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# OPPOSITION TO SB 76, A BILL PROVIDING FOR JOINT STOCKWATER FILINGS BY THE FEDERAL LAND AGENCIES AND RANCHERS, SUBMITTED BY HARRY W. SWAINSTON, ATTORNEY AT LAW

**Summary of Basis For Opposition**

I. SB 76, as it was introduced, is unconstitutional.
   A. SB 76 discriminates against the federal land agencies because it treats such agencies differently and less favorably than similarly situated owners of private grazing pastures.
   B. SB 76 constitutes State regulation of federal activities in violation of the Supremacy Clause in that it requires the federal land agencies to expend money from the federal treasury for water developments that may be jointly applied for.
   C. SB 76 conflicts with C.F.R. section 4120.3-9.
   D. SB 76 may violate Article I, Section 10 of the U.S. Constitution ("No State shall ...pass any ...law impairing the Obligation of Contracts") in that it creates new conditions, which affect preexisting understandings in contracts between livestock operators and the federal land agencies with respect to grazing permits.

II. SB 76 lays the basis for perpetual federal retention of water resources on the public grazing lands, which may be needed in the future by State, local and private water appropriators and which may otherwise be in conflict with State interests.
   A. Combining the land and water resources on the federal grazing lands for administrative and management purposes will likely result in the eventual subjection of grazing leases to a bidding process (FLPMA fair market value requirement) resulting in a displacement of pioneer ranching families.
   B. Water projects by local governments such as the Las Vegas Valley Water District may be adversely impacted (e.g., a project like the Coyote Springs project if the BLM had prior rights to the water).

III. SB 76 proposes complex and specialized grazing terminology, which will unduly complicate the Nevada Water Code.

IV. The objections in I., II. and III. can be avoided by simply, directly and without constitutional infirmities adding the following two general rules of property law to NRS Chapter 533 which the Nevada Legislature is competent without question to enact:
   A. Add a section to NRS 533.040 which states: " Water used for the watering of livestock shall be 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."
   B. Add a section to NRS 533.490 which states: "An applicant may not acquire a right to use water for watering livestock if he does not own, lease or otherwise possess a legal or proprietary interest in the livestock to be watered."

The foregoing objections are explained in the following brief.

## BRIEF IN OPPOSITION TO SB 76 AND IN SUPPORT OF ALTERNATIVE AMENDMENTS

### Introduction

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 has been introduced in this year's legislative session to provide for joint filings between the rancher and the BLM. It amends NRS 533.503. As introduced it is discriminatory because it requires (if the federal land agency is to acquire an interest in the application) joint filings on the federal grazing ranges but does not require similar joint filings as to privately owned grazing pastures. Even though the BLM may not be inclined to challenge the law on this basis, if enacted, it is almost certain that environmental groups or even individual ranchers who disagree with this policy will. Furthermore, it is questionable whether the Nevada Legislature can constitutionally require payment from the federal treasury for water developments on the federal grazing ranges. SB 76 appears to establish a contractual agreement between the federal land agency and the permittee in this regard despite preexisting understandings, which are part of the grazing permit. It is questionable whether this is constitutional in light of the constitutional restriction in Article I, Section 10: "No State shall ...pass any... law impairing the Obligation of Contracts..."

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. SB 76 is a giant step in this direction. Should SB 76 pass or if nothing is passed, the BLM will proceed to acquire ownership of State granted water permits. 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 of water law, which are rooted in our history.

The first principle is beneficial use. Nevada water cases uniformly state that a water right in Nevada is a user's right. Judge Pat McCarran, stated in a 1914 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. The BLM cannot

prove beneficial use under this principle, because it does not have any legal interest in the animal that is the instrumentality for the proof of beneficial use on behalf of the rancher by drinking from a trough or spring. NRS 533.490 should be amended by adding a section, which states: *"An applicant may not acquire a right to use water for watering livestock if he does not own, lease or otherwise possess a legal or proprietary interest in the livestock to be watered."*

The second principle is that of appurtenance. 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 place of use of stockwater is within the hide of an animal, the statute is ambiguous with respect to the principle 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 it is land or other water rights. Thus, NRS 533.040 should be amended by adding an exception which states: *"Water used for the watering of livestock shall be 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."*

The amendments discussed above 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 applicants for stockwatering permits. As such, unlike SB 76, they would most certainly withstand a constitutional challenge should anyone be foolish enough to try.

In 1988 the Nevada Supreme Court in *State v. State Engineer,* 104 Nev. 709, 714, 766 P.2d 263 (1988), recognized that the federal land agencies can qualify for State administered water permits for a variety of land management purposes including stockwatering. In the absence of the clarifying principles discussed in the preceding paragraphs the Court held that the agencies could prove beneficial use for watering livestock they did not own. No impediment will be imposed on the federal agencies land management activities if their water acquisitions are restricted to those where they can actually prove beneficial use under well established principles, if enacted into law, which were unavailable for consideration by the Nevada Supreme Court.

