MINUTES OF THE
SENATE COMMITTEE ON NATURAL RESOURCES

Seventy-fourth Session
March 28, 2007

The Senate Committee on Natural Resources was called to order by Chair Dean A. Rhoads at 3:49 p.m. on Wednesday, March 28, 2007, in Room 2144 of the Legislative Building, Carson City, Nevada. **Exhibit A** is the Agenda. **Exhibit B** is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Dean A. Rhoads, Chair
Senator Mike McGinness, Vice Chair
Senator Mark E. Amodei
Senator Joseph J. Heck
Senator Bob Coffin
Senator Michael A. Schneider
Senator Maggie Carlton

STAFF MEMBERS PRESENT:

Susan Scholley, Committee Policy Analyst
Randy Stephenson, Committee Counsel
Ardyss Johns, Committee Secretary

OTHERS PRESENT:

Tracy Taylor, P.E., State Engineer, Division of Water Resources, State Department of Conservation and Natural Resources
Steve K. Walker, Douglas County
Sabra Smith-Newby, Clark County
Gordon DePaoli, Walker River Irrigation District
Steve Bradhurst
Kyle Davis, Policy Director, Nevada Conservation League
Lisa A. Gianoli, Washoe County
Edwin D. James, P.E., Carson Water Subconservancy District
Ross DeLipkau
Michael Pagni, Truckee Meadows Water Authority
Andy Belanger, Southern Nevada Water Authority

Doug Busselman, Nevada Farm Bureau
Don Alt

CHAIR RHOADS:
We will open the hearing on Senate Bill (S.B.) 275.

SENATE BILL 275: Makes various changes relating to underground water. (BDR 48-208)

SUSAN SCHOLLEY (Committee Policy Analyst):
The Legislative Counsel Bureau is a nonpartisan staff and as such, we neither advocate nor oppose legislation. I am here today in my capacity as the Committee Policy Analyst for the interim water resources study, S.C.R. No. 26 of the 73rd Session. Senate Bill 275 is a recommendation from that interim study and is the bill that collects the various recommendations related to wells.

I have written an outline of each section of the bill, which shows what each of those sections will do (**Exhibit C**).

TRACY TAYLOR, P.E. (State Engineer, Division of Water Resources, State Department of Conservation and Natural Resources):
The Division of Water Resources is in support of S.B. 275 with some clarification and amendments. A handout with the Division's proposed amendments to S.B. 275 has been prepared for your review (**Exhibit D**). We have suggested some minor language changes to existing sections 1, 3, 4, 6 and 7 of the bill. Those changes will help clarify the bill by using language the Division has historically used in terms of secondary dwellings. Also, we have expanded section 4 regarding the dedication of water rights in support of the creation of new parcels to include the relinquishments of water rights back to the groundwater source in favor of a domestic well credit.

The most significant amendment to S.B. 275 adds a new section 7. We fully support this addition to the bill. Steve Walker will explain these amendments in more detail. We would like to work with staff on these amendments.

SENATOR COFFIN:
I assume 2 acre-feet is the equivalent of 1,800 gallons a day times 365. As our population increases, will we eventually use a term other than acre-feet? Do we need to make any adjustments, or can we just stay with acre-feet in the

definition? It seems the day will come when 180 gallons of water a day will be a lot.

MR. TAYLOR:
Acre-feet is standard for everyone to use. In fact, the *Nevada Revised Statute* (NRS) specifies that when we grant permits, we do so in acre-foot amounts.

SENATOR CARLTON:
I just had a chance to glance through this and something caught my eye under section 7. I may be reading this wrong since I realize you have to read things in their totality and I am just reading this section so correct me if I am wrong. Under section 7, subsection 8, paragraph (a), **Exhibit D**, "The water right being relinquished shall keep its priority date pursuant to NRS 534.080(3)." So, the water right from a person who would have to hook up to a public system will still keep its initial priority date. Am I reading that correctly?

MR. TAYLOR:
Are you talking about NRS 534.350?

SENATOR CARLTON:
Yes. If a water right is relinquished, it is going to keep its priority date. In other words, first-in-time, first-in-line, and in the event it gets relinquished, meaning if someone had to hook up to a public water system, then that right would go to that public system. Therefore, in essence, it will be transferred over to the public system.

MR. TAYLOR:
That is correct.

SENATOR CARLTON:
Okay, explain that to me. The principle I have learned in all of this is that the water belongs to the State and it should come back to the State. If a person is pushed from a well either by choice or due to a requirement to give up the well, it seems to me that municipality is going to have an edge over getting that water right back to that person.

MR. TAYLOR:
I will try to explain that whole section. The existing law allows for any parcel created for a domestic well prior to 1993, if a water

purveyor comes into the area and the well fails, or the water tables are getting low, or something is going on where they feel it is better to hook up to system, then we are allowed to give them a credit to serve this domestic well. The problem comes with the parcels created after 1993. The intent was, we do not just want you to go out and create a bunch of parcels with the chance of being served later with a free water right. So, after 1993, municipalities, or counties have required dedication of water rights to create new parcels, or relinquish new water rights to create new parcels. These parcels are created as a domestic well parcel, but if the same problem happens again later down the road where you want to hook up, now the purveyor has a water right to serve that parcel also.

