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PROPOSED AMENDMENTS TO THE FIRST REPRINT OF SB 76

BEFORE ASSEMBLY NATURAL RESOURCES COMMITTEE, MAY 12,2003

SUBMITTED BY HARRY W. SWAINSTON, ATTORNEY AT LAW

Summary of Basis For proposed amendments

I. The First Reprint of SB 76 approved by the Senate has two specific problems, which require amending language.
   A. Section 6. (b) and Section 6. (c) could be adjudged unconstitutional by a court causing the default provision, Section 1., to become effective pursuant to the condition stipulated in Section 9. Section 1. contains the same language in subsections (c) and (d), which would cause the anomalous effect of a default to the same condition of unconstitutionality.
   B. Section 2. amends NRS 533.040 by adding a new subsection 5. Subsection 5. of Section 2. is overly restrictive in specifying the lands to which a stockwatering water right may become appurtenant. There is no basis for limiting the doctrine of appurtenance to contiguous lands and lands owned by the livestock operator where the stockwatering is to occur. Other lands, which serve as the base property or the home ranch, are equally benefited by the application of water for livestock watering. Other water rights, which serve as the base property for water rights based grazing preferences may also be similarly benefited.

II. The First Reprint of SB 76 proposes complex and specialized grazing terminology, which is difficult to understand and will be unnecessarily confusing if made a part of Nevada's water laws. Amendments should provide concise, straightforward terminology in keeping with the historical style and content of Chapters 533 and 534 of the NRS.

III. The suggestions contained in I. and II. may be accommodated by the following amendments.

Amend Section 2. of the First Reprint of SB 76 as follows:

Sec. 2. NRS 533.040 is hereby amended to read as follows:

NRS 533.040 Water used for beneficial purposes to remain appurtenant to place of use; exceptions.

1. Except as otherwise provided in this section, any water used in this state for beneficial purposes shall be deemed to remain appurtenant to the place of use.

2. If at any time it is impracticable to use water beneficially or economically at the place to which it is appurtenant, the right may be severed from the place of use and be simultaneously transferred and become appurtenant to another place of use, in the manner provided in this chapter, without losing priority of right.

3. The provisions of this section do not apply to a ditch or canal company that appropriates water for diversion and transmission to the lands of private persons for an annual charge.

4. For the purposes of this section, a surface water right acquired by a water user in a federal reclamation project may be considered appurtenant to an entire farm, instead of specifically identifiable land within that farm, upon the granting of a permit for the change of place of use by the state engineer which designates the place of use as the entire farm. The quantity of water available for use on that farm must not exceed the total amount determined by applicable decrees as designated in the permit granted by the state engineer.

5. For the purposes of this section, a water right acquired for watering livestock by a person who owns, leases or otherwise possesses a legal or proprietary interest in the livestock being watered is appurtenant to:

(a) The land on which the livestock is watered if the land or an interest in the land is owned by the person who possesses a legal or proprietary interest in the livestock; or

(b) Other land or interests in real property which are benefited by the livestock being watered if that land or such interests in real property are owned by the person who possesses a legal or proprietary interest in the livestock.

Amend Section 6. of the First Reprint of SB 76 as follows:

Sec. 6. NRS 533.503 is hereby amended to read as follows:

533.503 1. The State Engineer shall not issue *a* permit to appropriate water for the purpose of watering livestock *unless:*

(a) The applicant for the permit owns, leases or otherwise possesses a legal or proprietary interest in the livestock for which the permit for watering livestock is sought; or

(b) The applicant for the permit has received from a person described in subparagraph (1), authorization to have physical custody of the livestock for which the permit is sought, and authorization to care for, control and maintain such livestock.

