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RE: AB 131: proposed amendments to NRS 383

Good day to all of you.

Frankly I am at a bit of a loss as to how to begin a discussion concerning this proposed legislation. As I read the bill for the first time I thought to myself "this is the bright idea of some well intentioned beaurocrat with way too much spare time. There seems to be an attitude that regards the public as needing supervision, and the inability of existing legislation and law enforcement to satisfy his/her desires. Therefor the necessity for a citizen vigilante group needs to be established directly under his/her supervision. This is what I would refer to as "empire building".

Now I understand that this may represent a position that could be described as paranoid, but the size of the current body of law is staggering. I believe that a great deal of thought should be given before more law is created. Particularly laws with the words "must" and "shall", rather than "may".

Some people would characterize my criticisms of this bill as "sour grapes". I have been sued by the Attorney General of Nevada regarding the regulation of cultural resources. The "cultural resource" concerned in the suit was my private residence and my private personal property. My home which I have owned and occupied since 1973, is located in the Comstock Historic District. I am acutely aware of the importance of the language contained in a law and in the practical application of that language, that is the administrative interpretation. I am also familiar with the economics of defending a suit.

There are a few very important concepts regarding this bill which should be kept in mind as the language is reviewed. First and foremost, the proposed language would apply to private as well as publicly owned "cultural resources". Second, there is no independent oversight of the program. The "administrator" is wholly and completely in charge of the entire program. Last but not least, no concrete results can be expected from the monitoring activities.

ASSEMBLY NATURAL RES., AGRICULTURE & MINING
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SUBMITTED BY: Larry Wahrenbrock

The mandate regarding the public awareness and education aspect certainly has value. The current legislation under which the State Office operates allows for the same activities as proposed here. Additionally the 1995 Nevada Historic Preservation Plan, the most current, encompasses virtually all of the concepts (see Goal1: Objective 1A, 1B, 1C, 1F, Goal 4: Objective 4A & D, Goal 6,) envisioned in this legislation. Is there redundancy here ?

A line by line analysis follows:
The actual language of the bill is in quotations

1. "The Administrator shall, by regulation, establish a stewardship program to ...
(a) Protect cultural resources in this state;"
When I hear the word "protect", a number of questions come to mind. First, how are the resources to be protected? What kinds of activities can be construed which would constitute damaging acts? Are these acts criminal or civil in nature? What form(s) of punishment are appropriate for persons found guilty of such acts? Is this legislature willing to allow (mandate) a state administrator to develop a body of regulatory law which will define acts which are to be considered detrimental to cultural resources and then provide for penalties and remedies for violative offenses? Will these regulations apply to all legal persons as well as government agencies? There appears to me that significant jurisdictional issues are left unaddressed by this language. There also appears to be serious constitutional issues relative to due process, equal protection, private property rights, etc. May I suggest that we consider the recent destruction of a nationally recognized cultural resource, the Mapes Hotel in Reno. In this circumstance there was certainly "damage" done. I ask what difference this legislation could make in that situation and could the proposed language withstand a constitutional test ? Then I ponder the issues of law involved, think of how regulations are promulgated by a state agency, wonder about regulation by adjudication rather than by duly adopted rules and regulations, look to the legislative intent, and frankly I come to the conclusion that this proposal is so broad and permissive that as a private citizen who owns a cultural resource I must immediately seek legal counsel.

(c) "Discourage ...the sale or trade of artifacts"
How? if it is illegal to sale or trade artifacts at present there is no need for this legislation. If it is not, then would it not be more reasonable to develop legislation which does make it illegal, assuming that such legislation could pass a constitutional test. I read this and consider that my personal residence is a cultural resource and therefor I assume since it is an object that it could be considered an artifact and then realize that this proposed

language directs the administrator of a state agency to "discourage" the sale of my home? What is this all about? I would suggest that specific definitions of "artifacts", and "archeological and paleontological materials" must be included in the language as well as some guidance regarding what kinds of behavior would be appropriate to discourage the sale or trade.

(d) "Support the adoption and enforcement of .....laws and regulations to protect cultural resources;"
What support can be offered by "the Administrator"? Does this language anticipate the administrator lobbying the US Congress? Is he/she to take this language to mean that local zoning ordinances should address the protection of cultural resources in a manner they do not currently and he/she should develop model legislation and advocate the adoption of such?

(e) "Support and encourage high standards for the investigation of cultural resources throughout the state;".
I fail to comprehend the meaning of this language. Are there established criteria for the investigation of cultural resources which constitute "standards for investigation"? Are these some how lacking and in need of support and encouragement ? Where can I obtain a copy ?

(f) Promote cooperation among agencies, organizations, Native American tribes and natural persons who are concerned about the protection of cultural resources and enter into agreements with such agencies, organizations, Native American tribes and natural persons to promote the protection of cultural resources; and"
The language here brings up the question of private contracts with private persons by the administrator. I am not sure of the full ramifications of this but the necessity for such "agreements" puzzles me. I would think that there exists other language in NRS regarding this issue which enumerates certain oversight provisions as well as other requirements when state agencies enter into contracts with other entities for whatever purpose.

(g) Add to the inventory of cultural resources maintained pursuant to NRS 383.021.
This seems absolutely redundant and unnecessary. Unless there is a problematic issue with the abilities of the administrator to maintain and add to the inventory as it now stands. The responsibility of adding to the inventory should not be displaced to a program of volunteers.

2. "The administrator shall select, train, and certify volunteers to serve in the stewardship program based on policy, criteria and procedures established by the administrator." This language places the administrator in

the position of being judge and jury. Where is the oversight? What if someone is denied certification after being selected and trained? What if a person is denied selection? Will there be an appeal process established? Will the principals of affirmative action apply? I ask you if this language does not provide a prescription for the creation of a citizen vigilante group under the sole and direct authority and exclusive supervision of a classified state employee? Is there a constitutional basis for such a legislative action?

