

**BASIN 162 GROUNDWATER MANAGEMENT
ADVISORY COMMITTEE**

MEETING MINUTES

**April 14, 2015 – 9:00 AM
BOCC Chambers, Pahrump, NV**

Regular Members: Gregory Hafen II – Chair
Gregory Dann– Vice Chair
Lenny Badger
Wendy Barnett
Kristian Bentzen
Walt Kuver
Mike Floyd

Alternate Members: Kenny Bent
Judith Holmgren

Legal: Marla Zlotek

Finance: Amy Fanning

Staff: Darrell Lacy
Oz Wichman
Levi Kryder
Teddi Osburn

Acronyms: AG - Attorney General
AVSTP - Amargosa Valley Science & Technology Park
BOCC - Board of County Commissioners
BOR - Bureau of Reclamation
CSWP- Community Source Water Protection
CNRWA - Central Nevada Regional Water Authority
DOA - Department of Agriculture
DOI - Department of Interior
EPA - Environmental Protection Agency
GID - General Improvement District
GM - General Manager
GWE- Groundwater Evaluation Grant
GWMP – Groundwater Management Plan
HUD - Housing and Urban Development
IRWMP - Inter Regional Water Management Program
MOU - Memorandum of Understanding
NTS - Nevada Test Site
NCWDGB - Nye County Water District Governing Board
NRWA – Nevada Rural Water Association
NWRA - Nevada Water Resources Association
RFP - Request for Proposals
RNWA - Rural Nevada Water Authority
ROW - Right of Way
SNWA - Southern Nevada Water Authority
USDA - United States Department of Agriculture
UGTA - Underground Test Area
USGS - United States Geological Survey
WD - Water District

Mission Statement: "To create an equitable groundwater management plan for the Pahrump Basin and the Pahrump Community that balances water supply and demand today and for the future."

BASIN 162 GROUNDWATER MANAGEMENT PLAN ADVISORY COMMITTEE

1. **(00:00:00) Call to Order – Pledge of Allegiance**
2. **(00:00:36) Roll Call – Present:** Gregory Hafen II, Greg Dann, Kristian Bentzen, Lenny Badger, Wendy Barnett, Walt Kuver **Absent:** Mike Floyd
3. **(00:00:59) General Public Comment (first): Three-minute time limit per person. Action will not be taken on the matters considered during this period until specifically included on an agenda as an action item.**
None
4. **(00:01:22) Approval or Modifications of the Agenda for the Groundwater Management Plan Advisory Committee Meeting of April 14, 2015.**
No modifications
5. **(00:01:34) For Possible Action – Approval of Minutes for February 9, 2015.**
Wendy Barnett made a motion to approve the minutes for February 9, 2015. Lenny Badger seconded the motion. The motion was approved with a vote of 6-0 in favor.
6. **(00:02:13) Correspondence and Announcements**
Gregory Hafen related that the BOCC wishes to only review the GWMP when it is in final draft form.

Mr. Dann requested that Kenny Bent, an alternate to the committee, be allowed to fill in temporarily at the present meeting due to the absence of Mike Floyd. Gregory Hafen felt that this proposal needs to be agendized and a vote taken on the procedure when substituting an alternate for an absent regular member. The public must be allowed to comment on this issue before a vote can be made. Wendy Barnett agreed that this action must be agendized first. She felt that Mr. Bent could be an asset during committee deliberations.

Mr. Hafen wished to discuss this issue further under Item 11 where the scheduling of future meetings and agenda items can be addressed.
7. **(00:08:26) Ex-Parte Communications and Conflict of Interest Disclosure Statements**
None
8. **(00:08:41) For Possible Action – Presentation, deliberation and decision regarding the Top 11 priority items selected by the Basin 162 Groundwater Management Plan Advisory Committee to be included in a Groundwater Management Plan for Basin 162.**
 - a. **Water Banking – Update**
 - b. **Goals and Objectives – Direction to Staff**
 - a. Oz Wichman discussed the latest version of SB81 that will be presented to the Assembly Government Affairs Committee. He noted the State Engineer has added provisions that support the water banking concept for Active Management Areas, explaining that banked water rights are not exempt from regulation by priority date. There is no language noting that relinquishment rates may vary for individual basins due to unique characteristics of each one.

