

SENATE BILL NO. 405—SENATOR AMODEI

MARCH 19, 2007

Referred to Committee on Natural Resources

SUMMARY—Revises provisions governing the appropriation of public waters. (BDR 48-1158)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: Yes.

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EXPLANATION – Matter in **bolded italics** is new; matter between brackets ~~omitted material~~ is material to be omitted.

AN ACT relating to water; granting the State Engineer full authority with respect to the analysis, management, appropriation and diversion of public waters; providing for the preemption by decisions of the State Engineer over certain actions of agencies and political subdivisions of the State; making various other changes concerning the powers and duties of the State Engineer; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Chapter 533 of NRS provides for the adjudication of water rights and the appropriation of public waters by the State Engineer. **Sections 1 and 4** of this bill provide that the State Engineer has full authority over the analysis, management, appropriation and diversion of water. **Section 5** of this bill prohibits actions by local governments and state agencies that conflict with decisions of the State Engineer. **Section 6** of this bill requires the State Engineer, when approving an appropriation for water for an amount less than the amount requested, to declare whether the refusal to appropriate the remaining amount is with or without prejudice.

Existing law provides for interested persons to oppose applications to appropriate water. (NRS 533.365) **Section 7** of this bill specifies which interested parties may fully participate in hearings, requires applicants and protestants to provide technical data to each other and to the State Engineer, and provides for the resolution of disputes over such data. **Section 7** also requires the State Engineer to render a decision regarding each permit application within 120 days after a hearing on the application.

Existing law provides for the approval or rejection of applications to appropriate water. (NRS 533.370) **Section 8** of this bill requires the State Engineer to reject an application for a proposed use or change in previously appropriated water that increases the amount consumptively used under the existing use. **Section**



21 **8** also prohibits the State Engineer from using the presence or absence of zoning or
22 planning designations as a determining factor in analyzing an application.
23 Additionally, **section 8** authorizes the State Engineer to grant or deny an
24 application to appropriate not more than 10 acre-feet of water without a hearing.
25 **Section 8** also authorizes the State Engineer to order a reconsideration of a decision
26 on the motion of an interested party or on the motion of the State Engineer.

27 Existing law authorizes the State Engineer, when approving a permit
28 application, to set a time limit on the validity of the permit. (NRS 533.380) **Section**
29 **9** of this bill authorizes the State Engineer to grant an extension to a permit if the
30 permit is the subject of a pending judicial proceeding.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 **Section 1.** Chapter 532 of NRS is hereby amended by adding
2 thereto a new section to read as follows:

3 *1. Except as otherwise provided in subsection 2, the State*
4 *Engineer has full, exclusive and final authority with respect to:*

5 *(a) The appropriation of water; and*

6 *(b) The place of diversion, manner of use and place of use of*
7 *appropriated water.*

8 *2. The orders and decisions of the State Engineer preempt the*
9 *authority of a political subdivision regarding planning, zoning and*
10 *management of growth within its jurisdiction only if the political*
11 *subdivision takes any action that directly or indirectly conflicts*
12 *with or is otherwise inconsistent with the orders and decisions of*
13 *the State Engineer or the purposes and objectives of chapter 533*
14 *of NRS.*

15 **Sec. 2.** Chapter 533 of NRS is hereby amended by adding
16 thereto the provisions set forth as sections 3 to 6, inclusive, of this
17 act.

