MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON GOVERNMENT AFFAIRS
SUBCOMMITTEE

Seventy-Sixth Session
March 14, 2011

The Committee on Government Affairs Subcommittee was called to order by Chair Marilyn K. Kirkpatrick at 5:31 p.m. on Monday, March 14, 2011, in Room 4100 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/76th2011/committees/. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblywoman Marilyn K. Kirkpatrick, Chair
Assemblyman Elliot T. Anderson
Assemblywoman Teresa Benitez-Thompson
Assemblywoman Irene Bustamante Adams
Assemblyman John Ellison
Assemblyman Ed A. Goedhart
Assemblyman Pete Livermore
Assemblywoman Dina Neal

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

None

STAFF MEMBERS PRESENT:

Susan Scholley, Committee Policy Analyst
Cyndie Carter, Committee Manager
Cheryl Williams, Committee Secretary
Olivia Lloyd, Committee Assistant

OTHERS PRESENT:

Steve Walker, representing Truckee River Water Authority
Jason King, State Engineer, Division of Water Resources
Susan Fisher, representing the City of Reno
Stephen D. Hartman, representing Nevada Land and Resources Company, LLC and Vidler Water Company
Susan Lynn, representing Great Basin Water Network
Kyle Davis, Political and Policy Director, Nevada Conservation League and Education Fund
Andy Belanger, representing Southern Nevada Water Authority
Gordon H. DePaoli, representing Truckee Meadows Water Authority
Leo M. Drozdoff, Director, Department of Conservation and Natural Resources

Chair Kirkpatrick:
[Roll was taken.] We open the subcommittee meeting with Assembly Bill 73.

Assembly Bill 73: Revises provisions governing the appropriation of water for a beneficial use. (BDR 48-467)

Tonight, I would like us to go through the proposed changes. I would like to talk about why we need the changes and what the intent of the new amendment is, section by section.

Steve Walker, representing Truckee Meadows Water Authority:
We have worked extensively with several entities and the state engineer since the hearing on Wednesday, and we have come up with amendments (Exhibit C) that we have agreed on.

We have asked that the state engineer present the amendments that we have agreed upon and go through the amendments with the Committee and explain what we are trying to do.

With that, I ask that Jason King come up and present the amendments.

Jason King, State Engineer, Division of Water Resources:
I would like to echo what Mr. Walker said. We met following the hearing last week and went over A.B. 73 and fine-tuned it. In section 1, we have almost identical language to *Nevada Revised Statutes* (NRS) Chapter 534, which is our groundwater law.

We did not have this language in our surface water law. An occasion has come up where we tried to get on a property, and someone asked where the statutory

authority to do that was. So we said we need to get NRS Chapter 533 and NRS Chapter 534 in law. It is almost identical language that is in NRS Chapter 534. We have made some changes. The previous language did say, "may enter the premises of any owner . . . . " Some people had some issues with the language, and I understand that. So, it has been changed to "may enter lands where any water subject to this Chapter is being diverted or used at any reasonable hour of the day to investigate and carry out the duties of the State Engineer pursuant to this chapter." It is now specific to the surface water chapter. The sole purpose of that addition is to mimic what is already in NRS Chapter 534 and give us that authority in NRS Chapter 533.

We made an amendment to our own bill to add like language in NRS Chapter 535, which is our dam safety chapter. Section 5 of this mock-up is almost the same language that we would like to put into NRS Chapter 535. It says "The State Engineer or any assistant or authorized agent of the State Engineer may enter lands where any dam or impoundment is situated, at any reasonable hour of the day, to investigate and carry out the duties of the State Engineer pursuant to this Chapter. We request that this be made part of A.B. 73.

Chair Kirkpatrick:
Just for the subcommittee, we are going to delete the pieces on section 2 in the original bill, correct?

Jason King:
I am sorry, Madam Chair, I am not there yet. Were we finished with section 1 and section 5?

Chair Kirkpatrick:
So section 1 and section 5. . .

Jason King:
I apologize. I jumped to section 5 just because it is really the same language; one is being inserted in NRS Chapter 533 and one in NRS Chapter 535.

I am going back to section 2. We send out what we call 30-day notices, and the existing language states that "if the holder, within 30 days after the mailing of this notice . . . . " There is some ambiguity in terms of what is the date of the mailing. So we amended it to say, "date of the notice." We were actually going to make it date-specific, but there were some concerns that we were actually shortening that 30-day notice because it would go to the mail room and you might lose a couple of days there. Coming back through the mail, you might lose another couple of days. After further investigation, we found out that there is a civil procedure rule called the mailbox rule that sets three days as

an allowance for going through the mail. So we thought we would just repeal what our amendment was, keep the language the way it is, and internally our office is going to add three days to that 30-day period in which someone has to reply to that notice.

Chair Kirkpatrick:
Let me make sure it says "if the holder within 30 days after the notice," correct?

Jason King:
It is "after the mailing of this notice."

Chair Kirkpatrick:
Okay.

Assemblyman Goedhart:
Does that mean 30 days after they have received the mailing or 30 days since your office initiated and postmarked your receipt?

Jason King:
It will be 33 days from the date of the letter because we make sure that letter goes out in the mail that day. It does not sit around the office.

We are trying to clarify some language in section 3. The very end to this bill draft in section 6 also gets to what we are doing here in section 3. We are trying to clear up the fact that, when it comes to the forfeiture of water rights, it only applies to certificated water rights and water rights that have been put to beneficial use. That is the way our office has always viewed this provision in the law. As the result of some recent court cases, we feel we have a strong case, and this is the way we have done it for 100 years. We wanted to clarify since we were already in this section. It is just making it clear that the only type of water right that can be forfeited is a certificated right, so we inserted the word "certificate."

At the very end of section 3, page 3, paragraph (e) gets to what happens if a person or an entity files an extension of time to prevent the working of a forfeiture, and within that last year they do not file an extension of time, they do not file a resumption of use, they do not file a proof of beneficial use. Our office then has the ability to forfeit that water right within 30 days after that time period has expired. Again, that is how we do it now.

Chair Kirkpatrick:
Please explain resumption to me.

Jason King:
An entity files an application. If it gets a favorable review, it becomes a permit. If you put the water to beneficial use, it becomes certificated. Once it is certificated, it is subject to forfeiture for five years of nonuse if it is groundwater. You can cure a forfeiture through a resumption of use. You have a certificated water right, and for four years you did not do anything. On the fifth year, you resumed use of it. You have cured that forfeiture, and we have an administrative procedure, a form that a person would file. It would be a resumption of use form that looks just like a proof of beneficial use form. It says I did put my water back to beneficial use and, therefore, forfeiture is off the table.

Assemblyman Goedhart:
Going back to the resumptions, say on the fourth year you had 500 acre-feet of water and halfway through the fourth year you actually started pumping the water. You had 500 acre-feet of water, but as you put the water back to use and halfway through the growing season, you only use 250 of the 500 acre-feet that were certificated. Does that resumption then hold all 500 acre-feet harmless, or because you only used 250 acre-feet in that fifth year, are 250 of the 500 acre-feet still subject to forfeiture?

Jason King:
It is not an easy answer. There is a disconnect in our water law. Our water law allows for partial forfeiture. By the letter of the law, the answer is yes, we could go after the 250 acre-feet that was not put to beneficial use.

