MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON NATURAL RESOURCES

Eighty-First Session
March 1, 2021

The Committee on Natural Resources was called to order by Chair Howard Watts at 4:01 p.m. on Monday, March 1, 2021, Online. 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/App/NELIS/REL/81st2021.

COMMITTEE MEMBERS PRESENT:

Assemblyman Howard Watts, Chair
Assemblywoman Lesley E. Cohen, Vice Chair
Assemblywoman Natha C. Anderson
Assemblywoman Annie Black
Assemblywoman Tracy Brown-May
Assemblywoman Maggie Carlton
Assemblyman John Ellison
Assemblywoman Cecelia González
Assemblywoman Alexis Hansen
Assemblywoman Susie Martinez
Assemblywoman Robin L. Titus
Assemblyman Jim Wheeler

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

None

STAFF MEMBERS PRESENT:

Jann Stinnesbeck, Committee Policy Analyst
Allan Amburn, Committee Counsel
Devon Kajatt, Committee Manager
Nancy Davis, Committee Secretary
Trinity Thom, Committee Assistant

OTHERS PRESENT:

Adam Sullivan, Acting State Engineer and Administrator, Division of Water Resources, State Department of Conservation and Natural Resources
Micheline Fairbank, Deputy Administrator, Division of Water Resources, State Department of Conservation and Natural Resources
Chelsey Hand, Outreach and Program Coordinator, Great Basin Resource Watch
Kyle Roerink, Executive Director, Great Basin Water Network
Shania Marques, Private Citizen, Ely, Nevada
Christine Saunders, Policy Director, Progressive Leadership Alliance of Nevada
Ainslee Archibald, Hub Coordinator, Sunrise Movement Las Vegas
Ashlee Forman, Cochair, Legislative Committee, Toiyabe Chapter, Sierra Club
Jake Tibbitts, Natural Resources Manager, Department of Natural Resources, Eureka County
John Hadder, Executive Director, Great Basin Resource Watch
Patrick Donnelly, Nevada State Director, Center for Biological Diversity
Neal Desai, Senior Program Director, National Parks Conservation Association
Will Adler, representing Pyramid Lake Paiute Tribe
Jeff Fontaine, Executive Director, Central Nevada Regional Water Authority; and Executive Director, Humboldt River Basin Water Authority
Emilia Cargill, Chief Operating Officer, Senior Vice President, General Counsel, Coyote Springs Investment, LLC
Doug Busselman, Executive Vice President, Nevada Farm Bureau Federation

Chair Watts:
[Roll was called. Committee rules and protocol were reviewed.] I will begin with a presentation from the Division of Water Resources, State Department of Conservation and Natural Resources (DCNR).

Adam Sullivan, Acting State Engineer and Administrator, Division of Water Resources, State Department of Conservation and Natural Resources:
I am pleased to be here this afternoon to discuss the primary water resource management challenges that are facing our state. In today's presentation, I will start with an overview of the Division of Water Resources, [Exhibit C]. I will provide some general statewide statistics on water supply and water use. I will provide some updates on recent accomplishments following the 2019 Session. I will also focus on some of the long-term challenges for the future of water management in Nevada.

Page 2 [Exhibit C] shows that the mission of the Division is "To conserve, protect, manage and enhance the State's water resources for Nevada's citizens through the appropriation and reallocation of the public waters." All waters belong to the public. A water right to divert for beneficial use of the public resource can be obtained and held as a property right. A water right can also be lost through nonuse. Nevada water law was established early in the twentieth century. While there have been additions and clarifications since then, the core

procedures and intent have not changed much since 1913 for appropriation and adjudication, and since 1939 for groundwater.

Page 3 is a more thorough list of what we do on a daily basis. We appropriate and manage use of Nevada's waters through water rights administration with the exception of the Colorado River, which is overseen by the Colorado River Commission of Nevada and managed by the Southern Nevada Water Authority to serve municipal water for its seven member agencies. We adjudicate claims of prestatutory vested rights and federal reserved water right claims. We manage the distribution and regulation of state-decreed water rights. By that I mean that our staff opens and closes head gates for irrigation purposes in accordance with rotation schedules and priority dates. We are in the process of updating the state water plan and drought response plan in cooperation with others. We regulate well drilling and the licensing of well drillers. We administer Nevada's dam safety program and the floodplain management program in coordination with federal guidance and local partners. We also regulate aquifer storage and recovery projects, including effluent reuse. We compile and collect water level data and water use data statewide and make it publicly available. We review subdivision plans for long-term water use areas. We also review water conservation plans for small communities.

Page 4 shows the summary of statewide surface water use. About two-thirds of our surface water is used for irrigation, which is typical for western states. About 15 percent is used for municipal supply and about 19 percent is used for wildlife and recreation, which are nondiversion uses. That also represents evaporation of water off of lakes and open water bodies that are represented by water rights. The average annual total surface water usage is approximately four million to five million acre-feet annually, depending on the year. To put that into visual context, the total storage volume in Lake Mead is approximately ten million acre-feet.

Page 5 is another diagram showing the same data for groundwater use. It is a similar pattern. About two-thirds of groundwater is used for irrigation purposes, about 10 percent is used for municipal supply, about 10 percent for mining, and lesser amounts for other manners of use. About 2 percent of groundwater use is by domestic wells that are exempt from the requirement of obtaining water rights. Statewide, groundwater use is approximately 1.5 million acre-feet annually. About one-third of our groundwater supply is from groundwater resources and two-thirds of our supply is from surface water resources.

Page 6 shows the comparison between basin-scale groundwater commitments and the long-term groundwater supplies of perennial yield. Groundwater rights are administered on a basin scale. There are 256 delineated topographic basins within the state; each one has an estimated water budget. Page 6 shows that for every basin that is colored, the appropriation, the commitment to groundwater within those basins exceeds what is estimated as the long-term average annual water budget. The darker colors show those basins that are more out of balance. I do want to note here that I noticed when reviewing this map this morning that it is not up to date, as of the date shown on the map. This still gives a good visual overview and an approximation of where we stand. It is also very important to note that

although this is a valid and useful metric for displaying this data, it does not necessarily show where the problems with conflict are. Each basin has different hydrologic conditions for actual water use, or local groundwater management programs, which are important components for the overall condition of the basins. The history of how basins became overappropriated and how they vary and what the circumstances are while addressing this issue, it is important to put all of that into context beyond what is shown on this page.

Before I discuss more on that topic, I want to go back and provide an update on 2019 legislative initiatives shown on page 7 [Exhibit C]. There were a handful of bills that passed in 2019 that are related to our Division and I will provide an update. Assembly Bill 62 of the 80th Session directed the State Engineer to develop regulations to address extensions of time for proving up on a water right. This is an important issue because the statutory guidance for approving extensions is very brief, and there are a large number of unprotected water rights that were initiated decades ago and continue to be extended. In response to A.B. 62 of the 80th Session, the Division developed draft regulations, held workshops in June 2020 and in January 2021, and we have another workshop planned for this summer. These regulations affect a lot of people, and with remote access we need to be as accommodating as we can to provide opportunity for public comment. A public hearing is tentatively planned for the fall of 2021.

Senate Bill 140 of the 80th Session established a 10 percent groundwater reserve for all basins that are not fully appropriated. On page 6 [Exhibit C], all those basins that are unshaded and do not have a number are those basins for which the perennial yield exceeds the current commitment. The directive of S.B. 140 of the 80th Session was to set aside 10 percent of available groundwater that is not available for use. This amount was calculated by our staff and enacted under State Engineer Interim Order 1308. The final amount of the groundwater reserve is subject to determination of all commitments under pending application and vested claims. For now, Order 1308 is in full effect to meet the intent of S.B. 140 of the 80th Session.

Senate Bill 150 of the 80th Session requires local governments to develop water resource plans and update them every ten years. The Division of Water Resources serves as cooperator and as a resource in the development of these plans, but they are locally developed plans specific to those areas. The Division can help in some ways, for instance by sharing a common baseline of data for regional water budgets, or by providing a record of valid water rights commitments within the area of each resource plan.

