I am reading this correctly and have heard correct information, we would be adding two students in grades 1-3 only. I did not see anything and had hoped to see some words of flexibility for the school districts to be able to use class-size reduction K-12. Was that even discussed?

MS. HALDEMAN:
Allowing us to add two students to those grades is the flexibility that we seek. That is exactly where we needed to be right now.

SENATOR CEGAVSKE:
The flexibility we have been trying to get through other sessions is flexibility for all grades K-12. For example, if you have more kids in your fourth and fifth grades, you would be able to go up and make some modifications up there, and you would have lower numbers in grades 1-3. That is all I am asking. Just for the record, that is not included and was not discussed?

MS. HALDEMAN:
That is correct.

SENATOR CEGAVSKE:
But that would be helpful to the school districts?

MS. HALDEMAN:
We are actually fine with the class-size reduction laws the way they are written because we think that those early primary grades are quite important to us.

SENATOR CARLTON:
I was under the impression that we really did not have class-size reduction for grades above third grade. Is that correct?

MS. HALDEMAN:
Throughout the state of Nevada except for Washoe County and Clark County, there is a flexibility piece that they can use class-size reductions if they want to. I believe it goes from grades K-6. In Washoe and Clark, the only class-size reduction funds we receive are for grades 1, 2 and 3.

SENATOR CARLTON:
Thank you. That is where I am getting confused.

SENATOR LEE:
I see in section 4, that this expires in one year. With that expiration in one year, based upon the workload of the school, how is this going to affect the labor of teachers? Is there going to be a layoff of teachers? What do you see by virtue of us doing this for one year? How will the school district be harmed or helped? Can you give me some clarification on that?

MS. HALDEMAN:
Thank you for asking that question. The savings that we realize is through laying off teachers. We will reduce the number of teachers we have. However, the reason we are in favor of this bill is because in the Clark County School District, we have a natural attrition rate every year. It is usually between 1,000 and 2,000. Under the economic circumstances we face, we know it is going to be slightly less. We think it will be around 750. We can absorb these teachers into other classrooms without requiring layoffs. It is only for one year because we are anticipating that economic times will improve and we will not have to keep these class sizes this large any longer than one year.

SENATOR LEE:
Thank you. That is the answer that I hoped I was going to get. These are trained people in the educational system. If out of 750, there are 50 that we do not have anywhere to put them, could we move them to the long-term substitute positions or keep them in the system so that they will have first ability to get a job back again and we can keep them working for our district and not moving to other locations? Is that possible to think of the third tier in this situation, that we will do everything we can to keep these teachers on the rolls?

MS. HALDEMAN:
That is exactly the way we work it in the Clark County School District. Any teacher is reduced in force automatically has first rights as a long-term substitute and works in our substitute program. They also have a two-year right to return, so, they are the first ones we hire back.

SENATOR MCGINNESS:
I would hope that these school districts would keep records on this. When we are back here in 2011, we may need to know how this worked. It could be that we will need to do this again. I am wondering if you can keep track of what this does for your districts so we can track it in 2011.

SENATOR SCHNEIDER:
One child equals $15 million, two children equal $30 million; how does that work? You have a school such as Roger Bryan Elementary in my district that has three second-grade classes, and so you can put two more in each class. Where do they come from? How do you really do that? These are not just like little bean counters your accountants are just moving around; these are kids that live maybe within walking distance or within a mile of the school.

MS. HALDEMAN:
It is one of the more challenging aspects of putting together a school plan when you are a principal. We always have that problem. It does not matter if the class size is 16, 18 or 30. Children never come to us in nice neat little chunks. We always have average class sizes. So when you hear sometimes of a teacher who has maybe 30 in their class and someone else who has 22 that is the law of the averages based on where the children live. Zoning for us is an ongoing process every year where we try to level the number of children who are in each class who attend each school so that we can have those even class sizes. You are absolutely right. It is not that every school will be able to divide their children evenly. It is just that right now, we staff our schools at a ration of 1:16. This is more about funding than it is about the actual class size. We staff the schools based on the funding ratio. Then we divide the students up based on that.

SENATOR SCHNEIDER:
So some classes could actually have 32 where they may have 30 now.

MS. HALDEMAN:
Not in first, second and third grades. In other classes, for example, we fund our secondary schools at 1-30. Oftentimes those classes have more than 30 because of the law of averages.

SENATOR SCHNEIDER:
At $15 million per child, we could almost fund the whole budget if we put 20 more in a class. We can get up to hundreds of millions of dollars.

SENATOR WASHINGTON:
I am just reading through the bill, and maybe this is more of a technical question. In section 1, subsection 3, it says that for the 2010-2011 fiscal year, available money is estimated to achieve the ratios set forth in subsection 2. I am just wondering how much money will this actually save? I know you already said this accounts for some flexibility. I remember the superintendent saying that they were looking for flexibility like some of the rural school districts have, like Elko being able to submit a waiver so that they can work with the ratios. I am not really sure how much this is going to save when you just arbitrarily take two students out. Do you have any numbers that we can look at?

MS. HALDEMAN:
For the Clark County School District, adding an additional two students to grades one, two and three will save us $30 million.

SENATOR WASHINGTON:
Has that has been worked through our fiscal department? Is that coming from the district or is that coming from the LCB?

MS. HALDEMAN:
That is based on our calculations of how many teachers we would hire based on that ratio.

SENATOR WASHINGTON:
Before we move further with this bill, I would like to really get some real numbers. Maybe we could have our staff take a look at this and see what the numbers really calculate out to.

SENATOR COFFIN:

We had the data in front of us when we were meeting in Room 1214. We had our staff in agreement with the school boards and the school districts. Our staff has looked at the data from the school districts and has agreed. Frankly, our staff has to rely upon that data, and then it checks and double checks. With their vast experience, they have determined that these are workable numbers and numbers that you can trust.

SENATOR WASHINGTON:

I appreciate your comments, and I am sure our staff is quite capable of delivering the numbers that have been requested. I just want to make sure because this is not what we talked about when we were in the Committee of the Whole. We were talking about complete flexibility for Washoe and Clark. This bill does not give them complete flexibility. What it does is add two more students and emphasize flexibility. I am not really sure that is flexibility. I would like to see the numbers because the numbers dealt with some type of flexibility that would allow those school districts to work within whatever the percent that we have set, whether it was 10 1/2 percent or whatever the numbers floating out there now. Now this is a little bit different. Could you tell me about that $30 million.

SENATOR CARE:

I will have to ask staff about that.

Ms. Haldeman, let me ask you, this is ultimately going to be a bill about funding. I just want to be clear because I think Senator McGinness kind of touched on this. This is not necessarily going to be a wholesale exercise where this year, for example, you have 16 kids in a first grade class. They all come back to the same school for second grade. So we do not have to ask ourselves where the other two kids are going to come from. It is not a given that there will necessarily be two more kids in that classroom.

That, by the way, raises the question about where you are going to get the extra desks? Do you have enough room in that room? Superintendent Rulffes was testifying the other day about how crowded some of these rooms could get and that a number of these elementary schools we have now, at least in Clark County, were constructed following the implementation of class-size reduction on the premise that it would always be that way.

MS. HALDEMAN:

Senator Care, thank you for that question. The classrooms that we constructed after the passage of the class-size reduction bill can hold up to 22 students, so 22 desks can fit into those classrooms. It is our goal not to get those early grades that high. We really think that the flexibility we need is to have the younger grades stay as low as possible. We do not intend to stuff them as much as we can, but they certainly can absorb two more desks. In fact, I will tell you, many of them already do. Even though we staff at 1:16 as children move in during the school year, we add another child to the teachers' class load rather than put two kids in a room by themselves down the hall. We are used to those kinds of fluctuations. It is part of doing life when you are in a big school district like we are. When the numbers get high enough, the principal qualifies to get an additional teacher and to create an additional classroom. These are things that we have worked through for a long time. As you said, correctly, this is more about money than it is about class-size reduction. It is how we will staff and the ratio we will use to determine the number of teachers that go to a school.

SENATOR CARE:

Also to follow up on Senator McGinness's comments, there will be a lot people interested in seeing in those classes where you did have increased class size such as comparative test score data-comparing what happens in this upcoming school year with what has happened in the past, to get some feel for whether class-size reduction actually works, at least according at least to test scores. Do you have any data that would indicate that we might see reduced test scores? Is that too hard to gauge at this point?

MS. HALDEMAN:

Senator Care, I do not have anything with me. I can tell you that our best scores ever are always in the early grades. It is when the students get in higher grades that they do not do as well. We truly believe that it is because of the smaller ratio in those classes. They are able to have more individualized attention from the teacher. I know that you have been in schools before and have seen the challenges that our teachers have. Sometimes the teachers are dealing with 25 to 30 or sometimes as many as 35 to 40 students. Some of those children are children who do not speak English as their first language. Some of them have individual education plans. Some of them come to school hungry and with medical problems that have not been met. The larger that class size is, the more difficult it is.

We have long believed that the early grades are the foundational grades, and that is why we have always pushed to keep those class sizes as small as we could. However, under the circumstances, for us across the board, Senator Schneider, you were noting that $15 million savings in years past whenever we have had to deal with budget issues, increasing every class K-12 across the board by one student is about $27 million. That is a lot of money. Sometimes it is a temptation for us to save money simply by adding one more student to the grade. We have done that many times.

We felt that the older grades have borne the burden of that for the past ten years, and we just simply can not see our way to adding another student to those older grades. That is why we are grateful for the flexibility with grades one, two and three that we can add two students to those grade levels.

SENATOR COFFIN:

I just wanted to say that in our hearing on Tuesday, we were told that in Clark County 540 teachers are going to be fired to meet this goal.

MS. HALDEMAN:

Those are the numbers for the Clark County School District. But, as I repeated earlier, we believe that through the natural attrition rate those teachers will be placed in other slots. We do not anticipate that we will be laying teachers off through this. Now, I could be wrong. If so, they would go through that process we just described about having the first opportunity to be a long-term substitute and right to return, all those things. We believe that we are going to have at least 750 slots open up through attrition and that these teachers will be absorbed into those.

SENATOR COFFIN:

So the bumping process really does not come into play if you are going to do it through attrition?

MS. HALDEMAN:

Senator Coffin, the bumping process does come into play. We certainly do it based on seniority; but we feel even though there will be some moving around, there will be slots available for those teachers to go to.

SENATOR WASHINGTON:

I just wanted to make sure that we would be able to have Fiscal Services at least give us a report back as to the amount of monies that will be saved by adding two additional students to the ratios. I am not questioning Ms. Haldeman's numbers. I just want to make sure that if I am going to have to vote on the bill, the numbers are accurate. If we are going to save $40 million, I want to see $30 million at least from our staff.

SENATOR CARE:

Section 3, subsection (a), talks about the plan and how the money appropriated will be used to comply with the required ratio. If you want to walk us through that, I do not know if that addresses fully Senator Washington's' concern.

MR. HULSE:
I believe the question is if this has a budget impact that is directly related to the budget reductions, and this goes along with our consistent message that this adds flexibility to whatever the cut is going to be or whatever the K-12 school district are given. This is something that allows us flexibility. This is not necessarily a certain number that comes right off of the top or something that we can even tell you we are going to use yet. We do not know what the reduction is. All this does is allow us flexibility within the class-size reduction to make our job easier once we have a number.

SENATOR WASHINGTON:
That is not satisfactory. I appreciate his answer. I realize I am just kind of hammering on this is because most superintendents from Clark and Washoe came in and asked for flexibility like the other school districts. Now, we get this bill from the Assembly, and basically we are not giving them flexibility, even though the word is mentioned in the language here. What we are doing is just adding two students to a ratio and claiming that this flexibility and that there will be some substantial savings in this budget crisis. You are telling us that there will be some numbers or it will meet your flexibility requirements to have your budget reduced or meet the requirements for whatever bill we pass out later to meet those requirements. It is just not enough. In my estimation, if you want flexibility, you should ask for flexibility so that you can work within the confines of whatever legislation or structure we set up in the waning moments of this session. I do not think that just adding two additional students to the ratio is going to give you the flexibility that you are asking for. I want to see the numbers.

SENATOR CARE:
We have forwarded that request to staff. It has been taken care of. I do not know when we will get the response.

DOTTY MERRILL (Nevada Association of School Boards, NASB):
I am here today on behalf of the NASB. The association has testified before the IFC and the Assembly in support of flexibility for local school boards as they consider responsible cuts in each of our 17 school districts.
On behalf of Nevada's 107 school board members, we appreciate the increased latitude in the form of temporary class-size flexibility provided in Assembly Bill No. 4. For those districts that may not need this flexibility, section 1, subsection 3, stipulates that the flexibility may be used as needed. I also wanted to point to section 3, subsection 20. I could not hear whether you were mentioning this section as the plan which school districts must provide to the superintendent of public instruction about their use of the flexibility.

SENATOR CARE:
It did fall upon a question asked by Senator Washington. His answer was not precisely on point. We have staff looking at that. But if you want to go ahead and elaborate on the plan, please do so.

MS. MERRILL:
In section 3, subsection 20, the language indicates that the board of trustees of each county school district shall file a plan with the superintendent of public instruction describing how the money appropriated by section 18 will be used to comply with the required ratio of pupils to teachers in kindergarten and grades 1, 2 and 3. So each district will be accountable by providing a copy of their plan.
We encourage your support of this proposal, and we thank you for your consideration of this additional flexibility for all 17school district.

SENATOR CARE:
Are there any more comments on Assembly Bill No. 4? Seeing none, we will close the hearing on Assembly Bill No. 4.

Senator Woodhouse moved to do pass Assembly Bill No. 4.

Senator Wiener seconded the motion.

Motion carried. Senators Amodei, Coffin, Schneider and Washington voted no.

SENATOR LEE:

I do not wish to testify on Assembly Bill No. 5, but I would like to make a statement on Assembly Bill No. 4. I can see how somebody could say that Senator Lee voted to increase class-size reduction. I would hope that anybody who runs against me or anybody else in this body, this favored few, who have to make these tough decisions would be very reticent to realize that if you do something like this to somebody, we are going to come and expose you as being an opportunist and someone who is misusing the facts. This was a one-year thing. It is something we had to do.

We had to save the State in a lot of other areas. So for somebody to come for this one vote and use it against anybody in this body, I will write a letter stating how uninformed the person is who is using it against you in your election, this is not something any of us wanted to do. I believe as a body we need to protect the body from these kinds of insidious things that could be said against us. Thank you.

SENATOR WASHINGTON:

I appreciate my colleagues' comments. I do not think anybody here is going to take this information or vote out and say that you opposed class-size reduction. I think the issue is dealing with finance and dealing with money. We have a budget deficit of $800 million plus and we are trying to find some solutions and some answers to try to negate this dilemma. The two largest school districts in this state have requested flexibility before and then we get a bill like this. My no vote is because it does not reduce it enough. It does not give them the flexibility that they have been asking for. That is not to say I am against class-size reduction; if you want to try to help out the budget deficit, than let us do what is right. Let us not put a band-aid on because somebody came to you and twisted your arm and this is something you can live with. We do that all the time.

We are in a situation now that we are facing a crisis, and we are trying to do the best thing possible for our state and for our students. It is probably not optimal, but nonetheless, it is an attempt. To come in here and say, well, we want flexibility, and then we are going to raise classes by two students, that is kind of a farce. Come on, now. I have a $2 bill that I will give you, and you can go buy a bridge with it.

SENATOR CARE:

We will now open the hearing on Assembly Bill No. 5, which provides a temporary waiver from the minimum textbook expenditure requirements for all school districts, charter schools and university schools for profoundly gifted students.

BRYN LAPENTA (Washoe County School District):

I am here today in support of Assembly Bill No. 5. During the 2009 session a bill was passed into law that allowed school districts to apply for a waiver from the minimum expenditure requirement in times of economic hardship. The application would go to the Department of Education, the Board of Examiners and then to the IFC. Recognizing that this is a time of economic hardship this bill now makes that application process unnecessary. It declares financial hardship for all of the school districts and charter schools so that they may use the minimum expenditure requirement money as flexibility to make up for the losses.

Thank you.

MS. HALDEMAN:

I echo my colleagues' sentiments. This is one of those bills that will just save us a lot of time and paperwork. We appreciate it. We all know that we are going through economic hardships. We all need the waiver this year.

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SENATOR TOWNSEND:

Thank you both for coming here today. Recently, I became acquainted with the technology that apparently has been out there for quite some time. I am a little slower than most in those areas. My colleague and a number of members of this body have been very active in looking at new technologies to help students relative to the textbook issue. Because of the hardwire nature of physical textbooks not only their weight but the fact that the information in them could be printed incorrectly and then we end up with inaccurate books. They change regularly in addition to a number of other problems.

That has been solved in the private sector in a competitive way by a number of things. My good friend and colleague from southern Nevada was nice enough to share with me her electronic book yesterday and showed me all the wonderful things about it, how you can download changes, etc. Where are the two largest districts with analyzing the need to grasp the latest technology for the benefit of our students, as opposed to keep doing the same thing with textbooks over and over? I asked that question in the context that we come in here every year and fight over how much you need for textbooks and can it be used for bargaining and all those things that have occurred in this body and in committee.

I think we missed the big picture of the technological advances that have gone in a competitive market that might benefit our students, K-12 as well as higher education. Where is that discussion. Will the next legislative session see the results of that discussion? Will there be information brought to my colleagues in the interim that they might be able to study analyses of long-term fiscal benefits as well as the short-term fiscal benefit, analyses by those that work in the industry as you do or the profession as you do? Some of those from the industry might be able to share the information regarding the effect on students, how much more reading is actually done on these electronic devices. I hope I gave you enough questions that you might be able to formulate an answer to give us a sense of where the districts are.

I hope I did not step on my colleague from southern Nevada. She is far more familiar with this that I but a little bit of information is exceedingly dangerous. I just thought I might give you an opportunity to share that because this body will be dealing with again very soon. It is not just about the dollars, but it is about how our students are learning. So if you could address that I would appreciate that. Thank you.

MS. LAPENTA:

Currently we do have a pilot project that we are working on through grant funding, not with the device of which you are speaking but with another device. We can certainly bring a report back as soon as that pilot project is completed and let you know how that is working. The whole purpose is to put technology in the hands of students who might not otherwise have that technology at home and be able to do the same with textbooks on that piece of equipment. Thank you.

MS. HALDEMAN:

I am not prepared to answer that question today. I do not work in that department. I will tell you that we have had some initial discussions about that, and we will be happy to bring it back to you when we come to the regular session. I will tell you that there is probably not as much cost-savings involved there as people might think. I am let to understand that the price breaks that you think you might get through a virtual textbook versus a hardcode textbook are not there. The devices themselves are not only expensive but they break. There are concerns about those things. If we were to do a massive turnover from the traditional textbooks to a new technology, there certainly would be a price tag to that. But, long term, there might be savings. Again, I am not prepared to discuss that. I do not have any of the information that my school district has been working on. Certainly, we will be glad to have that discussion at the next session.

SENATOR CARE:

This bill, unlike Assembly Bill No. 4, has retroactive application going back July 1, 2009, and that addresses waivers that have already been submitted. Are there any of those out there already? How many are we talking about?

MS. LAPENTA:
Senator Care, seven school districts have already submitted applications and they are in the pipeline.

SENATOR CARE:
The bill simply says those governing boards from the university system, charter schools, etc., do not have to do that. We are basically saying for the next two years, it is not necessary. You already have the waiver whether you have applied for it or not.

MS. LAPENTA:
That is correct.

MS. MERRILL:
I believe that previous testimony has drawn the attention of senators to the effective date showing in lines 22 through 24, section 2 of the bill. As you pointed out, it is retroactive from July 1, 2009, and expires June 30, 2011. Just for your information, the current president of the Nevada Association of School Boards (NASB), Jim Lemaire, who is a trustee for Carson City School District, is an expert in many areas related to technology and is a strong proponent of electronic textbooks and provision of virtual activities for students. He will be providing some professional development opportunities for our school board members on specific issue. We believe that we will be better prepared for the next discussion about textbooks that not made from paper and binding.

SENATOR CARE:
Are there any more comments on Assembly Bill No. 5? Seeing none, we will close the hearing on Assembly Bill No. 5.
At this time I will entertain a notion to "do pass" Assembly Bill No. 5.

SENATOR WOODHOUSE:
So move.

SENATOR PARKS:
I second the motion.

SENATOR CARE:
Let the record show, Senator Coffin voted "no."
The motion passes.

SENATOR CARE:
We will now open the hearing on Assembly Concurrent Resolution No. 2, which urges certain actions by school districts and the Nevada System of Higher Education to respond to the current budget shortfall.
Are there any comments on Assembly Concurrent Resolution No. 2? Seeing none, we will close the hearing on Assembly Concurrent Resolution No. 2.

Senator Woodhouse moved to do pass A.C.R. 2
Senator Wiener seconded the motion.
Motion carried unanimously.

