

SENATE ECOLOGY COMMITTEE

Minutes of Meeting --- February 23, 1971

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Committee Members Present:	Thomas Wilson, Chairman
	Chic Hecht
	John Foley
f	Clifton Young
	Lee Walker
"	Emerson Titlow
"	Coe Swobe
Absent:	

Also Present Were:

Janet MacEachern	League of Women Voters
Darryl Capurro	Nevada Motor Transport Assn. & Nevada Franchise Auto Dealers Attorney-Reno
Larry Struve	" "
Craig Howard	
and others	

Members of the News Media

Chairman Wilson called the meeting to order at 2:38 p.m. Under consideration was one bill: S.B. 108 which was previously considered during a public hearing on February 18th.

Attorneys Struve and Howard gave lengthy testimony based on their research in relation to various points contained in the bill.

Mr. Struve stated he and Mr. Howard were not representing any client but were appearing merely as private concerned citizens. He added he is generally in favor of the principle involved in S.B. 108 but that he wished to make some comments regarding the need for a private remedy bill of this type in Nevada. He explained that Mr. Howard's presentation would concern some of the advantages of the bill. Mr. Struve said he questioned some of the language contained in the bill and later discussed the subject at some length after his and Mr. Howard's formal presentations.

Mrs. Janet MacEachern informed the members that she felt various definitions contained in A.B. 29 could be applied to S.B. 108 and simplify the language of the bill and resolve differences of opinions.

Mr. Darryl Capurro stated he was concerned about the doctrine of the separation of the three branches of government's powers. However, he said he felt that amendment to the bill as finally proposed to be redrafted would probably solve the problems with the bill.

Counsel was instructed to redraft Sec. 2, Paragraph 2 of S.B. 108 and later present it for further consideration.

There being no further business the meeting was adjourned at 5:10 p.m.

(transcriptions attached)

Mr. Struve testified at length on the topic of "The Need For Private Remedies to Protect Nevada's Environment." His presentation was in relation to the following:

I. PROBLEM: Courts of equity are one of the few places to take effective action against polluters.

A. Difference in view points.

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1. Victor Yannacone, Air Pollution: A Case Study in Environmental Law and Policy: "Only in a courtroom can a scientist present his evidence, free from harassment by politicians. And only in a courtroom can bureaucratic hogwash be tested in the crucible of cross-examination."
2. SOME COURTS ARE NOT NOW RESPONDING IN CLEAR FASHION TO THE NEED: SEE Boomer v. Atlantic Cement, 1 Environment Reporter: Decisions 1175: "...it seems manifest that the judicial establishment is neither equipped in the limited nature of any judgement it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution. This is an area beyond the circumference of one private lawsuit. It is a direct responsibility for government and should thus not be undertaken as an incident to solving a dispute between property owners and a single cement plant in the Hudson River Valley."

B. Conclusion: The public is rightfully confused about what it can do to fight pollution in courts of law, and the Legislatures throughout the country are finding it more and more necessary to express new policy guidelines in this field and provide direction to our courts. This has been especially important in those states where government has either failed to act or refused to enforce effective pollution controls in the face of ecological disasters.

C. I feel the most effective way members of the public can act is through the vehicle of litigation; i.e. the "private remedy," the citizen law suit.

D. Present: Does the private citizen have an adequate private remedy under Nevada Law to protect the environment?
I don't believe so.

II. Limitations of traditional common law remedies to protect the environment.

A. Abatement of nuisances (public and private): Most obvious remedy at common law to clean up the environment.

Theory: Preventing interference with the use and enjoyment of one's land.

(Cont'd)

Four Problem Areas:

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1. "Balancing of the equities": interest of polluter weighed against interest of pollutee. Result is often forcing polluter to pay damages but not abate the nuisance that is destroying the environment.

Also, remedy of damages is limited in its effectiveness since the polluter can internalize the "cost" of damages by treating it as an item of overhead expense.

2. STANDING: An individual can only sue to abate a private nuisance or a public nuisance that causes him direct economic or pecuniary damage.

