MINUTES OF THE
MEETING OF THE SENATE COMMITTEE
ON JUDICIARY

SIXTY-FIRST SESSION
NEVADA STATE LEGISLATURE
April 20, 1981

The Senate Committee on Judiciary was called to order by Chairman Melvin D. Close at 8:00 a.m., Monday, April 20, 1981, in Room 213 of the Legislative Building, Carson City, Nevada. Exhibit A is the Meeting Agenda. Exhibit B is the Attendance Roster.

COMMITTEE MEMBERS PRESENT:

Senator Melvin D. Close, Chairman
Senator Keith Ashworth, Vice Chairman
Senator Don W. Ashworth
Senator Jean E. Ford
Senator William J. Raggio
Senator William H. Hernstadt
Senator Sue Wagner

STAFF MEMBERS PRESENT:

Sally Boyes, Committee Secretary

GUEST ASSEMBLYMAN:

Joseph E. Dini, Jr.

SENATE BILL NO. 519:

Increases and speeds compensation of attorneys representing indigents.

Mr. Bob Herman, Attorney, Carson City,stated he has represented several indigents. He stated he felt this increase is needed. A private attorney is appointed when a public defender cannot represent an indigent. This bill would increase the fee involved in a case. As the law now stands, an attorney is paid $20.00 per hour for work outside the court room and $30.00 for work in the court room. These rates are substantially lower than legal fees in the community. In Carson City, the fees usually range from $60.00 to $100.00 per hour. A attorney that is appointed

to an indigent case really takes about one third of the regular fee. If a feloney crime is involved, the law now states there is a $1,000.00 maxium fee. At the rate of $20.00 per hour, that represents 50 hours of work. If the state only allows 50 hours of research on a attempted murder case, there is a high possibility the attorney will not be paid when the case goes to court. This bill would increase the limits from $1,000.00 to $1,500.00 for felonies, and on crimes where the punishment could be death, life imprisonment, it goes from $2,500.00 to $3,500.00. These fees are still very low. The bill is reasonable and should be approved by the committee and hopefully, passed by the legislature.

Senator Wagner asked when the last time these limits were changed. Mr. Herman stated it was in 1977.

Mr. Herman stated the new paragraph added to the bill states the attorney may be paid after the matter has gone through the justice court. Money owing the attorney may be applied for up until the time the matter is remanded to the district court for dispostion. This would eliminate the long time factor for paying an attorney. It would give the attorney some partial compensation about half way through the proceeding.

Senator Raggio asked what the Federal fees were. Mr. Herman stated he did not know but that in Nevada, special prosecutors have the right to negotiate with the counties for fees. He stated he has heard of cases in which a special prosecutor has been paid $20,000.00; to have a defense attorney that is limited very severly in the total amount of time spent on a case, does not seem proper.

Chairman Close stated the judges award in excess of the amount that is allowed by statute. The statute now provides that in the case of extraordinary circumstances, a judge may allow the defense attorney more. With the amendment it reads, with extraordinary circumstances, which include fincial burdens and hardships in excess normally attendant upon the defense of an indigent person or unusually complex novel issues of law or fact are presented, the court may, in its discretion, award what is due. In most cases these limits will stand up; in unusual cases the courts will exceed the limit and that is allowed.

Senator Wagner asked how much time is spent on indigents. Mr. Herman stated in the last six months he has spent about 50% of his time on indigent cases. He felt he lost a lot of money.

Usually the younger attorneys take indigent cases because the more established attorney makes considerable more money and they have clients they must serve. They do not have the time to spend on the indigent case because they are time consuming. He stated in the future he would be more reluctant to take indigent cases because of the time factor and it is financially burdensome. More attorneys would be willing to get involved in indigent cases if the fees were set higher; it would help to eliminate the fear some attorneys have about the private practice they have falling apart while serving on an indigent case.

Senator Wagner asked if there was an option for an attorney to say yes or no when requested to defend an indigent. Mr. Herman stated there is an ethical obligation to take a case unless there is a problem with a conflict or a trial date is pending for the attorney. The reason must be compelling enough for the judge to allow the attorney not to take the case.

Mr.John DeGraff, Attorney, Carson City, stated he has handled many indigent cases. He stated recently he completed a two week trial in an attempted murder case from the prison. The stautory maxium was $1,000.00. The fee went substantially over that even at $20.00 and $30.00 per hour. The court did award an excessive fee but the fee that was award was $1,600.00. That fee is simply not a fair compensation. He felt this bill did not go far enough. He feels there will be an equal protection problem raised some day. So far the inherent powers of the courts have been based on separation of powers; it has not yet been based on equal protection and due process. Should the amounts be raised to sufficient amounts, that challenge would be headed off. He stated most cases that come out of the prison, come out of the statutory contingency fund and that is a state fund, not a county burden. Investigation problems are as burdensome as court appearances. He felt there should not be any difference in the hourly rate. He felt that in a case where the sentence is life without the possibility of parole, and another prosecution is charged which would add five years to a sentence that would never be finished, would compound an attorneys problems. Under the constitution that additional case would have to be defended. If the amounts were raised a little more, maybe the prosecutions would not be iniated quite so quickly. He stated in one case he was paid six months after the case was heard.

Mr. Thomas Ray, Attorney, Carson City, stated attorneys make money by the amount of time spent on a case. When an attorney takes an indigent case, money is lost because of overhead.

Senate Committee on Judiciary
April 20, 1981

SENATE BILL 520:

Sets time limit for bringing certain actions for malpractice and reduces time limit for certain other actions.

Mr. Bob Shriver, Executive Director,Nevada Trial Lawyers, stated this bill would limit the right to bring malpractice suits after four years against attorneys, veterinarians and accountants. The idea is to limit it with the statute for doctors and the providers of health care, under N.R.S. 41A.097. He felt the language used in the limitation of actions against the providers of health care under that statute are stronger than the language used in Section one, sub-section one, line three. He felt the time limit should be four years instead of six.

Senator Wagner asked if the time limit was being shortened on just some of the professions. Mr. Shriver stated that for attorneys there was no real time limit under the law; as for accountants and veterinarians he was not sure.

Senator Hernstadt asked in the event of someone discovering eight years after a surgery is preformed that there is an object inside a person's body, is there any cause of action. Mr. Shriver stated under present law there is none. Senator Hernstadt asked if the time limit applied to the point of discovery or from the time of damage. Mr. Shriver stated it was from the point of either damage or discovery. Mr. Shriver submitted a copy of limitations of actions; see Exhibit C. He stated the revision of the bill is only being asked for attorneys; when the original bill as drafted, all professional groups were put in the bill.

Senator Ford stated there is no representation from the other professional groups involved.

Senator Raggio stated that when this bill was drafted, there was no existing law regarding the other professions; they were all grouped together in this bill.

Mr. Richard Garrod, Farmers Insurance Group, stated he felt this new statute of limitations would make a policy more available. He stated the term used in a case against an attorney is malicious prosecution, not malpractice. He is supporting the bill

Senator Hernstadt asked if any attorneys were insured against malicious prosecution. Mr. Garrod stated he did not know of any, but there were a few veterinarians.

1520

Senate Committee on Judiciary
April 20, 1981

ASSEMBLY BILL 112:

Limits exercise of eminent domain to take land in historic districts for use in mining or related activities.

Assemblyman Joseph E. Dini, District 38, stated there was a considerable amount of descension in regard to development of the Huston Oil and Mineral Mine at Gold Hill. They exercised eminent domain to confiscate four pieces of property in that area. He stated there is a great need for something in the form of A.B. 112 to be iniated this session. A buffer is needed for the people to deal in the eminent domain problem. The Virginia City area is a state historic district under Chapter 384; there are great significant things in relation to the history of Nevada involved in the Virginia City - Gold Hill area. Under a bill passed last session, the county commissioners can establish a historic district by themselves without being state historic districts under that chapter. Permission must come from the commissioners, after a hearing is conducted, before the court can exercise eminent domain. The bill states that the property will be put to a public use, that it is necessary for that public use, and the intended public use will be a public benefit to the community or area in which the real property is situated and not significantly harmful to historic landmarks or features. This is the need of the bill; that these areas will be protected. Mining was the paramount industry in the state of Nevada when the eminent domain law was passed. Since that time gaming and tourism have become the industry of the state. The people need some protection from a company coming in and exercising eminent domain arbitrally. Judge Griffins decision on a hearing on eminent domain stated the inmores position of keeping property, which was argued was of historic value, was intellectually and perhaps morally appealing but the eminent domain law would not allow him to rule in their favor. He feels both sides could operate under the law as long as there is a buffer between the mining companies and eminent domain law.

Chairman Close asked who else was being considered in this bill. Assemblyman Dini stated sugar beet companies also used the eminate domain law. He stated there are 17 companies that could excerise the law, but mining and sugar beets are the two primary ones.

Senator Hernstadt asked why mining companies needed eminent domain law in the first place. He asked why the eminent domain law could not be repelled. Assemblyman Dini stated there is a

necessity for eminent domain for mining although the bill is here to try to put a buffer in it. Mining needs eminent domain because when large, open pit mines are being developed, many thousands of acres are involved. Someone could have 10 acres in the middle of the development; there being no way that person can be bought out, eminent domain would assure development of that mine.

Senator Wagner asked for the definition of public use. Assemblyman Dini stated court cases gave that definition. He stated in the minutes of the Assembly meeting on this, there was a great deal of testimony on the intent and concept of public use. The original bill had the authority of deciding about historic sites in the hands of the Comstock Historic District; however, there was a fear that would be one-sided, so the amendment was added to this bill.

Senator Raggio stated that in the original bill, A.B. 112, 37.010, points out the areas where eminent domain may be excerised and states the public uses.

Mr. Guy Rocha, State Archivist, entered a study of mining law, eminent domain and the conflicting public use and limitations of the police power, see Exhibit D, and a letter to Chairman Stewart, see Exhibit E. He stated the value of historic sites in regard to the movie industry and the value of Nevada's history to the tourism in the state. In regard to the sugar beet industry, they received the right of eminent domain in 1911. At that time the Nevada Sugar Company of Fallon, incorporated in the state; at that time a director in the corporation became a Churchhill County Senator; another investor in the corporation became a Churchhill County Assemblymen. The question of conflict of interest at that time was seldom raised. He felt the ememinent domain law was passed at time in order to give a concession to the County legislation, as well as the people on the Newlands Project. It was considered public use for a very small group of people. He stated in his opinion it was an abuse of the public use concept.