There were questions asked about the make-up of committees that have been reviewing SB81. Mr. Wichman related to Kristian Bentzen that he would track down an attendance sheet for a workshop in question and forward that to him. Rick Felling related that the original bill-draft came from the DWR. Due to disagreement among Senate Government Affairs Committee members, 3 workshops were held to gather public comment. SB81 will now be presented to the Assembly Government Affairs Committee for further deliberation. There was more discussion about where the bill goes after it passes the Assembly. Mr. Wichman noted that the entire process can become very confusing at times. Gregory Hafen requested that Mr. Wichman continue to update the GWMP Committee on the progress of SB81.

During public comment, John Bosta asserted how the water banking concept was poor legislation as this would create "superior" water rights that are exempt from regulations. Kenny Bent felt that this ruling may imply ownership of water by some individuals. Mr. Bent asserted that twenty thousand AF could potentially be exempt from regulation into perpetuity.

Oz Wichman stressed that exempt water rights will still be subject to curtailment by priority date. Mr. Hafen explained that citizens should contact State Representatives with their concerns as this issue was out of the hands of local authorities.

Greg Dann was concerned that there were not any proposals brought forth to regulate by beneficial use. Gregory Hafen noted that this topic had not been agendaized for discussion at this time.

b. Gregory Hafen gave direction to staff to begin the process of writing the Groundwater Management Plan. As sections of the plan are written, they will be presented to the committee for comment and their approval. Walt Kuver was concerned that the complexities of the water crisis were not being fully addressed and he offered a more specific set of goals and ideas (7) to consider as the plan was being developed. With this list he hoped to encourage members to think beyond only considering the Top 11 priority items.

Mr. Hafen was not willing to consider reopening the vote for the addition of the new items at this point. In the short term the committee needed to stay with the original approved items in order to get the plan moving along.

Oz Wichman continued to stress the importance of keeping the text short and simple as one might do when developing an ordinance. Greg Dann would like to see a second phase of the plan be developed once the initial plan is produced. Gregory Hafen agreed that there could be many more phases as time goes by.

Wendy Barnett felt that the plan must be written in the "spirit" of the original mission statement.

John Bosta had concerns about language of the Top 11 items continuing to be modified from the original context. He also warned of potential lawsuits resulting from proposals that might be considered a taking by a court of law, especially as they relate to rights of domestic well owners (see attached comments submitted by Mr. Bosta for the record). Kenny Bent would like to see the problem of providing water to the multiple 8,000 square foot lots be addressed before approving any additional lots in the valley. He would also like to have items proposed for inclusion in the plan divided into categories.

Gregory Hafen related that the DA's office will thoroughly evaluate the legalities of any proposal before it is accepted in the final version of a plan. Oz Wichman noted that there may be items that show up in the plan that were not necessarily voted upon, but they will play an integral part in working toward a specific goal and will be reviewed/voted upon by the GWMP prior to finalization.

Dwight Lilly felt that the 11 Priority Items were not enough with which to formulate a comprehensive plan as the State Engineer has requested. He agreed with Mr. Kuver's idea that this was just the beginning. Gregory Hafen stressed that right now we only had a list and it was time to start the writing process.

Wendy Barnett made a motion to direct staff to prepare a draft of the first phase of the Groundwater Management Plan based upon the Top 11 Priority Items, the State Engineer's Top 10, and that the first phase of the Groundwater Management Plan be in concert with the overall mission statement of this committee. Walt Kuver seconded the motion. The motion passed with a vote of 6-0 in favor.

9. (01:28:13) For Possible Action – Presentation, discussion and possible decision regarding ongoing and short-term projects of the Nye County Water District.

None

10. (02:40:52) Staff Reports/Comments:

A. Darrell Lacy

None

B. Oz Wichman

Mr. Wichman updated the committee regarding the use of domestic wells for home based businesses. Basically, if a property is zoned commercial or the business exceeds the 2.0 AF allowed for a domestic well, it will be required to have commercial water rights. It is up to the DWR to police water usage and not the responsibility of the Water District. John Guillory, from the DWR, discussed situations that would require the installation of a meter. He noted that violations can be reported by filling out a form on the DWR website.

C. Levi Kryder

None

D. John Klenke

None

11. (01:25:48) For Possible Action – Discussion, Direction and Possible Decision Concerning Future Meetings/Workshops.