Lastly, the creation of the Water Planning and Drought Resiliency Section within our Division. Page 8 further discusses this development. The Water Planning and Drought Resiliency Section is a statewide program with the Division focused on water conservation, drought response, long-term flood management, and long-range planning in cooperation with local water planning efforts. With authority under *Nevada Revised Statutes* (NRS) Chapter 540, it is critical that these efforts are in cooperation with local water authorities, boards, or counties that have a shared interest in water planning and water security. Large municipalities have very effective and forward-looking water planning programs.

The objective here is to be complementary to existing programs. What our small staff can do is review and offer technical assistance for water conservation plans and water resources plans that are developed by local communities by providing a common hub for data and methods analysis. Second, our staff is working on the state water plan, in cooperation with others, in building on existing work that has been done in Nevada and in our sister states. The intent is to have a functional living document that is databased and addresses current needs for Nevada. In drought response and planning, our staff is cooperating with others to share data, communicate science, and provide resources to help prevent the worst-case scenario.

Page 9 shows that the data are clear that we are experiencing increasing temperatures across the state. Climate models consistently forecast that we will continue to see greater extremes in drought periods and flood intensity. What this means for us is a longer growing season and corresponding higher water demand for crops. More precipitation falling is rain rather than snow. There is earlier peak runoff in the spring and greater late-season stress with more reliance on groundwater supplies. There is no easy path on how to be adaptive and resilient to these trends, but we can say that the greatest short-term impacts are to our agriculture issues for which reliable water supply on an annual basis is important for crops and the local economy. The large municipalities are less immediately at risk because they have extensive water planning efforts in place and also manage storage reserves. Our water planning section will be incorporating the state of the science into the state water plan to help understand the long-term effects on water supply for Nevada. It is also a very good compilation of data and the impact to Nevada within the Nevada Climate Initiative that is produced by the State Department of Conservation and Natural Resources (DCNR).

Page 10 shows that increased development and competing demands put pressure on our water security across the state. As we grow and diversify, water demands evolve and generally increase, but the supply is limited. This inherently creates conflicts, and our water laws have limited tools for how to manage them. We are a prior-appropriation state, which clearly establishes that senior uses that were established prior in time and have continually used water have priority to access that supply of water. If there is not enough to go around, then those junior in time are not served. There is not much flexibility in balancing interests, needs, and uses from the state water law point of view.

When I refer to conflict, I am talking about assertion that the use of water by junior water right holders has inhibited access to that water by senior water right holders [page 11, Exhibit C]. With a limited supply of water, conflict does arise. Managing conflicts can be complex due to a number of different variables. A large part of what makes managing conflict or potential conflict difficult is reconciling the strict higher appropriation doctrine with a dynamic nature of hydrogeologic systems and impacts of drought. It is difficult to delineate exactly what constitutes a conflict and how to resolve it. Predicting, measuring, and resolving potential conflicts are difficult to pinpoint.

Conjunctive management is referred to as the common management of groundwater and surface water resources that are connected, particularly where there is a hydraulic connection

between a well and a stream or a spring source. Conjunctive management was added into statute in 2017 under policy of the state, and it has some really challenging implications because historically, groundwater and surface water rights have each been administered independently [Senate Bill 73 of the 79th Session]. To address this, we are making a concerted effort to increase the amount of outreach and local engagement so we can develop a common understanding of the issue in different parts of the state, including what the limitations are, and how, as a state agency, we can help develop a pragmatic and equitable solution to local problems that work for the local area and still abide by state water law.

For our Division, with a relatively small staff and high volume of workload, it is essential that we maintain regular and wide-reaching fieldwork to be in touch with the water users, collect and maintain good data, and continue to be a resource-oriented public service agency that is helping people navigate water law. This helps build trust and facilitate conflict resolution and reduces the tendency to create winners and losers.

Page 12 [Exhibit C] shows that statutory tools meant to facilitate the administration of water law are not always easy to implement. Under the basic tenets of prior appropriation, water rights that go unused for a long period of time can be lost through cancellation, forfeiture, or by abandonment. In practice, there is a high threshold for implementing this because first, water rights have protections in property rights and second, if forfeiture or cancellation is challenged or appealed, courts are reluctant to uphold these actions. It is common that a court will find that the State Engineer follows the law; however, by reasoning of equity or compassion for circumstances, a court often overrides the statutory requirements and reverses the State Engineer's action. The consequences of this are that we have a compounding challenge, particularly in overappropriated basins where there are a lot of unused water rights on the books. The primary statutory tools to get the basin back into balance are difficult to implement. Assembly Bill 62 of the 80th Session, which I previously mentioned on extensions of time, will really help provide consistency and guidance for our Division in this regard, but it remains a statewide challenge.

The second topic on page 12 is protection of nonpermitted uses. Water for environmental use—such as springs to support aquatic habitat, or sub-irrigated meadows, or wetlands—is a common concern because those resources do not have protections against conflict that are afforded to other water right holders. In fact, there are a number of ways that environmental resources are protected. This might occur by protection of senior rights on a water source, which also protects the environmental value. It may occur through water right acquisition, for instance, for wildlife purposes; or through statutory protection for wildlife access to spring sources; or in the case of interbasin transfers, which must be shown to be environmentally sound to be approved. The State Engineer is also required to consider the public interest in making decisions to either approve or deny a water right application. Although that definition and interpretation have evolved over generations, the public interest can also be a basis for protecting environmental water resources. Domestic wells are exempt from the need to acquire and maintain a water right and have a protectible interest as the supply of drinking water for homes, but they also have a priority of the date the well was

drilled and they tap into the same shared groundwater supply as other water rights wells. The basis of the limited groundwater supply and the proliferation of domestic wells could create problems and potential conflict as well as confusion about the independence of domestic wells over all state water management.

There are two recent positive developments in this regard: First, the 2019 Legislature established that domestic wells would still be allowed to pump a reduced amount of water in the event of curtailment in order to protect drinking water supply [Assembly Bill 95 of the 80th Session]. Second, the Nevada Supreme Court recently provided some clarity of the state's role and authority in balancing the protectible interest in domestic wells with a need to address overappropriation at the basin scale. This is in the Pahrump area and is a decision that was just issued last week [*Wilson, P.E. v. Pahrump Fair Water*, *LLC,* 137 Nev., Advance Opinion 2] and will really help provide guidance for our Division for other parts of the state well into the future.

On page 13, the *Wilson* case is one example of a clear directive from the Supreme Court on water law administration, but it is also very common that judicial review of water cases results in disparate and inconsistent decisions that pose administrative and regulatory challenges for us. Often judicial decisions are focused on the interests of the challenging party. This is understandable, but the challenge here is that when the State Engineer makes his decision, he must consider the implications on the entire basin, or the regional flow system, or the entire state. That range of judicial decisions for site-specific issues builds a sub-contradictory precedence that makes it difficult for the state to administer water law consistently and defensibly.

Page 14 [Exhibit C] shows some key resources that our Division is working towards and will need to continue to serve the public and the water resources into the future. First, water right appropriations are made based on a determination of whether there is unappropriated water available. The State Engineer has for decades relied on United States Geological Survey studies of water budgets at a basin scale to determine the perennial yield, which is the primary measure used to determine water availability. This baseline science is increasingly being challenged because the original studies are 50 to 70 years old. It is still good science and often has proved to be very accurate despite the limited data available at the time the work was done. Today we have a lot more data and computing power to conduct more accurate and up-to-date analyses of water budgets and either verify or amend the older studies. We need our decisions to be accurate and defensible, especially in the face of increasing demand for water. Some of this work is already ongoing in a gradual manner where it is being used at a local scale, but to do it thoroughly and statewide will take many years and will require substantial investments.