Senator Ford asked if there were any cities that could determine a historic site. Mr. Rocha stated his understanding is the county commissioners are the ones that make that determination. He said there was no current action that he knew of for any decision to be made in regard to another historic site.

Senator Hernstadt asked what other states permitted eminent domain for mining companies. Mr. Rocha stated that most other

western states permit eminent domain; California ruled that eminent domain was in support of private industry. Most states have eminent domain laws. Utah and Nevada have very liberal laws. He stated open pit mining has the biggest effect on potential historic sites.

Senator Hernstadt asked if eminent domain should be limited to letting mining companies handle the problem themselves. Mr. Rocha stated there are people who are not mining companies who would exploit a situation.

Mr. Richard Harris, Mining Attorney, Reno, stated he represented certain land owners in the Gold Hill area and feels he is in a unique position to explain the conflict that went on between land owners and Houston Oil and Mineral.

Senator Ford asked if he was for or against the bill. Mr. Harris stated he had mixed feelings on the bill. He stated he would give testimony which suggests the existing law is fine; he would like to see the eminent domain law remain as it is. If there need be amendment to the law, he felt the industry could live with it. He stated a lode mining claim is 600 feet wide and 1,500 feet long. To create a claim a location monument is placed and notification of claim is posted. Later the claim is marked with posts at the corners and later on the side centers, which is the practice in Nevada. A lode claim is 20.66 acres and a placer claim is 20 acres exactly. He illustrated on the board how claims can over lap one another and when a monument is placed incorrectly, the entire claim is void. Since there are people that read records in the court house, they make use of those fractions of land that are over lapped and contact the owner of the claim and offer the fraction of land that is in question for tremendous sums of money. Nevada having an eminent domain law, allows for people to purchase the fractions involved for a more reasonable price.

Senator Ford asked if Nevada law allowed fractions to exist in mining claim. Mr. Harris stated there is a mining law of 1872, written by Senator William Stewart, it is supplemented by state laws and most of the volume of mining law comes from the court cases that have been decided over the last 109 years. The Federal regulation of mining laws would have to alter the situation in order for these fractions to be corrected. Nevada law only supplements Federal law.

Senator Raggio asked if Nevada law provided the right of immediate entry in a case like that. Mr. Harris replied it was

his understanding if a compelling need is shown for immediate access, a court could allow immediate entry so as not to impede a mining operation.

Senator Hernstadt asked if the patents were filed in a Federal facility. Mr. Harris stated a unpatented claim is what he has been discussing. A patented claim is a grant of full fee ownership from the Federal Government. The records are posted in two places; the County Recorder and the state office of the Bureau of Land Management.

Chairman Close asked the difference between a load claim and a placer claim. Mr. Harris stated a load claim is a zone or belt of mineralization surrounded on either side by barren post rock. There are seven posts for a load claim to mark it. A placer claim is anything but a load and is marked by one post. Mr. Harris felt there will be an increase in the placer mine operations in Nevada because of trace gold.

Senator Hernstadt asked why is it necessary that homes be condemed. Mr. Harris stated the activities of HOuston Oil and Minerals was reprehensible. A foriegn corporation came in and was uncaring of attitudes and property rights of the people and it behaved it self very badly. Mr. Harris represented three groups of homeowners against Houston Oil and Minerals. Before taking the commission, Mr. Harris spoke with various clients; they encouraged his efforts because their opinion was Houston Oil and Minerals was operating outside the bounds of good taste. There was questions in regard to undertaking an operation of that magnitude in an area that was inhabited. One condemnation action was filed to acquire a vacant two and one half acre parcel. Houston Oil needed this parcel to dispose of over burden. The assertion was made there would be no condemnation and there was. At the time the eminent domain action was filed, the owners of that parcel sought legal counsel in regard to that situation. The owners of that parcel settled for a sum in excess of three quarters of a million dollars and Houston Oil became a good neighbor. He stated in his knowledge any eminent domain case that was excerised for mining purposes, the system stepped in and protected the people. He felt in some situations where eminent domain has been excerised it is only because it was necessary; when it is excerised because it is not necessary, the system itself protects the people who may be abused in the situation. He stated that is why he feels the amendment is really not necessary; the mining industry can live with it.

Senator Keith Ashworth stated the abuse of this law would be in the future. He felt there should be some control on the creation of historic sites. Mr. Harris stated mining companies want to have good working conditions with the people of a state, but this bill would create a situation wherein mining companies would tend to oppose the creation of new historic districts. Most historic districts are in fact in the site of old mining camps. Gold valued at $700.00 per ounce is going to reopen many old mining camps. By reopening these mines, the companies are going to appear as if they are anti-historic and insensitive to the history of Nevada.

Senator Hernstadt asked if it would be better to rewrite the eminent domain statute as applying to mining, only to apply to this kind of claim situation, and exclude from eminent domain owner-occupied homes. Mr. Harris stated the Houston - Storey County confrontation was not the fact that there was a condemnation of a owner - occupied home, it was a condemnation of a lot. He said there was a need to be careful about circumscribing mining to too many limitations and regulations; the state of Nevada is a focal point of exploration and development in the entire world. There is a great deal of foriegn money in the state. These people come to the state because there is a minimun of environmental and technical restrictions on operations of mining. The more hurdles that are put in the way, the more reluctance there will be for people to invest in Nevada mining.

Senator Raggio stated what is to prevent an unscrupulous mining company from coming into the state and using the eminent domain law if this type of legislation is not passed. Mr. Harris stated the lesson has been made from the Houston Oil and Mineral situation that an operation cannot be handled with arrogance and aggressiveness.

Senator Wagner asked if the foriegn money that was coming into the state was looking at other states as well as Nevada. Mr. Harris replied there were several other states that those companies could put their money.

Mr. Bob Warren, Executive Secretary, Nevada Mining Association, representing the 60 larger mining corporations that are doing business in the state of Nevada, stated he has presented testimony in the Assembly for six hours. Copies of his testimony are attached, see Exhibit F, Exhibit G and Exhibit H. He stated that the bill was killed twice in Assembly; the first reprint of the bill had a vote and seven out of eleven votes were to kill the bill. The chairman did not accept the motion to kill the bill and felt there should be further consideration of the bill.

Mrs. Cafferata drafted an amendment to the bill for further consideration. That amendment passed with a seven to three vote in favor of the amendment. For further testimony, see the exhibits.

Mr. Larry Wahrenbrock, private planning consultant, stated he was a member of the committee that drafted the ordinance in reference to obtaining the special use permit for miners for operations in Lyon County. He felt that the issue of the matter is the power of a private industry to condem or confiscate private property for private gain. He felt the mining industry had the right under the present law, to take property for most anything needed. He felt the industries power of eminent domain could be totally eliminated. He was in agreement with previous testimony in regard to the tempering of what mining companies use the power of eminent domain for. He felt the scope of eminent domain should be limited.

Mr. Roger Jefferson, Attorney, testifying for the Mining Association, stated he was opposed to A.B. 112 as introduced and as amended by any proposal. He stated that land acquired after the passage of a zoning ordinance, the zoning ordinance would probably control. When a place for mining is being looked at, the historical character of that location must be looked at. If the location is eligible for listing in the National Historic Register, as are most of the mining towns, that is another factor in determining the historic value of the location. He stated he felt in section two of the amendment, there was a probable impermissible separation of powers.

Ms Diane Campbell, Nevada Miners and Prospectors Association, stated the association opposes the bill and they would like to see it killed. Should the bill be considered further, the association would like for the bill to read " notification to the county commissioner" instead of "permission from the county commissioners." This would give it a court opportunity to resolved.

Mr. M. Douglas Miller stated he opposes the bill. He felt the bill legislates for 15 people and not for the 15,000 people that live in Lyon County. He stated three companies have left Lyon County because of this ordinance. They cannot live with it.

Mr. Robert Simpson, Chairman of Comstock Historic District, stated the concern over proliferation over historic districts in

the state requires a great deal of authenticity of a need to get a historic district going. He felt there should be a buffer in regard to saving historic structures and districts without going through litigation to maintain them. The society felt there are some structures that are vulnerable if the eminent domain is excerised should a rich vein of ore be found going through a historic district. He felt the buffer should be in the bill.

Mr. Jim Schriver, Gold Hill resident, stated he is opposed to this legislation. He represents the Comstock Tunnel and Drainage Company and the Sutto Tunnel Coalition. A map of Gold Hill was shown; about 90% of the property is owned by mining interests. He voiced his opposition to any bill that would weaken the mining industry, regardless of what it could be. He felt that N.R.S. 384 adaquately protects historic landmarks.

ASSEMBLY CONCURRENT RESOLUTION NO. 10:

Urges district attorneys of Nevada's more populous counties to acquire staff necessary to presecute properly crimes involving mobile homes.

No action was taken on this bill.

There being no further business, the meeting adjourned at 11:00 a.m.

Respectfully submitted by:

Sally Boyes

Sally Boyes, Secretary

APPROVED BY:

Melvin D. Close

Senator Melvin D. Close, Chairman

DATE: April 30, 1981

EXHIBIT A

SENATE AGENDA

COMMITTEE MEETINGS

Committee on JUDICIARY, Room 213.

Day Monday, Date April 20, Time 8:00 a.m.

S. B. No. 519--Increases and speeds compensation of attorneys representing indigents.

S. B. No. 520--Sets time limit for bringing certain actions for malpractice and reduces time limit for certain other actions.

A. B. No. 112--Limits exercise of eminent domain to take land in historic districts for use in mining or related activities.

A. C. R. No. 10--Urges district attorneys of Nevada's more populous counties to acquire staff necessary to prosecute properly crimes involving mobile homes.

EXHIBIT B

ATTENDANCE ROSTER FOR COMMITTEE MEETINGS

SENATE COMMITTEE ON JUDICIARY

DATE: April 20, 1981

PLEASE PRINT NAME	PLEASE PRINT ORGANIZATION & ADDRESS	PLEASE PRINT TELEPHONE
Scott Bodem	A.G.s office	4170
Robert Simpson	Comstock Historic District Commission	786-4210
[illegible]	Attorney	883-[illegible]
Bob [illegible]	NTLA	883-8577
John DeGraff	Atty	882-9108
Dick Wells	[illegible]	[illegible]-[illegible]76
[illegible]	[illegible]	883-[illegible]
Tom Maxwell	Sutro Tunnel Coalition	882-2145
Thomas Ray	Atty	883-0716
Roger Jeppson	[illegible] & Jeppson	329-6131
[illegible] Campbell	[illegible]	273-2173
Larry Wanderbrock	Citizen	847-0319
[illegible] Louis Roche	State County & Municipal Archives	885-5210
Dick [illegible]	[illegible]	882-1890
Julie [illegible]	Inter[illegible]	[illegible]
[illegible]	Att-[illegible]	[illegible]
RICHARD HARRIS	Mining Attorney, Reno	825-0650
Jim Scharmer	Structural Scientist Property Owner - Gold Hill	882-2145
[illegible]	[illegible]	[illegible]
[illegible] Carroll	Citizen	

1529

request for a hearing by a screening panel until the screening panel notifies the parties in writing of its findings.
(Added to NRS by 1975, 411)

41A.090 Provision of expert witness for successful claimant; distribution of copies of complaint and findings of screening panel.

1. In any case where a screening panel determines, by a majority vote of the members present who have sat on all hearings pertaining to the case, that the acts complained of were or reasonably might constitute professional negligence, and the claimant was or may have been injured thereby, or if there is an equal division of opinion of a panel on either or both of these issues, the panel, its members, the Nevada State Medical Association and, if the screening panel includes hospital administrators, the Nevada Hospital Association shall provide a suitable witness who shall be a physician qualified in the field of medicine involved who shall, upon payment of a reasonable fee, consult and testify on behalf of the claimant to the same effect as if the physician had been employed originally by the claimant. If no suitable witness is available in the area in which the trial is held, the Nevada State Medical Association, and if the screening panel includes hospital administrators, the Nevada Hospital Association shall cooperate in providing a suitable witness from elsewhere.

2. Copies of the original complaint and of the findings of each screening panel with regard to each matter considered by the panel must be forwarded to:

(a) The board of medical examiners of the State of Nevada;

(b) The county medical society of the county in which the alleged malpractice occurred;

(c) If the screening panel includes nurses, the state board of nursing;

(d) The attorney general of the State of Nevada; and

(e) The commissioner of insurance.

(Added to NRS by 1975, 411; A 1977, 996; 1979, 634)

41A.095 Provisions of open meeting law inapplicable. The provisions of chapter 241 of NRS do not apply to any meeting of a screening panel.
(Added to NRS by 1977, 997)

LIMITATION OF ACTIONS

41A.097 Commencement of medical malpractice actions: Limitation.

1. Except as provided in subsection 2, an action for injury or death against a provider of health care shall not be commenced more than 4 years after the date of injury or 2 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury, whichever occurs first, for:

(a) Injury to or wrongful death of a person, based upon alleged professional negligence of the provider of health care;

(b) Injury to or wrongful death of a person from professional services rendered without consent; or

(c) Injury to or wrongful death of a person from error or omission in practice by the provider of health care.

2. This time limitation is tolled for any period during which the provider of health care has concealed any act, error or omission upon which such action is based and which is known or through the use of reasonable diligence should have been known to him.

3. For purposes of this section, the parent, guardian or legal custodian of any minor child is responsible for exercising reasonable judgment in determining whether to prosecute any cause of action limited by subsection 1. If the parent, guardian or custodian fails to commence an action on behalf of such child within the prescribed period of limitations, such child shall not be permitted to bring an action based on the same alleged injury against any provider of health care upon the removal of his disability, except that in the case of:

(a) Brain damage or birth defect, the period of limitation is extended until the child attains 10 years of age.

(b) Sterility, the period of limitation is extended until 2 years after the child discovers the injury.

4. As used in this section, "provider of health care" means a physician licensed under chapter 630 or 633 of NRS, dentist, registered nurse, dispensing optician, optometrist, registered physical therapist, podiatrist, licensed psychologist, chiropractor, doctor of traditional Oriental medicine in any form, medical laboratory director or technician, or a licensed hospital as the employer of any such person.

(Added to NRS by 1971, 366; A 1975, 407; 1977, 857, 954, 1082)—(Substituted in revision for NRS 11.400)

EVIDENCE

41A.100 Expert testimony required; exceptions; rebuttable presumption of negligence.

1. Liability for personal injury or death shall not be imposed upon any provider of medical care based on alleged negligence in the performance of such care unless evidence consisting of expert medical testimony, material from recognized medical texts or treatises or the regulations of the licensed health care facility wherein such alleged negligence occurred is presented to demonstrate the alleged deviation from the accepted standard of care in the specific circumstances of the case and to prove causation of the alleged personal injury or death, except that such evidence consisting of expert medical testimony, text or treatise material or facility regulations is not required and a rebuttable presumption that the personal injury or death was cause by negligence arises where evidence is presented that the personal injury or death occurred in any one or more of the following circumstances:

EXHIBIT D

NEVADA MINING LAW, EMINENT DOMAIN, AND HISTORIC PRESERVATION: A STUDY IN CONFLICTING PUBLIC USE AND THE LIMITATIONS OF THE POLICE POWER

by

Guy Louis Rocha

Historic Preservation 601
Professor Don Fowler
May 15, 1980

NEVADA MINING LAW, EMINENT DOMAIN, AND HISTORIC PRESERVATION: A STUDY IN CONFLICTING PUBLIC USE AND THE LIMITATIONS OF THE POLICE POWER

"Mining is the greatest of the industrial pursuits in this state," wrote Thomas Porter Hawley, Nevada Supreme Court Chief Justice, in October 1876. "All other interests are subservient to it. Our mountains are almost barren of timber, and our valley lands could never be made profitable for agricultural purposes except for the fact of a home market having been created by the mining developments in different sections of the state." Hawley went on to emphasize that "the mining and milling interests give employment to many men, and the benefits derived from this business are distributed as much, and sometimes more, among the laboring class than with the owners of the mines and mills."[1]

While Hawley overstated his argument, mining was certainly a "paramount industry" in Nevada during his tenure on the State Supreme Court (1872-1890), and later in the U.S. Circuit Court (1890-1906). His opinion in the case of Dayton Gold and Silver Mining Company v. W. M. Seawell had upheld the constitutionality of the state legislature's act granting the right of eminent domain to mining enterprises in 1875, and thus established a legal precedent in Nevada jurisprudence. His decision was later sustained in four Nevada Supreme Court cases (Hawley ruling in the 1880 case), a U.S. Circuit Court case (Hawley ruling in 1893), and bolstered by additional legislation. Moreover, Hawley's decisions influenced the legislatures and courts of other western states (Utah and Montana in particular) whereby eminent domain was recognized as the basis for a legitimate taking

in the area of mining.[2]

In an opinion by Justice Oliver Wendell Holmes, the U.S. Supreme Court, in 1906, upheld the states' right to grant the power of eminent domain to mining when classified as a "paramount industry" and "public use." Interestingly enough, most of the legislation and case law favoring the mining industry's right to condemnation in Nevada, and other mining states, existed before the first historic preservation bill, the Antiquities Act of 1906, had been passed by Congress.[3]

Today in 1980, historic preservation interests and the mining industry find themselves pursuing their respective objectives on the famous Comstock Lode. In 1961, the Secretary of the Interior designated the Comstock a National Historic Landmark under the auspices of the Historic Sites Act of 1935, and eight years later the Nevada Legislature passed the Virginia City Historic District Act (NRS. 384.010) which established an historic commission to create and administer the proposed district. Section 3 of the 1969 Act justified such regulation as a legitimate exercise of the police power:

> It is hearby declared to be the public policy of the State of Nevada to promote the educational, cultural, economic and general welfare and safety of the public through the preservation and protection of structures, sites and areas of historic interest and scenic beauty, through the maintenance of such landmarks in the history of architecture, and the history of the district, state and nation, and through the development of appropriate settings for such structures, sites and district.[4]

No major challenge to the historic integrity of the Comstock had been posed until some five years ago when mining experienced a rebirth in Gold Canyon as a result of the increasing market value of silver and gold. The last period of active mining which resulted in any

significant production of these precious metals occurred prior to World War II. War-time restrictions on precious metal mining halted Comstock operations, and post-war inflation precluded a return to large-scale production. In the intervening years, a lucrative tourist industry has emerged on the Comstock which today supports most residents of Storey and northern Lyon counties. With the coming of Houston Oil & Mineral, and more specifically its open-pit operations, a tourist-based economy, enhanced and protected to some degree by Historic Landmark and District status, is now faced with a serious challenge.[5]

The challenge is a provocative one. On the one hand, the Virginia City Historic District Act, section 18.5, had made substantial allowances for any renewed mining activity on the Comstock:

> 1. The commission shall issue a certificate of appropriateness without a hearing /Emphasis mine/ to the owner of any valid mining claim upon application by such owner for the removal of any structure in the historic district which is constructed on such mining claim if:
>
> (a) Such applicant is prepared within a reasonable time to begin production of such mine or to use such property for valid mining purposes; and
>
> (b) Such structure will interfere with such production or use.
>
> 2. Cost of moving a structure pursuant to this section shall be paid by the owner thereof to a site approved and provided by the commission within the district. If the commission does not provide a site for such structure within a reasonable time such structure may be demolished upon 5 days' written notice to the commission.[6]

As there had been little precedent for open-pit operations on the Comstock prior to 1969, there is some question whether the Nevada legislators had taken into consideration the effects of open-pit mining on the proposed district. This section of the law may well

have been drafted with the more traditional underground mining in mind. The Virginia City Historic District Act (renamed the Comstock Historic District Act) was amended in 1979, and section 18.5 was repealed. This legislative action appears to have been a direct response to Houston's open-pit mine in Gold Hill which began operation in 1978.[7]

On the other hand, even if the historic commission exercised its stauatory authority under section 10 of the Comstock Historic District Act, and refused to issue a certificate of appropriateness to Houston Oil & Mineral--or any mining company--its ruling could easily be circumvented. Nevada's one hundred year-old mining eminent domain law would come into play, and could be invoked by a mining firm seeking to condemn property in the district. Initially, the historic commission could not condemn any property in question in the cause of historic preservation as section 19 of the Virginia City Historic District Act stated that "the commission shall have no power of eminent domain."[8] This section as well was repealed in 1979.

At the same time, the mining interests could take the Comstock Historic District Commission to court if denied a certificate of appropriateness on the grounds that such denial constituted a taking. Using Justice Oliver Wendell Holmes' ruling in Pennsylvania Coal Co. v. Mahon, a case could be made that section 10 of the Comstock Historic District Act was unconstitutional as it represented undue regulation (inverse condemnation) of the property of a mining company. If the mining company bringing suit could effectively demonstrate substantial economic injury as a result of the exercise of the police powers vested

in the historic commission, given the U.S. Supreme Court precedent set by Holmes in 1922, the failure to issue a certificate of appropriateness could very well constitute a taking.[9]

As outlined above, there can be little question that the Comstock Historic District and mining represent two conflicting public uses. The police powers established to protect the historical and architectural integrity of the Comstock are limited in their application to the mining industry. Today, the bottom line appears to be that a mining company can operate anywhere in the district as long as it justly compensates property owners whose land has been condemned. The question as to whether mining in 1980 is still a "paramount industry" in Nevada is only now beginning to be asked.

Court actions by concerned Comstock residents against Houston Oil & Mineral have brought little success. For example, Dorothy and Fred Inmoor of Gold Hill filed suit against Houston after four parcels of land next to the company's open-pit mine were condemned on October 22, 1979 under Nevada's mining eminent domain law. District Judge Mike Griffen ruled that the Inmoor's position on keeping their property, which they argued was of historic value, was "intellectually and perhaps even morally appealing," but the eminent domain law would not allow him to rule in their favor."[10]

The Inmoor's counsel, Robert Perry, planned to challenge the constitutionality of the law on the grounds that it "allows a private company to take property of individuals for the sake of their own profit." According to Perry, the precedents and case law established in Dayton Gold and Silver Mining Company v. Seawell (1876), Overman Silver Mining

Company v. Corcoran (1880), Douglas v. Byrnes (1893), The Goldfield Consolidated Milling and Transportation Company v. The Old Sandstorm Annex Gold Mining Company (1915), Schrader v. Third Judicial District Court of the State of Nevada (1937), and Standard Slag Co. v. Fifth Judicial Court of the State of Nevada (1943) could be overturned by demonstrating that mining was a "paramount industry" in Nevada when the cases were heard, but that economic circumstances have changed over the last thirty-five years whereby tourism has replaced mining as the #1 industry and employer in the state. Under current conditions, mining should not be classified as a public use, and Nevada's mining eminent domain law should be declared unconstitutional as a violation of the Fifth Amendment and Article I, Section 8, of the Nevada Constitution.[11]

Perry also asserted that there is a body of persuasive authority which argues that eminent domain cannot be employed in behalf of mining any more than any other form of private business. He cited in particular Gallup American Coal Co. v. Gallup Southwestern Coal Co., 39 NM 344 (1935),[12] and Sutter County v. Nichols, 152 Cal. 688 (1908).

In Sutter v. Nichols, the court said:

> The production of sufficient gold to maintain the gold standard may be a matter of public importance, and it may be within the power of Congress to encourage it by appropriate legislation. It probably has the same power with regard to any other industry to increase the wealth of the nation. It cannot be admitted, however, that the mining of gold to be applied wholly to the private use of the miner, to whatever extent it may increase the general output, is a public purpose, in behalf of which the power of eminent domain may be resorted to, or for which the private property of others may be taken, or its injury lawfully authorized.

While this California Supreme Court decision had been cited in

Goldfield Con. v. O.S.A Co. (1915), its implications in regards Nevada's mining eminent domain law were apparently disregarded as the points of law centered on whether or not mining was a "paramount industry" in Nevada, and not in the nation. If one could clearly demonstrate that mining was no longer a "paramount industry" in contemporary Nevada, then Sutter County v. Nichols could be cited aspersuasive authority to the qualified value of mining, and especially gold mining, in the nation's economy.[13]

The New Mexico Supreme Court in Gallup American Coal Co. v. Gallup Southwestern Coal Co. accepted and promulgated the orthodox--as opposed to the liberal doctrine--of public use, i.e. the public must benefit directly by a condemnation action and any right of condemnation granted to private industry must demonstrate such. The state high court ruled:

> Here we are concerned with coal mining. As an essential or paramount industry, in its importance to the existence and functioning of the state and to the livelihood of the people, it does not seem to us to belong in a class with metal mining in Nevada, as appraised in Dayton Mining Co. v. Seawell, supra, or with irrigation in Utah or New Mexico, as appraised in Nash v. Clark, supra, and in City of Albuquerque v. Garcia, 17 N.M. 445, 130 P. 118, and other New Mexico cases. We consider it rather in a class with the timber or lumbering industry which was involved in the Threlkeld Case /36 N.M. 350, 15 P.(2d) 671/. We are not moved to accept the "liberal" view to an extent that it would embrace this industry.

The questions that could come before the courts today in regards Nevada's mining eminent domain law are, what doctrine should apply to condemnation given the fact that mining is no longer a "paramount" industry in the state? Should the body of mining eminent domain case law based upon the liberal doctrine of public use be upheld if mining no longer plays

a major role in Nevada's overall economy?[14]

Provocative questions to say the least, and especially since the last case to be heard in the Nevada Supreme Court contesting the state's mining eminent domain law, Standard Slag Co. v. Fifth Judicial Court (1943), resulted in a ruling that "a reasonable, fair, just, broad and liberal view should be taken in interpreting provisions of law authorizing the exercise of the power of eminent domain for mining purposes." Of particular importance to the Comstock Historic District, and the future of open-pit mining within its boundaries, is another point of law delineated in the court's decision: "Authority to condemn in order to facilitate and expedite extraction of ore by the means of the open-pit method is within the statute authorizing exercise of power of eminent domain for 'all mining purposes'." Unfortunately, the Inmoors settled out of court in their trespassing suit against Houston Oil & Mineral, and attorney Perry has for the time being filed away his legal brief challenging the constitutionality of Nevada's one hundred year-old mining eminent domain law.[15]

While forces throughout the state are gathering to challenge the 1875 law authorizing mining the power of eminent domain in the 1981 biennial legislative session--the State Democratic Party has passed a platform plank at their May 1980 convention calling for an amendment to the eminent domain law which would protect officially designated historic properties from condemnation--Houston Oil & Mineral continues to buy up and condemn land and historic buildings in the district. Much of what remains of Gold Hill is in the direct path of pit expansion. Houston has agreed to pay the costs of moving impacted historic structures--

the oldest buildings on the Comstock are to be found in Gold Hill, the Gold Hill Hotel dating back to 1859. Just the same, if Houston is allowed to expand the pit as proposed, Gold Hill as a representative historic mining community in the Comstock Historic District will for all practical purposed be obliterated.[16]

At the same time, Houston is currently in the process of opening a twenty-acre pit near Silver City. Bonnie Brown, a spokeswoman for homeowners in the Lyon County town, has in a recent statement to the press cogently expressed the community's general feeling of impotence in the struggle between the mining industry and historic preservation interests over the Comstock:

> We've all seen what's happened in Gold Hill. Houston bought seven houses and will eventually get the highway [State Highway 17 at Greiner's Bend]. So Gold Hill is gone.
>
> Both communities are national historical landmarks, but the mining laws seem to override that. They could move the buildings to extend the pit. The historical district laws tell you how to put on your windows and doors but they can let someone destroy the whole community.[17]

Implicitly Ms. Brown has posed a major question that is now before those persons concerned with the future of the Comstock. Just what is the more necessary public use: mining or historic preservation? Justice Benjamin W. Coleman addressed the concept of the "more necessary public use" in Goldfield Con. v. O.S.A. Co. (1915) when he discussed the proposed condemnation of a patented mining claim: "If the land is already appropriated to a public use, is the use to which it is sought to apply it a more necessary public use?" The same question could be applicable to the conflicting public uses represented in the Comstock Historic District Act, and

its associated police powers, and Nevada's mining eminent domain law. The mining interests will have the upper hand on the Comstock and elsewhere in the state unless the 1875 law is amended to recognize historic preservation as a "more necessary public use," repealed, or declared unconstitutional in a court of law on the grounds that mining is no longer a "paramount industry" and public use in Nevada.[18]

The fate of the Comstock Lode hangs precariously in the balance. A thriving tourist industry, an infinitely renewable resource, could be inalterably damaged if the historic and architectural integrity of the district is compromised much further. In the end, the credibility of historic preservation efforts on the Comstock over the last nineteen years may be in serious jeopardy.[19]

NOTES

1 Dayton Gold and Silver Mining Company v. W. M. Seawell, 11 Nev. 394 (October 1876).

2 Nichols on Eminent Domain, 3rd ed., Vol. 2A (7.624-Mines and mining); On March 3, 1866, the Nevada Legislature passed a law entitled "An Act to provide for the condemnation of real estate and other property for mining purposes." Its relation to the 1875 law is not known, as the first two Nevada Supreme Court cases in 1876 and 1880 addressed the constitutionality of the latter law, Statutes of Nevada 1866, 196; Statutes of Nevada 1875, 111. Note: No mention of mining as a public use in 1866 Statutes.

3 Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527 (February 1906).

4 Statutes of Nevada 1969, 1635; The National Register of Historic Places (Washington, D.C.: U.S. Government Printing Office, 1976), p. 446.

5 Rose Anne DeCristoforo, "Boom tastes bitter to Comstock folk," Las Vegas Review-Journal ("The Nevadan"), December 2, 1979, 30J-31J.

6 Statutes of Nevada 1969, 1639.

7 Statutes of Nevada 1979, 638.

8 Statutes of Nevada 1969, 1639; Statutes of Nevada 1979, 642.

9 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393.

10 Las Vegas Review-Journal, December 2, 1979, 31J.

11 Ibid.; Dayton Gold and Silver Mining Company v. W. M. Seawell, 11 Nev. 394; Overman Silver Mining Company v. Philip Corcoran, 15 Nev. 147; Douglas v. Byrnes, 64 Fed. 45; The Goldfield Consolidated Milling and Transportation Company v. The Old Sandstorm Annex Gold Mining Company, 38 Nev. 426; E. J. Schrader v. Third Judicial District Court of the State of Nevada, 58 Nev. 188; Standard Slag Co. v. Fifth Judicial District Court of the State of Nevada, 62 Nev. 113; telephone conversation with attorney Robert Perry, May 11, 1980. It should be noted that even with the Comstock's recent mining boom, tourism appears to still rank as the #1 industry and employer in Storey and northern Lyon counties.

12 Telephone conversation, Robert Perry, May 11, 1980.

13 Sutter County v. Nichols, 152 Cal. 688, 93 P. 872; Goldfield Con. v. O.S.A. Co., 38 Nev. 426.

14 Gallup American Coal Co. v. Gallup Southwestern Coal Co., 39 N.M. 344, 47 P.2d 414.

15 Telephone conversation, Robert Perry, May 11, 1980.

16 "Storey County going to court over Gold Hill mining dispute," Reno Evening Gazette, November 21, 1979, p. 21; "Nevada Democratic Party Platform," May 1980, mineral resources, p. 9.

17 "Silver City battles the miners," Nevada State Journal, March 15, 1980, p. 27.

18 Thomas P. Erwin, "Miners must have the power of condemnation: Nation's welfare at stake," Nevada State Journal, March 9, 1980, p. 5.

19 A HAER survey of the Comstock Historic District will be conducted this summer (1980) which, when completed, will hopefully strengthen the position of the historic preservation interests in their fight to preserve the Comstock.

EXHIBIT E

NEVADA STATE LIBRARY

Capitol Complex
Carson City, Nevada 89710

ROBERT LIST
Governor
JOSEPH J. ANDERSON
State Librarian

February 23, 1981

Public Services Division Director
885-5165
Reference/Documents Information
885-5165
State, County and Municipal Archives
885-5210

Honorable Janson F. Stewart
Chairman, Assembly Judiciary Committee
Nevada State Legislature, Room 238
Carson City, NV. 89710

Dear Chairman Stewart:

I want to thank you for the opportunity to respond to the testimony associated with AB 112 subsequent to my formal and informal statements before your committee.

It was stated by one of the attorneys for the mining interests, I do not recall the gentleman's name, that he had not established whether Utah mining eminent domain law preceded Nevada mining eminent domain law or vice-versa. That point of information was established in Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527 (1906). I quote: "The legislature of Utah adopted the Nevada statute after it had been held constitutional by the supreme court of Nevada /1876/."

From all indications, Nevada, was the first state in the Union to grant the mining industry the right of eminent domain (1875). That act, and subsequent case law upholding that act--see enclosed paper on "Nevada Mining Law, Eminent Domain, and Historic Preservation"--has been the precedent for most, if not all, subsequent mining eminent domain legislation in the country. It should be pointed out that Justice Thomas Porter Hawley ruled in the first three cases contesting the state's mining eminent domain law, 1876, 1880, and 1893. His strong ties to the mining interests on the Comstock and elsewhere can be documented. It is also important to note that the language of the current eminent domain statute defines mining in Nevada as a "paramount industry to the state," a distinction the industry can no longer justifiably claim in 1981, or for the last twenty-five years for that matter. The U.S. Supreme Court ruling by Oliver Wendell Holmes upholding the constitutionality of the Utah mining eminent domain law in 1906 was promulgated at a time when mining was indeed a "paramount industry" in the states with such laws. A case can be made in theory that Strickley v. Highland Boy Gold Mining Co. is "old" law, and does not address much changed circumstances seventy- five years later.

One final statement in line with this argument is in order. Whether or not the law is constitutional or unconstitutional, the Nevada Legislature has the final prerogative in determining

if the law should stand, be amended, or repealed. Justice Hawley recognized this point in his opinion in Dayton Gold and Silver Mining Company v. W. M. Seawell, 11 Nev. 394 (October 1876). I quote from the final paragraph of Hawley's opinion:

> We are of opinion that the present law can be enforced so as to prevent its being used as an instrument of oppression to any one. But if, in its practical operations, it is found to be incompatible with a just preservation of the rights of individuals in private property, it will be the duty of the legislature to repeal the act, and to that tribunal instead of this must the argument of justice be made. (Emphasis mine).

Two other points of information I would like to bring to the committee's attention. First, in regards the history of "open-pit" mining in Nevada and elsewhere. Open-pit mining as we know it today is a relatively recent technological advancement in the mining of precious metals, contrary to the statement of one of the mining officials testifying at the hearing. This technology dates back some fifty years or so, and its introduction into the state led to a challenge of Nevada's mining eminent domain law. The case, Standard Slag Co. V. Fifth Judicial District Court of the State of Nevada, 62 Nev. 113, (1943), dealt with an open-pit operation in Nye County which dated back to December 1936. Chief Justice Orr ruled in favor of the open-pit operation, but it is important to note the point of law made by Orr on the new technology -- quoted below -- as well as the fact that mining still had "paramount industry" status in 1943 using gross revenue as a yardstick: Justice Orr:

> The phrase "all mining purposes," as used in statute authorizing exercise of powers of eminent domain in mining operation, enlarged scope of meaning of statute beyond specific purposes mentioned and was broad enough to include mining activities prosecuted by open-pit method, although such method was unknown at time statute was enacted. Comp.Laws, sec. 9163, subd. 6. (Emphasis mine).

The final point of information concerns the right of eminent domain to "Pipe lines of beet sugar industry." As you will remember, this peculiarity was brought up during the hearing. In my research of Nevada's eminent domain statute, I discovered that right of eminent domain was granted the sugar beet industry in 1911 when the Civil Practice Act was amended by Assembly Bill No. 70. At this time, the Nevada Sugar Company of Fallon had been

incorporated in the State of Nevada (March 2, 1910). Thomas Dolph, a director in the corporation who had pledged between $5,000. and $10,000. to the construction and operation of a plant outside of Fallon, was elected Churchill County Senator in November 1910. W. H. Williams, who had subscribed some $1,000. to the Nevada Sugar Company, was elected Churchill County Assemblyman in the same election. The venture was well under way by the time the Nevada Legislature convened in January 1911. While a petition was sent to the Legislature asking that a state bounty be paid on Nevada sugar, apparently no action was taken on the state bounty petition. But, it is my opinion, that as a concession to the Churchill County legislative delegation, Dolph and Williams, who had a vested interest in sugar beet cultivation through their direct association with the Nevada Sugar Company--and the residents of the Newlands Project, "pipe lines for the purpose of conducting any and all liquids connected with the manufacture of beet sugar" were considered a "public use" and granted eminent domain status in statute.

It is also my opinion that granting the sugar beet industry the right of eminent domain in the manner outlined above is an [redacted] example of the abuse of the "public use" concept in law and its application to eminent domain.

I do hope the information contained in this letter will be of some real value in your deliberation of AB 112 and the merits of eminent domain as it relates to mining and sugar beets.

Cordially,

Guy Louis Rocha,
Nevada State Archivist

GLR/jsc

EXHIBIT F

A. B. 112

I.

INTRODUCTION

Presently, NRS Chapter 37 gives the unconditional right of eminent domain for mining, smelting, and related activities. NRS 37.010(6). A.B. 112 proposes to alter this by preconditioning the exercise of this right on the approval of a historic district's governing board if the land to be appropriated is within a historic district. In this regard, Section 1 of A.B. 112 provides, in pertinent part:

> "Before any person may exercise the right of eminent domain to any land within a historic district for use in mining, smelting or related activities, he must first obtain the consent of the commission, board of review or other body which administers the district."

It is interesting to note that, without any apparent rational basis for such a distinction, A.B. 112 does not require the same precondition to exercising eminent domain for other uses. Further, A.B. 112 fails to set forth any procedural or substantive guidelines governing the approval or denial of eminent domain by the historic district's governing board. In this regard, A.B. 112 purports to give the board unfettered discretion in determining the matter without any judicial intervention.

In light of these circumstances, A.B. 112 cannot pass constitutional muster. The proposed law is special legislation which violates Article 4, Section 21 of Nevada's Constitution. Similarly, A.B. 112 violates the separation of powers doctrine mandated by Article 3, Section 1 of Nevada's Constitution.

II.

A.B. 112 CONSTITUTES IMPERMISSIBLE SPECIAL LEGISLATION

A. Constitutional Mandate.

Article 4, Section 21 of Nevada's Constitution provides: "[W]here a general law can be made applicable, all laws shall be general and of uniform operation throughout the State." Nevada's Supreme Court has construed this mandate to mean that, "if the statute be special . . ., its constitutionality depends upon whether a general law can be made applicable." McDonald v. Beemer, 67 Nev. 419, 424-25, 220 P.2d 217 (1950). In other words, if a particular law is special legislation and a general law can be made applicable to the circumstances, then the law violates Article 4, Section 21 and is void. Colton v. District Court, 92 Nev. 427, 431, 552 P.2d 44 (1976). Clearly, A.B. 112 is special legislation where a general law could be made applicable, and, thus, A.B. 112 would be void if enacted.

B. A.B. 112 Is Special Legislation.

Special legislation is legislation which pertains to or acts upon only a part of a class instead of the entire class. Goodman v. City of Sparks, 93 Nev. 400, 402, 566 P.2d 415 (1977); Clark v. Irvin, 16 Nev. 111 (1869). In other words, special legislation is "one which affects only individuals and not a class - one which imposes special burdens, or confers peculiar privileges upon one or more persons in no wise distinguished from others of the same category. . . ." State of Nevada v. Cal. M. Co., 15 Nev. 234, 249 (1880).

Based on these judicial definitions, A.B. 112 is special

legislation. It singles out one part of a class and imposes a special burden on that part while conferring a peculiar privilege to the remainder of the class, all without any rational basis whatsoever in so distinguishing between the members of the class. In this regard, the class involved comprises all those who can exercise the right of eminent domain for the purposes enumberated in NRS 37.010; the part of the class singled out is those who are exercising the right of eminent domain for mining purposes; the special burdens imposed on this part of the class is the requirement to obtain special approval prior to exercising the right of eminent domain; and, the special benefit conferred on the remainder of the class is that they do not require such approval. Some illustrations of the operation of A.B. 112 as well as the fact that there is no rational basis for discriminating between eminent domain for mining uses and eminent domain for other uses are as follows:

1. A logging company desires to appropriate by eminent domain land within a historic district to construct a road for logging or lumbering purposes, as authorized by NRS 37.010(4). It may do so without obtaining prior approval from the historic district. On the other hand, a mining company desires to appropriate by eminent domain the same land within the same historic district to construct the identical road, but for mining, smelting and related activities, as authorized by NRS 37.010(6). However, for no reason in logic, A.B. 112 requires the mining company to obtain approval of the historic district, even though its exercise

of eminent domain is for the identical use as the logging company which is not required to obtain permission.

2. A water company desires to appropriate by eminent domain land within a historic district to construct a canal to supply water for industrial uses, as authorized by NRS 37.010(5). It may do so without obtaining prior approval from the historic district. On the other hand, a mining company desires to appropriate by eminent domain the same land within the same district to construct the same canal to supply the same water for its mining operations, as authorized by NRS 37.010(6). Again, A.B. 112 singles out the mining company and imposes the special burden of requiring the mining company to obtain prior approval of the district. Again, even though the two uses are identical, A.B. 112 treats the mining company differently than the water company for no rational reason.

The illustrations could go on indefinitely, but belaboring the point would serve no useful purpose. Suffice it to say that the two illustrations noted above show the injustices and evils of special legislation and the reason for our constitution banning such.

Based on the foregoing, A.B. 112 is clearly special legislation. Accordingly, if a general law can be made applicable, A.B. 112 is unconstitutional.

C. A General Law Can Be Made Applicable.

A general law is one which operates alike upon all persona similarly situated. Young v. Hall, 9 Nev. 212 (1874). Here, such a general law can be made applicable. That a general law can be made applicable is manifested by the mere existence of NRS Chapter 37

which currently is a general law applying similarly to all. Likewise, if the legislature desires to so precondition eminent domain in historic districts, a general law could be made applicable merely by requiring all persons desiring to exercise the right of eminent domain for any use in a historic district to obtain prior approval.

No logical argument can be made why eminent domain for mining purposes should be treated differently than eminent domain for other purposes. Indeed, any reason advanced in support of requiring prior approval of the exercise of eminent domain for mining purposes would be just as applicable to eminent domain for any other purpose.

D. Conclusion.

Perhaps the most appropriate manner to conclude the point that A.B. 112 is unconstitutional is to illustrate how courts view similar legislation under analogous circumstances. In this regard, attention is called to the City of Pasadena v. Stimson, 27 P.604(Cal 1891) where the California Supreme Court declared unconstitutional a statutory precondition to exercising the right of eminent domain which applied to only a part of a class. Pursuant to California law, a municipal corporation of the fifth or sixth class was required to attempt to agree with a property owner as to the sum to be paid for land prior to exercising the right of eminent doman. Id. at 605. However, no other person (artificial or natural, public or private) was required to satisfy this condition prior to exercising the right of eminent domain. Id. at 606. The court, in determining that such a statutory requirement was a special law by which the legislature

had attempted to make a forbidden discrimination by imposing solely upon a part of a class a condition to the right of eminent domain, held:

> "It seems to us perfectly clear that the clause of the incorporation act requiring cities of the fifth and sixth classes to make an effort to agree, while other persons are exempt from such condition, is in plain and direct conflict with both of these consti tutional inhibitions ['all laws of a general nature shall have a uniform operation' and 'the legislature shall not pass local or special laws in cases where a general law can be made applicable']. It destroys the uniform operation of a general law, and is special in a case where a general law not only can be made applicable, but in which a general law had been enacted, and in which there is no conceivable reason for discrimination.
>
> . . .
>
> [A law] is not general or constitutional if it confers particular privileges, or imposes peculiar disabilities or burdensome conditions in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law."

Cal. at 606-607.

A.B. 112, similar to the above-noted California law, constitutes special legislation and, if passed, would be void.

III

A.B. 112 VIOLATES THE DOCTRINE OF SEPARATION OF POWERS

The Nevada Constitution establishes that the doctrine of separation of powers is fundamental to this State's system of government. City of No. Las Vegas v. Daines, 92 Nev. 292, 550 P.2d 399 (1976); Dunphy v. Sheehan, 92 Nev. 259, 549 P.2d 332 (1976). Article 3, Section 1 of our constitution provides: "The powers of the Government of the State of Nevada shall be divided into three separate departments, - the Legislature, - the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others,. . ." Article 6, Section 1 of our constitution vests judicial power of our State only in a supreme court, district courts, justices of the peace, and courts the legislature establishes for municipal purposes in incorporated cities and towns. As more fully discussed below, A.B. 112 would violate these constitutional provisions and the separation of powers doctrine by conferring upon the governing board of a historic district the judicial power to determine whether a public use existed, and the highest and best use as between competing public uses.

As noted above, A.B. 112 requires approval of a historic district's governing board prior to one exercising the right of eminent domain for mining purposes. A.B. 112 establishes no substan-tive or procedural criteria to govern the board in determining whether to approve or deny eminent domain. However, because the right of eminent domain is involved, it is apparent

that legally the only determination which the board is making in granting or denying approval relates to public use. For example, if the board denies approval, the board necessarily has determined that the use for which the land is being appropriated is not a public use or, if a public use, the land has already been appropriated for a more necessary public use. Under the circumstances, I should note that, because mining, milling and smelting has long been a public use in Nevada, Standard Slag Co. v. Court62 Nev. 113, 143 P.2d 467 (1943), the board's denial necessarily would be founded on a determination that the land had already been appropriated for a more necessary public use, to-wit, a historic district. Conversely, if the board gave approval, this action necessarily would be based on the determination that the mining use was a superior public use.

However, in making any of the above determinations, the board would be impermissibly exercising a judicial function. Eminent domain proceedings are essentially judicial in their nature. The Virginia and Truckee Railroad Company v. Elliott 5 Nev. 358, 368 (1870). Further, it is well established that, whether a use is either a public use or the most necessary public use as between competing public uses is a justifiable issue presenting a legal question which must be determined by the judicial branch of government. 29A C.J.S. Eminent Domain §30 at 254 (1965) and cases cited therein; State v. Bank of California, 491 P.2d 697 (Wash.App.1971).

Because A.B. 112 would confer this broad judicial power on the board to the apparent exclusion of the judiciary, the law would violate the doctrine of separation of powers.

ALTERNATIVE REGULATION OF MINING IN HISTORIC DISTRICT

I.

INTRODUCTION

A.B. 112 proposes to require approval of the governing board of a historic district prior to exercising the right of eminent domain for mining purposes where the land to be appropriated is situated in a historic district. The apparent purpose of this requirement is to stop or diminish mining operations in a historical district.

If it indeed is the intent to regulate mining in a historical district, it is questionable whether A.B. 112 will achieve the desired results via the eminent domain statute. For example, if a land owner desired to sell his property to a mining company, the restriction on the right to exercise eminent domain would be meaningless.

Further, even assuming eminent domain is utilized, a scrutiny of NRS Chapter 37 discloses that, in all actuality, the protection of historic districts is already present in the statutes by reason of NRS 37.030(4). That provision states that land subject to a public use "shall not be taken [by eminent domain] unless for a more necessary public use than that to which it has been already appropriated."

Because mining is a public use, NRS 37.010(6), and the planning and coordinating of historic preservation of an area by means of historic districts is also a public use, NRS Chapter 383, NRS 37.030(4) requires the court to balance and weigh all factors pertaining to each such public use to ascertain which use is the most necessary. Naturally, this process would include consideration

as to potential degradation of historic preservation and archeological activities within the historic district which might be caused by mining.

Accordingly, under the present law of eminent domain, the purposes and functions of historic districts are adequately protected by an impartial arbitrator, the court. Further, in reaching its determination which is subject to review by higher authority, the court is bound by established procedural and substantive criteria to insure fair play and justice to all.

In light of these circumstances, it is difficult to perceive the necessity of A.B. 112. Even if the bill is adopted, any determination made by the historic district's board would not and could not preclude access to the judiciary for final resoltuion. See Nevada Industrial Commission v. Reese, 93 Nev. 115.560 P.2d 1352 (1977).

II.

ALTERNATIVES

If regulation of mining within historic districts is desired, alternatives other than eminent domain restrictions are more appropriate. These alternatives primarily are zoning and special use permits. In analyzing these alternatives, there are two important considerations. First, can zoning or land use planning be adopted to regulate mining activities. If so, the second question is, given the fact that eminent domain is granted for mining purposes, is one condemning for mining purpose immune from zoning regulations.

A. Zoning and Special Use Permits.

Pursuant to NRS Chapter 278, the governing board of a city or county may divide the city, county or region into zoning districts

and regulate land use thereby. NRS 278.250. Further, the governing body may provide for the granting of special use permits for certain activities. NRS 278.315. It would appear that, at least to privately owned land, these provisions would authorize the enactment of zoning ordinances pertaining to the development of natural resources.

As a general rule, a zoning body may regulate or restrict the use of land pertaining to the excavation and removal of coal, hard minerals or other related natural resources. See 101 A C.J.S. Zoning & Land Planning §63 at 248-51 (1979) and cases cited therein. Accordingly, there would be no prohibition to enacting zoning regulations pertaining to mining in a historic district provided the regulations have a substantial relationship to the public health, safety, morals, or general welfare. Id.

While the above-noted principles apply to privately owned land, they might not apply to public domain. In this regard, the power of the federal government over its public lands may not be restricted by state regulation. See Itcaina v. Marble, 56 Nev. 420, 55 P.2d 625 (1936). However, this does not prohibit a state from adopting regulations applicable to public domain provided the regulations do not conflict with congressional enactments. See 73 C.J.S. Public Lands §3 at 650 (1951) and cases cited therein. Thus, state zoning regulations could be made applicable to the public domain so long as such were not inconsistent with the uses authorized by federal law. If there was a conflict, the state regulations would not be effective. See Ventura County v. Gulf Oil Corp. F.2d 1080 (9th Cir. 1979).

B. Zoning Regulations in Relation to Eminent Domain.

Having determined that zoning regulations can be adopted to regulate mining activities within a historic district, the next question is whether one having the right to exercise the power of eminent domain is immune from zoning ordinances. It has been held that the propriety of a taking of property by eminent domain is not defeated by the fact that the purpose for which the property is taken is a use prohibited by zoning regulations. West v. Housing Authority of City of Atlanta, 84 S.E.2d 30 (Ga. 1954); see also 101 A C.J.S. Zoning and Land Planning §111 at 400 (1979). However, there is a split of authority as to whether one exercising eminent domain is immune from zoning ordinances once the property is so appropriated. See, e.g., Annot., 10 ALR 3d 1226. Some authorities hold that "the power of eminent domain is inherently superior to the exercise of the zoning power, and that the grant of eminent domain power to a governmental unit renders the unit immune from zoning regulations." Seward County Bd. of Com'rs v. City of Seward 242 NW2d 849 (Neb. 1976). See also 84 Har. L. Rev. 869, 874; 1 Nichols on Eminent Domain §1.141(6) at 1-46 (3rd Ed. 1980). Other cases hold that, even though one has the power of eminent domain, he still must comply with zoning ordinances. Union Agricultural Soc. at Palomyer v. Sheldon, 361 N.Y.S. 2d 598 (1 N.Y. Sup.Ct. 1974); N.Y. State Electric and Gas Corp. v. Statler, 122 N.Y.S. 2d 190 (N.Y. Sup. Ct. 1953); West v. Housing Authority of City of Atlanta, 84 S.E. 2d 30 (Ga. 1954).

Despite these conflicting authorities, the emerging rule appears to be that, if a governmental entity is condemning for a

governmental purpose, it is immune from zoning ordinances which would conflict with the purpose. However, if a governmental entity is condemning for a proprietary purpose or if a non-governmental entity is condemning, it would have to abide with zoning ordinances.

If Nevada courts followed the emerging rule, one who exercises or has the right of eminent domain would be required to comply with any zoning ordinances applicable to the appropriated land.

III

CONCLUSION

Zoning ordinances regulating or restricting mining operations could be adopted for land within a historic district; provided, however, that if public domain was included in the district, as to this land, the ordinances could not conflict with uses authorized by the federal government. One's right to condemn for mining purposes could not be hindered by zoning ordinances, but the condemnor would have to comply with zoning ordinances after appropriating the land.

Submitted to:
Nevada Mining Assn.
from:
Woodburn, Blakey, Wedge,
Jeppson - April, 1981

1560

EXHIBIT G

Assembly Committee on the Judiciary
Legislative Building
Capitol Complex
Carson City, Nevada 89710

Re: Assembly Bill 112

This memorandum is in response to Assembly Bill No. 112 and voices our continued opposition to this proposed legislation. It is our feeling that present State statutes and County ordinances provide adequate safeguards for the State's historical treasures. To assert that additional safeguards are needed to protect historical buildings and sites within the State requires the basic assumption that present controls are inadequate. Before making such an assumption this body would be exercising great prudence to carefully examine the safeguards presently in effect which protect historical buildings and sites within the State. If the present safeguards are adequate to protect all historical sites and buildings then any further regulation would necessarily be meaningless, redundant, and in some cases overly expensive and counterproductive.

The focus of the present legislation is mining and milling in the Comstock Lode Historical District. It is appropriate to note that had the mining industry been heavily regulated during the nineteenth century there would be no historical district to protect. Mining is an integral part of our State's heritage and it is a very important part of our State's economy today. The legislature should not needlessly overburden and overregulate the industry unless substantive reasons are advanced which compel further legislation. Previously, testimony was presented to this Committee relating to the ill effects that would result from passage of this Bill. Leaving that testimony aside, it would be appropriate to examine the controls the individual counties have over the operation of mining companies. Further, an examination of the State historical commission's power is in order and it will illustrate the redundancy of this legislation.

I. ADMINISTRATIVE PROCEDURE FOR INITIATING MINING OPERATIONS IN STOREY COUNTY AND LYON COUNTY

Once an individual or company decides to begin operation of a mine it must first receive the necessary approvals from the applicable county agencies. Since the major historical site in the State, and the only one presently sanctioned by statute, is the Comstock Lode area and since the lion's share of the Comstock is situated in Storey County, an examination of this ordinance is appropriate. The Storey County ordinances are in step with those of other counties throughout the State and are a proper focal point. In fact, they are somewhat less restrictive than the recent ordinances passed by Lyon County last year.

Before the right of eminent domain would even be exercised by a mining company, it first must obtain all necessary county approvals to begin initial operation. Even if a mining company were forced to secure land through the eminent domain process, such acquisition would be meaningless to the mining company unless and until it had previously received the necessary authorization to begin operation within the counties. Until this is done, eminent domain questions are irrelevant. Storey County has, in its master plan, delineated the various uses that can be made of the land within its boundaries. Uses vary from residential, industrial, and forestry. Chapter I, Section 4(a) of Ordinance 54 of the Storey County Ordinances states that all commerical, industrial, and open use activities are subject to the issuance of a special use permit. Ordinance 54, Chapter I, Section 4(b) depicts the standards to be used generally when examining applications for a special use permit for any of the above activities, and states in pertinent part:

Noise, smoke, odor, gas, and other nauseous nuisances shall be controlled so as not to become objectionable, or adversely affect the properties in the vicinity and shall not be detrimental to the public health, safety and welfare.

The Ordinance further describes what uses shall be regulated under the heading of "Industrial Zoning". Storey County Ordinance 54, Chapter I, Section 9. Section 9(c) includes mining and milling under the heading "Industrial Zone". Ordinance 54, Chapter I, Section 9(d) further requires that "all uses located within this zone shall be allowed by special use permit only." (emphasis added). Therefore, before any mining operations may be introduced into Storey County, the mining company must apply for a special use permit. The application for such special use permit requires that the property to be mined be delineated with great specificity. If the special use permit is granted, it is valid only for the area set forth in the special use permit.

If the company desires to expand operations, whether by purchasing additional land or being forced to exercise the power of eminent domain it must again seek a special use permit, as the originally issued special use permit is valid only for the property previously described. Therefore, there are not only controls over the original mining operation, but over any subsequent expansion. This is the first control over the eminent domain rights of the mining company and the standards and procedures should be examined with care. It is important to reiterate that procedures to obtain the initial special use permit are duplicated whenever an expansion of mining operations is sought.

The procedures for obtaining a special use permit are not peculiar to Storey County (in fact Lyon County made even more stringent requirements last year) and are similar to those throughout the State. First, "any person seeking [a special use permit] shall file a request with the County Building Inspector, together with evidence showing that the intended use is consistent with the public health, convenience, safety and welfare of the county, and that such use will not result in material damage or prejudice to other property in the vicinity." Ord. 54, Chap. II, Section 1(a). Once the application is filed, all adjoining landowners within 300 feet of the exterior limits of the property involved, as shown by the latest assessor's maps, are notified by the building inspector of the intended use of the property and the date that the application for special use permit will be presented to the Planning Commission. Ordin. 54 Chap. II, Section 1(d). Public hearings are then conducted by the Planning Commission, which must later determine whether to approve the project. The Planning Commission will recommend a project to the County Commission only if it is shown that the use will not be detrimental to the public health, safety, convenience, welfare and morals or will not result in material damage or prejudice to neighboring properties.

Once the Planning Commission makes its determination the project is forwarded to the County Commissioners who in turn must examine the project, hold public hearings, and finally determine its fate. The County Commission makes the final decision on the application for the special use permit. The seeking party is saddled with the burden of establishing that the permit sought will meet all standards required by the ordinance. The applicable standard used by the County Commission is the same as that used by the Planning Commission. This language is very broad and it

necessarily follows that the discretion of the County Commission is likewise broad. San Dieco County v. McClurken, 234 P.2d 972, 978 (Cal. 1957); Ames v. City of Pasedena, 334 P.2d 653 (Cal. 1959). For example, the term "public welfare" has been held to encompass the preservation of historical areas and buildings. City of Santa Fe v. Gamble-Skogmo, Inc., 389 P.2d 13 (N.M. 1964). As evidenced by the City of Sante Fe case the term "public welfare" is extremely broad and can encompass most anything that the county commissioners determine is a benefit to the community at large.

Storey County has further sought to protect the historical areas within its boundaries by establishing a historical district in Virginia City and Gold Hill. Storey County Ordinance No. 31-A, Article 29, section A. The enabling Ordinance provides that no building or structure within the district shall be razed or constructed without permit and that no permit may be issued without application made to the Architectural Commission. Ord. 31-A. The Architectural Commission is directed to prevent the erection or raising of buildings within the historical district obviously incongrous with the historical aspects of the district.

To recap, in order for a mining company to begin operations in the Storey County portion of the Comstock area it first must apply for a special use permit from the Storey Planning Commission and then submit another application for a special use permit to the Storey County Commission. As evidenced by the language of the enabling ordinances, the county has ample authority to terminate or prevent any proposed mining operations that would threaten or destroy historical areas or buildings. Furthermore, Storey County, in an effort to preserve its historical heritage has mandated that any modification or removal of a building within the historic district requires approval by its Architectural Commission.

II. STATE PROCEDURES APPLICABLE TO MINING OPERATIONS IN HISTORIC DISTRICTS

In 1969 the Nevada legislature enacted legislation to protect certain areas delineated as historic districts. NRS ch. 384; 1960 Nev. Stats. Ch. 682. This legislation established a commission which was empowered to, and which eventually, established a historic district in portions of Storey and Lyon Counties embracing the area of historical structures, sites, and railroads relating to the Comstock Lode and its history. NRS 384.100. The legislation further provided that before any structure could be erected, reconstructed, altered, restored, moved or demolished, a Certificate of Appropriateness must be obtained from the Comstock historic district commission. NRS 384.110. See also, Regulations Pertaining to the Comstock Historic District Commission. Such legilsation was an effort to protect historic buildings and areas of the Comstock Lode.

When initially enacted, the bill contained a section that allowed mining operations to acquire Certificate of Appropriateness without a hearing. That section provides as follows:

> Sec. 18.5. 1. The commission shall issue a certificate of appropriateness without a hearing to the owner of any valid mining claim upon application by such owner for the removal of any structure in the historic district which is constructed on such mining claim if:
>
> (a) Such applicant is prepared within a reasonable time to begin production of such mine or to use such property for valid mining purposes; and
>
> (b) Such structure will interfere with such production or use.

2. Cost of moving a structure pursuant to this section shall be paid by the owner thereof to a site approved and provided by the commission within the historic district. If the commission does not provide a site for such structure within a reasonable time such structure may be demolished upon 5 days' written notice to the commission.

NRS 384.160; 1969 Nev. Stat. Ch. 682, § 18.5. The legislature in the last session repealed this provision of the Act. 1979 Nev. Stat. Ch. 372, § 14. The reason for the amendment was to obviously protect the areas within the Comstock historic district without regard to whether a mining company was involved or not. This, therefore, places an additional protection on the Comstock historic district. At this time, there are no less than four substantive safeguards designed specifically to protect the historic buildings and areas within the Comstock. To reiterate they are:

(1) Special Use Permit from the Storey County or Lyon County Planning Commission;

(2) Special Use Permit from the County Commissions of Storey or Lyon Counties;

(3) A building permit from the Storey County Architectural Commission; and

(4) Certificate of Appropriateness from the Comstock Historic District Commission.

III. IS THE PRESENT BILL NECESSARY?

The present safeguards and procedures illustrate that the only historical district authorized by state statute is the concern of both the counties affected and the state. Both Storey and Lyon Counties, the only counties affected, have enacted stringent

controls over the development of the areas within their boundaries. It is apparent that they are also concerned about the historical treasures under their dominion and control. Further, the state has deemed it fit to insure that these historical treasures are safeguarded.

The question then arises, what will the present bill add to the above protections? Clearly, it must directly apply only to the Comstock area as that was the limit of the original historical district act. NRS 384.100(1). The language of the proposed bill is directed to "the right of eminent domain to appropriate any land." The rationale of this proposed bill apparently is to protect the historic areas of the Comstock Lode and to protect the integrity of the district. The question necessarily arises, however, whether these considerations compel adoption of this Bill.

It cannot be denied that the county commissioners have extremely broad powers governing the commercial activities within their respective boundaries. The preservation of historic areas and buildings clearly comes within the scope of the language "the intended use [must be] consistent with the public health, convenience, safety and welfare." The counties certainly have the power to protect their historical areas. This proposed Bill does not insure more protection for historical areas, rather it merely transfers control from an elected body to a State appointed body. Unless the proponents offer sound evidence establishing that elected county officials are completely insensitive to their historical treasures, then such a transfer is unnecessary.

It is conceivable that this Bill would be necessary if there were no existing protections covering historical areas. However, such is not the case. There can be no justification for duplication of the regulatory process in this area. A State

appointed board is not going to be any more sensitive or aware of historical buildings or sites than an elected county commissioner. In fact, the latter may be more sensitive since he or she lives in the area and is elected to represent its best interests. If this body were to pass this Bill, it would be tantamount to telling the counties that they are incapable of handling their own affairs.

Even if one considers the county commissioners inadequate for these protections, the County Architectural Commission and the State Comstock Historic District Commission are also other viable mechanisms in the protection scheme. The County Architectural Commission prevents the destruction of buildings in the Virginia City/Goldhill area. The Comstock Historic District Act is even more extensive in that it provides "no structure may be erected, reconstructed, altered, restored, moved or demolished within the historic district until after an application for a Certificate of Appropriateness as to exterior architectural features has been submitted to and approved by the Commission." NRS 384.110. At first blush it would appear that the language is not broad enough to encompass the protections prescribed by the proposed Bill. However, an examination of its language illustrates its tremendous scope.

To suppose that a mining company would be able to commence operations on any type of project without erecting or moving to the site any type of "structure" at all is ludicrous. At the very least a trailer would be necessary to store tools, records, and equipment, yet this is proscribed by the Act. NRS 384.1000(8). In fact, the Act as amended in 1979, would seem to govern all forms of mining save that of the lone prospector with his pick, shovel and burro.

The requirements for gaining approval to begin mining in the Comstock District are already redundant and quite burdensome. Presently, the counties are exercising similar control to protect the same interests. Further duplication is senseless. This Bill is not a step forward in the untouched wilderness of the protection of threatened historical treasures, rather it is but another rung in the ladder of regulatory burdens. It is respectfully submitted that the state does not need or want to superimpose this extra step which would consequently discourage mining and its additional revenues.

UNITED MINING CORPORATION

MEMO from
NEVADA MINING ASSOCIATION, INC.
P.O. Box 2498
Reno, Nevada 89505
Phone (702) 323-8575

4-20-81

Senator Close:

AB 112 - Eminent Domain

Roger Jeppson of Woodburn, Blakey, Wadget Jeppson is trying to round up article from the Rocky Mountain Mineral Law Review.

Article will discuss primacy of County ordinances to control use of land and buildings within an historic district.

Hope it will prove useful.

Bob Faiss

EXHIBIT H

NEVADA MINING ASSOCIATION, INC.

ROOM 709 • ONE EAST FIRST STREET
RENO, NEVADA 89505

ROBERT E. WARREN
Executive Secretary
W. HOWARD WINN
Consultant

POST OFFICE BOX 2496
TELEPHONE 322-6575

March 11, 1981

Submitted to Senate Committee on Judiciary April 20, 1981

Honorable Janson F. Stewart
Chairman, Assembly Judiciary Committee
Nevada State Legislature

Re: Assembly Bill 112 (Dini)- Limits exercise of eminent domain to take land in historic districts for use in mining or related activities.

* * * *

Dear Mr. Stewart, members of the committee:

During testimony by the Nevada Mining Association on Assembly Bill 112, I stated:

-- Assembly Bill 112 appears to be unconstitutional. The bill singles out the mining industry for restricted use or loss of the right of eminent domain within an historic district. But it permits other private interests - such as a logging company, a water company, or an agricultural operation - to exercise the right.

-- Assembly Bill 112 is redundant and unnecessary legislation. County authorities, i.e. planning commissions and boards of commissioners, have broad discretionary powers to place conditions and limitations upon or to deny outright the use for mining or other purposes of land and improvements within an historic district.

-- If a mining company were to acquire a parcel of land or a building by use of eminent domain, the mining company would still have to apply to the county authorities for a permit to use the land or alter or remove the building. This, of course, can be denied. Thus a prudent mining company would seek approval of authorities prior to exercise of eminent domain. We can properly presume that such approval would be granted only after the county authorities have stipulated restrictions to safeguard the historical values or have decided such values do not need protection

Mr. Chairman, I have since asked legal counsel to offer citations to demonstrate (or deny) the validity of my testimony. The law firms are:

-- Woodburn, Wedge, Blakey and Jeppson, acting on behalf of the Nevada Mining Association; and

-- Lionel, Sawyer and Collins, acting on behalf of United Mining Corp. of Virginia City.

A summary of their legal findings follow:
(Citations available upon request)

(1) AB 112 cannot pass constitutional muster. The proposed law is special legislation which violates Article 4, Section 21 of the Nevada Constitution.

Special legislation is "one which ... imposes special burdens, or confers peculiar privileges upon one or more persons in no wise distinguished from others in the same category...."

(2) AB 112 violates the separation of powers doctrine mandated by Article 3, Section 1 of the Nevada Constitution.

In making a determination whether eminent domain should be exercised, the Comstock Historic District Commission or the Board of County Commissioners would be impermissibly exercising a judicial function. Whether a use is either a public use or the most necessary public use as between competing public uses is a justifiable issue presenting a legal question which must be determined by the judicial branch of government. Certainly placing such burden upon the executive branch (an historic or county commission) will expose the decision making process to intense and persuasive political and economic pressures during the heat of public controversy. This may not result in a reasoned and dispassionate decision by the executive branch.

(3) County authorities have total control over use of land and improvements within the Comstock Historic District (and such historic districts as may be created in other counties). County authorities, therefore, presently can protect (with advice of historic district commissions) all historic values and buildings from private activities within the district.

Examples of agency control:

(a) Special use permit recommendation by the Lyon and Storey County Planning Commissions.

(b) Approval of Special Use Permit by Board of County Commissioners of Lyon and Storey County.

--"Any person seeking a Special Use permit shall file a request with the County Building Inspector, together with evidence showing that the intended use is consistent with the public health, convenience, safety, and welfare of the county, and that such use will not result in material damage or prejudice to another property in the vicinity." - Storey County ordinance.

(c) Building permit from the Storey County Architectural Commission; and

(d) Certificate of Appropriateness from the Comstock Historic District Commission.

-- Before any structure can be erected, reconstructed, altered, restored, moved, or demolished, a Certificate of Appropriateness must be obtained from the Comstock Historic District Commission.

Mr. Chairman, the Nevada Mining Association respectfully suggests that existing county agencies have the responsibility and full authority to protect all historical values within the famed Comstock Lode mining district of Lyon and Storey Counties. Assemblyman Joseph Dini, author of AB 112, has stated this is his sole objective - he does not wish to place an unnecessary and costly regulatory burden upon the mining industry or to inhibit the revival of future mining in old mining camps and districts within Nevada.

AB 112 is redundant and unnecessary. It should not, therefore, be added to the rapidly growing mass of local, state and federal regulations and controls which now confront the mining industy.

Sincerely,

Robert E. Warren

Robert E. Warren