SENATOR CARE:
We will now open the hearing on BDR 38-11.

CHARLES DUARTE (Administrator for the Division of Health Care, Financing and Policy):

I am here to present revised version of BDR 38-11. I have explained the intent of the bill previously. Section 1 of the bill takes off restrictions from three classes of medications. Section 1, subsection 2 specifically takes out atypical and typical antipsychotic medications, anticonvulsant medications and antidiabetic medications, which then gives us the opportunity to use our preferred drug list management process to manage the utilization of those drug classes.

Section 1, subsection 3 adds a criteria for the Pharmacy and Therapeutics Committee, which is made up of Nevada licensed pharmacists and physicians that make decisions on which drugs should be preferred for the Medicaid Program. It adds criteria that should there be one therapeutic failure of a preferred product that the patient can then be switched to a non-preferred product. Some of our drug classes have two therapeutic failures required. These will have one.

Section 1, subsection 4 of the bill, this provides for continued availability of the drugs that are on this list until the committee acts. June 30, 2010, these drugs can be put on the preferred drug list.

Additionally, if there is a current drug for which a new clinical indication is identified, that drug would also be considered to be available. This refers to section 1, subsection 5. These drugs would be available with a prior authorization. If there is a new drug or a new indication, it would be available; with prior authorization until the committee acts or June 30, 2010, the effective date.

Section 6 provides a clause for grandfathering current patients who are receiving a medication. By grandfathering, we mean that they can keep and stay on their current medications. This is for all the classes that I am discussing: atypical and typical antipsychotic medications, anticonvulsant medications and antidiabetic medications. They would stay on their drugs if they were receiving a drug prior to June 30, 2010.

Section 2 of the bill is a provision that requires us to continue to cover these medications until the Pharmacy and Therapeutics Committee acts.

Section 3 of the bill, the last section, puts in some reporting requirements so that on or before December 31, 2010 the director will report to the legislature on the status of the preferred drug list. Again, there is a sunset provision of the bill which sunsets June 30, 2011.

I will be available for any questions should you have any. Thank you.

SENATOR CARLTON:

In our previous discussion on this BDR, I cannot remember the number that was associated with the antidiabetic medications, but it seemed like it was a fairly low number.

MR. DUARTE:

The total computable savings associated with antidiabetic medications is $186,000.

SENATOR CARLTON:

That would be for just the one year?

MR. DUARTE:

Yes. For the antirejection medications, which are no longer being considered, the savings was about $13,000 in one year.

SENATOR WIENER:

In the original hearing, we heard that the savings from this would be about $766,000. Could you assure the Committee of the Whole about those who would be going to a preferred drug list (PDL) as to the level of safety that would be provided with regard to the drugs that are on the PDL, and what would happen if there is a problem with that particular drug? What would the course be for a patient to be sure that the patient care would be the top priority in terms as to how this program is managed?

MR. DUARTE:

Patient safety is a critical part of the entire preferred drug list program. We have a list of criteria by which we try to make sure that there are not any problems with the PDL. It really becomes an issue. We try to make it as simple as possible for the prescribing physician. If the

prescribing physician sees that there is an issue with their patient with respect to a problem with the current drug, assuming it is a preferred drug that they are on, there is a process by which they can request a prior authorization, prior approval, for a non-preferred product if the physician believes that that patient is going to be better served with that non-preferred product.

There is a whole list of indications that we have provided in testimony, such as allergies to preferred medications, any medical contraindication related to drug interactions if there are multiple drugs, a history of unacceptable or toxic side effects for a preferred product and therapeutic failures. I mentioned in this case that one therapeutic failure would be sufficient to move the patient onto a new product, indication which is unique to a non preferred product.

Sometimes although a drug is therapeutically equivalent in terms of what it might do there might be different safety criteria, different safety indices that a drug responds to or is better for certain diagnoses. Those cases are all covered, and it is as simple as a physician calling or faxing and requesting prior approval for any of these clinical indications or problems and getting that prior approval for a non-preferred product.

I have talked to some of you and told you that on the phone, it takes about three minutes to get a prior approval. In terms of the numbers of denials that we have on prior authorizations for our current preferred drug list program, about 0.2 percent of our prior authorizations are denied. Usually it is because we do not get the right information. Physicians are very familiar with this process. It is not unique to Medicaid. They know how to request prior authorizations for medical necessity, and they do it effectively. We have very few denials. They are done very quickly.

SENATOR CARLTON:

We have heard the positive side of this. I would like to have on the record what criteria you have set for denying a prior authorization?

MR. DUARTE:

There are a number of criteria, but it is difficult to identify why we would deny something. We have safety measures in place that for clinical reasons we would approve a prior authorization. The reasons for denial could be multiple. It could be that the indications for which the physician seeking the drug is not FDA approved. It might be an FDA approved product but not for that condition. There may be other kinds of clinical issues. If we are aware and the physician is not that there is another drug that the patient is taking that might interact unfavorably with this product or reduce its therapeutic efficacy, then we would recommend against it. There are many, many situations in which we would deny it. What we would make available to the physician is a peer-to-peer consultation. A physician talking to a physician about why it might be denied and what would be justification for an approval

SENATOR CARLTON:

Thank you, Mr. Chairman. That is my concern. Drugs are a strange world of chemistry. My physician knowing me over all the years would think that Maggie, you need to take this. I think this would be the best thing for you. Well, on that list it may not be included, on the PDL as recommended but he may think it is the best thing for me. If I am on Medicaid I am going to be having a non-medical person make a judgment on that. That gives me a bit of concern.

MR. DUARTE:

I understand the concern, Senator Carlton. Again, the numbers of denials, the percentage of denials that we have are very, very low, less than one percent. We try not to interfere with the patient/physician relationship. This is a process that is proven and used widely in every commercial health plan as well as Medicare and the VA programs. It is not a process that is unfamiliar to physicians. They know how to use this system.

SENATOR CARLTON:

This is a one-year change. If we could keep track of this for the year so that when you are done, I can come back and ask you what the denials were for that would be good. I think that is in there, but I just want to make sure that it is on the record if a doctor prescribes it for an

unrecommended use and you deny it, I would like to have a tally of that at the end. I would be more comfortable in voting for this.

MR. DUARTE:
I would be glad to do that.

SENATOR COFFIN:
Something similar to this bill has been rejected by us in committee for the last six or seven years. I see some differences, but I do not know if they are cosmetic or real. In conjunction with questions by Senator Carlton about a report, I see a report about possible results after one year on the financial savings. I do not know whether there is any regulation or requirement here for a report as to what kind of side effects or perhaps some sort of adverse consequences there might have been from people having to take essentially the same list of drugs that you might have to take in an HMO. Can you tell me what the differences are now between then and now?

MR. DUARTE:
I do not recall in the prior bills that were submitted and reviewed whether or not there were any reports required. I do not believe there were. I do not think it got that far, frankly. I do want to caution that we can provide information available to us administratively. For example, pertaining to denial reasons, those are things that we can report on. But if a person has an adverse reaction because of a variety of reasons to a medication whether it is preferred or non preferred, we may not know that. The physician would know that. What we would have to do is if there were reports of problems to us, we would have to investigate with the physician that is involved in directly caring for the patient to see whether or not that is relating to them not getting a non preferred product, whether or not the physician submitted a prior authorization requested or submitted an accurate a prior authorization and gave us the right information that prevented the patient from getting the drug. There are a variety of reasons why we may not be able to get direct information on the outcomes associated with these particular drugs. We would certainly be happy to give you whatever information we have. Again, things like denial reasons, approval rates, those things we can do. Adverse reactions, again, I am not sure we would be able report directly on that. There may be some information we can give you. It is very difficult for us to get information on what is happening to the patient in the physician's office because that is something the physician knows and we do not.

SENATOR COFFIN:
I still think this stands between the physician and the patient in some ways. Maybe it is more subtle than it had been previously been previously, but there is still a chance for the doctor to prescribe but the patient to not necessarily receive what he wanted. I know that there are others concerned about various segments of the drugs which would be on this list, but I like to focus on the atypical and typical antipsychotic medications. That still makes me uncomfortable that we would continue to do this. You will probably just say that it will work and I will probably say I do not think so and we will just argue. There is no point in wasting the time. Thank you.

SENATOR CARE:
Are there any other comments on the bill draft? Seeing none, we will close the hearing on the bill draft.

Senator Wiener moved to introduce BDR 38-11.
Senator Copening seconded the motion.
Motion carried. Senator Coffin voted no.

Senator Carlton moved to do pass S.B. 4.
Senator Wiener seconded the motion.

Motion carried. Senator Coffin voted no.

On the motion of Senator Townsend and second by Senator Wiener, the committee did rise, return and report back to the Senate.

SENATE IN SESSION

At 1:07 p.m.
President pro Tempore Schneider presiding.
Quorum present.

Mr. President pro Tempore announced that if there were no objections, the Senate would recess subject to the call of the Chair.

Senate in recess at 1:08 p.m.

SENATE IN SESSION

At 2:20 p.m.
President Krolicki presiding.
Quorum present.

INTRODUCTION, FIRST READING AND REFERENCE

By the Committee of the Whole:

Senate Bill No. 4—AN ACT relating to health care; revising provisions governing the list of preferred prescription drugs to be used for the Medicaid program; providing exceptions for medications not included in the list of preferred prescription drugs; and providing other matters properly relating thereto.

Senator Care moved that the bill be referred to the Committee of the Whole.

Motion carried.

REPORTS OF COMMITTEES

*Mr. President:*

Your Committee of the Whole, to which were referred Senate Bill No. 4; Assembly Bills Nos. 4, 5, has had the same under consideration, and begs leave to report the same back with the recommendation: Do pass.

Also, your Committee of the Whole, to which was referred Assembly Concurrent Resolution No. 2, has had the same under consideration, and begs leave to report the same back with the recommendation: Be adopted.

TERRY CARE, *Vice Chair*

MOTIONS, RESOLUTIONS AND NOTICES

Assembly Concurrent Resolution No. 2.
Resolution read.
Senator Care moved the adoption of the resolution.
Resolution adopted.
Resolution ordered transmitted to the Assembly.

GENERAL FILE AND THIRD READING

Senate Bill No. 4.

Bill read third time.

Remarks by Senators Carlton, Coffin, Wiener and Cegavske.

Senator Carlton requested that the following remarks be entered in the Journal.

SENATOR CARLTON:

Normally, legislative intent is established on the Senate floor. The way we have had our process this week, a lot of things have been discussed in Committee. I want to make sure those discussion points will be considered as intent when we are moving through this. The Secretary of the Senate is nodding "yes," which I will note so the record does not show it as an open-ended, unanswered question.

SENATOR COFFIN:

This bill drives a wedge between a physician and his patient. It really does not matter if the patient is poor, middle-class or wealthy. It sets a precedent. A lot of people have made note of this kind of legislation in the recent healthcare debate in Washington, D.C.

SENATOR WIENER:

This measure is the end product of a lot of deliberation. Various parties came to the table, and many compromises were struck. We have worked with colleagues, based on their concerns about the measure, to address the sunset and other provisions.

During this time of great fiscal concern, this measure will help deliver just under $800,000 to help us alleviate some of the financial burden. Important to all of this, we have assurances from the Department of Health and Human Services that this measure will cause no harm done to the people we serve. The reporting mechanism in the bill addresses the financial reporting. I have already talked with DHHS director Mike Wilden and informed him that the Legislative Committee on Healthcare will request, through a letter, some other considerations we want included in the report. This will provide full accountability to those of us who serve in this body and in this building.

SENATOR CEGAVSKE:

As we indicated in the Committee of the Whole, we have had years of debate on this issue, and I share the concerns of my colleague at the end of the Chamber. Nothing in healthcare is more important than the doctor-patient relationship, and it is critical that a physician be able to prescribe what is best for his or her patients. I request that the comments made by Mr. Duarte regarding the doctor-patient relationship be added to the record as my colleagues have asked.

I am going to support this bill because the industry has indicated that they worked on it with the Committee. I thank my colleagues for allowing the comments to be included in these amendments.

Roll call on Senate Bill No. 4:

YEAS—20.

NAYS—Coffin.

Senate Bill No. 4 having received a constitutional majority, Mr. President declared it passed.

Bill ordered transmitted to the Assembly.

Assembly Bill No. 4.

Bill read third time.

Remarks by Senators Woodhouse, Washington, Coffin, Cegavske, Schneider, Amodei and Horsford.

Senator Woodhouse requested that the following remarks be entered in the Journal.

SENATOR WOODHOUSE:

I have spent 40 years fighting for education, much of that time working as a classroom teacher. I have fought to make our children's education better and stronger; and I personally understand that class size does matter. I served as a first grade teacher with 30 to 35 students in the classroom for 16 years and one year with 19 students in second grade. This was before the implementation of class size reduction. I can assure you that the extra time a teacher can give a student is paramount.

I am voting for Assembly Bill No. 4, and I am voting for it for one single reason: This is what we must do to protect our children's education and their future.

Let me repeat that.

This measure protects the fabric of our children's education—the entire kindergarten through 12th grade system. We're giving a little in the lower grades so we don't have to balloon class sizes in the upper grades.

Our goal is to protect education as much as possible. Once our economy improves I will do everything that I can to restore class sizes to what they are today. I am not abandoning class-size reduction. And I will continue to fight in the coming years for all of our children in every classroom in Nevada. I urge your support. Thank you.

SENATOR WASHINGTON:

I had requested some information while we were in the Committee of the Whole in regard to the savings that would be gained by us giving flexibility on class size to the two largest school districts, Clark County and Washoe County. As I read through the bill, all we basically did was give them permission to add two more students to the lower grades. I remember in the testimony that they both asked for flexibility as we deal with this budget crisis in order to work with some of the offsets or other reductions they were going to be facing. To me, flexibility means the ability to take what is given to you and have the discretion to use it to the best of your ability to meet the needs and demands of your school district. What we have done is to mandate they can only go up to two students. That to me is not flexibility; it is a mandate. We are going to give you two more students in your classes, and we are going to ask you work in the confines of the budget we have set forth. Flexibility is giving them the autonomy to set what they need to set within their respective school districts so they can meet the demands of our budget.

We are not advocating that any teacher lose their job. We are not advocating that we abandon class-size reduction. We are saying that in the times we live in, with the budget constraints we face within Nevada, if the two largest school districts come to the Legislature and ask for flexibility, we ought to be willing to give them the discretion to make decisions based on their own needs. We should not tell them what their needs are and how they are going to meet their demands, but give them the flexibility to meet the needs within our budget constraints.

This bill is a farce. It is an attempt to capitulate to the teachers' union so they will not see the demise of class-size reduction or enrollment or, for lack of a better word, their own entitlement. It does no service to the situation we currently face. We should drop this bill and start all over, giving those school districts the flexibility they asked for. For this reason, I will vote against Assembly Bill No. 4.

SENATOR COFFIN:

Sometimes the issue is about money, and sometimes you have to put money behind the kids. In our committee discussion, it was pretty much laid out that it is all about money. If it is worth fighting for, it is worth paying for. Nothing is free. The kids have benefited from this for

20 years. It has been weakened since 1989 or 1991. Flexibility had been asked for and granted in the past, and now what is called flexibility is being granted again, but it is really not flexibility. In a perverse way, I have to agree with Senator Washington; it is not really flexibility. But it is a money-driven issue, and I am on opposite sides from him on the intent of this bill, on which I will vote no.

The whole idea is that we know the youngest children, the most vulnerable, learn more in a smaller class. I do not care if the teachers' union has its job protection issues on this particular issue because they are not actually going to lose any jobs. We have been told in testimony that attrition will take care of the reduction in teachers needed, at least at this first step. The point is we have a program that the late senators Nick Horn and John Vergiels, and former senator and now regent Ray Rawson and many others worked on. They were the drivers who built class-size reduction. They knew it would cost, but they also knew it was worth it. We have had a ton of evidence over the years of how it works. It does not take a scientist, a sociologist or a $5 million poll to know this works. But we run and hide at the first sign of trouble. We abandon these kids because it is all about money, and I cannot go for that. I suppose if we had made an effort to try to raise some tax money to help mitigate this cut, I could support it in some way or another because I would have to say well, the body tried. But it just has not tried, and there is apparently no will to try on the other side of the building either.

So I am sorry to say I will have to oppose this bill. Maybe toward the end of this day or tomorrow, I will find some measure I can support. At the present, however, it appears our fears are governing our actions, and in the case of the kids, you have to put your fears behind you.

SENATOR CEGAVSKE:

I appreciate the comments from both of my colleagues and agree with them. I will vote in favor of Assembly Bill 4 because it is a beginning, a first start, but I am also very disappointed. Over the years, we have talked about the need for flexibility. Now that we are in a situation where we need all the help we can get, this would have been an area in which we could have recouped more funds, yet we are not taking the opportunity. It is extremely unfortunate, because we are all looking for every penny available. The legislature has gone after school districts and other arenas and this would have been a perfect place to help us address the budget challenges.

Class-size reduction is something that everybody wants, but it cannot always be a reality despite our best efforts. What we have done is harm schools by failing to allow them the flexibility to succeed, especially in an elementary school where fourth and fifth grade classes are larger.

As we have discussed before, flexibility should be given to K-12 schools. I hope that everyone involved will realize in the next legislative Session that we can get this accomplished.

SENATOR SCHNEIDER:

I have had a bill, which I will have again next session, to fund education in Nevada at the national average. When Senator Beers was here, he came up with all these numbers saying that we were in the top fifty. Make no mistake; when we leave here, we will be funding education at the lowest rate in the nation.

Yesterday, I pointed out that the alumni associations of UNLV and UNR sent out a letter that I distributed stating Nevada ranks 50th in the nation in the likelihood of 19-year-olds being enrolled in college. That is a reflection of K-12. Nevada ranks 50th in the nation in percentage of young adults (25 to 34 years old) holding a college degree. That reflects the problems of K-12. Nevada ranks 49th in the nation for college participation for students from low-income families. Again, these people are not going to college because of what happens in their K-12 years, and because of our commitment to K-12 and to them.

On your desk as well is a letter from the American Institute of Architects. They understand how bad the economy is; nationally, architects have an unemployment level of 66 percent. If you think the construction industry is unemployed, look at architects, who design everything that is being built. The projects under construction right now were designed by architects two or three years ago. If there is nothing being built right now, it means the architects have not worked for a long time. The architects put out a statement saying that an educated workforce is vital to Nevada's future economic prosperity. They go on to say, "The foundation of a sustainable

Nevada economy is a quality education." These are guys who are unemployed. They are not paying any taxes right now because they have no income. They say, "Nevada's educational system cannot be compromised." Well, that is what we are doing here today. We are compromising again.

We are last in the nation. Do not kid yourself; we have been racing to the bottom for the last 18 years I have been here, and we have accomplished our goal. We do not step up, and here we are. I know times are tough, but it is just an excuse. Times were tough during the Great Depression, but during the Great Depression they built the Empire State Building in one year. Great things are accomplished when you are at the bottom. But we just keep whacking. We do not step forward to do anything monumental. We will set in motion here the wheels to discard another generation.

SENATOR AMODEI:

I agree with Senator Washington. I thought I heard a request for flexibility. When I heard the testimony that said the new rooms in Clark County will only hold 23 people, I thought, unless someone is going to go against the building codes, how are we going to increase class size by two people? That is a facilities issue for the newer schools. Why it is being limited to two is a curious question, and I will take my share of the responsibility for not asking the question. I wonder what the answer is?

In the interest of full information, on March 12 of our last session, I asked someone who used to work in the Fiscal Analysis Division to give me a history on what we have done for the DSA over the last two or three biennia. My feeling was that we have been trying not, to borrow a phrase, to "race to the bottom." I will make this available; it's from Bob Atkinson and details K-12 funding changes in recent biennia. I know this is comparing apples and kiwis and oranges and tangerines, but I will tell you this: In general fund appropriation change, we increased general fund appropriation funding in the 2003-2005 biennium by 13.4 percent, in the 2005-2007 biennium by 13.2 percent and in the 2007-2009 biennium by 38.9 percent. This is based on the previous biennium, not from the start. That is not a race to the bottom. I would submit most of us in here voted for all that. I know I did.

So it is not about whether you support education or not. We have been doing, during some of the most lucrative fiscal times in this state, double-digit increases based on the previous year. If you look at guaranteed state support, you get some similar numbers for those biennia before we embarked on the one we are in now.

So just in terms of what we have been doing here, there have been significant increases voted on by this body. Should anybody be satisfied? No. But when we talk about dealing with these fiscal times, let us not forget that there have been some significant and serious double-digit increases in school funding. And that is before you talk about the room tax earmark, which kicks in at the end of next year and is somewhere in the realm of the high 8 or 9 figures. I know you cannot count it towards the DSA, but it is a significant addition to the pay of those in the K-12 area.