Gregory Hafen related that the next meeting should be held on June 23, 2015 beginning at 9 AM to allow time for staff to begin drafting the first phase of the Groundwater Management Plan. Wendy Barnett made a motion that the next meeting of the Groundwater Management Plan Committee be held on June 23, 2015, beginning at 9 AM. Lenny Badger seconded the motion. The motion passed with a vote of 6-0 in favor.

An item to address seating of Alternate Members on the committee in the event of an absence by a regular member shall also be placed on the agenda for June 23, 2015.

12. (01:28:26) General Public Comment (second) - (Three-minute time limit per person) Action will not be taken on the matters considered during this period until specifically included on an agenda as an action item.

None

13. (0:28:41) Adjourn

Gregory Hafen adjourned the meeting.

April 14, 2015 Comments on Basin 162 Agenda Item 8:

Item 8 is for Possible Action-Presentation, discussion and deliberation regarding the Top 11 priority items selected by the Basin 162 Groundwater Management Plan Advisory Committee

Item 8 includes the Suggestions by State Engineer 1. Address domestic well issue, which is Basin 162 item E 1:

1. Require Meters on new domestic wells; and
6. All New Domestic wells limited to 0.5 AFA (include Treasure Trustee Properties (Tax sales) lots)

Number 6 is "taking" 75% of the percolating water of the landowner's real property which is a violation of the federal and state constitutions.

The *Takings Clause*, the last clause of the Fifth Amendment, limits the power of eminent domain by requiring that "just compensation" be paid if private property is taken for public use. The just compensation provision of the Fifth Amendment did not originally apply directly to the states, but since *Chicago, B. & Q. Railroad Co. v. Chicago* (1897), federal courts have held that the Fourteenth Amendment extended the effects of that provision to the states.

Eminent domain proceedings; restrictions and requirements are included in Article 1, Section 22, subsections 1-9 of the State of Nevada Constitution.

Before taking any action on item 8, you might study the legislative history and consider the following Supreme Court decision:

"every person who under color of any statute, ordinance, regulation, custom, or usage, of any state subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured." [*Hafer v. Melo*, 90 681 U.S. (1991)]

"That the patent carries the fee and is the best title known to a court of law is settled doctrine of this court," [*Marshall v. Ladd*, 7 Wall. (74 U.S.) 106 (1869)]

"that the patent carries the fee and is the best title known to a court of law is settled doctrine of this court," [*Marshall v. Ladd*, 7 Wall. (74 U.S.) 106 (1869)]

"and the patent is required to carry the, fee," [*Carter v. Ruddy*, 166 U.S. 493, 496 (1896)]

Ownership of land is much more complex proposition than simply acquiring all the rights to it. It is useful to imagine a bundle of rights that can be separated and reassembled. A "bundle of sticks"-in which each stick represents an individual right-is a common analogy made for the bundle of rights. Any property owner possesses a set of "sticks" related directly to the land.

In the United States (and under common law) the fullest possible title to real estate is called "fee simple absolute." Percolating Water is one of the fee "sticks" relating directly to my land.

The percolating waters under privately owned land are not and cannot be considered a part of a water basin. Legislature cannot take real property and change it into a privilege that is appropriated by the State Engineer to someone else. This is an unconstitutional "taking" without compensation.

I am elected non-partisan township officer that has taken the oath of office to support and defend the Federal and State Constitution, the same as each of you. The Basin 162 Committee adopting Item 8 is a "taking" of real property in violation of the Federal and State Constitution and should not be adopted.

It is essential for Basin 162 Committee to review, not only prior history, but also the public policy of the United State as expressed in acts of Congress and relevant Court decisions.

Let's review the prior history of percolating water in the State of Nevada.

Nevada's bifurcated system of water law has maintained separate groundwater and surface water regimes for over 100 years. In fact, percolating groundwater was held not subject to Prior Appropriation Doctrine by the Arizona Territorial Supreme Court eighty years before Arizona became a State. The Arizona Territorial Supreme Court made the following definition: "Filtrating or percolating water oozing through the soil beneath the surface in undefined and unknown channels, and therefore a component part of the earth, has no characteristic of ownership distinct from the land

itself, and therefore is not subject of appropriation by another, but belongs to the owner of the soil."