Second, modernizing our records by digitizing is needed to preserve historic documents, to enhance the ability to research these records, and to make good use of the limited space that we have available for document storage. We have come a long way in the last few years to provide basic water rights information and mapping through our website, but a lot of the supplemental historical records are only available on paper for someone to come into our

office to review. We are continually adding to the record of water rights decisions as time goes on. Today our staff needs access to all of the history to fully research different issues and be able to cross-reference different documents. The public records need to be accessible to the public. Digitization and improving our web-based service will be a continuing need for us going forward.

That concludes my presentation and I would be happy to take any questions you may have.

Chair Watts:
Thank you for the presentation. This is a complicated area with lots of moving policy pieces and lots of conflict. I appreciate your giving an overview on issues related to water law. We have a few questions.

Assemblywoman Anderson:
On page 6 [Exhibit C], the red zones on the map helped me understand some of this, but regarding mining activities, how is that handled? Are the basins being overappropriated based upon the mining activities or other elements?

Adam Sullivan:
Are you referring to mining operations, or are you talking about groundwater mining?

Assemblywoman Anderson:
Mining operations.

Adam Sullivan:
Mining operations are subject to the same statutory requirements as any other manner of use throughout the state. In some cases, mines that operate by dewatering reinject that water back into the aquifer; oftentimes, the water rights are conditioned on the requirement to reinject that volume of water and only consumptively use a fraction of what is pumped. Mining operations, especially the larger ones, regularly conduct annual updates with our Division to discuss their operation and water requirements, their monitoring plan, and the results of their forecast with impacts on the water resource surrounding the operation area.

With regard to the second question on groundwater mining, as a general rule, Nevada is fortunate that the criteria of water availability was established early on in history. We have one of the oldest groundwater laws among western states. It goes a long way toward preventing groundwater mining and long-term depletion of the groundwater resource. The basins in red that you pointed out are a comparison between the perennial yield and what is committed. Each basin has a different story. Some of these have a significant hydrologic supplemental source from surface water runoff as a terminal line of a river system. In southern Nevada, there is a very active groundwater management program, so although there is not a lot of groundwater being recharged naturally, there is active recharge from surface water sources and the basin is managed well for a sustainable supply.

Assemblywoman Anderson:
When you mentioned that there are updates while working with the mining companies, how often do those discussions take place? Is it a yearly discussion or just when there is a problem? Is it an ongoing, every three- to five-month assessment, or does it vary based on where the mine is as well as what their needs are?

Adam Sullivan:
It depends on the type of operation and its location within the state. The permit terms dictate what those requirements are. Often there are monitoring plans that require monthly reporting or quarterly reporting. Sometimes we have quarterly meetings with different operators. We do that in conjunction with other divisions within DCNR so that we can have consistent and compatible requirements and cooperative relationships with those companies.

Assemblywoman Titus:
Water law and water resources, or lack thereof, in Nevada is a very complicated subject. I think you were able to put it into a very brief overview in a very nice manner. I have a question regarding cooperating agreements and monitoring, management, and mitigation plans, otherwise known as "3M" plans. You went over the laws we passed, and for the last four sessions that I have been here, the latest controversial water law. "First in time is first in line" is something we have held since we wrote our *Nevada Constitution* at the inception of our state. It has always been a source of concern to other new and more junior members. You probably are limited on what you can share with us on this, but what is the status of the Diamond Valley lawsuit that is in front of the Nevada Supreme Court? It is my impression that until that lawsuit is settled, our State Engineer was somewhat hesitant about putting forward any more plans, as there was a fight over what he had already passed and needed some clarity in the language of 3M plans. Will you give us an update on that?

Adam Sullivan:
Diamond Valley is the only basin within Nevada that has been designated as a critical management area. The requirement for critical management areas is that within ten years, the local community must develop a groundwater management plan that is approved by the State Engineer. If that does not occur, then the State Engineer is required to regulate by priority for that basin. The Diamond Valley groundwater management plan was developed and approved by the State Engineer. It was appealed and was overturned by the district court. It was then appealed to the Nevada Supreme Court. At this time, we are waiting for the Supreme Court to schedule oral arguments. While we wait, the community of Diamond Valley has taken a number of measures to implement their groundwater management plan, but because of the legal status, it is unenforceable by our office. We have a staff member in Eureka who has done a lot of work to help people update their water rights records, to install meters on their irrigation wells, report data through our website, and keep very good records. No matter what happens with the groundwater management plan, whether it is upheld, it goes back to be revised, or any other outcome, the need of continued collection of good water use data at Diamond Valley is going to be essential for the sustainability of the irrigation community.

Assemblywoman Titus:
Several members of the Diamond Valley ranches have reached out to me with concerns over that. Will any of your bills that you are bringing forward be affected by the outcome of the Supreme Court decision?

Adam Sullivan:
Nothing that we are bringing forward in this session would be related to that decision.

Assemblywoman Titus:
It is my understanding that we need to bring more issues forward regarding the clarity in our language. I wanted to ensure that nothing you are bringing forward this session is affected by anything that comes out of the Supreme Court decision.

Assemblywoman Cohen:
I was struck by your reference to judiciary and putting sympathy for junior water rights holders above what the law actually is. It has me thinking about your office's involvement in lawsuits. Is it possible for us to get information on how often there are cases, and how often those cases end up being appealed?

Adam Sullivan:
I can provide that information to you.

Chair Watts:
Given the topic of today's bills, I think it is safe to say that litigation in this area is not uncommon.

Assemblyman Ellison:
A current issue is mining and dewatering. Statewide, most mining operations are into conservation and putting the water back into the aquifer or refining the water. It is not like they are letting water go on the ground to evaporate. Also, right now we are doing some cloud seeding, but I do not think we are doing enough to put more snowpack onto the mountains. For example, how much does cloud seeding help in putting more snow in the Ruby Mountains?

Adam Sullivan:
You are correct about mining water. Dumping water out onto the ground to evaporate is a waste of water and is illegal. Regarding cloud seeding, there has been an intermittent cloud seeding program that has been run through the Desert Research Institute and other entities since the 1960s. It has continually been in a state of investigation and research. I cannot directly speak to the efforts that are happening around the state right now, or to what extent that it adds to the snowpack. I think it is worth mentioning that I always like to remind people that the volume of water that is added to the snowpack is worth it, but the amount of that water that actually ends up running off into streams or rivers or infiltrates into the ground and becomes groundwater recharged is a small fraction of the total amount of water that falls as snow. That is an important consideration in evaluating the benefits of cloud seeding.

Assemblyman Ellison:
There has to be some kind of data on how much snow and how much water is in the snow that comes from the cloud seeding, if it is financially beneficial or not. I think we need to know how much of that water goes back into the aquifer. Some snow goes into runoff, but some goes into the aquifer. I think it is important and we should not dismiss it. Also, the misconception that dewatering goes into a lake and dries out, that is not true. The mines have some of the most sophisticated systems in the world with how much water is put back into the aquifer. I want that on the record because there is a lot of misconception out there that mines just pour the water out and it goes down the river. That is not true. There is a lot of research being done and millions of gallons of water are being put back into the aquifer. Some have even reduced the hayfields as far as pivots and use that for calculations. Mining is probably one of the best industries in the world. I would like to know about the snowpacks and if the cloud seeding is beneficial and how much it is and the costs per area. I think there are only three areas where cloud seeding is done: Mount Charleston, the Ruby Mountains, and the Sierra Nevada.

Chair Watts:
I know there has been a cloud seeding program in the past, and we will see if we can get some additional information on the status of it. I know budget constraints have always been an issue with that program.

Mr. Sullivan, you have already touched on the issues in Diamond Valley; will you give an overview on Pahrump Valley and the most recent court decision?

Adam Sullivan:
The recent decision that was issued last Thursday by the Nevada Supreme Court, [*Wilson*] upheld State Engineer Order 1293A. The Pahrump basin is a highly overappropriated basin and has been since the 1940s, long before there was even an estimate of perennial yield, so it is nothing new. The water supply in Pahrump is largely provided by domestic wells. There are a large number of existing lots that do not have wells on them. There is a concern from a water budget standpoint of the ability for the natural water budget to support the water supply for all those undeveloped lots. State Engineer Order 1293A made the requirement that in order to develop a domestic well, an owner needed to acquire and relinquish 2 acre-feet of water. That was challenged, overturned in district court, and the Supreme Court reversed the district court's decision and upheld Order 1293A. That is significant precedent and provides important guidance for the protections for domestic wells and balancing that with blended water supply on the basin scale.

