

Amendment No. 412

Senate Amendment to Senate Bill No. 405

(BDR 48-1158)

Proposed by: Senate Committee on Natural Resources**Amends:** Summary: Yes Title: Yes Preamble: No Joint Sponsorship: No Digest: Yes

ASSEMBLY ACTION				Initial and Date	SENATE ACTION				Initial and Date
Adopted	<input type="checkbox"/>	Lost	<input type="checkbox"/>	_____	Adopted	<input type="checkbox"/>	Lost	<input type="checkbox"/>	_____
Concurred In	<input type="checkbox"/>	Not	<input type="checkbox"/>	_____	Concurred In	<input type="checkbox"/>	Not	<input type="checkbox"/>	_____
Receded	<input type="checkbox"/>	Not	<input type="checkbox"/>	_____	Receded	<input type="checkbox"/>	Not	<input type="checkbox"/>	_____

EXPLANATION: Matter in (1) *blue bold italics* is new language in the original bill; (2) *green bold italic underlining* is new language proposed in this amendment; (3) ~~red strikethrough~~ is deleted language in the original bill; (4) ~~purple double strikethrough~~ is language proposed to be deleted in this amendment; (5) orange double underlining is deleted language in the original bill that is proposed to be retained in this amendment; and (6) *green bold* is newly added transitory language.

JRS/TMC



Date: 4/16/2007

S.B. No. 405—Revises provisions governing the appropriation of public waters.
(BDR 48-1158)



SENATE BILL NO. 405—SENATOR AMODEI

MARCH 19, 2007

Referred to Committee on Natural Resources

SUMMARY—Revises provisions governing the appropriation of ~~[public waters.]~~
water. (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;]~~
clarifying the authority of the State Engineer relating to the appropriation, allocation and determination of availability of unappropriated water; authorizing the State Engineer to consider the consumptive use of a water right under certain circumstances; authorizing the State Engineer to limit the initial use of water upon approval of an application to appropriate water under certain circumstances; 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.]~~ **water** by the State Engineer. ~~[Sections.]~~ **Section 1** ~~[and 4]~~ of this bill ~~[provide]~~ **provides** that the State Engineer has full **and exclusive** 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.]~~ **with respect to the appropriation, allocation and determination of availability of unappropriated water and the place of diversion, manner of use and place of use of appropriated water. Section 3 of this bill authorizes the State Engineer to consider the consumptive use of a water right in determining the appropriateness of approving a proposed change in the place of diversion, manner of use or place of use of water pursuant to that right. Section 4 of this bill authorizes the State Engineer, upon approval of an application to appropriate water, to limit the initial use of that water to an amount that is less than the total amount approved. If the State Engineer at a later date determines that water is available for the total amount approved for the application, he may authorize the use of that additional amount.**

Existing law provides for interested persons to ~~propose~~ **protest** 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.~~ **authorizes the State Engineer to refuse to consider a protest if certain information concerning the protest is not received by the State Engineer. Section 7 [also requires] makes various other changes concerning protests before the State Engineer, including, without limitation, requiring the State Engineer to render a decision regarding each [permit] application within [120] 240 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 8 also prohibits the State Engineer from using the presence or absence of zoning or planning designations as a determining factor in analyzing an application. Additionally, section 8 authorizes the State Engineer to grant or deny an application to appropriate not more than 10 acre feet of water without a hearing. Section 8 also authorizes the State Engineer to order a reconsideration of a decision on the motion of an interested party or on the motion of the State Engineer.]~~

Existing law authorizes the State Engineer ~~when approving a permit application, to set a time limit on the validity of the permit.~~, **for good cause shown, to extend the time within which water must be applied to a beneficial use under a permit for that use.** (NRS 533.380) **Section 9** of this bill authorizes the State Engineer to grant **such** an extension ~~to a permit~~ **of time** if the 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:

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

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

~~[(a)]~~ **1. The appropriation, allocation and determination of availability of unappropriated water; and**

