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**Senate Bill No. 76**

**Proposed Amendments to SB 76**

**Submitted by the Nevada Live Stock Association**

(Proposed Changes in Green)

(Delete in red)

**Summary of Proposed Amendment**

The proposed amendment to Senate Bill 76 (S.B. 76) simply denotes two classes of applicant(s) for stock watering permits as enumerated in the amended NRS 533.503 subsection (a) and (c). Subsection (b) is applicable to both classes of applicants. NRS 533.492 and NRS 533.495 have before, and as amended, substantiated the appropriateness of these classes.

These amendments apply equally to all persons and are not discriminatory.

The Supremacy Clause of the U.S. Constitution is not triggered by these amendments because U.S. 43 CFR 4120.3-9 clearly states that any right obtained for the purpose of watering livestock, "shall be acquired, perfected, maintained and administered under the substantive and procedural laws of the State within which such land is located. To the extent allowed by the law of the State..." by specifically acknowledging the limits set by state law, the United States could not have intended to occupy the entire field of regulated conduct. Thus, states have not been preempted from asserting their rights in this instance. The federal regulation itself sets the limits of the federal objective to be congruent with the limits allowed by state law.

By the few amendments below, based in historical state water law, the state water engineer can retain the authority to deny or grant stockwatering applications to any person(s) based upon the amended statutes presented. The July 24, 2001, Nevada Supreme Court Opinion, under "Facts", confirmed, "The applications state that the BLM desires to appropriate the water for purposes of granting water rights to individuals seeking to obtain grazing permits from the BLM. If granted, the BLM, rather than the state of Nevada, would have the ultimate say in the distribution and use of stockwater rights amongst competing interests in the livestock industry." United States v. State Engineer, No. 32740, 117 Nev. Adv. Op. No. 49.

However, Nevada's water rights are not based upon "a grazing permit from the BLM" but beneficial use (NRS 533.490). There is no property right in a grazing permit and therefore no value. (Hage v. U.S., In the United States Court of Federal Claims, No. 91-1470L, January 29, 2002). Nevada's stock water rights have great value and are tied to the beneficial use of the water, most of which occurred prior to the advent of the Forest Service or the BLM by the hard work of natural persons. Therefore, the entire premise that the BLM could lawfully become the grantor of stock water rights once they are acquired from the state engineer is erroneous.

The Nevada Live Stock Association represents members who are more than deeply concerned with the BLM becoming the grantor of Nevada's live stock water. The threat that stockmen be compelled to become a partner with the BLM to perfect additional waters within their adjudicated allotments is abhorrent to their sense of raw

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individualism. Therefore the Nevada Live Stock Association presents the above for serious consideration before a vote is taken, as an alternative to both S.B. 76 First Reprint, and the Swainston amendment to S.B. 76, First Reprint.

Section 1. 533.503 of NRS is hereby amended thereto in the following:

**Sec. 1.**

1. **The state engineer shall** issue a permit to appropriate water for the purpose of watering livestock (live stock) if:
  - (a) The applicant(s) for the permit own or otherwise possess livestock/live stock for which the permit is sought;
  - (b) The applicant(s) for the permit to the extent authorized by law, agree to provide the livestock/live stock with access to the water using procedures administered by the state engineer, of the water rights for which the permit is sought and, where applicable;
  - (c) The applicant(s) for the permit possess an adjudicated grazing allotment and;
    - (1) Have lawfully established a vested<sup>i</sup>, superior right<sup>ii</sup> or priority appropriation<sup>iii</sup> of entitlement<sup>iv</sup> in land<sup>v</sup> or water or both in the allotment<sup>vi</sup>, which is recognized by both the federal and state governments by virtue of the adjudication;<sup>vii</sup> and
    - (2) Have a superior right over subsequent entry men<sup>viii</sup> for stock watering purposes on the said allotment(s) and thereby are lawfully entitled to apply for a stock water permit within the allotment boundaries to the exclusion of all others.<sup>ix</sup>
2. This section must not be construed to impair the vested right and/or prior appropriation to the use of water for the purpose of watering livestock/live stock.
3. By virtue of Nevada's police power to regulate water within the state, Nevada's legislature has rationally decided to assert control over Nevada's livestock/live stock water. As the state of Nevada is a sovereign state and not disposed to jeopardize or surrender any of its sovereign rights, this chapter applies to all lands in the State of Nevada lawfully subject to its police powers (NRS 522.140).<sup>x</sup>

NRS 533.492 is hereby amended to read as follows:

**NRS 533.492 Subsisting right to water livestock: Manner of proof; marking of location of right.**

1. Subsisting right to water livestock may be proven by an owner of livestock by one or more of the following items of evidence for the number of livestock and date of priority:

- (a) As to water rights on open range, (whether) public lands, or unfenced private lands or a combination of these:
- (1) A statement of priority of use submitted to the Taylor Grazing Service, predecessor to the Bureau of Land Management, to show the numbers of livestock grazed upon the open range, for years 1928 to 1934, inclusive, if accompanied by evidence of changes or absence of change since the date of the statement;
  - (2) A license issued by the Taylor Grazing Service for use upon the open range; or
  - (3) A statement of priority of use, or a license, issued by the United States Forest Service for the grazing of livestock before 1950.
  - (4) A statement of vested, superior right or priority appropriation of entitlement in land or water or both, which is recognized by both the federal and state governments by virtue of an adjudicated grazing allotment.
- (b) As to water rights on other privately owned land:
- (1) An affidavit concerning the number and kind of livestock by a person familiar with the use made of the lands;
  - (2) A record of livestock assessed to the claimant of the right, or his predecessor, by a county assessor;
  - (3) A count of livestock belonging to the claimant or his predecessor made by a lender; or
  - (4) An affidavit of a disinterested person.

NRS 533.495 is hereby amended to read as follows:

**NRS 533.495 Subsisting rights not to be impaired.** Whenever one or more persons shall have a subsisting right to water range livestock at a particular place and in sufficient numbers to utilize substantially all that portion of the (public) range readily available to livestock watering at the place, no appropriation of water from either the same or a different source shall subsequently be made by another for the purpose of watering range livestock in such numbers and in such proximity to the watering place first mentioned as to enable the proposed appropriator to deprive the owner or owners of the existing water right of the grazing use of such portion of the (public) range, or substantially to interfere with or impair the value of such grazing use and of such water right.

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<sup>1</sup> "It is only a vested right which cannot be taken away except by due process of law." *Merritt v. Ash Grove Lime & Portland Cement Co.*, 136 Neb. 52, 285 N.W. 97 (1939); *Crump v. Guyer*, 60 Okla. 222, 157 P. 321, 2 A.L.R. 331 (1916).

"Meaning of 'Vested Rights.'" In a proceeding on an application to appropriate water, "vested rights" (see sec. 84, ch. 140, Stats. 1913; cf. NRS 533.085) as used in relation to constitutional guarantees implies interest proper for the state to recognize and protect, of which a person may not be deprived arbitrarily without injustice. In connection with a water right, it means that the right to use water has become fixed either by actual diversion and application to beneficial use or by appropriation according to the water law, and is a right regarded and protected as property. *In re Filippini*, 66 Nev. 17, 202 P.2d 535 (1949).

ii "Where the right to the use of running water is based upon appropriation, and not upon an ownership in the soil, the first appropriator has the superior right." *Lobdell v. Simpson et al.*, 2 Nev., 274, Nevada Reports, Republication, Hawley. 1865-1866, July, 1866.

"Every right to land is a 'title' and if a person has actual or constructive possession of property or right of possession, he has a title thereto, though another person may be owner." *Shingleton v. State*, 133 S.E.2d 183, 189, 260 N.C. 451.

"...the Court is not of the opinion that the lack of a grazing permit that prevents access to federal lands can eliminate Plaintiffs' vested water rights and ditch rights that pre-date the creation of the permit system."

*Hage v. U.S.*, In the United States Court of Federal Claims, No. 91-1470L, Order, Pg. 2, Feb. 5, 2003.

iii "This court finds that plaintiffs presented evidence at trial that showed by the preponderance of evidence that the plaintiffs and their predecessors appropriated and maintained..." *Hage v. U.S.*, In the United States Court of Federal Claims, No. 91-1470L, Page 11, Sections II, b., Jan. 29, 2002, (Findings).

iv "To have a property interest in a benefit protected by procedural due process, a person must have more than an abstract need or desire for it, and he or she must have more than a unilateral expectation of it; in short, he or she must have a legitimate claim of entitlement to it." *Board of Regents of State Colleges v. Roth*, 408 U.S. 565, 92 S. Ct. 2701, 33 L. Ed. 2d 548, 1 O/E/R/ Cas. (BNA) 23 (1972).

v " 'Lands' shall be construed as coextensive in meaning with lands, tenements and hereditaments, and shall include in its meaning all possessory right to the soil for mining and other purposes." NRS 111.010 (3).

