MEMBERS PRESENT

HARLEY HARMON, VICE-CHAIRMAN
Mr. BERGEVIN
MR. BEDROSIAN
MR. GETTO
MR. CRADDOCK
MR. JEFFREY
MS. WESTALL
MR. FITZPATRICK
MR. MARVEL

GUESTS PRESENT

SEE ATTACHED LIST

AB-234-ESTABLISHES BOUNDARY BETWEEN LAKE TAHOE AND ADJOINING LANDS.

MR. BRYCE WILSON, speaking for himself offered some amendments and stated that he agreed with Mr. Sheerin's testimony. He spoke from prepared text, acopy of which is attached. He elaborated further and said that he felt that if new legislation could be enacted, a preamble should be included which would clearly state that Tahoe has two bodies of water, the lake and the reservoir. That was implicit in the Bureau of Reclamation's approach to leasing land flooded by reason of raising the water of the reservoir. Mr. Wilson also requested that there be a clear delin eation of what the levels are: He suggested the high water line of the reservoir be 6229.1 Lake Tahoe Datum...Lake Tahoe Datum is important to use rather than sea level because of a 1.14 ft. error factor in the survey. 6223 Lake Tahoe Datum is the bottom of the artificial reservoir of the lake and it is also the natural high water line of the Lake with whatever additio is required for flow head down the Truckee River. The natural low has apparently never been recorded. The USGS water resources data report states that since 1900 the low was 6221.74 in 1934. There is currently a study being made of the Truckee-Carson basins which should turn up more specific information.

Private property rights are the foundation of our constitution and our system of government and our economic system. If the state is allowed to confiscate/acquire publicly owned land without compensation it can happen to anyone. Mr. Wilson said, "If it starts here, who knows where it will end?"

Mr. Bedrosian commented that he did not feel that ownership had been established by the private sector or the landowners would not be in front of the Legislature today asking them to make this decision. He noted that he felt that the reason the landowners were doing this is because they thought they would stand a better chance in the political arena rather than the judicial arena.

Mr. Wilson responded that factor here is that there has never been an effort before to say that public ownership extended to 6229.1. It has never been challenged. The bed of the lake was owned to the low water mark. He also maintained that the State has a liability involved which is covered in his prepared text and point two: you are extracting from private ownership.

Mr. Wilson also told the committee that there is currently on file a suit by IVGID challenging the current position.

Mr. Getto reminded the Committee that it was by Legislative action that this question had even come up. NRS 321.595 which noone seems to know anything about is what brought forth the question since prior to that time the boundary line was always presumed to be 6223. We are here to correct the clouded title which has resulted.

FRANK DAYKIN, Legislative Counsel, appeared at the request of the Chairman and said that he did not have a formal preparation but would attempt to answer the pertinent questions as they had been posed to him. His first point was "does the specification of 6223 ft. in this bill amount to either a claim or a relinquishment of ownership by the state. He did not feel that it did as he indicated that the first section of the bill was a police regulation as to who and under what circumstances may build a pier out into the water or remove material from it's bed.

He informed the members that Section 2, the schedule of rents is as close as you come to 6223 ft. relating to property where it says that you count the area occupied by the pier 6223 ft. outward not inward. The other two sections move the line for construction or alteration from 6229 as inserted in 1977 out to 6223. He said that the other question which was asked of him was, would specifying the 6223 feet elevation as the line for measuring piers or permitting other activity prevent the state from permitting or prohibiting activity between 6223 and the actual high mark. He said that he believed that the answer was NO...because the two sections which are involved refer to erecting any pier, & so forth, extending into Lake Tahoe. Now that has to be a question of fact; if the water of the Lake is above 6223 ft. which it has been since the building of the dam by some margin or other, you are extending into the Lake if you are building a pier which goes out from the water line, since that is the test of what you have to have a permit for, I don't think the specification of 6223 feet as the place from which you charge rent alters that.

Mr. Getto asked Mr. Daykin if he agreed with Mr. Wilson that on Page 2, Lines 9 thru 25 is unnecessary. Mr. Daykin stated that the TRPA has been established as the agency with jurisdiction over the basin and the question of sewage disposal can safely be left with that agency.

AB-234 CONTINUED....

W. W. WHITE, CONSULTANT REPRESENTING INCLINE VILLAGE.

Mr. White informed the members that last year when the state state came in with shoreline ordinances they included this provision and a claim to ownership to everything below 6229. He said that Incline had entered a suit against the state but that through meetings with the Attorney General, etc. by consent the question of ownership below 6229 was delayed to allow the Legislature to resolve. He also felt that Section 2 B should be deleted.

Mr. White noted that all of the 31 Lake front lots were constructed upon with the exception of one-half of one, and also that Washoe County currently has an ordinance provision that no approval shall be given within 100 feet of 6229.

Mr. Bedrosian voiced concern about the public getting their share.

Harry Swainston, DEPUTY ATTORNEY GENERAL, representing himself his family, the children and "perhaps those to come." He told the committee that he was the Author of A.G. Opinion 204, but was not speaking in his professional capacity. He cited two court decisions which are included in his presentation stating that the decisions were made in the effort to protect public values. IN establishing a high water mark we are saying that the public has the opportunity, the right & the privilege to use these lands for the purposes for which these lands are held in trust by the state. He said that this bill intends to establish the boundary at the low water mark and involved the committee in some serious constitutional questions: 1. an aspect of law called special legislation, where public property or public funds are given to certain private individuals. 2. The aspect of whether the state can alienate the trust lands so as to infringe and preclude public use.

Mr. Getto saidthat the high water mark at Lake Tahoe is man made and therefore a different situation. He cited an example of a government entity building a dam, flooding his land, thereby taking it from his use, without any compensation. He considered this an accurate analogy as what happened at Lake Tahoe. He also noted that the state had never taken prescription or title over this property. Mr. Getto made mention of the fact that when Mr. Swainston quoted the Attorney General's opinion he was really quoting his own opinion.

Mr. Bedrosian felt that the state did have prescriptive rights to the land in the sense that the state acquiesced because the water was being stored for beneficial use in the Newlands project.

Mr. Swainstron claimed that up to the high water mark the land has always belonged to the state. He also said that Judge Bowen quieted title to the high water mark.

Mr. Bergevin asked Mr. Swainston what the common law rule is, to which he was told that the common law rule is to the high water mark... although Mr. Getto pointed out that it is to the ordinary and permanent high water mark, and that the Lake Tahoe water mark is not natural. Mr. Getto noted that he felt that since there is no court case in Nevada, if what Mr. Swainston is talking about happens, it will open the door for taking property without compensation.

Mr. Craddock cited examples from his youth with the Tennessee Valley Authority wherein they acquired lands, but only after condemnation proceedings and compensation.

Mr. Bergevin said this bill is only trying to return the situation to the status quo of a few years ago.

Ms. Westall commented that she felt that this was an exercise in futility and that we were spending a lot of time on a moot question.

Mr. Bergevin introduced a memo from William T. Chidlaw asking that it be placed in the record (see attachment) and which he felt would refute the testimony of Mr. Swainston.

Mr. ROBERT WOOD, CHAIRMAN OF THE MARLA BAY GENERAL IMPROVEMENT DISTRICT, stated that he represented over 100 property owners and that they had documented in previous actions that they did most certainly own the land. We want the status quo that prevailed for over sixty years preserved. He cited several properties which are being investigated for the possibility of public access.

Mr. Craddock asked if all interests would be best served if the 6223 figure, or the waters edge, whichever is lowest were used.

Mr. Wood felt that would be equitable.

Emily Griel speaking as a private citizen said that she felt that the business of piers could be eliminated. She also noted that she did think that the public should have more access to MORE shoreline, but it would be ridiculous to have small islands dotting the beaches.

AB-275: ELIMINATES OBSOLETE OFFICES AND EXPANDS POWERS OF COUNTY COMMISSIONERS WITH RESPECT TO COUNTY ROADS.

The Speaker, Mr. Paul May, testified on his bill, saying that during his campaign one of the major issues was traffic and traffic congestion. In line with this in reading NRS, Chapters 403 & 404 he states that he realized that they were quite obsolete in character, mandating many things with which most of the counties were not in full compliance. Mr. May said that he had requested clean up of these chapters and this bill is the result. He also

mentioned that he is now aware of some objections and recommendations from Washoe and Clark Co.

Russ McDonald, Representing Washoe CO. said that Washoe Co. opposes this bill because there is no way of achieving any uniformity although these chapters do need attention. He informed the Committee that the trigger that disturbs Washoe Co. because NRS 244.151 allows The boards of Co. Commissioners of each of the counties to create a department of Public Works of which they may appoint a Director and provide for the appointment of any other employees as are necessary to carry out the functions of such department. Washoe Co. has excercised this option and their opposition is based on the triggering effect. He further suggested that it could be cleaned up by amendment.

Sam Mamet, Representing Clark Co. Said that they support the intent of the bill, but share the concerns of Mr. McDonald. He presented a memo listing other concerns (see attached) and stated that the most vital concern Clark Co. Public Works has is on Page 6 lines 22 thry 35 in Section 17 that requires the Counties to establish road districts. He suggested that perhaps a sub-committee could meet with him in going over the recommended amendments.

Mr. Jeffrey told the committee that the concern with regard to materials used are governed by federal regulations and that there is a large margin of latitude especially in that required for highways.

Mr. May detailed that the section of law dealing with materials has been in existence since 1913 and of course, obsolete.

Mr. Bob Sullivan, Carson River Basin Council of Governments added that Churchill Co. also has some difficulties with the current tax ceiling, and concurred in the other problems pointed out by the previous testimony.

Since there are these obvious problems with the bill, Mr. Harmon appointed a sub-committee of Mr. Jeffrey and Mr. Fitzpatrick to work it out with Mr. McDonald and Mr. Mamet.

AB-292: PROVIDES DUTY TO REPORT FAILURE TO COMPLY WITH CERTAIN PLANNING & ZONING REQUIREMENTS.

Gary Milliken, Representing the Clark Co. Asscessors office told the committee that this bill would severely limit and burden his office and would open the door to require any person to report discrepancies in planning or zoning requirements to local entities. He objected to the Asscessors office being placed in an enforcement capacity.

MJr. Stan Warren, Representing Nevada Bell, said that although he was opposed to the bill, he did not have any amendments to offer. He told the committee that this law would place the telephone company in a rather awkward position of having

to report to the Co. Assessors office and taking on the responsibilities that did not belong to them. Also, the possibility of liability if the findings were not reported accurately. He observed that all discovery should rest with the proper agency. He proposed a general exclusion for public utilities.

Mr. Craddock commented that he felt that perhaps there is a duty required, however Mr. Warren did not concur.

Mr. Vince La Veaga, representing Southern Pacific Power Co. said that they are also opposed to this bill for the same reasons posed by Nevada Bell.

Mr. Jeffrey injected that he had just looked at what was being discussed and the everything in the planning and zoning statutes was included. Citing several examples he said that he thought it would be better to leave those things to local governments. He expounded that to put that type of burden on every person does not make sense.

Mr. Getto said that he felt the language of the bill was opening up a can of worms regarding any attempt to prove awareness of violation.

Bob Sullivan told Mr. Jeffrey and Mr. Getto that his hat was off to them for recognizing the difficulties with this bill.

AB-306: MAKES VARIOUS CHANGES IN LAW RESPECTING STATE-OWNED RIGHTS-OF-WAY.