Chair Watts:
You touched briefly on interbasin transfers and the need for any such transfer to be determined to be environmentally sound. You also mentioned public trust. I would like you to speak on that again, about the higher standard under our state law that is in place for any proposed interbasin groundwater transfer. Usually with any such large proposals, they tend to be engaged in protracted litigation of any decisions. Would that be a fair characterization?

Adam Sullivan:
I think that is a fair characterization. Interbasin transfers of groundwater where the water is pumped from one basin and used somewhere else require a higher standard to be approved through our office. One measure is that the project needs to be determined to be environmentally sound. There are other requirements, such as the basin of origin still has sufficient water for future development, and it needs to be determined that the destination basin's plan of conservation is advisable. These additional standards are in NRS 533.370 that apply just to interbasin transfers. Otherwise, the requirements to publish the applications to the public, who can protest them, hold a hearing, those standards still apply to a project of that nature.

Chair Watts:
I think that one of the most often discussed transfers is no longer being pursued, but I wanted to ensure that some of that context is available for our newer members, as those are issues that come up from time to time and do come into the legislative and policy arena as well. Seeing no other questions, I will move on and open the hearing on Assembly Bill 6.

Assembly Bill 6: Revises provisions governing an application for a temporary change relating to appropriated water. (BDR 48-309)

Adam Sullivan, Acting State Engineer and Administrator, Division of Water Resources, State Department of Conservation and Natural Resources:
Assembly Bill 6 is a housekeeping measure intended to resolve ambiguity relating to whether the State Engineer is required to hold a hearing on protested temporary change applications to appropriate water. *Nevada Revised Statutes* (NRS) 533.345 allows for the issuance of a temporary change of a water right's point of diversion, place of use, or manner of use limited to a time period not to exceed one year. The State Engineer has discretion to publish a temporary water right application if the application is believed to implicate the public interest. And, just as with a permanent water right application, a temporary application may be protested. However, NRS 533.345, subsection 3, is ambiguous as to whether the State Engineer is required to hold a hearing on a protested temporary change application.

The State Engineer has discretion to hold a hearing on a protested permanent water right application. Review of legislative history for NRS 533.345 indicates that it was intended for the State Engineer to also have the same discretion to hold hearings on protested one-year temporary water right change applications. When the law was drafted, the omission of a comma has led to ambiguity regarding whether a hearing is discretionary or required. In order to make sure the law correctly reflects the original intent to allow the State Engineer discretion to hold a hearing, section 1, subsection 3, of the bill adds the following sentence: "The State Engineer may hold a hearing on the application before rendering a decision." This amendment resolves the ambiguity and makes it clear that a hearing on a temporary application is discretionary.

At this time, I am happy to take any questions from the members of the Committee.

Assemblyman Ellison:
If someone protests a decision, who decides if there will be a hearing or not?

Adam Sullivan:
When a protestant files a protest, the decision on whether to hold a hearing is at the discretion of the State Engineer, upon determination of whether that one-year temporary use of water may be in conflict with the public interest or would conflict with existing water rights. That is a determination at the discretion of the State Engineer. It is important to note that this is a one-year temporary change application. The intent is to provide a short-term supply of water for a temporary use. That goes into the consideration of whether to have a hearing and reviewing the substance of the protest and the content of the application.

Assemblyman Ellison:
My concern is that section 1, subsection 3, says, "the State Engineer shall give notice . . . ." It seems there needs to be some clarification to the last part of the sentence.

Chair Watts:
Thank you, Assemblyman Ellison. We have a question from Assemblywoman Cohen.

Assemblywoman Cohen:
Will you give us some background about what it takes to have a hearing, and how many are requested each year, to give us a better understanding of how this impacts the State Department of Conservation and Natural Resources (DCNR)?

Adam Sullivan:
In the cases of protested temporary change applications, the Division of Water Resources, DCNR, has always interpreted and implemented it the same way that we approach determining whether a hearing is required for any protested application or any application that is interpreted to potentially conflict with the public interest. Hearings are typically held in Carson City. They are administrative hearings run by our hearing officer who provides opportunities for the applicants and protestants to discuss their points of view before making a determination. The number of hearings we hold varies from year to year depending on the demand. If you want more specific statistics, I would be happy to provide them.

Assemblywoman Cohen:
Thank you, if you could give us a little more information about what it entails for the office to have these hearings.

Adam Sullivan:
I would like to invite Micheline Fairbank, Deputy Administrator, to address that for you.

Micheline Fairbank, Deputy Administrator, Division of Water Resources, State Department of Conservation and Natural Resources:
I would like to provide you with a little bit of specificity in regard to the administrative hearings process within the Division. In terms of the number of hearings we have, it is

variable. We are having more hearings as we have more contested issues, and we find that it is appropriate and necessary to develop a very robust administrative record because we have more and more of our decisions being challenged. With respect to what the process is for administrative hearings, we typically conduct an average of one to two hearings a month. The extent of those hearings is variable; for example, right now we are in the middle of a weeklong hearing that started today and will go all week. We have multiple hearings that are scheduled this month. Similar to a court docket, many of those hearings can be settled or be resolved prior to our office actually having to hold the administrative hearing. The process of getting to the hearing can be variable as well. In this particular context relating to A.B. 6, we are talking about temporary applications. A temporary application will get published, assessed for criteria, and evaluated. If that temporary application is protested, depending on the basis for the protest, we may decide to hold a hearing. That slows down the process because before we actually conduct a hearing, we have to notice it. We have to ensure it accommodates the availability of the parties. Oftentimes, there are attorneys involved, and it is also dependent on our schedule.

We have a Hearing Section, which consists of a hearing officer, a supervising professional engineer, and additional staff working on various other matters within that Section. The hearing officer and the professional engineer are responsible for conducting hearings as well as all the other responsibilities of that Section. The scheduling of hearings is based on staff availability. Just like many court proceedings, we go through similar processes; we establish a date, have scheduling conferences, and have prehearing conferences. Because it is an administrative hearing process, it is much more informal than a regular judicial proceeding. We are seeing more and more attorneys involving themselves in our administrative hearings process, which historically were the applicant, the water rights holders, or the protestants representing themselves; those hearing processes are becoming more complicated as well. We are happy to provide statistics of the number of hearings we are having.

Assemblywoman Cohen:
I would like to have that information. I would also like to see the numbers of hearings you are not having and how many are being requested but not being held.

Micheline Fairbank:
I will be happy to provide that.

Assemblyman Wheeler:
Section 1, subsection 3, states that "the State Engineer determines that the temporary change may not be in the public interest," and that the State Engineer "may" hold a hearing on the application. It does not say anything about an application being contested. More important, what makes you decide what is and is not in the public interest if there is no hearing?

Micheline Fairbank:
What involves the public interest is variable based upon the application, unique circumstances of the location of the application, and the type of application. What constitutes a public interest evolves over time. There are various factors that may be related

to a particular application. For example, we have a particular area where we have identified a limited availability of water and there are certain change applications. Because those change applications impact how that water hydrology is being used and the impact of water used in a particular region, any change application in that particular area is likely to implicate public interest. As we do our initial review of an application, we are going to look at any impacts on existing rights. We may look at whether there is a potential impact on some of those nonpermitted rights that State Engineer Sullivan discussed during his presentation. We may look at whether there are overappropriation issues. We look at a totality of various factors that may be related to the specific application to make a determination as to whether there may be public interest implicated within that temporary application. Again, you have to remember these are temporary applications and they are intended only to be in effect for one year. Another factor we may look at is, is this really a temporary use for a temporary project? Or is this temporary application an effort to get around a permanent application process? These answers may make us consider that it might be appropriate that that could have public interest implication. There is not a set criteria or a one-size-fits-all review. It is dependent on each individual application.

