

**NEVADA ASSOCIATION OF COUNTIES (NACO)
Board of Director's Meeting**

November 16, 2016

Upon adjournment of the NACO Annual Business Meeting
but no earlier than 8:15 a.m.
Valley Electric Association, Inc.
800 E. Hwy 372
Pahrump, NV 89048

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

1. Public Comment. Please Limit Comments to 3 Minutes.
2. Approval of Agenda. **For Possible Action.**
3. Approval of the Minutes of the October 21, 2016 NACO Board Meeting. **For Possible Action.**
4. Approval of the 2016 NACO Honor Roll and NACO 2016 Participatory Democracy Award. **For Possible Action.**
5. Discussion and Possible Approval for NACO to File an Amicus Brief in Support of Washoe County's Request for Rehearing En Banc the Nevada Supreme Court's Reversal of the Second Judicial District Court's Grant of Summary Judgment and Remand of Fritz v. Washoe County Inverse Condemnation Action. **For Possible Action.**
6. Update on Interim Legislative Committees, Studies and Priorities for the 2017 Legislative Session. **For Possible Action.**
7. Update and Possible Action Regarding Public Lands and Natural Resources Issues Including but not Limited to:
 - a) The Center for Biological Diversity's Lawsuit against the U.S. Fish and Wildlife Service Seeking to Vacate their Decision Not to List the Bi-State Sage Grouse as an Endangered Species and NACO's Motion to Intervene on behalf of the F&WS. **For Possible Action.**

- b) The U.S. Department of the Navy's Fallon Range Training Complex Modernization: Expansion of Land Ranges, Airspace Modifications, and Public Land Withdrawal Renewal Environmental Impact Statement, and the U.S. Air Force's Notice of Intent to Prepare a Legislative Environmental Impact Statement for the Nevada Test and Training Range Military Land Withdrawal at Nellis Air Force Base. **For Possible Action.**
- c) Update on H.R.1484 - Honor the Nevada Enabling Act of 1864 Act.

8. County Updates.

9. Public Comment. Please Limit Comments to 3 Minutes

Adjourn

Members of the public can request copies of the supporting material for the meeting by contacting Amanda Evans at aevans@nvnaco.org or online at www.nvnaco.org.

Members of the public who are disabled and require special accommodations or assistance at the meeting are requested to notify NACO via email at info@nvnaco.org, or by calling (775) 883-7863 at least three working days prior to the meeting. This agenda was posted at the following locations:

NACO Office 304 S. Minnesota Street, Carson City, NV 89703
Clark County Admin. Building 500 S. Grand Central Parkway, Las Vegas, NV 89155
POOL/PACT 201 S. Roop Street, Carson City, NV 89701
Washoe County Admin. Building 1001 E. Ninth Street, Reno, NV 89520

The following links and/or pages are support for agenda
Item 3

NEVADA ASSOCIATION OF COUNTIES (NACO)

Board of Directors' Meeting

October 21, 2016, 9:30 a.m.

UNADOPTED MINUTES

The meeting was called to order at 9:35A.

Attendance: Past President Wichman, Washoe County Commissioner Herman, Esmeralda County Commissioner Bates, Humboldt County Commissioner French, Carson City Mayor Crowell, Douglas County Commissioner Johnson & NACO Staff; Jeff Fontaine, Dagny Stapleton, Amanda Evans & Tori Sundheim.

Remote Attendance: President Carson, Vice President Weekly, Churchill County Commissioner Olson, Clark County Commissioner Kirkpatrick, Lander County Commissioner Waits, Mineral County Commissioner Tipton, Pershing County Commissioner Irwin, Washoe County Commissioner Lucey, Lyon County Commissioner Fierro, Tami Davis - Nevada Treasurer's Association, Nancy Parent - Nevada Association of Clerks & Election Officials, & Dave Dawley - Nevada Assessors Association.

Other Attendees: Douglas County Commissioner Thaler, Lyon County Commissioner Alt, Austin Osborn of Storey County, Rob Stokes, Elko County Manager and Gratton Miller from the office of Senator Heller.

1. **Public Comment.** Lee Bonner of the Nevada Department of Transportation informed the Board that the Department is modifying the county consultation process to include Commissioner participation in the workshops held prior to the Department's presentation to the individual Commissions. He noted that invitations will be sent and specifically noted that if workshop participation resulted in a quorum the counties would need to notice the workshop. Elko County Manager Rob Stokes informed the Board that he had just received notice that former Elko County Treasurer, Ceasar Salicchi had passed away the night before. Mr. Salicchi had served as the Elko County Treasurer for roughly three decades.
2. **Approval of Agenda.** The agenda was approved on a motion by Commissioner Bates with second by Commissioner French.
3. **NACO President's Report.** President Carson informed the Board that the White Pine County Commission had a discussion regarding proposed by-law change to include a public lands assessment to be added to the annual NACO dues assessment. She noted that her Commission had concerns with approval without a cap to the assessment and the item was tabled by her Board. Commissioner Tipton noted that the Mineral County Commission was in favor with a cap as well and their consensus was a 3% maximum cap. President Carson noted that the White Pine County Commission was willing to go up to a 4% maximum cap and that the public lands work the Association does is important, especially for counties without public lands and natural resources staff. Past President Wichman informed the Board that Nye County voted unanimously in favor of the additional assessment. Commissioner French told the Board that Humboldt County discussed the item and he believes they are in favor of the assessment based on the need to have consolidated efforts. Commissioner Waits said that Lander County is also in favor of the assessment with a cap and the item will need to be re-agendized for an official vote prior to the Annual Membership Meeting. President Carson reiterated White Pine County being in support with a maximum cap of 4% and Commissioner Waits suggested that Jeff do the calculations on what is needed in order to keep the cap as low as possible. Commissioner French noted that it is important to remember that the Board will review the need for implementation of the assessment based on an annual review of the needs of the Association and that there is the real possibility of not needing to implement the assessment on an

annual basis and/or not assessing at the cap. Jeff informed the Board that he had distributed a spreadsheet that showed what the potential assessments, which are based on a formula using the amount of PILT each county receives, would be. His calculations included what each county would pay at each of the different proposed cap levels. Based on the most recent PILT payments, the formula with a 4% cap would generate roughly \$100K. He also noted that PILT payments can be erratic based on the appropriations allowed for in Washington. He agreed that a cap is a good practice and that a maximum of 4% will work. Commissioner Tipton noted that based on the yearly review of the budgetary needs she feels that her Commission would be in favor of the assessment with a 4% cap and will trust the Board to make the decision on the percentage of assessment on an annual basis. President Carson concluded her report by mentioning SB3334 regarding RS2477 roads, which she believes will be on the agenda for the upcoming SLUPAC meeting in Eureka. She said that she will continue to speak with Donna Bath to determine how SB3334 would work and how it will affect previous actions.

4. **NACO Executive Director's Report.** Jeff informed the Board that Tori has been granted special admission to the Nevada Bar based upon her employment by the Association and that she can now serve as in-house council and officially offer advice to the Board. He also informed the Board that additional information had been sent to them as follow up to the September meeting. The first is a draft letter which can be used regarding the proposed action on data services and that the letter requests the slowing down of the process that the FCC is conducting regarding the change in the assessment of data fees. The second was requested to be distributed by Jim Hartman who had presented arguments against the passage of Question 2 regarding the legalization of recreational marijuana at the September meeting. Jeff noted one of the key pieces is that there is no specific opt out for counties other than through zoning changes and that there is no local input in the approval of licensing and that counties must make affirmation of zoning to the Department of Taxation within 90 days, or the Department will automatically assume that it is approved at the county level. Jeff informed the Board that there had been a hiccup in the nomination process for the office of Vice President and that as a result the Nomination Committee has removed their recommendation of Commissioner Lucey. Commissioner Waits had also wanted to be considered for the position but her email had been mistakenly overlooked. The Committee will now present both Commissioners to the General Membership for Consideration in November as well as open the position to nominations from the floor. Committee Chair Weekly apologized for the oversight and noted that he looks forward to the process going forward in November. Commissioner Lucey noted that he appreciated the original nomination and looks forward to addressing the General Membership. Commissioner Waits thanked Commissioner Weekly for his comments and noted that she too looks forward to speaking with the General Membership. Jeff informed the Board that he will communicate with the entire membership to ensure that the process is clearly defined. Jeff concluded his remarks by thanking Nye County for the work they have done to assist in planning the Annual Conference and that the event is expected to be very successful.
5. **Approval of Minutes of the September 23, 2016 NACO Board of Directors Meeting.** Commissioner Waites noted that the application deadline for the Senior Star program is October 31st not 3rd from her Board Member Update and President Carson noted a typo on page 2 in the 10th line from the bottom that was changed from the word "is" to "if". The minutes were approved as amended on a motion by Past President Wichman with second by Commissioner Bates.
6. **Approval of Endorsement for Pershing County Commissioner Patrick Irwin to Continue as a National Association of Counties Representative to the SAFECOM Executive Committee. SAFECOM was Formed in 2001 After the Terrorist Attacks of September 11, 2001 as Part of the Presidential E-Government Initiative to Improve Public Safety Interoperability, Allowing Emergency Responders to Communicate Effectively Before, During, and After Emergencies and Disasters.** Commissioner Irwin was unanimously endorsed to remain the representative to the Committee on a motion by Past President Wichman with second by Commissioner Bates.
7. **Update on the Consolidation of the University of Nevada, Reno College of Agriculture, Biotechnology and Natural Resources, Cooperative Extension, and the Nevada Agriculture Experiment Station.** Dagny informed the Board that since the consolidation was approved the Dean's

