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Ruling over mine exposes flaw in new law

Petitioners required to have standing in case

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Las Vegas Sun

It's right there in the U.S. Constitution, right there in the First Amendment. It's difficult to miss:

Nothing should stand in the way of American's right to "petition the government for a redress of grievances."

Except, apparently, in Nevada.

Here, under a law that took effect Oct. 1 but only now is attracting attention, if the state allows a polluter to ruin the landscape and soil the sky, you have no standing to "petition the government" to order the pollution to stop - unless you have a financial stake in doing so.

The law, approved by the 2005 Legislature, has environmental groups up in arms, law professors scratching their heads and at least one state legislator who voted for the law vowing to change it.

Even Nevada Attorney General George Chanos says he believes it ought to be rewritten. He said that on Friday, two weeks after he issued an opinion that unleashed the new law.

His opinion said that, indeed, Nevada citizens could not challenge the action of any state agency unless those citizens had a financial stake in the outcome.

Armed with that finding, the state Environmental Commission this week barred the Great Basin Mine Watch environmental group from protesting a state-issued permit to permanently close a gold mine in Elko County.

Great Basin argued that the state has not properly addressed storm runoff that washes salt, selenium and other mine waste residue into the north fork of Northern Nevada's Humboldt River. That pollution, they say, can prove toxic to the Lahontan cutthroat trout, a federally listed threatened species.

The Environmental Commission, citing Chanos' opinion, concluded that Great Basin couldn't protest a permit that was issued last year to close the Big Springs Mine because the environmental group did not have a financial interest in the decision. By issuing the permit to mine operator AngloGold Ashanti, the state commission was satisfied that all environmental issues had been settled, including protection of the river.

The law Chanos cited, Senate Bill 428, gained overwhelming bipartisan support in the Legislature last year. It sailed through the Assembly 40-1 and passed by a 17-4 margin in the state Senate

The law states that a person cannot be admitted as a party to an administrative proceeding in a contested case involving the granting, denial or renewal of a license unless he demonstrates that his financial situation "is likely to be maintained or to improve as a direct result of the grant or renewal of the license" or "is likely to deteriorate as a direct result of the denial of the license or refusal to renew the license."

Dante Pistone, spokesman for the state Division of Environmental Protection, said Friday that "the law was narrowly interpreted for this particular case."

"We can't pick and choose which laws we obey," Pistone said. "We didn't lobby for the law, and we weren't aware of the law until after it was passed. Our hands are pretty much tied. Certainly there's a remedy and it's the upcoming session of the Legislature."

Chanos, too, said his office is limited to its interpretation of the law based on the language in the Nevada Revised Statutes and an analysis of the Legislature's intent in adopting the law. As the opinion noted, Assemblyman Pete Goicoechea, R-Eureka, warned his colleagues in the Assembly Government Affairs Committee during a May 17, 2005, hearing that the legislation could restrict environmental groups.

"This would exempt, for example, the Sierra Club or some other group that really didn't have standing and would preclude them from coming in and having standing in the administrative appeals, which will probably end up in some court of competent jurisdiction," Goicoechea told his colleagues, who then handily approved the bill.

So the legislative intent seemed pretty clear.

Chanos, however, said the outcome is "a poorly crafted law."

"I believe the law should be changed," he said. "I would like to see broader public participation allowed."

Bill Araiza of Loyola Law School in Los Angeles said Friday that the law runs counter to normal practice at the federal level and the conduct of state agencies in California.

"At the federal level, this would be problematic," said Araiza, who is also an associate dean at the law

school. "This cuts against the last 50 years of American administrative law.

"Federal law is generous as to who can appear before an agency and complain. I'm also quite confident that under California law you don't have to have monetary standing to appear before a commission or agency."

Michael Asimow, a UCLA emeritus professor of law, said "I have never heard of anything like that" when he was read the new law.

He then offered some advice: "If the environmental group does their homework, they could find someone with a financial interest." For instance, he suggested finding a fisherman who makes a living off the Humboldt River.

Otherwise, Asimov said, the prospects of challenging the state are nil. The Nevada law is so tightly written that it does not appear to allow for any administrative remedies, which could be a big problem if someone wished to file a lawsuit, he said.

Similar bewilderment was expressed in an e-mail response from University of Southern California professor John Matsusaka, president of its Initiative & Referendum Institute.

"I have not heard of similar cases," Matsusaka wrote. "This one obviously raises questions about enforcement of a host of environmental issues. For example, no one has financial interest in endangered species preservation."

Assemblywoman Sheila Leslie, D-Reno, said the Environmental Commission ruling prompted her to submit a bill draft request to get the Legislature next year to change the law. Leslie voted in favor of the law but conceded that she did not realize its potential ramifications.

"I am working with legislative counsel to look at the best options to fix the law," Leslie said. "The environmentalists were asleep at the wheel and the press also missed this."

Leslie said the options include throwing out the entire law or simply amending it so that anyone could protest an agency decision if it impacts public health or the environment.

Veteran lobbyist James Wadhams of Las Vegas, whose clients include Newmont Mining Corp., said he had his insurance clients in mind when he advocated passage of the law last year. The law does not prevent someone from speaking out at a public hearing prior to an agency decision, he said, citing zoning matters as an example.

Rather, he said his intent was narrower - to help clarify existing law so that when licenses are appealed before state agencies, only persons who have financial interests in the outcome have the right to appeal, such as by calling witnesses.

He said situations, such as those involving licenses related to insurance companies, would affect only someone with a financial interest. Allowing someone without a financial interest to appeal could potentially violate the due process of parties who have financial stakes in the license, he said.

Having said that, Wadhams said, it would be "perfectly reasonable" to amend the law to narrow it to his original intent, and thus allow someone to appeal a decision that impacts the environment or public health.

Reno attorney Nicole Rinke, who represents Western Mining Action Project, which is working with Great Basin, is considering filing a lawsuit against the state. Rinke agrees that the law is poorly written - arguing that several other states have rejected similar laws - but also believes that the attorney general's opinion is too narrow in scope.

"This restricts the ability to challenge the decision of the agency to anyone who has a positive financial interest in the agency's decision," Rinke said. "It's very likely we have legal options to follow up on this."

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