Assemblyman Wheeler:
Are you saying there is no written criteria for public interest and that you do not take into account public comment to achieve public interest? Is this something determined through experience in your office?

Micheline Fairbank:
We do not have a checklist of what constitutes public interest. We look at case precedent. We have a significant amount of case law that establishes precedent regarding public interest issues. For example, in the Mineral County case, we set forth in our briefing there are about 13 different criteria that can involve the public interest. Those are varying factors, but we also look at the precedent that we have over history and Nevada Supreme Court determinations to help us define and refine what constitutes public interest. That is an ever-evolving factor because what constituted public interest 70 years ago has evolved to have different public interest in what is happening today. We look at the precedent that has been established, but it is not like we have a specific checklist. Again, each individual application is unique to the application, the quantity of water, the location, the basin, and many other factors that weigh into the analysis.

Chair Watts:
Are there any other questions? Hearing none, I will now hear testimony from those in support of A.B. 6. Hearing none, I will move to those in opposition.

Chelsey Hand, Outreach and Program Coordinator, Great Basin Resource Watch:
The Great Basin Resource Watch is a nonprofit public interest organization. We are in opposition to A.B. 6. [Unintelligible.]

Chair Watts:
I will go on to the next caller in opposition. Hearing none, I will hear those neutral to A.B. 6. Hearing none, I will close testimony. Are there any closing remarks? Hearing none, I will close the hearing on Assembly Bill 6 and open the hearing on Assembly Bill 5.

Assembly Bill 5: Makes various changes to provisions relating to judicial review of orders and decisions of the State Engineer. (BDR 48-311)

Adam Sullivan, Acting State Engineer and Administrator, Division of Water Resources, State Department of Conservation and Natural Resources:
Assembly Bill 5 is intended to provide greater clarity and specificity regarding when determinations made by the Division of Water Resources, State Department of Conservation and Natural Resources, are subject to being challenged through judicial review.

During the interim, the Division hosted several stakeholder group meetings to discuss the intent and provisions of this bill. As a result of those discussions, the Division is proposing an amendment [Exhibit D], which I will address later in my testimony.

Over the past ten years, the Division has seen an increase in litigation over nonfinal decisions, advisory, or generalized opinions that have not resulted in a final decision. Assembly Bill 5 clarifies that only formal orders, rulings, or decisions that are a final determination issued in writing may be challenged through judicial review. Assembly Bill 5 also clarifies that an appeal of a decision of the Division of Water Resources is in the nature of a civil appeal, meaning that there is a limitation on the introduction of new evidence and testimony not otherwise brought before the State Engineer at the time a decision was rendered.

With that, please allow me to briefly walk through the provisions of the bill.

Section 1, subsection 1, specifies that determinations subject to review must be "any formal order, ruling or decision that is a final determination issued in writing by the State Engineer, acting in person or through the assistants of the State Engineer or the water commissioner, which materially affects the person's interests." The intent of this section is to provide clarity that determinations subject to being challenged must be those that are final determinations that have a substantive and tangible impact on the interests of the person challenging the determination.

This clarification is needed because the courts have begun to expand the scope of decisions that are subject to challenge to include nonfinal decisions, such as a letter that did not make any final determination regarding the ability of a water right holder to use that water right, but was a generalized perspective of what may potentially occur in the future. This is one example of a hindrance to the Division's ability and willingness to have open deliberations with stakeholders prior to making a final decision. Additionally, it has been argued before the Nevada Supreme Court that if the State Engineer enters into a settlement, that such action constitutes a decision that is subject to judicial review. This would negate the whole intent of

a settlement agreement which is to resolve disputes outside of court. Expansions to the original intent, and Nevada Supreme Court precedent relating to judicial review of administrative agency actions, hinder the ability of the Division of Water Resources to perform its essential and core functions. These impediments only serve to harm the public and those reliant on the timely and efficient performance of the tasks of our office.

As previously mentioned, the Division's engagement with stakeholders over the interim sparked some concern with the bill as introduced. The primary concern we heard was that the phrase "which materially affects" could limit who could challenge a determination made by the Division. Because this is not the intent of the bill, the Division is proposing an amendment to delete the phrase "which materially affects" on page 2, lines 2 and 3, and restore the word "affecting" [Exhibit D].

It is important to emphasize that these provisions are not intended to hinder appropriate challenges to determinations of the Division. The Division recognizes that appropriately exercised judicial review is an essential check and balance to the decisions made by the Executive Branch of government. However, it is important to limit those challenges to final determinations that have a real and substantive, not hypothetical, impact on the interests of the challenging party.

Second, section 1, subsection 8, adds the word "appellate" to provide clarification to the intent of the law and to reflect the Nevada Supreme Court precedent that judicial review of Division determinations is appellate in nature, meaning "the practice in civil appellate cases applies." Again, in recent years the Division has seen district courts expand the scope of judicial review well beyond the limitations contemplated for matters that are in the nature of an appeal. Expanded scope has included the examination and testimony of witnesses during oral argument and the expansion of the record before the court that includes information and evidence not before the Division when the decision was rendered. Again, this change is needed to provide clarification to the intended scope and nature of judicial review.

Last, other changes throughout Section 1 are conforming changes related to determinations that are subject to judicial review.

That concludes my testimony. I am happy to take any questions from the members of the Committee.

Assemblywoman Brown-May:
Section 1, subsection 1, says, "Except as otherwise provided . . . any person feeling aggrieved by any formal order, ruling or decision that is a final determination issued in writing." Is there a time frame from when the order is made to when the final determination is issued?

Micheline Fairbank, Deputy Administrator, Division of Water Resources, State Department of Conservation and Natural Resources:
When we have a protested matter that we have a hearing on, under statute we are supposed to render a decision within 240 days unless there are other extenuating circumstances, then the 240-day time frame may be extended. With respect to other matters, whether it is an adjudication or a preliminary determination, those are not covered under *Nevada Revised Statutes* (NRS) 533.450 and there is also a statutory time frame for us to issue a decision. With regards to other decisions that may come from our office that are not related to a protested application, there are no existing statutory time frames.

Assemblywoman Anderson:
I appreciate the deletion of the word "materially." In light of the last bill hearing, how does this work? If I am understanding this correctly, if both bills were successfully signed into law, that means that a decision made from Assembly Bill 6 would never be brought up again to a court. Am I misunderstanding that? Will you clarify how these two bills will work if both are successful?

Micheline Fairbank:
We interpret current statute with respect to whether a hearing is required on a protested temporary application within our discretion. We have discretion to hold a hearing on a permitting application or a permanent application. The effect of A.B. 6 would not change anything with regard to A.B. 5. What A.B. 5 does is, once we render a decision or determination following a protested hearing, that starts the time frame in which to challenge the final decision. That would then be triggered under NRS 533.450 to initiate the decision for judicial review to challenge the State Engineer's decision. The two of them would not change the status of the laws that exist today in terms of application; everyone would still have an opportunity to challenge the final determination.

Assemblywoman Anderson:
I have problems with this bill. It gives the impression that the State Engineer's decision is not open for any sort of review or a judicial item, and I have some real concerns. It gives the impression that, again, the decision handed down by the State Engineer is exempt.

Micheline Fairbank:
We appreciate your expressing your concerns. The basis for this bill is related to Supreme Court precedent. This is not intended to prohibit anyone from challenging a final determination. The idea is that we need to give challenging decisions that are actually final. It was stated that there has been a tendency for the district courts to not necessarily honor the Supreme Court precedent that we have in place. This legislation proposes to codify into statutory language specific Supreme Court precedent. For example, one of the challenges that we have recently is this: We had a letter, it was a nondetermination, nonfinal letter, but it was found to have been sufficient to satisfy being a final decision, even though the individual letter that was issued by the State Engineer did not specifically and directly impact any individual rights. It was speculative in terms of what it thought, what it was forecasting, or what it was saying. There was no determinative issue before our office to decide on.