offer to include county representatives on the search committee for the new director of Cooperative Extension had been carried out. Commissioners French, Herman and Kirkpatrick had been named to the committee as had she. Dagny also noted that the remainder of the committee will be comprised of Cooperative Extension staff and Nevada First Lady Kathleen Sandoval. She noted that meetings are expected to begin. President Carson noted that she believes the team appointed to the Committee is a great one and that she looks forward to making additional headway on behalf of the counties.

8. **Update and Possible Action on AB191 Enacted in the 2015 Legislative Session which Authorizes a County to Place on the 2016 General Election Ballot a Question which Asks the Voters in the County whether to Authorize the Board of County Commissioners to Impose, for the Period beginning on January 1, 2017, Annual Increases to Taxes on Certain Motor Vehicle Fuels.** President Carson noted that she had requested the item be placed on the agenda in case there were any updates to the situation. Jeff told the Board that the Nevada Taxpayer's Association had come out in support, stating that "there is a clear user benefit relationship that NTA can support". He also noted that the Elko City Council voted in support as well. He told the Board that if he obtains any additional information he will distribute it to them. No action was taken.
9. **Update on Interim Legislative Committees, Studies and Priorities for the 2017 Legislative Session.** Committee Chair Lucey reported that the Committee has been meeting continuously with the support of Jeff and Dagny and thanked staff and the members of the Committee for their hard work. Dagny informed the Board that draft language is still expected from LCB on the BDR's NACO submitted and that she and Jeff are speaking with Legislators regarding Association priorities. She noted that there will be a legislative panel at the Annual Conference. She concluded her remarks with a review of the special session, noting that both bills introduced were "special acts" and were specific to Clark County. She noted that both were passed by the Legislature, the first authorizing the Clark County Commission to raise taxes for law enforcement and the second to raise room taxes to fund the proposed Raiders stadium and expand the convention center. She noted that it was the first time that the Legislature had mandated a county raise taxes for a specific purpose. Commissioner Kirkpatrick informed the Board that she had a meeting with Jeremy Aguero and the City of Henderson following the special session regarding a possible proposal by Senator Roberson to remove the commercial property tax cap in order to fund education and that such a proposal could have significant impacts to the work being done on the property tax issue. Jeff informed the Board that the individual agency budget requests had been posted to the website of the Governor's Finance Office and that he had reviewed them and identified a couple of areas of concern. The first could affect the NACO BDR submitted regarding PSI's the budget calls for increased dollars for Department of Parole and Probation for staffing, which includes PSI writers, and would result in \$2M or more passed down to counties. He also identified concern within the area of Child Protective Services and conversations with DHHS regarding the use of Medicaid for services within the department to offset county expenses and that the budget request appears to use these funds to offset general fund expenses. Jeff noted that he will work with the Governor's office and the agencies to gain additional clarity and information on the requests. Commissioner Kirkpatrick noted that she believes that the Department of Corrections budget request includes some unfunded mandates and service shifts to the counties that the Association needs to stay apprised of. She also noted that the budget request is a 'wish list' and doesn't necessarily mean adoption and that there is an opportunity to help shape the budget with staff conversations on specific issues. President Carson noted that her Board expressed concern with unfunded mandates and needing to use PILT funds for any new mandates during their discussion on the proposed NACO dues assessment component. No action was taken.
10. **Discussion and Possible Approval of Proposed Bill Draft Language Regarding Indigent Defense which will be Presented to the Advisory Commission on the Administration of Justice (NRS 176.0123) on November 1, 2016.** Jeff informed the Board that he had hoped to have David Carrol from the 6th Amendment Center on the call but were unable to connect. Jeff noted that the topic is important to address on behalf of counties and reviewed the discussion that took place at the September meeting of the Board. This is in regard to the Advisory Commission on the Administration of Justice (ACAJ) submitting a bill similar to SB451 from last session to create an indigent defense commission and provide state funding for county indigent defense. He discussed SB451 from the

2015 Session, which the NACO Board supported in concept but had concerns with the counties not being held harmless for future costs. He informed the Board that he had requested the Advisory Commission on the Administration of Justice remove the item from their September 27th meeting agenda and they did so. In the interim he has been working with counties and the 6th Amendment Center on language for the proposed bill and the item is back on the Commission's agenda for their next meeting. He informed the Board that he sent a draft of the language to counties and DA's and based on feedback the language was redrafted and redistributed with a request to have comments returned to NACO by Tuesday the 25th so that language could be in turn sent to the Commission for possible approval of a BDR. He noted that Mr. Carroll along with the Sixth Amendment Center are good advocates for the issue and well respected, though he did make reference to lingering concerns. It was his recommendation that the Board continue to work on the issue and work towards a consensus of language to address those concerns. Commissioner Kirkpatrick informed the Board that although Clark County has some concerns with the language staff had been informed that the issue is important to the state as a whole and that it needs to be supported as a larger mission. Jeff informed the Commissioner that Assistant County Manager Wells recognizes the need to address the problem statewide and has a great grasp of the issue and has been good to work with. Jeff concluded his remarks with an overview of the concept: the Commission would be comprised of 13 members; 7 would represent counties and include rural representation; and the Commission would develop standards yet as a large concession from the advocates, the Commission would not be allowed to develop case load standards. He noted that the goal is for the state to provide services across county lines and allow for counties to opt into the state system and then be held harmless for any increased future costs. He reiterated that the issue is complicated but the idea is to make it flexible with options available to counties. No action was taken.

Note: The NACO Board of Directors May Interrupt the Open Meeting and Exclude the Public from the Meeting for the Limited Purpose of Receiving Information and for Deliberation Relative to Agenda Items 11a, 11b, 11C and 11d below:

11. Update and Possible Action Regarding Public Lands and Natural Resources Issues Including but Not Limited to:
 - a) **Bureau of Land Management's Proposed 2.0 Planning Regulations.** Jeff informed the Board that the BLM is expected to release the regulations as early as the end of the month or early November and that, though they will address areas of the draft for statutory compliance, all other proposed areas of change will remain. He noted that there have been discussions with other states and that all options need to remain on the table. He suggested that the Board will need to be able to move quickly once the regulations are released if there is an appetite to do anything based on the final document. No action was taken.
 - b) **The Center for Biological Diversity's Lawsuit against the U.S. Fish and Wildlife Service Seeking to Vacate their Decision not to List the Bi-State Sage Grouse as an Endangered Species.** This item was heard in closed session. No action was taken.
 - c) **The Bureau of Land Management's and U.S. Forest Service's Greater Sage-Grouse Approved Resource Management Plans (ARMP'S) including the Complaint for Declaratory and Injunctive Relief Filed by Western Exploration LLC, Elko County, Eureka County, Quantum Minerals, White Pine County, Lander County, Humboldt County Ninety-Six Ranch, LLC, Paragon Precious Metals, LLC, Churchill County, Washoe County and the State of Nevada.** Jeff informed the Board that he had spoken with Laura Granier and that there is not much to update. Tori noted that she had seen some case law come out of a district court in the 9th Circuit where the court had sided with those making the same argument. No action was taken.

