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Presentation of the Draft Amendment to NRS 533.503

I. *General Summary of the Draft Amendment*

Good afternoon Chairman Rhoads and members of the Committee. For the record, my name is Rene Yeckley, Principal Deputy Legislative Counsel, with the Legal Division of the LCB. Before I begin explaining the provisions of Senate Bill No. 76, I'd like to briefly remind you of the events that led to this bill and focus a bit on Justice Becker's dissenting and concurring opinion in the recent stockwater case. Then I will provide a detailed summary of the provisions of S.B. 76.

HISTORY

Nevada has traditionally allocated water rights for watering livestock on federal land according to the "three-way system." Under this system, stockwater rights on federal land have been allocated to the range user; to the Federal Government; or jointly to the range user and the Federal Government, depending upon who developed the water right and put the water to beneficial use. For many years the Federal Government, through the Bureau of Land Management, obtained stockwater permits under this three-way system.

b. Rangeland Reform '94

In 1994, Nevada's three-way system was seriously threatened when the Department of Interior undertook an effort, called "Rangeland Reform" to revise its management of federal lands. Among the regulations adopted under Rangeland Reform was 43 C.F.R. § 4120.3-9 which provided a new approach to water rights on federal lands. That regulation appears to require all stockwater rights on federal lands to be held either exclusively by the Federal Government, if the state law allows it, or jointly by the Federal Government and a range user, if the state law allows it. In any case, the provision has the effect of eliminating the three-way system by precluding a range user from holding such water rights solely in his own name even if the range user was fully responsible for the development of the water rights and putting the water to beneficial use. It is this situation that caused concern for the State of Nevada.

c. Revision of Nevada Revised Statutes 533.503 in 1995 and United States v. State Engineer

To address the concern, the 1995 Nevada Legislature enacted S.B. 96, now codified as NRS 533.503 and commonly referred to as the "Stockwater Statute." That statute provides in relevant part that, "1. The state engineer shall not issue [a stockwater permit] unless the applicant for the permit is legally entitled to place the livestock on the public lands for which the permit is sought."

However, in the opinion of the Public Lands Committee, the concern presented by the federal regulation was not adequately addressed by the stockwater statute as interpreted by the Nevada Supreme Court. In July of 2001, after the 2001 Legislature had adjourned, the Nevada Supreme Court, in United States v. State Engineer, interpreted the "Stockwater Statute" - specifically the provision I just quoted. The main

issue in the case was whether under the stockwater statute the State Engineer may issue stockwater permits to the BLM in the name of the United States. The Nevada Supreme Court held that the BLM was a qualified applicant for stockwater permits under the statute. Specifically, the Court held that the statute is not ambiguous and that it "simply requires an applicant for a stockwater permit to have a legal right to graze livestock on the public land." Further, the Nevada Supreme Court reasoned that the United States has such a legal right because the United States owns the BLM land and Congress has authorized the grazing of livestock on such land. Further, the Nevada Supreme Court concluded that because the statute is unambigious and that the plain language of the statute does not prohibit the BLM from receiving stockwater permits in the name of the United States, the statute does not violate the federal or state constitution.

Nevada Supreme Court Justice Nancy Becker authored a dissenting and concurring opinion in the case. Although Justice Becker's opinion is not binding authority, the opinion was instructive in drafting S.B. 76 as the Public Lands Committee requested a bill draft that would protect ranchers to the greatest extent possible while still remaining constitutionally defensible.

In Justice Becker's separate opinion, she concluded that the legislative intent of the stockwater statute was "to create a new system that would prohibit the BLM from obtaining a stockwater permit in its own name, unless it had some legal or proprietary interest in the livestock to be watered under the permit," and that "the Legislature wanted to preserve state primacy over water rights without unconstitutionally discriminating against the federal government." Justice Becker conducted a constitutional analysis to determine whether, considering this intent, the statute could be held constitutional. The Federal Government had argued that such an interpretation would discriminate against the Federal Government or frustrate federal policy, in violation of the Supremacy Clause of the *United States Constitution*. To address this argument, Justice Becker relied on the constitutional principles set forth in the United States Supreme Court case of North Dakota v. United States, 495 U.S. 423, (1990).