SENATOR HORSFORD:

I rise in support of Assembly Bill No. 4, but I want to put some more context to my position on this. First, to my colleague from the Capitol District, while I agree there were increases in funding in those periods he indicates, that was also a period of unprecedented population growth in the state. What we need to keep in mind when we talk about funding in education in Nevada is that when students arrive at the schoolhouse, there is an obligation to provide them with an education. Over the last 20 years, we have seen major growth in enrollment in our schools across Nevada, but particularly in Clark County. The double-digit growth in funding is based on that fact. It is growth because of enrollment, not because of some huge investment of additional resources to drastically change the per-pupil funding, because that has not been the case.

Secondly, we are having this discussion about education funding, which is a good discussion to have. But I also want to ask this basic question as a parent: Do we think we are doing right by our children? Are we satisfied with the quality of education in this state? I know there are a lot of great schools and great teachers, and there are a lot of committed educational professionals. Too often, we focus on what is wrong in education, and we never talk about what is right. As a

parent, I know that for my two kids, one in first grade and one in fourth, the class size makes a difference. My first grader has a small class size. My son, who is now in fourth grade, has a larger class size after three years in smaller classes. And while he is not falling behind, there are students in his class who are. When I talk to my children's teachers, and I ask them, "How many more students could you handle in your classes?" they tell me unequivocally that the smaller the class size, the more enriching of an educational experience they can give to the students in their class. As a parent, that is what I want. I want the best for my kids, the same as I want the best for every other child in Nevada.

My last point is when you look at the private schools, particularly those that promote their programs and how good and successful they are, one of the key elements in those marketing materials is small classes. If it is good enough for private education, why is it not good enough for public education to have small classes? This bill gives temporary flexibility to the districts to administer class size reduction, but it preserves it and protects it.

To my colleague from Sparks, we have a waiver process for those districts that do not want to follow any of the class size requirements. They can apply to the Nevada Department of Education for a waiver and not be under the mandates. It is not that there is no flexibility; there are provisions that allow for the maximum flexibility he advocates for. But as a parent and someone who is committed to small class sizes, I think Assembly Bill No. 4 achieves that objective, and it does so in recognition of the dire economic situation our State faces.

I do not think we should be under any false pretense, though. Our class sizes are large now. This bill will help a little, but it is not going to fix the larger question, which is are we satisfied with the quality of education our students are receiving in this State? If not, when are we going to do something about it?

SENATOR WASHINGTON:

We could have a long philosophical debate about class size reduction and the amount of funds we put into our educational system. Some of us on the other side believe that if we revamp our educational system to allow a monopoly that has constricted any innovation, any creativity, any ability to think outside the box, to be dismantled, we would allow such ideas as vouchers, maybe even the proliferation of charter schools, maybe even the ability to have open zoning where parents can make the choice based on their own tax dollars where they want to put their child, whether it is in a public school, a charter school or a private school. Then we could see whether what we created by statute or what we have tried to define and protect is really working toward the best interests of our children.

This philosophical debate could go on and on and on. As a parent with three children who went through public school, I believe they did very well. I do not think class size reduction was implemented. My oldest child has a master's degree in public health administration; my youngest child has a degree in biochemistry; my son has a degree in engineering. They are a product of our public education system. When we buy a house or decide where we are going to raise a family, the first thing we look at is what kind of schools are in the area. If you want to better our educational system, and you want to make sure our dollars are more efficient and not belittle class-size reduction, let us have a real debate and open it up to giving parents the opportunity to make choices and allow their tax dollars to follow their children, based on the choices and decisions they make.

Roll call on Assembly Bill No. 4:

YEAS—18.

NAYS—Coffin, Schneider, Washington—3.

Assembly Bill No. 4 having received a constitutional majority, Mr. President declared it passed.

Bill ordered transmitted to the Assembly.

Mr. President announced that if there were no objections, the Senate would recess subject to the call of the Chair.

Senate in recess at 2:50 p.m.

SENATE IN SESSION

At 2:51 p.m.
President pro Tempore Schneider presiding.
Quorum present.

Assembly Bill No. 5.
Bill read third time.
Roll call on Assembly Bill No. 5:
YEAS—21.
NAYS—None.

Assembly Bill No. 5 having received a constitutional majority, Mr. President pro Tempore declared it passed.
Bill ordered transmitted to the Assembly.

MOTIONS, RESOLUTIONS AND NOTICES

Senator Horsford moved that the Senate resolve itself into a Committee of the Whole for the purpose of considering issues relating to the State's budget shortfall, with Senator Horsford as Chair of the Committee of the Whole and Senator Mathews as co-chair.
Motion carried.

Mr. President pro Tempore announced that if there were no objections, the Senate would recess subject to the call of the Chair.

Senate in recess at 2:55 p.m.

IN COMMITTEE OF THE WHOLE

At 9:36 p.m.
Senator Horsford presiding.
Considering issues relating to the State's budget shortfall.
The Committee of the Whole was addressed by Senator Horsford; Kevin Powers, Senate Legal Counsel; Senator Parks; Senator Nolan; Senator Care; Senator Raggio; Senator Carlton; Allen Biaggi, Director, Department of Conservation and Natural Resources; Danny Thompson, AFL/CIO; Senator McGinness; Joseph Guild, Southern Nevada Water Authority; Senator Coffin; Senator Cegavske; Senator Olsen; Kyle Davis, Nevada Conservation League; Michael Johnson, Virgin Valley Water District; Steve Holloway, Associated General Contractors, Las Vegas Chapter; Senator Townsend; and Samuel McMullen; Las Vegas Chamber of Commerce.

Senator Horsford requested that the following remarks be entered in the Journal.

SENATOR HORSFORD:

We are going to take up BDR 48-21, which revises provisions governing the approval or rejection of certain applications by the State Engineer. The purpose of this hearing is to help the members and the general public better understand both sides of this issue. This was part of the Governor's second proclamation for this special session. We felt it was important to get the information on the record and give the Committee the chance to ask questions. Our legal counsel will give us an overview of the measure since it was proposed by the administration through the proclamation process. We will then hear from proponents of the measure, and then we will take testimony from those speaking against it. I have also asked legal counsel to provide some background of the legal considerations in the matter, since there is pending litigation.

KEVIN POWERS (Senate Legal Counsel):

In order to understand the BDR, we will need to do some background on the Nevada Supreme Court case that led to this situation. That case was decided on January 28, 2010, and it was *Great Basin Water Network v. State Engineer*, 126 Nev. Adv. Op. 2 (2010). I will refer to it from hereon out as *Great Basin*. To understand *Great Basin*, we have to go back in time and understand the water applications *Great Basin* involved.

In 1989, the Southern Nevada Water Authority (SNWA) filed water appropriation applications to acquire water rights in rural counties as part of a pipeline transfer project where that rural water would be transported to the Las Vegas metropolitan area to be used in urban settings. When the SNWA filed their applications in 1989, the statute at that time required the State Engineer to take action on the applications within one year after the end of the period for people to file protests. The State Engineer at that time did not take action within that one-year period. Also at that time, the statute allowed the State Engineer to postpone taking action on applications under any of three conditions: if the applicant and the protestants could agree to postpone the application, if an existing water study was in progress, or if there was a court action pending. None of those conditions existed in this matter in 1989. So the State Engineer did not take action, and none of the conditions for postponement existed in 1989. Essentially, the application was not acted on and was in limbo.

In 2003, the Legislature passed legislation (Senate Bill No. 336 of the 72nd Session) to create another condition under which the State Engineer could postpone action on an application, and that was for applications for municipal water use. Also in 2003, the Legislature amended the statute to provide that if the State Engineer did not take action within that one-year period, the application would be deemed to remain active until the State Engineer took action on the application. In that same legislation, the Legislature provided that the bill would apply to pending applications.

In March 2005, the State Engineer began administrative proceedings on those 1989 applications. Until then, the State Engineer had taken no action on those applications. The State Engineer sent out certified mail notices to all the original protestants from 1989. Most of those certified mail notices came back undeliverable because the original protestants had moved, changed their address or sold their property. Several of the original protestants did appear at a pre-hearing conference in 2006. They requested the State Engineer renotice the application and reopen the protest period so everyone in 2006 whose rights might be affected by those 1989 applications would have an opportunity to protest those applications. The State Engineer denied that request, and that is what led to the case before the Nevada Supreme Court.

In the Nevada Supreme Court, the SNWA argued that the 2003 legislation, which allowed postponement for municipal water use and made the applications remain active if the State Engineer failed to take action, applied to those 1989 applications. The argument was that the intent of the Legislature was for that 2003 legislation to apply retroactively. The Nevada Supreme Court examined the legislative history, the intent and purpose behind the bill and the affects and consequences of applying the bill to the 1989 applications, and concluded that the

Legislature did not intend for the 2003 legislation to apply retroactively to those 1989 applications.

After making that determination, the Nevada Supreme Court had to decide what the remedy would be for its holding in the case. Because factual determinations needed to be made, the Nevada Supreme Court remanded the case to the district court with instructions to choose between two alternative remedies. The first alternative remedy the district court had to consider was whether to require the SNWA to file all new applications to replace those 1989 applications. If the district court were to choose that remedy on remand, one effect on the SNWA would be that the priority it got from the 1989 applications would be gone. Water rights are based on priorities of time of filing, so if the SNWA had to file new applications, they would lose those priorities. If the SNWA had to file new applications, there would be a new notice period and a new period for people to file protests. That remedy would benefit the people in the *Great Basin* case because the notice and objection period would be new and remain open for all those protestants.

The other possible remedy the Supreme Court told the district court to consider was to preserve the 1989 applications and their priorities, but to renotice those 1989 applications and reopen the protest period. However, the court case has not been remanded to the district court yet. As I understand it, the SNWA has filed a petition for rehearing in the Nevada Supreme Court. As long as that petition for rehearing is pending, the case will not be remanded to the district court for the determination of the proper remedy.

That gives you the background on the 1989 applications and the court case and brings us to BDR 48-21.

SENATOR PARKS:

The newspapers have been reporting that the only applications that were in question were those submitted by municipalities. Does this case involve all applications, whether filed by individuals or municipalities? If so, what is the size, scope and number of those cases?

MR. POWERS:

The facts of the case involve municipal water applications. If the case is viewed narrowly as precedent, it would only apply to municipal water use applications. However, it is possible down the line that other courts and litigants will argue that the principle set forth in the Supreme Court case has a broader application than simply to municipal water use applications. As far as the scope of the impact of such an interpretation, I am not in a position to be able to determine that. Essentially, what the court said in *Great Basin* was that if the State Engineer does not act on an application within that one-year period, the application may be considered lapsed and you may have to file a new application. It is possible that other individual water users had filed applications in the past, and the State Engineer did not act on those applications in one year. So using the court's logic in this case, that would mean either (1) those applications lapsed because the State Engineer never acted on them, or (2) if the State Engineer acted on them beyond the one-year period and granted them, they may not be valid because the State Engineer did not act within the required period. It thus creates the possibility of some legal difficulties on both applications that were not acted on and applications that were acted on and approved after the one-year period.

SENATOR NOLAN:

If things were to remain status quo when those water rights lapse, what will happen to the water rights in question? Will they revert back to the State Engineer so the original applicant has to refile, or do they fall back into the State Engineer's inventory and then become available to the next party on the list of those who are interested in acquiring those water rights?

MR. POWERS:

Because the Supreme Court has remanded the case to the district court to determine what is the proper remedy, either filing new applications or keeping the existing applications and requiring a new renotice and a reopening of the protest period, I cannot answer your question until the district court determines what the proper remedy in this case is and the case works its

way back up to the Supreme Court. The uncertainty is not knowing what is the remedy for the failure of the State Engineer to act on those water applications.

The BDR has two changes in it. The first is in section 1, subsection 4, the first part of which is existing language: "If the State Engineer does not act upon an application within 1 year after the final date for filing a protest, the application remains active until acted upon by the State Engineer." This is the language added by the 2003 amendment. To this, the BDR would add the sentence, "The provisions of this subsection apply to all applications filed with the State Engineer on or after January 1, 1947." I believe the intent of this from the SNWA is to ensure, when the district court is considering this case, that the intent of the Legislature to have those 2003 amendments apply retroactively is clear in the law. This language would clearly direct that these applications remain active even if the State Engineer does not act on them in the one-year period. This would apply retroactively to all applications filed on or after January 1, 1947.

SENATOR CARE:

You have not gotten to the second provision yet, but it has some language that is similar to what you just mentioned in section 1, subsection 4. I am trying to figure out if this would have retroactive application going back to 2003 or all the way back to January 1, 1947.

MR. POWERS:

As I read this BDR, this would have retroactive application going back to January 1, 1947. As I understand it, if the State Engineer at any time between January 1, 1947, and now failed to act on an application within one year and no action was ever taken on that application, that application is still active.

The other change in this BDR is in section 1, subsection 8. There is a connection between subsection 4 and subsection 8. The existing language in subsection 8 was added in 2003. At the time, those provisions were made applicable only to applications filed on or after July 1, 2007. Subsection 8 essentially provides that for the types of applications filed by the SNWA, if the State Engineer has not taken action on these applications within seven years after the date of the last publication of notice, a new notice and protest period would be opened. However, it would not be as broad as the original notice and protest period. This new notice and protest period would apply only to a person who is a successor in interest to a protestant or an affected water right owner. It is not everyone who could potentially be affected by this water application, but only those who are successors in interest to original protestants and original affected water right owners who had filed a protest during the original period. As I interpret this, and there may be disagreement among other attorneys, we go back to the remedies the Supreme Court told the district court to look at in the *Great Basin* case. The two remedies were new applications or maintaining the priorities of the 1989 applications, both of which would require a full renotice and a full reopening of the protest period.

This BDR, as I understand it, is offering a third remedy. It would maintain the priority of the 1989 applications, but would not require full renotice or full reopening of the protest period. Instead, it would have a limited renotice and a limited reopening of the protest period for those people who are successors in interest to the original protestants and the affected water right owners who filed their protests in 1989.

SENATOR CARE:

Are you aware of the Nevada Legislature ever enacting or passing a bill with retroactive application of 63 years?

MR. POWERS:

In my experience, no. This Legislature has passed retroactive legislation, but I am not aware of something of that scope.

SENATOR CARE:

Are you aware of any Nevada case law regarding retroactive curative statutes that are intended to basically eviscerate a pending judicial controversy?

MR. POWERS:

In fact, I am. The case you are referring to is *Karadanis v. Washoe County Commissioners*, 116 Nev. 163 (2000). In that case, the Nevada Supreme Court said the Legislature may violate separation of powers by enacting retroactive curative statutes that are intended to abrogate a pending judicial controversy. Because the *Great Basin* case has been remanded to the district court, it is still a pending judicial controversy. There is a potential that this retroactive curative statute could raise problematic issues under the separation of powers doctrine. I am not saying that is the case, but I am pointing out the Nevada case law dealing with retroactive curative statutes. Once again, as I understand this legislation, it is essentially offering a third remedy as an alternative to the two remedies the district court is supposed to look at based on the Nevada Supreme Court case.

SENATOR CARE:

Section 1, subsection 8 of the BDR adds the language, "The provisions of this subsection apply to all applications specified in this subsection and filed with the State Engineer on or after January 1, 1947, which have not been acted upon by the State Engineer or which are the subject of an appeal that is pending pursuant to NRS 522.450." If the Legislature passes this measure and the Governor signs it, where does that leave the 54 appellants in the *Great Basin* case procedurally?

MR. POWERS:

I believe the SNWA has either filed or asked for an extension to file a petition for rehearing before the Nevada Supreme Court. If that is the case, the *Great Basin case* remains before the Nevada Supreme Court, and I suspect in their petition for rehearing they will argue that the Legislature has changed the law making its retroactive intent clear, and thus the Supreme Court should therefore withdraw their January 28 opinion and issue a new opinion based on the change in the law. As a result, the original 54 appellants in the *Great Basin* case would have to argue against that and most likely, as you mentioned, will raise certain constitutional issues with regard to this legislation.

SENATOR RAGGIO:

I am following up on the questions from the senator from Clark County. I am apprehensive about the procedure if you make it retroactive to every application that was not acted upon in the last 63 years. Do we have any idea how many claims would come under that category? Are we talking about hundreds of thousands of applications that could be revived because they occurred during that time? I am nervous opening this up to unforeseen consequences. In many cases, there were applications that were not acted upon; some applications were granted; and some applications were denied that have some connection to applications that were not acted upon. Does that give all of those applications the right to become viable and maybe conflict with decisions on other applications made during that period? Or am I worrying unnecessarily?

MR. POWERS:

I believe all of your concerns are legitimate, and all of those questions are opened up by the possibility of this BDR being enacted. It is true that the status of those applications that had never been acted upon would, as I read the measure, be revived. There is a potential that they will have an earlier priority than subsequently approved applications. So the holders of existing water rights may be impacted if these revived applications have a higher priority and down the line the State Engineer would grant them because they have in fact been revived. These are all questions I cannot answer, but they are legitimate concerns, and I agree they exist. As far as the number of applications this may affect, only the State Engineer could provide that information.

SENATOR RAGGIO:

I have no real understanding or expertise in this area. If there were four or five applications for the same water usage and only one of those had been acted upon, would the four that were denied have the right to ask for their application to be reopened? Is that a possibility?

MR. POWERS:

I could not say it was not a possibility. The BDR raises potential legal arguments that would need to be litigated to determine the status of those four other applications that were not acted upon and what effect they have on the application that was granted.

I should have begun my presentation with the standard disclosure we give. The Legislative Counsel Bureau, Legal Division, is a nonpartisan bill-drafting agency. I am presenting the BDR in a nonpartisan manner. I am not urging or opposing this particular legislation. All I am trying to do is provide background and legal advice for the Legislature to best make the policy determination they see fit.

SENATOR CARLTON:

My concern is the crux of this comes down to the Supreme Court did not understand what our intent was with the bill in 1989. I would like to know what they looked at and how they evaluated it. The bill passed unanimously. I know what my intent was when I was processing it; I thought it was everything that was in the hopper. I remember this bill because there was some pulling and tugging on both sides. So I would like to know how the Supreme Court came up with the idea that we had no intent on this bill?

MR. POWERS:

Based on the language in the opinion, the Supreme Court found that the legislative history did not contain the type of clear and unambiguous intent that would justify a retroactive application of the statute back to 1989, which was a significant reach back in time. They reviewed the legislative history, and I would assume the parties presented every comment and committee minute report that existed for the bill; and the Supreme Court determined that the legislative history did not provide that clear and unmistakable intent. Also, without that clear and unmistakable intent, there could have been some constitutional issues arising from the statute reaching that far back in time. I believe the Supreme Court determined that the bill should not have retroactive intent in order to avoid having to decide those constitutional issues.

SENATOR CARLTON:

I know you are trying to address all paths here, but what with legislative intent and the two issues they are remanding back to the district court, adding a third pathway will not necessarily clarify what we are doing. We are becoming proactive in the middle of this, and I have a few concerns about that third option.

SENATOR CARE:

With regard to legislative intent, is it not true that the general rule is if a statute is going to be given retroactive application, the Legislature will make that clear in the bill itself?

MR. POWERS:

That is correct. As a general rule of statutory construction, all legislation is presumed to be prospective in operation unless a retroactive intent is clearly and unmistakably expressed in the language of the bill, or there is a clear intent found in the legislative history of the bill.

SENATOR CARE:

On page 13 of the Supreme Court's opinion on *Great Basin*, it states that the court examined the minutes of the hearing on the bill before the Assembly Committee on Natural Resources, Agriculture and Mining on April 30, 2003, and also the minutes of the hearing of the Senate Committee on Natural Resources held on March 26, 2003. Is that correct?

MR. POWERS:

That is correct. After examining that history, the court states, "The legislative history provides no guidance regarding retroactive effect of the amendment to pending applications."

SENATOR CARLTON:
Were the work session documents reviewed? A lot of times, where the decision, the conversation and the public policy are discussed is in the work session document and recordings. Were those considered by the Supreme Court?

MR. POWERS:
I cannot answer that question specifically. All I can say is I assume the parties presented to the Supreme Court in their briefs all of the committee minutes and supporting documents that were part of the public record for the 2003 legislation. If those work session documents and committee minutes included this discussion and were part of the public record, I assume the Nevada Supreme Court was presented with them through the parties.

SENATOR CARLTON:
I am confused. I understood intent starts from the Senate floor and works its way backwards, so what is said on the floor of the Senate can be intent, what we say in the work session can be intent and the committee meeting can be intent. If some of those steps get skipped or nothing gets said on the floor, they work their way back. I am curious if the work session document was included in this discussion.

MR. POWERS:
I do not know the answer to that question. It might be helpful to understand what I believe was the approach of the Nevada Supreme Court in this case in dealing with the retroactive effect. Another general rule of statutory construction is that a court will adopt an interpretation that avoids constitutional issues if at all possible. Even the 2003 legislation would have had constitutional issues because it was retroactive. Before the court got involved in the mire of those constitutional issues, it needed to see what it believed to be a clear statement of legislative intent in the language of the bill or the history. According to the court, it did not see it in either of those and concluded that it did not have retroactive effect to the 1989 applications.