18 **Sec. 3.** *As used in this chapter, "consumptive use" means*
19 *that portion of an annual volume of water diverted under a water*
20 *right that is transpired by growing vegetation, evaporated from*
21 *soils, converted to nonrecoverable water vapor incorporated into*
22 *products, or that otherwise does not return to the source from*
23 *which it was taken. The term does not include any water that falls*
24 *as precipitation directly on the place of use.*

25 **Sec. 4.** *The State Engineer shall be the only public agency to*
26 *analyze and manage the water resources of this State on a basin-*
27 *by-basin basis, a regional water flow basis or a statewide basis.*

28 **Sec. 5.** *A state agency or political subdivision, including,*
29 *without limitation, the Public Utilities Commission of Nevada,*
30 *shall not take any action that directly alters, changes or*
31 *diminishes any right regarding the appropriation of water or the*



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1 *place of diversion of water that is granted to a utility by a decision*
2 *of the State Engineer.*

3 **Sec. 6.** *If the State Engineer approves an appropriation of an*
4 *amount of water less than the amount requested by the applicant,*
5 *the State Engineer:*

6 1. *Shall make a specific declaration in the decision that:*

7 (a) *The State Engineer is denying the remaining amount of the*
8 *requested appropriation temporarily and without prejudice; and*

9 (b) *The applicant may resubmit the original application at any*
10 *point in the future to request an increase in the amount of water*
11 *appropriated; or*

12 2. *Shall make a specific declaration in the decision that:*

13 (a) *The State Engineer is denying the remaining amount of the*
14 *requested appropriation with prejudice; and*

15 (b) *The applicant:*

16 (1) *May not resubmit the original application at any point*
17 *in the future to request an increase in the amount of water*
18 *appropriated; and*

19 (2) *May file a new application to request an increase in the*
20 *amount of water appropriated.*

21 **Sec. 7.** NRS 533.365 is hereby amended to read as follows:

22 533.365 1. Any person interested may, within 30 days from
23 the date of last publication of the notice of application, file with the
24 State Engineer a written protest against the granting of the
25 application, setting forth with reasonable certainty the grounds of
26 such protest, which shall be verified by the affidavit of the
27 protestant, his agent or attorney.

28 2. On receipt of a protest, the State Engineer shall advise the
29 applicant whose application has been protested of the fact that the
30 protest has been filed with him, which advice shall be sent by
31 certified mail.

32 3. The State Engineer shall consider the protest, and may, in
33 his discretion, hold hearings and require the filing of such evidence
34 as he may deem necessary to a full understanding of the rights
35 involved. The State Engineer shall give notice of the hearing by
36 certified mail to both the applicant and the protestant. The notice
37 must state the time and place at which the hearing is to be held and
38 must be mailed at least 15 days before the date set for the hearing.

39 4. *If the protestant:*

40 (a) *Is a bona fide owner of water rights who has demonstrated*
41 *or provided technical data regarding injury or impairment of a*
42 *permitted, vested, decreed or otherwise adjudicated water right, the*
43 *protestant may fully participate in any hearing conducted by the*
44 *State Engineer on the application.*



(b) Has a concern relative to any public policy issues that may attend the application, the protestant may provide a written protest of the application and any supporting documentation and may offer oral comments during a time set by the State Engineer but may not otherwise participate in any hearing conducted by the State Engineer on the application.

5. Each applicant and each protestant shall provide to the State Engineer and to each protestant and each applicant all technical data regarding an application or an application protest not later than 60 days before the date set for the permit application hearing.

6. The State Engineer may, at his discretion, communicate with any applicant, protestant or person interested for the purposes of obtaining information which the State Engineer deems necessary to a hearing.

7. If there is a dispute regarding technical data relating to a permit application, the State Engineer shall invite technical representatives of the applicant and of the protestant to meet with the technical staff of the State Engineer one or more times, not less than 30 days before the date set for the permit application meeting, to attempt to reach an agreement regarding the dispute.

8. The State Engineer shall render a decision on each permit application not later than 120 days after the hearing on the application.

9. The State Engineer shall adopt rules of practice regarding the conduct of such hearings. The rules of practice must be adopted in accordance with the provisions of NRS 233B.040 to 233B.120, inclusive, and codified in the Nevada Administrative Code. The technical rules of evidence do not apply at such a hearing.