The Nevada Supreme Court in *State v. State Engineer, supra,* discussed the non-discrimination aspects of the Nevada water law in the context of this issue. The Court recognized at 718 , that "applications by the United States agencies to appropriate water for application to beneficial uses pursuant to their land management functions must be treated on an equal basis with applications by private land owners." It is important to recognize that the Nevada Supreme Court seemed to be saying that the federal land agencies should not be discrimated against even if there is a legitimate reason for doing so.

In *State v. State Engineer, supra,* at 717, the State argued "that once the water is subject to federal control it will not be available for other uses at a later time." The Nevada Supreme Court responded that:

> While this is true, it is inherent in the prior appropriation system of water rights, and we cannot discriminate against the United States on that basis.

While the Supreme Court was unable to discriminate, given the then existing state of the law, it is permissible and appropriate for the Nevada Legislature to curb the loss of water by evenhandedly clarifying the concept of beneficial use as it applies to all water users.

**The Extent and Nature of Property Rights in Water Are Questions of State Law.**

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.[1] The concept, "first in time being the first in right,"[2] 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[3] whose purpose was to recognize the validity of the water rights that the miners claimed. Justice Field 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 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.

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[1] *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).

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

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

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[4], 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,[5] 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.[6] *See also Andrus v. Charlestone Products Co., Inc.,* 436 U.S. 604, 614 (1978).

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

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

[5] 43 U.S.C.§321.

[6] Judge Foley's opinion in *Fallini v. Hodel,* 725 F. Supp. 1113 (D. Nev. 1989) was consistent.

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).

By the Mining Act of 1866, Ch. 262, 14 Stat. 251, Congress explicitly recognized and acknowledged the effect of the local water law of Nevada and the public land states:

> [W]henever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same. §9, 14 Stat. 253.

The priority of possession referred to pertains to the possession of rights to the use of the water. In *Jennison v. Kirk*, 98 U.S.453, 456-57 (1879), Justice Field, writing for the United States Supreme Court, stated the purposes of the Act of 1866 as follows:

> The object of the action was to give the sanction of the United States, the proprietor of the lands, to possessory rights, which had previously rested solely upon the local customs, laws and decisions of the courts, and to prevent such rights from being lost on a sale of the lands.

*See also, California v. United States*, 438 U.S. 645, 656-660 (1978) for a discussion of 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.

**Relevant principles of Nevada Water Law**

Nevada has two systems for the establishment of water rights, both based on the doctrine of prior appropriation.[7] The first predates the general appropriation statutes and is based upon the 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[8] and for groundwater enacted on March 25, 1939.[9]

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[7] 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).

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

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

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 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.

In Nevada "It is well settled that a water right is realty." *Nenzel v. Rochester Silver Corpn.,* 50 Nev. 352, 357, 259 P. 632 (1927); *see also Vinyard Land & Stock Co.,* 42 Nev. 1, 25, 171 P. 166 (1918); *Adams-Mcgill Co. v. Hendrix,* 22 F. Supp. 789,791 (D. Nev. 1938); *Town of Eureka v. Office of State Engineer, supra,* at 163.

It is not necessary to show that claims to vested water rights perfected under the common law scheme have been established in Nevada judicial proceedings (adjudicated). The Nevada Supreme Court in *Ormsby County v. Kearney,* 37 Nev. 314, 352, 142 P. 803 (1914) stated that water rights acquired before the enactment of any statute prescribing a method of appropriation had been recognized uniformly by the courts as being vested under the common law of the State. Appropriations made before the statutes were enacted were not to be impaired or affected by the adjudication process. *Id.* at 353. They were to be recognized. *Id.* The adjudication procedure was not enacted until 1913 for surface water and did not apply to groundwater until 1939. Certificated water rights acquired under the statutory scheme are vested the moment the certificate issues and they become of record in the State Engineer's office. 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 the basis, the measure and the limit of the right to the use of water. *See State v State Engineer, supra,* at 713. Livestock watering on the public lands in Nevada is a beneficial use with or without an artificial structure to divert the water from the source. *See Steptoe Livestock v. Gulley,* 53 Nev. 163. 295 P. 772 (1931); *Waters of Horse Springs v. State Engineer,* 99 Nev. 709, 712-715, 766 P.2d 263 (1988). The rationale for permitting a water right for stockwatering under the nonstatutory method without a formal diversion structure was the recognition that the cow or horse actually diverted the water by drinking.[10] *See e.g., Hunter v. United States,* 398 F.2d 148 (9th Cir.1967). Historically, livestock operators have constructed wells or elaborate tunneling developments on the public grazing lands in order to divert the small amounts of water, which may be coaxed out of the earth in Nevada. By diverting the water into pipes, tanks and troughs they reduced the water to possession and under the case law have acquired a personal property interest in the water, which is an incident of their real property interest in the water right itself.