The boundaries for the original territory, if they had kept their same size, would make Las Vegas part of Arizona. However, in 1866, the northwestern section was annexed to the state of Nevada, and the territory maintained its current size. The above Arizona Territorial Supreme Court ruling applies to groundwater in Las Vegas and Pahrump.

Percolating water was defined early on in Nevada Supreme Court in the case of *Mosier v. Caldwell*, 7 Nev. 363 (1872):

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

John H. Kinkead was the third elected Governor of Nevada and served one term from 1879-1883. During this period Congress and the Nevada Legislature passed the two-million-acre grant.

The 1879 Legislature adopted Nev. Stat. 100 proposing that the United States grant of two millions or more acres of land, in lieu of the Sixteenth and Thirty-sixth Section, and relinquishing to the United States all such Sixteenth and Thirty-sixth Sections as have not been sold or disposed of by the State

March 8, 1879 Chap. C the State of Nevada accepted from the United States a grant of two millions or more acres of land, in lieu of the Sixteenth and Thirty-sixth Section, and relinquishing to the United States all such Sixteenth and Thirty-sixth Sections as have not been sold or disposed of by the State.

The United States Congress adopted the State Selection Act of Congress June 16, 1880:

Congress granted to the Nevada two million acres of land in said state in lieu of the sixteenth and thirty-sixth section of land heretofore granted to the Nevada by the United State, provided that the title of the state or disposed of by said state prior to the passage of this act shall not be changed or vitiated in consequence of or by virtue of this act. The lands herein granted shall be selected by the state authorities of said state from any unappropriated non-mineral public land in said state, in quantities not less than the smallest legal subdivision, and when selected in conformity with the terms of this act, the same shall be duly certified to said state by the Commissioner of the General Land Office, and approved by the Secretary of the Interior.

The Act of Congress June 16, 1880 is codified by NRS 321.596(c). In 1880 Nevada agreed to exchange its 3.9-million-acre school grant for 2 million acres of its own selection from public land in Nevada held by the Federal Government

Pursuant to NRS 321.310; except as otherwise ordered by a court of competent jurisdiction, the title of the State to any lands acquired by patent from the Federal Government must be conveyed by patent.

All of the land in Pahrump Valley Township 20 South, Range 53 East of Mount Diablo Meridian, Nevada is State Selected Land is Private ownership of land and percolating water in Pahrump, Nevada issued by SS 2 (5/5/1883), 640 acres; SS 8 (2/3/1890), 3,760 acres; SS 9 (11/5/1890), 5,439 acres; SS 10 (1/8/1892), 11,919.13 acres; and SS 15 (5/11/1896), 40 acres; for a Total of 21,818 acres.

The Nevada Division of State Lands office issued 94 patents in the Pahrump Valley. Each patent has the following statement:

"To Have and to Hold the same, together with all rights, privileges, immunities and appurtenances of whatever nature thereunto belonging, unto the said (person) and to his heirs and assigns forever; provided, that all mines of gold, silver, copper, lead, cinnabar and other valuable minerals that may exist in said tract are hereby expressly reserved."

The first Nevada groundwater act is the Water Act of 1915 Chap. 210; an Act to provide a law for the conservation of underground waters, providing for the caring and capping of artesian wells, defining the underground waters which are governed by the laws relating to the appropriation of the public waters of the state:

Section 1. All underground waters, **save and except percolating water, the course and boundaries of which are incapable of determination**, are hereby declared to be subject to appropriation under the laws of the state relating to the appropriation and use of water. (Emphasis added)

Sec. 2. Every person sinking or boring an artesian well in the state shall cause to be placed in such well a proper and sufficient casing, so arranged as to prevent the caving in of such well, and to prevent the escape of water therefrom through any intervening sand or gravel stratum, and shall provide the necessary valves and appliance to prevent or control the flow of water from such well.

On May 7, 1920 application for Permit 1600 for irrigation and domestic use was made by the Pahrump Valley Company for artesian wells No.1 and No. 2 to supplement artesian well No. 3 to irrigate 50 acres of land.

APPROVAL OF STATE ENGINEER

This is to certify that I have examined the foregoing application, and do hereby grant the same, subject to the following limitations and conditions:

It is assumed by the approval of this application that the waters sought to be appropriated are **not percolating** and therefore come within the jurisdiction of the State Engineer. The State reserves the right to regulate the use of the water herein granted at any and all-times. It is distinctly understood that the applicant agrees to the terms herein contained. (Emphasis added)

Signed by the State Engineer October 30, 1920

May 7, 1920 is the priority date of the domestic wells in the Pahrump Valley Company's 11,000 acres of subdivided land.

