

**MINUTES OF THE
SENATE COMMITTEE ON NATURAL RESOURCES**

**Eightieth Session
May 14, 2019**

The Senate Committee on Natural Resources was called to order by Chair Melanie Scheible at 4:05 p.m. on Tuesday, May 14, 2019, in Room 2144 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. [Exhibit A](#) is the Agenda. [Exhibit B](#) is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Melanie Scheible, Chair
Senator Chris Brooks, Vice Chair
Senator Dallas Harris
Senator Pete Goicoechea
Senator Ira Hansen

STAFF MEMBERS PRESENT:

Alysa Keller, Committee Policy Analyst
Erin Sturdivant, Committee Counsel
Christine Miner, Committee Secretary

CHAIR SCHEIBLE:

We will open the work session on Assembly Bill (A.B.) 83.

ASSEMBLY BILL 83 (1st Reprint): Makes various changes to provisions relating to wildlife. (BDR 45-210)

ALYSA KELLER (Committee Policy Analyst):

I will read the summary of the bill and the amendments from the work session document ([Exhibit C](#)).

CHAIR SCHEIBLE:

I will entertain a motion on A.B. 83.

Senate Committee on Natural Resources
May 14, 2019
Page 2

SENATOR HARRIS MOVED TO AMEND AND DO PASS AS AMENDED
A.B. 83.

SENATOR BROOKS SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

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CHAIR SCHEIBLE:
We will move to A.B. 152.

[ASSEMBLY BILL 152 \(1st Reprint\)](#): Revises provisions relating to cultural resources and certain grave sites. (BDR 33-868)

Ms. KELLER:
I will read the summary of the bill from the work session document ([Exhibit D](#)).

CHAIR SCHEIBLE:
I will entertain a motion on A.B. 152.

SENATOR BROOKS MOVED TO DO PASS A.B. 152.

SENATOR HANSEN SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

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CHAIR SCHEIBLE:
The hearing on A.B. 30 was robust, and we are making progress. I will open the work session on A.B. 30 and will not entertain a motion. There are still unanswered questions from the hearing, and it is appropriate to formulate our goals and work on an amendment for this bill, which will go to vote this Thursday.

[ASSEMBLY BILL 30 \(2nd Reprint\)](#): Revises provisions governing water.
(BDR 48-214)

CHAIR SCHEIBLE:

Assembly Bill 30 is about Mitigation, Management and Monitoring (3M) plans.

SENATOR HARRIS:

The bill is about providing 3M plans as an option to avoid conflicts where the State Engineer might have found otherwise.

CHAIR SCHEIBLE:

The first threshold question is "are we going to pass a bill that will allow people to utilize 3M plans?"

SENATOR HARRIS:

I would support that.

SENATOR GOICOECHEA:

It depends on the timing.

SENATOR HANSEN:

The first premise is to protect senior water rights holders with prior appropriations under current State law. I do not have a problem with the 3M plan concept. I have read about the Nevada Supreme Court lawsuit with Eureka County and General Moly, Inc. in which the State Engineer approved the project. The mitigation portion of the project forced an arrangement with the senior water rights holder. This is not right. State law requires the State Engineer to reject any applications that conflict with existing senior water rights. That was the basis for the Supreme Court dismissing the case.

CHAIR SCHEIBLE:

The first question to consider is for what purpose is it appropriate to use a 3M plan? The hearing danced around mitigating, avoiding and predicting conflicts. The second question is if the 3M plan is being used, when does that plan have to be submitted? Is it before the conflict is found, when it is found or after it is found? Is that a fair assessment of the hearing?

SENATOR HARRIS:

There has never been an option of allowing a 3M plan once a conflict is found. If a conflict is found, water law states it must be denied. The initial finding of a conflict is what we were attempting to resolve. The State Engineer's office wants applicants to do all possible research ahead of time on the conflict issue

in order to mitigate the conflict. I suggest the requirement for an application include the attestation to the research of any potential conflicts by the applicant. The applicant must take the required steps stated in A.B. 30. When the initial application takes place, the applicant attests there are no conflicts or there may be possible conflicts.

The State Engineer can request a 3M plan be completed if potential conflicts are found in the initial review of the application. A hearing can then be held on the application and the 3M plan together. A finding of no conflict still has to be made at the end of the process.