SENATOR HORSFORD:
We will now hear from the proponents of the bill.

ALLEN BIAGGI (Director, Department of Conservation and Natural Resources):
Mr. Powers gave a very good overview of the bill, but I would like to point out that this is an administration bill. It came out of my office in the Department of Conservation and Natural Resources (DCNR), and we proposed it because of the serious potential impact this has on water resources within Nevada. I will not recount the legal basis of the bill; Mr. Powers has done that very well. I would emphasize, however, that the court based its decision on a 1947 statute which states that the State Engineer must approve or reject an application within one year of the filing date of a protest. It is interesting to note that the statute does not speak to the consequences of the one-year timeframes. In other words, are those applications active or are they rejected? This is best summarized in a 2002 ruling for Garnet Valley, where an identical issue arose. In that decision, then-State Engineer Hugh Ricci wrote:

> The 1-year statutory time frame is a statutory relic left from a much simpler time when processing water right applications was considerably different than what is presented to the State Engineer today. The population of the state was less than 100,000 people until the 1950's. Between 1905 and 1950, a little over 13,000 water rights applications had been filed averaging about 288 applications for each year. Between 1950 and 1979 about 27,000 water rights applications were filed averaging about 931 applications per year. Between 1980 and the present [2002], an additional 28,900 water rights applications were filed averaging about 1,313 applications per year.

The ruling goes on to state that "… approximately 25 percent of the active permitted and certificated water rights that exist in Nevada today would be affected if a court were to determine they were void because they had not been acted upon within the 1-year statutory time frame. The havoc such a determination could cause is unimaginable."

So for many years, it has been recognized that, given the complexity of water issues in the state, the ever-increasing number of applications filed and the limited staff resources in the agency, a negative decision on NRS 533.370 could have significant impacts to water rights in Nevada. As we have heard today, in 2003 the Nevada Legislature attempted to clarify the one-year time period and the status of pending applications. In making that clarification, however, the court ruled the Legislature's revised language was not explicit in its intent or reading for retroactivity of those applications not acted upon within the one-year time frame dating back to 1947.

The Court's intent was to address only the Spring Valley Applications; however, their ruling brought into question the status of approximately 14,500 other applications acted on by the State Engineer since 1947 not meeting the one-year timeframe criteria. These water applications are for all manner of uses in Nevada, including agricultural, industrial, commercial and municipal. They also are for all parts of the state, not just southern Nevada.

As was stated in the Garnet Ruling in 2002, this decision has the potential to turn the water allocation system that has been in place in Nevada for 106 years on its head. To give you some idea of the uncertainty this has caused in the water rights community, it has been less than a month since the ruling, and more than 220 applications have been refilled in order to preserve their rights and priorities. My office, and that of the State Engineer, have received many inquiries from water rights holders seeking advice as to what to do to preserve their very valuable water rights, which are personal property rights.

As a result of this uncertainty, the impact this decision could have on existing water rights of all types around the state and the financial implications it has to individuals and businesses is huge. I believe it is appropriate to have the Legislature hear this matter in special session and consider a statutory change.

The bill before you attempts to do that. Let me outline the concepts and goals we had in crafting the language.

First and foremost, it had to address the status of the thousands of water rights across Nevada that have been approved since 1947 and remove the uncertainty the Court's ruling placed on those rights.

Second, the language must address the Spring Valley applications, those that were the original subject and focus of the Supreme Court's decision. The language must be consistent with the Court's ruling, addresses the due process issues contained in it and not place the Las Vegas Valley Water District or the SNWA applications in a more favorable or unfavorable position than they currently are in.

Lastly, we recognized your time is very limited, so the language had to be simple and concise.

We believe the bill before you accomplishes those three goals. The first language modification would occur in NRS 533.370 (4). This language simply and explicitly states that applications filed between January 1, 1947 and July 1, 2003 not acted upon within one year are active. This addresses all 14,500 applications in question, including those of SNWA.

The second language modification would occur in the same NRS in subsection 8. A new provision would be added (e) which would apply retroactively to all applications involving an interbasin transfer of ground water in excess of 250 acre-feet per annum filed after January 1, 1947, that have not been acted upon by the State Engineer, or are subject of a pending appeal before the courts. These are the SNWA Spring Valley applications, and only those, and they would be subject to part (d) of that same subsection.

That would require the State Engineer to notice a new period of 45 days in which a person who is a successor in interest to a protestant or an affected water right owner may file with the State Engineer a written protest against granting of the application. Essentially, this fulfills option 2 of the Supreme Court's decision in reopening the comment period for these applications. It should also be noted that SNWA has refiled all of the Spring Valley applications with the State Engineer.

With these two simple amendments, we believe the status of a large portion of water rights in Nevada is clarified while allowing a new protest period to be initiated for the Spring Valley applications as contemplated by the court.

Finally, we recognize the complexity and disjointed language contained in NRS 533.370. It is the product of 97 years of piecemeal modification. The language before you is a "quick fix" in

response to the Court's decision. We are committed to working with all interested parties on a full rewrite of that section to achieve simplicity and clarity and present it to you for consideration in the full session in 2011.

SENATOR CARE:
Given what happened in 2003 and the confusion some say has arisen now because of the Supreme Court's order of January 2010, I am reading from the minutes of the Senate Committee on Natural Resources for March 26, 2003. These minutes report that Mr. Andy Belanger said, "This is a relatively simple proposal and clarifies traditionally what has happened over the last several years." That being the case, why is the fix not to simply repeal what we did in 2003? What we have in this bill, in section 1, subsections 4 and 8, is something much different than what Mr. Belanger said in 2003.

MR. BIAGGI:
I was not privy to those discussions in 2003. I think Mr. Belanger is here and can speak to what his statements were. I believe the language in the BDR today is consistent with the legislative intent as I understand it. I have talked to a number of people who were involved with it at that time. My primary goal here is to clarify the status of the 14,500 water rights applications that are now under a cloud and under question. If this issue is not clarified and dealt with, there will be more complexity and more litigation, and it will be a greater and greater problem for the State Engineer and for the water rights that currently exist in Nevada.

SENATOR PARKS:
We are in an interesting situation. We have a Legislature that is in session primarily because of our budget shortfall. Could you address some of the potential consequences that might arise if the Legislature were not to take it up at this time, but rather decided to leave it for the next regular session in 2011?

MR. BIAGGI:
It was fortuitous that we had a special session. I would have asked the Governor for his consideration to call a special session because this is such a significant issue and it has such dire financial and economic ramifications to the State. Whether the Governor would have agreed to that or not, I cannot say, but that would have been my recommendation at that time. In my opinion, the longer this decision stands forward without either clarification from the court or clarification of legislative intent, the more likely it is there will be additional litigation, more filings to preserve existing water rights and increasing complexity. We are going to see more and more problems and ways in which we cannot undo this thing that has been done. That is my grave concern, as well as the issue of the 14,500 existing water rights that are under a cloud.

DANNY THOMPSON (AFL/CIO):
We are part of a coalition of municipalities and interests who are concerned about the passage of this bill. I want to read you the list of people in that coalition who support this bill: the City of Mesquite, Virgin Valley Water District, the Truckee Meadows Water Authority, the City of Reno, the City of Sparks, Washoe County, Clark County, North Las Vegas, Boulder City, City of Henderson, City of Las Vegas, the Las Vegas Valley Water District, the Southern Nevada Water District, the Southern Nevada Home Builders Association, the Northern Nevada Home Builders Association, developers, the AFL/CIO, gaming, the Associated General Contractors, NV Energy, Sierra Pacific, the chambers of commerce, banking, economic development authorities, Barrick Mining, Newmont Mining and the manufacturing associations.

You heard testimony here about the chaos this Supreme Court ruling has caused. You do not have to look any further than the Virgin Valley Water District, who waited three days to go down and reapply for their water, and Vidler Water Company had filed in front of them.

This bill is about jobs. I have been a part of the water resource plan the water district came up with from the integrated resource plan to the drought committee to the water structuring pricing committee to today. If you look at any project currently being built or has been built, I would submit to you today that if this ruling were in effect, City Center would have never been built.

As sure as I am sitting here, you are going to see higher unemployment because of the chaos this will ultimately cause. You heard Mr. Biaggi talk about the potential for 14,000 applications, and I would tell you this is much like the Tahoe Regional Planning Agency (TRPA). The first meeting of the TRPA I went to, there were 100 chairs in a circle and 100 attorneys representing 100 different interests. That is where this ruling is going to take you.

In the case of the SNWA, I want to make sure you all understand the situation. Right now, Lake Mead has fallen 120 feet. We worked on an integrated resource plan to put a second straw into Lake Mead. Ninety percent of all the water for Clark County comes out of that lake. If the lake drops another 32 feet, you will not be able to take your 299,000 acre-feet out of that lake because you will not have the capacity in one straw alone. The only way we survive now is we take the water out, we use it and we put it back in. As a result of that, the SNWA has come up with a plan to put a third straw into Lake Mead, which we are currently constructing. We have drilled a hole 30 feet wide and we are down 600 feet at Saddle Island. Until that project is done, you will not have any guarantee that you have a reliable water source.

One of the problems of this ruling, which throws all the financing into question, is that while that stage of that project is bonded for, the stage to hook it to the other two straws is not. If this ruling is allowed to stand, you could potentially find yourself some years down the road with a third straw without the ability to bond those projects, and thus you will not be able to complete them. There are people who may be called to testify about the bond market, and I know the head of the SNWA has been called by an editorial board of the *Wall Street Journal* to explain this ruling.

From that perspective, we view this as a jobs bill. The reason you were called into session was to deal with the budget shortfall. I would submit to you that if you do not clarify what your intent was with the 2003 bill, a hundred years of water law will go out the window. It is tough enough right now for a developer to borrow money. You will impede their ability to do these jobs, and jobs like the Fontainebleau, which was purchased by Carl Icahn and will probably be sold again. They will have to borrow money to complete that project, which will make it that much more difficult. That is why we are urging you to pass this bill as it is.

SENATOR MCGINNESS:

You read a list of organizations involved in this. Are there any individuals on that list that are affected?

MR. THOMPSON:

All of those city municipalities are. The testimony was that while it speaks directly to municipalities, it also has the potential to affect a company like NV Energy, for instance, which has water rights throughout the State and is dependent on them for producing power. The argument can be made that once the Supreme Court has ruled these applications are in question, an attorney could go back and throw a cloud over all these agencies.

SENATOR MCGINNESS:

My question was whether there were individual farmers and ranchers included in your list. Maybe Mr. Guild could cover that.

MR. THOMPSON:

I think so, yes. He has indicated to me that there are individuals who will be affected.

JOSEPH GUILD (Southern Nevada Water Authority):

I am an attorney in Reno, and I have spent the great bulk of my career as a lawyer dealing with natural resources and water issues. In addition, many of my lobbying clients have those kinds of issues related to them. I am here today on behalf of the SNWA to explain why we think this is a critical endeavor you are entertaining tonight.

In answer to Senator McGinness's question, there are two categories of water rights holders or applicants that this Supreme Court decision impacts. There are some 1,800 pending applications at the State Engineer's office today that I believe are in jeopardy as a result of this decision. This is because of the potential for someone filing over those existing applications and becoming

senior in time because the State Engineer has not acted within a year and the applications do not fall within the exceptions. Then there are a few applications, but more importantly, the actions taken by the State Engineer since 1947 when the one-year rule was enacted by the Legislature, that are in jeopardy. To answer the question specifically, there are a bunch of existing applications that are pending. From Douglas County, we have Tomerlin, Colley, Biggs, Maggach, Ammons, Settlemeyer, Pruett, Hollister (which is probably the estate of Graham Hollister); from Elko County, Walt Leberski; and from White Pine County, Brent and George Eldridge. I am getting these names from a list compiled by the SNWA legal department on a quick abstract they did after this decision was rendered.

Mr. Powers did a great job explaining the Supreme Court's decision and its predicate. There are a few things I would like to add to that.

In 2003, the Nevada Legislature passed S.B. 336, which stated that water applications were valid until acted upon by the State Engineer, even if the statutory timeframe for action – one year – had been exceeded.

Further, in his 2002 ruling concerning Garnet Valley, the State Engineer disclosed the potential exposure his office faced because of a systemic inability to process applications within the statutory timeframe. The ruling states, "The 1-year statutory timeframe is a statutory relic from a much simpler time when processing water right applications was considerably different than what is presented to the State Engineer today."

It also reads, "Today, there are over 3,100 water right applications pending that have not been acted upon within the 1-year statutory timeframe and, of those, over 1,470 are protested applications."

"There are 5,906 active water right permits and 13,922 active certificated water rights on file with the office of the State Engineer, and of those approximately 4,800 were applications that were not acted on within the 1-year statutory timeframe prior to the water right being granted. This translates into 25 percent of the active permitted and certificated water rights that exist in Nevada today would be affected if a court were to determine they were void because they had not been acted upon within the 1-year statutory timeframe."

When the 2003 Legislature acted, the record clearly shows that the purpose of the language was to maintain the status of applications until the State Engineer's office could act. The Senate Natural Resources Committee adopted the language on April 2, 2003, the work session document stating: this "amendment…preserves the status of applications for which the State Engineer has not acted within the 1-year timeframe provided by statute, ensuring that these applications are not deemed approved or denied because of the State Engineer's inaction."

A bill summary of the second reprint of S.B. 336, produced by the LCB Research Division after it had been approved by the Assembly, included similar language: "It also preserves the status of applications upon which the state Engineer has not acted within the one-year timeframe provided by statute, thus ensuring that these applications are not deemed approved or denied because of a lack of action."

This history is critically important because it demonstrates legislative intent and shows that the Legislature intended the language to apply retroactively.

The impacts of the recent Supreme Court ruling are many. First, it delays permitting decisions for the Groundwater Project, at a time when the Colorado River—which represents 90% of Southern Nevada's water supply – is crippled with drought. With permitting for the Groundwater Project delayed, there is an immense hole in the water resource plan. We do not have long-term water supplies to replace the unused groundwater permitted by the State. We can fill in the gap with some short-term, stop-gap measures, but once those supplies are gone, we must find a permanent solution.

Second, water availability is a critical concern for investors. Before any bond is let in Southern Nevada, the investors first want to know if there is a long-term reliable water supply. The SNWA's water resource plan is studied, reviewed and scrutinized. Wall Street is intensely interested in the viability of Southern Nevada's water supply. If Southern Nevada cannot assure investors that there is a long-term reliable water supply available to the community, bonding for major construction projects and critical infrastructure will be much harder to secure, if it is available at all.

Third, the State Engineer's office cannot handle the increased workload to comply with the Supreme Court's decision. He does not have the staff to process all applications in the backlog within one year. Without a massive infusion of staff into the office, water right applicants might have to continually refile applications because the State Engineer's office would be unable to process them all within a year.

Finally, the Supreme Court decision not only impacts the Southern Nevada Water Authority, but all "future similarly situated applicants," meaning it has application to other applicants whose permits were not granted within a year. It also creates a cloud of uncertainty over the 25 percent of permits that were granted outside of the one-year timeframe. At this time of economic instability, it is imperative that the Legislature reaffirm its intent of retroactivity when passing S.B. 336 in 2003.

Some have suggested that the Legislature should not act to clarify its intent, leaving to the courts the ability to determine a proper remedy. I would suggest that the Legislature is the appropriate venue for making law. In many cases, the Legislature has acted when the Supreme Court needed clarity on legislative intent. Eighteen months ago, in a similar special session, the Legislature considered a retroactive gaming tax bill to address a Supreme Court ruling. In at least thirteen cases, the Legislature has considered legislation to address legislative intent or clarify the intention of a statute after a Supreme Court decision.

I would like to submit an excerpt from the February 11, 1999, meeting of the Joint Senate Finance and Assembly Ways and Means Committee:

> Senator Jacobsen asked what actions are being taken to reduce the backlog of applications. Mr. Turnipseed replied the Division of Water Resources has been reducing the backlog. An application is considered backlogged when it has been on file for more than one year and no action has been taken. The backlog has been reduced from 4,000 applications to approximately 3,200. The performance indicators anticipate the backlog to be reduced by about 600 applications each year. Mr. Turnipseed said there are many applications in the backlog that no action can be taken on. There are some applications being held because of litigation. Approximately 90 applications are awaiting decisions from the Supreme Court. Many of the applications are involved with desert land entries awaiting a determination from the Bureau of Land Management and many are awaiting protest hearings, Mr. Turnipseed said.
>
> Senator Jacobsen asked for a list of applications filed during the past 5 years indicating why they were not processed timely. Mr. Turnipseed said the Division of Water Resources has taken action on over 90 percent of the applications filed during 1990 and 85 percent of the applications filed since 1990. *The majority of the backlog consists of the old applications filed in 1979 and the early 1980s when the Cattlemen's Association and the woolgrowers were encouraging all of their members to get their stockwater rights up to date.* [emphasis added] There are not many applications in the backlog that were filed during the last 8 years, Mr. Turnipseed noted. Those applications that were filed during the last 8 years and are included in the backlog are awaiting for legal determinations.

In my research, I found Mr. Turnipseed testifying as far back as 1993, speaking to the Senate Finance Committee in February 25, 1993, about the critical problem of the backlog and some of the one-year rule violations occurring at that time.

We believe that when the 2003 Legislature acted, the record clearly shows the purpose of amending NRS 533.370 to add the one-year rule was to maintain the status of applications until the State Engineer could act. This was done because the State Engineer was not acting within that one year, which is why the exception to that rule in subsection 4 of S.B. no. 366 was added.

I submit an extract from work session documents from the April 2, 2003, meeting of the Senate Committee on Natural Resources regarding S.B. no. 336, which was prepared by the Research Division of the Legislative Counsel Bureau. The Supreme Court did not refer to these documents in its decision of January 28, 2010. There were minutes of hearings on S.B. no. 336 by the relevant committees in the Assembly and in the Senate. I cannot tell you whether the Supreme Court went beyond those minutes.

Senate Bill 336 (SENATOR HARDY) — *Directs the State Engineer to quantify older water rights in the Las Vegas Valley Groundwater Basin and so notify the holder of the right and the County recorder.*

A few older water rights express the amount of the appropriation only in cubic feet per second which can be a somewhat misleading term if not accompanied by a quantification in acre-feet per year. Senate Bill 336 directs the State Engineer to quantify these rights in the Las Vegas Valley Groundwater Basin and so notify the holders of these rights and the county recorder.

*Proposed Amendments*

Senator Hardy submitted the attached proposed amendment to the general statutes requiring that the State Engineer notify the person who submits a report of conveyance of a water right when the State Engineer's office has confirmed that conveyance. The amendment also specifies that the notification must include language explaining the limitations associated with this confirmation.

The Southern Nevada Water Authority proposed a second attached amendment which: (1) allows the State Engineer to postpone action on applications to appropriate water for municipal use; (2) preserves the status of applications for which the State Engineer has not acted within the 1-year timeframe provided by statute ensuring that these applications are not deemed approved or denied because of the State Engineer's inaction; and (3) ensures that the State Engineer must consider senior/existing applications, as well as existing certificates of water rights, when reviewing new applications.

The State Engineer testified in support of these proposed amendments.

Senate Bill 336 (Second Reprint) Summary:

Senate Bill 336 directs the State Engineer to quantify more clearly several older water rights in the Las Vegas Valley Groundwater Basin and notify the holders of these rights and the county recorder. The bill also modifies the statutes to require that the State Engineer notify the person who submits a report of conveyance of a water right after his office has confirmed that conveyance. Further, the bill specifies that this notification must include language explaining the limitations associated with the conformation.

In addition, the measure authorizes the State Engineer to postpone action on applications to appropriate water for municipal use. It also preserves the status of applications upon which the State Engineer has not acted within the one-year time frame provided by statute, thus ensuring that these applications are not deemed approved or denied because of a lack of action.

I submit that the work session documents evidence some intent by the Legislature; it is not crystal clear, but you can infer intent from that. The Supreme Court did not apparently take that document into account.

SENATOR HORSFORD:

Was the amendment proposed by the SNWA adopted?

MR. GUILD:

It was adopted.

SENATOR HORSFORD:

That same amendment?

MR. GUILD:

I believe so. The language you see in the second reprint of the bill is what was adopted.

SENATOR COFFIN:

I remember this bill, and I have been puzzled about this whole thing. I was on that committee for a long time and was in there in 2003 and a good many sessions before that. I remember the bill coming forth and being very controversial, having been opposed by many rural water users

and rural municipalities against the Las Vegas applications because Las Vegas came in with this amendment to Senator Hardy's bill. It was clear at the time that the point was that municipal water use needed a little more time because they were stacked behind all these affluent applicants with a ton of money and lots of lawyers, and the water authority did not have that kind of thing. They were municipal, meaning representing the people's water, and the people owned the State water. They own it, so it is not a question of dispute about who really owns the water.