It a hallmark of the prior appropriation doctrine that the senior appropriator, that is the one that has the earliest priority, is entitled to receive his whole supply before any subsequent appropriator shall have any right.

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[10] The livestock operator had the legal ownership of the instrumentality of the beneficial use and there was a diversion, in fact.

**History of the Stockwatering Issue in Decades Preceding NRS 533.503**

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 the 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 Court ruled against the BLM and the Forest Service. These cases eventually resulted in a reported decision by the Nevada Supreme Court, *State v. State Engineer,* 104 Nev. 709, 714, 766 P.2d 263 (1988).

In *State v. State Engineer, supra,* 104 Nev. 709, 714, 766 P.2d 263 (1988), the Nevada Supreme Court held that under Nevada's statutory scheme beneficial use is the only indispensable requirement to appropriate water. Citing NRS 533,035 the Court recognized that "[b]eneficial use shall be the basis, the measure and the limit of the right to the use of water." *Id.* at 713.

The Nevada Attorney General, representing the State and the Nevada Board of Agriculture, had argued before the State Engineer, the District Court and the Supreme Court that the BLM and Forest Service could not prove beneficial use of the water because the federal agencies did not own the livestock for which they were attempting to acquire the livestock watering right. The Supreme Court characterized the District Court's decision as follows:

> The district court reasoned that since the federal agencies owned no livestock, the United States could not put the water to beneficial use. The district court concluded that therefore under *Prosole* the United States could not appropriate water for stockwatering. The court noted that the United States does not own the wildlife, which is to receive the water, because no one `owns' animals in the wild.

In rejecting the District Court and the Attorney General's position the 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.
>
> Wildlife watering is encompassed in the NRS 533.030(2) definition of recreation as a beneficial use of water.

**Standing and Beneficial Use**

The Nevada Supreme Court in *State v. State Engineer, supra,* recognized a "proprietary" nexus between the United States as landowner and the land on which the water is to be put to beneficial use. These matters go to standing which is a term, which focuses on the applicant's capacity to qualify for the permit.

In the State Engineer's Rulings of October 4, 1985 and July 26, 1985 (reinstated by the Supreme Court's decision, 104 Nev. at 718) the State Engineer also framed the issue as one of standing:

> Throughout these proceedings, the protestants and Attorney General have challenged the standing or capacity of the United States to hold an appropriative right for stockwatering purposes primarily because it is not in a position--owning no livestock in its right--to put stockwater to beneficial use.

*See* Rulings, July 26, 1985 at p. 31; October 4, 1985 at p. 16.

There is no question that ranchers have standing as applicants. They are "persons" for purposes of NRS Chapters 533 and 534. Furthermore, they have the proprietary nexus to the land on which the water is to be put to beneficial use. Where they have a BLM or Forest Service grazing permits, such permits enable them to lawfully use the lands and springs to graze and water their cattle. Nothing more is required to establish standing to acquire a water permit for the watering of their livestock.

Once standing is established, the focus changes to beneficial use. Stockwatering is a statutorily established beneficial use. *See* NRS 533.490(1). Whether or not beneficial use can be proven at the application stage is immaterial. As the State Engineer ruled in the above referenced Rulings of July 25, 1985 (page 32) and October 4, 1985 (page 17):

> The application manifests the applicant's intent to divert and place water to beneficial use. No applicant under NRS Chapter 533 is required to prove beneficial use at the time of application, but only at a later time in the appropriative process. NRS 533.380.... Denial of a permit at the threshold, based on an unfounded suspicion that the applicant may fail to place the water to beneficial use, is not a basis for denial of an application.

**Possessory Interest Requirement**

In *Ansolabehere v. Laborde,* 73 Nev. 93, 103, n. 3, 310 P.2d 842 (1957), the Nevada Supreme Court construed the connection to an interest in the land in a stockwatering context involving livestock watering on the public lands as follows:

> Applications to the state engineer for permission to appropriate the public waters of the state (for stockwatering purposes as well as for irrigation, power, etc.) are followed by proof of application of the water to beneficial use. NRS 533.380. Prior to the Taylor Grazing Act federal permission to graze the public lands was not involved in the making of proof of application to beneficial use under stockwatering applications and could be made through the showing that a specified number of the applicant's sheep, cattle, etc. watered at the applicant's troughs, tanks, etc. and grazed the surrounding public domain. No confusion would be involved, following the initiation of federal control of the public lands, if the state engineer should require the final proof of application of the water to beneficial use to include a showing of a valid permit or license from the Bureau of Land Management. Without such permit or license the stockwater could not be put to beneficial use. [Emphasis added].