d) **NACO's Appeal to the United States Court of Appeals for the Ninth District from the Judgment and Order of United States District Court for the District of Nevada Granting the United States Department of Interior's (Defendants') Motion to Dismiss the Complaint Filed by NACO and Other Plaintiffs on December 30, 2013 Seeking to Compel the Bureau of Land Management to Comply with the Provisions of the Wild Free-Roaming Horse and Burro Act.** Jeff informed the Board that he had spoken with Mark Pollot who said that all the briefs had been filed and that the Government's Intervenor had filed a notice of related authority and there had been no dates set and that the case is in a holding pattern. Jeff noted a ruling in the 10th Circuit in a case filed by the state of Wyoming where the court dismissed the suit – the court said that though the BLM admitted the HMA's were over AML and hadn't done anything to address them, because the BLM hadn't taken action there was nothing to take legal action upon. Jeff noted that Mr. Pollot said the Wyoming ruling may not factor because it is in a different circuit. Staff was directed to follow up with Mr. Pollot on a regular basis. President Carson inquired as to the release of acreage to tribal control and how that affects the state's level of priority for gathers - it was noted that if a sovereign nation complains to the Bureau about horse populations it may increase priority. Staff will follow up on the details of how the Bureau may react to a complaint by the affected sovereign nation. No action was taken.

e) **The U.S. Department of the Navy's Fallon Range Training Complex Modernization: Expansion of Land Ranges, Airspace Modifications, and Public Land Withdrawal Renewal Environmental Impact Statement.** Commissioner Tipton requested Commissioner Olson give an update to the Board on the actions taken by Churchill County. Commissioner Olson informed the Board that the county had retained RCI to assist in developing scoping comments and that they are actively engaging the community on the issue. He noted that Jeremy Drew of RCI had provided individual maps that addressed the impacts on various areas of the proposal and was able to provide detailed information to the public on how to comment. He noted that the County's public lands policy is three phase and said that their goal is to continue to work toward mitigating the effects of the proposal while still supporting the Navy's mission. Past President Wichman asked if the County had sent or could send the RCI report to other affected counties and Commissioner Olson said that the report would be shared. Past President Wichman noted that the expansions of several military installations in Nye County are resulting in no benefit to the county or no partnerships with the County and yet the County is still providing services. She stated that she would like to see an active conversation as to how the bases could best partner to assist the county in providing the services they require. Jeff informed the Board that comments are due on December 1st and inquired whether the Board would like to participate, noting that while the specific issue affects only a few counties, there are overarching issues regarding takings, grazing, mining and PILT. Commissioner Tipton also addressed the potential long term loss in mining and energy related revenues and the potential damage to counties if allotments, including grazing, are deemed to have no value. The Board's concerns also included the need to maintain, at minimum, current revenues and the need to have a true conversation about socioeconomic impacts. Tori said that she and Jeff could work with the affected counties on possible language for a letter and it was noted that (approval of?) the plan will take 5-7 years so there is time to address the situation. Staff was directed to prepare a comment letter to be brought to the Board for consideration at the November meeting.

12. **National Association of Counties and Western Interstate Region Board Member Updates.**

Commissioner French discussed the recent WIR meeting on Oregon and informed the Board that there were interesting discussions regarding marijuana and that both Oregon and Washington seem happy with their laws. He noted that the WIR priorities include: the FAST Act; streamlining to allow counties and/or partners to fast track comments to federal agencies; emergency wildlife support funds; the proposal to use FEMA funding instead of agency funds ("borrowing") to fight wildfires and mental health reforms. Commissioner French informed the Board that according to NACO's Public Lands Director Chris Marklund, PILT is expected to be funded at only \$452M in the budget expected to pass before December 9th. Commissioner Tipton had no update other than the next meeting of the NACO Board is in Florida in December.

13. **NACO Board Member Updates.** Mayor Crowell informed the Board that his son has been appointed by the Governor to be the Director of Nevada's Department of Conservation & Natural Resources. President Carson told the Board that she had received an email from Cheva Gabor from the USFS regarding a meeting for implementation of the Sage Grouse plan amendment and Commissioner French noted that Humboldt County had held a coordination meeting with the BLMM and FS regarding the LUPA and mineral withdrawals. He noted that there is a lot the agencies don't know with regards to implementation; but that what they have made clear is that all existing claims will have to go through validation with the DOI at the claimant's expense and that the Department will determine marketable mineral resources.

14. **Public Comment** – None was given.

The meeting was adjourned at 11:39A.

DRAFT

The following links and/or pages are support for agenda
Item 4

NEVADA ASSOCIATION OF COUNTIES

2016 HONOR ROLL

The Nevada Association of Counties recognizes a select few who have given freely of their time and energy to contribute to the integrity of county government and the betterment of their community.

Each honoree has exhibited the honor, integrity and the highest ethical standards for public service.

Let it be known that _____ has been inducted into the NACO Honor Roll for _____ exemplary service to _____ County and for _____ leadership and many contributions to NACO.

Awarded by unanimous vote of the NACO Board of Directors,
this 16th day of November, 2016.

NEVADA ASSOCIATION OF COUNTIES

2016 Award for Participatory Democracy

This award is given to recognize those individuals that have made outstanding efforts to promote public participation in county government.

The Board of Directors of the Nevada Association of Counties herein bestows on _____ the NACO Award for Participatory Democracy for Connecting Citizens to County Governments and Enhancing Participation in the Nevada Association of Counties.

Awarded by unanimous vote of the NACO Board of Directors this 16th day of November 2016.

The following links and/or pages are support for agenda item 5

The Washoe County District Attorney's Office contacted NACO about filing an amicus curiae brief in support of Washoe County's request for rehearing En Banc the Nevada Supreme Court's reversal of the Second Judicial District Court's Grant of Summary Judgment and Remand of Fritz v. Washoe County Inverse Condemnation Action.

According to the DA's Office:

- The decision improvidently expands Nevada inverse condemnation law.
- The opinion extends the "substantial involvement" prong articulated in *County of Clark v. Powers*, 96 Nev. 497, 505 (1980) to potentially include acceptance of road dedications.
- The opinion concludes that a government entity accepting dedication of privately constructed roadways and drainage systems deems those improvements a public use supporting inverse condemnation liability.
- A municipality can now be liable for taking private property if storm water on a privately constructed roadway dedicated to and accepted by the municipality drains from the road onto private property. This decision could have a profound effect on the municipalities in Nevada and the approval of developments, generally.

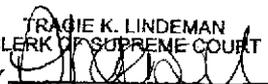
132 Nev., Advance Opinion 57
IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN FRITZ; AND MELISSA FRITZ,
Appellants,
vs.
WASHOE COUNTY,
Respondent.

No. 67660

FILED

AUG 04 2016

TRAGIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

Appeal from a district court summary judgment in an inverse condemnation action. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

Reversed and remanded.

Luke A. Busby, Reno,
for Appellants.

Christopher J. Hicks, District Attorney, and Stephan J. Hollandsworth,
Deputy District Attorney, Washoe County,
for Respondent.

BEFORE DOUGLAS, CHERRY and GIBBONS, JJ.

OPINION

By the Court, DOUGLAS, J.:

In this appeal, we are asked to consider whether, when a county approved subdivision maps, directed the flow of water, and accepted street dedications during the building process of two upstream

developments, its actions constituted substantial involvement to support inverse condemnation in the flooding of a downstream property. We conclude that inverse condemnation is a viable theory of liability and genuine issues of material fact remain as to the County's substantial involvement in the development of the drainage system at issue. We therefore reverse the district court's grant of summary judgment.

BACKGROUND

In 2001, appellants John and Melissa Fritz purchased property adjacent to Whites Creek. Before the Fritzes purchased their property, Washoe County approved plat maps for the upstream development Lancer Estates. After the Fritzes purchased their property, Washoe County approved plat maps for another upstream development, Monte Rosa. Washoe County subsequently accepted various street dedications that were incorporated into the upstream developments' drainage system, which diverts water to Whites Creek.¹ Since the construction of the developments, the Fritzes' property floods during heavy rainstorms.

In 2013, the Fritzes filed an inverse condemnation complaint against Washoe County. The Fritzes alleged that Washoe County approved plat maps, managed and directed development of the water drainage system, approved final maps, and ultimately accepted dedication of the water drainage system that increased the flow of water to Whites

¹It is clear from the record that Washoe County accepted certain street dedications. However, it is not clear whether Washoe County accepted dedication of other improvements incorporated into the drainage system, formally or informally.

Creek and caused flooding to their property. According to the Fritzes, Washoe County's conduct constituted substantial involvement in activities that caused the taking of their property.