SENATOR GOICOECHEA:

Are you saying if there is no conflict, the determination on the application can be made? If it becomes known there might be a conflict, will the State Engineer request a 3M plan to mitigate the perceived conflicts?

SENATOR HARRIS:

That is almost right. I suggest that before the application is filed, any applicant will attest to research done by the applicant as to any potential conflicts on the project as designed and has taken steps prior to the filing of the application to avoid any possible conflicts. Then, if the State Engineer considers there is a possible conflict, the 3M plan can be ordered. Then the hearing on the application and the 3M plan will take place.

SENATOR GOICOECHEA:

Are you saying the State Engineer accepts the application, knows there is a foreseen conflict, then makes the determination to take action at that point? Otherwise, the Engineer would deny the application knowing there is clearly a conflict.

There are hundreds of applications made in an agricultural area. Suppose an applicant wants 640 acre feet of water at a particular location and is required to do the research and come up with a plan and finds no conflicts. The applicant determines the plan will not cause a drawdown on an adjacent well or will not affect any other domestic wells. After that determination is made, the applicant will submit the application to the State Engineer. Then the State Engineer will review it and might make the determination that there may be a conflict and deny the application. Does that put the onus back on the applicant to provide a 3M plan to negate the perceived conflicts?

SENATOR HARRIS:

I suggest a step be put in between the final determination of a conflict. There can be an application filed, and the applicant can say there is a possible conflict which cannot be avoided in a variety of ways. The State Engineer can decide if the applicant has or has not avoided the conflict. If the applicant has avoided it, the permit can go forward. If the State Engineer decides the applicant has not done enough to avoid the conflict, the 3M plan can be required. A hearing will then take place on the application and the 3M plan together. The final determination will then be made if the conflict can or cannot be avoided.

In *Nevada Revised Statutes* 533.370, the State Engineer will reject an application if there is a conflict. There should be options given for the applicant and the State Engineer. For example, an application is submitted and there might be a conflict. The State Engineer agrees there might be a conflict, and the applicant should do a 3M plan before the hearing on the application.

SENATOR GOICOECHEA:

At that point, the impacted party of the conflict could come to the hearing process and could protest. Existing law allows the right to protest any application. This is fortifying the protestor. The protestor sees that the State Engineer recognizes a conflict because the 3M plan is ordered.

SENATOR HARRIS:

The hearing will be on whether the 3M plan avoids the conflict. If the State Engineer determines the 3M plan does not avoid the conflict, the project cannot move forward. If the hearing involving all interested parties determines the conflict can be avoided by the 3M plan, then the project can proceed.

SENATOR GOICOECHEA:

At that point, both sides are going to get attorneys involved. It is a good case for a protestor knowing the State Engineer thought there was enough of a conflict to order a 3M plan; the court will struggle to deny the protestor.

CHAIR SCHEIBLE:

Is there another point in the process?

SENATOR HARRIS:

It is a potential litigation issue. This does not inform our decision on whether we should give the State Engineer the latitude and discretion. If the 3M plan can

avoid a conflict, it can be ordered and then the determination can be made if the conflict no longer exists. The clearer the directive is, the less likely for the occurrence of complicated litigation and unintended consequences.

SENATOR GOICOECHEA:

It comes down to the impacted person and how much flexibility and buy-in the person has in the process. It is important for the impacted party to have the ability to veto or become involved. That is when it gets sticky.

CHAIR SCHEIBLE:

I do not see that possibility in this bill.

SENATOR HARRIS:

The intention is for any protestor to be able to come forward in the application and hearing process if conflicts are not found. Removing anyone's ability to publicly comment is not an option.

SENATOR GOICOECHEA:

I agree. Clearly the mitigation portion would be if that person can be bought off.

CHAIR SCHEIBLE:

The applicant will make findings on his or her own that there is no conflict.

SENATOR HARRIS:

It should be more of an attestation of having done the research and determining the conflict issue—whether it is yes or no. If potential conflicts are found by the applicant, then the applicant must do the three steps asked for in A.B. 30.

CHAIR SCHEIBLE:

Does that make sense to the Committee?

SENATOR GOICOECHEA:

It would take a person three minutes to claim attestation of no conflict. The next step is the determination by the State Engineer.

SENATOR HARRIS:

The State Engineer still retains the final determination on a potential conflict.

SENATOR GOICOECHEA:

If there clearly is a conflict, the State Engineer cannot issue a water right. Language needs to be put in A.B. 30 that he has to deny the application if there is a conflict, unless there is a possibility of mitigation.