March 25, 1939 the Nevada Legislature approved Assembly Bill No. 215 which is known as the 1939 Water Act, Chap. 178. This Bill was sponsored by the Clark County Delegation.

I must call your attention to Sections 1-3:

Section 1. All underground waters within the boundaries of the state belong to the public, and subject to all existing rights to the use thereof, are subject to appropriation for the beneficial use only under the laws of the state relating to the appropriation and use of water and not otherwise, therefore it is the intention of the legislature, by this act, to prevent the waste of underground waters and pollution and contamination thereof and provide for the administration of the provisions hereof by the state engineer, who is hereby empowered to make such rules and regulations within the terms of this act as may be necessary for the proper execution of the provisions of this act.

Sec. 2. The word "person" as used herein shall be interpreted to mean any firm, partnership, association, company, or corporation, municipal corporation, power district, political subdivision of this or any state, or government agency. ***

Sec. 3. "This act **shall not apply to the developing and use of underground water for domestic purpose where** the draught does not exceed two gallons per minute and where the water developed is not from an artesian well." (Emphasis added) (2 gallons per minute = 3.226 acre-feet per year)

Section 3 is codified by NRS Chapter 534.180(1) * * * "this chapter does not apply in the matter of obtaining permits for the development and use of underground water from a well for domestic purposes where the draught does not exceed 2 acre-feet per year." *** the second part of the conjunction is omitted, "where the water developed is not from an artesian well."

Pursuant to NRS 534.020 Underground waters belong to public and are subject to appropriation for beneficial use; declaration of legislative intent.

1. All underground waters within the boundaries of the State belong to the public, and, subject to all existing rights to the use thereof, are subject to appropriation for beneficial use only under the laws of this State relating to the appropriation and use of water and not otherwise.

Bergman v. Kearney, 241 F. 884 (1917):

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

"There can be no appropriation unless there is water to appropriate. There can be no just distribution of the waters flowing in a stream among those entitled thereto, until their respective rights and necessities are known." (Emphasis added)

State Engineer's Order 381 adopted June 1, 1970:

Pumpage records for the last five years indicated the following volumes of water pumped from the Pahrump Artesian Basins:

	Irrigation	Other	Total
1969	49,506 acre-feet	388 acre-feet	40,894 acre-feet
1968	47,632 acre-feet	317 acre-feet	47,949 acre-feet
1967	41,324 acre-feet	177 acre-feet	41,501 acre-feet
1966	37,944 acre-feet	166 acre-feet	38,110 acre-feet
1965	36,514 acre-feet	N/A	36,514 acre-feet

A review of the water rights of record as of May 1, 1970, confirms that appropriations have been approved for 45,607 acre-feet under certificated rights and 45,416 acre-feet under permitted rights which could legally make a total demand of 91,023 acre-feet of water per year within the designated area of the Pahrump Artesian Basin. This condition results in an over-draft of water which will deplete the ground water reservoir.

The 91,023 acre-feet of water per year is an overdraft of 7.58 times the 12,000 acre-feet of perennial yield.

Water for Nevada 1971 Special Planning Report; Water Supply for the Future in Southern Nevada by Montgomery Engineers of Nevada. In 1968 about 48,000 acre feet of water was used to irrigate 11,000 acres of cultivated land and to supply domestic water to less 1,000 people. The most probable population for the Pahrump Valley in year 2020 is 10,000 which require about 4,500 acre feet per year of water.

Today, the 11,000 acres of acres of cultivated land has been subdivided into 28,000 parcels which UICN Utility Company can supply water to only 6,400 parcels and 11,200 domestic wells to supplies percolating water to the owners homes. Over 10,000 more parcels will require domestic well for their water supply. Each of these 10,000 parcels has 2.2 acre feet of dedicate water from the relinquished irrigation water rights with priority dates as early as May 7, 1920.

A conservation domestic well with the maximum quantity of 0.5 acre-feet of water per year is a taking of real property without compensation.

If you vote aye to support the action for Item 8, **you shall be liable to the party injured.**

Respectfully submitted,
John F. Bosta