SENATOR CARLTON:
Okay, that is what I meant by the totality of it. I was afraid they were going to use this to build their water allotment, or whatever we want to call it, by asking people to relinquish their wells.

MR. TRACY:
That right would be limited just to that parcel. It would not be allowed to create new parcels.

STEVE K. WALKER (Douglas County):
I propose a friendly amendment to S.B. 275 (**Exhibit E**). Currently, three counties require you to dedicate water rights to the county when you create new lots served by domestic wells. Washoe, Churchill and Douglas Counties recently added that provision. The counties that have done this get these water rights and they sit ... in a no-man's-land. When we have these water rights that are tied to a specific parcel, if we want to make sure we can use them eventually to a public purveyor, then we have to file extensions of time on them to keep them viable. So, the counties file extensions of time, the Office of the State Engineer gets the extensions of time and they go 'Yeah, you filed an extension of time,' and we play this paperwork back and forth to keep these rights viable. We have tried through the interim to work out a system to solve that and I think we have come up with it in the language that is there, **Exhibit E**. Basically, now the county may

> relinquish the right that is dedicated for that parcel for that domestic well to the State Engineer. The State Engineer will hold that right and then when that parcel is to be hooked up by a public purveyor, or municipal water system, the State Engineer will grant a credit from that right. It stops all the applications yearly to keep the rights viable. This is a Douglas County bill that actually came out as another bill, but it fits perfectly into this segment and we asked to amend it into this bill, because it kills two birds with one stone.

CHAIR RHOADS:
How long does the State Engineer hold on to those water rights?

MR. WALKER:
Forever, as long as it is pertinent to the parcel.

SENATOR HECK:
This amendment appears identical to the mock-up amendment presented by the State Engineer.

MR. WALKER:
I did not review what was in the mock-up, so if there is a problem, I am unaware of it.

SABRA SMITH-NEWBY (Clark County):
I have been working with the State Engineer on this friendly amendment (**Exhibit F**). It was also included in the mock-up amendment proposed by the State Engineer. We are in favor of this bill, particularly as it relates to accessory structures.

CHAIR RHOADS:
We will close the hearing on S.B. 275 and open the hearing on S.B. 405. Senator Amodei requested we hold a hearing on this bill today and then wait a week and have another hearing on the same bill after amendments have been processed.

SENATE BILL 405: Revises provisions governing the appropriation of public waters. (BDR 48-1158)

SENATOR AMODEI:
For the record:

> I have filed this disclosure with the Director of the Legislative Counsel Bureau under NRS 281.501 to indicate to you there are members of my firm who lobby on behalf of people who are interested in water clients. Also, part of my practice in my full-time day job, relates to water matters in various areas of the State. I would refer people to that disclosure, but I will indicate, for purposes of this hearing today and also for this proposed legislation, that I have not accepted a gift or a loan with relation to this legislation. I have no pecuniary interest nor does my law firm in whether it passes or fails. Also, my commitment in a private capacity to interest of others will not reasonably affect my judgment in this matter. That is based on ethics opinion case of Henry Woodbury where it says if this affects all members similarly situated that it applies to, that there is a presumption that there is no commitment or effect in that capacity.

Allow me to give you a history of why I decided to bring a separate bill on water matters. If you look at the bill, I have tried to focus mainly on two areas. As Nevada has matriculated from where we get a lot of our major legislation regarding water law and the administration thereof, which was sometime around the time of World War I, we have evolved over the last 20 or 30 years from a state where we used to fight about water for agricultural reasons. However, we had not seen anything until we stopped fighting just about agricultural use and started fighting about domestic uses along with agriculture. The intensity level on water matters in Nevada has been escalated phenomenally over the last couple decades. When we look at how we administer that law, it is time for us to have the discussion and see if there are areas where we can give the State Engineer additional tools and also take care of some areas where jurisdictions have been blurred. Those are the main two themes of what I had hoped to accomplish with S.B. 405, and hope to accomplish with a major amendment before we get down to considering whether to support or not support this bill.

I have practiced in the water law area and served as a member of the S.C.R. 26 Committee, and this Committee. I have heard from jurisdictions in western Nevada with concerns of both surface and groundwater throughout the seven-county region in western Nevada. I have also served on this Committee

for the past several sessions and I have talked to the State Engineer and developers concerning issues regarding how we administer water.

Nothing in S.B. 405 is intended to, nor should be interpreted to, change the way we do priority in water or affect any negotiated settlements, court decrees, anything to do on the Colorado River or any of the bistate compacts that may be affected by this. This is strictly how we administer water law, mostly in terms of protests.

My intent through the first section of the bill was to say the State Engineer has exclusive and final administrative authority with respect to the appropriation, allocation and availability of water resources in this State. That is a restatement of the existing law, but I have heard over the last couple years, and become aware of situations where perhaps those lines are beginning to blur. There are jurisdictions that may be requiring people who go through the State Engineer's office to go through a second procedure regarding appropriation, allocation and availability. If that is not currently happening in any jurisdictions, then that should not be objectionable. However, we have set up the State Engineer's office as the primary and sole jurisdictional entity in the State for purposes of application, appropriation, allocation and availability of water. They go through a public process in carrying out those administrative abilities. It is not a process in which local jurisdictions or other regulatory entities cannot participate if they have issues relating to those areas. That was my intent.