At the work session, I made the motion to amend and do pass the bill with that water authority amendment, and it passed unanimously. I cannot quite figure out why it is so controversial today. We had clear intent in our committee; it passed unanimously. Were you there, Mr. Guild? Do you remember that meeting?

SENATOR HORSFORD:

Where is the actual amendment? I agree, based on the bill's summary, that it was adopted, but where is the amendment?

MR. GUILD:

I do not have it with me, but we can provide it to the Committee. Senator Coffin, I thought I was at that work session, but looking at the sign-in sheet, it seems I was mistaken, and it is too far back for me to remember.

Let me conclude with two points. The court went to a great deal of effort to decide what the word "pending" meant. This is important, because if the Legislature intended that applications that were pending and not acted upon by the State Engineer were all retroactive and beyond the one-year period that the court found in its January 28 decision, then retroactivity was clearly intended. But in the court's opinion, they took four paragraphs to define "pending." I went to the *Webster's New College Dictionary* in the lobbyist's room, and it says, "Pending: Not yet decided; being in continuance; while awaiting." *Black's Law Dictionary* defines it as, "Begun but not yet completed; undetermined." I would submit that your intent in 2003 and later in 2007, because section 8 of the bill is referring to your actions in 2007, was meant to be retroactive.

The notion that this is an unusual thing is not based in fact. I submit a list of legal cases demonstrating the Nevada Legislature's power to create curative legislation:

> The Nevada Legislature has the constitutional power to response through curative legislation to decisions of the Nevada Supreme Court, and the Nevada Legislature exercises that power often. When the Supreme court interprets a statute inconsistent with legislative intent, the Legislature may amend the legislation to clarify legislative intent retroactively. Also, the Legislature may pass legislation to address a remedy the Supreme Court implies is needed. The following cases involved such responses by the Legislature to decisions of the Nevada Supreme Court:
>
> Water Law Curative Legislation
>
> - Town of Eureka v. State Engineer, 108 Nev. 163 (court suggested the Legislature should adopt remedy for forfeiture and Legislature responded by amending NRS 533.090(1) to require the State Engineer to give notice of a potential forfeiture one year in advance).
> - Bailey v. State Engineer, 95 Nev. 378 (In response to this Supreme Court case, the Legislature adopted NRS 533.390(2) to require the State Engineer to give 30 days notice of the potential cancelation of a permit, and NRS 533.395(2) to provide a post-cancelation hearing to reinstate the water right permit.)
>
> Other Curative Legislation
>
> - Sparks Nugget, Inc. v. State ex rel. Department of Taxation. 124 Nev. Adv. Op. 15, 179 (AB 2 in the June 2008 24th Special Legislative Session passed 42-0 in Assembly and was a retroactive gaming tax bill put forth in direct response to Supreme Court decision and was intended to clarify the intent of a statute and apply a retroactive fix. Bill did not pass in the Senate).

- In re Christensen, 122 Nev. 1309, 1319 and In re Estate of Thomas, 116 Nev. 495, 495 ("Where a former statute is amended, or a doubtful interpretation of a former statute rendered certain by subsequent legislation,… such amendment is persuasive evidence of what the Legislature intended by the first statute.")
- Karadanis v. Bond, 116 Nev. 163, 169 (court recognizes that it is well within the Legislature's authority to amend a statute and void a prior judicial decision).
- County of Clark v. Buckwalter, 115 Nev. 58, 61-62 (Legislature's enactment of a different standard than the one used by the district court was not unconstitutional).
- Administrator of the Real Estate Educ. Research and Recovery Fund v Buhecker, 113 Nev. 1147, 1150 ("[T]he amendment of a statute is persuasive evidence of what the Legislature intended by the original statute.")
- Castillo v. State, 110 Nev. 535, 547 ("When a former statute is amended, or a doubtful interpretation rendered certain by subsequent legislation, such amendment is persuasive evidence of legislative intent.")
- Breithaupt v. USAA, 110 Nev. 31, 35 (court acknowledges that Legislature amended statute in response to court decision).
- Khoury v. Maryland Casualty Co., 108 Nev. 1037, 1040-41 (overruled on other grounds) (court acknowledges the Legislature's dissatisfaction with the court's earlier interpretation caused the Legislature to amend the statute).
- State v. Ninth Judicial Dist. Court, County of Douglas, Dept. I, 105 Nev. 644 (Legislature believed a case "resulted in confusion in the law on this issue," and the statute was amended to clarify the Legislature's intent.)
- Lyons v. State, 105 Nev. 317 (Legislature amended NRS 465.070 to make it unlawful for any person to manipulate, with the intent to cheat, any component of a gaming device in response to Supreme Court decision).
- Davenport v. State Farm Mut. Automobile Co, 81 Nev. 361 (Legislature amended NRS 41.100 to prohibit the subrogation of medical payments by insurance companies in response to Supreme court decision.)

You can do what the DCNR is asking you to do in this bill. It has been done before, and it has been upheld. It is clearly within your prerogative as a coequal branch of government to correct things you think were misinterpreted by another branch of government.

SENATOR HORSFORD:
Please get us a copy of that actual amendment. I am interested in why, if the language in the amendment indicated that it preserves the status of applications that have not been acted upon in the one-year timeframe that did not get into NRS 533.

MR. GUILD:
In 2003, S.B. no. 336 added the first part of section 1, subsection 4 of the BDR, which says, "If the State Engineer does not act upon an application within one year after the final date for filing a protest, the application remains active until acted upon by the State Engineer." If you use Webster's definition of the word "pending," that is some evidence of the intent to be retroactive. If you need more, I will try to supply it.

SENATOR HORSFORD:
I have just received a copy of the actual amendment as it was proposed, and I will make it part of the record:

PROPOSED AMENDMENT FOR SENATE BILL NO. 336
SENATOR WARREN B. HARDY

Amend NRS 533.386 to require that, when the State Engineer makes the confirmation required in subsection 1, he must so notify the person who submitted the report of conveyance. Further require that this notice must include a statement indicating in substance that the confirmation of the conveyance does not guarantee, nor does the listing of an amount of water on the report of conveyance guarantee, that:

- The water right is in good standing in the office of the State Engineer; or
- The amount of water referenced in the letter is the actual amount of water that the holder of the certificate is entitled to use.

SB 336 Proposed Amendment

Description. AN ACT relating to water; amending the deadlines by which the state engineer must act on certain applications; clarifying the priority of senior applications; and providing for other matters properly relating thereto.

Section 1. NRS 533.370 is hereby amended to read as follows:

NRS 533.370

1. Except as otherwise provided in this section and NRS 533.345, 533.371, 533.372 and 533.503, the state engineer shall approve an application submitted in proper form which contemplates the application of water to beneficial use if:

(a) The application is accompanied by the prescribed fees;

(b) The proposed use or change, if within an irrigation district, does not adversely affect the cost of water for other holders of water rights in the district or lessen the efficiency of the district in its delivery or use of water; and

(c) The applicant provides proof satisfactory to the state engineer of:

(1) His intention in good faith to construct any work necessary to apply the water to the intended beneficial use with reasonable diligence; and

(2) His financial ability and reasonable expectation actually to construct the work and apply the water to the intended beneficial use with reasonable diligence.

2. Except as otherwise provided in subsection 6, the state engineer shall approve or reject each application within 1 year after the final date for filing a protest. However:

(a) Action may be postponed by the state engineer:

*(1) U*pon written authorization to do so by the applicant or, if an application is protested, by the protestant and the applicant; or

*(2) In the case of applications for municipal use.*

(b) In areas where studies of water supplies have been determined to be necessary by the state engineer pursuant to NRS 533.368 or where court actions are pending, the state engineer may withhold action until it is determined there is unappropriated water or the court action becomes final.

*(c) If the state engineer does not act on an application or has not acted on a presently pending application within 1 year after the final date for filing a protest, the application remains active until acted upon by the state engineer. This section shall apply to all applications filed after its effective date and to all applications previously filed that are pending on or after the effective date.*

**3.** Except as otherwise provided in subsection 6, where there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights, *senior applications to divert water from the same source*, or with protectable interests in existing domestic wells as set forth in NRS 533.024, or threatens to prove detrimental to the public interest, the state engineer shall reject the application and refuse to issue the requested permit. If a previous application for a similar use of water within the same basin has been rejected on those grounds, the new application may be denied without publication.

4. In determining whether an application for an interbasin transfer of ground water must be rejected pursuant to this section, the state engineer shall consider:

(a) Whether the applicant has justified the need to import the water from another basin;

(b) If the state engineer determines that a plan for conservation of water is advisable for the basin into which the water is to be imported, whether the applicant has demonstrated that such a plan has been adopted and is being effectively carried out;

(c) Whether the proposed action is environmentally sound as it relates to the basin from which the water is exported;

(d) Whether the proposed action is an appropriate long-term use which will not unduly limit the future growth and development in the basin from which the water is exported; and

(e) Any other factor the state engineer determines to be relevant.

5. If a hearing is held regarding an application, the decision of the state engineer must be in writing and include findings of fact, conclusions of law and a statement of the underlying facts supporting the findings of fact. The written decision may take the form of a transcription of an oral ruling. The rejection or approval of an application must be endorsed on a copy of the original application, and a record made of the endorsement in the records of the state engineer. The copy of the application so endorsed must be returned to the applicant. Except as otherwise provided in subsection 7, if the application is approved, the applicant may, on receipt thereof, proceed with the construction of the necessary works and take all steps required to apply the water to beneficial use and to perfect the proposed appropriation. If the application is rejected, the applicant may take no steps toward the prosecution of the proposed work or the diversion and use of the public water while the rejection continues in force.

6. The provisions of subsections 1 to 4, inclusive, do not apply to an application for an environmental permit.

7. The provisions of subsection 5 do not authorize the recipient of an approved application to use any state land administered by the division of state lands of the state department of conservation and natural resources without the appropriate authorization for that use from the state land registrar.

8. As used in this section, "interbasin transfer of ground water" means a transfer of ground water for which the proposed point of diversion is in a different basin than the proposed place of beneficial use.

Sec. 2 This act becomes effective on July 1, 2003.

SENATOR COFFIN:
The amendment is available online as well.

SENATOR CARE:
I have been a member of the standing public lands committee since my first interim in 1999. You have testified at most of the hearings we have had. We have gone to Elko, Winnemucca, Ely and Carlin. You and I have sat in congressional offices in Washington, D.C., where the subject of discussion among other things was a proposed pipeline. So this question is lawyer to lawyer.

I am not viewing this as to the merits of the project. I understand all that; I have kept abreast of the debate since we first started hearing about it years ago. I have a threshold issue with the Legislature entertaining legislation that would effectively vacate a very recent Supreme Court order. That is the context in which I ask these questions. As a litigator, how convenient it would be if any time I had a summary judgment or a judgment entered against my client, I could just go to the Legislature and get them to vacate that judgment. I do not want to put the SNWA in that company. Before I got here, there was an attempt at the retroactive application of a statute that would have vacated an award of punitive damages to Lt. Coughlin following the Tailhook scandal at the Las Vegas Hilton. It did not work, because someone caught on to what was going

on. But you can see my trepidation, when you are asking the Legislature to do something like that.

Having said that, let me ask you a few questions. I do not know what the Supreme Court looked at, but they did make specific reference in the order to the minute hearings. I am reading the SNWA's motion for an extension of time in which to file a petition for rehearing, and it says:

> Respondents (SNWA et al) are currently reviewing the legislative history of the 2003 amendments, including the full recordings of the actual committee meetings and floor sessions, along with other relevant legislative materials. The legislative history available online is only a small portion of the complete history available in the archives, and this court will benefit from the time spent by the respondents to fully review the legislative history.

I do not know if you have actually filed the petition for rehearing, but it would seem to me the simplest thing to do is attach these materials as exhibits and make reference to them in the brief, so that the court cannot help but examine them. Have you done that? If you have not, I am sure you will, and you may find on rehearing that the court will vacate that order and issue a different order altogether. Why should we not let that play out procedurally, as opposed to what we are doing here tonight?

MR. GUILD:

We have not filed a motion for reconsideration yet. We intend to do so, and we will have that discussion if the Supreme Court allows us to do that. If our motion for reconsideration is denied, which is entirely possible given the fact that the January 28 decision was unanimous, then we go back to the district court—as Mr. Powers says, it has not been remanded because of these other procedural things that need to happen first—to answer two questions.

As an aside, it is interesting that we are before the Supreme Court on the issue of whether the State Engineer properly denied new protestants to come into the case that was heard by the State Engineer in September 2006. That hearing lasted three weeks and involved thousands of pages of testimony and numerous people who testified, including a very open public session in which people who had been denied protestant status were allowed to speak. As a result of that hearing, the State Engineer granted some of the applications that the SNWA was asking for. As a result of that action, we have permits for this in-state project. The substantive decision of the State Engineer granting the permits was never appealed. We are now faced with this procedural situation, which as a result of the January 28 decision puts all of these other potential decisions and actions of the State Engineer and potential decisions on the 1,800 pending applications in some sort of jeopardy. We have to believe the head of the DCNR when he says their opinion is these are under some sort of cloud. Is every one of those 14,500 decisions by the State Engineer affected by this? No. There will be a certain number that were never protested on which the State Engineer acted within one year, and those are fine. But there are enough of them out there that we have to do everything possible to protect our interest at the Supreme Court.

But remember, this is not about the SNWA. It was not our bill, though we obviously support it. It is the other applicants and actions by the State Engineer that are in jeopardy, and I agree with Mr. Biaggi on that point. We will do everything we can at the Supreme Court. If we are denied, we will go down to the district court and make our case there. Speaking lawyer to lawyer, there are a lot of issues related to issue preclusion, *res judicata, collateral estoppel* and virtual representation that will probably be raised if we end up back in the district court. In the meantime, I believe the Legislature should correct the Supreme Court's inaccurate reading of what you originally intended with S.B. no. 336.

SENATOR HORSFORD:

Please keep your comments brief. Your terminology is impressive, but you just lost about half of us.

SENATOR CARE:

Let me return to the *Karadanis* case, the specter of the separation of powers doctrine and the possible constitutional infirmity there. There is another issue here, and the court seemed to raise it. You will be familiar with it, and this goes to due process. In page 14 of its opinion, the court

says, "Third: A reading consistent with the Water Authority's interpretation of the 2003 amendment would deprive at least 11 appellants or original protestants of the Water Authority's 1989 applications of their due process right to grant or withhold authorization to postpone action by the State Engineer on the 1989 applications." I would like you to comment on that, especially how it is your proposed BDR would alleviate concerns about violation of due process rights for at least these 11 appellants.

MR. GUILD:

Interestingly enough, on the substantive issue of due process, the Supreme Court decision did not delve into that very deeply. Mr. Powers was correct; it was a very narrow remand order to go back to the district court. In the January 28 opinion, the court said:

> Voiding the State Engineer's ruling and preventing him from taking further action would be inequitable to SNWA and future similarly situated applicants. And applicants cannot be punished for the State Engineer's failure to follow his statutory duty. Similarly, it would be inequitable to the original and subsequent protestants to conclude that the State Engineer's failure to take action results in approval of the applications over 14 years after their protests were filed.

I believe the due process rights of the people who claimed they did not have an opportunity to be heard were met through the virtual representation and the issue preclusion doctrines of the protestants who were allowed to participate. Further, because the State Engineer gave so much deference to public comment, there was ample opportunity for people who were not part of the original protest group in 1989 to be heard.

SENATOR CARE:

I would just point out that the concluding sentence of that paragraph says, "These issues deserve full development before being adjudicated." To my mind, that means this remains in the courts. Obviously, we have a disagreement about that.

SENATOR HORSFORD:

The proposed amendment you submitted contains language not in the final bill. In section 1, subsection 2, paragraph (c), the proposed amendment includes the sentence, "This section shall apply to all applications filed after its effective date and to all applications previously filed that are pending on or after the effective date." That is not part of the amendment that was adopted.

MR. POWERS:

That sentence is a transitory provision and was put in section 18 of the final bill. The Supreme Court reviewed this language from the amendment, and their decision took this language into consideration.

SENATOR HORSFORD:

I do not have the NRS in front of me. Does that language go back retroactively? The proposed amendment refers to "all applications previously filed that are pending on or after the effective date."

MR. POWERS:

That goes to the heart of the entire *Great Basin* case. That was the determination the Supreme Court had to make: whether this language about pending applications meant only those that were still within the original one-year period, or everything that had not been ruled on by the State Engineer at any time after 1947. This was a technical decision, and I will try to explain it.

At the time the legislation became effective, July 1, 2003, there was a group of applications that had been filed prior to 2003 that the State Engineer had not ruled on but which were still within the one-year period during which he could take action. The Supreme Court said because that group of applications was still within the one-year period, those were the pending applications that S.B. no. 336 applied to. One of the reasons they reached this conclusion was because the State Engineer had not ruled on or postponed those applications during the one-year period, this legislation gave him another reason to postpone those applications. That would not

harm those original applicants because the State Engineer had not made his decision yet. The Supreme Court was asked by the SNWA to apply that "pending" term to those applications for which the one-year period had already lapsed. The question was if the State Engineer had not ruled on an application within one year and that period had lapsed, what was the status of that application? The statute did not tell the Supreme Court the answer to that question. Thus, the court probably concluded that "pending" did not apply to those applications because the one-year period had already lapsed. What was the proper term to apply to those applications was a question, but "pending" did not apply because they had exceeded the one-year period. The SNWA argued that "pending" meant both applications that were still within the one-year period and applications that had exceeded the one-year period. The Supreme Court concluded there was not enough clear legislative history to support applying it to those that fell out of the one-year period, and therefore they said it only applied to those that were pending within that one-year period.

SENATOR CEGAVSKE:

I am more confused now than before we started. Coming from southern Nevada, I am very concerned about the water, as we all are down there, but I am more concerned about setting a precedent if we get involved in this. I look at us taking water from the north, and I ask, is that the right thing to do? How much do we take? How long does it last? Do we borrow water? Are we looking at other avenues of how we are going to get water in the south? We have heard about doing projects with California. With regard to the legal issues, I have talked with Senator Care, and I appreciate the things he has explained to me, but I am trying to get down to the simple parts of this. I feel like I am in a court hearing with legal terminology being batted back and forth. You lost me on the legal part. I would really appreciate it if someone could help me understand in simple terminology what are the ramifications and concerns of this issue.

MR. GUILD:

I apologize for the legalese, especially at this late hour. I will attempt to simplify. The SNWA, as part of its resource plan, water importation from White Pine County, Lincoln County and northern Clark County. That resource plan is a component of a 30- to 50-year water supply outlook for southern Nevada. The State Engineer has issued permits, not just in the ones that are in question at the Supreme Court as a result of this decision, but other permits that will allow the SNWA to augment its water supplies. State law prohibits the State Engineer from issuing a permit for an interbasin transfer of water that would exceed the perennial yield of the basin from which the water is being exported. To determine whether that threshold has been exceeded, the State Engineer looks at testimony and hearings from hydrologists and competing geohydrologists and people like that. To give you a quick example, the SNWA was asking for 92,000 acre-feet of water from Spring Valley. They received 40,000 acre-feet in a basin that has a perennial yield of 125,000 acre-feet, and a contingent extra 20,000 acre-feet if, after 10 years of the project's life, it is determined there is no environmentally negative consequences. That means if the project ever happens, the water supply will be sustainable and the perennial yield of the basin will not be exceeded. Augmenting the southern Nevada water supply will be a portion.

This decision has put that component of the resource plan into question. What Mr. Thompson was saying is when a financing entity looks to do a project in southern Nevada, one of the questions they are asking is whether there is a reliable, sustainable source of water in the future of this project. Can we ensure that if we lend money on this project, there will be water to supply that project in the future? That is now in question. That is why the *Wall Street Journal* is asking questions about the impact of this Supreme Court decision. So at the moment, Mr. Thompson is right about this being a jobs bill. Just right now, since there is no clarity, jobs might be in jeopardy and there might not be financing for these projects.

SENATOR CEGAVSKE:

How will this impact the north? Are we going to drain the resources from northern Nevada?

SENATOR HORSFORD:

I do not know whether that is really germane on this topic, on this bill.

SENATOR CEGAVSKE:
If we okay this, then they will be able to get the water from the north. Correct?

SENATOR HORSFORD:
This BDR does not speak specifically to any one project. This is about water rights issues generally in the State. There are specific projects you can talk about, but that is not germane to the primary issue of this BDR.

SENATOR CEGAVSKE:
I know there is a legal interpretation that you are looking at whether or not we can override the decision of the Supreme Court, but I am concerned that this will have an impact on the south's ability to take water from the north. That is my question in all this. If I am wrong, please tell me.

SENATOR HORSFORD:
I do not know that you are wrong, but I do not think the policy in this BDR speaks to any one particular project. It is a general policy about water rights issues and the application process for water rights in the State. Your question may be better answered offline with those who can give the background.