According to the North Dakota case, "[s]tate law may run afoul of the Supremacy Clause in two distinct ways: First, the law may regulate the Government directly or discriminate against it, or second, it may conflict with an affirmative command of Congress." Further, "the state does not discriminate against the Federal Government and those with whom it deals unless it treats someone else better than it treats them. . . . When analyzing whether a state law discriminates against the Federal Government, the state law should not be viewed in isolation and the entire regulatory system should be analyzed to determine whether it is discriminatory." Finally, a state law may violate the Supremacy Clause if it "substantially interferes with the activities [of the Federal Government]."

In applying these constitutional principles to the Federal Government as a landowner under the statute, Justice Becker found that the statute was facially neutral and thus did not directly regulate the United States in a manner to constitute a prima facie violation of the Supremacy Clause. Further, she found that when the statute was considered in the context of Nevada's entire water appropriation scheme, any distinction

in the statute between the Federal Government as a landowner and other landowners was not significant enough to constitute a violation of the Supremacy Clause. Finally, she concluded that, in her opinion, "the statute is not discriminatory simply because the definition of public lands, as interpreted by the State Engineer, applies only to United States' land managed by the BLM" and not to other federally managed lands.

Next, Justice Becker applied the constitutional principles to the Federal Government's claims that the statute actually and substantially interfered with a federal policy or program. Justice Becker rejected this argument. She reasoned that because Congress has not authorized the BLM to raise livestock, the BLM cannot have a legal or proprietary interest in livestock to be watered, and thus, if the statute were interpreted as intended by the Legislature, the BLM effectively could not obtain a stockwater permit in its own name. Further, she acknowledged this effect upon the BLM "together with the fact that the statute, as interpreted by the State Engineer, applies to lands managed by the BLM, arguably poses a greater impact upon the issue of discrimination than that created solely by the restrictive interpretation of the phrase 'public lands.'" However, she concluded that the Federal Government "has not shown how it is so disadvantaged by the inability to obtain a permit in its own name, that it is being discriminated against within the meaning of the Supremacy Clause." While admitting that it is a close issue as to whether it is constitutional to essentially preclude the BLM from obtaining a stockwater permit solely in its own name, Justice Becker concluded that this interpretation of the statute would not violate the Supremacy Clause.

However, with respect to joint permits, Justice Becker concluded that if the statute were interpreted to prohibit the BLM from applying for a stockwater permit jointly with a person who is legally "entitled to place the livestock on the public lands," then this restriction, together with the restrictive interpretation of public lands, would violate the Supremacy Clause because it would prevent the BLM from obtaining a stockwater permit under any circumstances, and thus "would be a significant interference with the BLM's control and management of its rangelands."

In summary, Justice Becker concluded that by requiring at least one, but not both, of two joint applicants for a stockwater permit to have a legal or proprietary interest in the livestock to be watered, NRS 533.503 could partially achieve the applicable legislative intent while avoiding conflict with the Supremacy Clause. She also acknowledged that the Supreme Court of the United States could reach a different conclusion on the issues presented by the statute and "might conclude that defining 'public land' so as to target BLM managed lands is direct discrimination or regulation of the United States in violation of the Supremacy Clause."

d. Actions by the Committee on Public Lands

As a result of the stockwater case, the BLM is currently authorized under state law to obtain stockwater permits solely in the name of the United States. Ranchers may also apply for sole stockwater permits. However, because the federal regulation adopted in 1995 currently requires stockwater on federal lands to be held in the name of the

United States, it appears that the BLM must protest any application filed by a private person for a stockwater so that the BLM may be added as a joint holder.

In response to this situation, the Public Lands Committee sought to amend the stockwater statute to give the greatest protection possible to ranchers while still remaining constitutionally defensible. The Public Lands Committee spent a significant amount of time at seven of its nine meetings discussing this topic of amending the stockwater statute. A subcommittee was also appointed, which met once to further evaluate possible solutions. Additionally, the Committee discussed this issue at length during both of its trips to Washington, D.C.

The end result of the Committee's work is found in S.B. 76. Under the provisions of S.B. 76 any applicant, including the BLM, would not be authorized to obtain sole stockwater permits unless the applicant owned, leased or otherwise possessed a legal or proprietary interest in the livestock to be watered. If an applicant does not have such a legal or proprietary interest in the livestock, that applicant may file jointly with a person who does have such an interest in the livestock. Thus, it has been described by some that under current law, the BLM may file for sole permits and may impose joint permits on private applicants. Whereas, under the provisions of S.B. 76, the BLM may file for sole permits only if it owns or leases the livestock to be watered and, under S.B. 76, joint permits may, in practice, be imposed upon the BLM if it applies for a stockwater permit and does not own or lease the livestock to be watered.