SENATOR AMODEI:
What was not my intent was to place the State or the State Engineer in the planning, zoning or land-use master-plan business. What I was attempting to do was say, "If it is something that is in the State Engineer's jurisdiction, we want to reinforce that." The State Engineer is in charge of water in terms of appropriation, allocations and availability. The State Engineer is not in charge of planning, zoning and master-planning. That is the exclusive province of local county commissions, city councils or planning commissions. It is my hope to do whatever I have to do with bill drafting staff to obtain a mock-up of an amendment to have available a few days before the next hearing.

The intention of S.B. 405, for purposes of your record today, is in those areas. Water is considered a public resource of the State of Nevada and the administrative authority over that is given to the State Engineer. Nothing in the bill says you cannot still go to court and sue the State Engineer if you do not

like what he or she did. If the State Engineer is given the statutory authority to make a decision on those matters, that decision should not be modified or second-guessed by any other public entity or political subdivision of Nevada. If the U.S. Geological Survey wants to do a study, or someone wants to assist in the management, that is fine, but the initial determination, as far as availability or change applications, should clearly remain the exclusive province of the State Engineer.

There was a recent district court decision out of Lyon County that talked about consumptive-use issues. Consumptive-use issues are relevant when you make an application to change from agricultural use to domestic use. The Nevada Supreme Court basically said, "State Engineer, you cannot rely upon consumptive use because it is not in the statute." I am not sure consumptive use is an area I would beg for indulgence to speak about specifically, because we need to define "consumptive use" in the statute. In my opinion, if you respect the science and the resource, you do not change from agricultural to municipal, where we account for every drop, and then recycle it and turn it into effluent and then we use those drops once or twice more. For those of you who think I am just looking out for the developers, I can assure you there are many in the development community who vehemently disagree with me and want a one-to-one transfer. You cannot look at the science and reasonably come to the opinion that there is not a change in consumptive use. Even when those systems are going into septic systems, you must ask yourself if they are going to stay that way forever. When you talk about those issues related to the matriculation of water usage in this State, from agricultural to domestic, you need to talk about consumptive use.

SENATOR AMODEI:
Section 6 talks about incremental approvals. Currently, there are several instances in the State. The Southern Nevada Water Authority has an importation scenario where they have applied for 90,000-plus acre-feet in White Pine County and various valleys. It would not be unusual for the State Engineer to say, "I am going to approve a portion of your application. We are going to put it into effect a monitoring program to see how the water levels do based on what you pump. You can come back and if they go down too much, then we may adjust it downward. If they stay the same, then we may let you pump more." Section 6 is an attempt not to change the criteria by which the State Engineer makes a decision as to whether or not the water is available, but the administrative process by which they deal with that stair-stepped

approach. This will ensure it is in statute so everybody knows what the rules are in terms of protest and information submittal and how the monitoring programs are going to work. It should not be something that varies from application to application. Make sure the basic structure is there, go forward with it and proceed from then.

SENATOR CARLTON:
This is almost a contingency clause then. I am assuming because of this discussion, the State Engineer does not have an opportunity to say in this application, "Okay, you have asked for 70 and I am giving you 50, but contingent upon the study, I could give you 60."

SENATOR AMODEI:
I am not saying he does not have the opportunity, but he does not have clear-cut guidance in the statute. If he were to be sued, it would be everyone's interpretation of something that does not deal directly with that issue. This is an attempt to deal directly with that issue in statute.

Section 7 talks about protests. The language does not change the definition of an interested party, but you will notice that NRS 533.365 starts out, "Any person interested may, within 30 days from the date of last publication of the notice of application, file with the State Engineer a written protest ... " The change comes in the definition of protestant. This was an attempt to restrict the full-blown protest process to people who have a right on the stream or a right in the designated basin. Obviously, they have an interest in what is going on in their basin or on their stream if somebody wanted to do something that would potentially change their water rights. This was an attempt to say, "If you do not have a right on the stream or in the designated basin, you can still participate orally or submit anything in writing, but essentially, you do not have the ability to cross-examine the technical experts." However, as I read through this, I do not know if it will change anything or not, but I have heard time and time again from jurisdictions in western Nevada that they are tired of seeing the processes of the State Engineer subjected to a Xerox copy of a protest form that does not change except for the date over the years. There are 90 employees in the Office of the State Engineer. At some point in time, there should be a measure of respect for the process and the resource in the form of the State Engineer's Office to require at least some minimal qualification to basically put a protest in motion. This is not put in the context of people who have rights that could potentially be affected by a change of application or a new application to

appropriate. This is not to say the public interests should not be heard, but the protest process is being used in its barest form with a Xerox sheet where the dates change. I am not saying the State Engineer cannot deal with it, because they have been doing so for a long time, but the use of water is matriculating in this State over the last 20 years.