BRIEF IN SUPPORT OF AMENDMENTS TO THE FIRST REPRINT OF SB 76

Introduction

In January 1979, the BLM announced in a press release that the agency would apply to the State Engineer for approval of 6,000 to 9,000 applications to appropriate water for a variety of land management activities. Hundreds of applications were filed. Most of the applications were protested by individual ranchers and the Nevada Department of Agriculture. In a Ruling dated July 26, 1983 the State Engineer indicated that he was inclined to approve the applications but none of the applications were, in fact, approved by the Ruling. An Attorney General's Opinion, No. 83-15 dated October 28, 1983, was critical of the State Engineer's Ruling. The conflict was resolved by an agreement among all affected parties, which would provide for the conduct of a series of test cases to be heard and ruled upon by the State Engineer. These test cases involved actual protested applications filed by private appropriators for the use of water upon the public lands and applications filed for a variety of purposes by the federal land agencies, the BLM and Forest Service. The administrative proceedings produced two rulings dated July 26, 1985 and rulings dated October 4, 1985, December 9, 1985 and March 12, 1986. One of the July 26, 1985 rulings and the October 4, 1985 ruling were appealed to the Fourth Judicial District Court in Elko County. The District Court ruled against the BLM and the Forest Service. These cases eventually resulted in a reported opinion by the Nevada Supreme Court, *State v. State Engineer,* 104 Nev. 709, 766 P.2d 263 (1988). The opinion overruled the District Court and permitted the BLM and Forest Service to

apply for and prove beneficial use of the water, which was used for watering the permittees' livestock. This state of affairs was in effect until 1995.

Last year the Nevada Supreme Court ruled on changes to the stockwatering provisions of Nevada's water law which were enacted in 1995 to prevent the BLM from filing for stockwatering permits on the public lands. The Court ruled that the new language in NRS 533.503 was not ambiguous but that it entitled the BLM as well as the livestock permittee to file for stockwatering. Justice Becker, in a concurring opinion, went further and wrote that the U.S. Constitution forbids discrimination in the water application process.

SB 76 was introduced in this year's legislative session to provide for joint filings between the rancher and the BLM. It was intended to amend NRS 533.503. As passed by the Nevada Senate the First Reprint of Sb 76 presents a two-tiered process. Sections 2., 6., and 7. become effective upon passage and approval. These sections do not provide for joint filings. If any of the provisions contained in Section 6. of the First Reprint are invalidated by any court of competent jurisdiction, Sections 2. and 6. expire by limitation and Sections 1., 3., 4., 5. and 8. become effective. These sections do provide for joint filings.

The BLM and Forest Service have been trying to acquire ownership of stockwatering rights on the lands they administer for several decades. Their goal is to reunite the federal ownership of the land with the water so that they can administer them as a single resource and get fair market value for grazing permits as required by the FLPMA. If nothing is passed, the BLM will proceed to acquire ownership of State granted water permits and continue to protest the approval of private applications. This means that at some point in the future grazing permits will likely be offered to the highest bidder. Ranching families that endured the hardships of frontier life so that ownership of the western lands could be secured to the United States will likely loose their ranches in the process. It is unfair and unjust at this late date for the United States to faithlessly abandon the families who endured great sacrifices so the United States could gain so much. The Nevada Legislature should not become a party to this questionable assault on an enduring institution, Nevada ranching families.

To preclude the BLM and Forest Service from accomplishing their goals the water law should be amended in such a way to confirm historical principals of water law in a manner, which is evenhanded and nondiscriminatory. The task is straightforward and simple. The Nevada Legislature has the power to enact general rules of property law and Nevada water law needs to be amended to reconfirm reasonable nondiscriminatory principles, which are rooted in our history.

Arguments In Support Of Amendments

Beneficial Use

The first principle is beneficial use. Nevada water cases uniformly state that a water right in Nevada is a user's right. Justice Pat McCarran, stated in a 1914 Nevada Supreme Court case, *Prosole v. Steamboat Canal Co,* 37 Nev.154, 140 P. 720 (1914), that the person who proves beneficial use by his application of the water to a beneficial purpose is entitled to the water right. Justice McCarran's opinion with respect to beneficial use was interpreted by a *per curiam* opinion of the Nevada Supreme Court in *State v. State Engineer,* 104 Nev. 709, 714, 766 P.2d 263 (1988) to mean something entirely different from that intended by Justice McCarran. The Nevada Supreme Court in the 1988 opinion commented on the District Court reliance on Justice McCarran's opinion in *Prosole*:

The District Court reasoned that since the federal agencies owned no livestock, the United States could not put the water to beneficial use. Rather, the court stated, owners of livestock actually put water appropriated for stockwatering to beneficial use. The district court concluded that therefore under *Prosole* the United States could not appropriate water for stockwatering.