SENATOR OLSEN:
I would like to hear from Mesquite if there is time, since they have been particularly impacted by this.

SENATOR HORSFORD:
If there is time, I will give some additional opportunity for them. If we take this matter up further, there will be additional public comment before there is any action.
We will now hear from those who oppose this measure.

KYLE DAVIS (Nevada Conservation League):
Unfortunately, I am the only person here representing those who are opposed to moving forward on this legislation. None of the representatives from the Great Basin Water Network are here at the moment. I will try to do the best I can to represent their arguments, knowing that I am not trained in the law. The Progressive Leadership Alliance was also interested in being here tonight but was not able to make it due to the lateness of the hearing.

SENATOR HORSFORD:
What I will commit to is if those individuals would like to be heard, we will ensure they are able to get their comments on the record in a public forum. We apologize for the lateness of the hearing, but we are in a special session and had to work around the other budget issues we are faced with.

MR. DAVIS:
I appreciate that.
The Great Basin Water Network is a collection of citizens from throughout the State who are activists and volunteers concerned about water issues in Nevada. They have been involved with the SNWA proposals, which is what this case represents.
Our position is that the Legislature should not act on this legislation and should leave this pending legal matter to the courts, letting it be resolved in that fashion. There are four main reasons we feel this is the best course of action. The first is the pending court matter. This has been explained very well by your counsel and the question-and-answer that has gone on. This matter has not been decided; it has simply been remanded to the lower court, and they have yet to act. There are legal precedents showing that when an action like that is taken while a court matter is pending, it raises severe constitutional issues. That is the case here and gives caution to the idea of enacting legislation while something is still going on. We expect the court will be ruling on this matter relatively soon. We think we ought to let that happen.

The second point is that the Supreme Court ruling is very narrow. I will read an extract from a letter from the attorney who represented the Great Basin Water Network:

> The court found that the State Engineer did in fact violate his statutory obligations to act upon SNWA's applications within the required time period and to ensure that all protestants were kept apprised of any delay beyond that period. In connection with this ruling, the court rejected SNWA's and the State Engineer's attempt to gloss over that failing by pointing to 2003 legislation that exempted municipal applications from the one-year requirement. As the court noted, that legislation could not be retroactively extended to apply to SNWA's applications because to do so would cause a constitutional due process violation with regard to the petitioners. Therefore, the court remanded the matter to the district court for a determination as to whether SNWA's application should be renoticed for a new protest period [and] a new set of hearings, or whether those applications are void and must be refiled. In issuing its ruling primarily on the basis of the statutory violations, the Supreme Court was following sound judicial practice by avoiding ruling on constitutional issues where that is not necessary. But the court expressly noted that a different ruling on the statutory issues would necessarily raise at least one fundamental violation of constitutional due process rights. The obvious significance of this observation is that if the statutory outcome were reversed by the Legislature, the problems in this case would not go away, but rather would be turned into more fundamental and more problematic constitutional violations.

The third reason we feel you ought not to act is the general nature of water law. This was explained very well by Mr. Biaggi when he said Nevada water law is a complex thing that has been amended and tinkered with for a long time. We have seen in the past that changes made to Nevada water law have had some unintended consequences. A special session is necessarily a very quick process, and this is an issue that is more appropriately addressed during a regular session when there is more time to examine the issues, especially since this is a pending court matter.

The fourth reason is the due process issues. This is a matter of whether people have the right to be a part of this process. That is the reason the Great Basin Water Network went to court in the first place: to ensure people had the right to be a part of the process. The process was compromised by the length of time they waited to act on the applications and the nature of the protestants who originally filed versus the ones who were still around when the applications were taken up.

I would like to address two arguments that have come up during the testimony. The first is the idea of legislative intent. Some feel the legislative intent was clear in 2003 and the Supreme Court has acted incorrectly. If the Supreme Court has acted inappropriately, that is why there is an opportunity to ask for a reconsideration. The Great Basin Water Network and protestants were operating under existing law, and that law needs to be fair to them. The Supreme Court has interpreted that law, as is their job under the constitution, and the Supreme Court is the place to make the case that their interpretation was incorrect, rather than trying to circumvent the court ruling. It is unfair to the litigants in the court proceeding to change it in the middle.

The second point is the issue of the impact this may have on the economy in Nevada. I am not privy to issues of financing and the impact on various building projects. But as I have heard in the testimony here, these are guesses as to what might happen. We do not have any examples of a project that has not happened based on this court ruling, and it is certainly fair to wait a few more weeks for the court to decide. There may be theoretical examples of where this might have an impact, the impact on the protestants who were not allowed to be part of the process is very clear and very real.

Our bottom line is that this is a group of citizens in Nevada who spent their own time and raised the money to fight to be a part of this process. They relied on the laws on the books at the time, and this law has been interpreted by the Supreme Court. They deserve to be a part of this process. They deserve to be heard and have this matter fully adjudicated by the courts, and they feel it is unfair for a legislative action to pull the rug out from under them and put them back where they were before the court proceeding happened.

SENATOR HORSFORD:
Is there any evidence of any impact on the economy? Also, are any of the members of the Great Basin Water Network actual water right applicants?

MR. DAVIS:
Yes, some members of the Great Basin Water Network are existing water right holders.

MICHAEL JOHNSON (Chief Hydrologist, Virgin Valley Water District):
Virgin Valley Water District provides municipal water to the communities of Bunkerville and the City of Mesquite. The District has been proactive in securing and preserving water resources for our service area population. The recent Nevada Supreme Court ruling on the status of water right applications has severely and detrimentally impacted our future water resource. The District holds several applications that are an integral part of our future water resource portfolio to support future development in Mesquite and the surrounding service area – applications upon which the state engineer has not yet acted. Until recently the district's applications were senior in priority, but, as a result of the recent court ruling, that is no longer the situation. We believe a legislative solution addressing the matter would restore the district to its previous position.

In brief, prior to the court ruling, the district held senior position on water right applications central to our future water resource needs. However, as a result of the ruling, a flurry of applications were filed and the District lost its "place in line." Being a great distance from Carson City and not knowing that the Supreme Court ruling was coming out, we were not aware of the situation and were not able to file for our water rights until February 1, after the January 28 ruling. Whereas previously, the district was at the front of the line by approximately 20 years, we are now behind by about 36 hours. Should the recent court decision stand, the impact on the District and the communities it serves would be dramatic. It would severely hamper and curtail our future water resource availability and planning.

We strongly urge the Legislature, "the people's branch" of government, to enact a remedy at this special session.

STEVE HOLLOWAY (Associated General Contractors, Las Vegas Chapter):
I submit three letters from leading economists and financial experts in evidence. We became concerned early on over this Supreme Court decision and had requested what the potential impact might be, not just on water right applications but on financial institutions and future construction projects and development projects in southern Nevada. The first letter is from Jeremy Aguero, Principal Analyst with Applied Analysis:

February 5, 2010

RE: Potential Impacts of the Nevada Supreme Court's Ruling on Water Rights Applications

Dear Mr. Holloway:

Pursuant to our recent discussion, we have reviewed the Nevada Supreme Court's recent ruling on water rights applications relative to its potential economic and fiscal impacts on the state of Nevada. A summary of our analysis is provided below.

On January 28, 2010, the Nevada Supreme Court issued a ruling that appears to invalidate several water rights applications held by the Southern Nevada Water Authority and other interests across Nevada because of the time it took for the State Water Engineer's Office to review certain applications. The full implications this ruling are unclear at this time; however, it does have the potential to materially delay the timing of Nevada's in-state ground water development program should the 1,851 water rights applications filed between 1947 and 2002 ultimately be found to be invalid and have to be refiled. Assuming *arguendo* that this is the case, this situation would have immediate and long-term impacts on the state's economy and its fiscal system.

A key risk for any southern Nevada investment is availability and sustainability of water. These concerns are heighted by a serious drought and the reality that 90 percent of southern Nevada's water is now sourced to the Colorado River. Water levels in Lake Mead continue to drop; and, if the current drought continues or worsens, the

ability to draw water through one of the existing intakes will be put into jeopardy. This, in turn, would limit the ability to get water to the region's 1.9 million residents and businesses that provide jobs for its 982,000-person labor force.

Water-related risk concerns have been mitigated by southern Nevada's water resource development and management history as well as the community's ability to demonstrate a viable plan to sustain water resources into the foreseeable future. This plan includes in part the development of a third water intake in Lake Mead as well as the in-state ground water program. When combined, these projects allow the community to maintain an ability to draw water from its primary existing source, the Colorado River, and to diversify available water resources. This is not only important to the community's ability to grow into the future but also its ability to meet the current water demands of existing residents and businesses.

The implications of a loss of confidence that southern Nevada's water resource plan is viable are compelling and potentially far-reaching. Immediately, southern Nevada could expect a sharp reduction in new capital investment, putting additional pressure on an already ravaged construction industry that currently represents 7.6 percent of the region's employment and more than 25 percent of its unemployed labor force. Southern Nevada businesses facing huge debt loads as a result of nation-leading declines in property values and large increases in long-term debts would also be expected to face even more challenges in refinancing debt or persuading lenders to take a longer view on investment maturities. Already depressed property values, residential and commercial, would be expected to fall further or remain fixed at depressed levels as buyers and bankers manifest their concern by inaction. State and local governments would likely see key ad valorem and sales tax revenues fall as well as their bond ratings reduced as future economic growth would be impaired by the risk of water shortage.

There is neither an industry nor a sector of the economy that would go unaffected; southern Nevada could expect sustained job losses and increasing population outmigration. Simply put, if the Nevada Supreme Court's ruling is ultimately viewed by the market as putting at risk the sustainability of southern Nevada's water resources, this would not only impair southern Nevada's ability to rebound from the current recession, but it may very well do severe damage to the state economy into the foreseeable future.

The second letter is from Guy Hobbs:

February 26, 2010

To: Julie Wilcox

From: Guy Hobbs

Re: Credit issues associated with water resource reliability

A question has been posed to us regarding the impact that uncertainty in the reliability of water resource delivery to southern Nevada might have within the credit markets. Without question, the impact will ultimately be significant, negative and far-reaching, and can be avoided if the impacts created by the recent Supreme Court decision can be mitigated as quickly as possible through legislative action.

The economy of southern Nevada and the State as a whole is heavily reliant upon growth and development. Roughly 20 percent of the economy in southern Nevada is directly or indirectly tied to construction, as are the fiscal systems of the State and local governments. This sector of our economy has been severely impacted by the recession, as evidenced by the high levels of unemployment in this sector and the degradation of revenues (e.g., sales tax, modified business tax, real property transfer tax, etc.) associated with greatly reduced levels of construction activity. Our ability to recover from the recession and return to a level of normalcy will greatly depend upon the rehabilitation and health of the construction sector.

Central to the recovery of the construction sector will be the confidence on the part of developers and investors in the future of the local economy and the reliability of key factors that either promote or impede investment and development. In this regard, there is nothing more central to these investment decisions than the reliability of water.

Likewise, it is a certainty that the credit markets will recognize that an uncertain future with respect to the reliability of water will dim the future hopes for economic recovery in southern Nevada. The concerns of the part of the credit community will be manifested in the form of reduced confidence and credit ratings and, more importantly, a higher cost of capital for necessary public infrastructure projects. Since such a large part of our economy and fiscal system is built to rely upon a healthy and robust construction sector, it is inevitable that the anticipation of reduced private sector investment in residential and commercial development will result in negative credit market implications.

There are two actions that can be taken to avoid the negative credit fallout that may result from the uncertainty surrounding the reliability of water delivery into the future. The first would be to restructure the fiscal system of the State to lessen the reliance upon growth and development. While this is a worthwhile task given the problems inherent within the system, this is far from a quick fix. Fixing the fiscal system, however, would not be a cure for this problem if the uncertainty of future water delivery were to remain in question. The second and more immediate approach would be to mitigate the uncertainty created by the recent Supreme Court ruling, allowing for the concerns regarding reliability to be alleviated.

The third letter is from Peter Miller, Managing Director of Public Financial Management:

February 27, 2010

To: Members of the Nevada Legislature (via Julie Wilcox)

From: Peter W. Miller, Managing Director
Public Financial Management, Inc.

Re: Credit concerns relating to water resource reliability in southern Nevada

I have been asked to review the briefing paper previously provided to you by Guy Hobbs regarding the concerns arising from the recent Supreme Court decision affecting the Southern Nevada Water Authority's water rights and water resource plan. Following are my observations and comments.

If the Southern Nevada Water Authority's water resource plan, including the water importation component of that plan, is called into question as a result of the Supreme Court decision, it is expected that the credit markets will view this as a noteworthy and negative development for the future of southern Nevada. Clearly, the reliable delivery of water into the future will be a determining factor for future investment in the community and, consequently, the economic growth and development of the area. Without sufficient and reliable water resources, it would be expected that the credit markets would view this as a material weakness in the future prospects of the community. Less than positive feelings on the part of the credit markets will translate into higher costs of borrowing for the community and diminished credit ratings.

I concur with the viewpoint previously noted in Mr. Hobbs' analysis that mitigation of the problems created by the Supreme Court decision should be considered at the earliest possible opportunity. Dealing with this issue now will help avoid the potential of near-term credit implications for Nevada issuers caused by the gap in the Southern Nevada Water Authority's water resource plan.

INSTITUTIONS EXPRESSING CONCERN

<u>Financial</u>

- Credit Swiss
- JP Morgan

<u>Investment</u>

- S & P Investment
- Moodys

<u>Investment Forums</u>

- Goldman Sachs
- Wall Street Journal

Finally, here is a short bio of Mr. Miller, attesting to his credentials:

Peter W. Miller, a Managing Director, joined Public Financial Management, Inc. in 1991 and is currently the manager of the firm's Western United States Practice.

Mr. Miller has, structured, and managed the sale of over $20 billion of tax-exempt debt. He has advised clients regarding the issuance of many types of debt including: fixed and variable rate general airport revenue bonds (both senior and subordinate), passenger facility charge revenue bonds, general obligation bonds, sales tax revenue bonds, lease and installment purchase certificates of participation, lease revenue bonds, tax increment bonds, water and sewer revenue bonds, current and advanced refunding bonds, general, special assessment and Mello-Roos special tax bonds, and tax and revenue anticipation notes.

A sample of Mr. Miller's clients include: San Francisco International Airport, McCarran International Airport (Las Vegas, NV), the City and County of San Francisco, the cities of Modesto, Folsom, Roseville, Rancho Cordova, Pittsburg, and Lincoln, Solano County, Clark County (NV), Clark County Regional Transportation Commission, and Contra Costa Transportation Authority, among others.

Mr. Miller was the Director of Public Finance for the City and County of San Francisco from 1986 to 1991. He was responsible for all debt issuance sold by the city. Some of the major financings and accomplishments during Mr. Miller's tenure as Director of Public Finance include: $137 million lease revenue bonds for the expansion of the Moscone Convention Center; $60.5 million lease revenue bonds refunding the 1979 Moscone lease revenue bonds; $145 million sewer revenue bonds used to build secondary treatment facilities; $316 million in general obligation bonds issued in six series; the creation of San Francisco's land-based financial plan (a series of Mello-Roos districts) to pay for the construction of the public infrastructure in the 300-acre Mission Bay multi-purpose development project; the development of San Francisco's first equipment lease-purchase program using tax exempt bonds; assisting the San Francisco Redevelopment Agency issue its first series of Mello-Roos bonds and several series of tax increment bonds totaling approximately $70 million, and developing the first strategic plan for the purchase and construction of city office buildings.

Mr. Miller received his Bachelor of Arts degree in American Studies from Syracuse University, his Master's Degree in Economics from Tufts University and his Masters Degree in City and Regional Planning from Harvard University, John F. Kennedy School of Government.

One of our primary concerns was whether the Supreme Court ruling creates questions in the minds of financial institutions about the viability of the southern Nevada water resource plan. These documents attest to the fact that it does and also describe the result of that loss of confidence. We are afraid that if you do not do something about the Supreme Court ruling, the repercussions will be as they describe.

SENATOR RAGGIO:

If we pass this measure, it is my understanding that all applications, such as the one from the SNWA, will be deemed active, regardless of whether they were "pending" at the time of the 2003 enactment of the amendment in the Legislature. On these applications, particularly the one being highlighted, the agencies or individuals who want to protest have filed their protests, so the time for filing any protest has expired. Since we are going back 10 years or more, we have not been able to locate some of the people who filed protests. If we do this, there may be new people who want to file a protest. Is there some way they will be accommodated so we can keep the applications active and give them some opportunity to make their protest?

MR. BIAGGI:

The way the amendment stands right now, it reopens the comment period only for those people whose rights are going to be impacted or are impacted and those who previously protested or the successors in interest of those protestants. It does not open the entire process, but limits it to that particular scope. It is important to point out that the delays that were put into place were not solely the responsibility and the result of the State Engineer's activities. Many of the protestants also requested delays to do more studies and analysis of the ground water system and other issues out there. The delays are the result of both sides of this case.

MR. POWERS:
After hearing the testimony tonight, I have made some notes about possible amendments to the measure that would address many of the issues and probably still be constitutionally defensible. I am not urging policy; I offer them only from a constitutionally defensible standpoint.

SENATOR HORSFORD:
Please put those amendments into writing so the Committee members can consider them at a later time.

SENATOR TOWNSEND:
Individuals who build things are required to provide evidence of water rights for projects to any loan applications they file. Lending institutions want to know you have all your permits and filed business licenses and so on, including proof that the water will be there at least for the length of the loan. If I am a lender, and this piece of legislation puts the borrower's water rights at risk, do I have the opportunity to say, "That loan is now at risk, and I'm going to call it"?

MR. POWERS:
The relationship between the lender and the borrower is contractual. If there is a provision in the contract allowing the lender to react to an impairment of the water rights, the lender would have those rights under the terms of the contract. If the lender does not have those rights under the terms of the contract, an impairment on or impact on the water rights in general would not affect that contractual loan arrangement.

SAM MCMULLEN (Las Vegas Chamber of Commerce):
Basically, the answer to Senator Townsend's question is yes, if it was a fundamental feature of the backing of the loan or the bonds, as is usually the case in municipalities. If that was something they relied on and the circumstance has changed, that can be a reason the lender would adjust the loan. As the world knows, there are a lot of loans being called right now. The availability of water is quite frequently a condition of the loan because they want to know they have the water for the life of the project or the life of the loan.

SENATOR HORSFORD:
Thank you. Do you have other comments?

MR. MCMULLEN:
Yes. I do not have a reputation for being brief, but I will try to be.
This issue would have ranked as the highest priority issue of the Las Vegas Chamber of Commerce in 2011 if it had not come up today. What we are asking you to do is not change anything. We are asking you to maintain the status quo.
Let me state it this way. There are adjudicated, which is a term in water law meaning you have been granted the ability to use the waters of the State, and there are thousands of those. While you might think about the ones that have lapsed or been denied, what you really do not want to throw into the air are the ones that currently have a right to use water. Should they have been adjudicated after a one-year period, that would throw them into question. Let me put some legs under that. Quite often, applications for water rights are stacked. You will find somebody who has filed right on top of your application, and if your application is granted, their application is not processed. You could have five applications stacked on top of each other, only one of which was filed in the last year. So the four previous applications, the ones filed first in time, would be knocked out.
What you need to do is exactly what the Supreme Court was indirectly asking you to do by implication: clarify the intention of the 2003 amendment. It is clear to those of us who were there that they need your definition of the intent, and that would resolve a lot of constitutional questions. What we are doing right now is putting a lot of the water rights of the state into turmoil at no need. If nothing else, it could be that your action today would hold the matter until 2011, when it could be fully vetted and deliberated on.

The question was asked about the 54 appellants. The language in the BDR in subsection 8, paragraph (e), gives notice and comment rights to those and their successors in interest. I have never appreciated the LCB's Legal Division more than when Mr. Powers said there are some ideas about how to make this more constitutionally defensible as a clarification of intent.

First and foremost, making sure that to the extent you limit it – it doesn't necessarily have to go back to 1947, it can go back a lesser amount of time. But to the extent AD is there, those prior protestants and their successors in interest are – and I don't know that you necessarily want put it up to everybody.

In answer to Senator Cegavske's question, this is not really about the substantive question of whether you want to move water from one valley to another. What the water engineer does is go through the physical attributes of that geography and hydrology and find out whether than can actually happen. That is all that is at issue here. If you want to make that decision, you have to make it in a different bill.

There is some concern about intervening in a judicial action. What is happening here is the highest court in our State is saying what they think the law means. If they did it incorrectly, you need to clarify your intent. Otherwise, the law will be in a state of turmoil as it will be played out over the next 12 months until you come back into session, and we do not want that.

This is one of the most important issues to southern Nevada and the entire State. Please do not put any obstacles in the way of our economic recovery. That will be critical to all of us in dealing with the problems we have today and those you will face in 2011.