The rest of section 7, starting with subsection 5, is an attempt to provide a technical meeting process prior to a hearing on a protest. The way it is worded purposefully excludes members of the bar. This provides specific statutory authority to have technical settlement conferences in advance of hearings on protests. It is my hope that by virtue of putting this in statute, when the State Engineer calls all those protesting people in for the technical stuff and says, "Okay, tell me why you think the aquifer is going to go down, or why is this going to affect your existing right, or why is this too close to your point of diversion," they can work out as much as possible in that technical, informal context before the hearing in order to streamline the hearings.

SENATOR AMODEI:
Finally, in section 7, subsection 8, which reads, "The State Engineer shall render a decision on each permit application not later than 120 days after the hearing on the application," I threw in 120 days just to get the discussion started, but it could as easily be 240 days. The intent was for purposes of protest after a hearing is held and the transcript is delivered, or after the last piece of evidence the State Engineer asks for at the hearing is received, the State Engineer would have 240 days to make a decision. The 240 days would be extendable by the State Engineer based on necessity for additional information or whatever. That would be at the State Engineer's discretion. Currently, the time frame is open-ended and we need some sort of structure to say, "Here are the time frames, generally, unless there is something special going on in which case the State Engineer will have the ability to extend those deadlines."

There will be other State Engineers and there will be other circumstances. It is appropriate for us to think about some sort of time-frame network in terms of that action.

Section 8 has a change on consumptive use. For purposes of today, completely mark out that section. Regarding page 6, line 4, it was not our intent to affect what is going on in the Colorado River. On the same page, lines 23 through 25, is an example of miscommunication between the bill drafters and me. What

I had told the bill drafters was, "I do not want anybody in the State Engineer's jurisdiction, and I do not want the State Engineer in anybody else's jurisdiction." The State Engineer is not in the planning and zoning and master-plan process. That is local government jurisdiction and local government is not putting somebody through the same process they have to go through with the State Engineer.

Subsection 10 of section 8 was an attempt to give the State Engineer a tool to provide for a summary process for a relatively small amount. Ten acre-feet was picked as a number to start the discussion, but to say, "Listen, if it would help you in dealing with some of these administrative procedures in the protest process to have a summary process, here is an attempt to give you the ability to do that." It does not say if you are dealt with in the summary context, you cannot still sue him or her for whatever it is you think you were aggrieved. It is just another potential tool to help that office of 90 people deal with what has been going on in the State with respect to water.

SENATOR AMODEI:
Subsection 11 is an attempt to allow the State Engineer to make corrections to decisions without necessitating going to court. If there is a clerical error or an inadvertent omission in findings or facts, and it is pointed out in a certain time frame, then they ought to be able to correct it. A statutory authority ought to exist for that unequivocally, so they can correct it as an administrative matter. The reason all of these procedural things are being addressed is because the State Engineer is not subject to the Nevada Administrative Procedure Act.

The intent of lines 29 through 35 on page 8 is if there is litigation affecting someone's ability to proceed with the application, whether it is an initial application or a change process, then that person would get a stay. He or she would have to do an annual filing to tell the State Engineer what is going on with the litigation, but basically, no action will be taken on the application until that court proceeding is resolved.

The reason I did not ask that the bill be pulled is even though this is administrative and even though there are some jurisdictional things, it does represent a fairly big bite of the apple. It is a discussion we should have.

MR. TAYLOR:
I will read from prepared testimony (**Exhibit G**).

SENATOR COFFIN:
Senator Amodei, if you have the mock-up amendment ready in a few days, would it be possible to put it on the Internet where it can be seen by the interested parties before it goes to a hearing?

SENATOR AMODEI:
That is a legitimate concern and I will attempt to meet with the bill drafters first thing tomorrow morning to generate the mock-up. The only reason I delayed was to hopefully narrow the testimony on what I was attempting to do. I have no objection to having it put on the Internet.

The intention is to get it done as soon as possible. I just want it on the record too that, "There are deadlines that have come up and as soon as the individual bills were drafted, the committee bills were a priority and it is no secret we were on the Senate Floor at 5 p.m. for the third time last Monday getting that finished." It is no secret there has not been a single amendment come to the floor of the Assembly. It would be more productive to hear what the concerns are regarding those areas to which I have tried to narrow it, so we can have a more global discussion in terms of specifics at the next meeting on S.B. 405.

GORDON DEPAOLI (Walker River Irrigation District):
To a certain extent, my comments may be based on a misunderstanding of precisely what was intended with a particular provision. Senator Amodei's presentation has helped, and in some cases, I understood and in others, I did not. I did figure that section 1 was an attempt to draw a brighter line of the authority of the State Engineer as well as the authority of others. I do not think the language does that and I am not sure exactly what language can be used to get it to the point to which Senator Amodei would like to see. Historically, the State Engineer has had jurisdiction over appropriation, place of use and place of diversion, but that has not been exclusive and final on systems where there are court decrees. It will not be exclusive and final even now because of the judicial-review provisions of the statute. Irrigation districts have some authority in some of these areas as well. In terms of trying to establish a bright line distinction or dividing line between the State Engineer's authority and the authority of others, discussion about the availability of water is one that gives me some pause. I recognize that the State Engineer certainly has that authority from the standpoint of whether there are going to be new appropriations. When it comes to a situation where the State Engineer has issued a permit or certificate to an entity, whether it is a public utility or a local government that

provides municipal and industrial water service, it seems to me those entities have to have some authority to make judgments about whether or not that particular water right is going to be accepted for purposes of will-serve commitments. In rewriting this bill, those kinds of things need to be taken into account.