Sec. 8. NRS 533.370 is hereby amended to read as follows:

533.370 1. Except as otherwise provided in this section and NRS 533.345, 533.371, 533.372 and 533.503, the State Engineer shall approve an application submitted in proper form which contemplates the application of water to beneficial use if:

(a) The application is accompanied by the prescribed fees;

(b) The proposed use or change, if within an irrigation district, does not adversely affect the cost of water for other holders of water rights in the district or lessen the efficiency of the district in its delivery or use of water; and

(c) The applicant provides proof satisfactory to the State Engineer of:

(1) His intention in good faith to construct any work necessary to apply the water to the intended beneficial use with reasonable diligence; and



(2) His financial ability and reasonable expectation actually to construct the work and apply the water to the intended beneficial use with reasonable diligence.

2. Except as otherwise provided in this subsection and subsections 3 and 8, the State Engineer shall approve or reject each application within 1 year after the final date for filing a protest. The State Engineer may:

(a) Postpone action upon written authorization to do so by the applicant or, if an application is protested, by the protestant and the applicant.

(b) Postpone action if the purpose for which the application was made is municipal use.

(c) In areas where studies of water supplies have been determined to be necessary by the State Engineer pursuant to NRS 533.368 or where court actions are pending, withhold action until it is determined there is unappropriated water or the court action becomes final.

3. Except as otherwise provided in subsection 8, the State Engineer shall approve or reject, within 6 months after the final date for filing a protest, an application filed to change the point of diversion of water already appropriated when the existing and proposed points of diversion are on the same property for which the water has already been appropriated under the existing water right or the proposed point of diversion is on real property that is proven to be owned by the applicant and is contiguous to the place of use of the existing water right. The State Engineer may:

(a) Postpone action upon written authorization to do so by the applicant or, if the application is protested, by the protestant and the applicant.

(b) In areas where studies of water supplies have been determined to be necessary by the State Engineer pursuant to NRS 533.368 or where court actions are pending, withhold action until it is determined there is unappropriated water or the court action becomes final.

4. If the State Engineer does not act upon an application within 1 year after the final date for filing a protest, the application remains active until acted upon by the State Engineer.

5. Except as otherwise provided in subsection 8, where there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights or with protectible interests in existing domestic wells as set forth in NRS 533.024, *or where the proposed use or change increases the historic amount of consumptive use under the existing use or otherwise enlarges the use of the right*, or threatens to prove detrimental to the public interest, the State Engineer shall reject the



1 application and refuse to issue the requested permit. If a previous
2 application for a similar use of water within the same basin has been
3 rejected on those grounds, the new application may be denied
4 without publication ~~H~~, *with the exception of surface water sources*
5 *that are tributary to the Colorado River.*

6 6. In determining whether an application for an interbasin
7 transfer of groundwater must be rejected pursuant to this section ~~H~~
8 ~~the~~:

9 (a) *The State Engineer shall consider:*

10 ~~H(a)~~ (1) Whether the applicant has justified the need to import
11 the water from another basin;

12 ~~H(b)~~ (2) If the State Engineer determines that a plan for
13 conservation of water is advisable for the basin into which the water
14 is to be imported, whether the applicant has demonstrated that such
15 a plan has been adopted and is being effectively carried out;

16 ~~H(c)~~ (3) Whether the proposed action is environmentally sound
17 as it relates to the basin from which the water is exported;

18 ~~H(d)~~ (4) Whether the proposed action is an appropriate long-
19 term use which will not unduly limit the future growth and
20 development in the basin from which the water is exported; and

21 ~~H(e)~~ (5) Any other factor the State Engineer determines to be
22 relevant.

