

Overview of Water Resource Issues and Priorities of the Pahrump Private Well Owners Cooperative and Rural Nevada Domestic Well Association

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Agenda Item V A-1 (WATER)
Meeting Date: 07-11-16

Introduction

- **Senator Goicoechea and members of the Committee, my name is Frank Maurizio, President, Private Well Owners Cooperative.**
- **Today I am here on behalf of the members of the Cooperative and the Rural Domestic Well Association. I will provide a brief overview of underground legislation of both the United States and State of Nevada before the office of the State Engineer was created.**



The Declaration of Independence

July 4, 1776

- We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.
- That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.



Nevada Constitution

October 31, 1864

- **Section. 1. Inalienable rights. All men are by Nature free and equal and have certain inalienable rights among which are those of enjoying and defending life and liberty; Acquiring, Possessing and Protecting property and pursuing and obtaining safety and happiness[.]**
- **Sec. 22. Eminent domain proceedings: Restrictions and requirements. Notwithstanding any other provision of this Constitution to the contrary:**
 - **1. Public use shall not include the direct or indirect transfer of any interest in property taken in an eminent domain proceeding from one private party to another private party. In all eminent domain actions, the government shall have the burden to prove public use.**



Water is Life

- **The maintenance of life, as we know it, on this planet depends critically on an adequate supply of water of an acceptable quality and also on a well-regulated temperature and humidity environment.**
- **Water is essential for life and without water no life exists.**



Supremacy Clause

The Supremacy Clause of the United States Constitution (Article VI, Clause 2) establishes that the Constitution, federal laws made pursuant to it, and treaties made under its authority, constitute the supreme law of the land



Treaty of Guadalupe Hidalgo

- The Treaty of Guadalupe Hidalgo, signed on February 2, 1848, ended the Mexican-American War in favor of the United States.
- The war had begun almost two years earlier, in May 1846, over a territorial dispute involving Texas.
- **The treaty added** an additional 525,000 square miles **to United States** territory, including the including the land that makes up all or parts of present-day Arizona, California, Colorado, **Nevada**, New Mexico, Utah and Wyoming.
- Mexico also gave up all claims to Texas and recognized the Rio Grande as America's southern boundary



March 2, 1861-Chap. 82 -An Act of Congress Organizing the Territory of Nevada

- Sec. 14. **Sixteenth and thirty-sixth sections in each township reserved for schools.** *And be it further enacted,* That when the land in said Territory shall be surveyed, under the direction of the Government of the United States, preparatory to bringing the same into market, **sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same is hereby reserved for the purpose of being applied to schools** in the States hereafter to be erected out of the same.

SEE EXHIBIT 1



July 14, 1862 Congress moved the Nevada Territory eastern boundary to 115 Meridian

- Prior to the Second Session of the Nevada Territorial Legislature, Congress, at the urging of Territorial Delegate John Cradlebaugh, provided for an extension of the Territory of Nevada eastward at the expense of Utah Territory. The addition was made July 14, 1862, extending Nevada Territory to include what had formerly been St. Mary's County of Utah Territory
- This established the boundaries of the State of Nevada 1864



May 6, 1866 Congress adopted Chap. LXXIII an Act Concerning the Boundaries of the State of Nevada

- **Nevada is one of two States whose boundaries were changed after Statehood.**
- **Utah Territory was added to the eastern boundary as consented to in Construction of the State of Nevada.**
- **Arizona Territory was added to the southern boundary below the 37th parallel which would not become part of Nevada until approved the State. The State approved the addition on January 18, 1867**

SEE EXHIBIT 2



May 5, 1866 Congress moved the Nevada Territory eastern boundary to 114 Meridian and Jan. 18, 1867 added southern boundary from Arizona