However, there was a court case, *Town of Eureka v. State Engineer* 108 Nev. 163 (1992), that said that if the majority of the water was put back to use it cures the forfeiture. But that is not in law, it was a court case. We struggle with whether we go after the partial forfeiture because that is what the law says, or if 51 percent of the water was put back to beneficial use, does that cure all of it? I would tell you that the State Engineer's Office has not had good luck in going after forfeitures in law, and so we have erred more towards the side of if more than 51 percent was put to use, the forfeiture is cured. It is a question that needs to be answered one day.

Assemblyman Goedhart:
You have said that only certificated water can be forfeited. Is that applicable only to surface water rights, or does that apply to groundwater rights as well?

Jason King:
It is only applicable to groundwater rights, not to surface water rights.

Assemblyman Goedhart:
I have seen issues in the past where someone has had a permit issued. Someone else bought the permit from the person, who never actually got the chance to cure it, perfect it, and turn it into a certificate. He then, in turn, bought it, and it has never actually been turned into a certificate. There have still been forfeitures going after those people for non-use of their water.

Jason King:
If the water has never been certificated, forfeiture was never pursued. The proper vehicle to go after unused permitted water rights is through cancellation. A big part of our argument is permitted water rights are cancelled, and certificated water rights are forfeited.

Assemblyman Goedhart:
It sounds like the same thing, but one is called forfeiture and one is called a cancellation of the permit.

Jason King:
That is correct.

Chair Kirkpatrick:
This bill is only dealing with the forfeiture, correct?

Jason King:
That is correct.

Section 4 deals with the domestic well credit. I did not do a very good job of setting this up in my testimony last week. I would like to remind everyone of what a domestic well credit is.

There have been some areas where there is a proliferation of domestic wells. They are impacting each other and perhaps even the permitted rights are impacting them, and their wells are going dry. There could be a municipal waterline right in front of their home. Many years ago, if you had a domestic well, the only way to hook on was to say you need to go out and buy a water right that is fully appropriated and transfer that water right to the municipal system, and then we will hook you up. We have tried to look at the bigger picture, and we found that we did not want 10,000 straws. We want five or six straws.

So, this idea of a domesticated well credit program came about. That was, if there is a waterline in front of your house and you had a domestic well, you did not have to go out and get a water right; you did not have to purchase it and file a change of application. We came up with this program so that a purveyor

could hook that homeowner up without there being a piece of paper that says here is an acre-foot to hook up that home. We felt that it was the best way to manage the resource. We have done that six to ten times where we have these domestic well programs.

As I testified a week ago, as the language exists today we have to hold a hearing. We go to these hearings, and not one time has anyone come up and opposed and said no, these domestic well programs are a bad idea and please do not do them.

In this amendment we have done away with having to hold a hearing. On the surface it might sound unreasonable, but I want to point out that my office still has to issue an order and say we want to establish a domestic well credit program in this area. People see it; it is in the newspaper, and if people feel that they will be aggrieved by that decision they have the ability to appeal the order and go through the process. We do think that due process is still there, and we have a more efficient way to get to a domestic well credit program.

Assemblyman Goedhart:
It sounds entirely reasonable to me. I was wondering about the purveyor of the water. When he hooks up to a person that has anything over an acre, they usually have the assumption of up to 2 acre-feet per year. In this case, upon the purveyor hooking up that individual, how much would they be credited? Say everyone in those systems averages three-quarters of an acre-foot use, a little bit less than what the state would deem as a maximum allowable 2 acre-feet. Do you go by what the current average is, or do they give the purveyor a full 2 acre-feet?

Jason King:
Our interpretation of that is they get a domestic well credit for the amount of water that piece of property is using at the time they hook up. It could be 300 gallons a day over the year, or it could be the full 2 acre-feet. Again, we have had internal discussions on how are we going to truly track that. Should it just be what the average use is in that service area? We do not have any policy on that, but I would tell you that we are interpreting it as when they hook up, they get to use as much as they were using at that time.

Chair Kirkpatrick:
So, a domestic well is usually a single household, correct?

Jason King:
That is correct. It would be a single family dwelling, a small garden, and a few animals.

Assemblyman Ellison:
What if the domestic well is in a subdivision and the contractor made application for 100 lots. During that time, only 20 of the lots actually had been sold and put into beneficial use. What happens to remaining lots and those water rights if they are not being used?

Jason King:
I want to be sure that I understand your question. There are 100 lots in the subdivision. Are all 100 homes built, and only a handful are on a domestic well?

Assemblyman Ellison:
The water rights are there for these lots when they sell.

Chair Kirkpatrick:
I think we have heard this discussion within our "Water 101" class. I think what he is referring to is when a developer goes in and has water rights for individual lots, but he stops because he cannot finish them. You had told us that the contractor could get an extension of time. Is this correct?

Assemblyman Ellison:
Correct, but does that follow what you are talking about right now? Is there a certain amount of time in which the water has to be put to beneficial use?

Jason King:
In your scenario, there is a water right pertinent to many of these lots that have not been built on. I assume each home was going to have its own water system and not hook up to a purveyor. Now the purveyor comes along and has the waterlines in the street. We would say we have already dedicated water to those lots. There is no domestic well credit here. The water dedicated to those lots can be transferred to the purveyor to serve them, but it is not a double dip kind of situation. If the developer wants to remove the water rights off of the remaining lots and take the water rights somewhere else and then get hooked up for a domestic well credit, we would argue no. We have already signed off on the subdivision. We have already guaranteed that those lots are to be served by that water there. You cannot strip those water rights and take them somewhere else. I hope this answers your question.

Assemblyman Ellison:
We are talking five-acre lots and a domestic well at each lot. Basically the well would have to be drilled and, apparently, they must have water rights on them if they are selling the lots.

Jason King:
The lots you are talking about are in what we call a domestic wells subdivision. These are the larger lots, and many of the subdivisions you are speaking about were created in basins that were fully appropriated. A lot of these were created when we did not have statutory authority over them. They were just created, and they now have the ability to drill a domestic well. In those instances, yes, they could qualify for a domestic well credit program. But we have also required in domestic well subdivisions a dedication of 2 acre-feet for each one of the lots. So it is possible that the developer came in for his 100-lot subdivision where every one of those is a 5-acre parcel, and they want to drill a domestic well. They had to come in and dedicate 200 acre-feet of water rights that they got somewhere else in the basin and they dedicated to us. It is relinquished, and the water right goes back to the source and now every one of those lots can build a domestic well. Now that we have retired those water rights, they too can get a domestic well credit.

Section 5 basically mimics section 1 where we mention the dam safety.

In section 6, dealing with cleaning up the language on forfeiture of certificated rights, language was added that says, "The Legislature declares that it has examined the past and present practice of the State Engineer with respect to the forfeiture of water rights on or after March 15, 1947, and finds that the provisions of Nevada law concerning forfeiture of water rights have been applied in a manner consistent with Section 3 of this act."

Subsection 2 says that this act is to clarify rather than to change the operation. This is the way that we have always interpreted that provision. We are making this change now not because we are trying to change the law; we just want to clarify the law.

Chair Kirkpatrick:
Would you tell us why the date is March 15, 1947, please?

Jason King:
This is the day they started the forfeiture.

Chair Kirkpatrick:
Are there any other questions? Today would be the time to testify and not tomorrow morning. So if you have any concerns, please tell us now.

Steve Walker:
We would like to go on the record in support of the amendment to A.B. 73 as presented by the State Engineer, Jason King.

Chair Kirkpatrick:
Is there anyone else who would like to testify in support of A.B. 73? I am trying to get 3 of the 21 water bills out of Committee sooner rather than later.