NRS 40.140 (illustrates problem): Under this statute, a private person may bring an action to abate anything which is injurious to health, or indecent and offensive to the senses, or an obstruction to the free uses of property, so as to interfere with the comfortable enjoyment of life or property IF HIS "PROPERTY IS INJURIOUSLY AFFECTED...Or his PERSONAL ENJOYMENT IS LESSENERED BY THE NUISANCE."

- a. What if an individual wants to take action to abate an activity destroying ecological balance but cannot prove that his own health or property has yet been injured?
- b. What if a state agency either cannot or will not take action against a public nuisance because of inadequate funding for environmental protection or the absence of any clear authority to solve the problem?
- c. What if an environmental problem cannot be defined as a nuisance within the meaning of this statute and still pose a threat to the environment?

3. PRESCRIPTION: idea---if a nuisance goes on long enough, a polluter may have the right to continue it forever in spite of a lawsuit by an aggrieved individual or the effect on the environment.

4. Moving to a nuisance: private individual may not be able to abate a nuisance that already existed when he moved into an area. IF, HE ASSUMED BURDEN OF THE NUISANCE WHEN HE CAME THERE.

B. Negligence: violation of some standard of care within society, causing harm to an individual Plaintiff.

Problem: Many current standard of care in industry and society are not sufficient to protect the environment. This information is just being developed. New standards are required to meet the new problems of maintaining ecological balance, since the "community standard" as we know it may not do the job.

C. Strict Liability: three theories.

1. One who brings and collects something on his land that is likely to do harm if it escapes, must keep it at his peril, and if it escapes, he is prima facie answerable for all the damage which is the natural consequences thereof. (Ryland vs. Fletcher 1868, House of Lords.) Doctrine has been only slowly adopted in the United States.

I KNOW OF NO CASES IN NEVADA.

2. Nuisances per se (i.e. those defined by statute or those activities which a polluter knows are ultra-hazardous or certain to cause substantial harm.)

3. Restatement of Torts: non-trespassory AND UNREASONABLE invasion of another's interest in the private use and enjoyment of land. Example: Suing a coal mine for damage caused to homes by the intentional release of hydrogen sulfide from a refuse dump. (Evans v. Moffat, 160 A 2d 465 (1960.))

Problem: In applying these doctrines, wide variations have occurred in the decisions, and courts generally place a high value on economic activity at the expense of the environment. THIS REMEDY HAS BY AND LARGE BEEN CONFINED TO ULTRAHAZARDOUS ACTIVITIES SO FAR.

III. Related problems to the "private remedy" in Nevada.

A. Expense of litigation (delays, high burden of proof, complicated legal issues and factual issues, difficult discovery.)

Note: Typical plaintiff in an environmental lawsuit has little money, no paid legal staff, and must rely on donated services.

B. Requirements of standing to sue in Federal Court have been relaxed, but State Courts have some restrictions.

Federal Environmental Policy Act of 1969; Strongly approves conservationist activity. Private individuals and groups are being permitted to bring an environmental cause of action in Federal Courts even though they have not suffered direct injury, PROVIDED TWO CONDITIONS EXIST:

1. Plaintiff must show he is "aggrieved" by the action, which can be shown by a long and active interest in environmental activities; and

2. A "relevant federal statute" is found enunciating congressional recognition of the cause of the environmentalist.

Also: Federal Air Pollution Act gives individual the right to sue in Federal Court to enforce air pollution standards.

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Problem: No corresponding development has been underway in Nevada law (PTD. OUT ABOVE)

Need: similar statement of policy on the environment as in the Federal Government.

C. Exhaustion of administrative remedies.

Problems: discretionary action on the part of an agency; inability of private citizen to be heard before an agency; limited judicial review ("substantial evidence"); refusal of courts to interfere until completion of proceedings (time);

D. Sovereign immunity: refusal of the state to consent to being sued. If the state is the holder of the public trust, maybe the time has come to consider letting the public assure the trust by suing the state when it is not being kept.

IV. Procedural Problems.

A. Intervention in lawsuit by conservationist group or interested citizen:

1. Federal rules have widened the right of a person to intervene in an environmental lawsuit if he can show an interest in the subject matter which is affected by the litigation OR HE HAS A STATUTORY RIGHT TO INTERVENE.