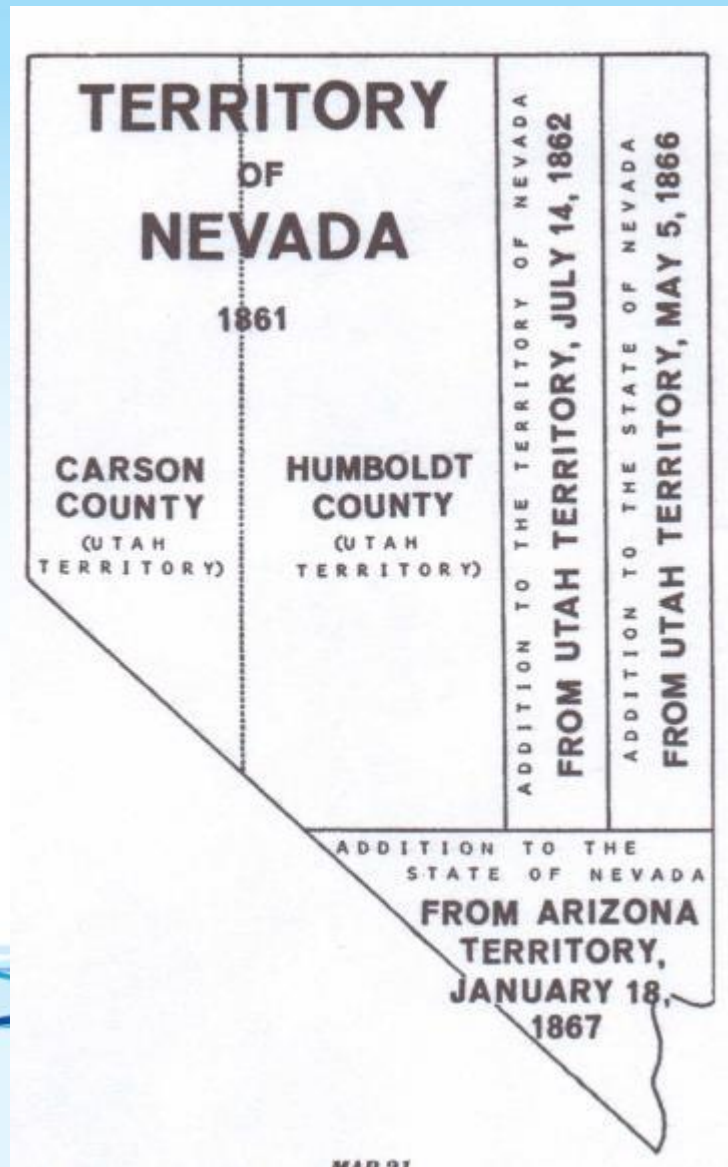


EXHIBIT 2

Mosier v. Caldwell

7 Nev. 363, 363 (1872)

- Percolating Water a Part of the Soil. Water percolating through the soil is not, and cannot be, distinguished from the soil itself; and of such water, the proprietor of the soil has the free and absolute use, so that he does not directly invade that of his neighbor, or, consequently, injure his perceptible and clearly defined rights.



Chap. C-An Act Of The State of Nevada

March 8, 1879

- Chap. C is **an Act accepting** from the United States **a grant of two million or more acres of land, in lieu of the Sixteenth and Thirty-sixth Sections** and relinquishing to the United States all such Sixteenth and Thirty-sixth Sections as have not been Sold or disposed by the State.



Exchange Act of June 16, 1880

- In 1880 Congress agreed and passed the Exchange Act of 1880, specifying that the 3.9 million acres (less 63,249 acres of land already patented) could be exchanged for **two million acres of land to be selected by the State.**
- The State thus consented to a reduction of almost half its grant lands. **These grant lands were subsequently virtually all patented by the United States to the State of Nevada and then patented to private owners by the State of Nevada.**



Land At Of March 12, 1885

- Chap. LXXXV is an Act to provide for the selection and sale of lands that have been or may hereafter be granted by the United States to the State of Nevada.
- Sec. 14. All lands selected under the two million acre grant of June sixteenth, eighteen hundred and eight, may be sold in tracts equal to one section to each applicant, notwithstanding such applicant may have heretofore purchased, or may hereafter purchase, three hundred and twenty acres of the State, selected under other grants of land to the State.
- Sec. 16. The title of the State to any lands sold under the provisions of this act shall be conveyed by patents.