3. "The stewardship program must.."
(a) In cooperation with agencies, organizations, Native American tribes and natural persons who are concerned with the protection of cultural resources, create a list of sites that are cultural resources in this state for monitoring;"
What criteria is to be used for the determination of a "site" to be placed on a list for monitoring. What if the "site" is comprised of multiple property owners? Will private property owners be notified if a "site" that they own is placed on the list or proposed for placement on the list ? Will a private property owner have the ability to refuse to have his property listed ? Will separate action be necessary for each property or owner? What would be the difference between this list and the inventory as established in NRS383.021?

(b)"Establish activities for periodic monitoring ..."
What does this mean? Are the activities to include visiting remote sites? What if a volunteer becomes injured during his/her "activities" ? Will the volunteers be legally able to enter and inspect private property without a warrant? Are the volunteers to be immune from the laws of trespass regarding private property? What will be the consequences of a volunteer providing false information?

(c) Establish requirements for reporting damage, threats of damage or vandalism of cultural resources to appropriate authorities as determined by the administrator; and"
Is the administrator qualified to "establish requirements for reporting". This language is essentially placing the administrator in a position not unlike that of a law enforcement agency. Is this reasonable ? Who or what are the "appropriate authorities as determined by the administrator". It seems to me that, if appropriate authorities exist (those which have jurisdiction and responsibilities for the enforcement of duly adopted laws and regulations for the protection of cultural resources) then these same "authorities" have policies, programs and personnel already in place to accomplish their mission. If these "authorities" do not exist, then this language is meaningless. Does the act of benign neglect on the part of a

property owner constitute "damage" or the "threat of damage" to a cultural resource? What kind of civil or criminal acts will persons guilty of damaging, threatening to damage, or vandalizing cultural resources be subjected to? Where are these codified? What legal liability will be incurred by volunteers in their activities? What penalty would a volunteer suffer if (knowingly or unknowingly) false information is reported. If damage or vandalism is discovered by a volunteer, will they be trained in proper forensic procedures so that legal remedies can be initiated?

3(d). "Establish programs for educating the public concerning the significance and value of cultural resources and the loss to the public resulting from damage to cultural resources."
This appears to be the only portion of the bill that makes any sense to me. If the problem is one of inappropriate or illegal behavior by certain persons with respect to cultural resources then the most effective programs have always been educational in nature. Public awareness and education programs consistently produce far greater results than any kind of enforcement program.

4. "The administrator shall coordinate the cooperation of federal authorities, Native American tribes and state and local governmental agencies, as necessary, to carry out the stewardship program."
Does the administrator lack authority to "coordinate cooperation" among these entities now? Is the administrator's work load lacking in volume sufficiently enough to allow him/her to take on these added responsibilities without additional staff or funding. Which of these other agencies and entities have any authority over cultural resources? Further more, the legislative responsibilities granted these, I would venture to guess does not contemplate oversight by any other agency regarding the administration of their duties which is exactly what this legislation proposes.

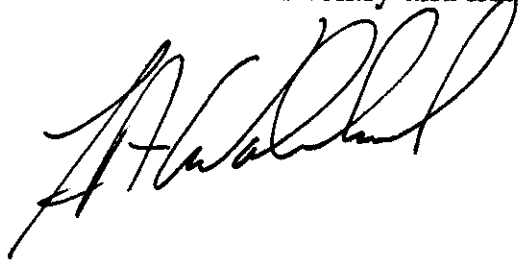
5. "The administrator and the office shall provide administrative support to the stewardship program."
I am confused as to this language. In previous parts of the bill there are "shall's" and "must's" enumerating duties, responsibilities, and actions on the part of the administrator. In this section the administrator is restricted solely to "administrative support". I try to imagine what kind of activity would constitute behavior that would not be administrative support. Why restrict the administrator to administrative support?

6. "Volunteers selected for the stewardship program serve without compensation and are not entitled to receive a per diam allowance or travel expenses." I have questions here regarding the prospect of a selected

volunteer sustaining serious injury or death as a result of his participation in the program. What liability could the state incur here? I would also suggest that there are issues regarding the future of such a program. Will the day come when funding is requested to compensate participants?

7. "The administrator may accept gifts and grants to assist in the operation of the stewardship program."
This section seems redundant, see NRS 383.101. I would suggest that there be some form of assurance that "gifts and grants" given to the program will be used exclusively for the proposed program.

383.011 number 3. "'Cultural resources' means objects, sites or information of historic, prehistoric, archeological, architectural, paleontological or traditional significance." I agree that it is more than reasonable to define terms. I find it curious however that in the existing language of NRS 383 where such things as the necessity for a state plan, the acceptance and disbursement of Federal monies, the creation of a State register of historic sites, requirements for intergovernmental cooperation, etc. the language is plain enough that a new term and subsequent definition was not deemed necessary. Does this bill, with the inclusion of this new term and definition, expand the mandate of the state office ? I would suggest that it does. I would also suggest that the term "artifact" needs to be defined. This term is used in section 1 (c) inconjunction with the term "cultural resource" but distinguished from it. I wonder what the difference is?

Let me finish by pointing out that there is no distinction between public and private property regarding the applicability of this proposed program. This is an extremely salient issue. We live in a nation with strong and clear constitutional guarantees regarding private property rights. We also govern ourselves by a system where the separation of power and a method of checks and balances exist. I contend that those parameters seem to be glaringly absent here.

In summary let me suggest that the State Office of Historic Preservation is probably over worked and underbudgeted. I know that I am. My solution is to work more efficiently and not expand my mandates.