It was a speculative letter that the decision was found, even though the Supreme Court precedent is there, to go ahead and be warranted for continuing on in front of a court. The intent here is to take that Supreme Court precedent that sets exactly what we offered to put forth in the bill. There are a lot of Supreme Court precedents that talk about what decisions and orders are appealable and also limit the nature of our records.

One particular case that I would like to refer to is *Howell v. State Engineer*, 124 Nev. 1222, 1228, 197 P.3d 1044, 1048 (2008). This case actually was with respect to a letter that was issued by our office. We are not saying that letters cannot be challenged, but it has to be something that has finality. Chief Justice Hardesty wrote in the decision that claims go ahead and establish what the criteria is, or deciding whether his decision or determination as the State Engineer is subject to judicial review. Chief Justice Hardesty wrote that accordingly "so long as the decision affects a person's interests that relate to the administration of determined rights, and is a final written determination on the issue, the aggrieved party may properly challenge it through a petition for judicial review." We are seeing courts make findings that may not necessarily be a final determination. These are the types of things that are becoming more challengeable with regard to individuals wanting to find a basis to create litigation before we actually get to a final decision. We become mired in litigation in the process of getting to a final decision without actually getting to that final decision or that final determination. We are trying to bring in a codified precedent in a manner that is very clear, one that courts and judiciary can very finely read in the language and ensure what we are doing is in the best interest of the state while still affording those who may not agree with our decision the opportunity to challenge it.

Assemblywoman Anderson:
I realize this is a very difficult and messy answer when it comes to water rights. Thank you.

Assemblywoman Black:
Are there other offices with the ability for the public to file appeals from another agency that you are basing this on?

Micheline Fairbank:
This does not limit the ability for someone to challenge a decision, it just sets the timing in which the decision can be challenged, that it is a final determination. The Division of Water Resources and our judicial review process is defined in NRS 533.450. Other administrative agencies are governed through the Nevada Administrative Procedure Act under NRS Chapter 233B. The State Engineer is explicitly exempt from the Administrative Procedure Act except for the adoption of our hearing regulations. Again, this does not prohibit or preclude anyone from being able to challenge the decision of our office.

Assemblywoman Black:
In water law, definition and litigation appear to be everything. As I am reading A.B. 5, it seems like it creates new definitions for applicants for the public to work with. I am concerned about those definitions not being listed and defined in the bill.

Micheline Fairbank:
I am not sure what language you believe is referring to the applicants within the language of this bill. As was stated, we are incorporating Supreme Court precedent into the determination of the finality of the decision being reviewed by the district courts. It does not necessarily impact the standing of anyone; it does not affect the standing of who can challenge our decisions. It is just addressing the timing and the rightness of that decision being challenged.

Assemblywoman Black:
I will take this discussion off-line.

Chair Watts:
Are there any other questions? I would like to follow up on Assemblywoman Black's question and your response. I think the amendment addresses "materially" affecting language [Exhibit D]. You mentioned the Supreme Court case establishing a precedent for a decision being a final determination. Can you talk a little bit more about what your understanding of a formal decision would be and what an informal decision would be? It seems the most often-used example has been a letter, particularly some form of advisory letter. I know a settlement agreement was also mentioned in the presentation, and previously you had mentioned preliminary decisions, or interim or intermediate decisions. Will you elaborate on what you would see as informal decisions or communications versus formal?

Micheline Fairbank:
What constitutes a formal decision is the finality of the decision. Formality is something more than an email from staff or correspondence from staff that does not necessarily implicate a determined right of an individual. The finality is, as you have identified, multiple different types of issues; for example, a settlement agreement is really a finality with regard to the litigation we are resolving. With regard to certain letters that are either speculative or advisory, those are certainly purposes as part of our office. We are a publicly engaged, public service agency. Part of that is providing insight and instruction to individuals in regard to how to move forward or to respond to questions. Some of those different types of processes do not necessarily result in a finality of a decision and become subject to litigation with a significant impediment from the ability of the Division to do our daily work.

You raised the question regarding "interim." The word "interim" does not necessarily mean that it would not be subject to judicial review. There are interims that can have a spectrum of use, a spectrum of finality with regard to the types of issues that are being presented. For example, an interim order that may issue a temporary moratorium or a temporary pause maintains status quo for a short period of time in order to make decisions with regards to water resource management of a particular locality. We want to be able to issue an order, create a pause to allow that status quo is maintained, and not make greater issues. We do not want to create more significant issues because people are afraid of pending decisions. The Division wants to be able to have a pause to come to that final decision, go through an administrative process, and come to that final decision.

As for where we may also issue an interim order, for example, we talked about using the 10 percent reserve bill from last session [Senate Bill 140 of the 80th Session]. We see that as an interim order. In reality, for the purpose for the time and place right now, while it is interim it is final for its intended purpose, which is to finally determine what the water reserve is in those particular basins. It is interim because we ultimately do not know what that final number may be because of the outstanding issues with regard to undecided applications and unadjudicated rights and claims.

Even though it is qualified as an interim decision, it is really the process of how we are at a point where there is a final determination. That is the line in the sand stating that this is where we are at, this is the management process, this is the management decision, or there is a decision that ultimately makes a long-term permanent implication on interests of the water right holders that may be existing in that location. That is what would be subject to a decision; if it is merely a step in the process to getting to the finality, that should not be subject to judicial review because we have got to be able to do the work to get to that final decision and not be fighting about the process about things that are really questions.

Chair Watts:
It sounds like some of the debate is due to certain orders or decisions that may have different impacts or levels of finality. Some of these decisions may still end up being sent to the courts to determine what is right for a field. I appreciate your providing some clarification about that on the record. Are there any more questions? Hearing none, I will move on to testimony in support of Assembly Bill 5. Hearing none, I will move on to those in opposition.

Kyle Roerink, Executive Director, Great Basin Water Network:
The Great Basin Water Network opposes A.B. 5 despite the proposed amendment [Exhibit D]. This bill will erode an important check-and-balance mechanism from state law. Other agencies and divisions are subject to similar appeals processes via the state's Administrative Procedure Act. We must ask, why do officials want to remove this important safety net? Right now, NRS 533.450 says any person feeling aggrieved by any decision of the State Engineer has a right to appeal to a district court. This is a valuable check on the unelected officials in the Division.

The Great Basin Water Network knows firsthand how important it is to have the provisions of the law remain intact.

In 2006, during the beginning of the regulatory proceedings for the Las Vegas pipeline fight, we were concerned that the State Engineer was not properly noticing protestants as required by law. We asked that the State Engineer re-notice. The State Engineer issued an intermediate order that denied our request. We then used the law to appeal to the district court. Ultimately, our case wound up in front of the Nevada Supreme Court.

The high court ruled that the State Engineer was derelict in his duty and denied Nevadans their due process rights. Assembly Bill 5 would have likely blocked us from seeking justice for those Nevadans.

Next, current law does not require a decision to be formal, and the inclusion of the word "formal" would overturn the Supreme Court's decision in *Howell*. The Nevada Supreme Court in *Howell* used the phrase "final written determination of the issue" as opposed to this bill's broader "final order." Assembly Bill 5 will block access to justice. Lastly, the Division's intent as it relates to the word "appellate" makes this bill even worse. That is why we need to keep the checks and balances that NRS 533.450 provides.

Right now, we have the Supreme Court ruling and other laws. We need not go forward with this bill. [Written testimony was also provided Exhibit E].