State Selected Lands in Artesian Well Basin 162

- The State made the following selections in Pahrump Valley Township 20 South, Range 53 East of Mount Diablo Meridian, Nevada: SS 2 (5/5/1883), 640 acres; SS 8 (2/3/1890), 3,760 acres; SS 9 (11/5/1890), 5,439 acres; SS 10 (1/8/1892), 11,919.13 acres; and SS 15 (5/11/1896), 40 acres for a total of 21,798.13 acres.
- The Patents are the Priority date of the percolating water contained in the soil of the land.
- 60 State Selected Land Patents have been issued in T20S, R53E from June 9, 1891 to July 11, 1962 by the State of Nevada.

SEE EXHIBIT 3



BLM Land Record-T20 R53E Mount Diablo Meridian

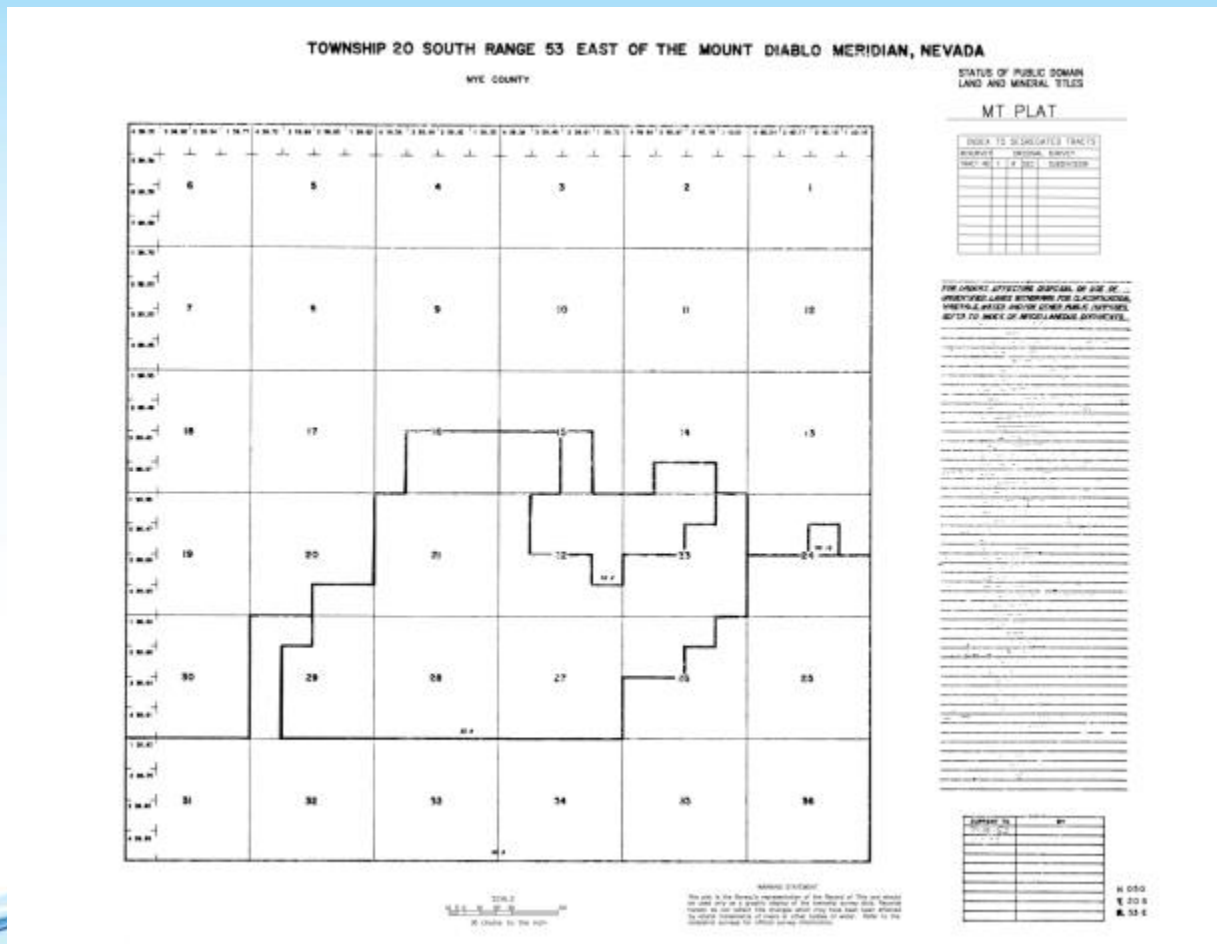


EXHIBIT 3

State Selected Land Patents

- **The Land came to the nation by 1848-Treaty of Guadalupe Hidalgo. The government only had limited ability to own land and all of the remainder of the land was held in the sole disposition of the United States until it was granted under act of Congress by the land and seal of the President to some person. Then in the same act the President makes the Grant Patent. Since the Land came to the nation by treaty, the patent assigns a specific part of that treaty to you and your heirs and assigns forever.**
- **The court is bound by the supremacy clause of Constitution to uphold the treaty making your Patent a statutory limitation throughout the land. Wineman v. Gastrell, 53 FED 697, 2 Us App. 581.**
- **The State Selected patents issued by the United States to the State of Nevada and the State of Nevada patents issued to the citizens *To Have and To Hold* all rights, privileges, immunities and appurtenance of whatever nature thereunto, unto said “person” and his heirs and assigns forever; provide that all mines of gold, silver, copper, lead, cinnabar and other valuable minerals that may exist in said tract, are hereby expressly reserved.**
- **Water was not reserved by these patents. Water belongs to the land.**



Water Act of 1866

- 1st Water Statute enacted in State of Nevada
- Chap. C –An Act to allow any person or persons to divert the Waters of any River or Stream, and run the same through any Ditch or Flume, and to provide for the Right of Way through the lands of other



Bounty for Sinking Artesian Well

- **Chap. CXXVII – An Act to encourage the sinking of artesian wells – March 5, 1887. Examination of well to be taken to County Commissioners.**