CHAIR SCHEIBLE:

In the hearing on the bill, different ways of determining whether the 3M plan was supposed to mitigate or avoid the conflict was heard. The verbiage and legal concepts are important to many of the stakeholders. Where is the Committee on that question?

SENATOR HARRIS:

The conflict has to be avoided. There is statutory language saying if there is a conflict, the State Engineer must deny. Mitigating a conflict is not sufficient for approval. If a 3M plan can avoid a conflict, or gets the support of a senior water rights holder, then it can move forward. Without mending that particular provision, there is no option for mitigating the conflict. If the conflict cannot be avoided, denial must be made on the application.

SENATOR GOICOECHEA:

There is an application and the applicant attests there is no conflict. Then the State Engineer determines there is a conflict. At that point, the State Engineer has to deny that application, or the applicant has to provide a 3M plan in the hearing to show mitigation. Then the State Engineer can consider if the applicant's plan is workable. The hearing takes place; then it goes to litigation.

It seems that is and has been the process. Before a 3M plan was put in place, the case with Eureka County and General Moly, Inc., was in court by a protest action. Under today's scenario, a person submits an application and if a neighbor protests, it ends up in a hearing. The 3M plan comes forward at the hearing process. Costs make it challenging.

CHAIR SCHEIBLE:

To be clear, the first step is making the application. The applicant claims there is no conflict, or has tried to negotiate the conflict, reduce the size of the project or become more water efficient. None of these things worked. The applicant wants to have a hearing, regardless and asks to submit a 3M plan.

SENATOR GOICOECHEA:

Technically, I do not know if statute allows the State Engineer to deny any application. By law, the Engineer has to accept an application and then can deny it.

SENATOR HARRIS:

Someone puts forward an application and attests to the research up front. The research done by the applicant shows there is no conflict, yet, the State Engineer can retain the ability to deny the application when a conflict is found. There will be no mandatory requirement to allow someone to do a 3M plan when a potential conflict is found.

SENATOR GOICOECHEA:

I agree with that. The State Engineer has to accept the application. If there is a true conflict, regardless of what the applicant attests to, the application has to be denied. That is existing law.

What is the next step if it is not validated that there is a conflict?

SENATOR HARRIS:

There may be a disagreement on whether there is going to be an impact. A protestor can come forward and the Engineer can order the 3M plan and hold a hearing on the application and the 3M plan together.

SENATOR GOICOECHEA:

If there is a protest to a project by an impacted party, will statute require the State Engineer to order the 3M plan? Some of the protests are frivolous.

SENATOR HARRIS:

Statute should not require the State Engineer to order a 3M plan. If the process operates properly, it allows the State Engineer another tool as opposed to outright denial of a project. If the State Engineer considers the application frivolous, the hearing can be held on the application only; the determination can be made that there is no conflict, and the permit can be granted.

SENATOR GOICOECHEA:

If the State Engineer gets an application and is unsure of a conflict and there are a couple of protests, then is it at that point in the bill the State Engineer agrees with the protest and requires a 3M plan to mitigate?

SENATOR HARRIS:

I do not think the State Engineer would have to agree in order to offer a 3M plan. It should be an option if there is a question of conflict. If it is clear there is a conflict, and the State Engineer thinks a 3M plan could avoid the conflict, the State Engineer should be able to offer the 3M plan. Then a hearing can be held to determine if the conflict has been avoided. The touchy part is getting around the idea that the State Engineer is going to find a conflict, and it might be able to be avoided by a 3M plan. It allows the Engineer to have options. The language has to be such that there is a potential or actual conflict.

CHAIR SCHEIBLE:

I will conclude the meeting and continue discussing the issue between today and Thursday to come up with a plan.

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Senate Committee on Natural Resources
May 14, 2019
Page 10

CHAIR SCHEIBLE:

With no more business to conduct, we will adjourn at 4:48 p.m.

RESPECTFULLY SUBMITTED:

Christine Miner,
Committee Secretary

APPROVED BY:

Senator Melanie Scheible, Chair

DATE: _____

EXHIBIT SUMMARY				
Bill	Exhibit / # of pages		Witness / Entity	Description
	A	2		Agenda
	B	1		Attendance Roster
A.B. 83	C	2	Alyssa Keller	Work Session Document
A.B. 152	D	1	Alyssa Keller	Work Session Document