Veronica Meter of the Las Vegas Chamber of Commerce was also interested in testifying, but in the interest of time we kept it to one person.

SENATOR HORSFORD:

I will close the hearing on BDR 48-21. I will ask Mr. Powers to draw up whatever amendments you would suggest, and we will bring it back to the Committee for further consideration.

SENATOR CARE:

The letters from Mr. Aguero and Mr. Hobbs make no mention of specific building projects. I am wondering what projects we are talking about here specifically that have been put at risk by this Supreme Court decision. We all know the Echelon was stopped, and the Fontainebleau and others, so I am not sure what projects we are talking about.

MR. MCMULLEN:

That question is just as dangerous as the questions asked by the *Wall Street Journal* about the future of Las Vegas. I can answer it generally, but I would rather not talk about specific projects. If there is any property out there that is leveraged, has huge loans right now and will need to refinance before this is resolved, those properties are at risk. Any properties that for their continued existence need to have their loan restructured or adjusted, and there are many of those in Nevada, they are jeopardized by this. The SNWA writes letters all the time saying that based on their water resource plan, they will commit and confirm that there are adequate water resources for the development of projects and the loans will not be in jeopardy because of the availability of water as a resource. New projects rely on the SNWA's ability to write those letters. Mr. Guild said it very well. By this decision, you could functionally say you have taken a stripe of the water resources out of the Las Vegas and Clark County water resource plan and depressed the availability of resources for them to fulfill that obligation. Consequently, anybody that wants that letter will not be able to in the current circumstances.

I apologize for not giving specifics, but I think you all understand why.

On the motion of Senator Townsend and second by Senator Wiener, the committee did rise and return to the Senate.

## SENATE IN SESSION

At 11:59 p.m.
President Krolicki presiding.
Quorum present.

### MESSAGES FROM THE ASSEMBLY

ASSEMBLY CHAMBER, Carson City, February 27, 2010

*To the Honorable the Senate:*

I have the honor to inform your honorable body that the Assembly amended, and on this day passed, as amended, Senate Bill No. 3, Amendment No. 7, and respectfully requests your honorable body to concur in said amendment.

LUCINDA BENJAMIN
*Assistant Chief Clerk of the Assembly*

### UNFINISHED BUSINESS

CONSIDERATION OF ASSEMBLY AMENDMENTS

Senate Bill No. 3.

The following Assembly amendment was read:

Amendment No. 7.

"SUMMARY—Revises provisions relating to governmental administration. (BDR S-16)"

"AN ACT relating to governmental administration; ~~[revising the amount of unpaid furlough leave that certain state employees are required to take during the 2010-2011 Fiscal Year;]~~ providing for a temporary reduction in salary in lieu of furlough leave for state employees who are exempt from taking unpaid furlough leave; requiring the approval of a plan for additional overtime to be approved before the overtime *is* worked; providing for a temporary reduction in compensation for employees of the Senate and Assembly; providing for the closing of state offices on certain days and the revision of the workweek of state employees with certain exceptions and exemptions; temporarily authorizing school districts to require employees to take unpaid furlough leave; prohibiting certain additional compensation *for* and adjustments to the salaries of newly hired classified state employees; and providing other matters properly relating thereto."

Legislative Counsel's Digest:

Existing law requires state employees to take unpaid furlough leave during the 2009-2011 biennium and authorizes exemptions from that requirement. (Sections 3 and 5 of chapter 391, Statutes of Nevada 2009, pp. 2159 and 2161) Section 1 of this bill ~~[increases the amount of unpaid furlough leave for full-time state employees from 8 hours per month to 10 hours per month for the 2010-2011 Fiscal Year. Section 1 also]~~ provides flexibility for employees of the Budget Division of the Department of Administration, Legislature and Legislative Counsel Bureau to use the unpaid furlough leave in increments of less than 1 day in the same manner as classified employees. In addition, section 1 authorizes school districts to require employees to take unpaid furlough leave unless the requirement would conflict with a collective bargaining agreement. Section 1 also provides that the furlough requirements

do not apply to a board, commission or agency *,* the sole function of which is regulating a profession, occupation or business and which is not subject to the State Budget Act.

Section 3 of this bill provides that certain exemptions from the furlough requirement must be approved by the Interim Finance Committee and that the salary of any employee who is exempt from the furlough requirement must be reduced by ~~[5.75]~~ *4.6* percent in lieu of furlough leave for the 2010-2011 Fiscal Year.

Existing law provides that employees who are subject to the furlough requirement be held harmless in the accumulation of retirement service credit and reported salary for purposes of the Public Employees' Retirement System. (Section 4 of chapter 391, Statutes of Nevada 2009, p. 2160) Section 2 of this bill provides similar protections for state employees whose salaries are reduced by ~~[5.75]~~ *4.6* percent in lieu of furlough leave but provides school districts with discretion as to whether such protections are provided to its employees.

Existing law sets forth the compensation of employees of the Senate and Assembly. (NRS 218A.605) Section 4 of this bill requires that such compensation be reduced by ~~[5.75]~~ *4.6* percent in lieu of furlough leave and prohibits certain step increases in that compensation for the 2010-2011 Fiscal Year.

Existing law requires that state offices be open for the transaction of business for at least 8 hours on every day of the year, with the exception of Saturdays, Sundays and legal holidays. (NRS 281.110) Except for certain boards, commissions and agencies, section 5 of this bill provides for the closing of state offices on Fridays and for the revision of the regular workweek of state employees to four 10-hour days. Section 5 also authorizes exemptions for state offices that must remain open on Fridays because of the need to provide appropriate services that are necessary to the protection of public health, safety and welfare. Section 5 further provides an extension of the time for filing any paper with or complying with any deadline involving a state office that is closed on Friday if the last day for filing the paper or complying with the deadline falls on that Friday. Section 6 of this bill provides additional exceptions to the requirements of section 5 for the employees of the Nevada System of Higher Education.

Section 7 of this bill provides that certain additional overtime required by state agencies may only be worked pursuant to a plan that is approved before the overtime is worked. Section 9 of this bill revises the calculation of overtime to account for workweeks consisting of 8-hour or 10-hour days and with respect to corrections officers of the Department of Corrections. *(NRS 284.180)*

Existing law authorizes certain supplemental compensation *for* and adjustments to the base rate of pay of classified employees for various purposes. (NRS 209.183, 284.175, NAC 284.206-284.218) Sections 7.5 and 8.5 of the bill prohibit such supplemental compensation *for* and adjustments

to the salaries of classified employees hired on or after March 1, 2010. *Section 13.5 of this bill ensures the continued payment of such supplemental compensation and adjustments as well as uniform allowances to current employees.*

Section 13 of this bill declares void all exemptions from furlough leave that were granted on or before June 30, 2010, but authorizes the reapplication for and granting of such exemptions. Section 14 of this bill sunsets on June 30, 2011, the [requirement:] *requirements:* (1) for unpaid furlough leave or a salary reduction in lieu of such leave; (2) that state agencies are closed on Fridays; and (3) that state employees work 10-hour days.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section 3 of chapter 391, Statutes of Nevada 2009, at page2159, is hereby amended to read as follows:

Sec. 3. 1. Except as otherwise provided in *subsection 9 and* section 5 of this act:

(a) For the period beginning on July 1, [2009,] *2010,* and ending on June 30, 2011, each employee of the State, other than a classified employee [,] *or an employee of the Legislature, Legislative Counsel Bureau or Budget Division of the Department of Administration,* shall take 1 day of unpaid furlough leave each month.

(b) Except as otherwise provided in subsection 5, the furlough requirement applies to all branches of state government and includes the Nevada System of Higher Education, the Public Employees' Retirement System and all other entities of state government.

➥ The requirements of this section do not apply to employees of the Department of Cultural Affairs whose standard workweek was reduced from 40 hours to 32 hours effective July 1, 2009.

2. Except as otherwise provided in this subsection, for the purposes of this section "1 day" consists of the number of hours an employee works in a standard workday, but not more than 8 *[10]* hours. An employee must take 1 day of furlough leave each month and cannot take portions of a day that combine to total the amount of the required monthly furlough leave. A full-time employee whose standard workday is longer than 8 *[10]* hours shall take 8 *[10]* hours of furlough leave on a single workday and may take annual leave for the remainder of the day, work a reduced schedule that day or work a modified schedule approved by his employer. An employee who works less than full time with a fixed schedule shall take as furlough leave the portion of an 8-hour *[a 10-hour]* day that his scheduled workweek or biweekly schedule bears to a full-time workweek or biweekly schedule.

3. For the period beginning on July 1, [2009,] *2010,* and ending on June 30, 2011, each employee in the classified service of the State [,] *and each employee of the Legislature, Legislative Counsel Bureau and Budget Division of the Department of Administration* shall:

(a) If he is a full-time employee, take 96 *[120]* hours of unpaid furlough leave . [each year.]

(b) If he is employed less than full time, take a number of hours of unpaid furlough leave [each year] which is equal to the average number of hours worked per working day multiplied by 12.

➥ An employee in the classified service of the State *or an employee of the Legislature, Legislative Counsel Bureau or Budget Division of the Department of Administration* may take unpaid furlough leave in portions of a day that combine to total the amount of required yearly leave. To the extent practicable, full-time classified employees *and full-time employees of the Legislature, Legislative Counsel Bureau and Budget Division of the Department of Administration* should take 8 *[10]* hours of unpaid furlough leave per month. To the extent practicable, a classified employee *or an employee of the Legislature, Legislative Counsel Bureau or Budget Division of the Department of Administration* who works less than full time with a fixed schedule should take as unpaid furlough leave the portion of an 8-hour *[a 10-hour]* day his scheduled workweek or biweekly schedule bears to a full-time workweek or biweekly schedule.

4. *For the period beginning on July 1, 2010, and ending on June 30, 2011, except as otherwise provided in subsection 8 and notwithstanding any other specific statute to the contrary, a school district may require each employee to take unpaid furlough leave in the amount and manner determined by the school district.*

*5.* Furlough leave pursuant to this section must be scheduled and approved in the same manner as other leave. Notwithstanding any statute or regulation to the contrary and except as otherwise provided by regulation adopted pursuant to this section by the Personnel Commission, an employee *of the State* who is on furlough leave is considered to have worked that day or portion of a day, as applicable, for all purposes except payment of salary and determination of overtime, including without limitation:

(a) Accrual of sick and annual leave;

(b) Determining the employee's pay progression date;

(c) Continuity of service and years of service for the purposes of payments pursuant to the plan to encourage continuity of service;

(d) The duration of a probationary period;

(e) Determining eligibility for holiday pay if the shift immediately precedes a holiday;

(f) Seniority for all purposes, including layoffs;

(g) The Public Employees' Benefits Program; and

(h) The Public Employees' Retirement System, including for the purposes of contributions to the System, subject to the requirements of sections 4 and 5 of this act.

[5.] *6.* The Board of Regents of the University of Nevada shall determine and implement the method by which:

(a) The professional employees of the Nevada System of Higher Education will participate in the furlough requirement pursuant to this section; or

(b) The overall costs for the professional employees of the Nevada System of Higher Education will be reduced in an amount at least equal to the savings which would have otherwise been produced by furlough leave pursuant to this section.

~~[6.]~~ *7.* Except as otherwise provided in subsection ~~[5,]~~ *6,* the Personnel Commission shall adopt regulations *which are applicable to employees of the State* to carry out the provisions of this section.

*8. The provisions of subsection 4 do not apply to the extent that those provisions conflict with the provisions of a collective bargaining agreement entered into pursuant to chapter 288 of NRS.*

*9. The provisions of this section do not apply to a board, commission or agency the sole function of which is the regulation of a profession, occupation or business and which is not subject to the provisions of NRS 353.150 to 353.246, inclusive.*

*10. As used in this section, "public employer" has the meaning ascribed to it in NRS 286.070.*

Sec. 2. Section 4 of chapter 391, Statutes of Nevada 2009, at page 2160, is hereby amended to read as follows:

Sec. 4. 1. It is the intent of the Legislature to establish a program whereby employees of the State and other participating *public* employers ~~[who]~~ *:*

*(a) Who* take furlough leave due to extreme fiscal need ~~[, including employees required to take furlough leave pursuant to section 3 of this act,]~~ *; or*

*(b) Whose salaries are reduced in lieu of furlough leave,*

➥ be held harmless in the accumulation of retirement service credit and reported salary pursuant to chapter 286 of NRS ~~[.]~~ *, except that, in the case of an employee of a school district, the school district shall determine whether the employee will be so held harmless.*

2. Except as otherwise required as a result of NRS 286.537 and notwithstanding the provisions of NRS 286.481, an employee is entitled to receive full service credit for time taken as furlough leave pursuant to the program established pursuant to section 3 of this act if:

(a) The employee *, if he is an employee of the State,* does not take more than 96 ~~*[120]*~~ hours of furlough leave ~~[in a year;]~~ *for the period beginning on July 1, 2010, and ending on June 30, 2011;* and

(b) The public employer certifies to the System that the employer is participating in the furlough program established pursuant to section 3 of this act and that the furlough leave which is reported for the employee is taken in accordance with the requirements of section 3 of this act.

3. In any month in which a day of furlough leave is taken, an employee is entitled to receive full-time service credit for the furlough leave in

accordance with the normal workday for the employee. An employee who is less than full time is entitled to service credit in the same manner and to the same extent as though the employee had worked the hours taken as furlough leave.

4. *If the salary of any member is reduced in lieu of furlough leave, the public employer shall certify to the System that the salary of that member has been so reduced.*

*5.* When a member is on furlough leave pursuant to the program certified by the public employer in accordance with this section, *or when the salary of a member is reduced in lieu of furlough leave and certified by the public employer in accordance with this section,* the public employer must:

(a) Include all information required by the System on the public employer's regular monthly retirement report as provided in NRS 286.460; and

(b) Pay all required employer and employee contributions to the System based on the compensation that would have been paid to the member but for the member's participation in the program. The public employer may recover from the employee the amount of the employee contributions set forth in NRS 286.410.

~~[5.]~~ *6.* Service credit under the program established pursuant to this section must be computed according to the fiscal year.

~~[6.]~~ *7.* As used in this section:

(a) "Member" has the meaning ascribed to it in NRS 286.050.

(b) "Public employer" has the meaning ascribed to it in NRS 286.070.

(c) "System" means the Public Employees' Retirement System.

Sec. 3. Section 5 of chapter 391, Statutes of Nevada 2009, at page 2161, is hereby amended to read as follows:

Sec. 5. 1. It is the intent of the Legislature to limit exceptions to the requirement of furlough leave for employees of the State pursuant to section 3 of this act to identified areas of critical need. If ~~[an]~~ *a state* employer, ~~[including the State,]~~ participating in the program established pursuant to section 3 of this act determines that a position cannot be subject to furlough leave because of the need to provide appropriate services that are necessary to the protection of public health, safety and welfare, the governing body of the agency must make findings on the record in a public meeting that:

(a) The position is necessary to the protection of public health, safety, or welfare;

(b) The public health, safety or welfare will be significantly diminished if mandatory furlough leave is implemented for employees in these positions; *and*

(c) No alternatives exist to provide for the protection of public health, safety or welfare . ~~[; and~~

~~(d) The agency has identified and will implement other methods to reduce overall costs equal to the savings produced by furlough leave under the~~

~~program or received an allocation of funds as set forth in section 8 of this act.]~~

2. For the purposes of subsection 1:

(a) Except as otherwise provided in this subsection, the State Board of Examiners shall determine positions within the Executive Branch of State Government that cannot be subject to furlough leave. *Any such determination is not effective unless approved by the Interim Finance Committee.*

(b) The Board of Regents shall determine positions within the Nevada System of Higher Education that cannot be subject to furlough leave. *Any such determination is not effective unless approved by the Interim Finance Committee.*

(c) The Public Employees' Retirement Board shall determine positions within the Public Employees' Retirement System that cannot be subject to furlough leave.

(d) The Supreme Court shall determine positions within the Judicial Branch of State Government that cannot be subject to furlough leave.

(e) The Legislative Commission shall determine positions within the Legislative Branch of State Government that cannot be subject to furlough leave.

3. The entities described in subsection 2 shall report to the Interim Finance Committee on a quarterly basis all positions that have been determined not to be subject to furlough leave pursuant to this section and the reasons for such determinations.

*4. The salary of any position that has been determined not to be subject to furlough leave pursuant to this section must be reduced by an amount of ~~[5.75]~~ 4.6 percent in lieu of furlough leave, except that the payment of any special or other adjustments to the base rate and any overtime that is worked by an employee who is filling such a position must be calculated based on the employee's unreduced salary.*

Sec. 4. *For the period beginning on July 1, 2010, and ending on June 30, 2011:*

*1. The compensation of employees of the Senate and Assembly due pursuant to NRS 218A.605 must be reduced by ~~[5.75]~~ 4.6 percent in lieu of furlough leave;*

*2. In calculating the amount of compensation due such an employee pursuant to NRS 218A.605, no additional step increase authorized by that section may be applied; and*

*3. If such an employee is a member of the Public Employees' Retirement System who is contributing to the System, the provisions of section 4 of chapter 391, Statutes of Nevada 2009, at page 2160, as amended by section 2 of this act, apply with respect to the employee.*

Sec. 5. *1. Notwithstanding the provisions of NRS 281.110 or any other statute or regulation to the contrary, except as otherwise provided in this section and section 6 of this act, for the period beginning on July 1, 2010, and ending on June 30, 2011, the offices of all state officers, departments,*

*boards, commissions and agencies must be closed on Fridays and be open for the transaction of business at least from 7 a.m. until 12 p.m. and from 1 p.m. until 6 p.m. on Monday through Thursday. The workweek of the employees of those offices must consist of four 10-hour days, Monday through Thursday.*

*2. During any week in which falls one or more legal holidays pursuant to NRS 236.015, all such offices must be open for the transaction of business at least from 8 a.m. until 12 p.m. and from 1 p.m. until 5 p.m. on each day which is not a legal holiday, and the workweek of the employees of those offices during that week must consist of 8-hour days.* ~~[No furlough leave may be taken by an employee on any 8-hour day described in this subsection.]~~

*3. An office and its employees may be exempted from the requirements of this section upon a determination pursuant to subsection 4 that the office must remain open on Fridays because of the need to provide appropriate services that are necessary to the protection of public health, safety and welfare.*

*4. For the purposes of subsection 3:*

*(a) Except as otherwise provided in this subsection, the State Board of Examiners shall determine exemptions from the requirements of this section for offices within the Executive Branch of State Government.*

*(b) The Board of Regents shall determine exemptions from the requirements of this section for offices within the Nevada System of Higher Education.*

*(c) The Public Employees' Retirement Board shall determine exemptions from the requirements of this section for offices within the Public Employees' Retirement System.*

*(d) The Supreme Court shall determine exemptions from the requirements of this section for offices within the Judicial Branch of State Government.*

*(e) The Legislative Commission shall determine exemptions from the requirements of this section for offices within the Legislative Branch of State Government.*

*5. An entity described in subsection 4 shall report to the Interim Finance Committee not later than 60 days after determining that an office is exempt from the requirements of this section concerning the determination and the reasons for the determination.*

*6.* ~~[Notwithstanding the provisions of section 3 of chapter 391, Statutes of Nevada 2009, at page 2159, as amended by section 1 of this act, to the contrary, an employee of an office that is exempted from the requirements of this section may take portions of a day as furlough leave that combine to total the amount of the furlough leave required by that section, except that any such employee described in NRS 284.148 shall take all required furlough leave each month during the same week.~~

~~7.]~~ *If the last day limited by a specific statute for filing any paper with or complying with any deadline involving an office that is closed on a Friday*

*pursuant to this section falls on that Friday, the period so limited must expire on the following business day at 5 p.m.*

~~[8.]~~ 7. *The provisions of this section do not apply to a board, commission or agency , the sole function of which is the regulation of a profession, occupation or business and which is not subject to the provisions of NRS 353.150 to 353.246, inclusive.*

Sec. 6. *For the period beginning on July 1, 2010, and ending on June 30, 2011, the Board of Regents shall establish a schedule consisting of rolling 10-hour days which is designed to allow staffing by employees of the Nevada System of Higher Education on Monday through Friday, with each employee working on only four of those days.*

Sec. 7. *For the period beginning on July 1, 2010, and ending on June 30, 2011, if any state agency determines that it will require its employees to work more overtime than the amount of overtime the state agency required of its employees during the preceding fiscal year or, if the overtime requirements of the state agency vary substantially during each year of a biennium, during the corresponding year of the preceding biennium, the additional overtime may only be worked pursuant to a plan that is approved in advance by one of the following entities:*

*1. Except as otherwise provided in this section, the State Board of Examiners must approve overtime plans for the Executive Branch of State Government.*

*2. The Board of Regents must approve overtime plans for the Nevada System of Higher Education.*

*3. The Public Employees' Retirement Board must approve overtime plans for the Public Employees' Retirement System.*

*4. The Supreme Court must approve overtime plans for the Judicial Branch of State Government.*

*5. The Legislative Commission must approve overtime plans for the Legislative Branch of State Government.*

Sec. 7.5. NRS 209.183 is hereby amended to read as follows:

209.183 In addition to his or her regular salary, each person employed *before March 1, 2010,* by the Department of Corrections or the Division of Forestry of the State Department of Conservation and Natural Resources at the Southern Nevada Correctional Center, the Southern Desert Correctional Center, the Indian Springs Conservation Camp, the correctional institution identified as the Men's Prison No. 7 in chapter 656, Statutes of Nevada 1995, and chapter 478, Statutes of Nevada 1997, or the Jean Conservation Camp is entitled to receive, as compensation for travel expenses, not more than $7.50 for each day he or she reports to work if his or her residence is more than 25 miles from the respective facility. The total cost for compensation for travel expenses authorized by this section must not exceed the amount specially appropriated for this purpose.