- **Chap. LXXXVI – An Act to provide for the payment of a bounty to encourage the boring of wells in searching for oil, natural gas and artesian water in the State of Nevada – March 19, 1901. Examination of well to be taken to County Commissioners**
- **Chap. LXXXII – An Act to encourage the Sinking of Artesian Wells. – March 6, 1979. Examination of well to be taken to State Engineer.**



State Engineer's 1907-08 Biennial Report

- **State Engineer Frank R. Nicholas made the following comment.**
- **“The passage of the Irrigation Laws of 1903, by which the office of State Engineer was created, was due to the existing conditions governing the appropriation and distribution of water rights in the State of Nevada. There had grown up in this State prior to 1903 a mass of water rights which were inchoate and undetermined, arising from what might be termed an extension of ‘squatter sovereignty,’ whereby appropriators simply avail themselves of the use of public waters by appropriating them and constructing ditches for their diversion, often failing to record the required notice in the county in which the appropriation was made and to make public in any way their intention, save by the actual fact of construction.”**
- **The State Engineer calls the first Water Act March 3, 1866, Chap. C the March 8, 1879 Chap. C, the Exchange Act June 16, 1880, March 12, 1885 Land Act, Chap. CXXVII March 5, 1877, and Chap. LXXXVI 1901 ‘squatter sovereignty’**



March 22, 1913 Water Act

- **Chap. 140-An Act to provide a Water Law for the State of Nevada providing a system of State Control.**
- **Sec.1. The water of all sources of water supply within the boundaries of the state belongs to the public.**
- **This act is for surface water, lakes, streams, rivers, springs.**
- **Ormsby County v. Kearney Dec. 31, 1914 the sections 18-58 of said Act,1913, and each section are unconstitutional.**



March 24, 1915 Water Act

- **Chap. 210-An Act to provide a law for the construction of underground waters, providing for casing and capping of artesian wells.**
- **Sec. 1. All underground waters, save and except percolating water, the course and boundaries of which are incapable of determination, are hereby declared to be subject to appropriation under the laws of the state relating to appropriation and use of water.**
- **Sec. 2. Artesian wells to be properly encased.**
- **Sec. 3. Water not allowed to run to waste.**
- **Sec. 4. District Attorney to enforce this act.**



District Court, D, Nevada Bergman et al. v. Kearney, State Engineer March 8, 1917.