Mr. Joe Silva, representing the state highway department told the committee that they had requested the bill because they were concerned with the liability of the highway department regarding the construction or maintenance of sidewalks in the different cities throughout the state.

The Deputy Attorney General, Mel Beecham, related that at the present time the state is involved in litigation in three cases over liability in defects of sidewalks, which normally it is the duty of local entities to maintain. The highway department's contention is that even though the sidewalks are constructed on state owned right of ways, they have no responsibility to maintain. However if a party is injured they usually sue both the state and the city. He further commented that there has been no case in Nevada to his knowledge that spoke directly to this question. He reiterated that the responsibility rests with local entities, not the state highway department.

Mr. Beecham was asked if this bill would relieve the highway department from liability, and he said that that was what precipitated the request.

AB-307: PERMITS ACQUISITION OF PROJECTS UNDER COUNTY IMPROVEMENTS LAW WITHIN INCORPORATED CITY WITH UNANIMOUS CONSENT OF CITY COUNCIL.

Mr. Harmon called for testimony on this bill, however there was no one present who wished to comment.

AB-308: PROVIDES FOR REGULATION OF ROADSIDE PARKS.

Mr. Don Crosby, representing the highway department said that the problems with the roadside rests are that at present there is no authority to vacate people who cause the problems. He stated that what they want is the authority to call on law enforcement to control the problem.
He further elaborated that there is an 18 hour limit, but it cannot be enforced.

Stan Warren, representing Nevada Bell, requested that in the interest of public safety the words "other than a public utility" should be inserted so that they would still be able to provide public telephones without having to worry about attempting to conform with the requirements included in the bill.

AB-309: PERMITS ADVANCE FROM STATE GENERAL FUND TO DIVISION OF STATE PARKS OF STATE DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES FOR CONSTRUCTION PROJECTS FINANCED IN PART BY FEDERAL GOVERNMENT.

Mr. John Meder, Director of the Division of State Parks, spoke in favor of this measure, having requested it initially. He said this will help relieve a cash flow problem, allowing them to withdraw from the general fund on a temporary basis an amount equal to the funds which would be reimbursable under the federal programs. He explained that they were trying to provide a stop gap while waiting for federal money.

AB-312: EXEMPTS DEPARTMENT OF HIGHWAYS AND ITS CONTRACTORS AND SUB=CONTRACTORS FROM PERMIT REQUIREMENT FOR APPROPRIATING PUBLIC WATERS UNDER CERTAIN CIRCUMSTANCES.

Mr. Joe Sousa, State Highway Engineer, stated that this bill deals with the well permits at construction sites. He added that during the last year and one half they have had trouble getting permits in a timely fashion. The average time is 60 days and during that period, lack of a well permit will further delay construction. The request is an exemption . He explained that Mr. Westergaard also has a bill which may be added to or used in lieu of this bill,

AB-312 CONTINUED.....

Ms. Westall commented that she was concerned about the wording which does not include language which would prohibit private industry from doing the same thing. Mr. George Wilkenson, who is the Chief right of way agent said that her fears were covered under section 1 in which NRS 533.325 is quoted, and does limit to only highway department or it's sub-contractors. He further informed her that the protective language is contained in the permits issued by the state engineer.

Rolan Westergaard, Director of the State Department of Conservation and Natural Resources directed his remarks to those parts of the bill which caused him the greatest concern, citing Section 1, paragraph 1 which would not exclude the appropriational use of water by private contractors without a permit from the state engineer. On page 2, there is a change in the definition of the word person and it is necessary for the protection of the resource not to exempt all other agencies which would be included in this definition from obtaining a permit. There is another bill being drafted which would duplicate exemptions in the ground water act and Mr. Westergaard requested that the committee and the highway department allow incorporation of the two bills via amendment and allow for safeguards.

Mr. Bergevin questioned whether the language sufficiently protected present ground water users, and Mr. Westergaard replied that it did.

MR. Harmon called for further testimony, and there being none, called a 5 minute recess.

COMMITTEE ACTION

AB-292: Mr. Jeffrey said that he could understand the assessors concern however did not feel that it was valid. He moved for INDEFINITE POSTPONEMENT, MOTION SECONDED BY MS. WESTALL, CARRIED UNANIMOUSLY.

AB-292:..INDEFINITE POSTPONMENT

AB-306: Mr. BERGEVIN MOVED AMEND & DO PASS, SECONDED BY MS.WESTALL, CARRIED UNANIMOUSLY.

AB-306: ..AMEND & DO PASS

AB-307: MR. GETTO MOVED FOR INDEFINITE POSTPONMENT, MR. MARVEL SECONDED, UNANIMOUSLY CARRIED.

AB-307...INDEFINITE POSTPONMENT

AB-308: MR. JEFFREY MOVED AMEND & DO PASS, MR. CRADDOCK SECONDED. UNANIMOUSLY APPROVED.

AB-308: AMEND & DO PASS

AB-309 MR. MARVEL MOVED DO PASS, MR. FITZPATRICK SECONDED. UNANIMOUSLY APPROVED.

AB-309...DO PASS

AB-312...HELD FOR MR. WESTERGAARD & HIGHWAY DEPT. TO GET LANGUAGE.

AB-1: MR. DINI MOVED FOR INDEFINITE POSTPONMENT, SECONDED BY MS. WESTALL. UNANIMOUSLY APPROVED....INDEFINITE POSTPONMENT.

AB-1:...INDEFINITE POSTPONMENT

AB-234: Mr. Bedrosian said that he felt that water should be the topic of an interim study.

Mr. Bergevin stated that he felt that last session the Legislature created a problem and that it is up to this body to address and correct the situation. He declared that we have to rectify and return to the status quo. He said that he would get together with Mr. Daykin for language which would suit the Assembly.

Mr. Jeffrey reported that he had a meeting with Don Pfaff and that they were attempting to draft a bill that would take care of the domestic well problems and at the same time he had requested an interim study of water.

Mr. Dini requested a committee introduction for BDR 26-466 which abolishes state land registrar appraisel and publication revolving fund.

Mr. Bergevin moved for introduction, Mr. Craddock seconded. APPROVED.

Mr. Dini also asked for a bill draft of a committee bill having to do with charter changes concerning elections for Las Vegas.

Mr. Jeffrey Moved that the committee request such a bill, seconded by Mr. Fitzpatrick. APPROVED.

THERE BEING NO FURTHER BUSINESS, THE MEETING ADJOURNED.

BC.

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February 22, 1979

M E M O R A N D U M

TO: Assemblyman Joseph E. Dini, Jr.

FROM: Fred W. Welden, Senior Research Analyst

SUBJECT: State Ownership of Land Between High and Low Water Levels of Navigable Waters

I have compiled some information concerning the referenced topic, especially in relationship to Lake Tahoe.

Attorney General's Opinion No. 204 dated April 20, 1976, concluded that "The State of Nevada owns the bed and shores of Lake Tahoe and other navigable bodies of water within Nevada to the present ordinary and permanent high-water mark. The State of Nevada has not divested itself of any interest in the subject lands by state law or usage. Rather, it holds them in trust for full public enjoyment or navigation, fishery and related purposes." In that opinion the attorney general expressed "no opinion as to the precise location of the present ordinary high-water mark which may be considered permanent for title purposes. The United States Department of the Interior, Geological Survey, has kept records of the elevation of the Lake since 1900 and such records especially those of recent years, are good evidence of the elevations of the permanent high-water below which title to that portion of the shore and bed of Lake Tahoe within the State of Nevada inures to the State."

The elevation of 6229.1 Lake Tahoe Datum represents the high-water mark arrived at by agreement among several public agencies, and made possible by the construction of a dam in the early 1900's across the Truckee River at the outlet of Lake Tahoe. This dam is actually capable of raising the lake level to the elevation of 6231 feet. The

EXHIBIT

natural outlet of Lake Tahoe, referred to as the natural rim of the lake, is at approximately 6223.0 feet. The natural low-water mark is somewhere below 6223.0 feet and may have been as low as 6216 at the time Nevada was admitted to the Union in 1864. Since the dam was built, the all-time high has been 6231.19. The presently agreed high-water mark of 6229.1 feet has, since 1918, only been achieved in 1957, 1958, 1959, and in 1969, 1970 and 1971. The low-water mark, since construction of the dam, was achieved in 1936 at 6221.82.

FWW/jld

EXHIBIT

JOE DINI, JR.
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LEGISLATIVE COMMISSION

Nevada Legislature

SIXTIETH SESSION

February 22, 1979

M E M O R A N D U M

TO: Assembly Committee on Covernment Affairs

FROM: Joseph E. Dini, Jr., Chairman

RE: A.B. 234

Two separate and distinct subjects are being discussed in testimony relative to A.B. 234. These two subjects are:

1. Property ownership, and

2. Permitting or property management.

A.B. 234 does not directly address property ownership. The concepts within this bill specifically deal with permitting and property management. If ownership of the property is to be the subject of legislation, it probably should be discussed in a different bill. Only one ownership question is relevant to this bill--does specifying an elevation for management and permitting purposes have the secondary effect of establishing or influencing land ownership? I have requested that the legislative counsel comment on this question. If the answer to this question is "no," the committee need not hear any more testimony relative to land ownership while we are discussing A.B. 234.

If the intent of the committee is to address property management, such as pier permits, rental fees, dredging, and shoreline alteration, additional testimony should be restricted to these subjects and the ways that the 6,223 foot elevation affects these subjects.

EXHIBIT

If these land management issues are discussed, it should be understood that the 6,223 foot elevation represents the natural rim of Lake Tahoe. Since construction of the dam at the Lake's outlet, the actual water level is most often above the 6,223 foot elevation. I have also asked the legislative counsel, regrettably on very short notice, to be prepared to discuss the language relative to the 6,223 foot elevation and how this language would affect the permitting program.

JED:jd

EXHIBIT

LAW OFFICES OF
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A PROFESSIONAL CORPORATION

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November 16, 1977

M E M O R A N D U M

TO: TAHOE SHOREZONE REPRESENTATION BOARD OF DIRECTORS

FROM: WILLIAM T. CHIDLAW

RE: BOUNDARY LINE BETWEEN STATE AND PRIVATE OWNERSHIP AT LAKE TAHOE.

For well over a century, Nevada law has limited the extent of state ownership on lakes or river beds to land below the ordinary natural low water mark. It is presumed that the shoreline owner -- whether private parties or the federal government -- owns down to the ordinary natural low water mark unless the state has purchased or been given the land below the high water line. This legal doctrine applies to Lake Tahoe.

Nevada law on this point is a common law rule, since there are no statutes or constitutional provisions stating a contrary rule. Nevada Revised Statutes 1.030.1/ While the best evidence of a common law rule is the reported decisions of the Nevada Supreme Court, in the absence of cases, private practice and administrative construction of the law are given great weight, particularly where property rights and contracts have been founded upon that construction. Consolidated Casinos Corp. v. L. A. Caunter & Co., 89 Nev. 501, 504, 515 P2d 1025 (1973); State ex rel Pittson v. Beemer, 51 Nev. 192, 199, 272 P 656 (1928).

1/ NRS §§ 537.010 and 537.020 adopted in 1921 declared the Virgin and Colorado rivers navigable and claimed title to the high water mark. These statutes are of doubtful validity, however. State Engineer v. Cowles Bros., 86 Nev. 872, 478 P2d 159 (1970), for example, held that the declaration of navigability was meaningless. Presumably the claim to high water would also be meaningless because the shoreline property rights to low water vested in 1864 and cannot be eliminated by statute. In any event, it is unlikely the Legislature would have mentioned the high water line unless the law was otherwise to low water.

EXHIBIT

TO: TSR BOARD OF DIRECTORS November 16, 1977

In point of fact, there are two Nevada cases, in addition to three opinions of the Nevada Attorney General, and a vast amount of evidence in the files of state agencies, title companies, realtors and others showing that the Nevada common law rule is that the state owns only up to the low water mark. Both of the Nevada Supreme Court cases turned on whether the state had title to the land between the low and the high water lines, and both cases held that the land between the low and the high water lines on navigable waterways belonged to the shoreline owner. Reno Brewing Co. v. Packard, 31 Nev. 433, 103 P 415 (1909); Shoemaker v. Hatch, 13 Nev. 261 (1878). See also, Nevada Attorney General Reports and Opinions, 1950-52, Opinion No. 29, p. 163 (1951); Nevada, Opinions of the Attorney General, 1970-71, Opinion No. 632, p. 75-76 (1970); Nevada, Opinions of the Attorney General, 1972-1974, Opinion No. 133, pp. 71-73 (1973).

Although the law would seem to be very well settled, a recent opinion of the Nevada Attorney General has attempted to change the above rules. Opinions of the Attorney General, No. 204 (April 20, 1976). The opinion, unfortunately, ignored the rules for determining common law, and asserted a state claim to ownership to the high water mark at Lake Tahoe because of a mistaken belief that the United States Supreme Court case of Barney v. Keokuk, 94 U.S. 324 (1876) somehow determined Nevada common law.

Barney v. Keokuk, however, merely upheld the right of Iowa courts to interpret Iowa common law. As it happened, Iowa courts had consistently interpreted Iowa common law, since Iowa had become a state, as giving sovereign ownership on river beds up to the high water mark. On an appeal from an Iowa court ruling (which followed all the prior Iowa decisions) the appellant sought to have the United States Supreme Court overrule Iowa's interpretation of its own law. The United States Supreme Court, as it always has done, refused to do so. Indeed, the United States Supreme Court has, without exception, refused every request that it determine what common law rule of sovereign ownership applies in a particular state, and has said the only question for the Supreme Court to decide is whether the state has unconstitutionally sought to change its rules. See, for example, Packer v. Bird, 137 U.S. 661 (1891); Hardin v. Jordan, 140 U.S. 371 (1891); New York v. Massachusetts, 271 U.S. 65 (1926); Oregon State Land Commission v. Corvallis Sand & Gravel Co., ___ U.S. ___ (1977).

Thus, Opinion No. 204 has created needless doubt about Nevada law. Simply put, the United States Supreme Court has nothing to say about what Nevada's common law was or is provided that Nevada

EXHIBIT

would not now try to change the rule.

In any event, Opinion No. 204 also misread the Shoemaker case, failed to mention the Reno Brewing Co. case, and erroneously cited State v. Bunkowski, 88 Nev. 623, 503 P2d 1231 (1972) as overruling Shoemaker.2/ Bunkowski not only did not even mention the Shoemaker case, but said absolutely nothing about the high/low water line controversy: the issue in Bunkowski was whether the Carson River was a "navigable" river for title purposes -- that is, was it a river on which Nevada could claim any portion of the bed. Both Shoemaker and Reno Brewing Co. clearly held that state title went only up to the low water mark.

The recent Nevada Attorney General Opinion appears to be the only thing in Nevada law or practice which indicates any doubt that the low water mark rule applies. While it would be speculation to consider the reasons or motives for an opinion which ignores the Nevada case law, administrative practice, and a century of private practices, it is perhaps significant that Lake Tahoe is the subject of some political controversy at present. But, however well intentioned Nevada's Attorney General's Opinion was, it is completely incorrect.

There is no doubt about Nevada law: shoreline owners have title down to the ordinary, natural low water line of Lake Tahoe unless they or their predecessors gave or sold the land to the state.

* * *

2/ There was dicta in Bunkowski about the right to navigate on the river waters, but the court clearly was not discussing title. Indeed the remark about rights of navigation below high water (88 Nev. at 629) was a quote from a California case where the court specifically held that navigation rights had no effect on title questions and that rights to use the water were entirely separate from ownership of the bed. People ex rel Baker v. Mack, 19 Cal.App.2d 1040, 1050, 97 Cal.Rptr. 448-454 (1971). Nev. A.G. Op. 204 completely ignores this and cited both Bunkowski and Baker v. Mack for results directly contrary to the actual holdings of the case.

EXHIBIT

BRYCE WILSON
P. O. BOX 277 • GLENBROOK, NEVADA 89413

February 20, 1979

MEMORANDUM

TO: Committee on Government Affairs

FROM: Bryce Wilson

SUBJECT: Lake Tahoe, Nevada, Boundary Legislation AB254
Exhibits
A - Deed - Park to USA, 1919
B - Deed - Krick to Greenwood, 1961
C - Memo - Bryce Wilson, January 11, 1979

It is respectfully suggested that AB234 should be amended as follows:

1. Lines 11 and 12 should be deleted. This sub-paragraph requires rent for lands underlying piers.

   a. Such rentals would be contrary to practice since Nevada became a State in 1864.

   b. Such rentals would be contrary to the littoral parcel owners right of wharfage to the navigable waters of the Lake.

   c. Rental fees would be difficult to establish with equity and and undoubtedly would become the subject of litigation.

   d. Cost of administering a rental program would result in little,if any significant net revenue.

2. Line 16, Page 1: Delete the words "For the purposes of this Section". Line 18, Page 1: Add the following language after "6223 feet above mean sea level" the words "or the waters edge, whichever is lower". The purpose of this language is to establish the claim of the State of Nevada to the bed of Lake Tahoe to a boundary line which will eliminate the possibility of there being a ring of land around the Lake owned by the State. Such a situation would raise significant, undesirable problems.

EXHIBIT

a. Liability of the State involving public use of such lands including exposure to claims for damages, littering and clean-up, policing, pollution, traffic and parking(already a problem along highway 28 between Spooner Summit and Sand Harbor), fires, vandalism of adjacent private property and structures and administration.

b. Shoreline clean-up from indescriminate picnicing and camping by both the Nevada and California public would be impractical under public ownership. Littoral parcel owners currently do a good job of "housekeeping" their shoreline.

c. Title of most if not all littoral parcel owners to land extending to "the water line" or 6223.0 or lower, such title insured by title insurance, nullified. The dam at Tahoe City, built in 19I2 by private enterprise was acquired by the Bureau of Reclamation from condemnation proceedings in 1915. The purpose was to create a Federal Reservoir on top of Lake Tahoe for storage of water between 6223 feet elevation, the rim of the natural lake, and 6229.5 feet which was to be the high water line of the artificially created Federal Reservoir. The figure 6229.5 was later reduced to 6229.1 by agreement. After acquiring the dam the Bureau of Reclamation on behalf of the US entered into agreements with littoral parcel owners to flood their lands between 6223 and 6229.5. Copy of such a Deed is attached hereto as Exhibit "A" and is recorded in Douglas County Book "Q" of Deeds, page 209. Quoting in part therefrom:

"This Indenture, made this 7th day of June, 1919, in pursuance of the Act of Congress of June 17, 1902 (32 Stat. 388) and the Acts amendatory thereof and supplementary thereto...

Whereas the Land owner owns the following land riparian to Lake Tahoe, which Lake the United States is using and desires to use more extensively as a storage reservoir for the storage of waters for irrigation, power and other purposes which said lands are located in the County of Douglas, State of Nevada and are more particularly described as follows, to-wit.....

EXHIBIT

Now, therefore, in consideration of One Dollar paid by the United States to the Land Owner, receipt of which the Land Owner hereby acknowledges the said Land Owner,

1. Hereby releases and quit-claims to the United States for its use and for the fulfillment of its obligations to others the right for reservoir irrigation, power and other purposes, to flood with the waters of said lake and withdraw the said waters from and uncover the above described lands by the regulation of the levels of said lake between elevations 6223.0 feet and 6229.5 feet above sea level, as said elevations are now recognized and accepted by the United States Reclamation Service....."

Exhibit "B" is a typical Deed of a littoral parcel containing the language "and the westerly boundary of said Lake (Tahoe)". "state line"

d. By Nevada common law, the extent of State ownership of the bed of the Lake has heretofore been limited to the ordinary natural low water mark, however, there seems to be some legal controversy about this. There is documentary evidence to indicate that prior to 1912 at one time or another the Lake was as low as 6208. Documentation of this figure is not available to the writer at this time. Whether or not 6208 is a valid low water line, it is reasonable to assume that with a continuation of the present series of dry winters, a significantly lower level than 6223 could be achieved in future years. Hence the suggested language "6223 or the waters edge, whichever is lower", is appropriate. Certainly 6223 is a figure recognized by all parties including the Federal Government.

e. Public beaches, previously acquired by the State for use and enjoyment by the public, currently exist and are excellent facilities operated and maintained by the State. They encompass some of the best beaches in the entire basin. If additional public access is desireable , additional shoreline should be acquired by the State and should be developed and utilized in a similar manner.

EXHIBIT

3. Lines 9 through 25, Page 2 and similar language contained in NRS 445.090 should be deleted. This implies that direct discharge of sewage or other waste is permissible anywhere in the Tahoe basin, Nevada, except within 100 feet of the lake or any stream or other water supply. The entire basin is now sewered and stringent laws, regulations and controls for sewage and waste disposal are already in place and functioning. Consequently lines 9 through 25 are redundant and reflect an undesirable misrepresentation of fact and policy.

Your favorable consideration of these suggestions is respectfully requested and will be appreciated.

Bryce Wilson

Bryce Wilson
Phone: 749-5667
749-5202

EXHIBIT

Book Q of Records, Douglas County p. 209

Deed.
B. L. Park and
Mrs. R. Park
2249. to
United States of America

This Indenture, made this 7th day of June, 1919, in pursuance of the act of Congress of June 17, 1902 (32 Stat, 388), and the acts amendatory thereof & supplementary thereto, between B. L. Park and Mrs. R. Park, his wife of Minden, Douglas County, of the State of Nevada hereinafter referred to as Land Owner, their heirs, executors, administrators and assigns, and the United States of America, and its assigns, Witnesseth:

Whereas, the Land Owner owns the following land adjacent to Lake Tahoe, which Lake the United States is using and desires to use more extensively as a storage reservoir for the storage of water for irrigation, power and other purposes, which said lands are located in the County of Douglas, State of Nevada and are more particularly described as follows, to-wit:

A. The S½ of Lot three (3), that borders on Lake Tahoe and all of Lot four (4), Section twenty two (22), Township thirteen (13) North, range eighteen (18) East, M. D. M.;

B. All of section twenty seven (27) in said township and range on the State of Nevada, bordering on Lake Tahoe except a small tract at the Nevada-California State Line belonging to F. J. Moore.

Now, Therefore, in consideration of One Dollar paid by the United States to the Land Owner, receipt of which the said Owner hereby acknowledges, the said Land Owner,

1. Hath released and quit-claimed to the United States for its use and for the fulfillment of its obligations to flow the right for reservoir, irrigation, power and other purposes, to flood with the waters of said Lake and withdraw the said waters from and uncover the above described lands by the regulation of the levels of said Lake between elevations 6223.0 feet and 6229.5 feet above sea level, as said elevations are now recognized and accepted by the United States Reclamation Service, and also the right to store in said Lake the waters thereof up to said elevation 6229.5 feet, and withdraw said waters therefrom down to said elevation 6223.0 feet and to use said waters for the purposes aforesaid or any of them, and also, in order to make said regulation, storage and use more effective, hereby releases and quit-claims to the United States the right, as far as it said Land Owner can do so, to make, maintain and use such changes in the outlet of said Lake as may be

of the Secretary of the Interior may be necessary to effect said regulation of the lake level and to use the water stored therein, such changes, however, to be so made as to prevent settling [illegible] the lake when the water therein shall have been lowered to said elevation 6223.0 feet.

2. [illegible] the United States [illegible] [illegible] [illegible] [illegible] the [illegible] [illegible] of said lake by the United States heretofore [illegible] [illegible] from the regulation thereof hereby authorized.

In Witness Whereof, The said Land Owners have hereunto set their hands and seal the day and year first above written.

Witness
R. M. Patrick }

B. L. Park (Seal).
[illegible] A. Park (Seal).

[illegible] } On this [illegible] day of [illegible], 1917, [illegible] } ss before [illegible] [illegible] [illegible] [illegible] me, R. M. Patrick, personally known to me to be the person whose name is subscribed to the foregoing instrument as witness thereto, and being by me duly sworn deposes and says (1), That the said instrument [illegible] as [illegible] executed by B. L. Park and [illegible] A. Park,

(2), that said parties whose names are subscribed to such instrument as a party thereto are the [illegible] described in and who executed the same and

(3), That affiant subscribed his name to said instrument as a witness thereof.

(Seal). Geo. D. [illegible]
Notary Public.

My commission expires Jan 30, 1923.

Filed for record Nov [illegible] [illegible]
at 5 min past [illegible] o'clock P. M.
[illegible] County Recorder

Affix I.R.S. $ —

18881

GRANT, BARGAIN, SALE DEED

THIS INDENTURE WITNESSETH: That GROVER L. KRICK and HATTIE L. KRICK, his wife,

in consideration of $ 10.00 the receipt of which is hereby acknowledged, do hereby Grant, Bargain Sell and Convey to ROBERT STRATTON GREENWOOD and PATRICIA GRIFFIN GREENWOOD, his wife, as Joint Tenants, with right of survivorship, and not as tenants in common

all that real property situate in the County of Douglas State of Nevada, bounded and described as follows:

Commencing at a point whence the Southeast corner of Section 3, Township 14 North, Range 18 east, M.D.B.&M. bears South 45°14' East, 645.75 feet; thence North 89°50' East, 30.02 feet to the true point of beginning, being also the Southwesterly corner of the parcel of land deeded to Martha A. Waterhouse, et al, in Deed recorded in Book Y, Page 103, Deed Records Douglas County; thence along the westerly boundary line of said Waterhouse parcel, North 11°13' West, 253.82 feet; thence South 73°33' West, 30.13 feet; thence South 70°31' West, 301.59 feet to the Northeast corner of that parcel of land deeded to Catherine L. Knight in deed recorded in Book X, Page 248, Deed Records of Douglas County; thence South 10° 37' West along the Easterly boundary of said Knight parcel, 203.77 feet to the Southeast corner of said Knight parcel; thence South 89° 17' East, 198.5o feet; thence North 80°50' East, 150.09 feet; thence North 20°50' East, 30.02 feet to the true point of beginning.

Together with an easement described as follows:

The point of beginning is a point marked by an iron pipe set in concrete whence the meander corner between Sections 3 and 10, Township 14 North, Range 18 East, M.D.B.&M., bears North 33°13' West 1,627.24 feet. The Northerly boundary of the parcel hereinafter referred to is a line extending South 69°42' West from said point of beginning to the water line of Lake Tahoe. The Easterly boundary of said parcel is a line extending from said point of beginning South 20°18' East, 300 feet to a point. The Southerly boundary of said parcel is a line extending from said last mentioned point South 69°42' West to water line of Lake Tahoe; and the Westerly boundary of said parcel is the water line of said Lake Tahoe.

all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

WITNESS OUR hand S this day of 19 62

Grover L. Krick

Hattie E. Krick

STATE OF NEVADA } ss.
COUNTY OF

On , 1961

before me, the undersigned, a Notary Public in and for said County and State, personally appeared

GROVER L. KRICK and HATTIE E. KRICK, his wife,

known to me to be the persons described in and who executed the foregoing instrument, who acknowledged to me that they executed the same freely and voluntarily and for the uses and purposes therein mentioned.

WITNESS my hand and official seal.

Notary Public in and for said County and State

ESCROW NO. RECORDER'S
ORDER NO. INSTRUMENT NO.
WHEN RECORDED MAIL TO

SPACE BELOW FOR RECORDER'S USE ONLY

18881

Recorded at Request of
PIONEER TITLE INSURANCE CO.

OCT 6 1961

At 56 min P.M.

Ethel D. Blizzard

By Deputy

Fee $2.00

18881

Exhibit B

EXHIBIT

BRYCE WILSON
P. O. BOX 277 • GLENBROOK, NEVADA 89413

Jan. 11, 1979

MEMORANDUM

SUBJECT: Lake Tahoe, Nevada, Shoreline Legislation

FROM: Bryce Wilson

SUGGESTED LEGISLATIVE ACTION

1. Establish the claim of the State of Nevada to ownership of the bed of the lake within State boundaries to the water's edge, wherever that may be. Possible alternative would be to the historical low water mark and define that mark as a specific elevation above sea-level, i.e., 6221.0, or 6218. Any of these solutions would serve to effecively eliminate the problem of public ownership of a"ring around the lake". Use of the 6223.0 figure would not eliminate this problem in dry, low water level years such as 1977.
2. Provide for regulation of, permits for, and attendant fee schedules for construction of new structures and maintenance of old structures on the shoreline or in the lake. The term "structures" should be defined to include anything man-made, such as piers, boat-houses, breakwaters, jetties, buoys, moorings, etc.
3. Eliminate requirements in existing law for rental of such State lands as might be under such structures. Such rentals would be contrary to past practice, difficult to administer and next to impossible to price equitably.
4. Reaffirm the right of the public to the use of the navigable waters of Lake Tahoe to the waters' edge, and in conformance with U.S. Coast Guard rules and regulations.

EXHIBIT

5. Retain provisions of the currentlaw contained in:
   a) NRS 321.595 par. 1 and par. 3.
   b) NRS 445.080 par. 1,2,3.

PROBLEM: The elevation of 6229.1 above sea level at Lake Tahoe represents an artificial high water mark arrived at by agreement among several public agencies, and made possible by the construction of a dam (in the early 1900s) across the Truckee River at the outlet of Lake Tahoe. This dam is actually capable of raising the lake level to the vicinity of 6231 feet. The natural outlet of Lake Tahoe, referred to as the natural rim of the lake, is at 6223.0 feet. The natural low water mark is somewhere below 6223.0 feet and may have been as low as 6216 at the time (or before) Nevada was admitted to the Union in 1864. Since the dam was built, the all time high has been 6231.19. The presently agreed high water mark of 6229.1 feet has, since 1918, only been achieved in 1957, 1958, 1959 and in 1969, 1970 and 1971. The low water mark, since construction of the dam was achieved in 1936 at 6221.82. It is evident, therefore, that most of the time during this entire century there has been a significant strip of land around the lake between the natural high and the artificial high water marks. In many areas this can amount to several hundred feet of exposed beach. Throughout this century up to the time the current problem arose, littoral parcel owners title to their land to the shoreline at the water's edge or 6223 or lower has not been challenged. Many deeds are in fact couched in such phrases as: "and the westerly boundary of said parcel is the water line of said Lake Tahoe". See Exhibit F, attached hereto, typical Deed.

Now, if the State ownership of the lake-bed is extended to 6229.1, significant problems result. Among them are:

1. Title of most if not all littoral parcel owners to land extending to "the water line" or 6223.0 or lower, such title insured by title insurance, nullified.
2. Abrogation of the rights of wharfage to navigable water for owners of littoral parcels. The common law from which Nevada law is derived and under which Nevada was admitted to the Union in 1864 on an equal footing basis, provided for such rights.
3. Public access to heretofor private beaches and shoreline will create attendant problems of State liability, littering and cleanup, policing, pollution, traffic and parking (already a problem on highway 28 between Glenbrook and Incline), fires, vandalism of adjacent private property and structures, and administration, and possible confrontations requiring the intervention of a deputy sheriff.

EXHIBIT LL

4. Cleanup and care of the shoreline will cease under public ownership. Private owners currently do a good job of "housekeeping" their shoreline.

Public beaches, previously acquired by the State for use and enjoyment by the public, currently exist and are excellent facilities operated and maintained by the State. They encompass some of the best beaches in the entire basin. If additional public access is desireable, additional shoreline should be acquired by the State and should be developed and utilized in a similar manner.

BACKGROUND

1. Attorney General's Opinion #204, dated April 20, 1976, in response to query from Nevada Dept. of Fish & Game, stated "...The State of Nevada owns the land below the present ordinary and permanent high water mark...." but "...this office expresses no opinion as to the precise location of the present ordinary high water mark which may be considered permanent for title purposes...." See Exhibit A attached.

2. The Nevada Law
A. NRS 445.080, a statute that has been on the books for several years, provides in paragraph 2: "Construction or alteration of the Lake Tahoe shoreline below the high water elevation (6229.1 feet) requires written permission from the state department of conservation and natural resources."
B. NRS 321.595 (Senate Bill 153 in the 1977 Legislature) contains a section, added by amendment with no public notice or testimony, which requires the Division of Lands to establish a schedule of fees and regulations governing structures extend-into the lake. See Exhibits B and C, attached.

3. Division of Lands Rugulations
Pursuant to NRS 321.595 and NRS 445.080, the Division of Lands promulgated regulations governing permits, permit fees, and rental of land below 6229.1 feet above sea level.

4. The Legislative Commission requested theDivision of Lands to defer the effective date of the proposed regulation until after the 1979 regular session of the Legislature to permit reconsideration of NRS 321.595 by that session. See Exhibit D.

EXHIBIT

5. Court Action was initiated by Incline Village General Improvement District when it filed suit on May 16, 1978, against the State of Nevada in District Court, Washoe County, asking the court to declare the ordinary high water mark to be approximately 6224 feet elevation. The State, in an ammended answer to the complaint requested judgement that the "State of Nevada owns absolute title to the bed of Lake Tahoe to the ordinary and permanent high water mark." No elevation was suggested or stated. Trial date was subsequently set for March 8, 1979.

6. Public Statement by the Attorney General, now Governor Robert List, on July 21, 1978, firmly supports:

a. Protection of the right of private property owners fronting on the lake to wharfage and direct access thereto.
b. Legislation which will eliminate rental charges for piers and wharves extended from private property.
c. The concept that the boundary between state owned lands and private property adjacent to the lake be the water's edge, wherever it may be.
d. The view that no one ever intended at the time Nevada was admitted to the Union for the state to acquire what would be at most a narrow ring of land surrounding the lake on dry years. The State does not have the resources manage or assume the responsibility that would accompany such ownership. See Exhibit E, attached.

7. Historical Documents from the Bliss family and Glenbrook Company archives currently being reviewed and catalogued, including patents, deeds, photographs, and correspondence dating back to the 1870s, all refer to "the waters of Lake Tahoe", not "high water" or "low water". It is implicit in these documents that the lake rose and fell from season to season in considerable degree, and consequently title descriptions consistently used the phrase "the waters of Lake Tahoe" to describe westerly boundaries of littoral parcels, even as does Exhibit F, hereto attached.
8. Artificial Reservoir constitutes the waters above the 6223 foot level, made possible by the dam at Tahoe City. Flooding of littoral parcel owners land without acquisition thereof was legally provided for in a number of instances at the time the dam was built and subsequently.
9. Documentation of subparagraphs 7 and 8, above, will be furnished at an early date.

Enactment of appropriate legislation, after due consideration by the legislature and full input derived from public hearings is considered essential to resolve the problems, inequities and confusion which currently exist with respect to title, management, development and preservation of the lakeshore.

Bryce Wilson

Bryce Wilson
Phone: 749-5667, 749-5202

EXHIBIT

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p.1 of 7

STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL
CAPITOL COMPLEX
SUPREME COURT BUILDING
CARSON CITY 89710

ROBERT LIST
ATTORNEY GENERAL

April 20, 1976

OPINION NO. 204

Lands Beneath Navigable Waters: The State of Nevada owns the land below the present ordinary and permanent high-water mark of the portion of Lake Tahoe within Nevada and beneath the ordinary and permanent high-water marks of other navigable bodies of water within the boundaries of the State.

Mr. Glen K. Griffith
Director
Nevada Department of Fish and Game
1100 Valley Road
Reno, Nevada 89510

Dear Mr. Griffith:

You have requested an Attorney General's opinion concerning the following question.

QUESTION

Who owns the land below the high-water mark at Lake Tahoe?

ANALYSIS

In 1864 the State of Nevada was "admitted into the Union on an equal footing with the original states." See, President Abraham Lincoln's Proclamation of October 31, 1864. The "equal-footing doctrine" was explained by the U. S. Supreme Court in Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 317-318 (1973) as follows:

> "When the Original Colonies ratified the Constitution, they succeeded to the Crown's title and interest in the beds of navigable waters within their respective borders. As

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> new States were forged out of the federal territories after the formation of the Union, they were 'admitted [with] the same rights, sovereignty and jurisdiction...as the original States possess within their respective borders.' Mumford v. Wardwell, 6 Wall. 423, 436 (1867). Accordingly, title to lands beneath navigable waters passed from the Federal Government to the new States, upon their admission to the Union, under the equal-footing doctrine. See, e.g., Pollard's Lessee v. Hagan, 3 How. 212 (1845); Shively v. Bowlby, 152 U.S. 1 (1894); Weber v. Board of Harbor Comm'rs, 18 Wall. 57, 65-66 (1873)."

Lake Tahoe was held to be navigable in Davis v. United States, 185 F.2d 938, 942-943 (9th Cir. 1950). Thus, when Nevada achieved statehood in 1864, it assumed title to the land beneath Lake Tahoe and its shores by virtue of the equal-footing doctrine, and such title was later confirmed by the Submerged Lands Act of 1953. Considering the effect of the Act, the Supreme Court in Bonelli, supra, explained at 318 that:

> "The Act merely confirmed the States' pre-existing rights in the beds of the navigable waterways within their boundaries by, in effect, quitclaiming all federal claims thereto...43 U.S.C. § 1301 (a)(1)."

According to principles early announced in Barney v. Keokuk, 94 U.S. 324 at 336 (1877), the extent of Nevada's ownership on October 31, 1864, was to the then ordinary high-water mark, and conversely, the

> "[T]itle of the riparian proprietors... extends only to ordinary high-water mark, and that the shore between high and low water mark, as well as the bed...belongs to the State. This is...the common law with regard to navigable waters; although, in England, no waters are deemed navigable except those in which the tide ebbs and flows. In this country, as a general thing, all waters are deemed navigable which are really so...."

This office is of the opinion that under federal law, the State of Nevada was vested with the title to the bed and shores of Lake Tahoe below the ordinary high-water mark as it existed October 31, 1864. Accord, Utah v. United States, 420 U.S. 304 (1975); Bonelli Cattle Co. v. Arizona, supra, at 318; Brewer-Elliott Oil & Gas Company et al v. United States, et al, 260 U.S. 77, 84 (1922); Arkansas v. Tennessee, 246 U.S. 158, 176 (1918); Shively v. Bowlby, 152 U.S. 1, 40, 49-50 (1894); Hardin v. Jordan, 140 U.S. 371, 381, 383 (1891); Packer v. Bird, 137 U.S. 661, 666-667 (1891). The State holds its title as a public trust for navigation, fishery, and related public purposes. See Bonelli, supra, and the cases discussed therein at 321.

A determination of the extent of the present day ownership of the land below the high-water mark at Lake Tahoe necessarily entails an inquiry into whether the State has divested itself of any interest since the time of statehood and whether there has been a permanent change in the high-water mark.

The question of whether the State has granted interests in the beds of navigable waters or otherwise divested itself of such interests is governed by state law. See Bonelli Cattle Co. v. Arizona, supra, at 319-320; Arkansas v. Tennessee, supra, at 175-176; Scott v. Lattig, 227 U.S. 229, 242 (1913); Shively v. Bowlby, supra at 40; Hardin v. Jordan, supra, at 382; Barney v. Keokuk, supra at 338. As Mr. Justice Brewer in beginning his dissenting opinion in Hardin v. Jordan, supra, at 402 said:

> "Beyond all dispute the settled law of this court, established by repeated decisions, is that the question how far the title of a riparian owner extends is one of local law. For a determination of that question the statutes of the State and the decisions of its highest court furnished the best and final authority."

As a general proposition, the Nevada Legislature has not divested the State by statute of any interest in the beds of its navigable waters. On the contrary, in 1921, the Legislature declared that the Colorado River and Virgin River were navigable and the title to the lands below the high-water mark

thereof is held by the State. See NRS 537.010 and NRS 537.020. Although the Nevada Supreme Court in State Engineer v. Cowles Brothers, Inc., 86 Nev. 872, 876, 478 P.2d 159 (1970) held that the issue of navigability is a judicial question, and that the "statement in the statutes therefore served no purpose", it is the opinion of this office that the statutes at least have expressed the legislative intent to claim complete sovereignty and ownership to the high-water mark of waters declared navigable by the courts.

The Supreme Court of Nevada in State Engineer v. Cowles Brothers, Inc., supra, at 877 recognized the applicability of the common law to questions of the ownership of beds of navigable lakes as a consequence of the Legislature's declaration "that the common law shall be the rule of decision in the courts of this state unless repugnant to the constitution and laws of this state. NRS 1.030." A decision consonant with the common law would recognize the ordinary high-water mark as the proper boundary as was done in Barney v. Keokuk, supra.

In the case of Nevada v. Julius Bunkowski, et al, 88 Nev. 623, 503 P.2d 1231 (1972), the Supreme Court of Nevada apparently recognized the high-water mark as the extent of the State's ownership of the beds of navigable waters. In Bunkowski the Court quoted at 629 the following excerpt from People of the State of California v. Mack, et al, 19 Cal.App.3d 1040, 1050, 97 Cal. Rptr. 448, 454 (1971):

> "[M]embers of the public have the right to navigate and to exercise the incidents of navigation in a lawful manner at any point below high water mark on waters of this state which are capable of being navigated by oar or motor propelled small craft." (Emphasis added)

Although the Court cited People of the State of California v. Mack, et al, supra, and the cases discussed therein for the proposition that state courts have not striven for uniformity as to the test for navigability, the inference is that once the uniform federal test of navigability for title is answered in the affirmative, then the State's title extends to the high-water mark.

The case of Nevada v. Bunkowski, supra, appears to have overruled dicta contained in the early Nevada case of

John A. Shoemaker, et al v. A. J. Hatch, et al, 13 Nev. 261, 265, 267 (1878) that the "low water mark, and not the middle thread of the stream, was the proper boundary." The Court in Shoemaker, supra, cited Railroad Company v. Schurmeir, 74 U.S. (7 Wall.) 272, 286-287 (1868) for its holding. A close reading of the cited portions of Railroad Company v. Schurmeir, supra, discloses that only the river, the watercourse or the stream is a boundary of navigable streams but the fine distinction between the high and low water marks simply was not made. It is important to note that in Shoemaker, supra, the State of Nevada was not a party and did not have an opportunity to litigate the extent of its ownership on behalf of the public. For these reasons, this office is of the opinion that Shoemaker v. Hatch, supra, is not a controlling precedent with respect to the extent of the State's ownership of the beds of navigable waters.

Attorney General Opinions No. 632 dated January 6, 1970, and No. 59 dated May 17, 1951, indicated that the low-water mark is the boundary of the State's ownership of the Carson and Truckee Rivers. Both opinions cited Shoemaker v. Hatch, supra, as the sole support for the proposition. For the reasons mentioned above, that Shoemaker, supra, is not controlling with respect to the issue, and because of the clear and contrary legislative intent, this office is compelled to disapprove statements in the prior opinions issued by this office which delineate the low-water mark as the boundary of State lands under navigable waters.

It is the present opinion of this office that the title to lands beneath navigable waters in Nevada is bounded by the ordinary and permanent high-water mark and prior opinions to the contrary are hereby superseded.

Having established the extent of the State's ownership to the beds and shores of navigable waters which include Lake Tahoe, the final consideration is the effect that changes in the elevation of the Lake have on the extent of the State's ownership.

As the United States Supreme Court explained in Bonelli, supra, at 318:

> "In order for the States to guarantee full public enjoyment of their navigable watercourses, it has been held that their title to the bed of a navigable river mechanically follows the river's gradual changes

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> in course. See Oklahoma v. Texas, 268 U.S. 252 (1925). Thus, where portions of a riparian owner's land are encroached upon by a navigable stream, under federal law, the State succeeds to title in the bed of the river to its new high-water mark." (Emphasis added and footnotes omitted) [1]

The foregoing principle announced in Bonelli, supra, is the result of the policies subserving the common law doctrines of erosion, accretion and reliction and is equally applicable to navigable lakes as to navigable streams. See United States v. Utah, 403 U.S. 9, 10 (1971); United States v. Oregon, 295 U.S. 1, 14 (1935).

We know that because of certain artificial controls at the mouth of Lake Tahoe the elevation has been controlled since 1870, first by private parties and thereafter by the United States. In Bonelli, supra, at 327 the Court considered the effect of artificial changes:

> "The doctrine of accretion applies to changes...due to artificial as well as natural causes. [Citations omitted] Where accretions to riparian land are caused by conditions created by strangers to the land, the upland owner remains the beneficiary thereof."

By giving the upland owner the benefit of relictions and accretions, riparianness is maintained, but he is subject to losing land as well by erosion or submergence due to the same policy of maintaining riparianness. See Bonelli, supra, at 326; see also State Engineer v. Cowles Brothers, Inc., supra at 876.

At the present time Lake Tahoe is controlled between the elevations of 6223.0 and 6229.1 feet (Lake Tahoe datum). Stabilization of the Lake's surface elevation between these levels has resulted in a relatively permanent high water level somewhat less than 6229.1 feet. Seasonal or temporary

---

1 Although the federal question jurisdiction suggested by Bonelli, supra, in purely intrastate title disputes has now been challenged in the case of Oregon v. Corvallis Sand and Gravel Company, Nos. 75-567 and 75-577 before the United States Supreme Court, the federal common law principles announced in Bonelli, supra, are for the most part well settled common law doctrines applied by the State of Nevada. See State Engineer v. Cowles Brothers, Inc., supra, at 874-877.

Exhibit A p 6 of 7

effects such as cresting during periods of rapid runoff or the necessity of pumping water out of the Lake during perio of drouth are transient effects and are not significant wit respect to a permanent high-water mark. The common law has always seemed to contemplate a result substantially permanent; thus the land "hath been formed, and hath been settled, grown and accrued upon." The King v. Lord Yarboro 107 Eng. Rep. 668 (K.B. 1824).

This office expresses no opinion as to the precis location of the present ordinary high-water mark which may be considered permanent for title purposes. The United Stat Department of the Interior, Geological Survey, has kept rec of the elevation of the Lake since 1900 and such records, especially those of recent years, are good evidence of the elevations of the permanent high-water mark below which titl to that portion of the shore and bed of Lake Tahoe within th State of Nevada inures to the State.

CONCLUSION

The State of Nevada owns the bed and shores of Lake Tahoe and other navigable bodies of water within Nevada to the present ordinary and permanent high-water mark. The State of Nevada has not divested itself of any interest in t subject lands by state law or usage. Rather, it holds them in trust for full public enjoyment of navigation, fishery an related purposes.

Very truly yours,

ROBERT LIST
Attorney General

By Harry W Swainston
Harry W. Swainston
Deputy Attorney General

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Nevada law - Excerpts

LAKE TAHOE

321.595 Permit to erect structures extending into Lake Tahoe or remove material from lakebed: Requirement; regulations; penalty.

1. When any person desires to erect any pier, breakwater or other structure extending into Lake Tahoe, or remove any material from the bed of the lake, he shall first obtain a permit to do so from the division of state lands. The division shall not issue the permit until it has consulted the Nevada department of fish and game and the division of environmental protection.

2. The division shall establish by regulation:

(a) A reasonable fee to be paid when an application is made for a permit.

(b) A schedule of annual rents, according to the size and use of the pier, to be paid for the use of the underlying land.

3. Any person who engages in any activity for which a permit is required by this section, without first obtaining the appropriate permit, is guilty of a misdemeanor.

(Added to NRS by 1977, 1124)

PROTECTION OF LAKE TAHOE AND ITS WATERSHED

445.080 Construction permits, other permission required from state department of conservation and natural resources.

1. It is unlawful for any person, firm, association or corporation to:

(a) Construct a pier, breakwater or marina in or to alter the shoreline of Lake Tahoe;

(b) Remove gravel, sand or similar material from Lake Tahoe; or

(c) Deposit any fill or deleterious material in Lake Tahoe,

without first having secured written permission from the state department of conservation and natural resources.

2. Construction or alteration of the Lake Tahoe shoreline below the high water elevation (6,229.1 feet) requires written permission from the state department of conservation and natural resources.

3. A permit shall be denied when the source of domestic water or the place of disposal of sewage or other wastes would create a health hazard or the quality of Lake Tahoe waters would be impaired.

[1:306:1949; 1943 NCL § 8247.01]—(NRS A 1963, 957; 1967, 404, 1171; 1973, 1406; 1975, 1402; 1977, 1139)

Exhibit B

[illegible] A. SHEERIN
SENATOR
[illegible] COUNTY
P.O. BOX 606
[illegible] NEVADA 89701

COMMITTEES
CHAIRMAN
ENVIRONMENT AND PUBLIC RESOURCES
MEMBER
JUDICIARY
TAXATION

Nevada Legislature

FIFTY-NINTH SESSION

GPOA Memo
1-11-79
page 13

July 21, 1978

Mr. Robert L. Erickson
Acting Administrator
State of Nevada, State Lands Division
Capitol Complex
Carson City, Nevada 89710

Dear Bob:

I would like to make the following comments on the proposed regulations governing the use of State Lands currently under consideration by your department.

The statutory authority for such regulations is derived from NRS 445.080 and 321.595. NRS 445.080 is a statute that has been on the books for several years. It simply provides that if a dam is to be built or if gravel is to be removed from below the mean high water, written permission is required. In 1977, we changed that statute so that the written permission would come from the State Department of Conservation and Natural Resources in place of the Bureau of Environmental Health.

→ NRS 321.595 was passed by the 1977 Legislature. I am embarrassed to say that I have no recollection of this section, and I recently discovered why that is the case. This new statute was buried in a 59-page bill that was designed to reorganize state agencies---Senate Bill 153. The title of that bill reads as follows:

> "An Act relating to governmental agencies; reorganizing certain of those which deal with energy and the use and conservation of natural resources; and providing other matters properly relating thereto."

A careful reading of this title would not lead a legislator to think that the bill contained substantive changes that granted the State Lands Division power to make regulations and charge fees.

→ I have researched the record of the passage of Senate Bill 153 - - - -

Exhibit C
page 1 of 3

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page 14

and I am enclosing a complete copy of that record for your use. A recapitulation follows:

1. The original version of SB153 did not contain Section 23---the section that is now known as NRS 321.595.

2. On pages 1112 and 1114 of the record, there is written testimony of Norman Hall. It simply said,

> "The Division of State Lands will be the state agency responsible for issuing pier permits at Lake Tahoe,"
>
> and
>
> "Adds and consolidates land acquisition administration and pier permitting at Lake Tahoe to the existing Division of State Lands."

3. The record is completely void as to any public notice or legislative or public input as to a section of this bill that would allow the State Lands Division to make regulations and charge fees.

4. When SB153 was first amended, it added paragraphs 1 and 3 of the present NRS 321.595. However, there is nothing in the record to show any public input on this matter.

5. When SB153 was amended a second time, paragraph 2 of NRS 321.595 was added. This is the paragraph that concerns regulations and fees. Again, there is absolutely nothing in the record to show that the public was given notice of this addition and there was no public input shown in the record.

6. Mr. Hall's testimony again shows up on pages 1354 and 1356 before the Assembly Committee on Governmental Affairs. It was the same written statement mentioned above.

In view of the fact that there was no public notice as to this specific substantive addition to the state statutes and the public was not given a chance to testify, I would request that your division take no action on the regulations until the 1979 Legislature hears this matter in full.

I believe the Legislature should set any fees that would be charged. It is a duty that should be undertaken by the elected

Exhibit C
page 2 of 3

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officials and should not be delegated to a state agency.

I realize your division has been very careful in giving adequate public notice on all your hearings and you have listened to much public input. I appreciate your procedure. However, the Legislature should have taken that same procedure on this specific item. I propose to introduce legislation in 1979 that will be adequately noticed so the statute coming to you will be more complete.

Sincerely,

GARY A. SHEERIN

GAS/jb
cc: Governor Mike O'Callaghan

Enclosures

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RESOLUTION

WHEREAS, The legislative commission has considered Chapter I of the Regulations Governing the Use of State Lands, relating to the use of lands beneath Lake Tahoe, and believes that this regulation is within the statutory authority of the division of state lands of the state department of conservation and natural resources to adopt; but

WHEREAS, It was suggested to the commission that adverse public reaction to the proposed adoptions stems from a lack of public awareness at the time of the enactment in 1977 of NRS 321.595 which provides for the establishment of fees for the use of these lands; now, therefore, be it

RESOLVED BY THE LEGISLATIVE COMMISSION OF THE STATE OF NEVADA, That the division of state lands is requested to defer the effective date of its proposed regulation until after the 1979 regular session of the legislature, to permit reconsideration of NRS 321.595 by that session.

Adopted this 15th day of August, 1978.

Donald R. Mello, Chairman
Legislative Commission

Attest:

Arthur J. Palmer, Ex officio Secretary
Legislative Commission

Exhibit D

PLANS

3 9 : 2

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STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL
CAPITOL COMPLEX
CARSON CITY 89710

ROBERT LIST
ATTORNEY GENERAL

JAMES H. THOMPSON
CHIEF DEPUTY ATTORNEY GENERAL

July 21, 1978

Incline Village, Nevada

STATEMENT OF ATTORNEY GENERAL ROBERT LIST BEFORE PUBLIC HEARING OF THE NEVADA DIVISION OF STATE LANDS

Upon examining the record of the hearing on March 6, 1978, I directed my staff to work with Mr. Erickson to seek to resolve the problems raised on that occasion. His statement reflects the results of that effort.

I am accutely aware of the fundamental concern of those who will be affected by these regulations. Those concerns cut deeper than the cost of pier or wharf rental. The underlying question involved affects the basic property rights of citizens who have made substantial investments in the Lake Tahoe Basin. The question involved is whether government is going to be practical and responsive. It is more than a question of law or of emotion--in my mind it is a question of fairness.

I wish to make the following observations:

1. The right of private property owners fronting on the lake to wharfage and direct access must be protected.

Exhibit E
page 1 of 4

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Page

2. While current state law mandates the State Lands Division to establish a rental fee to be charged for new piers, and I recognize that this hearing must result in such a determination, I personally support legislation which will eliminate such rental charges for piers and wharves extended from private property. I see no jusitifcation for the state collecting rental on such structures.

3. On the question of the boundary between state-owned lands and private property adjacent to the lake, it is my view that as a matter of policy the state should not have ownership above the water's edge, wherever it may be.

4. Everyone is no doubt aware that my office issued an opinion concerning the question of the state's title which reached the conclusion that the state owns to the ordinary and permanent high water mark. Exactly where that mark may be is a question which no one in this room can answer with certainty. Suffice it to say that there is an honest and legitimate legal controversy pending in the courts on this issue. One thing is clear though: No one ever intended at the time Nevada was admitted to the Union for the state to acquire what would be at most a narrow ring of land surrounding the lake on dry years. Any such ownership that might exist only exists as an accident of law because of a technicality. The state does not have the resources to manage or assume the responsibility that would

Exhibit E
Page 2 of 4

accompany such ownership. I therefore reiterate my proposal for legislative action to clarify the law in the upcoming session of the Nevada Legislature. The property line between state-owned land beneath the lake and private property adjacent to the lake should be no higher than the water's edge.

There are a number of related areas of concern which touch upon today's proceedings and upon which I wish to comment briefly.

FIRST, the public access to the lake should be guaranteed by the continuing development of beaches and parks on land which the state has bought and paid for and which is appropriate for such development. This will permit harmonious enjoyment of Tahoe by everyone concerned.

SECOND, it is imperative that the relationship between Nevada and our neighboring state of California be improved upon. Let me warn that without a workable bistate agreement we will soon find ourselves under yet another direct federal intrusion. Such a solution must provide for a working participation on the part of those who live and work in the Tahoe Basin. I strongly believe that this splendid lake can be preserved through a cooperative effort by the land owners, residents, government and those who visit here to share the wonders of Lake Tahoe and I believe just as strongly that while protecting this scenic basin it is

imperative that we protect the individual rights of property owners.

Let this be the beginning of a new sprit of cooperation.

Affix I. R. S. $ —

18881

GRANT, BARGAIN, SALE DEED

THIS INDENTURE WITNESSETH: That GROVER L. KRICK and HATTIE E. KRICK, his wife,

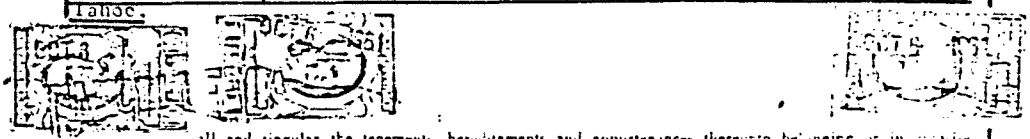
in consideration of $ 10.00 the receipt of which is hereby acknowledged, do hereby Grant, Bargain, Sell and Convey to ROBERT STRATTON GREENWOOD and PATRICIA GRIFFIN GREENWOOD, his wife, as Joint Tenants, with right of survivorship, and not as tenants in common

all that real property situate in the County of Douglas State of Nevada, bounded and described as follows:

Commencing at a point whence the Southeast corner of Section 3, Township 14 North, Range 18 east, M.D.B.&M. bears South 45°14' East, 645.78 feet; thence North 89°50' East, 30.02 feet to the true point of beginning, being also the Southwesterly corner of the parcel of land deeded to Martha A. Waterhouse, et al, in Deed recorded in Book Y, Page 103, Deed Records Douglas County; thence along the westerly boundary line of said Waterhouse parcel, North 11°13' West, 253.82 feet; thence South 73°33' West, 30.13 feet; thence South 70°31' West, 301.59 feet to the Northeast corner of that parcel of land deeded to Catherine L. Knight in deed recorded in Book X, Page 248, Deed Records of Douglas County; thence South 10° 37' West along the Easterly boundary of said Knight parcel, 203.77 feet to the Southeast corner of said Knight parcel; thence South 89° 17' East, 198.56 feet; thence North 80°50' East, 150.09 feet; thence North 50°50' East, 30.02 feet to the true point of beginning.

Together with an easement described as follows:

The point of beginning is a point marked by an iron pipe setin concrete whence the meander corner between Sections 3 and 10, Township 14 North, Range 18 East, M.D.B.&M., bears North 33°13' West 1,627.24 feet. The Northerly boundary of the parcel hereinafter referred to is a line extending South 69°42' West from said point of beginning to the water line of Lake Tahoe. The Easterly boundary of said parcel is a line extending from said point of beginning South 20°18' East, 300 feet to a point. The Southerly boundary of said parcel is a line extending from said last mentioned point South 69°42' West to water line of Lake Tahoe; and the Westerly boundary of said parcel is the water line of said Lake Tahoe.



all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

Witness our hand S this day of 19 62

Grover L. Krick

Hattie E. Krick

STATE OF NEVADA } ss.
COUNTY OF }

On , 1961 before me, the undersigned, a Notary Public in and for said County and State, personally appeared

GROVER L. KRICK and HATTIE E. KRICK, his wife,

known to me to be the person S described in and who executed the foregoing instrument, who acknowledged to me that they executed the same freely and voluntarily and for the uses and purposes therein mentioned.

WITNESS my hand and official seal.

Notary Public in and for said County and State

ESCROW NO. RECORDER'S
ORDER NO. INSTRUMENT NO.
WHEN RECORDED MAIL TO

SPACE BELOW FOR RECORDER'S USE ONLY

18881

Recorded at Request of
PIONEER TITLE INSURANCE CO.
OCT 6 1961
At 56 min past 2 P.M.
Fee 2.00

18881

Exhibit F

Statement Relative to the Legal and Practical Implications of Assembly Bill 234

Assembly Government Affairs Committee

February 21, 1979

Assembly Bill 234 is a bill which, among other things, may establish the boundary between the State-owned bed of Lake Tahoe and the littoral private property at the elevation of 6,223 feet above mean sea level or at the rim of the Lake.

The State of Nevada presently owns the land below the present ordinary and permanent high-water mark of the portion of Lake Tahoe within Nevada and beneath the ordinary and permanent high-water marks of other navigable bodies of water within the boundaries of the State. See Attorney General's Opinion No. 204, dated April 20, 1976, attached hereto; see also NRS 537.010 et seq. The reasoning of Attorney General's Opinion No. 204 was upheld in a case involving the State's ownership of the beds and banks of the Truckee River to the high-water mark. The case, styled Professional Manivest Inc. v. City of Reno, State of Nevada, et al., Case No. 311182, was decided February 25, 1977.

Fixing the boundary at 6,223 feet instead of the estimated location of the ordinary and permanent high-water mark of approximately 6,227.6 feet, while amounting to only 4.6 feet in elevation could amount to in excess of one hundred feet of beach at some locations. It's important to note that

EXHIBIT

the elevation of 6,223 is even below the generally accepted low water elevation of 6,225.5 feet. The elevation of 6,223 feet is generally associated with the rim of the natural outlet of the Lake but it seldom reaches that elevation.

It is clear that legislation which would establish a 6,223-foot elevation as the boundary of State lands would result in a gift of substantial areas of State-owned beach property. The constitutionality of such a gift is questionable. Such legislation could be struck down on at least two bases: (1) that it is special legislation and/or (2) that it violates the trust responsibility underlying the State's ownership of lands submerged by navigable waters.

Special legislation applies only to certain individuals or classes of individuals and is designed to benefit private interests and not public interests. See Clarke v. Irwin, 5 Nev. 111, 120 (1869); Attorney General's Opinion No. 215, dated July 12, 1977. Generally, a statute which is designed to benefit private interests instead of public interests is void ab initio. See State ex rel. Davis v. Reno, 36 Nev. 334, 336-337, 136 P.110 (1913).

The individuals or class of individuals to benefit by A.B. 234 would be the littoral owners of shorezone property. To them, A.B. 234 would represent a windfall. To the extent that the private interests are benefited out of publicly owned lands, A.B. 234, if enacted, may be declared void by the courts.

The trust responsibility of the State is associated with the nature of the State's ownership of lands submerged by navigable waters. The nature of the State's interest was probably expressed best by the Oregon Supreme Court in Brusco Towboat Co. v. State, By And Through Straub, 567 P.2d 1037, 1042-1043 (1977):

> The state's ownership of submerged and submersible land is not, however, limited

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to the incidents of legal title. Rather, it is comprised of an interrelationship of two distinct aspects, each possessing its own characteristics.

As sovereign, the state holds full proprietary rights in such land; it is invested with a fee simple title. This first element of the state's interest is called the jus privatum. See, Shively v. Bowlby, 152 U.S. 1, 11, 14 S.Ct. 548, 38 L.Ed. 331 (1894).

Dominion, as opposed to title, over submerged and submersible lands, as a natural resource, is invested in the state in its capacity as the public's representative. The state holds such dominion in trust for the public. This second aspect of the state's ownership is called the jus publicum. See, Shively v. Bowlby, supra, 152 U.S. at 11, 14 S.Ct. 548.

* * *

The jus publicum aspect of the state's ownership is rooted in a philosophical conception of natural law. The principle that the public has an overriding interest in navigable waterways and lands underlying them is as old as the waterways themselves, traceable at least to the Code of Justinian in the Fifth Century A.D. See, Advisory Committee to the State Land Board, Oregon's Submerged and Submersible Lands 15 (1970). Navigable waterways are a valuable and essential natural resource and as such all people have an interest in maintaining

EXHIBIT ___

> them for commerce, fishing and recreation. The right of the public to use the waterways for these purposes has always been recognized at common law. See, Shively v. Bowlby, supra, 152 U.S. at 14, 14 S. Ct. 548. As representative of the people, the sovereign bears the responsibility to preserve these rights. Shiveley v. Bowlby, supra, 152 U.S. at 11, 14 S.Ct. 548; Illinois Central Railroad v. Illinois, 146 U.S. 387, 452, 13 S.Ct. 110, 36 L.Ed. 1018 (1892); Cook v. Dabney, 70 Or. 529, 532, 139 P.721 (1914).

The leading case with respect to alienation by the Legislature of state-held lands beneath navigable waters was Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892) in which a disposal of a portion of the harbor of Chicago was invalidated. The language of the Court at 452-457 is instructive:

> The question, therefore, to be considered is whether the legislature was competent to thus deprive the State of its ownership of the submerged lands in the harbor of Chicago, and of the consequent control of its waters; or, in other words, whether the railroad corporation can hold the lands and control the waters by the grant, against any future exercise of power over them by the State.
>
> That the State holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the State holds title to soils under tide water, by the common law, we have already shown, and that title necessarily carries with it control over the waters above

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them whenever the lands are subject to use. But it is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to preemption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State. But that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or

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bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled. General language sometimes found in opinions of the courts, expressive of absolute ownership and control by the State of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases. A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be

held, if not absolutely void on its face, as subject to revocation. The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the State the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the State.

* * *

It is hardly conceivable that the legislature can divest the State of the control and management of this harbor and vest it absolutely in a private corporation. Surely an act of the legislature transferring the title to its submerged lands . . . would be repudiated, without

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hesitation, as a gross perversion of the trust over the property under which it is held.

* * *

We cannot, it is true, cite any authority where a grant of this kind has been held invalid, . . . But the decisions are numerous which declare that such property is held by the State, by virtue of its sovereignty, in trust for the public. The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the State. The trust with which they are held, therefore, is governmental and cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining.

This follows necessarily from the public character of the property, being held by the whole people for purposes in which the whole people are interested.

* * *

In Arnold v. Mundy, 1 Halsted, 1, which is cited by this court in Martin v. Waddell, 16 Pet. 418, and spoken of by Chief Justice Taney as entitled to great weight, and in which the decision was

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> made "with great deliberation and research," the Supreme Court of New Jersey comments upon the rights of the State in the bed of navigable waters, and, after observing that the power exercised by the State over the lands and waters is nothing more than what is called the jus regium, the right of regulating, improving and securing them for the benefit of every individual citizen, adds: "The sovereign power, itself, therefore, cannot consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the State, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people."

The Courts of many States have afforded judicial protection of the public trust as announced by the Illinois Central Railroad case. See, e.g., Morse v. Oregon Division Of State Lands, 581 P.2d 520 (Or. App., 1978); Muench v. Public Service Commission, 53 N.W.2d 514 reh., 55 N.W.2d 40 (Wis. App., 1952) (authority to deal with lands beneath navigable waters not delegable); Brickell v. Trammel, 82 S. 221, 226 (Fla. App., 1919); State v. Cleveland & Pittsburgh R.R., 113 N.E. 677, 682 (Ohio App., 1916); Winters v. Myers, 140 P. 1033, 1035 (Kans. App., 1914) (alienation of islands within navigable river to private parties declared void); Diana Shooting Club v. Lamoreaux, 89 N.W. 380 (Wis. App., 1902); Village of Pewaukie v. Savoy, 79 N.W. 436, 437 (Wis. App., 1899); Prieve v. Wisconsin State Land and Improvement Co., 67 N.W. 918 (Wis. App., 1896) (finding of fraudulent legislative purpose to convey and relinquish the State's right, title and interest beneath Muskego Lake without public benefit).

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In State v. Bunkowski, 503 P.2d 1231, 1237 (1972), the Nevada Supreme Court noted in a case involving the bed of the Carson River:

> "It has been held, in what appears to be a majority of cases, that the states hold title to the beds of navigable watercourses in trust for the people of their respective states [Citations omitted]. Title to navigable water beds are normally inalienable."

Although the Court went on to note, citing a California case, Alameda Conservation Association v. City of Alameda, 264 Cal. App. 2d 284, 70 Cal. Reptr. 264 (1968), that "such lands can be transferred by the state free of trust upon proper legislative determination," it is clear from other California cases that the jus publicum aspect of the state's ownership may not be divested. Thus, if this view prevails, the public would have the right to continue to use the beach lands between the elevation of 6,223 feet and the ordinary and permanent high-water mark. The only apparent change would be the State's relinquishment of some regulatory power over structures such as piers and wharves and fences in the shorezone and the necessity to compensate the littoral owners if such lands are ever appropriated for State purposes. The Nevada Supreme Court's recognition that the beds of navigable waters are normally inalienable is an approval it seems of the United States Supreme Court's statement in Illinois Central Railroad that:

> "The trust with which they are held, therefore, is governmental and cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining."

EXHIBIT ___

In the case of A.B. 234 it is clear that the alienation of the State's shorezone interest is not in furtherance of the interest for which the State holds such land, that is, the trust responsibility to the people. A conveyance of the shorezone lands to a level approximately 2.5 feet below the ordinary low water mark would effectively preclude all public use in the shorezone. It would promote the construction of unsightly fences and proliferation of other structures well below an elevation normally covered with water. It is also evident that an attempted disposal would not only exacerbate the conflicts that may arise between the shorezone owners and the public but would increase antagonism between adjacent landowners as well. According to the cases from other states the shorezone lands, even if title were conveyed, would continue to be subject to an easement on behalf of the public for fishing, navigation and recreation. See, e.g., Marks v. Whitney, 491 P.2d 374, 379 (Cal. App., 1969); Brusco Towboat Co. v. State, By And Through Straub, supra, 567 P.2d 1037, 1043 (Or. App., 1977); New Jersey Sports & Exposition Authority v. McCrane, 292 A. 2d 545, 579 (N.J. App., 1972); People v. California Fish Company, 138 P.79 (Cal. App., 1913).

The California Attorney General's Office, representing the State of California and the State Lands Division in two cases now before the California courts, one involving Clear Lake and the other involving Lake Tahoe, has taken the position that whether or not a grant by the Legislature was made, the Legislature cannot abrogate the public trust for commerce, navigation, fisheries and recreational and environmental purposes between low and high-water marks of navigable bodies of water. The cases are Lyon v. State of California, et al., Case No. 13925, and Fogerty, et al. v. State of California, et al., Case No. 3 Civ. 17381.

Recently, the United States Supreme Court reaffirmed the title of the States to lands underlying navigable waters in Oregon v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977),

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a rule followed in an unbroken line of cases since Pollard's Lessee v. Hagan, 3 How. 212 (1845), that such title is conferred not by Congress but by the Constitution itself. The Court cited Mr. Justice Catron's dissenting opinion in Pollard's Lessee, apparently with approval, "that he deemed the case 'the most important controversy ever brought before this court, either as it respects the amount of property involved, or the principles on which the present judgment proceeds . . .'" This class of case takes on added significance to the State when it is realized that the State's sovereignty over navigable waters is an indispensable aspect of the internal sovereignty of the State. The State would undoubtedly survive the loss of such sovereignty, but as substantial measure of the full power and dignity associated with the State's sovereignty over the public trust lands will be lost forever.

Of the states contiguous to Nevada all recognize State ownership to the high-water mark. The following citations are not intended to be exhaustive, but merely to indicate the treatment given by the courts of nearby western states whose circumstances are more nearly akin to the State of Nevada's. The courts in each of the following cases have held that the state owns to the high-water mark. Provo City v. Jacobsen, 111 Utah 39, 176 P.2d 130 (1947); State of Utah v. U. S., 304 F.2nd 23 (1962); Dahl v. Clackamus County, 243 Or. 152, 412 P.2d 364 (1966); State Land Board v. Western Pac. Dredging Co., 244 Or. 184, 416 P.2d 667 (1966); State v. Bonnelli Cattle Co., 489 P.2d 699 (Ariz. 1971); Halmadge v. Village of Riggins, 78 Ida. 328, 303 P.2d 244 (1956); People ex rel. Dept. Pub. Works v. Shasta Pipe etc. Co., 264 Cal. App. 2d 520, 531-36 (1968), and memorandum of decision and final judgment upon retrial in The People Of The State Of California v. Shasta Pipe and Supply Co., Butte County Sup. Ct. No. 37390 (1972), in which the ordinary high-water mark was held to constitute the watershed boundary of private

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uplands along the Feather River, a non-tidal, navigable watercourse; Churchill Co. v. Kingsbury, 178 Cal. 554, 558-59 (1918); Heckman v. Swett, 99 Cal. 303, 307-08, 309-10 (1893) aff'd 107 Cal. 276, 280 (1895); Packer v. Bird, 71 Cal. 134, 135 (Cal. 1886), aff'd 137 U.S. 661, 673 (1891).

Probably the single most important detriment to the State resulting from the shifting by legislative action the boundary of the State's property at Lake Tahoe would be the loss of options in providing for future recreational facilities for an expanding population. Already in the summer months, Sand Harbor, one of the State's few parks at Lake Tahoe, is hopelessly overcrowded. Adjusting the property line to elevation 6,223 feet will cost the State untold millions of additional dollars to purchase or condemn beach areas for public recreation.

Harry A. Swainston

EXHIBIT

REPORT TO THE GOVERNMENT AFFAIRS COMMITTEE HEARING ON A.B. 234

This is a statement in regard to A.B. 234, which was introduced by Mr. Weise, Mr. Glover and Mr. Bergevin. I am very much opposed to this measure. I speak as a private citizen, who is not a member of any environmental or tax group. I have no motive other than the protection of the rights of the vast number of non-lakeshore property owners and all the residents of the State of Nevada. My position is that this is a needless and ill-advised giveaway of State property - for the financial benefit of a very few lakefront property owners.

I have been spending vacation time at Lake Tahoe since 1932 and my sister and I owned a non-beachfront home on the California side of the Lake for some twenty years. Our friends and our children and their friends have been enjoying Lake Tahoe for many years. I am very familiar with the problem of finding a place to get to the beach without crossing private property. California recognizes 6229.1' as the high water line and property line. In addition, they have seen to it that there are clearly marked easements to allow public access to the beaches. Nevada has been derelict in its duty to preserve Lake Tahoe for its citizens, and this Bill would simply compound that dereliction.

The Attorney Generals of both Nevada and California have issued opinions that recognize 6229.1' as the high water mark and no court challenge of this decision has met with success. I feel sure that all legal precedents were carefully considered in issuing these opinions.

If we consider what A.B. 234 does, we see that by changing property lines to 6223', it will give some very choice beachfront property to the present owners of the land adjacent to the present 6229.1' high water line. It will also extend the present legislative controls to the new areas (below 6223'). The objectives are to limit access to lakefront property, to give title to private owners and to clear up title questions.

The reasons advanced for the proposed changes are; first of all, it is a "housekeeping" measure to clear up claims of ownership as set forth in old deeds (some of which give ownership down into the water). This is a legal matter which is already clarified by the 6229.1' high water and property line. Any challenge of ownership is a matter for the courts.

SUMMARY: THE ATTORNEY GENERALS OPINION OF 6229.1' AS THE HIGH WATER MARK AND PROPERTY LINE HAS ALREADY ACCOMPLISHED THIS.

The second reason advanced is that it is difficult to administer this strip of land in regard to littering, general policing and may lead to tresspassing on private property, as well as littering of private property.

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I realize that there are problems in policing public property at Lake Tahoe, just as there are problems on the banks of the Truckee River, the desert areas, the mountains or any other public property. If the goal of this Bill is to protect the private property owners from having other people using the beaches in front of their homes, then there are some alternatives:

The proper Nevada agency can post the beaches in front of private property as " Not open for public use" and provide additional policing if needed.
Or - Lease this extra property to the private owners with the stipulation that at such time as the State of Nevada or the County requires that portion for use as a part of the development of a public beach area, it would be theirs. The public should not have to pay, at some future date, to regain these parcels as a part of an overall project.

SUMMARY: THIS BILL IS NOT NEEDED TO SOLVE THESE PROBLEMS, AS WE NOW HAVE STATE AGENCIES EMPOWERED TO CONTROL THEM.

The third reason advanced is that this land is of no value to the State of Nevada and title should be transferred to the lakefront property owners. It should be acknowledged, while these areas are presently of so-called limited value to the general public, due to their limited access, at some future time these areas, particularly the broader beaches, will be provided with suitable public access and will become important additions to the enjoyment of Lake Tahoe by all of Nevada's people and visitors.

SUMMARY: THIS PROPOSED LEGISLATIVE ACTION FINANCIALLY BENEFITS A FEW LAKE TAHOE BEACH FRONT PROPERTY OWNERS AND IS NOT IN THE BEST IMMEDIATE OR LONGTERM INTERESTS OF THE RESIDENTS OF NEVADA.

Eleanor Savage

EXHIBIT

MEMORANDUM

OFFICE OF THE COUNTY MANAGER

~~RICHARD W. BUNKER~~
~~County Manager~~
BRUCE W. SPAULDING
~~Assistant~~ County Manager

TO: ASSEMBLY GOVERNMENT AFFAIRS COMMITTEE

FROM: SAMUEL D. MAMET, MANAGEMENT ANALYST

SUBJECT: A.B. 275

DATE: FEBRUARY 21, 1979

Attached, please find suggested amendments to the above captioned legislation. We support the basic intent of the legislation to "clean-up" antiquated language in this statute set forth generally at NRS 403. However, in so doing we feel several additional changes ought to be made and in one instance we would like to offer an alternative amendment to that suggested in the bill. The rest of the remarks in this memorandum will reference to the particular amendments attached. We appreciate, as always, the committee's attention of our concerns.

1. NRS 403.190(1) (2), section 8 of this bill, presently requires road maps to be filed each with the board of commissioners, the county clerk, and county recorder. Clark County now maintains such a map in our engineering department. It, however, encompasses nearly thirty sheets and only one copy is updated. Revising three separate copies every time a new road is accepted as required under present statute could require a minimum of two additonal personnel. Further, the three copies would be absent from the three offices getting the maps a significant portion of the year while they are being updated. Our modification of the statute would allow the county to require a master map to be on file with the county engineer and updated copies filed annually with the recorder, clerk, and commissioners. We feel this would serve as a necessary modernization of the law as it presently stands.

2. NRS 403.480(1), section 12 of this bill, should be modified to strike references to specific materials. As the law now stands, the county could be prohibited from using plastic pipe, asbestos concrete pipe, aluminum products, and other acceptable construction materials. The language we suggest would modernize the law with current construction practices.

3. NRS 403.550, section 16 of this bill, is in conflict with county agenda deadlines as set forth in the open meeting statute. Our agenda deadline in Clark County is ten days prior to the county commissioners' meeting. The current statute presents problems. This amendment would bring the statute in conformance with the open meeting law.

4. NRS 404.010, section 17 of this legislation, would require road districts be established by the board of commissioners. As the law now reads, road districts are established at the request of a majority of taxpayers in a township or polling place. To mandate that this be done, as the bill suggests, would entail complex tax records and bookkeeping to insure compliance that monies collected are being expended within that district. We feel very strongly that this should be

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permissive rather than mandatory as the bill now is drafted and would respectfully request your consideration of this change.

5. NRS 404.060, section 20 of this bill, could preclude a county from having the property dedicated rather than condemned. We are proposing that a change be made to have this type of road change through private property dedicated as opposed to condemnation proceedings. Our feeling is that a dedication procedure is less costly and quicker to accomplish.

SDM/mg

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CLARK COUNTY AMENDMENTS TO AB 275

#1 Page 3, Line 23:

roads and their designations. The master copy of the map [shall] must be filed with the county engineer. One copy of the map [shall] must be filed with the [clerk of the] board .....

Page 3, Line 30:

[copies] master copy of the map on file with the county engineer, which is to be updated at least annually and copies of which are to be filed with the [clerk of the].....

#2 Page 4, Line 29:

403.480(1) Delete entire section and insert new language: All work on county roads and appurtenances, including superstructures, shall utilize acceptable engineering materials in conformance with adopted county or state highway standards.

#3 Page 5, Line 41:

[1 day] before the regular meeting of the board by whatever the number of days is required by the open meeting law.

#4 Page 6, Line 24:

Change shall to may.

#5 Page 7, Line 27:

[condemned] dedicated.

EXHIBIT ___