Washoe County answered and then filed a motion for summary judgment, arguing that the Fritzes did not have standing to assert claims against it for plat maps it approved before the Fritzes owned their property. As to the maps approved after the Fritzes came into ownership, and its acceptance of dedications, Washoe County argued that its conduct was not substantial and did not give rise to the Fritzes' inverse condemnation claim.

The Fritzes opposed Washoe County's motion for summary judgment and attached documents detailing Washoe County's involvement in the developments' draining scheme. One such document was a 1996 letter from the Nevada Department of Transportation (NDOT) to Washoe County. In the letter, NDOT refers to a previous agreement with Washoe County wherein Washoe County would direct the developers to convey water north through Lancer Estates. NDOT then requested that Washoe County follow through with that agreement. In addition to the letter, the Fritzes submitted the Lancer Estates Hydrology Report, wherein the developers stated that they were in compliance with the NDOT and Washoe County agreement to convey water north.

Ultimately, the district court granted summary judgment in favor of Washoe County. The court reasoned that Washoe County's approval of subdivision maps and acceptance of dedications did not amount to substantial involvement sufficient to support a claim for inverse condemnation. The Fritzes appealed.

DISCUSSION

“This court reviews a district court’s grant of summary judgment de novo, without deference to the findings of the lower court.” *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if “the pleadings and other evidence on file demonstrate that no genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.” *Id.* (alteration in original) (internal quotation omitted). When reviewing a summary judgment motion, all evidence and reasonable inferences “must be viewed in a light most favorable to the nonmoving party.” *Id.*

Standing

On appeal, Washoe County contends that the Fritzes do not have standing to assert their inverse condemnation claim because Washoe County approved the majority of subdivision maps before the Fritzes owned the land. Construing the facts in a light most favorable to the Fritzes, we disagree.

Takings claims lie with the party who owned the property at the time the taking occurred. *Argier v. Nev. Power Co.*, 114 Nev. 137, 139, 952 P.2d 1390, 1391 (1998). The Fritzes alleged that their property was taken by flooding as a result of heavy rainstorms occurring during the course of their ownership. The district court made no findings with regard to when the taking occurred. Thus, a genuine issue of material fact remains as to the issue of standing, and we cannot uphold summary judgment on this ground.

Substantial involvement

The district court found that Washoe County approved maps and accepted certain dedications. The Fritzes presented evidence that

Washoe County also directed the developer to divert water north from Mount Rose Highway into Whites Creek. According to the Fritzes, these actions constitute substantial government involvement in private activities that led to an increased quantity and flow of water in Whites Creek and flooding on their property. Washoe County contends that approval of maps and acceptance of dedications are insufficient to constitute substantial involvement giving rise to a claim for inverse condemnation.

The Takings Clause of the United States Constitution provides that private property shall not “be taken for public use, without just compensation.” U.S. Const. amend. V. Similarly, the Nevada Constitution provides that “[p]rivate property shall not be taken for public use without just compensation having been first made.” Nev. Const. art. 1, § 8(6). When a governmental entity takes property without just compensation, or initiating an eminent domain action, an aggrieved party may file a complaint for inverse condemnation. *State, Dep’t of Transp. v. Cowan*, 120 Nev. 851, 854, 103 P.3d 1, 3 (2004).

Nevada caselaw has not clearly and comprehensively set forth the elements of inverse condemnation, but we do so now. As the counterpart of eminent domain, inverse condemnation requires a party to demonstrate the following: (1) a taking (2) of real or personal interest in private property (3) for public use (4) without just compensation being paid (5) that is proximately caused by a governmental entity (6) that has not instituted formal proceedings. *See Dickgieser v. State*, 105 P.3d 26, 29 (Wash. 2005); *see also ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 645-47, 173 P.3d 734, 738-39 (2007) (providing that an interest in real or personal property satisfies the private property requirement); *Gutierrez v.*

Cty. of San Bernardino, 130 Cal. Rptr. 3d 482, 485 (Ct. App. 2011) (providing that the taking must be proximately caused by a government entity).

A private party cannot recover in inverse condemnation for property taken by another private party. However, when a private party and a government entity act in concert, government responsibility for any resulting damage to other private property may be established by demonstrating that the government entity was substantially involved “in the development of private lands for public use which unreasonably injure[d] the property of others.” *Cty. of Clark v. Powers*, 96 Nev. 497, 505, 611 P.2d 1072, 1077 (1980); see *Gutierrez*, 130 Cal. Rptr. 3d at 485 (“To be a proximate cause, the design, construction, or maintenance of the improvement must be a substantial cause of the damages.”).

The district court reached its conclusion that Washoe County was not substantially involved, in part, by distinguishing the government involvement here from the government involvement in *Powers*. We affirmed a district court’s judgment that held the County liable in inverse condemnation for acting in conjunction with various private parties to cause large amounts of water to be cast upon the property of the plaintiff landowners. 96 Nev. at 499-500, 611 P.2d at 1073-74. We held the County liable because it “participated actively in the development of these lands, both by its own planning, design, engineering, and construction activities and by its adoption of the similar activities of various private developers as part of the County’s master plan for the drainage and flood control of the area.” *Id.* at 500, 611 P.2d at 1074.

We agree with the district court that *Powers* is distinguishable. The government conduct in *Powers* can be described as physical involvement directly attributable to the government entity. Here, however, the Fritzes did not provide any evidence that Washoe County participated in the engineering and construction of the developments. Thus, the district court correctly concluded that the significance of Washoe County's involvement here is distinguishable from that in *Powers*.

However, drawing this distinction is not dispositive of the issues raised in this appeal. *Powers* indicates that an act, such as construction, which by any measure reaches the height of substantial involvement, is sufficient to establish a claim. We have not limited the range of actions that constitute substantial involvement to physical engagement in private activities. We have, nonetheless, provided that claims based on mere planning are outside the scope of substantial involvement. *Sproul Homes of Nev. v. State, Dep't of Highways*, 96 Nev. 441, 443, 611 P.2d 620, 621 (1980) ("It is well-established that the mere planning of a project is insufficient to constitute a taking for which an inverse condemnation action will lie."). Hence, this case presents a novel question: whether government activities short of physical labor, but with more engagement than mere planning, can constitute substantial involvement in a private development sufficient to constitute public use in support of inverse condemnation. While we have not previously addressed this question, the California courts have addressed similar factual situations.

The district court relied in part on *Ullery v. Contra Costa County* to reach its determination that the Fritzes' inverse condemnation claim was not actionable. 248 Cal. Rptr. 727 (Ct. App. 1988). In *Ullery*,

the developer of property located at the bottom of a hill made an offer of dedication of a water drainage easement in a natural stream running parallel to the bottom of the hillside, but the County expressly rejected the dedication. *Id.* at 728-29. Thereafter, neither the County nor City performed maintenance on the drainage easement. *Id.* at 729. A landslide later injured two hillside neighboring properties, and the landowners brought suit against the County, City, and Sanitary District, arguing that the County's approval of tentative and final subdivision maps resulted in an "environment conducive to landslide damage" caused by erosion from water drainage. *Id.* at 731 (internal quotation omitted).

In this case, apparently analogizing it to *Ullery*,² the district court concluded that Washoe County's approval of subdivision maps and acceptance of dedications was insufficient to support the Fritzes' inverse condemnation claim. However, the district court misapplied *Ullery*. The *Ullery* court recognized that a public use or improvement cannot be demonstrated by mere subdivision map approval, finding that, without the County's acceptance of the dedication, its "sole participation in the development process was approval of the tentative and final subdivision maps. This alone [was] not enough to give rise to establish inverse condemnation liability." *Id.* at 731-32. Thus, *Ullery* draws a distinction between merely approving subdivision maps and taking other actions, including accepting dedications. The former, on its own, does not convert

²Although the district court's order does not directly state that the instant case is analogous to *Ullery*, this conclusion can be drawn from its use of the case to reach its conclusion that approving subdivision maps and dedications is insufficient to constitute inverse condemnation liability.

the private development into a public use that gives rise to inverse condemnation liability. We adopt this rule from *Ullery*.

However, the case at bar is distinguishable from *Ullery*. The Fritzes alleged that Washoe County did more than approve subdivision maps. The Fritzes provided evidence that, among other activities, Washoe County formally accepted dedications of the streets in the developments and entered into an agreement with NDOT to direct water from the developments north into Whites Creek, rather than to allow the water to follow its natural path down Mount Rose Highway. Therefore, unlike the county in *Ullery*, Washoe County has taken actions beyond merely approving the subdivision maps, and the Fritzes' inverse condemnation claim here is actionable.