I did not completely understand section 6. I will be interested in how it comes out and what it says. In terms of the two categories of protestants, the language seems to create the two categories, those with and those without water rights. On page 3 at the bottom, it seems to say that even those with water rights do not get to participate unless somehow, they have demonstrated, through technical data, that there may be injury to their water rights. It suggests the potential for a need to have a hearing to see who can participate in a hearing, which I do not think is intended. This is not a good distinction to draw. I am not sure what is meant in the reference to technical data. A lot of times, these issues can be resolved based on common sense without technical data, whether it relates to injury to a water right or public interest. There are a lot of other issues potentially raised by protestants that go beyond conflicts with existing rights. It is not clear to me where you fall in those categories. For example, one of the key issues in an appropriation case is whether or not there is any unappropriated water on the source. That is a question that is not necessarily related to conflict with existing rights. Impacts on district efficiencies, absence of speculation, forfeiture, abandonment and reasonable beneficial use, and reasonable means and methods of diversion are all issues that are not caught in this distinction.

MR. DEPAOLI:
The second category of protestant created here talks about public policy concerns. Whatever you do, you need to use the terminology in statute, regarding whether or not the use or change threatens to prove detrimental to public interest. In my experience, the problem has not been with the people who want to participate on that issue and how many there are. The real question is what is within that category and how do you limit the issues they want to raise. In a lot of cases, people want to raise issues the State Engineer really does not have any control over, no matter what he does. For example, dust, traffic mitigation, sewage issues and those kinds of things. My recent experience has been good with getting the State Engineer to decide early that certain issues people want to raise under the, "threatens to prove detrimental to the public interest," provisions simply are not issues the State Engineer is going to

consider. In reference to sections 5, 6, 7 and 8, the State Engineer should remain as the party responsible for deciding how contested proceedings should be managed. The State Engineer needs to decide when there will be an exchange of information, of documents and of testimony. He needs to decide if there will be settlement discussions and a process to narrow issues. You should not build that into a statutory requirement. Participants in cases before the State Engineer can help themselves by raising these issues early with the State Engineer and the State Engineer will deal with them in an efficient way. Regarding the time requirement for the State Engineer to render a decision on each permit, 120 days is not enough. I will even be interested to see if 240 days is enough. I like the idea of building some exceptions into that for the State Engineer in special cases.

I initially skipped over the definition of consumptive use. Though the definition is not there, consumptive use comes into the statute at the bottom of page 5, starting on line 42 of the bill, where the State Engineer is directed to reject an application if, "... the proposed use or change increases the historic amount of consumptive use under the existing use or otherwise enlarges the use of the right ..." The statute already says he is to reject an application if it conflicts with existing rights. Two ways that can happen is if the consumptive use increases or there is something in the change that is going to enlarge the use of the right. However, if those things do not conflict with an existing right, then the State Engineer need not limit the change to a consumptive-use component. That simply is a tool to decide whether there is injury and if so, the extent of the injury. A good example is the Truckee Meadows. For years, the State Engineer has not limited conversion of irrigation rights in the Truckee Meadows to a consumptive-use component. The reason he has not done so is twofold. The change does not really increase consumptive use, but rather decreases it. Second, the return flow from municipal and industrial use goes back to the river at the sewage treatment plant and is available to serve downstream water rights. If we get into a situation where changes from agriculture to municipal and industrial in the Truckee Meadows are going to be reduced to the consumptive-use component, the water supply for the Reno/Sparks communities is going to be drastically reduced as a result.

MR. DEPAOLI:
Another factor to take into account is the historic amount of consumptive use. How are you going to define it and how is the State Engineer going to apply it? Within the Walker River Irrigation District, the cropping pattern has changed

considerably from what crops were being grown back when the decree was issued on that system, to the kinds of crops being grown today. Potentially, just by changing the kind of crop being grown, the consumptive use will change. Are you going to be looking at what crops were grown when the right was established, or what crops are being grown currently? I am not disagreeing, but it is a factor the State Engineer needs to take into account in applying the, "conflicts with existing rights" standard. It does not need to be looked at in every case, but it has to be looked at in the injury context.

Regarding section 8, subsection 10, in NRS 533.365, there is already a provision giving the State Engineer discretion in regard to a hearing. I would be concerned this language would result in someone saying, "For every application of more than 10 acre-feet, you have to hold a hearing." You need to take into account there is already language allowing the State Engineer not to have a hearing.

I would like to see how subsections 11 and 12 are fleshed out. It is a good idea, even though I am not sure what it should say. There should be some fairly narrow reasons. I am not sure it can happen within five days of a decision. One thing that should be included is if there is a request for reconsideration, it then stays the time for filing an appeal under NRS 533.450 so that 30-day clock does not start running.

Regarding page 8, lines 29 through 35, it was not clear to me if this means any kind of judicial proceeding, or rather was intended to be limited to a judicial proceeding actually involving an action the State Engineer has taken. I know the State Engineer does grant extensions where other kinds of procedures are impacting someone's ability to comply with a permit.