~~Sec. 7.7.~~ *NRS 227.150 is hereby amended to read as follows:*

~~227.150~~ 1. The State Controller shall:

(a) Open and keep an account with each county, charging the counties with the revenue collected, as shown by the auditor's statements, and also with their proportions of the salaries of the district judges, and crediting them with the amounts paid to the State Treasurer.

(b) Keep and state all accounts between the State of Nevada and the United States, or any state or territory, or any person or public officer of this State, indebted to the State or entrusted with the collection, disbursement or management of any money, funds or interests arising therefrom, belonging to the State, of every character and description, if the accounts are derivable from or payable into the State Treasury.

(c) Settle the accounts of all county treasurers, and other collectors and receivers of all state revenues, taxes, tolls and incomes, levied or collected by any act of the Legislature and payable into the State Treasury.

(d) Keep fair, clear, distinct and separate accounts of all the revenues and incomes of the State, and of all the expenditures, disbursements and investments thereof, showing the particulars of every expenditure, disbursement and investment.

2. The State Controller may:

(a) Direct the collection of all accounts or money due the State, except as otherwise provided in chapter 353C of NRS, and if there is no time fixed or stipulated by law for the payment of any such accounts or money, they are payable at the time set by the State Controller.

(b) Upon approval of the Attorney General, direct the cancellation of any accounts or money due the State.

(c) Except as otherwise provided in subsection 3, withhold from the compensation of an employee of the State any amount due the State for the overpayment of the salary of the employee that has not been satisfied pursuant to subsection ~~[8]~~ *9* of NRS 284.350 or in any other manner.

3. Before any amounts may be withheld from the compensation of an employee pursuant to paragraph (c) of subsection 2, the State Controller shall:

(a) Give written notice to the employee of the State Controller's intent to withhold such amounts from the compensation of the employee; and

(b) If requested by the employee within 10 working days after receipt of the notice, conduct a hearing and allow the employee the opportunity to contest the State Controller's determination to withhold such amounts from the compensation of the employee.

➥ If the overpayment was not obtained by the employee's fraud or willful misrepresentation, any withholding from the compensation of the employee must be made in a reasonable manner so as not to create an undue hardship to the employee.

4. The State Controller may adopt such regulations as are necessary to carry out the provisions of this section.

Sec. 8. (Deleted by amendment.)

Sec. 8.1. NRS 284.065 is hereby amended to read as follows:

284.065 1. The Commission has only such powers and duties as are authorized by law.

2. In addition to the powers and duties set forth elsewhere in this chapter, the Commission shall:

(a) Advise the Director concerning the organization and administration of the Department.

(b) Report to the Governor biennially on all matters which the Commission may deem pertinent to the Department and concerning any specific matters previously requested by the Governor.

(c) Advise and make recommendations to the Governor or the Legislature relative to the personnel policy of the State.

(d) ~~[Adopt]~~ *Except as otherwise provided in subsection 4 of NRS 284.175, adopt* regulations to carry out the provisions of this chapter.

(e) Foster the interest of institutions of learning and of civic, professional and employee organizations in the improvement of personnel standards in the state service.

(f) Review decisions of the Director in contested cases involving the classification or allocation of particular positions.

(g) Exercise any other advisory powers necessary or reasonably implied within the provisions and purposes of this chapter.

Sec. 8.3. NRS 284.155 is hereby amended to read as follows:

284.155 1. ~~[The]~~ *Except as otherwise provided in subsection 4 of NRS 284.175, the* Commission shall adopt a code of regulations for the classified service.

2. The code must include regulations concerning certifications and appointments for:

(a) Positions in classes having a maximum salary of $12,500 or less as of December 31, 1980, where the regular procedures for examination and certification are impracticable; and

(b) Classes where applicants for promotion are not normally available.

➥ These regulations may be different from the regulations concerning certifications and appointments for other positions in the classified service.

Sec. 8.5. NRS 284.175 is hereby amended to read as follows:

284.175 1. After consultation with appointing authorities and state fiscal officers, the Director shall prepare a pay plan for all employees in the classified service.

2. The pay plan and its amendments become effective only after approval by the Governor.

3. ~~[The]~~ *Except as otherwise provided in subsection 4, the* pay plan must include, without limitation, ranges for each class, grade or group of positions in the classified service. Each employee in the classified service must be paid at one of the rates set forth in the pay plan for the class of position in which the employee is employed and at such time as necessary money is made available for the payment.

4. *The pay plan may not include any special or other adjustments to the base rates set forth in the pay plan for employees hired on or after March 1, 2010.*

*5.* The Commission shall adopt regulations to carry out the pay plan.

~~[5.]~~ *6.* The Director may make recommendations to the Legislature during regular legislative sessions concerning salaries for the classified service of the State. In making such recommendations, the Director shall consider factors such as:

(a) Surveys of salaries of comparable jobs in government and private industry within the State of Nevada and western states, where appropriate;

(b) Changes in the cost of living;

(c) The rate of turnover and difficulty of recruitment for particular positions; and

(d) Maintaining an equitable relationship among classifications.

Sec. 9. NRS 284.180 is hereby amended to read as follows:

284.180 1. The Legislature declares that since uniform salary and wage rates and classifications are necessary for an effective and efficient personnel system, the pay plan must set the official rates applicable to all positions in the classified service, but the establishment of the pay plan in no way limits the authority of the Legislature relative to budgeted appropriations for salary and wage expenditures.

2. Credit for overtime work directed or approved by the head of an agency or the representative of the head of the agency must be earned at the rate of time and one-half, except for those employees described in NRS 284.148.

3. Except as otherwise provided in subsections 4, 6, 7 and 9 ~~[,]~~ *:*

*(a) During a workweek consisting of 10-hour days, overtime is considered time worked in excess of:*

*(1) Ten hours in 1 calendar day;*

*(2) Ten hours in any 18-hour period; or*

*(3) A 40-hour week.*

*(b) During a workweek consisting of 8-hour days,* overtime is considered time worked in excess of:

~~[(a)]~~ *(1)* Eight hours in 1 calendar day;

~~[(b)]~~ *(2)* Eight hours in any 16-hour period; or

~~[(c)]~~ *(3)* A 40-hour week.

4. Firefighters who choose and are approved for a 24-hour shift shall be deemed to work an average of 56 hours per week and 2,912 hours per year, regardless of the actual number of hours worked or on paid leave during any biweekly pay period. A firefighter so assigned is entitled to receive 1/26 of the firefighter's annual salary for each biweekly pay period. In addition, overtime must be considered time worked in excess of:

(a) Twenty-four hours in one scheduled shift; or

(b) Fifty-three hours average per week during one work period for those hours worked or on paid leave.

➥ The appointing authority shall designate annually the length of the work period to be used in determining the work schedules for such firefighters. In addition to the regular amount paid such a firefighter for the deemed average of 56 hours per week, the firefighter is entitled to payment for the hours which comprise the difference between the 56-hour average and the overtime threshold of 53 hours average at a rate which will result in the equivalent of overtime payment for those hours.

5. The Commission shall adopt regulations to carry out the provisions of subsection 4.

6. ~~[For employees who choose and are approved for a variable workday, overtime will be considered only after working 40 hours in 1 week.]~~ *Corrections Officers of the Department of Corrections must be scheduled to work not less than three consecutive 12-hour shifts and not less than seven 12-hour shifts during each 14-day pay period. Overtime must be considered time worked in excess of:*

*(a) Twelve hours in one shift; or*

*(b) Eighty-four hours in any 14-day pay period.*

7. Employees who are eligible under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201 et seq., to work a variable ~~[80-hour]~~ work schedule within a biweekly pay period ~~[and who choose and are approved for such a work schedule]~~ will be considered eligible for overtime ~~[only after working 80 hours biweekly, except those eligible employees who are approved for overtime in excess of one scheduled shift of 8 or more hours per day.]~~ *in accordance with the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201 et seq.*

8. An agency may experiment with innovative workweeks upon the approval of the head of the agency and after majority consent of the affected employees. The affected employees are eligible for overtime only after working 40 hours in a workweek.

9. This section does not supersede or conflict with existing contracts of employment for employees hired to work 24 hours a day in a home setting. Any future classification in which an employee will be required to work 24 hours a day in a home setting must be approved in advance by the Commission.

10. All overtime must be approved in advance by the appointing authority or the designee of the appointing authority. No officer or employee, other than a director of a department or the chair of a board, commission or similar body, may authorize overtime for himself or herself. The chair of a board, commission or similar body must approve in advance all overtime worked by members of the board, commission or similar body.

11. The Budget Division of the Department of Administration shall review all overtime worked by employees of the Executive Department to ensure that overtime is held to a minimum. The Budget Division shall report quarterly to the State Board of Examiners the amount of overtime worked in the quarter within the various agencies of the State.

Sec. 10. NRS 284.350 is hereby amended to read as follows:

284.350 1. Except as otherwise provided in subsections 2, 3 [and 4,] *, 4 and 5,* an employee in the public service, whether in the classified or unclassified service [,] *:*

*(a) Except as otherwise provided in paragraph (b),* is entitled to annual leave with pay of [1 1/4 working days] *10 hours* for each month of continuous public service. The annual leave may be cumulative from year to year not to exceed [30 working days.] *240 hours.*

*(b) Who works 24 hours in one scheduled shift is entitled to annual leave with pay of 1 1/4 working days for each month of continuous public service. The annual leave may be cumulative from year to year not to exceed 30 working days.*

➥ The Commission may by regulation provide for additional annual leave for long-term employees and for prorated annual leave for part-time employees.

2. Except as otherwise provided in this subsection [,] *and subsection 3,* any annual leave in excess of [30 working days] *240 hours* must be used before January 1 of the year following the year in which the annual leave in excess of [30 working days] *240 hours* is accumulated or the amount of annual leave in excess of [30 working days] *240 hours* is forfeited on that date. If an employee:

(a) On or before October 15, requests permission to take annual leave; and

(b) The employee's request for leave is denied in writing for any reason,

➥ the employee is entitled to payment for any annual leave in excess of [30 working days] *240 hours* which the employee requested to take and which the employee would otherwise forfeit as the result of the denial of the employee's request, unless the employee has final authority to approve use of the employee's own accrued leave and the employee received payment pursuant to this subsection for any unused annual leave in excess of [30 working days] *240 hours* accumulated during the immediately preceding calendar year. The payment for the employee's unused annual leave must be made to the employee not later than January 31.

3. *Except as otherwise provided in this subsection, any annual leave in excess of 30 working days of an employee who works 24 hours in one scheduled shift must be used before January 1 of the year following the year in which the annual leave in excess of 30 working days is accumulated or the amount of annual leave in excess of 30 working days is forfeited on that date. If such an employee:*

*(a) On or before October 15, requests permission to take annual leave; and*

*(b) The employee's request for leave is denied in writing for any reason,*

➥ *the employee is entitled to payment for any annual leave in excess of 30 working days which the employee requested to take and which the employee would otherwise forfeit as the result of the denial of the employee's request, unless the employee has final authority to approve use of the*

*employee's own accrued leave and the employee received payment pursuant to this subsection for any unused annual leave in excess of 30 working days accumulated during the immediately preceding calendar year. The payment for the employee's unused annual leave must be made to the employee not later than January 31.*

*4.* Officers and members of the faculty of the Nevada System of Higher Education are entitled to annual leave as provided by the regulations adopted pursuant to subsection 2 of NRS 284.345.

[4.] *5.* The Commission shall establish by regulation a schedule for the accrual of annual leave for employees who regularly work more than 40 hours per week or 80 hours biweekly. The schedule must provide for the accrual of annual leave at the same rate proportionately as employees who work a 40-hour week accrue annual leave.

[5.] *6.* No elected state officer may be paid for accumulated annual leave upon termination of the officer's service.

[6.] *7.* During the first 6 months of employment of any employee in the public service, annual leave accrues as provided in subsection 1, but no annual leave may be taken during that period.

[7.] *8.* No employee in the public service may be paid for accumulated annual leave upon termination of employment unless the employee has been employed for 6 months or more.

[8.] *9.* Upon the request of an employee, the appointing authority of the employee may approve the reduction or satisfaction of an overpayment of the salary of the employee that was not obtained by the fraud or willful misrepresentation of the employee with a corresponding amount of the accrued annual leave of the employee.

Sec. 11. NRS 284.355 is hereby amended to read as follows:

284.355 1. Except as otherwise provided in this section, all employees in the public service, whether in the classified or unclassified service, are entitled to sick and disability leave with pay of [1 1/4 working days] *10 hours* for each month of service, which may be cumulative from year to year. After an employee has accumulated [90 working days] *720 hours* of sick leave, the amount of additional unused sick leave which the employee is entitled to carry forward from 1 year to the next is limited to one-half of the unused sick leave accrued during that year, but the Commission may by regulation provide for subsequent use of unused sick leave accrued but not carried forward because of this limitation in cases where the employee is suffering from a long-term or chronic illness and has used all sick leave otherwise available to the employee.

2. *Except as otherwise provided in this section, employees who work 24 hours in one scheduled shift are entitled to sick and disability leave with pay of 1 1/4 working days for each month of service, which may be cumulative from year to year. After an employee has accumulated 90 working days of sick leave, the amount of additional unused sick leave which the employee is entitled to carry forward from 1 year to the next is*

*limited to one-half of the unused sick leave accrued during that year, but the Commission may by regulation provide for subsequent use of unused sick leave accrued but not carried forward because of this limitation in cases where the employee is suffering from a long-term or chronic illness and has used all sick leave otherwise available to the employee.*

*3.* Upon the retirement of an employee, the employee's termination through no fault of the employee or the employee's death while in public employment, the employee or the employee's beneficiaries are entitled to payment:

(a) For the employee's unused sick leave in excess of [30 days,] *240 hours* [,] *for employees to which subsection 1 applies and 30 days for employees to whom subsection 2 applies,* exclusive of any unused sick leave accrued but not carried forward, according to the employee's number of years of public service, except service with a political subdivision of the State, as follows:

(1) For 10 years of service or more but less than 15 years, not more than $2,500.

(2) For 15 years of service or more but less than 20 years, not more than $4,000.

(3) For 20 years of service or more but less than 25 years, not more than $6,000.

(4) For 25 years of service, not more than $8,000.

(b) For the employee's unused sick leave accrued but not carried forward, an amount equal to one-half of the sum of:

(1) The employee's hours of unused sick leave accrued but not carried forward; and

(2) An additional 120 hours.

[3.] *4.* The Commission may by regulation provide for additional sick and disability leave for long-term employees and for prorated sick and disability leave for part-time employees.

[4.] *5.* An employee entitled to payment for unused sick leave pursuant to subsection 2 may elect to receive the payment in any one or more of the following forms:

(a) A lump-sum payment.

(b) An advanced payment of the premiums or contributions for insurance coverage for which the employee is otherwise eligible pursuant to chapter 287 of NRS. If the insurance coverage is terminated and the money advanced for premiums or contributions pursuant to this subsection exceeds the amount which is payable for premiums or contributions for the period for which the former employee was actually covered, the unused portion of the advanced payment must be paid promptly to the former employee or, if the employee is deceased, to the employee's beneficiary.

(c) The purchase of additional retirement credit, if the employee is otherwise eligible pursuant to chapter 286 of NRS.

~~[5.]~~ *6.* Officers and members of the faculty of the Nevada System of Higher Education are entitled to sick and disability leave as provided by the regulations adopted pursuant to subsection 2 of NRS 284.345.

~~[6.]~~ *7.* The Commission may by regulation provide policies concerning employees with mental or emotional disorders which:

(a) Use a liberal approach to the granting of sick leave or leave without pay to such an employee if it is necessary for the employee to be absent for treatment or temporary hospitalization.

(b) Provide for the retention of the job of such an employee for a reasonable period of absence, and if an extended absence necessitates separation or retirement, provide for the reemployment of such an employee if at all possible after recovery.

(c) Protect employee benefits, including, without limitation, retirement, life insurance and health benefits.

~~[7.]~~ *8.* The Commission shall establish by regulation a schedule for the accrual of sick leave for employees who regularly work more than 40 hours per week or 80 hours biweekly. The schedule must provide for the accrual of sick leave at the same rate proportionately as employees who work a 40-hour week accrue sick leave.

~~[8.]~~ *9.* The Department may investigate any instance in which it believes that an employee has taken sick or disability leave to which the employee was not entitled. If, after notice to the employee and a hearing, the Commission determines that the employee has taken sick or disability leave to which the employee was not entitled, the Commission may order the forfeiture of all or part of the employee's accrued sick leave.

Sec. 12. Any use of the term "working day" in a regulation of the Personnel Commission which concerns the earning, calculation or use of annual leave or sick leave must be interpreted to mean a period of work consisting of 8 hours until that regulation is otherwise amended by the Personnel Commission.

Sec. 13. 1. Each exemption from furlough leave which was granted on or before June 30, 2010, is hereby declared void.

2. The provisions of subsection 1 do not preclude the reapplication for and granting of any exemption that is declared void by subsection 1.

Sec. 13.5. 1. Notwithstanding any contrary order, directive, policy or request made by any other officer or agency of the Executive Department of the State Government, the Department of Personnel or other responsible officer or agency shall administer, carry out and make payments pursuant to NRS 209.183 *and 281.121* and NAC 284.206, 284.208, 284.210, 284.214 and 284.218, as those provisions existed on February 23, 2010, to any employee as defined in this section who:

(a) Was receiving such payments on February 23, 2010, in accordance with the provisions of those statutes and regulations; or

(b) Becomes eligible to receive such payments on or after February 23, 2010, in accordance with the provisions of those statutes and regulations.

2. This section does not:

(a) Make any employee eligible to receive such payments if the employee does not otherwise meet the criteria to receive such payments in accordance with the provisions of those statutes and regulations.

(b) Prohibit the Department of Personnel *or other responsible officer or agency* from stopping such payments to any employee when the employee no longer meets the criteria to receive such payments in accordance with the provisions of those statutes and regulations.

3. As used in this section, "employee" means a person who:

(a) Is employed by the Executive Department of the State Government on February 23, 2010; or

(b) Was employed by the Executive Department of the State Government on or before February 23, 2010, and who returns to employment with the Executive Department of the State Government on or after that date.

4. The term "employee" does not include any person who is employed by the Executive Department of the State Government for the first time after February 23, 2010.

Sec. 14. 1. This section and sections 7.5, 8.1, 8.3, 8.5 and 13.5 of this act become effective upon passage and approval.

2. Sections 1 to 7, inclusive, *7.7,* 8, 9 to 12, inclusive, and 13 of this act become effective on July 1, 2010.

3. Sections 1 to 7, inclusive, *7.7,* 12 and 13 of this act, and sections 3, 4 and 5 of chapter 391, Statutes of Nevada 2009, expire by limitation on June 30, 2011.

Senator Horsford moved that the Senate concur in the Assembly amendment to Senate Bill No. 3.

Remarks by Senators Horsford and Coffin..

Senator Horsford requested that the following remarks be entered in the Journal.

SENATOR HORSFORD:

This was an issue that was caught by the Assembly. There are state workers who work on a 24-hour shift whose accumulated leave needed to be included in the bill, and it was not caught in the original version.

SENATOR COFFIN:

In addition to that, does this amendment also restore the pay that had been reduced by the Senate in a prior action?

SENATOR HORSFORD:

Yes, it does. This amendment will not increase further the impact to state workers, based on the furlough moving from an 8-hour day to a 10-hour day. The additional 1.16 percent that would have been taken out of their pay will not be taken, with this amendment.

Motion carried by a constitutional majority.
Bill ordered enrolled.

SIGNING OF BILLS AND RESOLUTIONS

There being no objections, the President and Secretary signed Assembly Bills Nos. 3, 4, 5; Assembly Concurrent Resolution No. 2.

Senator Horsford moved that the Senate adjourn until Sunday, February 28, 2010, at 11 a.m.
Motion carried.

Senate adjourned at 12:02 a.m.

Approved: BRIAN K. KROLICKI
*President of the Senate*

Attest: CLAIRE J. CLIFT
*Secretary of the Senate*

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