II. *Detailed Summary of the Draft Amendment*

I will now briefly explain the provisions of the bill. The language of S.B. 76 generally parallels the advice offered by Justice Becker in her dissenting and concurring opinion.

A. Subsection 1 of Section 1 of the bill.

Generally, this subsection prohibits the State Engineer from issuing stockwater permits on public grazing lands, unless the applicant for such a permit, or in the case of a joint permit, at least one of the applicants: (1) is entitled to place the livestock on the public grazing lands for which the permit is sought AND either: (1) owns, leases or otherwise possesses a proprietary interest in the livestock for which the permit is sought; OR (2) has received from such a person who owns a proprietary interest in the livestock, authorization to possess physical custody of the livestock and authorization to care for, control and maintain the livestock.

Further, if the application is for a joint stockwater permit, the applicants must agree, to the extent authorized by law, to contribute to the means for putting to beneficial use the water for which the permit is sought and to contribute to the development of the water rights.

Finally, the forage serving the beneficial use of the water to be appropriated must not be encumbered by an adjudicated grazing preference recognized pursuant to federal

law for the benefit of a person who is not an applicant for the permit. This lack of encumbrance may be demonstrated by a number of ways, including evidence of a valid grazing permit other than a temporary grazing permit.

RATIONALE (a)

The language in paragraph (a) was drafted to tie the ability to obtain a stockwater permit to the requirement that the permittee have some legal or proprietary interest in the livestock.

RATIONALE (b)

The language in paragraph (b) was included to address applicants such as grazing associations which do not actually have a proprietary interest in the livestock. This particular language was drafted in consultation with Joe Guild of the Nevada Cattlemens' Association.

RATIONALE (c) and (d)

The language in paragraphs (c) and (d) was drafted in consultation with representatives of the Humboldt River Basin Water Authority. The intent of the provisions is to ensure that the rights of existing graziers are not encroached upon by any new applicants for stockwater rights.

RATIONALE subsection 1 as a whole

Subsection 1 as a whole would preclude applicants, such as the BLM, who do not satisfy the criteria of subsection 1 from obtaining stockwater permits solely in their own names. However, until those applicants do meet the requirements of subsection 1, the applicants still have the opportunity to obtain joint permits. Further, we note that the BLM has indicated to Chairman Rhoads that, the BLM is supportive of a proposal to "provide for the BLM and livestock operators to jointly file with the State Engineer for permits for water development on public lands."

B. Subsection 2 of Section 1.

Moving on to subsection 2. I would just point out that subsection 2 of section 1 generally mirrors subsection 1. The only difference is that subsection 1 addresses stockwater permits and subsection 2 applies to certificates of appropriation based on stockwater permits.

C. Subsection 4 of Section 1.

Subsection 4 of section 1.

This subsection defines the terms "grazing preference" and "public grazing lands." The term public grazing lands was used instead of "public lands" to specifically expand the scope of the statute from only BLM managed lands to certain other federally managed lands on which livestock are permitted to graze.

RATIONALE

The rationale for expanding the scope of the statute from only BLM lands to other federal lands is that it is our opinion that the broader the class of persons or land subject to the statute, the stronger the argument is, that the statute is not discriminatory of the Federal Government, but is rather a neutral law. We note that Justice Becker believed that applying the statute only to BLM lands would pass constitutional muster if the BLM was able to obtain joint permits. However, she also acknowledged that, "the United States Supreme Court, if presented with the issue, might conclude that defining "public lands" so as to target the BLM managed lands is direct discrimination or regulation of the United States in violation of the Supremacy Clause."

It would appear that there is a spectrum for how this statute may be applied. It ranges from applying the statute only to BLM managed lands all the way to applying it across the board to all landowners, public and private. We cannot say with certainty where along this spectrum a court would find it constitutional to apply the statute to a limited class of property. However, it is our opinion that the broader the class of persons or land subject to the statute, the stronger the argument is, that the statute is not discriminatory of the Federal Government, but is rather a neutral law.

E. Section 2.

Next, we move on to section 2 of S.B. 76. This section provides that the bill would not apply retroactively to permits and certificates that the State Engineer had issued before the effective date of the bill. Rather, the bill would apply prospectively. Further, the bill would not apply to any transfers of such permits or certificates. This provision was included to prevent challenges based on the Takings Clause of the Constitution.

IV. *Conclusion*

That concludes my remarks concerning S.B. 76 as drafted. I'd be glad to answer any questions you or the other members of the Committee may have. Also, we are fortunate to have Wayne Howle of the Attorney General's Office available for questions as well. Chairman Rhoads, would you like me to quickly explain the two proposed amendments that our office was requested to prepare?

PRESENTATION OF PROPOSED AMENDMENTS

At the request of Chairman Rhoads, our office prepared the two proposed amendment that you have entitled "Proposed Amendment to Senate Bill No. 76 Version 1" and "Version 2." We worked closely with Wayne Howle of the Attorney General's Office in preparing and reviewing the proposed amendments.

Proposed Amendment #1

The proposed amendment to Senate Bill No. 76 (S.B. 76) expands the types of lands that are subject to the provisions of the bill. Specifically, S.B. 76 currently applies to applications for stockwater permits on certain federally managed lands on which livestock are permitted to graze. The proposed amendment would provide that S.B. 76 applies to applications for stockwater permits on the "public range." NRS 533.485 defines the term "public range" as, "all lands belonging to the United States and to the State of Nevada on which livestock are permitted to graze, including lands set apart as national forests and lands reserved for other purposes."

It is the opinion of our office that this proposed amendment would strengthen the constitutionality of S.B. 76 because it makes it more difficult for one to claim that the bill is discriminatory.

Proposed Amendment #2

The proposed amendment #2 would amend S.B. 76 in four primary respects:

1. First, the proposed amendment provides that stockwater rights are appurtenant to real property owned by the person or entity which owns, leases or otherwise possesses a legal or proprietary interest in the livestock being watered.

2. Second, the proposed amendment expands the types of lands that are subject to the provisions of the bill. Specifically, S.B. 76 currently applies to applications for stockwater permits on certain federally managed lands on which livestock are permitted to graze. The proposed amendment would provide that S.B. 76 applies to all types of lands, including federally managed lands, lands managed by the State of Nevada, and private lands.

3. Third, the proposed amendment deletes references to joint permits. Therefore, it appears that applicants for joint stockwater permits would be required to meet the same requirements as applicants for sole stockwater permits.

4. Finally, the proposed amendment amends the definition of "grazing preference" to refer to the "public range" instead of "public grazing lands." This change expands the types of lands included in the definition of "grazing preference."

It is the opinion of our office that the proposed changes to expand the scope of the bill to apply to public and private lands would strengthen the constitutional defensibility of S.B. 76.

However, there are legal concerns with the remaining proposed changes. The first primary legal concern is that Proposed Amendment #2 removes the ability for the federal government to participate in joint permits. By removing the language concerning joint permits, the bill would effectively preclude the Federal Government from obtaining any stockwater rights. The Federal Government would not qualify for a sole stockwater permit because it does not own or lease livestock. It would also not qualify for a joint stockwater permit because it must satisfy the same requirements as an applicant for a sole permit. This is exactly the situation that Justice Becker addressed and opined would be unconstitutional as it would constitute a substantial interference with the Federal Government's federal activities in managing the federal lands. This problem is exacerbated by the proposed change that provides that water rights will be appurtenant to the real property owned by the person or entity which owns, leases or otherwise possesses a proprietary interest in the livestock to be watered. Thus, the benefit of appurtenance would not be available to the Federal Government.

In summary, it is our legal opinion that the changes in Proposed Amendment #1 would likely make S.B. 76 more constitutionally defensible and that certain provisions of Proposed Amendment #2 would likely make S.B. 76 less constitutionally defensible.

V. ***Conclusion***

That concludes my remark, Chairman Rhoads. I would be glad to answer any questions you or the members of the Committee may have. Also, I'd like to remind the Committee that we are fortunate to have several representatives of the Department of Conservation and Natural Resources, the Attorney General's Office and the BLM here today to give you their input and answer any questions you may have. Thank you.