In rejecting the District Court's decision and the Attorney General's position in the State's briefs the Nevada Supreme Court held that:

> The proposed new water sources are dedicated to providing water to livestock and wildlife. These are beneficial uses of water. Nevada law and longstanding custom recognize stockwatering as a beneficial use of water.
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> Although the United States does not own the livestock and wildlife, it owns the land on which the water is to be put to beneficial use. In addition, the United States benefits as a landowner from the development of new water sources on federal land.

The Nevada Supreme Court, in effect, held that the federal agencies could prove beneficial use for watering livestock they did not own on the basis that the United States owned the land. This theory is a form of riparian water rights, that is, the entitlement to the use of water is directly tied to ownership of land. The doctrine of riparian water rights was repudiated in Nevada by 1885.

Nevada has two systems for the establishment of water rights, both based on the doctrine of prior appropriation.[1] The first predates the general appropriation statutes and is based upon common law principles established by Nevada courts. The other is an administrative system administered by the Nevada State Engineer pursuant to the general appropriation statutes for surface waters enacted on March 22, 1913[2] and for groundwater enacted on March 25, 1939.[3]

Water rights acquired under either method are "vested" under Nevada law. Vested water rights describe water rights, which have become fixed and established either by diversion and beneficial use or by permit and certificate procured pursuant to the statutory water law relative to appropriation. *See e.g. State v. Application of Fillippini,* 66 Nev. 17, 22, 202 P.2d 535, 537 (1949); *Carson City v. Estate of Lompa,* 88 Nev. 541, 542, 501 P.2d 662 (1972); *State v. State Engineer,* 104 Nev. 709, 714, 766 P.2d 263, 266 ((1988); *Town of Eureka v. Office of State Engineer,* 108 Nev. 163, 167, 826 P.2d 948, 951 (1992); *United States v. Alpine Land & Reservoir Co.,* 983 F.2d 1487 (9th Cir. 1987). Water rights that were acquired pursuant to the statutory administration scheme are certificated after proof of beneficial use has been shown.

The common law method of appropriation was accomplished by a diversion of the water from the source with intent to apply the water to a beneficial use followed by an application to such use within a reasonable time. *See, Application of Fillippini, supra,* at 22; *Walsh v. Wallace,* 26 Nev. 299, 327, 67 P. 914 (1902). Under the later enacted statutory scheme beneficial use is also the basis, the measure and the limit of the right to the use of water. *See State v State*

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[1] A small number of riparian rights were adjudicated prior to the repudiation of the doctrine in 1885. *See e.g., Union Mill & Mining Co. v. Dangberg,* 81 Fed. 73, 116 (C.C.D. Nev. 1897).

[2] Nevada Laws 1913, ch.140 (codified as Nev. Rev Stat. Chapter 533). *See* Nev. Rev. Stat. 533.085.

[3] Nev. Stats. 1939, ch. 178 (codified at Nev.Rev.Stat. 534.010 *et seq.*). *See* Nev. Rev. Stat. 534.020, 534.100.

Engineer, supra, at 713, but as noted above, beneficial use took on a different meaning as the result of the Nevada Supreme Court's opinion in *State v. State Engineer.*

To correct the aberration in the concept of beneficial use resulting from the 1988 opinion in *State v. State Engineer, supra,* and ensure that historical principles of beneficial use remain applicable to statutorily created livestock water rights, NRS 533.503 should be amended to read as follows:

533.503 1. The State Engineer shall not issue *a* permit to appropriate water for the purpose of watering livestock *unless:*

(a) The applicant for the permit owns, leases or otherwise possesses a legal or proprietary interest in the livestock for which the permit for watering livestock is sought; or

(b) The applicant for the permit has received from a person described in subparagraph (1), authorization to have physical custody of the livestock for which the permit is sought, and authorization to care for, control and maintain such livestock.