After applying *Ullery*, we conclude that genuine issues of material fact exist as to whether Washoe County's actions constituted substantial involvement in the drainage system sufficient to deem it a public use. In particular, when resolving a summary judgment motion, the district court has the obligation to "set forth the undisputed material facts and legal determinations on which the court granted summary judgment." NRCP 56(c). In this case, however, the district court's order summarized the basic facts, but ignored certain evidence provided by the parties and did not explicitly state which facts were undisputed. On appeal, while the parties periodically alleged in their briefs that the facts are undisputed, they differ as to the import and effect of these facts on the substantial involvement considerations.

Therefore, because genuine issues of material fact remain, we reverse the district court's grant of summary judgment and remand this matter to the district court for proceedings consistent with this opinion.³

Douglas, J.
Douglas

We concur:

Cherry, J.
Cherry

Gibbons, J.
Gibbons

³Washoe County also contends that the injuries caused by flooding were not substantial. However, the district court did not make findings on this issue sufficient for this court to review. Therefore, we decline to consider this question.

The following links and/or pages are support for agenda
Item 6

Draft changes to SB451 (2015 Session) regarding the provision of indigent defense services in Nevada.

SB451 of 2015 Session

Sec. 1. Chapter 180 of NRS is hereby amended by adding 1 thereto the provisions set forth as sections 2 to 9, inclusive, of this 2 act.

Sec. 2. *As used in this chapter, unless the context otherwise requires, the words and terms defined in sections 2 and 3 of this act have the meanings ascribed to them in those sections.*

Sec. 3. *“Commission” means the Nevada Right to Counsel Commission created by section 5 of this act.*

Sec. 4. *“Indigent defense services” means the provision of legal representation to an indigent person who is charged with a public offense or to an indigent child who is alleged to be delinquent or in need of supervision pursuant to title 5 of NRS.*

Sec. 5. (1) *The Nevada Right to Counsel Commission, consisting of 13 voting members and 1 ex officio nonvoting member, is hereby created.*

(2) *The voting members of the Commission must be appointed as follows:*

- (A) The Majority Leader of the Senate appoints one member who must be an attorney in good standing of the State Bar of Nevada;*
- (B) The Speaker of the Assembly appoints one member;*
- (C) The Chief Justice of the Supreme Court appoints one member who must be a former judge or justice or expert in juvenile justice;*
- (D) The Governor appoints ten (10) members as follows:*

(i) Two members from among six nominees selected by the President of the State Bar of Nevada, three of whom must be a member in good standing of the State Bar of Nevada who resides in a county whose population is less than 100,000 and three of whom must be a member in good standing of the State Bar of Nevada who resides in a county whose population is 100,000 or more;

(ii) Two member from among three nominees selected by the Nevada Association of Counties who resides in a county whose population is less than 100,000;

(iii) Three members from among six nominees selected by the Board of County Supervisors of Clark County;

(iv) Two members from among four nominees selected by the Board of County Supervisors of Washoe County;

(v) One member from among three nominees selected jointly by associations of the State Bar of Nevada who represent members of racial or ethnic minorities;

(3) The Chief Justice of the Supreme Court is an ex officio, nonvoting member of the Commission.

(4) Each person appointed to the Commission pursuant to subsection 2 must have:

(A) Significant experience in providing legal representation to indigent persons who are charged with public offenses or to indigent children who are alleged to be delinquent or in need of supervision; or

(B) A demonstrated commitment to providing effective legal representation to such persons.

(5) Authorities shall not appoint to the Commission a person who is:

(A) A current judge, justice or judicial officer;

(B) A prosecuting attorney or an employee thereof;

(C) A law enforcement officer or an employee of a law enforcement agency; or,

(D) An attorney who may obtain any financial benefit from the policies adopted by the Commission.

(6) Authorities shall not appoint more than two current county managers or current members of a county Board of Supervisors.

(7) After the initial terms, each appointed member of the Commission serves a term of 4 years, commencing on July 1. Each member of the Commission continues in office until a successor is appointed. Members may be reappointed for additional terms of 4 years in the same manner as the original appointments.

(8) Any vacancy occurring in the membership of the Commission must be filled in the same manner as the original appointment for the remainder of the unexpired term.

(9) Each member of the Commission:

(A) Serves without compensation; and

(B) While engaged in the business of the Commission, is entitled to receive the per diem allowance and travel expenses provided for state officers and employees generally.

(10) Each member of the Commission who is an officer or employee of the State or a local government must be relieved from his or her duties without loss of his or her regular compensation so that the member may prepare

for and attend meetings of the Commission and perform any work necessary to carry out the duties of the Commission in the most timely manner practicable. A state agency or local government shall not require an officer or employee who is a member of the Commission to make up the time the member is absent from work to carry out his or her duties as a member, and shall not require the member to take annual vacation or compensatory time for the absence.

(11) The Governor may remove a member of the Commission for incompetence, neglect of duty, moral turpitude, misfeasance, malfeasance or nonfeasance in office or for any other good cause.

(12) A majority of the voting members of the Commission constitutes a quorum for the transaction of business at a meeting of the Commission. A majority of the voting members of the Commission is required for official action of the Commission.

Sec. 6. *(1) The Indigent Defense Account is hereby created in the State General Fund, to be administered by the Commission. Any money that is received by the Commission from any source, including, without limitation, money received pursuant to a specific statute, tax, legislative appropriation, gift and grant shall be deposited into the Indigent Defense Account.*

(2) Any money remaining in the Account at the end of a fiscal year remains in the Account and does not revert to the State General Fund.

(3) Money in the Account may only be expended to administer the provisions of this chapter.

(4) The interest and income on the money in the Account, after deducting any applicable charges, must be credited to the Account.

Sec. 7. *(1) The Commission may propose minimum standards for the provision of indigent defense services to ensure that those services are provided in a manner that complies with the standards for the effective assistance of counsel established by the United States Supreme Court and the appellate courts of this State under the Sixth Amendment to the United States Constitution and Section 8 of Article 1 of the Nevada Constitution. The standards proposed by the Commission may include, without limitation, standards ensuring that:*

(a) Defense counsel is provided sufficient time, and a space where the confidentiality of the communications between the defense counsel and his or her client is safeguarded, for meetings with his or her client.

(b) The ability, training and experience of defense counsel matches the nature and complexity of the case to which he or she is appointed, except that the Commission may not propose standards pursuant to this paragraph concerning the ability, training and experience of defense counsel in cases in which the death penalty is or may be sought or has been imposed if rules adopted by the Supreme Court establish such standards.

(c) The same defense counsel continuously represents and personally appears at every court appearance through the pendency of a case, except that a standard proposed pursuant to this paragraph must provide an exemption from this requirement for ministerial, nonsubstantive tasks and court hearings.

(d) The collection and reporting of data concerning the caseload and workload of defense counsel is uniform.

(2). A standard proposed by the Commission pursuant to this section must be submitted to the Supreme Court for approval and does not become effective unless the Supreme Court approves the standard. Before submitting a proposed standard to the Supreme Court, the Commission shall conduct a public meeting on the proposed standard. Opposition to a proposed standard that has been submitted to the Supreme Court may be submitted to the Supreme Court in the manner prescribed by the Court. A standard proposed by the Commission pursuant to subsection 1 becomes final upon approval by the Supreme Court.

(3) A standard proposed and approved pursuant to this section is not a regulation for the purposes of chapter 233B of NRS.

(4) The Commission may issue guidelines for the workload of defense counsel to be controlled to permit effective representation. Any guideline proposed pursuant to this paragraph must be based on objective criteria derived from the tracking of the time spent by attorneys on criminal defense matters and that take into account variations in practice due to the jurisdiction(s) in which the attorney practices. These guidelines shall be provided to the State and counties to assist them during their budgetary process.

Sec. 8. *(1) Counties whose population is 100,000 or less shall notify the Commission by XX (Date to Be Determined) if the county elects to cede administration of indigent defense to the Office of Indigent Legal Services, under the following terms:*

(A) The Commission shall deem the existing county-based indigent defense delivery system appropriate unless the chief judge of the judicial district and the county Board of Supervisors choose to have

the Commission determine another service delivery model or until the Office of Indigent Legal Services evaluates the local system against Commission standards and finds the system not to meet Commissions standards;

(B) The Commission shall provide services through any combination of private service providers paid hourly or under contract on a case-by-case, county or regional basis unless workload considerations allow for no less than five full-time state government attorneys and appropriate support staff.