Shania Marques, Private Citizen, Ely, Nevada:
I am a member of the Ely Shoshone Tribe. I oppose A.B. 5. I believe that A.B. 5 will harm Native communities by removing access to the legal system and giving unelected officials more power over who can appeal their decisions in a regulatory realm. Any effort to limit a tribal government's access to justice should give Committee members pause. Assembly Bill 5 will make it harder to access the courts. Right now, we have an inclusive statute that has served Nevada well for more than a century, and there is no need to change it. We should look at history to consider what harm A.B. 5 could do in the future. The Ely Shoshone Tribe spent decades fighting the Las Vegas pipeline in regulatory and judicial proceedings. An important milestone in that case involved the nonfinal determined decision by the State Engineer that was appealed under NRS 533.450. Ultimately, the Nevada Supreme Court ruled that the State Engineer failed to uphold his duties as a public official by denying due process rights of Nevadans when he issued that nonfinal decision in 2006. Assembly Bill 5 would likely have prevented the Supreme Court from making such an important ruling that brought justice to the public. You must consider what damage this bill would do in the future. This bill will not serve the interest of tribes, it will only serve the interest of unelected officials.

Christine Saunders, Policy Director, Progressive Leadership Alliance of Nevada:
I am here in opposition to A.B. 5. Assembly Bill 5 is a bill that will block access to justice for Nevadans. This legislation will undermine Supreme Court rulings, introduce undefined language into law, and upend a standard of review that has served Nevadans well for more than a century. *Nevada Revised Statutes* 533.450 is a statute that was at the heart of the Las Vegas pipeline case, which Progressive Leadership Alliance of Nevada members and staff played an important role in fighting. Assembly Bill 5 language would have likely prevented our allies in that case from appealing a flawed interim decision by the State Engineer. Fortunately, we had this statute and our coalition had our day in court.

Indigenous peoples, rural communities, the environment, and many other Nevadans are depending on you to do the right thing and oppose this bill. [Written testimony was also provided Exhibit F].

Ainslee Archibald, Hub Coordinator, Sunrise Movement Las Vegas:
We are speaking today in opposition to A.B. 5. We believe A.B. 5 would limit access to the justice system and do harm to our currently very inclusive judicial review system.

As climate change worsens, so will our communal relationship with water. In the decades ahead, it will become even more crucial that our institutions can handle the rising tension. This is no time to be limiting access to the justice system.

We were happy to sign the coalition letter and fully support the concerns raised in it [Exhibit G]. We oppose A.B. 5. [Written testimony was also provided Exhibit H].

Ashlee Forman, Cochair, Legislative Committee, Toiyabe Chapter, Sierra Club:
On behalf of the Sierra Club and our more than 30,000 members and supporters statewide, I am speaking in opposition to A.B. 5.

We appreciate the proposed changes put forward by the State Engineer, but they do nothing to quell our overarching concerns. This bill hinders access to the justice system and hacks away at an inclusive statute that provides for checks and balances on unelected officials at the Division of Water Resources.

We support the way that the law is currently worded because it provides Nevadans the opportunity to seek legal action on impactful water decisions. In the long run, A.B. 5 will likely harm those who can least afford to fight for themselves and have the most to lose. This would foreclose on the opportunity for folks to take legal action on decisions that go beyond the short term and serve as a barricade to the justice system for rulings outside of what is proposed in section 1. Additionally, the bill's new, undefined terms will likely undermine the supposed reason for the bill by resulting in more litigation for the state.

This bill limits access to the justice system and makes it harder for grassroots organizations, small businesses, tribes, and environmental advocates to protect water in the courts. Right now, Nevada has a progressive, inclusive statute that allows anyone feeling aggrieved by a bad water decision to seek judicial relief. This bill will limit the public's ability to fight against water grabs by reining in who can participate in the courts and when. Water is our state's most limited and important resource. Its protection depends on the public's ability to participate in these decisions.

The bottom line: There is no good reason for limiting someone's access to the justice system. This bill lets the state shield itself from the courts. That is bad for the environment and our citizens.

Water law is complicated, but the choice you need to make on this bill is simple. For these reasons we urge you to vote no on A.B. 5. [Written testimony was also provided Exhibit I].

Jake Tibbitts, Natural Resources Manager, Department of Natural Resources, Eureka County:
We have provided written testimony as well [Exhibit J]. We support many of the things that have been said before us related to our concerns with the bill. We do want to go on record and thank the State Engineer and the Division of Water Resources for working to bring forward the amendment [Exhibit D] to strike "materially" from the bill and also for their efforts in outreach with stakeholders. We are very grateful for that.

I want to note that Ms. Fairbank mentioned that the intent is to align and codify the Supreme Court's precedent. That *Howell* decision that was referenced, Ms. Fairbank read a sentence from that. The immediately preceding sentence in that same case casts the final determination on the issue as being an "informal letter." That letter was explicitly designated in that case as being informal, yet it was found to be a final determination on the issue. For this truly to be in alignment with the Supreme Court case, this bill does not do that by bringing in the language "formal." Even without A.B. 5, parties already have a heavy lift to challenge the decisions of the State Engineer. The State Engineer is always considered prima facie correct; the burden of proof falls on the party attacking the same. That is in NRS 533.450, subsection 10. Only decisions that are truly arbitrary, capricious, and an otherwise abuse of discretion can be overturned. This existing legal standard is protective enough against frivolous litigation, but it also protects access and due process to those feeling aggrieved. We put in our testimony our concerns with "materially affected," but with the amendment, I will not belabor that.

We do see opportunities to clarify the appellate process through A.B. 5. Eureka County has been at the center of many of the water matters you have heard today, with Diamond Valley and case law and other things. It is important that the judicial review of the State Engineer's decisions are in the nature of an appeal and we are open to working on language to address that issue. We are also open to finding better ways to outline how parties may participate in judicial review proceedings in a streamlined way. We remain open to work with the Division to find language that we can all live with moving forward.

John Hadder, Executive Director, Great Basin Resource Watch:
We are testifying in opposition to A.B. 5. Great Basin Resource Watch is a Nevada-based nonprofit public interest organization. It has been monitoring mining-extractive industries in the Great Basin since 1995. We support communities protecting the air, water, land, and culture from the adverse effect of extractive industries. The availability and access to water is fundamental to life and livelihood. According to the NRS, water is publicly owned; however, access to water is controlled by the State of Nevada. Nevada has a responsibility to ensure equity in access. Any decision by Nevada in allocating access to water rights needs to be subject to internal agency and legal review by an aggrieved party, either personally or in the public interest. Given the essential nature of water, there must not be any limitation or increased restriction or impediment to legal redress.

Assembly Bill 5 will limit access to redress by adding unnecessary and restrictive language to NRS 533.450, including terms like "formal order," "ruling decision," and "final determination issued in writing." These new additions are likely to lead to litigation down the road because they are undefined. The average citizen is already at a disadvantage to protect his access to

needed water in the face of large corporations with well-paid legal consultants to act on their interest, despite the needs of individuals of the general public.

Great Basin Resource Watch has seen how many corporations have gained control over large amounts of water in rural Nevada, making it more difficult for the individual water right holders to protect their interest. Assembly Bill 5 will further favor the large corporations and their ability to control access to water. Whether it is an environmental group, irrigation district, rural counties, or tribal government, we believe this language will make it harder to stop unnecessary and dangerous processes moving forward. We urge the Committee to oppose this bill as written.

Patrick Donnelly, Nevada State Director, Center for Biological Diversity:
We are opposed to this bill and support the comments and written testimony submitted by the Great Basin Water Network. I would just say, look at the politics here. This bill should not be taken in isolation. There was also the proposal which would have overhauled the entire mechanism for appealing water cases, which is currently going before the Supreme Court for a proceeding there to make those decisions. Basically, the Division loses in court quite often, and so now they are trying to change the law to change that situation. If you look at the politics here, we have environmental groups, water advocates, rural counties; we even have Coyote Springs Investment, LLC submitting letters opposing this bill. The opposition is widespread and I think it speaks for itself.

Neal Desai, Senior Program Director, National Parks Conservation Association:
We are a 101-year-old nonprofit, nonpartisan organization advocating for the protection of our national parks and public lands, including Great Basin National Park and Tule Springs Fossil Beds National Monument. We oppose A.B. 5 and our members do not want their voices silenced. You are hearing from folks today along with written comments, including ours [Exhibit G], on the numerous problems that make this bill fundamentally flawed and unsalvageable, even with the proposed amendment discussed today [Exhibit D].