Appurtenance

The second principle is that of appurtenance. An appurtenance is something that belongs to and benefits real property like a right of way or an easement. The real property, which is benefited by a stockwatering right is real property owned by the livestock operator. In the case of stockwatering on the federal grazing ranges this would be the home ranch or base property whether the base property is land or other water rights.

NRS 533.040 states in subsection 1 that: "Except as otherwise provided in this section, any water used in this state for beneficial purposes shall be deemed to remain appurtenant to the place of use." Since the obvious place of use of stockwater is within the hide of an animal, the statute is ambiguous with respect to the principle of appurtenance. In *Hage v. United States,* Case No. 91-14701 (January 29, 2002) Judge Loren A. Smith observed at page 22 of the slip opinion: "In a sense, the place of use for the water is the cow's head, which is an extension of the base ranch." If in fact the place of use is the cow's head, which is an extension of the base ranch, the stock watering right is also appurtenant to the base ranch as provided for in the language of NRS 533.040, *supra.* The federal land agencies claim the place of use is federal land and therefore they are entitled to ownership of the stockwatering rights. It is possible that the Nevada Supreme Court might have been swayed by this argument with the circular reasoning that if the federal lands are lands to which the stockwatering rights are appurtenant, then such rights must be beneficial to those lands, and consequently, the federal land agencies were in a position to claim beneficial use. Despite the disparate treatment of the principles of beneficial use and appurtenance in the past, the principles are important enough to remove them from future conjecture by appropriate legislation. The proposed amendments to the First Reprint of SB 76 will accomplish this task in a way that leaves the federal agencies unable to complain.

"Of general application in the West is the rule that an appropriative right becomes appurtenant to the land for the benefit of which the water is applied." *Water Rights Laws In The Nineteen Western States,* I Hutchings 455. It did not take legislation to establish the principle of

appurtenance in Nevada. *See e.g., Zolessi v. Jackson*, 72 Nev.150, 153-154, 297 Pac. (2d) 1081 (1956); *Rickey Land &Cattle Co. v. Miller & Lux*, 152 Fed. 11, 15 (9th Cir. 1907); *Prosole, supra.*

The possessory interest that the livestock operator has in his grazing allotment has long been regarded as an appurtenance to the base ranch. It requires no stretch of imagination to afford the right to water livestock on such allotments the same status. Thus, NRS 533.040 should be amended by adding a section, which states:

5. For the purposes of this section, a water right acquired for watering livestock by a person who owns, leases or otherwise possesses a legal or proprietary interest in the livestock being watered is appurtenant to:

(a) The land on which the livestock is watered if the land or an interest in the land is owned by the person who possesses a legal or proprietary interest in the livestock; or

(b) Other land or interests in real property which are benefited by the livestock being watered if that land or such interests in real property are owned by the person who possesses a legal or proprietary interest in the livestock.

The Extent and Nature of Property Rights in Water Are Questions of State Law; State Sovereignty and Jurisdiction over Its Water Resources Were Granted By The United States Constitution.

It is important in connection to possible claims of discrimination or violations of the Supremacy Clause of the U.S. Constitution by the federal land agencies, to consider the basis for the State of Nevada's jurisdiction to enact provisions of State water law, which may incidentally prohibit the federal land agencies from acquiring livestock watering water rights for livestock that pasture on public ranges. Federal land managers are prone to greet such legislation with a variety of political activity, which may constitute violations of the Hatch Act, particularly 5 U.S.C.7324, which prohibits political activity while the employee is on duty. Testimony provided by federal employees of the federal land agencies before legislative committees is permissible, but "back door" tactics, particularly lobbying, are suspect where thinly veiled threats of litigation or other reprisals tend to coerce the State legislative process.

Litigation, often threatened, should not be feared or avoided. It is an opportunity to acquire judicial sanction for legislative enactments. A challenge to the proposed amendments will not be expensive, should it happen. The State has the legal representation in place to handle such cases in the normal course of business of the Attorney General's Office. The following discussion deals with legal issues that might arise as the result of a challenge to the amendments.