Susan Fisher, representing the City of Reno:
We do not have any problem with the bill as written or with the proposed amendment. We want to put on the record that we are concerned about what if there is any damage to any property as a result of an inspection. For example, if a pump goes, where does the liability fall? Under the current administration the State Engineer's Office take care of any damage if there is any question, but it is not in writing anywhere. This is just their practice. So with a change in administration, this may change.

Chair Kirkpatrick:
How is this different from any other utility? They should all have the liability issue. We will make sure it is clear on the record.

Susan Fisher:
They should.

Chair Kirkpatrick:
Is there anyone that is opposed to A.B. 73 who would like to come up to testify? [There was no one.] Is there anyone neutral? [There was no one.] This bill will be on work session next Friday. We will close the hearing on A.B. 73 and open the hearing on Assembly Bill 115.

Assembly Bill 115: Revises provisions governing the appropriation of water for beneficial use. (BDR 48-207)

Jason King, State Engineer, Division of Water Resources:
As with A.B. 73, and following the hearing last week on A.B. 115, a number of us met to see how far apart we were and if this was the direction that we wanted to take. We have now met a few times and spent a considerable amount of time with this bill.

I would like to give you a little background on the discussions. They have run the gamut from whether to make a recommendation to the Committee to pull it, whether we should try to simplify it and get a few things in, or whether we should go after A.B. 115 and try to clean it up. We kept coming back to seeing if we could clear it up, and that is where we are at.

I also want to make sure that it gets on record that not everyone was involved in these meetings. They were not left out or excluded on purpose; it was just the way it went. So I am looking forward to hearing comments from the others.

You should have the new bill draft (Exhibit D) on A.B. 115 in front of you. What I need to make very clear from the beginning is the amendments that you see in front of you have nothing to with the A.B. 115 you saw a week ago. Think of it as if we had the A.B. 115 a week ago, and we tore it up and this is the new A.B. 115. When you see new language in color, it is actually corrections being made to *Nevada Revised Statute* (NRS) 533.370 as it exists today. It is not a reference back to the A.B. 115 of a week ago.

Chair Kirkpatrick:
Let me say for the Committee, if you need to go get your statutes you are welcome to do so. I did that this weekend. I know that you are both close, but it might be easier for you to follow along.

Jason King:
As you can see in section 1 and 2, there were a couple of small changes. I did not list out all the text that was in these two sections under NRS 533.360 and NRS 533.365. There were just a couple of small internal reference amendments. Instead of slowing this down, just know there are a couple of internal citation amendments that are going to occur in those two statutes until you finally see them. They are just citation references that have changed as a result of the new language, and there is nothing substantive at all.

As I testified last week, NRS 533.375 is one of the most important sections of our water law. Within NRS 533.370, there are criteria that our office uses to decide whether or not we can approve or deny an application. We can start with the language where it talks about criteria that the office shall use when contemplating the application to put the water to beneficial use. The first one, section 3, subsection 1, paragraph (a) is if the application is not accompanied by the prescribed fees. The language that exists today says that our office shall approve an application submitted in proper form which contemplates the application of water to beneficial use if the application is accompanied by the prescribed fees. We changed that to "not accompanied by the prescribed fees," because we added the language "unless any of the following grounds for rejection are established."

In this part of NRS 533.370, we talk about what we are going to do in terms of approving an application. Later on in NRS 533.370 as it exists today, we talk about grounds for rejecting the application. In rewriting NRS 533.370, we tried to put all this criteria together under one subsection instead of having them spread out over multiple subsections. In doing so, we had to come up with some different language. That is what we are attempting to do here.

Essentially, the language is here; we are just trying to clean it up. The language for paragraph (b) stating that when "there is no unappropriated water in the

proposed source of supply;" is taken right out of NRS 533.370, subsection 5. If you take the time to look at NRS 533.370, subsection 5 as it exists today, you will see that criterion is in there. Paragraph (c) in our amendment talks about "The proposed use or change conflicts with existing rights or with protectable interests in existing domestic wells as set forth in NRS 533.024." This comes from NRS 533.370, subsection 5 as well.

I just want to make sure that you understand that this is not new language. We are taking it out of subsection 5 and trying to move it up into subsection 1 where they all are to make it flow better. Some people might think that it makes it a little more convoluted.

Chair Kirkpatrick:
This is existing language, so it does not change the way we do the process. It is just cleaning it up. Is that the intent?

Jason King:
That is the intent, although we have had a number of attorneys be involved in what we are trying to do. I am not an attorney, and some of them have some real concerns about the burden of proof possibly changing as a result of how we are wording this.

I believe you will be hearing a couple of comments to that effect. Our office is comfortable with it right now. I think they may have some valid points. Again, under paragraph (d), "The proposed use or change threatens to prove detrimental to the public interest," was taken out of NRS 533.370, subsection 5, and moved up with section 1. Paragraph (e) is already there in section 1. We are just adding it to the list. Paragraph (f) again, is existing language that is there. We are trying to put it all in one spot. Section 2 states "If a previous application for the same manner of use of water within the same basin has been rejected because the application did not meet the requirements set forth in paragraphs (b), (c), or (d), of subsection 1, the State Engineer may reject a new application without publication."

Chair Kirkpatrick:
I am looking at the statute right now. This is in addition to what is already in subsection 1, correct?

Jason King:
We are taking it from subsection 5. Essentially we have taken subsection 5 and moved it to section 1, so it is all in one spot.

Chair Kirkpatrick:
Then we would delete that subsection as a whole because we have now moved it up. Is that correct?

Jason King:
That is correct.

Chair Kirkpatrick:
It does not change the authority and it does not change anything else; it just moves it all up so that it is very clear on what the process is. Is this your intent?

Jason King:
Yes, absolutely that is the intent.

Assemblyman Goedhart:
As it relates to paragraphs (c), (d), (e), (f), do the conditions apply to someone that may want to go ahead and switch their point of diversion within their land, say, anywhere over a 300-foot distance?

Jason King:
Absolutely, it does.

Assemblyman Goedhart:
So you would still be subject to all of those points even if it is on the same piece of land?

Jason King:
Absolutely.

Chair Kirkpatrick:
Are there any other questions? [There were none.]

Jason King:
We just went through the portion that guides us in approving or denying an application.

In this new amendment, we are asking to change the time for which we have to take action on an application from one year to two years. In section 3, we make that change. We say that "Except as otherwise provided in this subsection and subsections 9 and 10, the State Engineer shall approve or reject each application within 2 years after the final date for filing a protest."

Then we go on to say that the State Engineer may postpone action. We have added some real-life exceptions that we deal with on a day-to-day basis as to why we cannot take action on many applications. The existing language talks about written authorization to do so by the applicant; existing language says if it is a protested application there has to be written authorization by both the protestor and the applicant. We are saying that if an application is protested, we may postpone action on that application for more than two years.

Again, you remember Mr. DePaoli from the Truckee Meadows Water Authority had talked about two years for a nonprotested action and four years for a protested action. I think this is a different means to the same end.

Current language allows for postponement if the purpose for which the application was made is municipal use. This stems from large municipalities that need more time to perform studies and do other things in order to get their permit issued.

Existing language under paragraph (d) talks about where there needs to be a study pursuant to NRS 533.368. That language is kept in.

Existing language under paragraph (e) talks about court actions. We added "or adjudications are pending which may affect the outcome of the application." I want to reiterate that is a major reason why we cannot take action on applications in my office. We have not adjudicated other rights that are out there, so we do not know what we can do with these other applications. I would like to make that distinction. Paragraph (e) of subsection 3 of section 3 of the bill, as amended, talks about, "Where court actions or adjudications are pending which may affect the outcome of the application."