(C) A county ceding authority to the Commission under the terms of this section on a yearly basis shall pay to the Commission the average annual amount paid by the county to provide indigent defense services for the three fiscal year ending on June 30, 2016, and no more. In calculating the amount paid by each county, any extraordinary costs accrued in any of the prior three fiscal years ending on June 30th, 2016 that were associated with the legal representation of indigent criminal defendants charged with capital crimes, shall not be included.

*(2) Counties whose population is 100,000 or less shall notify the Nevada Right to Counsel Commission by XX **(Date to Be Determined)** if the county elects to retain autonomy for the administration of trial-level indigent defense services. By the close of each subsequent calendar year counties retaining the autonomy for the administration of trial-level indigent defense services under this section must notify the Commission that they will continue to administer services in the forthcoming fiscal year.*

(A) A county retaining autonomy over the administration of trial-level indigent defense services shall cede responsibility for the funding and delivery of indigent appellate services to the Commission.

(B) A county retaining autonomy over the administration of indigent defense services shall continue to fund all trial-level services at a level to meet Commission standards.

*(C) A county that retains the autonomy for trial-level indigent defense services must submit annual reports to the Commission by XX **(Date to Be Determined)** annually that shall include:*

- (i) Names, state bar card number, and business address of all indigent defense providers;*
- (ii) Names and title of all non-attorney support staff;*
- (iii) Number of cases assigned to each indigent defense attorney categorized by the following case types: delinquency, misdemeanor, felony, capital, and, child in need of services.*

- (iv) Number of cases disposed by each indigent defense attorney categorized by case type as described in sub-section iii;*
- (v) Number of cases of defendants proceeding pro se by case type categorized by case type as described in sub-section iii;*
- (vi) Number of trials conducted by each indigent defense attorney categorized by case type as described in sub-section iii.*

(D) A county electing to cede authority to the Commission for trial-level indigent defense services for any ensuing fiscal year other than the one ending June 30th, 2017, on a yearly basis shall pay to the Commission the average annual amount paid by the county to provide indigent defense services for the three fiscal years ending on June 30, of the year in which the Commission assumes authority for the administration of services, and no more. In calculating the amount paid by each county, any extraordinary costs accrued in any of the prior three fiscal years ending on June 30, of the year in which the Commission assumes authority for the administration of services that were associated with the legal representation of indigent criminal defendants charged with capital crimes, shall not be included.

(E) The Office of Indigent Legal Services shall conduct periodic evaluations against Commission standards of trial-level services in counties retaining autonomy of the administration of indigent defense services. Counties shall cooperate fully with the evaluation.

(F) Counties found not to be in compliance with Commission standards shall be notified in writing of non-compliance. Counties shall be given nine months from the date of notification to remedy said violations. If after the nine-month period counties are found to be in compliance with Commission standards, services will continue under the terms of this section. If after the nine-month period the county is found to still be in violation of Commission standards the county shall cede the administration of services to the Commission in the ensuing fiscal year. The county will be charged the additional cost of running services for that year. Thereafter the county on a yearly basis shall pay to the Commission the average annual amount paid by the county to provide indigent defense services for the three fiscal years ending on June 30, of the year in which the Commission assumes authority for the administration of services, and no more. In calculating the amount paid by each county, any extraordinary

costs accrued in any of the prior three fiscal years ending on June 30, of the year in which the Commission assumes authority for the administration of services that were associated with the legal representation of indigent criminal defendants charged with capital crimes, shall not be included.

Sec. 10. NRS 180.010 is hereby amended to read as follows:

(1) The ~~Office of State Public Defender~~ **Office of Indigent Legal Services** is hereby created . ~~[within the Department of Health and Human Services.]~~ **The head of the Office is the Commission.**

(2) The ~~[Governor]~~ **Commission** shall appoint the ~~State Public Defender~~ **Chief Counsel** for a term of 4 years, and until a successor is appointed and qualified. **The Chief Counsel is the administrative officer of the Office and is responsible to the Commission.**

(3) The ~~State Public Defender~~ **Chief Counsel:**

- (a) Must be an attorney licensed to practice law in the State of Nevada.
- (b) Is in the unclassified service of the State.
- (c) Except as otherwise provided in NRS 7.065, shall not engage in the private practice of law.

(4) ~~[No officer or agency of the State, other than the Governor and the Director of the Department of Health and Human Services, may supervise]~~ **The Commission shall supervise** the ~~State Public Defender~~ **Chief Counsel**. No officer or agency of the State, other than the ~~[Governor,]~~ **Commission**, may assign the ~~State Public Defender~~ **Chief Counsel** duties in addition to those prescribed by this chapter.

(2) The Commission may authorize the Chief Counsel of the Office of Indigent Legal Services to employ the following:

- (A) Deputy Chief Counsel;**
- (B) Director of Appellate Counsel Services**
- (C) Director of Private Counsel Services;**
- (D) Director of Training;**
- (E) Deputy Director of Training;**
- (F) An Information Technology Officer;**
- (G) A Budget Director;**
- (H) A Director of Juvenile Justice Standards Compliance;**
- (I) A Director of Adult Justice Standards Compliance; and**
- (J) A Director of Policy, Data and Research.**

(3) The Commission may, within the limits of available money, employ such other persons as the Commission deems necessary to perform the duties

of the Commission and the Office of Indigent Legal Services, including, without limitation, attorney, clerical, social worker and investigative staff.

(4) Each Office of Indigent Legal Services attorney must be an attorney licensed to practice law in the State of Nevada, and shall not engage in the practice of law, except in performing the duties of office and as otherwise provided in NRS 7.065.

Sec. 11. NRS 180.040 is hereby amended to read as follows:

(1) The ~~Commission and the Office of the State Public Defender~~ **Office of Indigent Legal Services** shall be in Carson City, Nevada, and the Buildings and Grounds Section of the State Public Works Division of the Department of Administration shall provide necessary office space ~~[]~~ **for the Commission and the Office.**

(2) ~~[The]~~ **With the approval of the Commission, the** State Public Defender **Chief Counsel** may establish branch offices necessary to perform the State Public Defender's **Chief Counsel's** duties. The ~~[State Public Defender]~~ **Commission** shall designate a deputy state public defender **lead attorney** to supervise each such office.

Sec. 12. NRS 180.050 is hereby amended to read as follows:

(1) The State Public Defender **Office of Indigent Legal Services, with the approval of the Commission,** may contract with attorneys licensed to practice law in the State of Nevada and with county public defenders to provide services required by this chapter **if deemed appropriate.** ~~it is impracticable for the State Public Defender or the State Public Defender's deputies to provide such services for any reason.~~

(2) All such contract services ~~[shall]~~ **must** be performed under the supervision and control of the State Public Defender **Chief Counsel.**

Sec. 13. NRS 180.080 is hereby amended to read as follows:

(1) The State Public Defender **Chief Counsel** shall submit:

(a) A report on or before December 1 of each year to the ~~[Governor]~~ **Commission** and to each participating county containing a statement of:

- (1) The number of cases that are pending in each participating county;
- (2) The number of cases in each participating county that were closed in the previous fiscal year;
- (3) The total number of criminal defendants represented in each participating county with separate categories specifying the crimes charged and whether the defendant was less than 18 years of age or an adult;

- (4) The total number of working hours spent by the ~~State Public Defender and the State Public Defender's~~ **Office of Indigent Legal Services** staff on work for each participating county; and
- (5) The amount and categories of the expenditures made by the State Public Defender's office.

(b) ~~To each participating county, on~~ On or before December 1 of each even-numbered year, the total proposed budget of the ~~State Public Defender~~ **Office of Indigent Legal Services** or that county including the projected number of cases and the projected cost of services attributed to the county for the next biennium.

(c) Such reports to the Legislative Commission as the regulations of the Commission require.

~~(2) As used in this section, "participating county" means each county in which the office of public defender has not been created pursuant to NRS 260.010.~~

Sec. 14. NRS 180.110 is hereby amended to read as follows:

~~(1) [1.] Each fiscal year [the State Public Defender may collect from the counties amounts which do not exceed those authorized by the Legislature for use of the State Public Defender's services during that year.~~

~~2. The State Public Defender shall submit to the county an estimate on or before the first day of May and that estimate becomes the final bill unless the county is notified of a change within 2 weeks after the date on which the county contribution is approved by the Legislature. The county shall pay the bill:~~

~~(a) In full within 30 days after the estimate becomes the final bill or the county receives the revised estimate; or~~

~~(b) In equal quarterly installments on or before the 1st day of July, October, January and April, respectively.~~

~~3. The counties shall pay their respective amounts to the State Public Defender who shall deposit the amounts with the Treasurer of the State of Nevada and shall expend the money in accordance with the State Public Defender's approved budget.]~~

Sec. 15. NRS 260.010 is hereby amended to read as follows:

(1) In counties whose population is 100,000 or more, the boards of county commissioners shall create by ordinance the office of public defender.