23 (b) *The presence or absence of zoning or master plan*
24 *designations must not be a determining factor in the State*
25 *Engineer's analysis.*

26 7. If a hearing is held regarding an application, the decision of
27 the State Engineer must be in writing and include findings of fact,
28 conclusions of law and a statement of the underlying facts
29 supporting the findings of fact. The written decision may take the
30 form of a transcription of an oral ruling. The rejection or approval of
31 an application must be endorsed on a copy of the original
32 application, and a record must be made of the endorsement in the
33 records of the State Engineer. The copy of the application so
34 endorsed must be returned to the applicant. Except as otherwise
35 provided in subsection 9, if the application is approved, the
36 applicant may, on receipt thereof, proceed with the construction of
37 the necessary works and take all steps required to apply the water to
38 beneficial use and to perfect the proposed appropriation. If the
39 application is rejected, the applicant may take no steps toward
40 the prosecution of the proposed work or the diversion and use of the
41 public water while the rejection continues in force.

42 8. The provisions of subsections 1 to 6, inclusive, do not apply
43 to an application for an environmental permit.

44 9. The provisions of subsection 7 do not authorize the recipient
45 of an approved application to use any state land administered by the



1 Division of State Lands of the State Department of Conservation
2 and Natural Resources without the appropriate authorization for that
3 use from the State Land Registrar.

4 10. *The State Engineer may grant or deny any application to*
5 *appropriate not more than 10 acre-feet of water without a hearing*
6 *if the applicant has provided sufficient information with the*
7 *application. Any application granted pursuant to this subsection*
8 *must not be used as a precedent for any future or similar*
9 *applications.*

10 11. *Subject to the provisions of subsection 12, not later than 5*
11 *days after the State Engineer issues a decision pursuant to*
12 *subsection 7, the State Engineer may order reconsideration of the*
13 *decision:*

14 (a) *On the motion of any person interested to reconsider the*
15 *decision; or*

16 (b) *On the motion of the State Engineer.*

17 12. *Grounds for reconsideration pursuant to subsection 11*
18 *include, without limitation:*

19 (a) *Newly discovered or available evidence;*

20 (b) *Error in the hearing or in the findings of fact or*
21 *conclusion of law; or*

22 (c) *The need, in the public interest, for further consideration*
23 *of the issues or the evidence, or both.*

24 13. As used in this section, "interbasin transfer of
25 groundwater" means a transfer of groundwater for which the
26 proposed point of diversion is in a different basin than the proposed
27 place of beneficial use.

28 **Sec. 9.** NRS 533.380 is hereby amended to read as follows:

29 533.380 1. Except as otherwise provided in subsection ~~15.1~~ 6,
30 in his endorsement of approval upon any application, the State
31 Engineer shall:

32 (a) Set a time before which the construction of the work must be
33 completed, which must be within 5 years after the date of approval.

34 (b) Except as otherwise provided in this paragraph, set a time
35 before which the complete application of water to a beneficial use
36 must be made, which must not exceed 10 years after the date of the
37 approval. The time set under this paragraph respecting an
38 application for a permit to apply water to a municipal or quasi-
39 municipal use on any land:

40 (1) For which a final subdivision map has been recorded
41 pursuant to chapter 278 of NRS;

42 (2) For which a plan for the development of a project has
43 been approved by the local government pursuant to NRS 278.010 to
44 278.460, inclusive; or



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(3) On any land for which a plan for the development of a planned unit development has been recorded pursuant to chapter 278A of NRS,

↪ must not be less than 5 years.

2. The State Engineer may limit the applicant to a smaller quantity of water, to a shorter time for the completion of work, and, except as otherwise provided in paragraph (b) of subsection 1, to a shorter time for the perfecting of the application than named in the application.

3. Except as otherwise provided in subsection ~~4~~ 5 and NRS 533.395 and 533.4377, the State Engineer may, for good cause shown, extend the time within which construction work must be completed, or water must be applied to a beneficial use under any permit therefor issued by him, but an application for the extension must in all cases be:

(a) Made within 30 days following notice by registered or certified mail that proof of the work is due as provided for in NRS 533.390 and 533.410; and

(b) Accompanied by proof and evidence of the reasonable diligence with which the applicant is pursuing the perfection of the application.