Paragraph (f) says "In areas in which adjudication of vested water rights is deemed necessary by the state engineer." Our adjudication section is 1.5 full-time equivalents, and we have no fewer than 40 adjudications ongoing somewhere in this process. Many of you know an adjudication takes a lot of time and uses a lot of manpower. We did not want to limit ourselves by saying that an adjudication had to be pending in order for us to take longer than two years.

If it is in a basin where we have a lot of vested claims and have not begun that adjudication process, we feel that it is still reasonable for not being able to move forward on another application.

Paragraph (g) is along the same lines. "On an application for a permit to change a vested water right in a basin where vested water rights have not been adjudicated." As we discussed a few weeks ago in our water law class, we

have a prestatutory water right that has not been adjudicated. It is just a claim. If we have an application before us that changes that vested claim but we have not quantified it so we do not know if it is good or not, we should have the ability to postpone action on that change application because we have not quantified that base right yet.

Paragraph (h) says "Where authorized entry to any land needed to use the water for which the application is submitted is required from a governmental agency." We have many, many applications that are pending that are on Bureau of Land Management (BLM) land. We call them desert land entries, and they have to get approval from BLM that the land is suitable for farming. If they do not get that approval, we cannot issue the permit. We have many of these applications that have been pending for years, and this is another reason why we need to postpone an application for more than two years.

Lastly, paragraph (i) is already in statute. Currently, NRS 533.375 states that before taking any action on an application, the State Engineer may require additional information for approval or rejection of the application. We get to the point where an application is ready for action but we still have a number of unanswered questions. Under this provision, we have the ability to go out and say we need you to tell us more about your project, et cetera. We have included that as one of the criterion to allow us to postpone an application beyond two years.

Assemblyman Ellison:
On paragraph (h), where authorized entry to any land needed to use the water for which the application is submitted is required from a governmental agency, you mentioned the BLM. Does that also pertain to an application for stock watering?

Jason King:
It certainly does apply to stock water, and that is the primary piece of paper we need in order for us to move forward on a permit. We have to have that notification from BLM stating that the applicant is the authorized range user.

Assemblyman Ellison:
I just wanted to make sure because you said farmland but not stock watering.

Chair Kirkpatrick:
Are there any other questions on this portion of the bill? [There were none.]

Jason King:
On to subsection 4. It reads, "If the State Engineer does not act upon or postpone an application pursuant to subsection 3, the application remains active until approved or rejected by the State Engineer."

So we have an application before us, and we have two years to approve it or postpone it or to take some kind of action on it. But if we have not, then it remains active. There is much discussion about that, so what does a person do? You have not approved it, you did not deny it, and you have not postponed it. The answer we came up with was that applicant still has a legal right under common law to go to a district court. I believe they call it writ of mandamus. They can go to court and say that the State Engineer was supposed to have done this in two years and he has not. Once they make that request to the court, it is up to the court to tell the State Engineer he now needs to do something within 90 days or, in actuality, there are some other studies going on and it did qualify as one of the postponed. That would be the course of action that would be available to that applicant.

Chair Kirkpatrick:
Are there any questions? Would you postpone it, or is the person with the water rights going to postpone it? With that piece right there, I feel like we are reliving what we lived in special session, but I am not sure.

Jason King:
Let us say the application is not protested. One of our provisions under paragraph (a) of subsection 3 is upon written authorization to do so by the applicant. So, the applicant could come and ask us to postpone it. It will be our decision though. There would have to be something in writing from our office that would go out and cite one of these criterion in paragraphs (a) through (i) that said this very reason is why we are not approving it at this moment, and we need to postpone it.

Chair Kirkpatrick:
If nothing is done with it, do they still stay within their numbered application process? Everything stays exactly how it was, correct?

Jason King:
That is correct. They would retain their priority, and they would remain active if you get to seven years, and after two years if we have not postponed it, or even if we have postponed it. Once you get to seven years, that is the line in the sand where, regardless, that application is going to be renoticed, reopening the protest period, and that is the Great Basin Water Network Nevada Supreme Court case, regarding *Great Basin Water Network v. State Engineer* 126 Nev. Adv. Op. 2D, due process.

Chair Kirkpatrick:
My hope is that we are going to be able to act on a lot of these that are not protested within two years. Would that be correct?

Jason King:
Absolutely, that is my hope, and at least for the last sessions we really have been touting how well we have been doing on our backlog.

I have also said that we have had to keep positions vacant, and there is very little low-hanging fruit anymore in terms of taking action.

I agree with you completely. We want to get the backlog down to zero so that we can use our efforts somewhere else.

Chair Kirkpatrick:
But at the same time, you still need a little flexibility in case you cannot make it, because that was the question that we heard.

Assemblyman Goedhart:
I have a question on section 3, subsection 5. I realize what you have done there with reopening it to a republication and giving an opportunity to refile a protest. That was done as part of the *Great Basin* case as related to the interbasin transfer of water rights.

What if you are a little farmer in one basin and you have been protested by the United States Park Service? Because of the protest you are up to seven, eight, nine years, and you have been working diligently to try to work to have something adjudicated. Since it did not get done in seven years even though it is an interbasin transfer of a preexisting valid certificated or permitted water right, you now have to reopen the whole process again and invite more protests into it. I am wondering if there is an appetite from anyone out there to make a differentiation between an interbasin transfer of water rights, which I think should be held to a higher standard or higher threshold than an intrabasin transfer of water rights.

Jason King:
I understand the question and that it is in response to the Nevada Supreme Court decision. My belief is that it was about due process, and due process does not care whether it is an interbasin transfer or an intrabasin transfer. The fact that it has taken our office seven years to get something done is not right, and it should be reopened, but I certainly understand the argument. I would add that when we get to the end of the bill, you will see that it is prospective. It is to affect those applications that are filed on or after July 1, 2011. That is not

to say that farmer will not have those applications in the future, but that does not apply to those that are existing right now.

Assemblyman Goedhart:
This is prospective in age rather than retroactive?

Jason King:
Yes, sir.

Assemblyman Anderson:
Why does that backlog exist? Is it because of the complicated nature or is it because of funding?

Chair Kirkpatrick:
I will say it for everyone; we do not fund the State Engineer's Office. We put a bill in last session on which we had to override a veto. Six other states have since followed suit. Now this session they are on the chopping block again.

Jason King:
You can see that subsection 6 has a couple of very small changes. Subsection 6 contains the criteria that deal with interbasin transfers. Under subsection 1, when looking at an application we have to look to see whether or not there is water available, whether or not it will conflict with existing rights or potential interest in domestic wells, or proves detrimental to the public interest. In subsection 6, these criteria are specific to interbasin transfers. I want to make it clear. This is in addition to subsection 1. Do not just look at subsection 6 for interbasin transfers. You have to be able to meet the criteria under subsection 1, and then when you get interbasin transfers you have to be able to meet the criteria in subsection 6. So there is some discussion and we have not done it in this amendment. It might make sense to move subsection 6 to be right after subsection 1. We have criteria that deal with any application that is filed at the State Engineer's Office. The next section would hit you with "Oh by the way, if it is an interbasin transfer then this is not the criteria." That might be something maybe the Legal Division might help with.

Chair Kirkpatrick:
Currently there are not any changes within subsection 6, but it has been a point of discussion.

Jason King:
That is correct.