STEVE BRADHURST:
I appear before you today as a concerned citizen who has 34 years of experience with Nevada water law in various professional capacities, including directing a state agency, being a county commissioner, directing a public water utility and providing services to rural counties on contentious water issues. I mention my previous capacities because it is important you consider that in terms of what I am going to say. Nevada water law works. It may be the best water law in the West, so when I saw S.B. 405 and what I consider shocking revisions, it bothered me considerably, because when you make changes to Nevada water law, it should be in an incremental fashion. It should be studied

by interim and standing committees looking at every word as you have done in the past and not make significant wholesale changes. I was pleased with Senator Amodei's comments that the content of this bill was not what he had in mind and he is hoping that testimony will focus on what he did have in mind.

Nevada water law works because we have checks and balances. That is, it is not the State Engineer out there by himself making decisions without some checks and balances in Nevada law, not just Nevada water law. What I mean by checks and balances is in State planning law. In NRS 278, that law allows local governments to make decisions, for example, on subdivisions, based on what local governments think the water resources are for that subdivision. If someone comes before a local government with a subdivision and says, "Well you have to approve this subdivision because we have paper water here," meaning water permits, local government can use the best available information to make a determination as to whether or not to approve that subdivision. Therefore, there is a check and balance there in terms of State law.

There was a Nevada Supreme Court decision back in 1995 with respect to Washoe County. The county did not approve a subdivision zoning because the density looked like it would be too high and would require too much water in Washoe Valley. It went all the way to the Nevada Supreme Court, which upheld the ability of the county to impose water resource-based land use and zoning restrictions that are not consistent with the water-rights decisions of the State Engineer. Therefore, the county can use the best available water resource information when making land-use and zoning decisions. That is important.

MR. BRADHURST:
There is also a check and balance with respect to utilities. You heard Mr. DePaoli mention his concern about availability of water. Having run a water utility, I can tell you, I would not have my staff respond to someone walking in the front door saying, "Here, I have water rights. You need to issue will-serve letters for this 100-unit subdivision because I have these water rights." The responsibility of a prudent utility is to make sure those water rights involve real water. If the water is not real water, and you issue a water right, then the responsibility falls on the utility. Who is going to back that up if the water is not there? The utility will have to, so if you have a water right that says I have 2,000 acre-feet of water, but there is really only 500 acre-feet and there is a subdivision out there requiring all 2,000 and they are tied into the system,

there is a shortfall and somebody is going to have to come up with that shortfall. The utilities have a right to say no.

There is also a check and balance with respect to Nevada water law in terms of the public being involved. I would hate to see that diluted, in terms of anyone being able to come to the table and file a protest against a water right. The State Engineer is able to take care of those extraneous protests, and I have seen him do that over the years. You should not throw the baby out with the bathwater. Everybody will have the right to come to the table and file a protest if they want to and if they do not have a case, they are out of the picture in terms of the hearings. There is also a financial responsibility. If you protest when the hearing starts, you are going to have to put some money on the table. It is required by the State Engineer because you are going to have to pay for some of the hearings. That sometimes causes people to think twice about whether or not they want to go forward.

Regarding comments on S.B. 405, on the surface, it appeared to me that it was eliminating the public-interest safety net we have today with respect to Nevada law. I would hope the local governments would continue to be able to use the best available water-resource information they have in terms of making decisions. That should also apply to the utilities. It would be a terrible burden for a utility to have to issue a will-serve letter based on a water right.

MR. BRADHURST:
I will give you an example. In Spanish Springs Valley, which is just north of Sparks, there are 6,000 acre-feet of water rights. Two U.S. Geological Studies have been conducted out there on the water resource and have indicated that at best, there is 1,000 acre-feet of water in the ground. That includes secondary recharge with the Orr Ditch that carries Truckee River water through the Valley. Well monitoring out there has indicated the water level is dropping. So even though there are 6,000 acre-feet of water there according to paper, there is actually no more than 1,000 acre-feet. If one were to go forward and have to go into the utilities that provide water service there, and say, "I now have these water rights and you have to go ahead and issue will-serve letters," there will be a significant impact on the utility and more particularly on the water customers. Somebody has to make up for that water. In Spanish Springs Valley, if you had to make up for the 5,000 acre-feet shortfall, it would cost approximately 5,000 times $40,000 per acre-foot, because water would have to come in from the outside. There would be a $200 million fiscal impact. When I look at this bill

and see there is no effect on local government as far as a fiscal note, I would question it.

MR. BRADHURST:
In the 1999 Legislative Session, this Committee led the charge to add NRS 533.370, subsection 6. If you go to page 6 and take a look at lines 6 through 21, those provisions were added to address concerns rural counties have with respect to interbasin transfer of water. The rural counties asked the Legislature to add additional findings the State Engineer has to make to try to protect the basins of origin and make sure the job is done right in terms of looking at the natural resources. I read lines 23, 24 and 25 to contradict lines 18, 19 and 20, which states the State Engineer shall determine, "Whether the proposed action is an appropriate long-term use which will not unduly limit the future growth and development in the basin from which the water is exported." One way to determine the future growth in a basin is to look at the zoning and the master plan in that basin in order to get a sense of where the community is going with that basin. That is what we had in mind back in 1999 when we put this in the bill. This Committee approved it and it was approved by the Legislature. That is of particular concern to me and it seems to be a step backwards from what was a fine addition to State water law to protect the rural counties. I will look forward to Senator Amodei's revised bill.