2. Nevada rules are similar and give a court the discretion to permit a permissive joinder of an interested person.

IMPORTANT POINT TO REMEMBER: NO GUARANTEE UNDER PRESENT RULES THAT A CONCERNED PRIVATE PERSON OR GROUP WILL BE PERMITTED TO BECOME A PARTY TO AN ENVIRONMENTAL LAWSUIT.

B. Class action: device to permit a representative of a class to bring a lawsuit on behalf of the class when joinder of all the members is impractical, common questions of law or fact exist, and representative will fairly protect the interests of the class.

Problem: Under present Nevada law, a class action device is clumsy and difficult.

True class action: but for the class action, joinder of all interested persons would be essential. An environmental suit is not considered an example of this type of action.

Spurious class action: no better than an ordinary action, since the judgement does not bind the absent members of the class.

V. Constitutional Right to a Decent Environment?

- A. Probably not. *Griswold v. Conn.* (1965), Supreme Court enunciated the existence of a "penumbra" of unenumerated natural rights guaranteed by the ninth amendment.

MOST COMMENTATORS FEEL IT IS DOUBTFUL THAT A RIGHT TO A DECENT ENVIRONMENT IS INCLUDED IN THIS "PENUMBRA" AND IT HAS NOT YET BEEN TESTED IN THE COURTS.

- B. Until the Constitution of Nevada is amended, there appears no way for a private individual to assert this right within the meaning of the Constitution.

VI. CONCLUSION: traditional legal remedies and procedures available to a private citizen to protect the environment in our state courts have severe limitations. It would be difficult, at the least, for an individual to even get into court in such a lawsuit let alone to prove a case.

Solution will simply have to come from legislation, like S.B. 108.

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A. B. 29

 ASSEMBLY BILL NO. 29—MESSRS. HILBRECHT, FRANK
 YOUNG, MRS. BROOKMAN AND MR. BRYAN

 JANUARY 20, 1971

Referred to Committee on Environment and Public Resources

 SUMMARY—Provides private remedy of abatement in air and
 water pollution matters. Fiscal Note: No. (BDR 3-1)

 EXPLANATION—Matter in *italics* is new; matter in brackets [] is
 material to be omitted.

 AN ACT relating to air and water pollution; providing for the remedy of abate-
 ment; providing for injunctive relief and the award of damages; and providing
 other matters properly relating thereto.

*The People of the State of Nevada, represented in Senate and Assembly,
 do enact as follows:*

- 1 SECTION 1. Chapter 41 of NRS is hereby amended by adding thereto
 2 the provisions set forth as sections 2 to 19, inclusive, of this act.
- 3 SEC. 2. *As used in sections 3 to 19, inclusive, of this act, unless the*
 4 *context otherwise requires, the words and terms defined in sections 3 to*
 5 *13, inclusive, of this act have the meanings ascribed to them in such sec-*
 6 *tions.*
- 7 SEC. 3. *“Abatement” means the reduction of any emission causing air*
 8 *pollution or the reduction of any contamination or discharge causing*
 9 *water pollution up to and including the cessation of such emission, con-*
 10 *tamination or discharge.*
- 11 SEC. 4. *“Air contaminant” means any substance, including but not*
 12 *limited to, any particulate matter, fly ash, dust, fumes, gas, mist, liquid,*
 13 *smoke, solid, vapor, odorous substance, microorganisms, radioactive*
 14 *material, ionizing radiation, or any combination thereof or any decay or*
 15 *reaction product thereof.*
- 16 SEC. 5. *“Air pollution” means the presence in the outdoor atmos-*
 17 *phere of one or more air contaminants in such quantities and duration*
 18 *as, from any single source or in combination with any other source, is or*
 19 *tends to be injurious to human health or welfare, animal or plant life,*
 20 *or property, or as will interfere with the comfortable enjoyment of life or*
 21 *property.*
- 22 SEC. 6. *“Industrial waste” means any water-borne liquid, gaseous,*
 23 *solid or other waste substance, or a combination thereof resulting from*

1 any process of industry, mining, manufacturing, trade, or business or from
2 the development of any agricultural or natural resource.

3 SEC. 7. "Located" means residing in or doing business in.

4 SEC. 8. "Other wastes" means garbage, refuse, decayed wood, saw-
5 dust, shavings, bark, sand, lime, ashes, offal, oil, tar, dyestuffs, acids,
6 chemicals, and all other substances organic or inorganic other than sew-
7 age or industrial waste, but does not include chemicals used as necessary
8 additives in the treatment of drinking water.