Subsection 8 was stricken in the existing statute. Subsection 8 was stricken because it dealt with interbasin transfers and the renotification after seven years for interbasin transfers of 250 acre-feet. However, our new language under subsection 5 says that if after seven years the State Engineer's Office has not done anything, the application has to be renoticed. We no longer needed subsection 8, and that is why it was stricken from the exiting statute.

Assemblyman Goedhart:
Because you got rid of the 250 acre-feet threshold at one point in time, it sounds to me as though there is a conceptual notion that it had to be over a certain amount of acre-feet in order to be renoticed. Now you are saying that, regardless of whether it is one acre-foot or three acre-feet, and just because of the time factor alone and not in addition to a volume, you are going to go ahead and go through the whole renotification process.

Jason King:
That is correct, and the section that we are striking dealt with 250 acre-feet of an interbasin transfer.

Under subsection 8 that is also stricken. There was some concern about no longer notifying county commissioners. Under NRS 533.363, our office is required to notify the counties when water is taken from one county to another. I know there is some concern that the counties would no longer get notice, and that is not the case.

Chair Kirkpatrick:
That was just an attempt to try to clean it up, and instead we are going to back and do it through statute, correct?

Jason King:
Yes, that is correct.

Assemblyman Ellison:
Does that give the towns and counties enough time to weigh in or protest any kind of transfers at that point in time? I would like to know what rights do they have at that point when you notify the county. Do they have enough time to protest?

Jason King:
Typically what happens and what my office has noticed is that we will get a response right away saying, "We have put that on our agenda for our next meeting," which could be up to two weeks away. We tell them that is great, but please get back to us as soon as you have had the meeting. In more cases than not, the county does not reply at all. Some have affirmative responses

that they are in agreement. Seldom are they not in agreement. We get more nonresponses than anything else, but the counties have not balked at not having the time to get back to us.

Chair Kirkpatrick:
I think it is NRS 533.363, subsection 4, correct?

Jason King:
That is correct. We notify them and they put in on their agenda.

Chair Kirkpatrick:
I believe that has been in statute since the early 1980s.

Jason King:
You will see that in section 4 and section 5 of the amended version of A.B. 115, there are some internal reference amendments. In looking at the final transitory language that is in section 6, I would like to get on record that the intent of this bill is to apply only to those applications filed.

Chair Kirkpatrick:
Can we go back to subsection 9 of section 3?

Jason King:
If you remember in the current statute, NRS 533.370, section 3 is that provision that talks about applications that are filed and moved are on the same property. The State Engineer needs to act within six months. What we did change, however, was now we have the ability to postpone that longer if it meets those same postponement exceptions that are new now under section 2, whereas before they were limited. In general, that is the same subsection 3, but we have said that we could postpone it pursuant to (a) through (i).

Chair Kirkpatrick:
In what instance would you postpone it? Would it be lack of information?

Jason King:
Sure.

Assemblyman Goedhart:
I have a piece of land and I wanted to move the water 1,100 feet away. Because it is moved more than 300 feet away, even on your own land with water you own and use, you still have to renotify and publish it. That opens it up for a public protest.

Jason King:
That is correct.

Chair Kirkpatrick:
Are there any questions on subsection 9? We will call the opposition up first. Those who have concerns with the way the amendment is written, even if you have not gone through it, it is better to put those concerns on the record now than to not address them.

Mr. King can you restate your intent on section 6?

Jason King:
Subsection 3 in section 6 is a little confusing in terms of a written protest. I just want it to be clear. In terms of this amendment, we are talking about applying to applications, whether they are new appropriations or changes of existing rights—either one of those that are filed on or after July 1, 2011. We are not looking back in time.

Assemblywoman Benitez-Thompson:
My question relates to subsection 9 of section 3. Do you run into any instances in which people want to move water on the same piece of property in which they would contest? It seems to me like they would be contesting themselves, or if they protested, would they be protesting themselves?

Jason King:
Yes, we do get quite a few. Many times they are benign changes. Their well has gone down and they need to drill a backup well and they want to drill it on their property. They still have to go through the same process. We still have the criteria, but those are not the ones that can cause problems.

Problems can arise on very large farms. I will give you the case in Amargosa Valley where you have Devil's Hole and you have an endangered fish, the Devil's Hole pupfish. There is a federal reserve right that is one of the most senior rights in the basin. You have a very large farm and you want to move a water right that is two miles away; and now you are moving the water right one mile closer. We are talking about pumping a couple of thousand acre-feet, and that is a lot of water. Those are the types of applications that protect an existing right, and especially a federal reserve right that came down from the United States Supreme Court, that we may want to postpone because we might need some additional studies.

Yes we do get many of these, and I would say that most of them are not difficult decisions at all. But some of them can be.

Assemblywoman Benitez-Thompson:
So it is not really an issue, unless it is an issue and then, it is an issue.

Assemblyman Goedhart:
I would like to make a comment for the record. In Amargosa Valley, and in many cases even just with one or two or three or four acre-feet, Death Valley National Park has decided with the Department of Interior to launch protests. In the case of my property, I was actually moving 500 acre-feet 1,300 feet farther from Devil's Hole. I was actually moving it west, and they still protested it. In certain basins, certain federal agencies will launch protests against any and all attempts to move water in an attempt to discourage anyone from being able to have enough money to fight for their ability to use their own personal private property right, which is why, later in this session, I will be introducing a bill.

Stephen D. Hartman, representing Nevada Land and Resources Company, LLC and Vidler Water Company:
This amendment is considerably better and much clearer. My concern is one that Mr. King raised earlier. As long as we have as many lawyers in this room as we currently have, we would do far better to spend our time making sure there is no ambiguity on who has the burden of proof. I think when you move from basically a condition to a rejection, which is an action taken by the state engineer the way it is written, inherently that creates the issue of putting a burden on the state engineer to have something. Part and parcel of that is in section 2. If it is a similarly situated sequent application, whoever is that subsequent applicant is bound by the earlier decision.

One of the problems with that is that it depends on who had the first case and how good or how bad of a job they did in providing information to the state engineer's office. Whoever is behind them is going to be cut with the same sword. I think there may be a little difficulty in going down that road.

But again, I think that the substance of this is good. It is more clear. This has built up for 60 years, and sooner or later we need to step up and fix it all. I think that would be an appropriate action, perhaps in the interim. As Mr. King indicated, I do believe there are issues on properties where you are ending up trying to move rights within an existing property. Every case is different, and that is why we have got to have the discretion of the state engineer. But there are multiple ones where there are protests that are protests just to be protests.

There are some that are 50 miles away. It is difficult to justify those protests, particularly when little empirical evidence is brought with them. It creates a delay for the state engineer as well as the applicant. Because the overwhelming purpose of our statute and its history was to put water to beneficial use, I think that is what we all endeavor to do in trying to create economic activities and

yet preserve the economy as best we can to balance with the environment. Generally it is a very good job. I would disagree with Mr. King that you can go get a writ of mandamus. It is a really poor remedy. Most often going to the courthouses is the worst place to go. I think we need to take our time to clarify the language in terms of the burden.

Chair Kirkpatrick:
Mr. King, would you please do that? On the other points, you hear that a lot. At least I heard it in the special session where people from Georgia were opposing different pieces. Are we consistent with other states, or are we still unique with our own way?

Jason King:
To be honest with you, I do not know what the criteria are for filing protests in other states. You are right; anyone can file a protest for any reason. People would probably disagree with me, but I also think that our office does a pretty good job of culling out those applications that have been there, done that. If a protest is filed, the applicant has some different hoops, so I understand the comment. I do not know what the other states do in terms of trying to dissuade people by raising the fees on their protests. I am not sure.