Legislative declaration contained in section 1 of said Water Law of 1913, which reads, **‘The water of all sources of water supply within the boundaries of the state, whether above or beneath the surface of the ground, belongs to the public,’** is insufficient to, and does not, warrant or authorize the acts done and threatened to be done by defendant, as state engineer, as alleged in the bill of complaint, because the waters of all sources of water supply within the boundaries of the state are appropriated or unappropriated; **if appropriated, they belong to the appropriator thereof;** if unappropriated, they belong to the United States government, **by virtue of the treaty of the United States of America and the United Mexican States in 1848, and by virtue of the Enabling Act, approved March 21, 1864.**



April 1, 1935 Water Act

- **Chap. 184-An Act to amend the March 24, 1915 Water Act.**
- **Sec. 4. The State Engineer shall administer this act.**
- **Sec. 8. The Intent of the Act: State Engineer to prescribe fees for all services provided herein to cover reasonable cost of state services not defrayed by appropriation or otherwise.**

This is the first time the State Engineer has power over Artesian Wells.



March 25, 1939 Water Act

- **Chap. 178-An Act to provide for the conservation and distribution of underground artesian water.**
- **Sec. 1. All underground water within the boundaries of state belong to the public.**
- **Sec. 2. Defines “person”, “aquifer”, “artesian well”, and “waste”.**
- **Sec. 3. Exemption: This act shall not apply to developing and use of underground water for domestic purposes where the draught does not exceed two gallons per minute (3.28 acre-feet) and where the water developed is not from an artesian well.**

The State Engineer has no control over wells for domestic purposes.



Nevada Division of State Lands Office

- **The Nevada Division of State Lands office has issued 94 patents in the Pahrump Valley.** Each patent includes the following statement:
 - *To Have and to Hold* the same, together with all rights, privileges, immunities and appurtenances of whatever nature thereunto belonging, unto the said (person) and to his heirs and assigns forever; provided, that all mines of gold, silver, copper, lead, cinnabar and other valuable minerals that may exist in said tract are hereby expressly reserved.



NRS 321.010

State Land Office created

- **For the purpose of selecting and disposing of the lands granted by the United States to the State of Nevada, including the 16th and 36th sections, and those selected in lieu thereof, in accordance with the terms and conditions of the several grants of land by the United States to the State of Nevada, a State Land Office is hereby created.**
- **Except as otherwise ordered by a court of competent jurisdiction, the title of the State to any lands acquired by patent from the Federal Government must be conveyed by patent.**



Land Patents

- **The Land Patent is the only form of perfect title to land available in the United States. *Wilcox v. Jackson*, 38 US 498; 10 L.ED. 264**
- **The Land Patent is permanent and cannot be changed by the government after its issuance.**
- **"Where the United States has parted with title by a patent legally issued and upon surveys made by itself and approved by the proper department, the title so granted cannot be impaired by any subsequent survey made by the government for its own purposes." *Cage v. Danks*, 13 La. Ann 129**
- **In the history of this county no Land Patent has ever lost an appellate review in the courts.**



Common Law

- **Nevada is a Common Law State**
- **NRS 1.030 Application of common law in courts.** The common law of England, so far as it is not repugnant to or in conflict with the Constitution and laws of the United States, or the Constitution and laws of this State, shall be the rule of decision in all the courts of this State.
- **The legal system may review only findings of law, not determinations of fact.**
- **Under common law, all citizens, including the highest-ranking officials of the government, are subject to the same set of laws, and the exercise of government power is limited by those laws. The judiciary may review legislation, but only to determine whether it conforms to constitutional requirements.**



General Principles of Law

- **Both common law and civil law jurisdictions have formed what they variously call "pure common law" or "general principles of law" to define what the law is in the absence of, or gap in, legislation.**
- **If there is a material gap, then you can incorporate a common law doctrine**
- **Common law doctrine of first in time, first in right, for which there is no argument that it is infused and is the theme that runs through the statutory scheme. This is the "Rule of Capture.**