SENATOR COFFIN:
You suggested in your opening remarks that it might be a good idea to study this, which usually means put it off until the end and then create a study. I do not like studies. They go on and on and frankly, it is almost as if you are learning the same thing over and over again. I have an obligation to try to do better. I can see this is an important bill and not one we ought to put off, and not be forced to make a judgment.

MR. BRADHURST:
I concur with what you are saying, but I must comment on the studies. I understand what you say about studies continuing and continuing, but there is nothing like success. The process we followed was deliberate and it had to take two or three years. We worked very hard with the Southern Nevada Water Authority and all the parties to come together under Senator Rhoad's leadership, and we brought it before the Legislative Committee on Public Lands. We discussed it and we worked it out during the interim session, so when the

1999 Session came around, we were ready to go and we had something that worked. I do not think we could have done it during the session. It needed a couple years. I was pleased with the result which is the reason I am so concerned about this possible amendment.

SENATOR AMODEI:
I hear what you are saying regarding water law. For the most part, I agree that it works. However, the example you used regarding Spanish Springs Valley where there is 6,000 acre-feet on paper and 1,000 acre-feet by the science, at some point in time, that is going to occur in every basin that is urbanizing around the State, except possibly in Clark County. Do we just wait for that to happen? It is not the intent to tell utilities they have to issue will-serve letters based on what the State Engineer says, but at some point, someone has to be responsible for those decisions, at least going forward. I do not know whether that is something where they have a special deal that talks about utilities and irrigation districts, or whatever, but for better or for worse, we are discussing it now.

MR. BRADHURST:
What Washoe County has done in a situation like Spanish Springs Valley is discounted those water rights. For example, instead of half an acre-foot needed for development in a valley where there is too much on paper in terms of water rights versus what really exists, then when somebody comes to the table with a development, instead of having half an acre-foot for a home, they may be required to dedicated two and a half acre-feet for a home to draw down on that deficit. That seems to have been very successful. People with water rights are not happy about that, but the alternative is not a very positive situation.

KYLE DAVIS (Policy Director, Nevada Conservation League):
I had originally signed in as opposed to S.B. 405 but I did not know there would be significant amendments. I am hopeful those amendments will clarify and resolve any issues I had. I do still have some concerns about section 7 with regard to the public process. As a public interest group, the Nevada Conservation League would like to maintain the ability for public interest groups to fully participate in the process. In hearing Senator Amodei's comments, it reminds me of the Nevada Administrative Procedure Act. The bill last session actually restricted, to some degree, people's ability to participate in administrative procedures. Consequently, we are now in a situation where there

is a possibility that the U.S. Environmental Protection Agency may take over the regulation of air and water.

LISA A. GIANOLI (Washoe County):
We initially signed in as opposed to S.B. 405, but based on the introduction done by Senator Amodei and other testimony that has been given, we would like to work with the Senator on his amendments.

EDWIN D. JAMES, P.E. (Carson Water Subconservancy District):
I signed in as neutral to S.B. 405 because there are still a lot of things I do not understand. The language on consumptive use is extremely important. I cut my eye teeth in the business doing consumptive-use analysis and studies. It is very important and is something that needs to be considered. However, I also do not want to be in conflict with any federal decrees. With the Alpine Decree, we already administer the federal waters in the Carson River. It already establishes how much water can be transferred if you are moving the water, and we do not want a conflict between the two. We are looking at a lot of regional programs and working together and looking at how to utilize the water as efficiently as possible. We do that, but then we also work with the State Engineer to make sure whatever we do come up with is legal. We are a planning agency that does a lot of analysis and planning. When I saw language that only a State Engineer would do it, it concerned us, because that is what we do.

ROSS DELIPKAU:
I am a lawyer in Reno and have basically spent my career in water law. I have submitted a written summary by one of my partners, Bob Marshall, who is in favor of this bill, with certain amendments (**Exhibit H**). In general terms, I am in favor of this bill. Consumptive use can be polished up. The purpose of setting forth the definition is when, for example, a 100-acre alfalfa farm is converted to a different use, that the different use will develop water from the same or different sources, meaning wells, but the hydrologic effect upon the aquifer is zero, meaning if water is used for the alfalfa field or used for the development, the effect upon the aquifer is zero. If we can collectively get to that point, we have our problem resolved. Regarding section 6 of the bill, the State Engineer has, for many years, issued permits incrementally. I can recall one in 1981, a very large Washoe County development. We are codifying what he has done for at least 25 years. I am in favor of section 6.

I have been involved in many administrative hearings involving protestants and have always adhered to the theory that the water law is specific in character and must be strictly followed. That principal applies to both the State Engineer protestants and applicants. I have found that many times, protests are filed, not on a water-rights basis, but because the protestants do not like the end result. The end result is some sort of development, factory, power plant, mine or something that is simply unpopular to the protestants. The protestants have no water rights in the valley or on the surface source, so upon the public-interest doctrine, they attempt to convince the State Engineer to deny the water right based on the fact they do not like the project.