↪ The State Engineer shall not grant an extension of time unless he determines from the proof and evidence so submitted that the applicant is proceeding in good faith and with reasonable diligence to perfect the application. The failure to provide the proof and evidence required pursuant to this subsection is prima facie evidence that the holder is not proceeding in good faith and with reasonable diligence to perfect the application.

4. *The State Engineer shall grant an extension pursuant to subsection 3 if the permit for which a request for an extension is made is the subject of a pending judicial proceeding. Each extension granted pursuant to this subsection must be in annual increments. An applicant who has been granted an extension pursuant to this subsection shall provide a report to the State Engineer during each year that the permit remains valid.*

5. Except as otherwise provided in subsection ~~5~~ 6 and NRS 533.395, whenever the holder of a permit issued for any municipal or quasi-municipal use of water on any land referred to in paragraph (b) of subsection 1, or for any use which may be served by a county, city, town, public water district or public water company, requests an extension of time to apply the water to a beneficial use, the State Engineer shall, in determining whether to grant or deny the extension, consider, among other factors:

(a) Whether the holder has shown good cause for not having made a complete application of the water to a beneficial use;



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(b) The number of parcels and commercial or residential units which are contained in or planned for the land being developed or the area being served by the county, city, town, public water district or public water company;

(c) Any economic conditions which affect the ability of the holder to make a complete application of the water to a beneficial use;

(d) Any delays in the development of the land or the area being served by the county, city, town, public water district or public water company which were caused by unanticipated natural conditions; and

(e) The period contemplated in the:

(1) Plan for the development of a project approved by the local government pursuant to NRS 278.010 to 278.460, inclusive; or

(2) Plan for the development of a planned unit development recorded pursuant to chapter 278A of NRS,

↳ if any, for completing the development of the land.

~~15-1~~ 6. The provisions of subsections 1 and ~~14~~ 5 do not apply to an environmental permit.

~~16-1~~ 7. For the purposes of this section, the measure of reasonable diligence is the steady application of effort to perfect the application in a reasonably expedient and efficient manner under all the facts and circumstances. When a project or integrated system is comprised of several features, work on one feature of the project or system may be considered in finding that reasonable diligence has been shown in the development of water rights for all features of the entire project or system.

Sec. 10. NRS 538.171 is hereby amended to read as follows:

538.171 1. The Commission shall receive, protect and safeguard and hold in trust for the State of Nevada all water and water rights, and all other rights, interests or benefits in and to the waters described in NRS 538.041 to 538.251, inclusive, and to the power generated thereon, held by or which may accrue to the State of Nevada under and by virtue of any Act of the Congress of the United States or any agreements, compacts or treaties to which the State of Nevada may become a party, or otherwise.

2. Except as otherwise provided in this subsection, applications for the original appropriation of such waters, or to change the place of diversion, manner of use or place of use of water covered by the original appropriation, must be made to the Commission in accordance with the regulations of the Commission. In considering such an application, the Commission shall use the criteria set forth in **paragraph (a) of** subsection 6 of NRS 533.370. The Commission's action on the application constitutes the recommendation of the State of Nevada to the United States for the



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1 purposes of any federal action on the matter required by law. The
2 provisions of this subsection do not apply to supplemental water.

3 3. The Commission shall furnish to the State Engineer a copy
4 of all agreements entered into by the Commission concerning the
5 original appropriation and use of such waters. It shall also furnish to
6 the State Engineer any other information it possesses relating to the
7 use of water from the Colorado River which the State Engineer
8 deems necessary to allow him to act on applications for permits for
9 the subsequent appropriation of these waters after they fall within
10 the State Engineer's jurisdiction.

11 4. Notwithstanding any provision of chapter 533 of NRS, any
12 original appropriation and use of the waters described in subsection
13 1 by the Commission or by any entity to whom or with whom the
14 Commission has contracted the water is not subject to regulation by
15 the State Engineer.

