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BACKGROUND PAPER 03-4

STOCKWATER PERMITS AND RANGELAND REFORM '94

An Overview of Nevada's Traditional System for the Issuance of Stockwater Permits and the Influence of Federal Regulations and Subsequent Court Decisions on Existing Nevada Law

RESEARCH DIVISION
LEGISLATIVE COUNSEL BUREAU

Nevada Legislature
Legislative Building
Carson City, Nevada 89701

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Linda J. Eissmann, Senior Research Analyst
Research Division
Legislative Counsel Bureau
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I. INTRODUCTION

The traditional allocation of stockwater rights on Nevada's public lands allowed for the permits to be held in one of three ways, depending upon who developed the water right and put it to beneficial use: (1) in the name of the livestock owner/rancher; (2) the Federal Government; or (3) jointly between the two.

However, adoption of new federal regulations under Rangeland Reform '94 (which became effective in 1995), resulted in a change to this system by requiring (to the extend allowed by state law) that stockwater rights shall be acquired, perfected, maintained, and administered in the name of the United States.

Because 61 million acres of Nevada's land are owned by the Federal Government and managed by various agencies, the issuance of these permits solely to the Federal Government was of great concern in Nevada. In an attempt to avoid such issuance, the State Legislature enacted Senate Bill (S.B.) 96, in 1995 (Chapter 652, *Statutes of Nevada 1995*), now codified in *Nevada Revised Statutes* (NRS) 533.503, and commonly referred to as the "Stockwater Statute." This statute attempted to tie the right to hold a stockwater permit to a legal right to place livestock on the land.

As a result of passage of S.B. 96, the United States Department of the Interior, Bureau of Land Management (BLM) filed suit against the Nevada State Engineer for denying nine stockwater applications submitted in the name of the Federal Government. The State Engineer (relying on an opinion from the Office of the Attorney General) argued that the BLM was not legally entitled to place livestock on the land. Further, the State Engineer stated that the statute was ambiguous and therefore its interpretation must rely on the legislative intent of the statute.

The case eventually made its way to the Supreme Court of Nevada, which rejected the State Engineer's argument. It concluded that the statute is not ambiguous and simply requires an applicant to have a legal right to graze livestock on public land. As the owner of the public land on which grazing was authorized, the Federal Government (and therefore the BLM) was legally entitled to place livestock on the land. As a result, stockwater rights could be held solely in the name of the Federal Government.

While concurring with the majority opinion, Supreme Court Justice Nancy Becker offered a dissenting opinion. In it, Justice Becker set forth legal guidance on how the Nevada Legislature might amend NRS 533.503 to achieve its original intent.

As a result, the Nevada Legislature's Statutory Committee on Public Lands addressed this issue in great depth during the 2001-2002 interim and crafted two pieces of legislation that will be considered by the 2003 Legislature (Bill Draft Request [BDR]s 48-670 and R-671).

II. TRADITIONAL ALLOCATION OF STOCKWATER RIGHTS ON PUBLIC LANDS IN NEVADA

The management of water resources is of critical concern to many Western states. In Nevada, this is especially true. Not only has Nevada been the fastest growing state in the nation in each decade from 1960 to 2000, it is also one of the driest states in the nation. The demands on Nevada's limited water supplies to support its growing population and economy are significant, making the appropriation and effective management of water by the Nevada State Engineer particularly important.

With 87 percent of Nevada's lands federally managed, and 68 percent administered by the BLM, the state's agricultural industry is highly dependent on grazing allotments on these public lands. At present, nearly 700 grazing permits are issued to Nevada ranchers.

The use of water on the public lands to water livestock has been a controversial issue over the years, with debate about to whom the stockwater permits should be issued — the BLM, the range user, or both. The issuance of these permits in the name of the BLM, and control of the water rights by the Federal Government is a source of concern in Nevada. Many Nevadans believe that allowing the United States to obtain water rights on public lands would allow it to interfere in the management of the state's water by exercising substantial control over water used for livestock on these public lands. Such action could undermine Nevada's primacy over its limited water supply.

Nevada has traditionally allocated water rights on federal land according to the "three-way system." Under this system, water rights on federal land have been allocated in one of three ways depending upon who developed the water right and put the water to beneficial use: (1) to the range user; (2) to the Federal Government; or (3) jointly to the range user and the Federal Government. Prior to the Rangeland Reform regulations in 1994, the Nevada State Engineer encouraged the United States to utilize joint applications whenever possible and the BLM frequently did. In addition to joint applications, the BLM has applied for and received more than 500 permits, certificates, and vested water rights for livestock watering in Nevada in its name only.

III. RANGELAND REFORM '94

Nevada's three-way system was seriously threatened when, in 1994, the Federal Government undertook an effort to revise its management of federal lands. Among the regulations adopted was a new approach to water rights on public lands, codified in 42 C.F.R. § 4120.3-9. This regulation reads:

> Any right acquired on or after August 21, 1995 to use water on public land for the purpose of livestock on public land shall be acquired, perfected, maintained and administered under the substantive and procedural laws of the State

within which such land is located. To the extent allowed by the law of the State within which the land is located, any such water right shall be acquired, perfected, maintained, and administered in the name of the United States.

The first sentence of this regulation acknowledges the primacy of the state's water law. However, it appears that the second sentence requires all such water rights to be held either exclusively by the Federal Government, if the state law allows it, or jointly by the Federal Government and a range user, if the state law allows it. In either case, the federal regulation appears to preclude a range user from obtaining a stockwater permit solely in his own name even if the range user has totally financed the development of the water rights and has otherwise taken full responsibility for putting the water at issue to beneficial use. It is this latter provision that is cause of concern for the State of Nevada.

IV. ENACTMENT OF *NEVADA REVISED STATUTES* 533.503 IN 1995 AND *UNITED STATES V. STATE ENGINEER*

A. Enactment of Legislation

To address the concerns raised by the adoption of 43 C.F.R. § 4120.3-9, the 1995 Nevada Legislature enacted S.B. 96 (Chapter 652, *Statutes of Nevada 1995*), now codified in NRS 533.503, and commonly referred to as the "Stockwater Statute." Specifically, the statute provides in relevant part that, "1. The state engineer shall not issue [a stockwater permit] unless the applicant for the permit is legally entitled to place the livestock on the public lands for which the permit is sought."

B. Court Cases

In July 2001, in *United States v. State Engineer*, 117 Nev. Adv. Op. No. 49 (2001), the Supreme Court of Nevada interpreted the "Stockwater Statute" — specifically the provision quoted in the preceding paragraph. In that case, the BLM had filed nine applications with the State Engineer for stockwater permits on federally managed public lands. *Id.* at 2. Relying on an opinion from the Office of the Attorney General, the State Engineer denied the applications on the grounds that "the BLM is not a person who is authorized to graze livestock on public lands." *Id.* at 3. Specifically, the State Engineer argued that because the statute was ambiguous, the Supreme Court must rely on the legislative intent regarding the statute and the legislative intent would support the State Engineer's interpretation of the statute. Respondent's Brief at 6-7, *United States v. State Engineer* (No. 32740); see *United States v. State Engineer*, 117 Nev. Adv. Op. No. 49, 4-5 (2001).

The district court denied the BLM's petitions and affirmed the State Engineer's decision. *Id.* On appeal, the Supreme Court of Nevada reversed the decision of the district court. *Id.* Specifically, the Supreme Court rejected the State Engineer's arguments and held that the statute is not ambiguous and it "simply requires an applicant for a stockwater permit to have a

legal right to graze livestock on the public land." *Id.* at 5. Further, the Supreme Court reasoned that the U.S. has such a legal right because the United States owns the public BLM land and Congress has authorized the grazing of livestock on such land. *Id.* Thus, the Court concluded, "the BLM is a qualified applicant under [the statute]" and the statute does not prohibit the BLM from receiving stockwater permits in the name of the United States. *Id.* at 2 and 5.

C. Analysis by Justice Nancy Becker

Supreme Court Justice Nancy Becker authored a dissenting and concurring opinion in the case. Justice Becker first disagreed with the majority regarding the clarity of the statute and found the statute was ambiguous, and thus, an examination of the legislative intent of the statute was required. *Id.* at 5 (Becker, J., concurring and dissenting).

Further, Justice Becker concluded that the legislative intent was "to create a new system that would prohibit the BLM from obtaining a stockwater permit in its own name, unless it had some legal or proprietary interest in the livestock to be watered under the permit," and that "[t]he Legislature wanted to preserve state primacy over water rights without unconstitutionally discriminating against the federal government." *Id.* at 11. Next, Justice Becker conducted a constitutional analysis to determine whether, considering this intent, the statute could be held constitutional. The United States had argued that such an interpretation would discriminate against the Federal Government or frustrate federal policy, in violation of the Supremacy Clause of the *United States Constitution*. *Id.* at 17. To address this argument, Justice Becker relied on the constitutional principles set forth in the United States Supreme Court case of *North Dakota v. United States*, 495 U.S. 423, (1990).

According to *North Dakota*, "[s]tate law may run afoul of the Supremacy Clause in two distinct ways: The law may regulate the Government directly or discriminate against it, *see McCulloch v. Maryland*, 4 Wheat. 316, 425-437 (1819), or it may conflict with an affirmative command of Congress." (citations omitted) *North Dakota*, at 434. Further, over 50 years ago, the Court "decisively rejected the argument that any state regulation which indirectly regulates the Federal Government's activity is unconstitutional, *see James v. Dravo Contracting Co.*, 302 U.S. 134 (1937), and that view has now been 'thoroughly repudiated.'" (citations omitted) *North Dakota*, at 434. "The Court has more recently adopted a functional approach to claims of governmental immunity." *Id.* Under this approach, "the question whether a state regulation discriminates against the Federal Government cannot be viewed in isolation. Rather, the entire regulatory system should be analyzed to determine whether it is discriminatory . . . ." (citations omitted) *Id.* at 435. "Moreover, in analyzing the constitutionality of a state law, it is not appropriate to look to the most narrow provision addressing the Federal Government or those with whom it deals. A state provision that appears to treat the Federal Government differently on the most specific level of analysis may, in its broader regulatory context, not be discriminatory. [The Court] has held that, '[t]he State does not discriminate against the Federal Government and those with whom it deals unless it treats someone else better than it treats them.'" (citations omitted) *Id.* at 438. Finally, a state

law may violate the Supremacy Clause if it "substantially interfere[s] with [the] activities [of the Federal Government]." *Id.* at 452, (concurring and dissenting opinion) (*quoting United States v. New Mexico*, 455 U.S. 720, 735, n. 11 (1982)). The Court explained that, "The nondiscrimination rule finds its reason in the principle that the States may not directly obstruct the activities of the Federal Government." (citations omitted) *Id.* at 438.

In applying these constitutional principles to the Federal Government as a landowner and NRS 533.503, Justice Becker concluded that the statute was facially neutral and thus did not directly regulate the United States in a manner to constitute a prima facie violation of the Supremacy Clause. *United States v. State Engineer*, 117 Nev. Adv. Op. No. 49, 19 (2001) (Becker, J., concurring and dissenting). Further, she found that when the statute was considered in the context of Nevada's entire water appropriation scheme, any distinction in the statute between the Federal Government as a landowner and other landowners was not significant enough to constitute a violation of the Supremacy Clause. *Id.* Finally, she concluded that, in her opinion, "NRS 533.503 is not discriminatory simply because the definition of public lands, as interpreted by the State Engineer, applies only to United States' land managed by the BLM." *Id.*

Next, Justice Becker applied the constitutional principles to claims raised by the Federal Government that the statute violated the Supremacy Clause because it actually and substantially interfered with a federal policy or program. Justice Becker rejected this argument. She reasoned that "[w]hile the statute on its face does not bar the BLM from being a qualified applicant in its own name, it has that effect because the BLM is not a person 'legally entitled to place the livestock on the public lands.'" *Id.* at 21. Further, she acknowledged that such effect upon the BLM "together with the fact that the statute, as interpreted by the State Engineer, only applies to lands managed by the BLM, arguably poses a greater impact upon the issue of discrimination than that created solely by the restrictive interpretation of the phrase 'public lands.'" *Id.* However, she concluded that the Federal Government "has not shown how it is so disadvantaged by the inability to obtain a permit in its own name, that it is being discriminated against within the meaning of the Supremacy Clause." *Id.* While admitting that it is a close issue as to whether it is constitutional to essentially preclude the BLM from obtaining a stockwater permit solely in its own name, Justice Becker concluded that this interpretation of the statute would not violate the Supremacy Clause. *Id.*

However, with respect to joint permits, Justice Becker concluded that if the statute were interpreted to prohibit the BLM from applying for a stockwater permit jointly with a person who is legally "entitled to place the livestock on the public lands," then this restriction, together with the restrictive interpretation of public lands, would violate the Supremacy Clause because it would prevent the BLM from obtaining a stockwater permit under any circumstances, and thus "would be a significant interference with the BLM's control and management of its rangelands." *Id.*

Continuing her analysis, Justice Becker opined that the statute could be construed to allow the BLM to obtain stockwater permits jointly with another person, even if the BLM could not

obtain stockwater permits solely in its own name. *Id.* at 22. She then determined that if the statute were so construed it would not violate the Supremacy Clause. *Id.*

In summary, Justice Becker concluded that by requiring at least one, but not both, of two joint applicants for a stockwater permit to have a legal or proprietary interest in the livestock to be watered, NRS 533.503 could avoid conflict with the Supremacy Clause. *Id.* at 23. She also acknowledged that the Supreme Court of the United States could reach a different conclusion on the issues presented by the statute and "might conclude that defining 'public lands' so as to target BLM managed lands is direct discrimination or regulation of the United States in violation of the Supremacy Clause." *Id.*

V. ACTIONS BY THE NEVADA LEGISLATURE'S STATUTORY COMMITTEE ON PUBLIC LANDS

The Legislative Committee on Public Lands spent a significant amount of time discussing the "stockwater statute" during the 2001-2002 interim. The issue was debated at seven meetings and one subcommittee meeting. Additionally, the Committee discussed this issue at length during both of its trips to Washington, D.C.

In response to the Supreme Court of Nevada's decision and Justice Becker's remarks, the Committee on Public Lands requested that the Legislative Counsel Bureau's Legal Division draft language for a possible bill draft request, which would amend NRS 533.503 to achieve the original legislative intent concerning the issuance of stockwater permits. At the Chairman's request, a draft was prepared with the following objectives in mind:

1. Draft the amendment in such a manner as to tie the ability to acquire a stockwater permit or certificate to the requirement that an applicant for such a permit or certificate would have a proprietary interest in the livestock;

2. Draft the amendment in a manner that addresses, to the extent possible, concerns raised by various interested entities, including, without limitation: (1) the State Engineer; (2) the Administrator of the Division of State Lands; (3) the Attorney General's Office; and (4) representatives of the Nevada Cattlemen's Association.

3. Draft the amendment in a manner that the Legal Division believes is constitutionally defensible and consistent with the guidelines discussed in Justice Becker's dissenting and concurring opinion.

At the work session meeting on August 16, 2002, the Committee decided to consider certain changes proposed by representatives of the Humboldt River Basin Water Authority. The primary conceptual change proposed was to provide that a stockwater permit shall not be issued unless the forage serving the stockwater is not encumbered by a grazing preference given to a person other than the stockwater applicant.

During the final meeting held November 18, 2002, the Committee deliberated specific provisions for obtaining a stockwater permit that would address forage encumbered under adjudicated grazing preferences and/or a proprietary interest in the livestock to be watered. After considerable discussion and participation by a number of witnesses, the Committee agreed to include both provisions in the BDR (48-670), thereby allowing further discussion to identify preferable language during the 2003 Legislative Session.

In addition, the Committee has requested that the provisions of 43 C.F.R. § 4120.3-9 be amended by eliminating the last sentence, as follows (deleted language is [~~stricken~~]):

> Any right acquired on or after August 21, 1995 to use water on public land for the purpose of livestock on public land shall be acquired, perfected, maintained and administered under the substantive and procedural laws of the State within which such land is located. [~~To the extent allowed by the law of the State within which the land is located, any such water right shall be acquired, perfected, maintained, and administered in the name of the United States.~~]

The Legislative Committee on Public Lands feels this change would continue to allow flexibility in the issuance of livestock water rights, including issuance in the name of the Federal Government if states choose to allow it. However, it does not preclude issuance of stockwater permits to range users who develop the water rights and put the water to beneficial use.

In addition to amending the "Stockwater Statute," a resolution urging the Federal Government to amend 43 C.F.R. § 4120.3-9 was requested by the Committee for consideration by the 2003 Legislature (BDR R-671).