~~[(b)]~~ **2. The place of diversion, manner of use and place of use of appropriated water.**

~~[2. The orders and decisions of the State Engineer preempt the authority of a political subdivision regarding planning, zoning and management of growth within its jurisdiction only if the political subdivision takes any action that directly or indirectly conflicts with or is otherwise inconsistent with the orders and decisions of the State Engineer or the purposes and objectives of chapter 533 of NRS.]~~

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

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

1. The State Engineer may consider the consumptive use of a water right and the consumptive use of a proposed beneficial use of water in determining whether a proposed change in the place of diversion, manner of use or place of use complies with the provisions of subsection 5 of NRS 533.370.

2. The provisions of this section:

(a) Must not be applied by the State Engineer in a manner that is inconsistent with any applicable federal or state decree concerning consumptive use.

(b) Do not apply to any decreed, certified or permitted right to appropriate water which originates in the Virgin River or the Muddy River.

~~Sec. 4. [The State Engineer shall be the only public agency to analyze and manage the water resources of this State on a basin by basin basis, a regional water flow basis or a statewide basis.]~~

1. Upon approval of an application to appropriate water, the State Engineer may limit the initial use of water to a quantity that is less than the total amount approved for the application. The use of an additional amount of water that is not more than the total amount approved for the application may be authorized by the State Engineer at a later date if additional evidence demonstrates to the satisfaction of the State Engineer that the additional amount of water is available and may be appropriated in accordance with this chapter and chapter 534 of NRS. In making that determination, the State Engineer may establish a period during which additional studies may be conducted or additional evidence provided to support the application.

2. In any basin in which an application to appropriate water is approved pursuant to subsection 1, the State Engineer may, pursuant to this chapter and chapter 534 of NRS, act upon any other pending application to appropriate water in that basin that the State Engineer concludes constitutes the use of a minimal amount of water.

~~Sec. 5. [A state agency or political subdivision, including, without limitation, the Public Utilities Commission of Nevada, shall not take any action that directly alters, changes or diminishes any right regarding the appropriation of water or the place of diversion of water that is granted to a utility by a decision of the State Engineer.] (Deleted by amendment.)~~

~~Sec. 6. [If the State Engineer approves an appropriation of an amount of water less than the amount requested by the applicant, the State Engineer:~~

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

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

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

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

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

~~(b) The applicant:~~

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

~~(2) May file a new application to request an increase in the amount of water appropriated.] (Deleted by amendment.)~~

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

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

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

3. ~~[(The)]~~ Except as otherwise provided in subsection 4, the State Engineer shall consider the protest, and may ~~[, in his discretion,]~~ hold hearings and require the filing of such evidence as he may deem necessary to a full understanding of the rights involved. The State Engineer shall give notice of the hearing by certified mail to both the applicant and the protestant. The notice must state the time and place at which the hearing is to be held and must be mailed at least 15 days before the date set for the hearing.

4. ~~[(If the protestant:]~~

~~— (a) Is a bona fide owner of water rights who has demonstrated or provided technical data regarding injury or impairment of a permitted, vested, decreed or otherwise adjudicated water right, the protestant may fully participate in any hearing conducted by the 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.]~~ In addition to the provisions of subsection 5, the State Engineer may refuse to consider the protest if the protestant fails to provide information relating to the protest required by the State Engineer.

5. Each applicant and each protestant shall, in accordance with a schedule established by the State Engineer, provide to the State Engineer and to each protestant and each applicant ~~fall technical data regarding an application or an application protest not later than 60 days before the date set for the permit application hearing.]~~ information required by the State Engineer relating to the application or protest.