Chair Kirkpatrick:
What about this piece? I know you said we were going to have some discussion on this piece. Why was it rejected this time as opposed to the way it was before?

Jason King:
In my nonlegal mind I did not read this as a problem, but I have had enough attorneys tell me that they see that shift, and so I am trying to understand that. I also think it is worth getting on the record in terms of the burden of proof. Our office thinks the burden of proof is on both sides. We might have an application where there are no protestants, but yet you better meet all these criteria or we will not issue the permit. So in that instance, it is the applicant. I understand also with the protested ones the applicant needs in many cases to see what the protestants think the approval of the right is going to do adversely to them. They need that identified first in order for them to even combat that, so I understand the position.

Chair Kirkpatrick:
I am nervous because I see Ms. Lynn and Mr. Hartman nodding their heads at the same time in agreement, and that does not ever happen on water issues.

Stephen Hartman:
I assume one of the reasons was to try to carry out the rejection language in subsection 5 of NRS 533.370 to try to keep them internally consistent. My view is that the applicant has always had the burden of proof thus far. I do not want to muddy the waters in this section any more than they have been muddied over the past years.

Back to your question about what other states do. We can perhaps provide you with some of that, but most of the other states in the West require some showing of impairment of an existing right that is impacted. You always have your public interest issue, but it is not as a participating protestant. That is typically the status of the law in most of the other jurisdictions.

Chair Kirkpatrick:
Does anyone have any questions?

Susan Lynn, representing Great Basin Water Network:
We were not involved in the discussion of this amendment, and frankly, it is just as well. I agree with Mr. Hartman that this has come some distance. We still do have some concerns on subsection 4 and subsection 5. In subsection 4, it states, "If the State Engineer does not act upon or postpone an application pursuant to subsection 3, the application remains active until approved or rejected by the State Engineer." It seems like it should not be active indefinitely. Whether it is 20 years, 30 years, or 40 years, I do not know. Indefinitely is really an issue for people who have protested applications, especially those related to municipal applications that are allowed to be held for future growth.

In subsection 5, I understand Assemblyman Goedhart's situation, and indeed, he is in reverse and we are on the other side of it and I can see it cutting both ways.

Our question is the renoticing process. Again, how many times can a republication take place if the applicant chooses to delay or postpone and the protestants are not allowed to participate in that process? It is not clear, and I think it needs to be clarified. Right now, it appears that every 7 years it would have to be republished and our thought is that if it goes beyond 7 years and the state engineer chooses to postpone it for 11 years, it should not have to be republished twice. It should be when the state engineer or the applicant chooses to move ahead with the hearing process.

Chair Kirkpatrick:
Does it take away from the due process that we are trying make sure happens?

Susan Lynn:
We want there to be a due process, but it becomes very repetitive every seven years if a municipality holds on to its water, as in the case of southern Nevada which I am most familiar with. They have held on to those applications for almost 22 years, but we have just gone to renotifying and republishing on several of the applications. Not all of them but several of them after 22 years. Under this, as I read it, it would have had to occur at 7 years, 14 years, and 21 years, and maybe even longer. How many times does an applicant have to renotice and republish if they hold rights for 20 years or 25 years?

Chair Kirkpatrick:
Let me say this for all of you that are out there. When our Legal Division gets hold of this, it is going to be a little bit different. That is why we are going through this legislative intent. Our legal staff can go through it, and I promise to let everyone see it before it goes to a floor session. But it is going to be a little bit different, so Mr. King maybe you can answer that question.

Jason King:
I should have made that clear when going through subsection 5. The language that is in subsection 5 was selected specific to Ms. Lynn's question. How it reads right now is that if our office has "postponed action on an application pursuant to subsection 3 and does not approve, reject, or hold a hearing on the application within seven years after the final date for filing a protest, the State Engineer shall cause notice of the application to be republished pursuant to NRS 533.360 prior to approving or denying the application." So the idea was if after seven years we have not acted on it and we are still four years off, we would not republish that. The intent was that we would not republish it right away. It would be somewhere in the time frame before we knew we could take action on it. Before we either issued or denied it. That is probably not clear, but that is the intent of that language. It would not be 7 years, 14 years, or 21 years. Okay, in seven years we know we have to republish this application and it looks like we are three years off from holding a hearing. We will republish it as we get close to that time.

Chair Kirkpatrick:
Ms. Lynn, does that answer your question?

Susan Lynn:
In part. It is still not clear in the wording that that has to happen.

Chair Kirkpatrick:
I do not disagree, but my Legal Division is listening right now, and if that is his intent, would that work for you?

Susan Lynn:
Yes.

Stephen Hartman:
I think one of the reasons that it is written that way is so that the state engineer has that discretion, particularly in some of these more complex matters where you have got ongoing studies and you are doing a lot of work and trying to bring the reports together. There is a time frame at the point at which your reports and data collection reaching x point and you know that in 18 months or 2 years, depending on the schedule for setting hearings, you will be ready to go to hearing. I think what I hear Mr. King saying is when I know that we are that far down the process, that is when we will renotice it for protestants and for setting the date for certain.

Chair Kirkpatrick:
Is that correct? Here is how I read it, and I am far from an attorney. If it has gone seven years, no matter what, you have to renotice it before you are ready to go to the hearing before it starts.

Jason King:
That is correct.

Assemblywoman Benitez-Thompson:
I am trying to clarify this for myself. The way that I am reading it is that you go seven years, you republish, and then after you republish the only path you take is either approving the application or denying the application, but not that it can perpetually keep cycling back, is that right?

Jason King:
The intent of this is the application has gone 7 years without an action, so we have identified this and the application has to be republished, renoticed, and the protest period has to be reopened. However, based on the studies that are on-going we are not going to be ready for hearing for another 4 years. We decide not to republish it right now, so we will wait until we get closer to that hearing because people move, things change, and we will make it current to the hearing that we are going to have 5 years down the road. Even though we have to renotice it we are going to hold off 3.5 years or 4 years and then renotice it and we would still be meeting this provision. I hope that answers your question.

Chair Kirkpatrick:
I think it says that the state engineer shall cause notice of the application to be republished pursuant to the section that is in statute prior to approving. I read that the intent is that he cannot do anything with the application until he renotices it. That is the way I read it.

Jason King:
Just like we do now, it would go in the newspaper for 4 weeks, with a 30-day protest period, et cetera.

Chair Kirkpatrick:
Does any one else have any questions?

Kyle Davis, Political and Policy Director, Nevada Conservation League and Education Fund:
When we are talking about subsection 4, it is not clear to me that there would be a remedy in the case of that application that is both not acted upon and not postponed. There are cases where that exists where it has not been officially postponed, but it also has not been acted upon and it could go beyond the seven years. I want to make sure that those specific applications would also be subject to same provisions of this section.

Chair Kirkpatrick:
My understanding, and Mr. King please chime in here, was that they stay active; you still have to meet all parts of this section. Correct? I do not want to restate your question, but I think what you are saying is that if the application is still active and we have not done anything with it and it has gone past seven years, you want to confirm that it does have to be noticed.

Jason King:
Absolutely. I am sorry, Mr. Davis. Were you just saying there are those occasions where we did not postpone, we did not act on it, and it has run seven years? That could be a concern that would need to be cleaned up. Regardless, if an application has been sitting around for seven years, it needs to be republished.