Domestic Wells

- All use of water requires a permit from the State Engineer except for Domestic wells. (534.180 [1]).
- Except as otherwise provided in subsection 2 and as to the furnishing of any information required by the State Engineer, this chapter does not apply in the matter of obtaining permits for the development and use of underground water from a well for domestic purposes where the draught does not exceed 2 acre-feet per year.
- (534.180 [4]) If the development and use of underground water from a well for an accessory dwelling unit of a single-family dwelling, as defined in an applicable local ordinance, qualifies as a domestic use or domestic purpose:
 - (a) The owner of the well shall:
 - (1) Obtain approval for that use or purpose from the local governing body or planning commission in whose jurisdiction the well is located;
 - (2) Install a water meter capable of measuring the total withdrawal of water from the well; and
 - (3) Ensure the total withdrawal of water from the well does not exceed 2 acre-feet per year;



State Engineer's Power Point;
October 2, 2012 Regulation by Priority

- What does administering the valley on a priority date basis mean?
- Groundwater pumping in the valley would be limited to the annual perennial yield of 12,000 acre-feet.
- Water rights with priority dates later than 1943 would be subject to regulation.
- Domestic Wells have a “priority” of the date they were drilled, and would have similar restriction (NRS 534.080), and almost all were drilled after 1943. **(NOT TRUE)**
- The Land Patent is permanent and cannot be changed by the government after it issuance. The land patent is the “priority”.



Protectable Interest

- In 1993, the Legislature created a "protectable interest" in domestic wells as set forth in NRS 533.024. (**Page 10, LCB Bulletin No. 07-11**)
- NRS 179.1163 - "Protected interest" means the enforceable interest of a claimant in property, which interest is shown not to be subject to forfeiture.



Legislative Declaration

- **It is the policy of this State:**
- **To recognize the importance of domestic wells as appurtenances to private homes, to create a protectable interest in such wells and to protect their supply of water from unreasonable adverse effects which are caused by municipal, quasi-municipal or industrial uses and which cannot reasonably be mitigated.**



Nevada Constitution

Nevada Constitution Article 1 -Sec. 22. Eminent domain proceedings: Restrictions and requirements. Notwithstanding any other provision of this Constitution to the contrary:

1. Public use shall not include the direct or indirect transfer of any interest in property taken in an eminent domain proceeding from one private party to another private party. In all eminent domain actions, the government shall have the burden to prove public use.



Nevada Constitution (cont.)

3. If a public use is determined, the taken or damaged property shall be valued at its highest and best use without considering any future dedication requirements imposed by the government. If private property is taken for any proprietary governmental purpose, then the property shall be valued at the use to which the government intends to put the property, if such use results in a higher value for the land taken.



Conclusions

- 1. This involves numerous violations of the Constitutional Rights both by the State Water Engineer and the State of Nevada.**
- 2. The State Water Engineer's exercise of his delegated authority needs to be reigned in.**
- 3. The Attorney General of the State of Nevada has blatantly lied to the District Court by stating that NRS 0.039 applies to NRS 533.010 and NRS 534.010. The Attorney General and the District Court knew that the Legislature in 1985, in AB200, removed the terms "Natural person" and "Individual" from NRS 533.010 and NRS 534.010 the delegating Statutes for the State Engineer.**
- 4. The State is massively confused about the application of Law pertaining to Domestic Wells.**



Conclusions

5. The **Court MUST** make a decision once and for all regarding the illegal way that NRS 1.030 has been dealt with. Currently, the State is permitting Federal Law to abrogate Nevada's Common Law when only NRS 1.030 only allows conflict with the Federal and State Constitutions or conflict with a Nevada Statute abrogate State Common Law. Permitting this abrogation is unlawful, in conflict with the State Engineer's and the Attorney General's oath of office to support and defend the Nevada Constitution and the United States Constitution.
6. Water is appurtenance to the land which is the Domestic Priority Right to water purposes on their land.
7. Amend AB 419 by removing the language, "including, without limitation, withdrawals from domestic wells".



Conclusions

8. **Change language, State Engineer “may” call for Beneficial use to “shall” call for Beneficial use.**
9. **Reserve a BDR for Domestic Water and Use under a population of 200,000 to help rural counties protect the Domestic Water.**