Nevada's authority over its scarce water resources is the result of a direct grant from the United States Constitution at the time of Nevada's admission to the Union on an equal footing with the other states. At the time of admission there was a severance of the water from the public lands with the expectation that, for the future of the new state, rights to the use of water arising on the public lands would be provided to state and private appropriators according to the system of water law which was selected by the state's legislature.

The only Constitutional limitations to the plenary control of the state in this regard would be overriding considerations resulting from conflicts with the federal reserved water rights doctrine or the navigational servitude arising from the commerce clause. It is not conceivable that general principles of water law which are, on their face, nondiscriminatory and which are applied evenhandedly might run afoul of the Supremacy Clause of the U.S. Constitution. A brief review of the historical facts and legal precedents, will make this concept clear.

Until the settling of the arid west, principles of English common law were adopted by states to define private rights to the use of water. The common law doctrine of riparian rights recognized water rights in landowners, which were riparian to watercourses. *See, e.g., Tyler v. Wilkinson,* 4 Mason 379, 400 (C.C.R.I. 1827). Early in the settlement of the West it was apparent to water users and state courts that the riparian doctrine was not suited to the arid conditions of most of the western states, and particularly Nevada. Riparian water rights were repudiated in Nevada in 1885. *See Jones v. Adams*, 19 Nev. 78, 84-88, 6 P. 442 (1885); *Reno Smelting Mill & Reduction Works v. Stevenson,* 20 Nev. 269, 280-282, 21 P. 317, 321-22 (1889). Following the lead of the early mining codes, western courts adopted a system of water rights, which was based upon a concept developed by the early miners to settle disputes among themselves.[4] The concept, "first in time being the first in right,"[5] came to be known as the prior appropriation doctrine. *See e. g., Coffin v. Left Hand Ditch Co.,* 6 Colo. 443 (1892); *In re Waters of Manse Spring,* 60 Nev. 280, 286, 108 P.2d 311, 314 (1940).

In 1866, Nevada's first Senator, William M. Stewart, authored an act[6] whose purpose was to recognize the validity of the water rights that the miners claimed. Justice Field writing for the U.S. Supreme Court explained the purpose of the act in *Jennison v. Kirk,* 98 U.S. (8 Otto) 453, 460 (1878):

> In other words, the United States by the section said, that whenever rights to the use of water by priority of possession had become vested, and were recognized by the local customs, laws, and decisions of the courts, the owners and possessors should be protected in them;... Any other construction would be inconsistent with the general purpose of the act, which as already stated was to give sanction of the government to possessory rights acquired under the local customs, laws and decisions of the courts.

The settlers who followed the miners included hearty pioneers like the ancestors of many present-day Nevada ranching families. Justice Sutherland, from Utah, described their role in the settlement of the western third of the United States in *California, Oregon Power Co. v. Beaver Portland Cement Co.,* 295 U.S. 142, 156-57 (1935):

> In the beginning, the task of reclaiming this area was left to the unaided efforts of the people who found their way by painful effort to its inhospitable solitudes. These western pioneers, emulating the spirit of so many others who had gone before them in similar ventures, faced the difficult problem of wresting a living and creating homes from

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[4] *See, e.g., Atchison v. Peterson,* 87 U.S. (20 Wall.) 507, 513-514 (1874); *see also, Jennison v. Kirk,* 98 U.S. (8 Otto) 453, 459 (1878).

[5] *Jennison v. Kirk, supra,* at 461.

[6] The Act of July 26, 1866, ch. 262, § 9, 14 Stat. 251, 253 (Mining Act of 1866, 3 U.S.C. §661)

the raw elements about them, and threw down the gage of battle to the forces of nature.... In the success of that effort, the general government itself was greatly concerned--not only because, as owner, it was charged through Congress with the duty of disposing of the lands, but because the settlement and development of the country in which the lands lay was highly desirable.