Stephen Hartman:
I think that is the instance that Mr. King spoke of earlier because, otherwise, until there is a denial or approval there cannot be an appeal up to the district court level. So you would have to push that if it were prior to seven years. That is why Mr. King was saying in those nonactions where it is still kicking along and it is in the sixth year, it is not time to renotice pursuant to this. The only remedy for the applicant would be to file an action for mandamus that asks the state engineer or compels him to do that.

Chair Kirkpatrick:
Okay.

Jason King:
I do not mean to turn this into a debate, but in reading section 3, subsection 5, it says that if the state engineer has postponed action on an application pursuant to subsection 3 and does not approve, et cetera, et cetera, then we have to renotice it. I believe Mr. Davis's point is, and Mr. Hartman if I am hearing you correctly, there could be those occasions where we did not postpone it, and even though they have not gone for a writ of mandamus, after seven years there should still be that requirement to renotice. And I agree with that.

Chair Kirkpatrick:
Do you agree with that, Mr. Hartman, and does that answer your questions? Do either of you have any other concerns? Is there anyone else who would like to testify on A.B. 115?

Andy Belanger, representing Southern Nevada Water Authority:
We are in support of the amendment as it was drafted by the state engineer. We do have the same concerns that were voiced by Mr. Hartman concerning subsection 1 and the way that section is drafted currently with all of those items being grounds for rejection rather than requirements or conditions for approval.

We are concerned whether that changes the burden of proof, and so we understand what the state engineer is trying to do as far as clarifying and putting all those requirements in one section. I think that the idea of moving subsection 6 related to interbasin transfers up closer to this section is a good one. Perhaps we do not change subsection 1 or subsection 5 but put those up front as well so that all the sections related to the conditions and the rejections are all within the same section of NRS 533.370.

As it relates to subsection 5 and as it is currently in the amended proposal, we support the idea of renotice after seven years regardless of whether the application has been postponed or not. I just want to make sure that we have said on the record that we support these provisions being related only to applications prospectively, after July 1, 2011. So any of the provisions related to the conditions on which the state engineer can postpone action including court actions, adjudications, et cetera, are all related to applications filed after the effective date.

Chair Kirkpatrick:
Does anyone have any questions?

Assemblywoman Benitez-Thompson:
This might be a can of worms. When we talk about the burden of proof and how this changes the burden of proof, can someone put that in perspective for me. What does it mean in terms of workload for the State Engineer's Office? I think this is the most litigious issue that there in the state. Does this mean it will become more burdensome in terms of whether it is a workload the State Engineer's Office can carry, or does this prohibit you from doing the work that you need to do?

Jason King:
The intent was not to change the workload. The workload would stay the same. It was just to clean this up. As I stated, I believe the burden of proof is on both sides. But because I do not fully understand the shifting of the burden of proof, I cannot answer you as to whether or not it would mean additional time to my office.

I think I gave a kind of nonanswer. My answer was that the intent of what we are trying to do is to really keep the status quo in terms in how we are going to deal with these applications. It was to better organize it so that the section was a little more fluid and made more sense to other people. If the burden of proof were changed as people have concerns with, I do not have a good answer as to what kind of workload it would be.

Chair Kirkpatrick:
Can we ask an attorney to come up and tell us about the burden of proof?

Gordon H. DePaoli, representing Truckee Meadows Water Authority:
I am not sure if I can answer the question to anyone’s satisfaction. I do not think it will affect the workload in the state engineer’s office one way or another. It may affect the workload of the attorneys who handle appeals for the state engineer resulting from their decisions. I am happy to see this bill structured the same way as the original subsection 5 was structured.

The way the bill was written, it may not change the issue of who ultimately has the burden of proof in a hearing, but it may change who has the burden of coming forward first with evidence on a particular issue. The ones that were particularly troublesome are matters on which the protestant must come forward first with evidence—the case where the argument is that it is going to conflict with an existing right or it will threaten to prove detrimental to the public interest.

It is important for a protestant who is raising those issues in a hearing structure to come forward with evidence that narrows the field so that an applicant can respond to them. It is very difficult for an applicant to come in and prove the

negative that their application will not threaten to prove detrimental to the public interest. That is a huge scope of when someone first comes in, like in the Devil's Hole situation with the Devil's Hole pupfish. An applicant can respond to that if the argument is that it is either conflicting with that right or threatening to prove detrimental to the public interest. But if there is nothing first on those issues, then an applicant has a very difficult time trying to prove the negative—that it will never threaten to prove detrimental to the public interest or it will not conflict with existing rights. I am not sure that this helps, but that is my concern.

Chair Kirkpatrick:
That is subsection 2 of the new amended bill, correct?

Gordon DePaoli:
It is in section 3 of the new version.

Chair Kirkpatrick:
Ms. Lynn, do you agree with what Mr. DePaoli said?

Susan Lynn:
Can I have Mr. DePaoli explain that again?

Gordon DePaoli:
First was the response to Assemblywoman Benitez-Thompson's question which is that I do not think this issue changes the workload in the State Engineer's Office. The state engineer is going to have to make a determination on each one of these in any event.

In terms of the burden of proof, I have always approached these from the standpoint that an applicant for a new appropriation has both the burden of proof and burden of coming forward with evidence on the issue of whether there is any unappropriated water.

On the other hand, when the issue relates to whether an application is going to conflict with an existing water right or threaten to prove detrimental to the public interest, I think that the protestant has the burden of coming forward with evidence first on those two issues, which then allows an applicant to respond more narrowly to a focused issue. The applicant may still wind up having the burden of proof on those issues, but is not required to simply come in and prove the negative of those two things without any parameters.

Susan Lynn:
Thank you for that clarification. I agree with you in part, and I disagree with you in other parts. It seems to me that the applicant needs to prove that the

water is there. I agree that the protestants need to come up with their reasoning as to why it is not there or why it is insufficient to grant. It is a give-and-take, and I think the burden of proof is really on the protestants and the applicants to make their case for the state engineer. In looking at section 3, you raise some interesting issues. There was language I saw earlier that expressed things in more of negative manner rather than a positive manner. I am still digesting that so I cannot answer your question totally.

Chair Kirkpatrick:
The waters just got muddied, but "it's all good." Let me ask, you are fine with the bill with the concerns that we clarified, subsection 5, correct? And you just wanted to make sure that you agreed with Mr. Hartman that we needed to change the wording from rejection to presumption, correct?

Susan Lynn:
I need the page and line.

Chair Kirkpatrick:
Originally when you came up you agreed, and we clarified subsection 4 on page 2.

Susan Lynn:
Yes.

Chair Kirkpatrick:
We clarified that section for you, so you are good with that.

Susan Lynn:
Yes.

Chair Kirkpatrick:
Then we came back to subsection 2 where I said, "Wow you and Mr. Hartman were agreeing at the same time, that we needed to bring that language back to where it was before."

Susan Lynn:
I think there are some wording changes that might be made to make it clearer and to make it more specific. But, knowing that legal counsel is going to change this, I prefer to wait and see how it is changed before I say yes or no.

Chair Kirkpatrick:
Okay.

Susan Lynn:
I think you are headed in a better direction, and I think the organization's suggestion is probably a good change too.

Chair Kirkpatrick:
Mr. DePaoli, you want to take subsection 3 and go back to the original wording all together, correct?

Gordon DePaoli:
No, the Truckee River Meadows Authority is fine with this as presented by Mr. King.

Chair Kirkpatrick:
You are clear with all the discussion that we have had in between?

Gordon DePaoli:
We are clear with the comments that took place regarding page 2, subsection 5, and the requirement that after seven years if nothing has happened it needs to be republished.