I would like to talk about this bill in the context of the Nevada State Legislature's priorities in the first year since the end of the Trump era. It is well documented that the Trump Administration spent considerable time and effort the past four years undermining the public interest by devising policies that limit access to justice, science, and facts that protect our water, our land, and our public health. It is incredible that you, the members of this esteemed Natural Resources Committee, are being asked by the Division of Water Resources to carry on the mantle of limiting access to justice by advancing this bill. This Committee needs to ask itself whether it is smart politics and smart policy to continue this legacy of the Trump Administration to limit your constituents, and all Nevadans, access to justice on matters of water, which sustains life and culture and state treasures such as Great Basin National Park.

Now is the time to be inclusive and to help restore trust and engagement in government decision-making; now is the time to restore the public's involvement in the management of our public lands and our waters. We urge you to reject this bill.

Will Adler, representing Pyramid Lake Paiute Tribe:
Pyramid Lake Paiute Tribe would like to add its voice in opposition to A.B. 5, a bill which would cause large destruction to existing water law and would have a detrimental impact on the public process of groundwater rulings in Nevada. Assembly Bill 5 introduces new definitions and creates new changes in Nevada's water law that are not in the interest of the public. Additionally, Pyramid Lake Paiute Tribe feels that A.B. 5 would open the door to more water litigation in Nevada, not less, as it could add to the opportunity to have a relitigation of previously decided water issues. Pyramid Lake Paiute Tribe was not consulted during the interim for this process, and they want to share their opinions with the State Engineer on A.B. 5 and other water issues this year. Again, A.B. 5 does not seem to be written in the interest of the public good of Nevada and would limit the ability to comment as well as other upsetting precedents and definitions into the law.

Jeff Fontaine, Executive Director, Central Nevada Regional Water Authority; and Executive Director, Humboldt River Basin Water Authority:
I represent the Central Nevada Regional Water Authority, which is a nine-member county unit of local government, and the Humboldt River Basin Water Authority, which is a five-member county unit of local government. Both authorities have a mission to protect water resources. I agree with the other comments that have been made today. I want to thank the State Engineer for providing the amendment [Exhibit D]; however, we are still opposed. We also acknowledge the State Engineer for his efforts to reach out to stakeholders and work through this bill as well as other bills that will likely be heard this session.

I want to mention that this would affect not only local government, but any person and should not be reducing the ability to challenge problematic decisions of the State Engineer, and for that reason, we are in opposition to A.B. 5. [Written testimony was also provided Exhibit K].

Emilia Cargill, Chief Operating Officer, Senior Vice President, General Counsel, Coyote Springs Investment, LLC:
Coyote Springs Investment, LLC opposes the revisions to NRS 533.450 as set forth in Assembly Bill 5. We appreciate the amendment [Exhibit D]; however, we remain in opposition.

Section 1 of A.B. 5, which proposes to modify NRS 533.450, inappropriately limits a person's right to challenge an order or decision. We believe it is inappropriate because of the diminishment of a person's rights and the result of delays and suspensions of unknown and potentially limitless time frames in a water user's ability to use or develop a water right, meaning this could easily lead to abuses. The State Engineer would only need to insert some kind of "not final" language into an order or decision, and then the aggrieved party is prejudicially remediless.

We also object to the inclusion of the word "appellate" in section 1, subsection 8 of A.B. 5. We do not believe it would be helpful or expedient in matters of petitions for judicial review. [Written testimony was also provided Exhibit L].

Doug Busselman, Executive Vice President, Nevada Farm Bureau Federation:
We are testifying today in opposition to A.B. 5. We greatly appreciate the outreach that the State Engineer has been engaging us in, and while A.B. 5 has been one of the legislative proposals that have been included in our conversations, we are not at a point in this area where we are comfortable in having current law changed.

Over the past several years, water right owners have needed to use the court system to stand up for themselves in protecting their rights. In a number of instances, they have been successful in defending those rights through the process that has been open to them.

Assembly Bill 5 seems to put limitations and restrictions on what persons can do to protect themselves and their interests.

I understand some of the perspective that the State Engineer's office is taking in seeking to reduce some of their legal exposure and have a shift to a more finalized action for being challenged. But we still have to maintain that the laws as they are now, give us more assurance that the proposals for the limited challenges are available to us.

Chair Watts:
Are there any other callers in opposition to A.B. 5? Hearing none, I will note to the Committee members that there are other exhibits submitted in opposition and are available on the Nevada Electronic Legislative Information System [Exhibit M and Exhibit N]. Is there anyone who would like to testify in neutral on A.B. 5? Hearing none, are there any closing remarks?

Adam Sullivan:
The Division recognizes the importance and the value of the ability of the public to challenge decisions of the State Engineer. This bill is not intended to have any effect on who can bring these challenges. The Division is simply asking that challenges brought forward are to final decisions, not just steps along the way in the deliberative process. If there are more appropriate ways to accomplish this end goal, the Division is open to them.

Chair Watts:
I will close the hearing on Assembly Bill 5 and move on to the last item on the agenda, which is public comment. Hearing none, our next meeting will be on Wednesday, March 3, at 4 p.m. This meeting is adjourned [at 6:15 p.m.].

RESPECTFULLY SUBMITTED:

_____
Nancy Davis
Committee Secretary

APPROVED BY:

_____
Assemblyman Howard Watts, Chair

DATE: _____

EXHIBITS

Exhibit A is the Agenda.

Exhibit B is the Attendance Roster.

Exhibit C is a copy of a PowerPoint presentation titled "Water Resource Management Challenges," dated March 1, 2021, submitted and presented by Adam Sullivan, Acting State Engineer and Administrator, Division of Water Resources, State Department of Conservation and Natural Resources.

Exhibit D is a proposed amendment to Assembly Bill 5, submitted and presented by Adam Sullivan, Acting State Engineer and Administrator, Division of Water Resources, State Department of Conservation and Natural Resources.

Exhibit E is a letter to Chair Watts, dated February 28, 2021, submitted by Kyle Roerink, Executive Director, Great Basin Water Network, in opposition to Assembly Bill 5.

Exhibit F is a letter to the Assembly Committee on Natural Resources, dated March 1, 2021, submitted by Christine Saunders, Policy Director, Progressive Leadership Alliance of Nevada, in opposition to Assembly Bill 5.

Exhibit G is a letter to Chair Watts, dated February 26, 2021, submitted by Baker Ranches, et al, in opposition to Assembly Bill 5.

Exhibit H is written testimony submitted and presented by Ainslee Archibald, Hub Coordinator, Sunrise Movement Las Vegas, in opposition to Assembly Bill 5.

Exhibit I is a letter to Chair Watts and members of the Assembly Committee on Natural Resources, dated February 28, 2021, submitted by Ashlee Forman, Cochair, Legislative Committee, Toiyabe Chapter, Sierra Club, in opposition to Assembly Bill 5.

Exhibit J is written testimony submitted and presented by Jake Tibbitts, Natural Resources Manager, Department of Natural Resources, Eureka County, in opposition to Assembly Bill 5.

Exhibit K is a letter to Chair Watts and members of the Assembly Committee on Natural Resources, dated March 3, 2021, submitted by Jeff Fontaine, Executive Director, Central Nevada Regional Water Authority; and Executive Director, Humboldt River Basin Water Authority, in opposition to Assembly Bill 5.

Exhibit L is a letter to the Assembly Committee on Natural Resources, dated March 1, 2021, submitted by Emilia K. Cargill, Chief Operating Officer, Senior Vice President, General Counsel, Coyote Springs Investment, LLC, in opposition to Assembly Bill 5.

Exhibit M is a letter to Chair Watts, dated February 25, 2021, submitted by Richard Howe, Chairman, White Pine County Board of County Commissioners, in opposition to Assembly Bill 5.

Exhibit N is a letter to the Assembly Committee on Natural Resources, dated February 27, 2021, submitted by Rupert Steele, Chairman, Confederated Tribes of the Goshute Reservation, in opposition to Assembly Bill 5.