~~(2) [Except as otherwise provided by subsection 4, in] counties whose population is less than 100,000, boards of county commissioners may in their respective counties create by ordinance, at the beginning of a fiscal year, the office of public defender [3. Except as otherwise provided in subsection 4, if a board of county commissioners intends to create the office of county public defender, the board shall notify the State Public Defender in writing on or before March 1 of any odd-~~

~~numbered year and the office may not be created before July 1 of the same year in which the notice was given.~~

~~4. If the county contribution approved by the Legislature exceeds the estimate provided to the county on December 1 by more than 10 percent for either year of the biennium, the board of county commissioners may create the office of county public defender on July 1 of the next even-numbered year if the board notifies the State Public Defender on or before March 1 of the same year in which the office is to be created. 5.]~~

(2) The office of public defender when created must be filled by appointment by the board of county commissioners. ~~[6.]~~ ***Not later than 30 days after the appointment of the public defender, the board of county commissioners shall submit to the Indigent Defense Commission created pursuant to section 5 of this act a report of the procedures used by the board to ensure that the appointment of the public defender was not the result of undue political and judicial interference.***

(3) The public defender ~~[serves at the pleasure of]~~ ***may be removed by the board of county commissioners [] for misconduct in office, incompetence, misfeasance, malfeasance or nonfeasance. Not later than 30 days after the removal of the public defender, the board of county commissioners shall submit to the Indigent Defense Commission created pursuant to section 5 of this act a report of the procedures used by the board to ensure that the removal of the public defender was not the result of undue political and judicial interference.***

Sec. 16. NRS 260.040 is hereby amended to read as follows:

(1) The compensation of the public defender must be fixed by the board of county commissioners. ~~[The public defender of any two or more counties must be compensated and be permitted private civil practice of the law as determined by the boards of county commissioners of those counties, subject to the provisions of subsection 4 of this section and NRS 7.065.]~~

(2) The public defender may appoint as many deputies or assistant attorneys, clerks, investigators, stenographers and other employees as the public defender considers necessary to enable him or her to carry out his or her responsibilities, with the approval of the board of county commissioners. An assistant attorney must be a qualified attorney licensed to practice in this State and may be placed on a part-time or full-time basis. The appointment of a deputy, assistant attorney or other employee pursuant to this subsection must not be construed to confer upon that deputy, assistant attorney or other employee policymaking authority for the office of the public defender or the county ~~[or counties]~~ by which the deputy, assistant attorney or other employee is employed.

(3) The compensation of persons appointed under subsection 2 must be fixed by the board of county commissioners of the county ~~[or counties]~~ so served.

~~(4) The [public defender and his or her deputies and assistant attorneys in a county whose population is less than 100,000 may engage in the private practice of law. Except as otherwise provided in this subsection, in any other county, the] public defender and his or her deputies and assistant attorneys shall not engage in the private practice of law except as otherwise provided in NRS 7.065. An attorney appointed to defend a person for a limited duration with limited jurisdiction may engage in private practice which does not present a conflict with his or her appointment.~~

(5) The board of county commissioners shall provide office space, furniture, equipment and supplies for the use of the public defender suitable for the conduct of the business of his or her office. 30 However, the board of county commissioners may provide for an allowance in place of facilities. Each of those items is a charge against the county in which public defender services are rendered. ~~[If the public defender serves more than one county, expenses that are properly allocable to the business of more than one of those counties must be prorated among the counties concerned.]~~

(6) In a county whose population is 700,000 or more, deputies are governed by the merit personnel system of the county.

Sec. 17. As soon as practicable after July 1, 2017, the Governor, Majority Leader of the Senate, the Speaker of the Assembly, and the Chief Justice of the Supreme Court shall appoint the members of the Indigent Defense Commission created pursuant to section 5 of this act as follows:

~~(1) One member appointed pursuant to paragraph (a) of subsection 2 of section 5 of this act, one member appointed pursuant to paragraph (b) of subsection 2 of section 5 of this act, the member appointed pursuant to paragraph (c) of subsection 2 of section 5 of this act, one member appointed pursuant to paragraph (e) of subsection 2 of section 5 of this act and one member appointed pursuant to paragraph (h) of subsection 2 of section 5 of this act must be appointed to terms that expire on June 30, 2021.~~

(1) Members appointed pursuant to paragraphs a-d(1) of subsection 2 of Section 5 of this act must be appointed to terms that expire of June 30, 2023.

(2) Members appointed pursuant to paragraphs d(2)-(3) of subsection 2 of Section 5 of this act must be appointed to terms that expire of June 30, 2022.

(3) Members appointed pursuant to paragraphs d(4)-(6) of subsection 2 of Section 5 of this act must be appointed to terms that expire of June 30, 2021.

Sec. 18. Notwithstanding the provisions of this act, if, before July 1, ~~2017~~ 2015, a county whose population is less than 100,000 has created the office of public defender pursuant to NRS 260.010, as that provision existed before July 1, ~~2017~~ 2015, the county may provide legal representation to indigent persons through the office of public defender created by the county until the ~~Indigent Defense~~ Commission created by section 5 of this act determines the appropriate method for providing such legal representation in the county pursuant to section 9 of this act.

Sec. 19. NRS 180.030 and 260.020 are hereby repealed.

Sec. 20. This act becomes effective on July 1, 2017.

The following links and/or pages are support for agenda
item 7a

1 TORI N. SUNDHEIM (Cal. Bar No. 294559)
2 Nevada Association of Counties
3 304 S. Minnesota St.
4 Carson City, Nevada 89701
5 Tel: (775) 548-6081
6 Fax: (775) 887-2057
7 tsundheim@nvnaco.org

8 *Attorney for Proposed Intervenor Nevada Association of Counties*

9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**
11 **SAN FRANCISCO DIVISION**

12 DESERT SURVIVORS; CENTER FOR
13 BIOLOGICAL DIVERSITY; WILDEARTH
14 GUARDIANS; and WESTERN
15 WATERSHEDS PROJECT,

16 Plaintiffs,

17 vs.

18 UNITED STATES DEPARTMENT OF THE
19 INTERIOR; and UNITED STATES FISH AND
20 WILDLIFE SERVICE,

21 Defendants.

Case No. 3:16-cv-01165-JCS

**PROPOSED DEFENDANT-INTERVENOR'S
NOTICE OF MOTION AND MOTION TO
INTERVENE; MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
THEREOF**

Date: December 16, 2016
Time: 9:30 a.m.
Place: Courtroom G, 15th Floor
Judge: Hon. Joseph C. Spero

1 **NOTICE OF MOTION AND MOTION TO INTERVENE**

2 **To All Parties and their Attorneys of Record:**

3 **Please take notice**, pursuant to Civil L.R. 702, that on December 16, 2016, at 9:30 a.m., in
4 Courtroom G, 15th Floor, 450 Golden Gate Avenue, San Francisco, California 94102, or as soon
5 thereafter as the matter may be heard, the Nevada Association of Counties ("NACO") will and hereby
6 does move this Court to let it intervene in this action.

7 This motion is made pursuant to Federal Rule of Civil Procedure 24, on the ground that the
8 Proposed Defendant-Intervenors have an interest in this action that will not be adequately represented
9 by the named Defendants, and that this interest is sufficient to warrant intervention as a matter of right
10 under Rule 24(a), or, alternatively, by permissive intervention under Rule 24(b). NACO sought consent
11 to Intervene. Defendants' counsel takes no position. Intervention is opposed by Plaintiffs' counsel.

12 This Motion is based upon this Notice of Motion and Motion, the accompanying Memorandum
13 of Points and Authorities, the Declarations of Jeffrey Fontaine, Jerrie Tipton, and Tori N. Sundheim,
14 the records and files in this action, any matters of which judicial notice may be taken, and on such
15 additional papers and arguments as may be presented at or before the hearing of this matter. NACO's
16 proposed Answer is attached as Exhibit A to this Motion.

17 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO**
18 **INTERVENE**

19 **STATEMENT OF THE ISSUE TO BE DECIDED**

20 On this motion, the Court must decide whether to grant the Proposed Intervenors leave to
21 intervene in this action pursuant to Rule 24 of the Federal Rules of Civil Procedure.

