



# Washoe County District Attorney

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**DISTRICT ATTORNEY**

## MEMORANDUM

TO: Jerry McKnight, Acting Director  
Washoe County Department of Water Resources

FROM: John B. Rhodes  
Deputy District Attorney

SUBJECT: BDR 48-183/Northern Nevada Water Authority

DATE: February 2, 2007

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I have completed a review of the above BDR and submit the following analysis regarding its provisions and potential consequences if enacted as currently proposed. Because the BDR is so lengthy and complex, it is not possible, in this Memorandum, to discuss all proposed provisions. I will, however, touch upon the most significant legal issues raised by the BDR, and the most far-reaching of its many impacts and consequences. For organizational purposes, I will address the provisions of the BDR in numerical order.

### ANALYSIS

**Sec. 5** sets forth a list of purportedly unique circumstances in portions of Washoe County to support and justify special, as opposed to general legislation applicable to all counties of a specified population. A strong argument can be made that the circumstances cited are not unique and that all of the proposed revisions to existing conditions could be enacted by way of amendment to the current provisions of general legislation, specifically Chapter 540A, Nevada Revised Statutes.

For example, the same membership of the proposed Board of Trustees and Water Planning Commission could be achieved simply by using more general references such as "largest city", "second largest city," "largest General Improvement District", etc. The use of special legislation is constitutionally suspect when the same result can be accomplished through general legislation, or amendment to existing general legislation.

**Sec. 24** provides for a nine member Board of Trustees for the Northern Nevada Water Authority (the "Authority"). The proposed composition of the Board of Directors for the Authority would ensure that the County and STMGID could always be outvoted, even in instances where Sun Valley General Improvement District agrees with the County's position.

**Sec. 27(2)** provides that a majority of a quorum of the Board can approve any motion or resolution. The text of the BDR does not specify any circumstances that would require a supermajority vote of the Board. Thus, unless the small reference in the upper right hand corner of page 1 of the BDR (“2/3s Vote Required - §§29, 36, 56”) requires a supermajority vote for the referenced sections, any authorized power of the Authority could be exercised by a vote of 3 of 5 Trustees present -- 1/3 of the total membership.

**Sec. 29(6)(a)** and (b) give the Authority broad powers to enter into agreements with the County, the Cities, and any public water purveyor to acquire, manage, or cooperatively administer water supplies, water resources or regional (Emphasis added) water conveyance and treatment facilities of such entity . . . . "Water resources" is not a defined term. While the above provisions appear to limit the powers of the Authority to agreed-upon arrangements, the following subsection (8) expands those powers as explained below.

**Sec 29(8)** allows the Authority to establish “a mechanism to schedule the deliver of water resources held by public purveyors before January 1, 2008 . . .” This broad grant of discretion can reasonably be interpreted to give the authority the power to dictate to any public purveyor how and when it will use its existing water rights and water supplies. Again “water resources” is not a defined term. This subsection could also arguably allow the reallocation of existing water rights and water supplies, already dedicated to specific projects, to allow new uses based upon circumstances where the actual metered use is less than the dedicated amount. If such a reallocation is intended or attempted to be implemented, it will likely receive opposition from those who dedicated the original water rights, and require eventual adjudication by the State Engineer and the judicial system.

**Sec. 29(9)** allows the Authority to designate the service territories for all public purveyors after January 1, 2008, pursuant to the criteria set forth in **Sec. 31**, discussed below.

**Sec. 29(10)** permits the Authority to establish rates, tolls, connection charges and commitment fees, etc. for a “public utility” (not a defined term) or public purveyor, and other fees and charges on users of water supplies “held by . . . any public purveyor” and “collect revenues for the use of its [the public purveyor’s?] water supplies . . .” At a minimum, this subsection would allow the authority to collect connection fees for service by any public purveyor. Liberally construed, it would allow the Authority to set the rate schedules for all public purveyors in potential contradiction to the provisions of **Sec. 32(2)**, discussed below.

**Sec. 29(19)** provides a broad power of eminent domain which would allow the Authority to condemn privately owned water rights and potentially affect prices in a free market.

**Sec. 30** requires any water rights for use by any public purveyor to be acquired only by the Board, after June 1, 2008. There is no requirement that those water rights be held in trust, or in any fiduciary capacity for the benefit of the purveyor, or leased back to the purveyor for beneficial use. This creates the possibility of over-commitment or duplicate commitment of the same rights, as has occurred in the past with small private purveyors, and would by implication, require repeal of Article 422 of the Washoe County Development Code which requires all water rights necessary for service by the County to be dedicated to the County.