Chair Kirkpatrick:
But you are also in agreement that subsection 2 is not very clear on the first page?

Gordon DePaoli:
Are you referring to section 3, subsection 2? Actually, I think it is clearer now than it was in the existing law. This is really the existing tail end of NRS 533.370, subsection 5. In the existing law it does not say, same manner of use, it says, "similar manner of use." So this is a little clearer.

I understand Mr. Hartman's concern that someone can file an application they do not even have an intention of supporting and do not support it at all and it gets turned down for one of these reasons. Then someone who really wants to file an application could simply get cut off at the knees without ever having an opportunity to present their case. The only thing I can say is that this is not changing the existing law. It is in the existing law.

I would have to defer to the state engineer on how they might narrow that to deal with Mr. Hartman's concern.

Chair Kirkpatrick:
Let me ask you this, if you were to tell me what this section meant in layman's terms, what would you say?

Gordon DePaoli:
It means that if I have filed an application for an irrigation use in some basin and the state engineer has rejected that application on the basis, that say, there is no unappropriated water in that basin. Whether or not I supported that, it got rejected for that reason. Five years later, Steve Hartman comes in and files another application for irrigation use in that basin. What the state engineer can then do is simply deny it without even publishing notice of the application based on the fact that I had done it 5 years earlier.

Jason King:
That is a good interpretation of what that means. I would tell you that practically speaking, there are a couple of things playing out here. In many basins we will issue a statewide order that says we will no longer issue an irrigation right based on the fact that the basin is fully appropriated.

The scenario that Mr. DePaoli just described would be a perfect scenario where we would not only be pointing to this but we would also have the state engineer order shore up that decision.

Practically speaking, before we ever deny an application based on this provision, we look to see what has changed. I know that is not what this language says so I understand the concern by attorneys in the room. What we do is we say, well yes, but since that previous application was denied we have cancelled 4,000 acre-feet of water rights. So, there is now that additional water that we could appropriate. Or we just look to see what has changed. Maybe there has been new perennial yield analysis so it is not like we say, okay we have already denied an irrigation; we can deny this one. We do not do that. We look to see what has changed and, as Mr. Harman said, is it possible to put water to beneficial use in this state. I understand the concern, but practically speaking, that is not how we do it.

Chair Kirkpatrick:
Let me ask, because you and I will not be around forever. If a new person comes in, would that be something in the regulations that they would do or was that protocol? Do we need to make it clear somewhere? I am worried about the future and the one thing that this group has taught me is that since 1907, we have had water law and we try to make few changes, but when we do make changes we want to make them very clear.

Jason King:
If the next state engineer or three state engineers down the road just read that language and said we are going to deny this one because we have denied one before, a good attorney like Mr. DePaoli is going to represent his client and say the one you denied previously for irrigation was based on this set of

circumstances, and the world has turned many times and it is a completely different set of circumstances. He would make the argument that this, in fact, does not apply. But again it would require something like that to occur. This has not been a problem. It does not mean it will not be a problem.

Assemblyman Anderson:
I am glad you mentioned that, because that was a question I was having.

If you take a look at the new reports coming about the Colorado River snowpack that would fill Lake Mead and that now has changed this year. Water is not something that stays the same from year to year. Groundwater aquifers can fill up and surface water can form and go. Would you be comfortable putting something in there that would put a time frame on that subsection or something in that regard to make it a little more clear for a future state engineer?

Jason King
I do think this could be cleaned up so that it would maybe offer some language to look at the same manner of use you might have the same set of circumstances surrounding that previous decision.

Chair Kirkpatrick:
Let me remind everyone, my Legal Division is going to take this hearing and they are going to write the language. We could get into a debate over specific words, but I am trying to get the legislative intent that everyone agrees to so that my Legal Division, who has to defend me, actually writes it.

Jason King:
Mr. Drozdoff pointed out something to me that I am aware of, but I did not make it clear. In subsection 2 it says that the state engineer may reject a new application. It certainly is not mandatory. Practically speaking, there are a lot of instances that come up today where we have seen that a previous application for a similar manner of use has been denied. We say we will run it through publication anyway because there might be enough things that have changed since that time that it does not fit into this criterion. It is discretionary.

Leo M. Drozdoff, Director, Department of Conservation and Natural Resources:
I just wanted to amplify what I was saying to Mr. King. The way I look at this word "may," it is a tool. As with any decision the state engineer makes, they have to defend that decision. This is just a tool. This is something they may do or they may not do. It is something that is available to them, but they cannot be "willy-nilly" about it or, as Mr. King said, an attorney can come forward and say well, but that was based on something flawed. This simply is a tool to work through obvious areas where they need to be dealt with.

Chair Kirkpatrick:
Does anyone have any questions?

Steve Walker:
Truckee Meadows Water Authority supports the amendment presented by the state engineer with the proposed inclusion of a non postponed right in subsection 5 after seven years.

More importantly I would like to thank the Chair for holding this hearing and providing us the format to go through these bills. I think it has been productive. It has been hard, but I would like to say thank you for helping us.

Chair Kirkpatrick:
We appreciate that, and we just want the record to be clear. Is there anyone else who would like to testify on A.B. 115? [There was no one.]

Let me be clear on where we stand. Everyone is good with the clarification that we had on section 6, that this is anything filed after July 1, 2011. Everyone is good with subsection 5 where we clarified it was not intended to notice every seven years but that it was clear that we were going to notice when we were ready and if it had a lapse of seven years. I believe everyone is now clear on subsection 4 on page 2, the state engineer does not act upon or postpone. Everyone is still clear on that? We come back to section 3 subsection 2 where I believe everyone agrees on what the intent was as stated. It is just a matter of how we legally write it, correct?

Jason King:
Correct. Was that subsection 2?

Chair Kirkpatrick:
It is section 3, subsection 2, the famous, "if a previous application" piece. Everyone agrees on the legislative intent as stated before, we just have to make sure the language is clear per my Legal Division, correct?

Jason King:
That is correct.

Chair Kirkpatrick:
With those clarifications, here is the way I would like to proceed. It will have to go to a work session and this particular type of amendment and my Legal Division would not actually submit an amendment. I will tell you that they are probably not going to until after the 28th. I would like everyone to look at the amendment before it goes to the floor. In the past I have worked with Senator Lee and he does not like changes. That is why now I am telling you

now is the time to fix it, because he makes me sign off on every single amendment.

I do not foresee any changes on the other side. I will tell you that I would like to get water out of the way so that it does not become an issue at the end of session. I think it is very important that we fix it now as opposed to June 5, as we have done in the past.

Please take one final look at this. Pass it to whomever you need to pass it to and, if you have any comments, please get to them to me by Friday of this week because I would like to put it on work session the following Friday and move through the process. If there is anyone that is not comfortable with that, please let me know, but I think it is better for our state that we move forward sooner rather than later. With that, I close the hearing on A.B. 115.

Is there any public comment? [There was none.] Thank you for doing this. This is 3 bills out of 21, so we have at least two more hearings at night.

Meeting adjourned [at 7:22 p.m.].

RESPECTFULLY SUBMITTED:

_____
Cheryl Williams
Committee Secretary

APPROVED BY:

_____
Assemblywoman Marilyn K. Kirkpatrick, Chair

DATE: _____

EXHIBITS

Committee Name: Committee on Government Affairs

Date: March 14, 2011 **Time of Meeting: 5:31 p.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
A.B. 73	C	Steve Walker	Amendment
A.B. 115	D	Jason King	Amendment