NEVADA ASSOCIATION OF COUNTIES (NACO)

Board of Director's Meeting and
Association Meeting
March 30, 2015 – 9:30 a.m.
NACO Office
304 S. Minnesota Street
Carson City, NV 89703

Some members may participate in the meeting via teleconference or videoconference.

NACO Board of Directors

AGENDA
Items on the agenda may be taken out of order. The NACO Board may combine two or more agenda items for consideration. The NACO Board may remove an item from the agenda or delay discussion relating to an item on the agenda at any time.

Call to Order, Roll Call, Pledge of Allegiance

1. Public Comment. Please Limit Comments to 3 Minutes

2. Approval of Agenda. **For Possible Action.**

3. Approval of Minutes of the February 27, 2015 and March 20, 2015 Meetings of the NACO Board of Directors. **For Possible Action.**

4. President's Report.

5. Executive Director's Report.

6. Presentation on a Proposed Nevada Intelligence Symposium, a Partnership between the Department of Homeland Security and the Private Sector to Address Cyber Security Mitigation and Response Strategy, and Possible Direction to Staff. **For Possible Action.**

7. Discussion and Possible Action regarding Bills in the 2015 Legislative Session of Interest to Nevada's Counties and Other Actions regarding NACO's Participation in the Legislative Session. **For Possible Action.**

8. Discussion and Possible Action regarding a Draft Memorandum of Agreement among Nevada, U.S. Department of Interior Bureau of Land Management; Region 4 & 5, U.S. Department of Agriculture Forest Service and the Nevada Association of Counties, Representing Nevada County Governing Bodies to Establish a Means of Communication between the USFS, BLM, and County Governing Bodies that Occurs Often as a General Practice. **For Possible Action.**

9. Discussion and Possible Action on Public Lands and Natural Resources Issues Including but Not Limited to:

    a. Update on the Complaint Filed by NACO and Others on December 30, 2013 Against the Department of Interior and Bureau of Land Management Seeking to Compel the BLM to Comply with the Provisions of the Wild Free-Roaming Horse and Burro Act. **For Possible Action.**

b. Update on the Complaint Filed by NACO and Others on December 4, 2014 Against the U.S. Fish & Wildlife Service (USFWS) Seeking Declaratory and Injunctive Relief for Violations of the Endangered Species Act, the Administrative Procedure Act, and the United States Constitution for Entering into Private Settlement Agreements with Special Interest Litigants that Established Deadlines by which USFWS Must Make Listing Determinations for Certain Candidate Species, including the Greater Sage-Grouse (GSG) and Bi-State Distinct Population of the GSG. **For Possible Action.**

c. Update and Possible Action regarding U.S. Fish and Wildlife Service's Listing Determination of the Greater Sage-Grouse and Proposed Plans for Protection of Greater Sage-Grouse Habitat in Nevada. **For Possible Action.**

10. NACO Board Member Updates.

11. Public Comment - Please Limit Comments to 3 Minutes

Adjourn

Members of the public who are disabled and require special accommodations or assistance at the meeting are requested to notify NACO in writing at 304 S. Minnesota Street, Carson City, NV 89703, or by calling (775) 883-7863 at least three working days prior to the meeting.

Members of the public can request copies of the supporting material for the meeting by contacting Amanda Evans at (775) 883-7863. Supporting material will be available at the NACO office.

This agenda was posted at the following locations:
NACO Office 304 S. Minnesota Street, Carson City, NV 89703
Washoe County Admin. Building 1001 E. Ninth Street, Reno, NV 89520
Clark County Admin. Building 500 S. Grand Central Parkway, Las Vegas, NV 89155
POOL/PACT 201 S. Roop Street, Carson City, NV 89701

The following pages are backup
for agenda item
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NEVADA ASSOCIATION OF COUNTIES (NACO)

Board of Director's Meeting and
Association Meeting
February 27, 2015 – 9:30 a.m.
NACO Office
304 S. Minnesota Street
Carson City, NV 89703

UNADOPTED MINUTES

Attendance: (NACO Staff: Jeff Fontaine, Dagny Stapleton and Amanda Evans) President Wichman, President Elect Carson, Vice President Phillips, Past President Irwin, Douglas County Commissioner Johnson, Lyon County Commissioner Hastings, Elko County Commissioner Dahl, Esmeralda County Commissioner Bates, Lander County Commissioner Waits, Clark County Commissioner Collins, Humbolt County Commissioner French, Mineral County Commissioner Tipton, Nye County Commissioner Schinhofen, Washoe County Commissioner Herman and Larry Burtness, County Fiscal Officers Association. A quorum was present.

Other Attendees: , Douglas County Commissioner Thaler and Nye County Commissioner Borasky.

AGENDA

1. **Public Comment**. None was given

2. **Approval of Agenda**. The agenda was approved on a motion by Commissioner Tipton with a second by Commissioner Dahl.

3. **Approval of Minutes of the October 31, 2014, November 19, 2014, December 3, 2014 and, January 16, 2015 Meetings of the NACO Board of Directors**. The minutes were approved on a motion by Vice President Phillips and second by Commissioner Johnson.

4. **Acceptance of NACO's December 2014 Financial Statement and Investment Reports**. The financial statements and reports were unanimously approved on a motion by Commissioner Tipton and second by Commissioner Hastings.

5. **President's Report**. President Wichman noted her private meeting with Neil Kornze of the BLM regarding the comments made on the RMP for the report and delivered the letter in support of the report by Lander County.

6. **Executive Director's Report**. Jeff announced the new NACO brochure and its distribution to the Legislature and noted April as National County Government Month and how work is being done to promote and develop ideas on how to participate in the event. President Elect Carson inquired about obtaining a proclamation to that effect from NACo. Jeff announced that the Federal Lands Access program has $28 million over the next four years specific to local highways that access Federal lands that are high tourist destinations and/or revenue generators. He noted the first sets of projects approved are underway and the deadline for submission is May 8th. Jeff is one of the three people on the committee who will make the determination as to which projects will receive the funds. Jeff noted Churchill County Commissioner Olsen's accident and that although he was in the ICU for a time he is home and recuperating.

7. **Appointment of NACO's Fiscal Officer**. The County Fiscal Officers Association provided a recommendation for the Fiscal Officer of Vanessa Stephens of Storey County. The Board approved the appointment unanimously.

8. **Briefing on the National Association of Counties Legislative Conference in Washington D.C., February 21-25, 2015 including NACO's meetings with Nevada's Congressional Members and Staff and Federal Agency Officials.** Jeff thanked those who attended and the challenges of transportation and the juggling of the conference events as well as the meetings with our Congressional delegation. Meetings took place with the staff of Senator Reid, Senator Heller and his staff, Congressman Amodei and staff and Congressman Hardy and staff. It was noted the meeting with Senator Reid's staff provided the opportunity to speak about issues, specifically public lands that the Senator traditionally does not entertain during meetings with our members. Jeff also noted the meeting with the BLM Director, Neil Kornze and the productive nature of the meeting. He also said that the Vice President, members of Congress and federal agency officials spoke at the conference.

   President Wichman spoke regarding the meeting with Director Kornze and issues of intimidation occurring within the field offices of the department. It was noted that without specific names his hands are tied as to doing something about specific persons. She also noted she was pleased to be able to tell the Director that with the direction he has given to his staff communication has improved within the district. She also echoed Jeff's comments about the ability to speak on public lands issues with Senator Reid's office.

   Commissioner Waits inquired about the field hearing that had been requested. Commissioner Dahl noted that it would not occur soon if it happens at all. He noted Congressman Amodei indicated that Congressman Rob Bishop is extremely busy and setting up meetings with him is difficult. President Wichman noted that Director Kornze had indicated coming out here and assured Commissioner Waits that she would contact her immediately if and when he makes contact for a meeting.

   Commissioner Johnson noted that not many people are afforded the opportunity to meet with Mr. Kornze and the fact there is dialogue with him is important. He noted that the Douglas County delegation met with Gary Schiff a former U.S. Forest Service District Ranger in Nevada who is now working for the House Natural Resources Committee staff regarding public lands issues as well.

   Commissioner Collins noted that with Senator Reid being up for reelection that there will be many more opportunities to bring attention to the public lands issues and there will be more access to persons of authority in some of these departments.

   President Wichman announced she was approached by the incoming president of the Western Interstate Region to possibly hold the position of the Chair of the Public Lands Steering Committee in the future and she has accepted the possibility.

9. **Discussion and Possible Action regarding Joint Position Statements with the Nevada League of Cities and Municipalities**. This item was deferred for further review.

10. **Presentations on Bills and Other Issues related to the 2015 Legislative Session by Members of the Nevada Legislature and the Executive Branch**. Assemblyman Randy Kirner gave an overview of the PERS system, its current funding challenges and presented his bill AB190 regarding possible changes to the PERS contribution system to the Board. His proposed changes include changing PERS from a defined benefit system to a hybrid, defined benefit/defined contribution system.

    Craig Hulse, Chief of Staff for Assembly Leadership gave an overview of bills having to do with collective bargaining. Jeff noted AB158 being heard at 11:00A and that the bill requires that a copy of a proposed agreement and any and/or all materials would be made available to the public not less than 10 days before the ratification hearing. SB168 would allow the opening of negotiated contracts when there is a 5% budget shortfall and that 25% of the ending fund balance

for three months would not be negotiable. Commissioner Collins noted that Clark County has already negotiated some of the items contained within the Bills. The Board consensus was to show support for both Bills. Mr. Hulse noted that the fiscal emergency portion of AB168 was heard as well as discussion on how to give local government some more administrative controls. Assemblyman Kirner's Bill, AB182 was also presented which would require that union dues no longer be automatically deducted from paychecks; disallow doing union business at the government's expense; remove managers from union membership; create performance mechanisms for layoff's and eliminates evergreen clauses. The Bill would also eliminate automatic mandatory arbitration and allow for negotiated dispute resolution.

Governor Sandoval's Chief of Staff, Mike Willden gave a review of the Governor's proposed budget for the biennium. The budget calls for $7.3 Billion which is $1 Billion more than what was forecast by the Economic Forum but $700 Million less than what was requested by the collective State agencies. It includes additional spending for education, human services and corrections. In order to raise the additional Billion dollars the Governor has proposed the continuation of the Sunset's with the exception of prepayments of mining net proceeds and Government Services Tax which would raise approximately $580 Million. Proposed new revenue streams are an estimated $80 Million from increasing the cigarette tax by $.30 to $1.20 per pack and an adjustment to slot machine taxes. The most controversial part of the Governor's plan is the proposed change to the Business License Fee from a flat $200 to a matrix fee based upon revenue and type of business – the proposed tax is estimated to provide $438 Million over the next two years. Mr. Willden also noted that in FY15 has an ending fund balance crisis and there will be sweeps from several accounts which will not include sweeping of county funds and/or cost shifting to the counties. He also noted the shoring up of the 'checking' account is important not only for cash flow but for bond ratings as well. Mr. Willden noted expenditure's in the budget include expanded Medicaid and Silver State Health which he also noted that the state's uninsured rate is down to 11% with children being at a 2-3% uninsured rate and that the state has been receiving more Federal dollars for these programs. Discussion on the children's services system included adoption subsidies and that although there is unrest with the decision to maintain the current juvenile justice system's facilities there will not be funds available for additional facilities. Commissioner Dahl inquired as to the projected revenue for the proposed Business Tax which is $188 Million in the first year (3 quarters) and $250 Million the second year with a full four quarters. Commissioner Collins inquired as to any adjustments to the Live Entertainment Tax which would make the costs more equitable to which Mr. Willden stated it had been discussed but there are several issues to work out prior to proposing the change. Commissioner Collins also inquired about the adjustment of property taxes outside of abatements and if there is support for the adjustment. Mr. Willden noted that the Governor believes in broadening the tax base to more dependable revenue streams from reliance on the volatility of the gaming and mining industries. Nye County Commissioner Schinhofen noted that the Yucca Mountain Repository is a viable revenue stream that wouldn't tax the citizens of Nevada. Commissioner Hastings expressed frustration over the continued requests for the counties to approve tax abatements for new businesses when existing are being asked to pay more and why new funds are being funneled into 'broken' systems like education before they are repaired. Mr. Willden noted several Bills being brought forward that deal with accountability issues and reform initiatives. Commissioner Tipton noted that the tax abatements given for some geothermal plants in Mineral County were extremely detrimental to the school district and that if the associated sales taxes were not abated that the amount of funds being proposed for the education system might not be necessary. An interim talking group was proposed to continue the discussion on tax abatements. Commissioner Collins noted that a large number of companies leave as soon as their tax abatements expire.

11. **Discussion and Possible Action regarding Bills in the 2015 Legislative Session of Interest to Nevada's Counties and Other Actions regarding NACO's Participation in the Legislative Session**. Jeff started the discussion with the fact SB30 (Longevity Pay Bill) has started the discussion on county Elected Officials salaries. Many of the Affiliate members have contacted him with the fact the last pay bill setting their salaries was in 2007 and the previous was 6 years prior to that. Jeff brought up interest in amending the bill to address salaries and that NRS

287.157 allows for a commission to review these salaries and hasn't met since its inception in 1993 and inquired about the possibility of sending a letter to the Governor and Legislative leadership requesting to convene the commission. Commissioner Johnson noted that Nevada has the lowest salaries of all the states, and as a terming out commissioner he would be willing to testify to the issue. It was also discussed that the elected officials are often supervising people making more money than they are and that even if a request is denied by the Legislature it will bring the issue to the forefront and help the citizens to understand the true pay rates of the elected officials. Carson City Assessor Dave Dawley spoke to the issue as a member of the Assessor's Association who contacted Jeff to start the discussion. Bonnie Weber noted that in 2003 the Legislature allowed Clark and Washoe Counties to increase wages of District Attorney's, she also noted that term limits make it very difficult for Commissioners to serve on national committee's and boards. Commissioner Collins noted that a bill would have a better chance this year with former county commissioners on and/or chairing the committee's which would initially hear the bill with support from all affiliate groups and to request matching the increases given to the collective bargaining groups. Although the issue doesn't directly relate to SB30 it is an open statute and can therefore be amended. The Board approved allowing the Legislative Committee to make the final determination on the direction to head after further research and discussion with the appropriate Affiliate organizations on a motion by Commissioner Tipton with second by Commissioner Collins.

Dagny continued the legislative discussion with updates on bills of importance to the organization and counties. She noted SB30 (longevity pay) passed out of committee, AB10 (indigent defense) was heard and passed out of committee unanimously and is on its way to Ways & Means. AB80 (prepayment of net proceeds) is in the Governor's budget to eliminate and it is the hope language will be included in the budget package. SB60 (rebalancing presentence investigation reports) was referred out of the Judiciary Committee to Senate Revenue due to the fiscal note. Home Rule (SB29 NACO Bill)/SB11 (Senator Goicochea's bill) was heard and had opposition from the truckers, manufacturers and retailers. There were a number of meetings and proposed amendments that were too restrictive in NACO's opinion and would actually further limit the existing powers of local government. The Senator feels he has the support to pass the bill but the conversation will continue with the groups voicing concern, prior to the work session scheduled for Friday the 6th. Dagny noted the meetings she and Jeff have held with all but two or three of the freshman legislators and that the Assembly Republicans seem receptive.

Additional bills of interest have to do with gun control (AB127, SB171 & SB175) one specifically removes Clark County's hand gun registry as well as local government's ability to control fire arms. Clark County may put forth an amendment to ensure counties ability to regulate guns in public buildings. Commissioner French expressed concern about several other areas of gun regulations including ordinance's regarding health and safety. President Wichman suggested the Board take some time to read and digest the bills as well as obtaining an LCB opinion before coming to a consensus about any form of support.

AB161 (aircraft abatements to support manufacturing of parts) Jeff noted that there will be more and more bills for tax abatements and the Board's position remains to require county approval for any abatements.

After discussion the Board is neutral on AB163 (rangeland fire protection associations), AB182 (collective bargaining), AB190 (PERS reform) and SB28 (fees for public records). The Board is in support of SB95 (changes in the publication of property tax rolls) and SJR1 (public lands transfers). NACO remained neutral on the increase in fees for court reporters, but did express concern about the fiscal impact.

Jeff addressed the bill the Legislative Committee is working on regarding the lifetime heart & lung benefit and presumptive eligibility for fire and police. Several Legislators have requested the organization work on some compromising efforts to manage the costs. He also discussed the hearing held on Tuesday at the request of Senator Roberson on property tax's during which

interest was expressed by Legislators for assistance in addressing necessary reforms to the property tax structure. It is expected that at least two bills will be brought forward on the issue including one that will include a constitutional amendment. He noted that there will be a need for taking a position on these issues in the near future.

12. **Discussion and Possible Action on Public Lands and Natural Resources Issues Including but Not Limited to:**

    a. Update on the Complaint Filed by NACO and Others on December 30, 2013 Against the Department of Interior and Bureau of Land Management Seeking to Compel the BLM to Comply with the Provisions of the Wild Free-Roaming Horse and Burro Act. Commissioner Dahl noted that a there is a bill out there from Congressman Stewart in Utah to give the management of Wild Horse & Burro's to the states if requested but we are waiting to find out where the draft stands.

    b. Update on the Complaint Filed by NACO and Others on December 4, 2014 Against the U.S. Fish & Wildlife Service (USFWS) Seeking Declaratory and Injunctive Relief for Violations of the Endangered Species Act, the Administrative Procedure Act, and the United States Constitution for Entering into Private Settlement Agreements with Special Interest Litigants that Established Deadlines by which USFWS Must Make Listing Determinations for Certain Candidate Species, including the Greater Sage-Grouse (GSG) and Bi-State Distinct Population of the GSG. This item was heard time certain due to a conference call from Ms. Laura Vernier, council for this item. Ms. Vernier told the Board that the Government filed a motion to change the venue to Washington DC as anticipated. The motion was fully briefed and is waiting consideration from the judge. She noted a multi-district panel which was put in place and made the decision on the original settlement agreement. The panel has a procedure which would allow for a clerical transfer which would require a motion to vacate the order of venue change. She noted Commissioner's Dahl and Goicoechea being instrumental in the creation of letters which outline the importance of keeping the case in Nevada. She noted the filing of an amended complaint regarding the implementation of a land use plan or other actions which would preclude the implementation of the Nevada Conservation Plan which was developed through the cooperation of many stakeholders both monetarily and in effort and completed at the invitation of Secretary Salazar. Jeff inquired as to the quick answer to the amended complaint and if there is anything within the answer that is out of the ordinary. Ms. Vernier noted the response is fairly typical and responded so quickly because they took a lot of the response language from the suit brought by Oklahoma.

    c. **Update and Possible Action regarding U.S. Fish and Wildlife Service's Listing Determination of the Greater Sage-Grouse and Proposed Plans for Protection of Greater Sage-Grouse Habitat in Nevada**. Commissioner Dahl referred back to the meeting with Neil Kornze and his comments on planning on what they are doing and implementation of their EIS and that they are "trying to mirror as much of the state's plan as possible" which the group feels is debatable. The cost estimate he gave was roughly $80 Million. Information has also been received regarding some potential new plans to create a 'super habitat' of 2.7 million acres. Commissioner Dahl noted the allowances of the proposed area are very restrictive. He noted the inclusion of a 3% disturbance when the council had turned down a 5% disturbance rate. Commissioner Tipton noted that the more soil disturbance she experienced the more birds came in.

    d. **Discussion and Possible Action regarding Rangeland Management Issues in Nevada**. Commissioner Dahl noted that John McClain communicated the gathering of professionals to do "white paper" and to use them where applicable. President Wichman noted the scientists who will develop the papers are non-paid professionals. It was also

noted the need to use the Range Land Management Handbook as well as the Fire Wise book when writing EIS's and the fact the 'agencies' are not using them.

13. **Discussion regarding Centrally Assessed Property Taxes**. Past President Irwin noted the need to complete more research and gathering of information and will have a report for the next agenda.

14. **NACO Board Member Updates**. Members of the Board gave brief updates on what is occurring in their counties and of matters of importance to their individual Boards.

15. **Public Comment - Please Limit Comments to 3 Minutes** None was given

NEVADA ASSOCIATION OF COUNTIES (NACO)
Board of Director's Meeting
March 20, 2015 – 3:00 p.m.
NACO Office
304 S. Minnesota Street
Carson City, NV 89703

UNADOPTED MINUTES

Attendance: (NACO Staff Jeff Fontaine, Dagny Stapleton and Amanda Evans) President Elect Carson, Past President Irwin, Carson City Mayor Crowell, Douglas County Commissioner Johnson, Elko County Commissioner Dahl, Esmeralda County Commissioner Bates, Eureka County Commissioner Goicoechea, Humboldt County Commissioner French, Lyon County Commissioner Hastings, Mineral County Commissioner Tipton, Storey County Commissioner McGuffey, Washoe County Commissioner Herman, Lander County Commissioner Waits, Clark County Commissioner Collins, Nye County Commissioner Schinhofen, Larry Burtness County Fiscal Officers Association, Tammi Davis Nevada Association of County Treasurers, Katrinka Russell Nevada Assessors Association, Mark Jackson Nevada District Attorneys Association, Bob Roshak Nevada Sheriffs and Chiefs Association. A quorum was present.

Other Attendees: Bryce Shields Pershing County DA, David Dawley Carson City Assessor, Sue Merriweather Carson City Clerk/Recorder, Norm Frey, Lisa Ginolli, Joni Eastley Nye County, Nye County Commissioner Borasky, Vida Keller and Jake Tibbitts.

1. **Public Comment.** None was given.

2. **Approval of Agenda.** The agenda was unanimously approved on a motion from Commissioner French with second by Commissioner Dahl.

3. **Discussion and Possible Action regarding Bills in the 2015 Legislative Session of Interest to Nevada's Counties and Other Actions regarding NACO's Participation in the Legislative Session, Including but Not Limited to a County Elected Officials Salary Bill Draft Request.** Jeff led the discussion on the proposed County Elected Officials Salary BDR and the history of discussion regarding the item at the February Board meeting. A discussion was held with Senator Goicoechea, Chairman of the Senate Government Affairs Committee, regarding a separate BDR for the item. Jeff noted that with the filing of a BDR, the amendment of SB30 is no longer necessary. Discussion centered on the specific language of the bill language, which was to be submitted by the end of the day. The last bill dealing with County Elected Officials salaries was in 2007 and statute authorized the increases for all officials other than County Commissioner salaries.. Meetings had been held over the past two weeks to discuss what could be considered reasonable and the political feasibility of salary increases. It was noted the initial language being discussed. did not include Commissioners. Nevada District Attorneys Association President, Mark Jackson (Douglas County) gave a more detailed history of how elected officials salaries are set through the Legislature and discussed the inequity of the elected officials salaries, specifically compared to those of the employee's whom they supervise and the widening gap between them. He noted the possibility of a $30,000. (32%) gap between his salary as the District Attorney and those of some of his deputies and that there are often very talented deputies throughout many of the elected offices who are interested in holding public office but choose not to because they can't afford to take the pay cut. Similar comments were made by Assessors Association President, Katrinka Russell. Ms. Russell noted that the deputies in her department would not step up to the Assessor's position should something happen to her because of the discrepancy in compensation. She pointed to the need to protect the integrity of the office's in question. Mr. Jackson noted the need to address the gap and that the application of a 3%/year increase would lower the salary gap to 13%. He noted that it is understood that some counties are still struggling financially but the need to address the situation is imperative. Fiscal Officers Association President, Larry Burtness spoke in support of Mr. Jackson's comments. Clark County Commissioner Collins noted the DA's office of his county has about five times the work load of the same office at the City of Las Vegas with a substantially reduced salary. Commissioner Collins also noted the need to include Commissioners in the bill to ensure that quality people will run of the office. Humboldt County Commissioner French spoke to the political challenges of the issue and the longevity pay increases and catching up,

specifically while Commissions are faced with negotiating contracts and the fact that some will be hard pressed to include increases in those contracts. He noted that the lack of addressing cost of living increases on an annual basis is a part of the problem and inquired if instituting a formula for elected officials to receive the same COLA increases as employees should be considered. Jeff noted that it is a complicated issue due to different bargaining units having different COLA increases. Mr. Jackson noted that his Association is mindful of the politics of the situation which is why the Legislature addresses the issue in statute and that it is important to all the Associations to work together with NACO and to nurture the relationships with their sister Associations and the individual Commissions. Mr. Jackson also noted that the proper place to address the situation outside of the next four years is at the commission, outside of elected officials. Carson City Mayor Crowell inquired to the draft language and Jeff discussed the inclusion of the commissioners and county elected officials in the setting of salaries by the Legislature. Jeff also noted there is never a time that is good for all counties to address the issue and suggested consideration of language that authorized individual officials to opt out of the increases. Mr. Jackson stated his Association would accept the amendment to the submitted BDR language to include opt out language. Commissioner Johnson inquired as to why the BDR was only looking at four years and Mr. Jackson noted the discrepancy is too great to overcome in four years and the Affiliate Associations are committed to convene the commission allowed for by statute in 2019 to determine a more permanent fix. Mayor Crowell moved to accept the BDR language of 8% for the first year and 3% for the subsequent three years without qualifying language. Nye County Commissioner Schinhofen seconded the motion and it was passed. Commissioner Johnson that it would be known right away upon introduction if the language was acceptable and can and most likely will be adjusted and amended and there would be further discussion during the evolution of the Bill into its final form.

Jeff noted the late hour but requested discussion on bills released earlier in the week. He specifically noted several Bills regarding collective bargaining and that there were components of many of them that were good. Commissioner Johnson acknowledged the need to protect fund balances and to pick important battles accordingly. Mayor Crowell suggested taking a close look at AB249, that early discussion showed the bargaining groups in Carson City could live with its components. Jeff also suggested support for Assemblyman Hansen's law enforcement bill, with which the Board concurred.

4. **Discussion and Possible Action to Appeal the March 12, 2015 Federal District Court Decision to Dismiss NACO's Lawsuit Seeking an Order to Require the U.S. Department of the Interior and the Bureau of Land Management to Comply with the Requirements of the Wild Free-Roaming Wild Horse and Burro Act of 1971 as Amended.** This item was taken out of order time certain due to Attorney Mark Pollot, and Clay McCaulley of the Nevada Farm Bureau Federation joining the meeting telephonically. Mr. Pollot noted that he was shocked by the decision of Federal District Court Judge Miranda Du to dismiss the complaint without oral argument as well as to the length of time the motions were 'sat on'. He reviewed the basic arguments within the complaint that the BLM failed to perform duties and/or took too long to comply with requests to perform the duties as required under the Administrative Procedure Act. The response cited language regarding "thriving ecological balance" that in his opinion the ruling doesn't meet the way the suit was filed. Concern was voiced by several members of the Board that if the ruling stands unchallenged it will not compel not only the BLM but all Federal agencies to comply with law. Mr. Pollot noted that Judge Du would more than likely not be willing to reconsider her decision and the best course of action would be to file an appeal within 60 days of the ruling to dismiss.

   The current contract does include an amount for appeal and Mr. Pollot feels the cost to appeal would be $8,000-10,000 at the most. There would not be need for additional local council, court reporters fees etc. Commissioner Dahl inquired as to what the current financial status is and Jeff noted the total spent to date is $89,103 with funds received of $76,000, and commitments for an additional $20,000 to $25,000. Clay McCauley of the Farm Bureau noted his Board had yet to meet on the issue but hoped they would confer with a decision to appeal. Bevin Lister of the Farm Bureau also echoed concerns regarding the earlier discussion that a Federal court doesn't have the jurisdiction to compel a Federal Agency to follow the law. The Board unanimously voted to appeal on a motion by Commissioner Dahl with a second by Commissioner French. Jeff will maintain contact with the other members of the suit and get their decisions regarding joining the appeal to Mr. Pollot as soon as possible. Jeff also inquired if there would be an opportunity for Amicus briefs and it was noted that they can elevate the importance of the complaint and if they are to be included to be submit as soon as possible. Commissioner French also noted that the BLM violated their own agreement with the

State and other stakeholders involved in the agreement by not following through and/or initiating some of the AML's they agreed to.

5. **Public Comment**. None was given.

The meeting was adjourned on a motion by Commissioner French.

The following pages are backup
for agenda item
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MEMORANDUM OF AGREEMENT (MOA)
AMONG
NEVADA, USDI BUREAU OF LAND MANAGEMENT
REGION 4 &5, USDA FOREST SERVICE
AND THE
NEVADA ASSOCIATION OF COUNTIES,
REPRESENTING NEVADA COUNTY GOVERNING BODIES

Definitions:

"NACO" means Nevada Association of Counties.

"County" means a county in Nevada that has a national forest or public land administered by the Bureau of Land Management within its boundary.

"USFS" means Region 4&5, USDA Forest Service, including its National Forests in Nevada.

"BLM" means Nevada, USDI Bureau of Land Management.

Preface:

1. The BLM and USFS, under the laws of Congress, executive orders, and federal regulations, are responsible for the management of the federal public lands, national forests, and their resources. The BLM and USFS have a responsibility to sustain the health, diversity, and productivity of these federal public lands and national forests for the use and enjoyment of present and future generations.

2. NACO serves and represents all of the 17 Nevada counties and their commissioners, as well as 9 affiliate organizations. NACO works with federal, state, and local governments to improve cooperation as well as the ability of county government to serve the citizens of Nevada efficiently and effectively.

Statement of Purpose:

The USFS, BLM, and counties share a long history of partnership with respect to federal public lands in Nevada, including conferring on management direction and projects, sharing resources and revenues, and participating in the social, environmental, and economic vitality of local communities.

The purpose of this MOA is to establish a means of communication between the USFS, BLM, and county governing bodies that occurs often as a general practice. This regular communication is intended to maximize trust and communication between the USFS, BLM, and county government, minimize misunderstanding and potential conflicts, produce USFS, BLM, and county actions that are as a consequence better end products for all Nevada citizens, and enhance community support for those actions.

It is agreed that:

1. With implementation of this MOA:
   a. The governing body of each county shall designate a county contact for the USFS and BLM.
   b. The USFS Regional Forester shall designate a USFS contact for each county.
   c. The BLM State Director shall designate a BLM contact for each county.

2. When any significant land management actions or any significant downsizing or reorganization actions are contemplated in a county by USFS or BLM, the federal agency contact shall notify the appropriate county contact. Actions that are considered significant in the county shall be defined among the parties. The notice shall provide sufficient substance and give enough time for the county governing body to study and respond to the contemplated action. Notice of sufficient substance and time to the county shall be defined among the parties. In keeping with federal policy, the federal agency will consider the county's response before taking any action. If the action is different from the county recommendations, the federal agency will explain the rationale of their decision. The federal agency contacts for each county and the county contacts for each county shall meet at least twice per year but are encouraged to communicate on a regular and ongoing basis.

3. When any action that will change the law is contemplated by a county that may significantly impact the operation of USFS or BLM, the county contact shall notify its respective federal agency contact. Actions that are considered significant to the USFS or BLM shall be defined among the parties. The notice shall provide sufficient substance and give enough time for the federal agency to study and respond to the contemplated action. Notice of sufficient substance and time to the federal agency shall be defined among the parties. The county will consider the federal agency's response before taking any action. If the action is different from the federal agency recommendations, the county will explain the rationale of their decision.

4. The USFS Regional Forester, BLM State Director, and NACO Executive Director shall convene, as appropriate but no less than once a year, representatives of the USFS, BLM, and county governing bodies to discuss and resolve issues related to land management in Nevada.

Limitations:

The USFS, BLM, and county governing bodies recognize that this MOA is not intended to create a forum for resolution of all issues between a county and the USFS or BLM. Nor is it intended to replace presently existing lines of communications, such as Resource Advisory Committees, federal or county workgroups, and informal or formal policy meetings between the USFS or BLM, and NACO or a county.

Nothing in this MOA shall require the USFS, BLM, NACO or a county to violate or ignore any laws, rules, directives, or other legal requirements imposed by law.

This MOA is adopted to enhance communication and mutual cooperation between the USFS, BLM, and counties. It does not create any right to administrative or judicial review, or any other right, benefit, or responsibility, enforceable by any party against the USFS, BLM, NACO or county governing bodies, their agencies, officers, employees or any other person.

This MOA becomes effective upon the date of signature by all parties.

This MOA is expected to continue for five years, after which it will expire, unless canceled, extended, or renewed. This MOA may be extended or renewed prior to expiration if all the participants agree that there is a continuing need for this agreement. The terms or conditions of such extension or renewal will be in writing and require the signature of BLM, USFS, NACO.

This agreement is neither a fiscal nor a funds obligation document. Any endeavor to transfer anything of value involving reimbursement or contribution of funds between the parties to this agreement will be handled in accordance with applicable laws, regulations, and procedures including those for Government procurement and printing. Such endeavors will be outlined in separate documents that shall be made in writing by representatives of the parties and shall be independently authorized by appropriate statutory authority. This agreement does not provide such authority. Specifically, this agreement does not establish authority for noncompetitive award to the cooperator of any contract or other agreement.

FREEDOM OF INFORMATION ACT (FOIA). Any information furnished to the agencies under this instrument is subject to the Freedom of Information Act (5 U.S.C. 552).

MODIFICATION. Modifications within the scope of the instrument shall be made by mutual consent of the parties, by the issuance of a written modification, signed and dated by all parties, prior to any changes being performed.

PARTICIPATION IN SIMILAR ACTIVITIES. This instrument in no way restricts the agencies or the Cooperator(s) from participating in similar activities with other public or private agencies, organizations, and individuals.

TERMINATION. Any of the parties, in writing, may terminate the instrument in whole, or in part, at any time before the date of expiration.

ESTABLISHMENT OF RESPONSIBILITY. This MOA is not intended to, and does not create, any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity, by a party against the United States, its agencies, its officers, or any person.

AUTHORIZED REPRESENTATIVES: By signature below, the cooperator certifies that the individuals listed in this document as representatives of the cooperator are authorized to act in their respective areas for matters related to this agreement.

Principal Contacts for this MOA are:

BLM
Name of Appropriate Representative
Title

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Agreement:

U.S. Department of the Interior
Bureau of Land Management

_____
Date

Name of signatory

Title

U.S. Department of Agriculture
Forest Service

_____
Date

Name of signatory

Title

Nevada Association of Counties

_____
Date

Jeff Fontaine
Executive Director

_____
Date

Lorinda Wichman, Nye County
NACO President

_____
Date

_____
Date

Signatures from NACO Public Lands and Natural Resources Chair and Vice Chair if desired

The following pages are backup
for agenda item
9b

BEFORE THE UNITED STATES
JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE ENDANGERED SPECIES ACT SECTION 4 DEADLINE LITIGATION — MDL No. 2165

F.I.M. Corp., et al. v. U.S. Dep't of Interior, et al.
No. 3:14-cv-00630-MMD-WGC (D.Nev.)

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO VACATE CONDITIONAL TRANSFER ORDER (CTO-6)

Defendants United States Department of the Interior ("Interior"); S. M. R. Jewell, in her official capacity as Secretary of the Interior; the United States Fish and Wildlife Service ("FWS" or "Service"); Daniel M. Ashe, in his official capacity as the Service's Director; Gary Frazer, in his official capacity as the Service's Assistant Director for Ecological Services; Ren Lohoefener, in his official capacity as the Service's Pacific Southwest Regional Director; and Edward Koch, in his official capacity as Field Supervisor of the Service's Nevada Fish and Wildlife Office, (collectively, "Defendants") respectfully submit this response in opposition to Plaintiffs' Motion to Vacate Conditional Transfer Order. *See* Docket ("Dkt.") 142; Dkt. 142-1 ("Memorandum" or "Pls.' Mem.").[1]

INTRODUCTION

This case marks the latest in a series of challenges to two separate but related settlement agreements ("MDL Agreements") that, in 2011, were approved and entered as consent decrees by Judge Emmet Sullivan of the United States District Court for the District of Columbia in the above-captioned action ("ESA Section 4 MDL"). The Panel recently concluded that two related cases originally filed in the Northern District of Oklahoma – *State of Oklahoma v. U.S. Dep't of Interior* and *Hutchison v. U.S. Dep't of Interior*, which involve nearly identical claims as *F.I.M.*

[1] Unless otherwise noted, the docket citations herein refer to the ECF-stamped pagination, *i.e.*, the page notations that appear in the header of ECF-filed documents.

and which presented the same arguments both in favor of and against transfer as the arguments made here – shared common questions of fact with the ESA Section 4 MDL, and that transfer to the District of Columbia would serve the convenience of parties and witnesses and promote the just and efficient conduct of those cases.

Since the primary claims in this case are substantively indistinguishable from the related claims recently transferred by the Panel, the same result should apply here. For the same reasons that the Panel rejected similar objections to transfer in those related cases, Plaintiffs' arguments against transfer of this case are unpersuasive. Consistent with the underlying objectives of 28 U.S.C. § 1407, transfer would prevent the risk of conflicting rulings, promote judicial economy, and also further the interests of justice. Nothing in Plaintiffs' Memorandum compels a different conclusion. Accordingly, as discussed further *infra*, the Panel should deny Plaintiffs' Motion to Vacate Conditional Transfer Order, and instead transfer this case to the District of Columbia.[2]

STANDARD OF REVIEW

Pursuant to Section 1407(a), the Panel may transfer a tag-along action to an existing multidistrict action for coordinated pretrial proceedings if the actions "involv[e] one or more common questions of fact," and transfer "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407(a). "Section 1407 does not require a complete identity or even a majority of common factual or legal issues as a prerequisite to transfer." *In re Darvocet, Darvon and Propoxyphene Prods. Liab. Litig.*, 939 F.Supp.2d 1376, 1377 (J.P.M.L. 2013) (citing *Gadolinium Contrast Dyes Prods. Liab. Litig.*, 536

[2] For the sake of brevity, and because substantial briefing has already been recently submitted to the Panel in two related cases, Defendants presume familiarity with the operative facts and legal background, as described in prior filings. *See, e.g.*, Dkt. 128; *see also* Dkt. 78-1. This brief only reiterates those particular facts or authorities that are relevant to the arguments presented herein.

F.Supp.2d 1380, 1382 (J.P.M.L. 2008)). A conditional transfer order may be vacated only upon a showing of good cause. *See In re Grain Shipments*, 319 F.Supp. 533, 534 (J.P.M.L. 1970).[3]

ARGUMENT

I. The Panel's Recent Order Supports Transfer Of This Case

Plaintiffs' Memorandum is most remarkable for what it *does not* say. In a recent order, the Panel transferred nearly identical claims from two related cases that were originally filed in the Northern District of Oklahoma – *State of Oklahoma v. U.S. Dep't of Interior*, formerly No. 4:14-cv-00123-JHP-PJC (N.D.Okla.); and *Hutchison v. U.S. Dep't of Interior*, formerly No. 4:14-cv-00509-JHP-PJC (N.D.Okla.) – to the ESA Section 4 MDL in the District of Columbia. *See* Dkt. 132. In its transfer order, the Panel squarely addressed – and flatly rejected – many of the same arguments made by Plaintiffs here, as addressed *infra*. Nowhere in their Memorandum, however, do Plaintiffs even acknowledge this order, even though the Panel's findings are directly relevant to this case. *See, e.g., In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, MDL No. 1720, 2013 WL 8123000, at *1 (J.P.M.L. Dec. 18, 2013) (ordering transfer where movant "adopt[ed] and repeat[ed] arguments made by plaintiffs in [other] actions . . . recently transferred" because the "Panel rejected each of those arguments when it transferred

[3] Defendants have separately moved in the District of Nevada to transfer this case to the District of Columbia, pursuant to 28 U.S.C. § 1404(a). *See* Dkt. 130 at 5. The parties have completed their briefing on this Section 1404(a) motion; to date, no decision has been issued. However, the Panel need not await a decision on the Section 1404(a) motion before it resolves whether transfer is warranted under Section 1407, particularly given the substantial risk that similar challenges to the MDL Agreements will be filed elsewhere if transfer is not ordered, as discussed further *infra*. *See, e.g., In re Natrol, Inc. Glucosamine/Chondroitin Marketing and Sales Practices Litig.*, MDL No. 2528, 2014 WL 2616783, at *1 (J.P.M.L. June 10, 2014) (ordering transfer, notwithstanding the "pendency of Section 1404 motions," in part, because "additional actions also are possible"). Moreover, since *State of Oklahoma* and *Hutchison* were recently transferred by the Panel to the District of Columbia and include nearly identical claims, judicial economy favors timely transfer of this case for coordinated proceedings in that forum.

the [other] actions" and movant "offered no justification for the Panel to reconsider its decision on any of those issues"); *In re Polyurethane Foam Antitrust Litig.*, MDL No. 2196, 2011 WL 3182411, at *1 (J.P.M.L. May 19, 2011) (concluding transfer to venue of previously-transferred cases was "warranted for reasons set out in [the Panel's] original order directing centralization"); *In re Nat'l Arbitration Forum Trade Practices Litig.*, 729 F.Supp.2d 1353, 1354 (J.P.M.L. 2010) (same); *In re Musical Instruments and Equipment Antitrust Litig.*, MDL No. 2121, 2010 WL 9537783, at *1 (J.P.M.L. Apr. 1, 2010) (same).

This omission is curious, particularly given the extensive overlap between the transferred claims in *State of Oklahoma* and *Hutchison* and the claims presented in this case. The first six claims raised in Plaintiffs' First Amended Complaint, Dkt. 142-4 ("FAC"), for example, are substantively identical – often word-for-word – to the first six claims in the *State of Oklahoma* complaint. Both complaints contain duplicative claims challenging FWS's "[e]limination of the ESA's '[w]arranted but [p]recluded' [a]lternative" (Count I), *compare* Dkt. 78-10 ¶¶90-97 *with* FAC ¶¶85-92; its "[f]ailure to [c]onsider [b]est [s]cientific and [c]ommercial [d]ata and [c]onservation [p]ractices" (Count II), *compare* Dkt. 78-10 ¶¶98-104 *with* FAC ¶¶93-99; its "[f]ailure to [c]omply [w]ith ESA Section 4(h) [g]uidelines" (Count III), *compare* Dkt. 78-10 ¶¶105-110 *with* FAC ¶¶100-105; and its "[r]ulemaking [w]ithout the [r]equisite [l]egal [p]rocess" (Count IV), *compare* Dkt. 78-10 ¶¶111-118 *with* FAC ¶¶106-113. The complaints also contain nearly identical constitutional claims. *Compare* Dkt. 78-10 ¶¶119-128 *with* FAC ¶¶114-123 (Count V – due process); *compare* Dkt. 78-10 ¶¶129-134 *with* FAC ¶¶124-129 (Count VI – Article II). So too with the *Hutchison* complaint, which includes substantively identical claims challenging FWS's "[e]limination of the ESA's '[w]arranted but [p]recluded' [a]lternative,"

compare Dkt. 90-5 ¶¶92-99, 108-111 *with* FAC ¶¶85-92; and its "[r]ulemaking [w]ithout the [r]equisite [l]egal [p]rocess," *compare* Dkt. 90-5 ¶¶100-107 *with* FAC ¶¶106-113.[4]

Plaintiffs' almost verbatim repetition of these claims is significant, because the Panel recently concluded that transferring these claims from *State of Oklahoma* and *Hutchison* "will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation." Dkt. 132 at 3. Because the claims in this case are "almost identical" to these previously-transferred claims, "*a fortiori*, a prima facie case for transfer under Section 1407 has been made." *In re West Coast Bakery Flour Antitrust Litig.*, 383 F.Supp. 842, 843 (J.P.M.L. 1974); *see also In re Lipitor Antitrust Litig.*, MDL No. 2332, 2012 WL 4069565, at *1 (J.P.M.L. Aug. 3, 2012) (ordering transfer because "complaint contains essentially identical allegations" to previously-transferred cases); *In re Nat'l Arbitration Forum*, 729 F.Supp.2d at 1354 (ordering transfer where there is "no doubt whatever that the action and the actions already in MDL No. 2122 share multiple factual issues"); *In re "Fine Paper" Antitrust Litig.*, 453 F.Supp. 118, 120 (J.P.M.L. 1978) (ordering transfer; noting that allegations were "very similar" to the allegations in previously-transferred cases); *In re Equity Funding Corp. Litig.*, 391 F.Supp. 767, 768 (J.P.M.L. 1975) (ordering transfer for consolidation with previously-transferred cases where a comparison of complaints "indicates that both contain similar allegations focusing upon

[4] The complaints in *State of Oklahoma* and *Hutchison* also raise separate claims challenging the merits of FWS's final listing determination for a different species: the lesser prairie-chicken. *See* Dkt. 78-10 ¶¶135-140; Dkt. 90-5 ¶¶112-129. By contrast, Plaintiffs' FAC includes no such claims regarding the lesser prairie-chicken (or any other final listing determination), but it does include an equitable estoppel claim. *See* FAC ¶¶130-139. As discussed further *infra*, this claim is derivative of Plaintiffs' other claims, and, in any event, Plaintiffs' claims need not be identical to the claims in *State of Oklahoma* and *Hutchison* to warrant transfer. *See, e.g., In re Oxycontin Antitrust Litig.*, 542 F.Supp.2d 1359, 1360 (J.P.M.L. 2008) (noting "the presence of additional or differing legal theories is *not significant* when the actions still arise from a common factual core").

analogous violations of securities laws"); *In re Stirling Homex Corp. Sec. Litig.*, 405 F.Supp. 314, 315 (J.P.M.L. 1975) (ordering transfer because "plaintiffs complain of precisely the same type of conduct as the plaintiffs allege in all but one of the actions that were previously transferred").

In light of the similarities between *State of Oklahoma* and *Hutchison* and this case, as discussed further *infra*, the same reasoning applied by the Panel to those cases should equally apply here. Like *State of Oklahoma* and *Hutchison*, the claims in this case directly implicate the MDL Agreements, are similar to claims that were previously addressed – and rejected – in the ESA Section 4 MDL, and raise the same risk of inconsistent rulings, particularly with respect to Plaintiffs' requested relief. *Id.* Thus, as with *State of Oklahoma* and *Hutchison*, this case also should be transferred to the District of Columbia.

II. Transfer Is Appropriate Because There Are Common Questions Of Fact

As an initial matter, there are several factual commonalities between this case and the ESA Section 4 MDL (as well as the recently-transferred *State of Oklahoma* and *Hutchison*).[5] To show a factual linkage, Section 1407 requires only "*one or more* common questions of fact." 28 U.S.C. § 1407(a) (emphasis added). Thus, "Section 1407 does not require a complete identity or even a majority of common factual or legal issues as a prerequisite to transfer." *In re Darvocet*, 939 F.Supp.2d at 1377 (citation omitted); *see also In re Katz Interactive Call Processing Patent Litig.*, 481 F.Supp.2d 1353, 1355 (J.P.M.L. 2007) (same). Even when a tag-along action presents "some unique or localized factual issues," the Panel will routinely order transfer if other factual

[5] Other parties have raised similar challenges since Judge Sullivan's approval of the MDL Agreements – but have recognized that such post-approval challenges should be reviewed by Judge Sullivan. *See* Dkt. 71-3 (notice of related case in *NAHB* identifying action as related to the ESA Section 4 MDL because it "grow[s] out of the same event or transaction").

commonalities exist. *In re Cuisinart Food Processor Antitrust Litig.*, 506 F.Supp. 651, 654-55 (J.P.M.L. 1981); *see also In re Grain Shipments*, 332 F.Supp. 588, 589 (J.P.M.L. 1971) (same).

Here, several factual commonalities weigh in favor of transfer. Again, the Panel's recent decision to transfer the nearly identical claims in *State of Oklahoma* and *Hutchison* is instructive. As relevant here, the Panel addressed the argument – also pressed by Plaintiffs in this case – that those claims did "not share questions of fact" with the ESA Section 4 MDL. Dkt. 132 at 3; *see also* Pls.' Mem. at 9 (similarly alleging this case "does not involve questions of fact in common" with the ESA Section 4 MDL). However, the Panel was "not convinced by these arguments." Dkt. 132 at 3. Rather, the Panel held that *State of Oklahoma* and *Hutchison* "involve common questions of fact" in two respects. Dkt. 132 at 2. First, the Panel found that the claims in *State of Oklahoma* and *Hutchison* "directly implicate the [MDL Agreements], and therefore will share questions of fact" with the ESA Section 4 MDL, specifically noting that "several claims in *State of Oklahoma* and *Hutchison* are similar to claims" previously addressed in the ESA Section 4 MDL. *Id*. at 3 (citing *In re ESA Section 4 Deadline Litig.*, 704 F.3d 972, 977-79 (D.C.Cir. 2013), *reh'g en banc denied* (Apr. 29, 2013)). Second, the Panel found that *State of Oklahoma* and *Hutchison* "necessarily will involve questions of fact as to the FWS's nationwide listing budget, priorities, and workload, the very questions also involved in the MDL actions." *Id*.

The same reasoning – and outcome – should apply here. As with *State of Oklahoma* and *Hutchison*, Plaintiffs here directly challenge the lawfulness of the MDL Agreements. *See, e.g.*, FAC ¶2 ("By entering into private settlement agreements with special interest litigants, FWS has . . . fundamentally changed its obligations under the ESA."); *see also* Dkt. 130 at 2-5. Because the MDL Agreements remain subject to Judge Sullivan's continuing jurisdiction and oversight, Plaintiffs' claims, like the claims from *State of Oklahoma* and *Hutchison*, unavoidably implicate factual questions before Judge Sullivan, *e.g.*, questions of fact as to the nature and requirements

of the MDL Agreements and FWS's implementation thereof. Indeed, even before its decision in *State of Oklahoma* and *Hutchison*, the Panel recognized that the cases properly centralized in the ESA Section 4 MDL included those cases that "stemmed from the MDL No. 2165 settlements." Dkt. 43 at 1. That is precisely the case here. In addition, there are common questions of fact as to any remedy that Plaintiffs might obtain.[6] For example, an order from the District of Nevada granting Plaintiffs their requested relief would likely force Judge Sullivan to reconsider the same questions identified by the Panel in *State of Oklahoma* and *Hutchison* – and also at issue in the ESA Section 4 MDL – regarding FWS's "nationwide listing budget, priorities, and workload." Dkt. 132 at 3.

Plaintiffs' recent addition of an equitable estoppel claim (Count VII), *see* FAC ¶¶130-139, does not dictate a different result.[7] Nevertheless, Plaintiffs rely on this new claim as the basis for seeking to recast their case in a completely different light, now alleging that, "[w]hile the [MDL Agreements] precipitated the listing decision deadlines for FWS, the focus of this litigation is . . . how Defendants' threatened action will interfere with implementation of the Nevada Conservation Plan." Pls.' Mem. at 9; *see also id*. at 5 (alleging that "a critical issue . . . is Plaintiffs' attempt to estop the interference . . . that would result from the FWS's actions and intentions regarding the Greater Sage Grouse"). Indeed, in their Memorandum, Plaintiffs devote

[6] Plaintiffs cryptically suggest that they only seek to "estop the interference . . . that would result from the FWS's actions and intentions" regarding certain court-ordered commitments for the greater sage-grouse in the MDL Agreements. Pls.' Mem. at 5. But it is unclear how Plaintiffs expect to achieve this outcome without vacating or modifying the MDL Agreements. Moreover, even if FWS were compelled by an adverse ruling to move for such vacatur or modification, there is no guarantee that Judge Sullivan would grant such a motion. Further, any such motion would likely be opposed by the other signatories to the MDL Agreements as contrary to the bargain they struck.

[7] Plaintiffs added this estoppel claim one day after the Panel issued its transfer decision in *State of Oklahoma* and *Hutchison*. *See* FAC ¶¶51-54, 130-139.

considerable space to this claim, reciting various allegations purporting to show their "reliance upon" then-Interior Secretary Kenneth Salazar's "invitation to Nevada . . . to influence [FWS's] listing determination and avoid listing" the greater sage-grouse. *Id*. at 7.

However, this line of reasoning – that allegations made in connection with this estoppel claim somehow alter the factual character of Plaintiffs' six remaining claims – lets the tail wag the dog. Section 1407 only requires "common questions of fact." 28 U.S.C. § 1407(a). Hence, the Panel need not find that legal issues are completely overlapping to conclude that transfer is appropriate. *See In re Darvocet*, 939 F.Supp.2d at 1377. Indeed, "the presence of additional or differing legal theories is *not significant* when the actions still arise from a common factual core." *In re Oxycontin Antitrust Litig*., 542 F.Supp.2d at 1360 (emphasis added); s*ee also In re MF Global Holdings Ltd. Inv. Litig*., 857 F.Supp.2d 1378, 1380 (J.P.M.L. 2012) ("Where actions share factual questions, the Panel has long held that the presence of disparate legal theories is no reason to deny transfer.") (citing *In re Merscorp Inc. Real Estate Settlement Procedures Act Litig*., 560 F.Supp.2d 1371, 1371 (J.P.M.L. 2008)); *cf. In re Cuisinart Food Processor Antitrust Litig*., 506 F.Supp. at 654-55 (ordering transfer, in spite of "some unique or localized factual issues"). Because several factual commonalities exist between this case and the ESA Section 4 MDL, as discussed *supra*, this estoppel claim does not tip the transfer analysis. This conclusion is further supported by the decision in *State of Oklahoma* and *Hutchison*, in which the Panel transferred to the District of Columbia all claims, including the final listing rule-related claims that do not directly challenge the MDL Agreements. *See* Dkt. 132 at 4.[8] The Panel should do the same here.

[8] Defendants had requested that the Panel separate and remand these final listing rule-related claims to the Northern District of Oklahoma; the Panel noted that Judge Sullivan will be "in the

More importantly, Plaintiffs' attempt to recast their claims elevates form over substance, drawing a distinction where there is none. *See In re Collins*, 233 F.3d 809, 811 (3d Cir. 2000) (recognizing that the Panel is not bound to accept the plaintiffs' characterization of their claims). This new estoppel claim, like Plaintiffs' constitutional claims (Counts V and VI), is based on the predicate notion that the MDL Agreements require FWS to violate the ESA. *See* FAC ¶2 ("This action seeks relief from an agency's action purporting to alter its obligations under Federal statutes through settlement of litigation with no Congressional action."). In particular, this claim presumes that the MDL Agreements impose an "arbitrary listing deadline" with respect to the greater sage-grouse. *Id* ¶135. Moreover, with respect to remedy, Plaintiffs seek to estop FWS's actions "pursuant to or as a result of the Settlements." *Id*. ¶139. Therefore, because the estoppel claim stems from the allegation that the MDL Agreements are unlawful, and Plaintiffs seek to limit FWS's implementation of the MDL Agreements as a result, this claim is derivative of Plaintiffs' other claims. *Cf. Brown v. Holder*, 763 F.3d 1141, 1152 (9th Cir. 2014) (dismissing estoppel claim that was "entirely dependent on [a separate] constitutional challenge" because plaintiff already "has a remedy if his constitutional rights have been violated"). In other words, but for the MDL Agreements, which Judge Sullivan and the D.C. Circuit have held to be lawful, there would be no estoppel claim, and thus Plaintiffs' reliance on this claim to distinguish their case from the ESA Section 4 MDL is misplaced.

III. Transfer Is Necessary To Avoid The Possibility Of Conflicting Rulings

In their Memorandum, Plaintiffs also fail to grapple with the substantial risk that their requested relief would directly conflict with the previously-approved consent decrees that remain under Judge Sullivan's jurisdiction. As the Panel explained in *State of Oklahoma* and *Hutchison*,

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best position to determine which claims implicate only the merits of the listing decision and whether remand of those claims is appropriate." Dkt. 132 at 4.

it is "particularly appropriate" to consider the risk of inconsistent rulings in this context – "*not* because we are certain how the transferee judge will rule, but rather because a finding in favor of plaintiffs will require the transferee judge to modify the settlement agreements over which he still has jurisdiction – a process that would be *far more efficient* if all the parties to these actions are before the same court." Dkt. 132 at 4 (emphasis added); *see also In re Polar Bear ESA Listing and 4(d) Rule Litig.*, 588 F.Supp.2d 1376, 1377 (J.P.M.L. 2008) (granting transfer to "avoid potentially conflicting obligations placed upon the federal defendants"); *In re Tri-State Water Rights Litig.*, MDL No. 1824, 481 F.Supp.2d 1351, 1352 (J.P.M.L 2007) (noting transfer to avoid conflicting rulings is warranted in light of "potential requests for imposing conflicting standards of conduct") (citing *In re Operation of the Missouri River System Litig.*, 277 F.Supp.2d 1378 (J.P.M.L. 2003) ("*Missouri River*")).[9]

So too here, where Plaintiffs seek to impose conflicting obligations on Defendants, who remain bound by the court-approved terms of the MDL Agreements and thus subject to Judge Sullivan's continuing oversight. *See* Dkt. 132 at 3 (acknowledging that Judge Sullivan "will oversee implementation of the settlement agreements through fiscal year 2017"). Plaintiffs, for example, seek to preclude FWS's compliance with certain future commitments under the MDL Agreements (*e.g.*, completion of a final listing rule for the bi-state distinct population segment ("DPS") of greater sage-grouse by April 28, 2015; and completion of a not-warranted finding or proposed listing rule for the greater sage-grouse rangewide by September 30, 2015), requesting that a court "[e]njoin any decision . . . that would exclude from consideration the potential for

[9] *Missouri River* is instructive. In that case, the plaintiffs brought a series of cases challenging the United States Army Corps of Engineers' ("Corps") operation of dams and reservoirs on the Missouri River. In separate cases, the plaintiffs ultimately obtained conflicting injunctions – one that required the Corps to release more water to the Missouri River, and another that barred it from doing so. The conflict was only resolved when the Panel transferred and centralized all of the claims in a single forum. *See Missouri River*, 277 F.Supp.2d at 1378.

determining that one or more of these species should remain a candidate species." FAC, Prayer for Relief ¶9. Plaintiffs also seek to undo FWS's prior compliance with the MDL Agreements and ESA by vacating the previously-issued proposed listing rule for the bi-state DPS. *See id.* ¶99 ("FWS's listing decisions . . . must be set aside"), *id*., Prayer for Relief ¶8 (seeking to "[v]acate and remand to FWS any FWS decision to propose a listing of any of the Nevada Candidate Species as threatened or endangered under the ESA"). With respect to their estoppel claim as well, Plaintiffs request that a court bar any actions made "pursuant to or as a result of the Settlements." *Id*. ¶139.

Such relief, if granted, would directly conflict with Judge Sullivan's "inherent power to enforce compliance with [his] lawful orders through civil contempt." *Guantanamera Cigar Co. v. Corporacion Habanos, S.A.*, 750 F.Supp.2d 31, 34 (D.D.C. 2010) (quotation omitted) (noting this retained "power is 'essential to the enforcement of the judgments [and] orders . . . of the courts,'" and "includes enforcement of [c]ourt-imposed deadlines") (citations omitted)); *see also Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 440 (2004) ("Federal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, [a consent] decree may be enforced."). This requested relief would also conflict with Judge Sullivan's expressly-reserved "jurisdiction to oversee compliance with the terms of the [MDL Agreements] and to resolve any motions to modify such terms." Dkt. 76-4 ¶ 28; Dkt. 76-5 ¶ D.10. Defendants therefore face a substantial risk of being subject to conflicting court orders in the absence of a transfer order.

Without transfer, there also is a significant risk of conflicting rulings with respect to the legality of the MDL Agreements – the sort of risk that transfer pursuant to Section 1407 was meant to prevent: "The purpose of Section 1407 . . . is to eliminate the potential for conflicting contemporaneous pretrial rulings by coordinate district and appellate courts in multidistrict related civil actions." *In re Plumbing Fixture Cases*, 298 F.Supp. 484, 490-492 (J.P.M.L. 1968);

see also In re Columbia and Snake River Dams Clean Water Act Litig., 987 F.Supp.2d 1377 (J.P.M.L. 2013) (same). In this instance, Plaintiffs seek a ruling from the District of Nevada that "FWS's agreement to eliminate one of the statutorily mandated alternative findings . . . is not in accordance with the law." FAC ¶ 92; *see also id.* ¶ 113 (challenging legality of "FWS's decision not to consider continued retention" of the greater sage-grouse "as candidate species beyond the deadlines in the Settlements"). Such a ruling, if granted, would directly conflict with previous rulings in the ESA Section 4 MDL. As relevant here, Judge Sullivan (1) reviewed and approved the MDL Agreements and entered them as enforceable consent decrees, and also (2) ruled that a would-be intervenor "ha[d] not shown that any portion of the [MDL Agreements] will cause the FWS to violate or ignore a procedural requirement." *In re ESA Section 4 Deadline Litig.*, 277 F.R.D. 1, 6-7 (D.D.C. 2011). The D.C. Circuit affirmed, also finding that the MDL Agreements do not "cause the Service to violate any ESA-mandated procedure" because these "agreements are an exercise – not an abdication – of the Service's authority under the ESA." *In re ESA Section 4 Deadline Litig.*, 704 F.3d 972, 977-79 (D.C. Cir. 2013), *reh'g en banc denied* (Apr. 29, 2013).[10]

These prior rulings are significant, because most of Plaintiffs' claims mirror the claims that were earlier addressed by Judge Sullivan and the D.C. Circuit. Plaintiffs allege in Count I, for example, that, "[b]y entering into the Settlements," FWS "eliminate[d] one of the statutorily mandated alternatives for categorizing species," *i.e.*, making continued warranted-but-precluded findings. FAC ¶90. This same claim was twice rejected in the ESA Section 4 MDL. *See In re ESA Section 4 Deadline Litig.*, 704 F.3d at 976-77 (rejecting claim that the MDL Agreements

[10] Subsequent decisions have further supported these rulings. *See Nat'l Ass'n of Home Builders v. FWS*, 34 F.Supp.3d 50, 60 (D.D.C. 2014) (rejecting "underlying claim that by acting pursuant to the [MDL] Agreements, the Service fails to follow ESA-mandated procedures").

"establish an illegal procedure – the elimination of the Service's statutory authority to find that a proposal to list a species is warranted but precluded by higher priorities"); *In re ESA Section 4 Deadline Litig.*, 277 F.R.D. at 6-7 (holding that would-be intervenor ("SCI") had "not shown that any portion of the settlement agreement will cause the FWS to violate or ignore a procedural requirement"). Similarly, in Count II, Plaintiffs assert that, as a result of the MDL Agreements, "FWS will not sufficiently review and analyze scientific data and conservation practices," FAC ¶99, but similar claims were rejected. *See Nat'l Ass'n of Home Builders*, 34 F.Supp.3d at 60 (rejecting, *inter alia*, claims that the MDL Agreements "require the Service to make decisions that disregard the best scientific and commercial data available" because these claims "have been considered and rejected by this Court and Circuit" in the ESA Section 4 MDL). So too with their Count III, which alleges that the MDL Agreements require FWS to violate ESA guidelines for ranking candidate species. *See* FAC ¶104. This claim was also rejected. *See In re ESA Section 4 Deadline Litig.*, 277 F.R.D. at 6-7 ("The rankings do not create any requirement – procedural or otherwise – that the agency consider the species in the order they are ranked."). Plaintiffs further allege, in Count IV, that FWS was required to undertake notice-and-comment rulemaking for the MDL Agreements. *See* FAC ¶113. Again, this claim was earlier rejected. *See In re ESA Section 4 Deadline Litig.*, 704 F.3d at 979 (finding no comment period was required when FWS evaluates whether to make a warranted-but-precluded finding); *see also Nat'l Ass'n of Home Builders*, 34 F.Supp.3d at 60 (rejecting, *inter alia*, claim that the MDL Agreements "change the procedure for listing species without allowing public notice and comment").

IV. The ESA Section 4 MDL Is Ongoing

Plaintiffs next assert that the "procedural posture of the cases" weighs against transfer, arguing against consolidation of *F.I.M.* with a "matter that is no longer pending." Pls.' Mem. at 5. However, their characterization of the ESA Section 4 MDL's status as "not pending," *id* at 4,

is inaccurate. Judge Sullivan's approval of the MDL Agreements marked only the beginning of a detailed multi-year schedule for FWS to address the listing status of numerous species. This was – and still is – a sizeable undertaking for FWS. *Cf. WildWest Inst. v. Ashe*, 15 F.Supp.3d 1057, 1073 (D.Mont. 2014) (describing court-ordered commitments in the MDL Agreements as "a considerable and aggressive task"). Thus, far from being completed, the ESA Section 4 MDL is an ongoing matter, with Judge Sullivan continuing to oversee FWS's implementation of the MDL Agreements. *See* Dkt. 76-4 ¶ 28; Dkt. 76-5 ¶ D.10.[11]

The Panel's decision in *State of Oklahoma* and *Hutchison* also bears out this point. In rejecting the same argument that the ESA Section 4 MDL was "resolved" in 2011, Dkt. 132 at 3, the Panel emphasized that "the transferee judge will oversee implementation of the settlement agreements through fiscal year 2017." *Id*. The Panel thus "was not persuaded that this MDL has reached the point that transfer of these related actions would not benefit from inclusion." *Id*.; *see also In re Four Seasons Sec. Laws Litig*., 429 F.Supp. 527, 529 (J.P.M.L. 1976) (ordering transfer to action in which settlement had been approved where tag-along case "appears to raise factual questions common to the previously transferred litigation concerning the effect of the class settlement"); *In re Seeburg-Commonwealth United Merger Litig*., 362 F.Supp. 568, 571 (J.P.M.L. 1973) (ordering transfer to action in which settlement had been approved because "questions concerning orders entered by the transferee court and the effect of the [approved] settlement upon the claims asserted by plaintiffs in [the tag-along action] are all questions best resolved by the transferee judge"). The same reasoning should also apply here.

[11] Since approval of the MDL Agreements, Judge Sullivan has exercised his authority to modify several deadlines. *See, e.g., In re ESA Section 4 Deadline Litig*., Misc. Action No. 10-377 (EGS) (D.D.C.), Dkt. 68, 71, 72; *see also* minute orders dated Dec. 20, 2012; Dec. 27, 2012; June 21, 2013; Aug. 15, 2013; Dec. 3, 2013; Jan. 28, 2014; May 6, 2014; July 28, 2014; Sept. 19, 2014.

V. Transfer Will Serve The Convenience Of The Parties

Plaintiffs' remaining argument – that transfer of *F.I.M.* to the District of Columbia would be "extremely inconvenient to parties and witnesses," Pls.' Mem. at 10 – is equally unavailing. In both *State of Oklahoma* and *Hutchison*, the plaintiffs raised similar objections, alleging that transfer of those cases to the District of Columbia would impose "an especially difficult burden" and a "great inconvenience." Dkt. 105-1 at 13; *see also* Dkt. 86 at 20 (citing the "inconvenience of having these parties travel"). However, the Panel was not swayed by these objections, instead finding that transfer of the two cases "will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation." Dkt. 132 at 3.

Nothing in Plaintiffs' Memorandum compels a different conclusion here. First, Plaintiffs devote considerable space to arguing that numerous "witnesses . . . would testify" as to a broad range of issues. Pls.' Mem. at 10. But this argument is inapposite. No such testimony is likely in this case, since claims brought under the Administrative Procedure Act ("APA"), *see* FAC ¶17, are reviewable on an administrative record in the first instance. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) (holding that, in APA cases, a court's "task . . . is to apply the appropriate APA standard of review. . . to the agency decision based on the record the agency presents to the reviewing court"); *Goonsuwan v. Ashcroft*, 252 F.3d 383, 390 n.15 (5th Cir. 2001) ("It is a bedrock principle of judicial review that a court reviewing an agency decision should not go outside of the administrative record."); *Olenhouse v. Commodity Credit Corp*., 42 F.3d 1560, 1579-80 (10th Cir. 1994) (describing court's "reliance on arguments, documents and other evidence outside the administrative record" as "inconsistent with the standards for judicial

review of agency action under the APA"). Plaintiffs' wholly speculative assertion that witness testimony may be required does not justify a departure from this line of authority.[12]

Second, Plaintiffs contend that transfer would be "extremely . . . costly to Plaintiffs." Pls.' Mem. at 2. But the only particularized allegations concerning any costs relate to just one person (Mr. Fulstone), who estimates that, if he were to attend a hearing in the District of Columbia, then "each trip" would "cost roughly $2,000." Dkt. 142-6 at ¶16. These allegations are insufficient for several reasons. To start, Plaintiffs offer no estimates regarding the costs that might be incurred by any other Plaintiffs. Nor do they estimate Mr. Fulstone's travel costs if the case remains in Nevada, or attempt to quantify the difference between these costs. More importantly, as discussed *supra*, if this case is transferred, it is highly unlikely that Mr. Fulstone (or any other Plaintiffs) would be required to make repeated trips to the District of Columba, and it is possible that no travel would be required, since Plaintiffs' claims will likely be resolved through dispositive briefing, based on review of an administrative record, if necessary.

In any event, even if transfer would result in some inconvenience to Plaintiffs, "transfer is often necessary to further the expeditious resolution of the litigation taken as a whole." *In re Darvocet, Darvon and Propoxyphene Prods. Liab. Litig.*, MDL 2226, 2012 WL 7764151, at *1 (J.P.M.L. Apr. 16, 2012) (ordering transfer that "might inconvenience some parties to that

[12] Plaintiffs also contend that transfer would "limit the ability" of other Nevada-based persons to "participat[e] in court proceedings." Pls.' Mem. at 11. The list of such participants includes – in addition to Plaintiffs – their "representatives," "members," "constituents," as well as "county residents" – all of whom allegedly "must be able to attend the court proceedings." *Id.* at 11-14; *see also id.* at 14 (alleging "logistical and financial hardships" for interested "county residents" to "attend[] the court proceedings in Washington, D.C."); *id.* at 13 (alleging that county official, "along with his constituents . . . must be able to attend"). However, since witness testimony is highly unlikely, and Plaintiffs' claims will likely be resolved through dispositive briefing, it is unclear why these various persons would be required to attend any hearing, if one even becomes necessary.

action") (citation omitted); *see also In re Fenofibrate Patent Litig.*, 787 F.Supp. 2d 1352, 1354 (J.P.M.L. 2011) (ordering transfer based on "overall benefits of centralization"). Further, all of the key FWS officials and personnel involved in negotiating the MDL Agreements, as well as their counsel at Interior, are located in or near the District of Columbia. Therefore, even if fact-finding were required in this case, the relevant witnesses and information for Defendants would be located in or near the District of Columbia.

VI. Transfer Will Serve The Just And Efficient Conduct Of The Case

Other factors related to the "just and efficient conduct" of this case, 28 U.S.C. § 1407(a), also support transfer. Because Judge Sullivan reviewed and approved the MDL Agreements and also retains ongoing jurisdiction for their enforcement and modification, he is uniquely familiar with the factual and legal issues relevant to FWS's implementation of the MDL Agreements – a fact that favors transfer. In other cases, the Panel has cited judicial familiarity as an important factor, affirming the entirely commonsensical notion that a transferee judge who has reviewed and approved a settlement agreement is often "uniquely well versed in every aspect of the action . . . [and] is in the best position to resolve these issues quickly and with a minimum of pretrial effort by the parties, the witnesses and the judiciary." *In re Four Seasons Sec. Laws Litig.*, 429 F.Supp. at 529; *see also In re Seeburg-Commonwealth United Merger Litig.*, 362 F.Supp. at 571. The same reasoning should apply here, since Judge Sullivan has continued to oversee FWS's implementation of the MDL Agreements, and is also familiar with the factual and legal issues relevant to other challenges to the MDL Agreements.[13] Judge Sullivan therefore is uniquely situated to guide *F.I.M.* to a just and efficient resolution.

[13] The following related actions have been assigned to Judge Sullivan: *CBD v. Salazar*, No. 1:12-cv-00861 (D.D.C.); *CBD v. Salazar*, No. 1:12-cv-01073 (D.D.C.); *CBD v. Salazar*, No. 1:12-cv-01091 (D.D.C.); *CBD v. Salazar*, No. 1:12-cv-01514 (D.D.C.); *Ctr. for Envtl. Sci., Accuracy & Reliability v. Salazar*, No. 1:12-cv-1311 (D.D.C.); *Nat'l Ass'n of Home Builders v.*

Moreover, if transfer is not granted, and these claims are permitted to proceed elsewhere, then there is a substantial risk that other would-be litigants will mount similar challenges, asking different courts to engage in the piecemeal dismantling of the MDL Agreements. Transfer thus is also appropriate to avoid this sort of "pretrial chaos." *In re Plumbing Fixture Cases*, 298 F.Supp. at 492-493 ("The contentions of the [non-movant], if sustained, would make possible, and perhaps probable, pretrial chaos . . . which Section 1407 was designed to make impossible.").

CONCLUSION

For all these reasons, the Panel should deny Plaintiffs' Motion to Vacate Conditional Transfer Order, and instead transfer the case to Judge Sullivan of the United States District Court for the District of Columbia.

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Respectfully submitted,

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