9 SEC. 9. "Person" means any individual, group of individuals, partner-
10 ship, firm, company, corporation, association, trust, estate, political sub-
11 division, administrative agency, public or quasi-public corporation, or any
12 other legal entity, or any legal representative, agent or assign of any such
13 entity.

14 SEC. 10. "Prohibitive" means any cost, economic or otherwise, so
15 great as to threaten seriously the continuation of the enterprise or activity
16 under consideration. Prohibitiveness shall be determined without regard to
17 the comparative equities involved.

18 SEC. 11. "Sewage" means the water-carried human or animal wastes
19 from septic tanks, water closets, residences, buildings, industrial establish-
20 ments or other places, together with such ground water infiltration, surface
21 water, admixtures of industrial waste, or other wastes as may be present.

22 SEC. 12. "Water pollution" means such contamination, or other alter-
23 ation of the physical, chemical or biological properties of any waters, or
24 such discharge of any industrial waste, sewage or other wastes in any
25 waters, as will or is likely to render such water unclean to the extent of
26 being harmful or inimical to the public health, safety or welfare, or to
27 domestic, commercial, industrial, agricultural, recreational, or other legiti-
28 mate beneficial uses, or to animal or aquatic life.

29 SEC. 13. "Waters" means any stream, lake, marsh, pond, watercourse,
30 waterway, well, spring, irrigation system, drainage system, and any other
31 body or accumulation of water, surface and underground, natural or arti-
32 ficial, public or private, which are contained within, flow through or
33 border upon this state or any portion thereof, except any such waters
34 which are under the jurisdiction of an agency created pursuant to an
35 agreement or compact entered into with another state under the provisions
36 of NRS 445.070.

37 SEC. 14. 1. Any person in this state may commence an action in any
38 district court of the State of Nevada against any person to abate an enter-
39 prise or activity causing or which will cause air or water pollution in this
40 state.

41 2. Any such action may include a prayer for the recovery of damages
42 for actual injury suffered by the person instituting the action.

43 SEC. 15. 1. If the court finds that the defendant in any action com-
44 menced under section 14 of this act is or will be causing air pollution or
45 water pollution, the court shall, except as provided in subsection 2, order
46 abatement to the level attainable.

47 2. If the court finds that abatement is prohibitive, the court shall
48 order abatement to at least the level established by statute, ordinance or by
49 any regulation of an authorized public agency.

1 3. *In any order entered under this section the court shall grant such*
2 *time as may appear necessary to institute and complete abatement. No*
3 *such time shall be granted unless the defendant posts a bond in an amount*
4 *set by the court, conditioned upon the defendant's complying with the*
5 *order.*

6 SEC. 16. *In addition to or in conjunction with an action commenced*
7 *under section 14 of this act, a person may seek an injunction in the man-*
8 *ner provided by law against that part of the defendant's enterprise or*
9 *activity which causes the air pollution or water pollution.*

10 SEC. 17. 1. *If damages are sought in any action commenced under*
11 *section 14 of this act the court may award damages for the actual injury*
12 *to the plaintiff by the air pollution or water pollution caused by the*
13 *defendant's enterprise or activity.*

14 2. *If the court finds that the air pollution or water pollution causing*
15 *such injury was a result of a willful or knowing violation of a pollution*
16 *level established by statute, ordinance or by a regulation of an authorized*
17 *public agency it shall award punitive damages in treble the amount of the*
18 *actual damages awarded.*

19 3. *Compliance with any such statute, ordinance or regulation is not a*
20 *complete defense to any such action but shall be a bar to the award of*
21 *punitive damages.*

22 SEC. 18. *If the court finds for the plaintiff in any action commenced*
23 *under section 14 of this act, it shall award the plaintiff a reasonable attor-*
24 *ney's fee and the costs incurred in prosecuting the action.*

25 SEC. 19. *Nothing contained in sections 2 to 19, inclusive, of this act*
26 *shall be construed to abrogate any existing or future right or remedy*
27 *which a person may have against air pollution, water pollution or any*
28 *other damage to the environment.*