" 'Estate in interest in lands' shall be construed and embrace every estate and interest, present and future, vested and contingent, in lands as defined in subsection 3. NRS 111.010 (2).

" 'Land' includes the water upon it, and when the fee to land is acquired by condemnation, everything which is comprehended in the term 'land,' including water, vests in the expropriator." *Philadelphia Trust, Safe Deposit & Ins. Co. v. Borough of Merchantville*, 69 A. 729, 730, 74 N.J.Eq. 330.

"A water right is 'land' within constitutional provision which, in effect, exempts from taxation all property of water storage district except such lands and improvements thereon located outside of district as were subject to taxation at time of acquisition." *North Kern Water Storage Dist. v. Kern County*, 179 C.A.2d 268, 3 Cal. Rptr. 636, 639.

vi "...plaintiffs and their predecessors appropriated and maintained a vested water right in the following bodies of water on the Ralston and McKinney allotments. In addition to certificates of appropriation that were entered into evidence, the plaintiffs also submitted an exhaustive chain of title which showed that the plaintiffs and their predecessors-in-interest had title to the fee lands where the following springs and creeks are located." *Hage v. U.S.*, In the United States Court of Federal Claims, No. 91-1470L, Page 11, Sections II, b., Jan. 29, 2002, (Findings).

"Allotment of lands to individual Indians in Pursuance of a treaty or Act of Congress, by the terms of which it is agreed between the US Government and the Tribe, assented to by the state, that the lands thus allotted in severalty shall remain tax free for a stipulated period, creates a 'vested property right' in the individual allottee which neither national nor state government may impair or invade." *Board of County Com'rs of Creek County, Okl. v. Seber*. C.C.A. Okl., 130 F.2d 664, 668.

vii Ibid.

viii "NRS 533.495 **Subsisting rights not to be impaired.** Whenever one or more persons shall have a subsisting right to water range livestock at a particular place and in sufficient numbers to utilize substantially all that portion of the public range readily available to livestock watering at that place, no appropriation of water from either the same or a different source shall subsequently be made by another for the purpose of watering livestock in such numbers and in such proximity to the watering place first mentioned as to enable the proposed appropriator to deprive the owner or owners of the existing water right of the grazing use of such portion of the public range, or substantially to interfere with or impair the value of such grazing use and of such water right." (2:201;1925; NCL Chapter 7980).

"One complying with local laws for appropriation of water and constructing works for diversion thereof on vacant public lands of US acquires 'vested and accrued right' within Rev.St. U.S. Subchapter 2339, 2340, 30 U.S.C.A. Subchapter 51, 52, which is superior to rights of subsequent entrymen and carries with it right of way or easement for impounding water." *Gila water Co. v. Green*, 232 P. 1016, 1017, 27 Ariz. 318.

"A patent of the government to land vests in the patentee the perfect legal title, which relates back to the entry of the land." *Rankin v. Miller*, 43 Iowa, 11, 17.

<sup>ix</sup> "Under Rev. Codes, 1905, Chapter 4702, defining "ownership" as the right to possession and use to the exclusion of others, the term is broader than either "title" or "possession" and includes both." Fleming v. Sherwood, N.D., 139 N.W. 101, 103, 24 N.D. 144, 43 L.R.A., N.S., 945.

"A party may have a title to property, though he is not the absolute owner. If he has the actual or constructive possession of title thereto, though another person may be the owner." Roberts v. Wentworth, 59 Mass. (5 Cush.) 192, 193, 739.

<sup>x</sup> It has long been a principle of water law that state law controls where it is not directly superseded by federal law. Indeed, it "is settled that the states may prescribe police regulations applicable to public land areas, so long as the regulations are not arbitrary or inconsistent with applicable congressional enactments." McKelvey v. United States, 260 U.S. 353, 359 (1922); see e.g. Itcaina v. Marble, 55 P.2d 625, 630, (Nev. 1936).

The Supreme Court recognized that the Reclamation Act "leaves it to the State to say what rights of an appropriator or riparian owner may subsist along with any federal right." And the court concluded that Congress "elected to recognize any state-created rights and to take them under its power of eminent domain." United States v. Gerlach Live Stock Co., 339 U.S. 725, 736 n. 7 (1950). As well as, "Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior....shall proceed in conformity with such laws..." 43 U.S.C. Paragraph 383.

The Nevada Supreme Court, when examining the intersection of the Taylor Grazing Act, reiterated that where the federal government has not acted, the state may act. Ansolahehere v. Laborde, 310 P.2d. 842, 845 (Nev. 1957).