In 1996, the Nevada Supreme Court affirmed the State Engineer's definition of public interest. To the best of my knowledge, the State Engineer's Office, in over 100 years of history, has only denied 2 applications solely on the basis of being detrimental to the public interest. Both of those applications involved disputes between the Truckee/Carson Irrigation District and the Pyramid Lake tribe of Paiute Indians. I further found that many of these protestants, without literal legal standing, are attempting to have the State Engineer base his or her denial upon grounds outside of the State Engineer's area of expertise, or outside of the State Engineer law. An example was raised earlier about traffic or air problems. The State Engineer has no jurisdiction over those two items. There are other agencies to handle the air-quality issues. I fully agree with Senator Amodei when he said there should be a clear line of jurisdiction between local government and the State Engineer. One does not cross over into the other. The State Engineer should be the ultimate decider of water-right applications. There should not be a two-step process where the applicant first must go, for example, to the county, ask the county if they will approve the application, and if they do, the applicant would then have to file it with the State Engineer. We have had many examples of local government protest based upon the fact the local governments feel they should be duplicating or acting in lieu of the State Engineer. The balance of the proposed bill is acceptable with the rewrites that will come up.

MICHAEL PAGNI (Truckee Meadows Water Authority):
Some of our concerns have not been mentioned. We were concerned section 1 eliminated the right of judiciary review. I understand now that is not the intent. In sections 4 and 5, we were concerned to what extent this might impact our ability to use best management practices and the effect it might have on the Truckee River Operating Agreement. Referring to section 8, there was a case

that came out of the Nevada Supreme Court in November 2006, which talked about interbasin transfers and the requirement to show need. Sometimes with a municipal purveyor, the only way you are going to be able to show need is to look at a regional plan or zoning. To completely exempt that as something that can be considered could be problematic in that context. Finally, on the consumptive-use aspect, we do have some significant concerns about the adverse affect that could have in the Truckee Meadows. We would welcome the opportunity to engage in discussions on consumptive-use issues as they relate specifically to the Orr Ditch Decree in the Truckee Meadows.

MR. WALKER:
We have an agreement on the Truckee River in which 119,000 acre-feet of Orr Ditch rights will eventually be converted to municipal, industrial rights and with that, certain things happen. Getting those 119,000 acre-feet takes the conversion of an agricultural Orr Ditch right to a municipal right on a one-to-one basis. You have heard testimony from Mr. DePaoli saying that basically, from a downstream benefit, under the municipal right, you have a better benefit than you did under the Orr Ditch agricultural application. All we need to do is make sure we take care of the unique issue on the Truckee River because it is basically our water supply for the next 25 years.

SENATOR AMODEI:
Consumptive use is something that does not always mean a right gets reduced. If there are facts available to the State Engineer that indicate a one-to-one transfer is appropriate, then it ought to be one to one. Do not assume that trying to add consumptive use into the statute means an agricultural acre-foot is always going to get reduced.

ANDY BELANGER (Southern Nevada Water Authority):
We want to register our willingness to work with the sponsor on this bill. We have a couple comments related to ensuring the consumptive-use portion does not affect the Colorado River. We know there is language in the bill, but we want to make sure however that language is finalized, we are involved.

SENATOR COFFIN:
What is the difference between groundwater and surface water?

MR. BELANGER:
The State manages two water resources separately; ground water and surface water. However, our real focus related to this surface-water provision, is we do have compact rights on the diversion of the Muddy Rivers and we want to make sure we have the ability to access those rights. They are being used for agriculture. We currently have them under agricultural lease and when we do use those water rights, we want to be able to transfer them.

SENATOR COFFIN:
Sometimes, when you add words to define something, you add problems and when you try to make an exception, sometimes you create a lockout situation.

CHAIR RHOADS:
If there is no one else to testify on S.B. 405, we will close the hearing on that bill and open the hearing on S.B. 433. A constituent of mine suggested this bill in a letter I have given to the Committee (**Exhibit I**). He would like to see a developer of private land within a Bureau of Land Management or U.S. Forest Service allotment be required to fence off the private land before he is permitted to let people start living there. That is what this bill does.

SENATE BILL 433: Requires a developer of private land to ensure that the land is enclosed by a legal fence under certain circumstances. (BDR 50-264)

DOUG BUSSELMAN (Nevada Farm Bureau):
The Nevada Farm Bureau is here today to speak in favor of S.B. 433. This is an issue, not only in the northeastern corner of the State, but also in places where there is an expanding interface with rural areas. This type of legislation clearly puts the burden on those who are developing within these agricultural areas. They need to take an action that is unquestioned so they do not try to soften the approach later by claiming there is harm when they could have prevented the harm by building the fence in the first place. From that standpoint, this piece of legislation clearly defines that responsibility. Also, Mike Montero from the Nevada Cattlemen's Association asked that I express their interest in support of the bill as well.

DON ALT:
I am in favor of this bill.

CHAIR RHOADS:
We will close the hearing on S.B. 433. There being no further business before the Senate Committee on Natural Resources, this meeting is adjourned at 5:48 p.m.

RESPECTFULLY SUBMITTED:

Ardyss Johns,
Committee Secretary

APPROVED BY:

Senator Dean A. Rhoads, Chair

DATE: