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:
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> (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
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> (b) Such structure will interfere with such production or use.
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> 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." This section as well was repealed in 1979.[8]

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, miningshould 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.[1]

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 as persuasive 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 l 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 1861. 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.
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> 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, 84 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.