6. The State Engineer or any member of his technical staff may ~~[, at his discretion,]~~ communicate with any applicant, protestant, [for person] interested person, governmental entity, technical representative or expert 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] act on a protested application if the State Engineer:~~

~~(a) Provides notice of the communication to each applicant, protestant, interested person, governmental entity, technical representative or expert with whom the State Engineer did not communicate relating to the protested application; and~~

~~(b) Provides an opportunity to respond to each applicant, protestant, interested person, governmental entity, technical representative or expert specified in paragraph (a).~~

7. The State Engineer ~~[shall]~~ may invite technical representatives of the applicant [and off], the protestant, an interested person or a governmental entity 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] to consider issues relating to an application to appropriate water.~~

8. If the State Engineer holds a hearing pursuant to subsection 3, the State Engineer shall render a decision on each ~~[permit]~~ application not later than ~~[(20) 240 days after the [hearing on the application.] later of:~~

(a) The date all transcripts of the hearing become available to the State Engineer; or

(b) The date specified by the State Engineer for the filing of any additional information, evidence, studies or compilations requested by the State Engineer. The State Engineer may, for good cause shown, extend any applicable period.

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, ~~and~~ NRS 533.365, 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, ~~for where the proposed use or change increases the historic amount of consumptive use under the existing use or~~

1 ~~otherwise enlarges the use of the right,~~ or threatens to prove detrimental to the
2 public interest, the State Engineer shall reject the application and refuse to issue
3 the requested permit. If a previous application for a similar use of water within the
4 same basin has been rejected on those grounds, the new application may be denied
5 without publication ~~;~~ ~~[with the exception of surface water sources that are~~
6 ~~tributary to the Colorado River.]~~

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

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

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

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

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

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

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

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

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

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

39 9. The provisions of subsection 7 do not authorize the recipient of an
40 approved application to use any state land administered by the Division of State
41 Lands of the State Department of Conservation and Natural Resources without the
42 appropriate authorization for that use from the State Land Registrar.

43 10. ~~[The State Engineer may grant or deny any application to appropriate~~
44 ~~not more than 10 acre-feet of water without a hearing if the applicant has~~
45 ~~provided sufficient information with the application. Any application granted~~
46 ~~pursuant to this subsection must not be used as a precedent for any future or~~
47 ~~similar applications.]~~

48 11. ~~Subject to the provisions of subsection 12, not later than 5 days after the~~
49 ~~State Engineer issues a decision pursuant to subsection 7, the State Engineer~~
50 ~~may order reconsideration of the decision.]~~

51 ~~(a) On the motion of any person interested to reconsider the decision; or~~

52 ~~(b) On the motion of the State Engineer.]~~

~~12. Grounds for reconsideration pursuant to subsection 11 include, without limitation:~~

~~(a) Newly discovered or available evidence;~~

~~(b) Error in the hearing or in the findings of fact or conclusion of law; or~~

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

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

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

533.380 1. Except as otherwise provided in subsection ~~5~~, ~~6~~ in his endorsement of approval upon any application, the State Engineer shall:

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

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

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

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

(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, including, without limitation, a pending judicial proceeding, 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.]~~

~~5.7~~ Except as otherwise provided in subsection ~~5~~ ~~6.7~~ 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;

(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.

~~5.6.7~~ The provisions of subsections 1 and ~~4~~ ~~5.7~~ do not apply to an environmental permit.

~~6.7.7~~ 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 purposes of any federal action on the matter required by law. The provisions of this subsection do not apply to supplemental water.~~

~~3. The Commission shall furnish to the State Engineer a copy of all agreements entered into by the Commission concerning the original appropriation and use of such waters. It shall also furnish to the State Engineer any other information it possesses relating to the use of water from the Colorado River which~~

~~the State Engineer deems necessary to allow him to act on applications for permits for the subsequent appropriation of these waters after they fall within the State Engineer's jurisdiction.~~

~~4. Notwithstanding any provision of chapter 533 of NRS, any original appropriation and use of the waters described in subsection 1 by the Commission or by any entity to whom or with whom the Commission has contracted the water is not subject to regulation by the State Engineer.] (Deleted by amendment.)~~