**Sec. 31** establishes the criteria to be used by the Board in establishing wholesale and retail service territories for new customers for all public purveyors after January 1, 2008. This Section will, by implication, void all existing interlocal agreements and the 1996 Agreement between the County and SPPCo., now TMWA, delineating such service territories. It also limits the ability of public purveyors to do facility or infrastructure planning during 2007, because they have no indication as to whether such facilities will eventually fall within their respective future service territories.

**Sec. 32(1)** prohibits the Authority from controlling the use of water supplies owned by public purveyors within their own retail service territories, other than by scheduling delivery to maximize yield. (See discussion of **Sec. 29(8)**, above). However, after January 1, 2008, the Authority will acquire and “own” all new water rights and water supplies for retail service (**Sec. 30**). Thus, after the effective date, the Authority will have complete control over water supplies for all new retail service, regardless of the service territory.

**Sec. 32(2)** states that the Authority shall not fix the retail rates for public purveyors, which appears to be inconsistent with the provisions of **Section 29(10)**, above. This Section is vague and leaves open the question of whether the Authority will be allowed to set retail rates for all public purveyors for customers acquired after the effective date.

**Sec. 32(3)** states, in effect, that the Authority shall not provide wholesale water services to a public purveyor if TMWA is able to provide such wholesale service. The net result of this Section appears to be that the County will never be able to obtain wholesale supplies directly from the Authority, and will continue to receive such service only from TMWA.

**Sec. 36** authorizes the Board to impose the same 1.5% fee now being collected for water planning by the RWPC to fund “the planning and administration required by this Act” and to implement the proposed Comprehensive Plan. There is no provision in this Section limiting expenditures of the 1.5% fee to the existing water planning activities of the RWPC. Additionally the administration of those activities is already primarily

funded by the County, not the fee. As written, this Section would allow the Authority to use the fee solely for its own administrative expenses, to the detriment of regional water planning.

**Sec. 37** creates a new Water Planning Commission with a new membership. There is no representation for domestic well owners, even though the impacts of municipal pumping on domestic wells has been and will continue to be a significant issue both at the local level, and with the State Engineer.

**Sec. 40(2)** will allow 4 of 6 members present at any meeting of the Commission to take action, even though the total membership will be 10 or more. There are no supermajority requirements for the new Commission.

**Sec. 41(1)** creates a potential gap between January 1, 2008, and January 1, 2011, where arguably there will be no Regional Water Plan in place. If the intent of this subsection is for the current Plan to continue until the new Plan is adopted, that intent should be specifically stated.

**Sec. 43(1)** and **Sec. 48** perpetuate current statutory requirements that the Water Plan be in conformance with the Truckee Meadows Regional Plan. If the Regional Plan is to be effectively "resource constrained," as intended by the 2006 Annexation Settlement Agreement, then the reverse of the above should be the requirement, i.e., the Regional Plan should be required to conform to the Water Plan.

**Sec. 53(1)** requires the Board to assume the administration of the existing Remediation District and administer the money held by the County for developing and implementing the plan for remediation. However, it appears that after January 1, 2008, the Board will be required to create a new Remediation District. Abolishing an existing district only to create a new one in its place, with the same goal and mission, seems to be both operationally unnecessary and financially irresponsible. If desired, the Board could simply continue to administer the existing District.

**Sec. 67** repeals Chapter 540A, NRS. As stated above, this appears to be unnecessary because the goals of the BDR could be more easily accomplished by amending the existing statutes and remaining on firm constitutional ground.

### **Funding**

Other than the Water Planning Fee (use of which is not restricted) and the Remediation Fee (limited to remediation purposes) referred to above, the provisions of the BDR do not contain any proposals for funding the activities of the Authority. **Sec. 2** provides for

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the creation of Redevelopment Districts, which cannot be implemented to support new development.

**Sec. 29(15)** provides that the Authority may directly assess public purveyors for any costs arising from regional capital improvements related to the delivery of water supplies. Even though a purveyor can "opt out," those that choose to participate can only recover the assessments imposed through their rate schedules. The end result is that existing customers will be funding the cost of new water for new development and new customers.

### **Conclusion**

As set forth above, the BDR is replete with provisions subject to varying interpretations and resulting consequences, intended or unintended, that will impose radical and expensive changes on all municipal water customers in the Planning Area.

If you have any comments or questions, please let me know.

Very truly yours,

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District Attorney

By 

JOHN B. RHODES

Deputy District Attorney

JBR:cm

cc: Katy Singlaub, County Manager  
Jeanne Ruefer, Water Resources Planning Manager  
Jim Smitherman, Water Resources Program Manager