In contexts other than stockwatering, there does not appear to be any requirement that the applicant have a possessory interest in the public land in order to appropriate the public waters arising on such lands. The history of the appropriation doctrine recognizes that water may be appropriated on the public lands for a variety of purposes whether or not there is an underlying possessory interest in the public lands.

No Court has ever engrafted a possessory interest in the public lands as a condition to the appropriation of water arising thereon. The Court's reference in *Ansolabehere,* it should be noted, was tied directly to the question of the proof of beneficial use. Simply put, without the livestock to water, the appropriator would not be able to prove beneficial use to the water for livestock watering. In *State v. State Engineer, supra,* the Nevada Supreme Court made clear that the important consideration is that the appropriator's interest in the permit must have some legal connection to the instrumentality of the use. Thus, if the permit were for irrigation the appropriator must have some possessory interest in the land to be irrigated.[11] In the case of livestock watering on the public lands, the instrumentality of the use, the appropriator's livestock, must have a legitimate presence at the site of the use of water on the public lands. Thus the requirement for a BLM permit.

> In *Burford v. Houtz,* 133 U.S. 320, 326 (1890) the Supreme Court stated:
>
> We are of the opinion that there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids this use.

*See also, Omaechevarria v. Idaho,* 246 U.S. 343 (1918).

Mining was afforded a similar status. In *United States v. Northern Paiute Nation,* 490 F.2d 954, 957 (Ct. of Cl. 1974), the United States Court of Claims summarized the possessory interest of miners which had arisen under the law as follows:

> The Government referred to the miners as "others," disassociating them from the United States. However, the land involved was part of the public domain which they exploited, not only without interference by the national government, but under its implied sanction; *Del Monte Mining and Milling Co. v. Last Chance Mining and Milling Co.,* 171 U.S. 55, 18 S.Ct. 895, 43 L.Ed 49 (1965): *Sparrow v. Strong,* 171 Wall. (70 U.S.) 97, 104, 18 L.Ed. 49; they were in no sense trespassers. Mining rights were not obtainable by patent until much later. The miners originated a "mining district" in 1859 according to their custom. In 1865 and 1866 the Congress retroactively validated the rules of such districts as evidence of title to mining claims vis-a-vis other miners, 13 Stat. 441, and vis-a-vis the United States, 14 Stat. 43.

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[11] Where it appears, at the time of the filing of the application to appropriate water for irrigation or a particular parcel it is appropriate for the State Engineer to assure that the appropriator has an interest in the land to be irrigated. This threshold consideration is a matter of standing to be an appropriator in the particular circumstances as explained previously.

During the time the miners were establishing water rights for their mining claims, their presence on the public lands was encouraged by the implied sanction of the United States. Multiple use of the public lands is similarly encouraged today. *See e.g.,* the Multiple Use and Sustained Yield Act, 16 U.S.C. § 528 *et seq.* (re National Forest lands). *See also,* Section 102(a)(8) of the Federal Land Policy and Management Act, 43 U.S.C. § 1701(a)(8), (re BLM lands).

**Public Water Reserve No. 107**

Public Water Reserve No. 107 created by Executive Order dated April 17, 1926 is a part of the total stockwatering issue. *See* 43 CFR 2311. The basis of the BLM's contention that private stockwatering rights will interfere with Public Water Reserve 107 were considered and rejected by the State Engineer in the Ruling dated July 26, 1985, which was not appealed. In the Ruling the State Engineer stated at p.13, following an extended discussion concerning the nature of the federally reserved right, that:

> Water in PWR 107 sources is available for private appropriation under Nevada law to the extent of any excess over the minimum quantity required to satisfy the primary purpose of the reservation, and to the extent the private applicant can gain access to the source. Private individuals, whether members of the public for whose benefit PWR 107 was created or appropriators of excess water from the source under state law, may not restrict access of other members of the public or other appropriators to the source nor may they restrict access to wildlife that customarily use the source.

The State Engineer further recognized at p. 14, consistent with the case of *United States v. Denver,* 656 P.2d 1, 31 (Colo. 1982) and the reserving documents, that the limited purpose of a Public Water Reserve No.107 reservation is for animal and human consumption (domestic and stockwatering) and that wildlife watering is excluded from the purposes of this type of reservation. The quantity reserved is the minimum quantity required to prevent monopolization of the land and water source. Ruling at p.11. In addition, small sources, such as springs and water holes which produce no more water than that capable of serving a single family and its livestock were excluded as a PWR 107 reserve. Ruling at p.11.
The BLM's arguments in the context of interference with the purposes of Public Water Reserve 107 are simply "dog in the manger" rhetoric.