The Congress did not break faith with the settlers who were responsible for solidifying the claim of the United States to the western lands. Justice Sutherland reviewed the history of what had happened with respect to congressional recognition of the validity of water rights established under state law on the federal lands. He stated that the Act of July 26. 1866, particularly when construed in relation to the later Act of July 9, 1870[7], was not merely to confirm local and customary law and usage, rather the Acts reached into the future as well as the past to approve and confirm the policy of appropriation for a beneficial use recognized by local rules and customs. *Id.* at 155 (citing, *inter alia, Jones v. Adams, supra*). He discussed a third act, the Desert Land Act of 1877,[8] which confirmed the power of the public land states to legislate as to water or water rights as the states should deem wise in the public interest. *Id.* at 163. He explained that the Desert Land Act "effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself." *Id.* at 158. The non-navigable waters, which had been severed were "reserved for the use of the public under the laws of the states and territories." *Id.* at 162. He stated at 163-164 that:

> [F]ollowing the Act of 1877, if not before, all non-navigable water then a part of the public domain became *publici juris*, subject to the plenary control of the designated States, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common law rule in respect of riparian rights should obtain.

It is apparent that the Western states were empowered by acts of Congress to legislate in a manner, which was suited to the conditions of the several western states.

.Justice Rehnquist, writing for the Supreme Court, also reviewed the historical precedents in the case of *California v. United States,* 438 U.S. 645, 653-656 (1978), reaching the same result. *See also Andrus v. Charlestone Products Co., Inc.,* 436 U.S. 604, 614 (1978).
In *California v. United States*, at 656-660, Justice Rehnquist discussed the effect that the Mining Acts of 1866, 1870 (16 Stat. 218) and the Desert Land Act of 1877 had on the development of water rights in the West. In effect, Congress recognized the "preexisting right of possession constituting a valid claim to its [water right] continued use." *Id.* at 656. The Court also recognized that "in the Act of Mar. 3, 1891, 26 Stat. 1101, as amended, 43 U.S.C. § 946, Congress provided for rights-of-way across the public lands to be used by `any canal or ditch company formed for the purpose of irrigation.'" *Id.* at 659. Finally, the Court recognized that "except where the reserved rights or navigation servitude of the United States are invoked, the State has total authority over its internal waters." *Id.* at 662. Thus, the State may grant the appropriation of water for legitimate uses on the public lands and for diversions of water off such lands for use on private property. The entire history of appropriation for irrigation, for instance, is premised on this well-settled proposition.

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[7] Act of July 9, 1870, ch. 235, § 17, 16 Stat. 217, (amending the Act of 1866).

[8] 43 U.S.C.§321.

Exclusive state authority over the creation of private water rights is also supported under the equal footing doctrine. *See e.g., California v. United States, supra,* at 654, where Justice Rehnquist stated:

> One school of legal commentators held the view that, under the equal footing doctrine, the Western States, upon their admission to the Union, acquired exclusive sovereignty over the unappropriated waters in their streams.... Such commentators were not without some support from language in contemporaneous decisions of the Court.

See also United States v. New Mexico, 438 U.S. 696, 698 (1978)("The Court has previously concluded that whatever powers the States acquired over their waters as a result of congressional acts and admission into the Union,...."). The California Supreme Court adopted the "equal footing" doctrine rationale in a contest between California and the United States in *In re Waters of Hallett Creek Stream System,* 44 Cal. 3rd 448, 749 P.2d 324, 330, n.15 at 335, 243 Cal. Rptr. 887 (1988)(" The State of California's authority to regulate and control the water within its borders does not, however, rest on the Desert Land Act; that act merely recognized the state's preexisting authority over its waters under the `equal footing ' doctrine.") The United States Supreme Court has recognized in the context of an equal footing doctrine case that "under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States." *Oregon v. Corvallis Sand & Gravel Co.,* 429 U.S. 363, 378 (1977).

The amendments to the First Reprint of SB 76 discussed herein do not single out the federal land agencies for special treatment. They are general rules of property law, which the Nevada Legislature is competent to enact into law and they evenhandedly apply to all lands whether Federal, State or private and to all applicants for stockwatering permits. As such, the amendments will most certainly withstand a constitutional challenge should anyone be foolish enough to try.