22 **STATEMENT OF RELEVANT FACTS AND INTEREST OF PROPOSED DEFENDANT-**
23 **INTERVENOR**

24 The Nevada Association of Counties ("NACO") seeks to intervene in this action and join with
25 the Defendants in defending against Plaintiff's claims. In this lawsuit, Plaintiffs allege the United States
26 Department of the Interior ("USDOJ") and Fish and Wildlife Service ("FWS") decision to not list the
27 Bi-State Sage Grouse ("BSSG") under the Endangered Species Act ("ESA") was unlawful. Plaintiffs
28 seek declaratory and injunctive relief in an effort to force the Service to list as threatened the BSSG

1 under the ESA, despite the FWS's reliance on unprecedented local conservation efforts with \$45 million
2 secured funding and designed collectively by the FWS, the State of California, the State of Nevada,
3 local governments, private stakeholders, and Federal Agencies.

4 NACO meets the requirements of Federal Rule of Civil Procedure Rule 24(a) for intervention as
5 of right, or alternatively, Rule 24(b) for permissive intervention. This motion is timely. The Nevada
6 Association of Counties ("NACO") represents all of Nevada's 17 counties. Five of NACO's member
7 counties fall within proposed BSSG critical habitat and are similarly and disproportionately impacted
8 by federal regulations as they contain large amounts, ranging from 46.2 to 98.3 percent, of federally
9 managed land. The majority of this percentage is under Bureau of Land Management ("BLM")
10 jurisdiction followed by the U.S. Forest Service ("USFS"). Of necessity, counties manage land
11 concurrently with State and federal agencies to comprehensively implement statutory requirements,
12 provide critical services such as road maintenance and fire protection, and carry out land use and zoning
13 policies applicable to all lands and residents within county borders. Thus, counties must stay apprised
14 of and involved in federal land management planning and conservation efforts because cross-
15 jurisdictional decisions are inextricably tied to the counties' ability to implement their own planning
16 powers and authorities, and manage assets that often require federal permits, leases, or easements.
17 NACO helps its members, especially rural counties without dedicated staff, as a central clearing house
18 and advocate that monitors and responds to these issues on behalf of counties.

19 This land management picture shows that NACO's member counties are limited by a very small
20 tax base yet must nevertheless provide critical county services and carry out land management planning
21 responsibilities throughout county borders irrespective of jurisdiction. These services and planning
22 responsibilities are identified by Plaintiffs as threats to the BSSG who seek to restrict or control these
23 functions. If Plaintiffs are granted their requested action, county interests would be directly impacted
24 through permits, leases, or easements held with federal land managers, from harm to responsibilities
25 granted to counties under State and federal planning authorities, and from impacts to private land
26 adjacent to federally managed land, all of which would inhibit the counties' ability to protect the health,
27 safety, and welfare of their citizens.

1 County interests cannot be represented by any existing party to this action. Counties hold
 2 different powers, authorities, and assets compared to State or federal agencies and are independently
 3 liable for failures associated with those responsibilities. Further, county responsibilities are not the
 4 focus of State and federal entities' concerns and often create inter-jurisdictional conflicts. Therefore,
 5 Counties are the only governmental entities in this case positioned to protect county-specific interests.
 6 Accordingly, NACO should be granted leave to intervene as of right under Rule 24(a). In the
 7 alternative, NACO should be granted permissive intervention under Rule 24(b).

8 ARGUMENT

9 **I. Proposed Defendant-Intervenors Satisfy the Requirements of Rule 24(a) and Should be** 10 **Granted Intervention as a Matter of Right**

11 Rule 24(a) of the Federal Rules of Civil Procedure governs intervention as of right. That rule
 12 states, in relevant part: On timely motion, the court must permit anyone to intervene who . . . claims an
 13 interest relating to the property or transaction that is the subject of the action, and is so situated that
 14 disposing of the action may as a practical matter impair or impede the movant's ability to protect its
 15 interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). The Ninth
 16 Circuit has outlined four requirements for intervention under Rule 24(a): (1) a timely application; (2) a
 17 significantly protectable interest relating to the subject of the litigation; (3) disposition of the lawsuit
 18 may adversely affect the applicant's interest if intervention is not granted; and (4) inadequate
 19 representation by the existing parties to the action. *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173,
 20 1177 (9th Cir. 2011).

21 Intervention is to be construed liberally in favor of potential intervenors to serve "both efficient
 22 resolution of issues and broadened access to the courts." *Id.* at 1179. The Court notes its "consistent
 23 approval of intervention of right on the side of the federal defendant in cases asserting violations of
 24 environmental statutes." *Id.* at 1178. No specific legal or equitable interest need be established, as
 25 review is "guided primarily by practical considerations," rather than technical distinctions. *Southwest*
 26 *Center for Biological Diversity v. Berg*, 268 F.3d 810, 817 (9th Cir. 2001). The interest must only be
 27 protectable under some law and related to the claims at issue. *Id.* Accordingly, the Proposed
 28 Intervenors meet the requirements for intervention as of right under Rule 24(a).

1 **A. This Motion is Timely**

2 Whether a motion to intervene is timely depends on: “(1) the stage of the proceeding at which
3 an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of
4 the delay.” *United States v. Carpenter*, 298 F.3d 1122, 1125 (9th Cir. 2002).

5 NACO's motion meets these criteria because it seeks to intervene at an early stage of this
6 litigation. The complaint was filed in March 2016 and schedule in the initial case management
7 conference held in July is no longer in effect as Plaintiffs did file a motion regarding the administrative
8 record, Docket 34 ("Dkt. 34"). No substantive briefing has been filed or any determinations made
9 regarding the issues raised by the complaint. *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397
10 (9th Cir. 1995)(Motion to Intervene was timely when filed after the government's answer and
11 administrative record submittal but before substantive briefing began.)

12 Although NACO argues it is necessary and has the right to intervene by a separate motion,
13 NACO will make every effort to join merits filings with the State of Nevada in the interest of
14 minimizing the burden on existing parties and also to serve judicial efficiency. NACO does not plan to
15 take any position on Dkt. 34. NACO will also not move for any venue change and will make every
16 effort to adhere to existing parties' joint proposed schedule. NACO consents to proceed before
17 Magistrate Judge Joseph C. Spero.

18 **B. Proposed Defendant-Intervenors Have Significant Protectable Interests That Will**
19 **Be Adversely Affected If Intervention is Not Granted**

20 Bi-State Counties' significant proprietary and contract interests will be adversely affected if
21 intervention is not granted. Plaintiffs seek specifically to restrict county authorities, as they are listed in
22 the complaint as threats to the BSSG that allegedly should be regulated under the ESA. Five of NACO's
23 member counties' boundaries include proposed critical habitat for the BSSG: Carson City, Douglas,
24 Esmeralda, Lyon, and Mineral ("Bi-State Counties"). 80 Fed. Reg. 2283; Decl. of Jeffrey Fontaine,
25 filed concurrently, at ¶ 14, 15. Bi-State Counties contain 46.2 to 98.3 percent federally managed land
26 and as such their proprietary interests are disproportionately impacted by federal land management
27 decisions. *Id.* The BLM and USFS manage significant amounts of proposed critical habitat within these
28 counties, at 40.39 percent of Carson City, 66.7 percent of Douglas, 35.6 percent of Esmeralda, 43

1 percent of Lyon, and 37.24 percent of Mineral Counties. *Id.*

2 The term "proprietary interest," with respect to counties has been defined by the Ninth Circuit as
 3 protectable interests "as varied as a municipality's responsibilities, powers, and assets." *City of*
 4 *Sausalito v. O'Neill*, 386 F.3d 1186, 1198-99 (9th Cir. 2004). Bi-State Counties also hold as protectable
 5 contractual interests the permits and Right of Ways ("ROWs") held by the USFS and BLM for various
 6 county functions. Decl. of Tori N. Sundheim, filed concurrently, at ¶ 3, 4, 10. These are "squarely in the
 7 class of interests protectable by law" where a lawsuit would affect the ability of the counties to
 8 implement the terms of permits or Right of Ways ("ROWs") and regulate the use of that real property.
 9 *Sierra Club v. United States EPA*, 995 F.2d 1478, 1483 (9th Cir. 1993)(Finding intervention as of right
 10 proper where Plaintiff sought under the CWA to require that defendant agency alter the terms of the
 11 environmental permits issued to intervenor for two of its water treatment plants.) Thus, by granting
 12 intervention, this Court will allow Applicants to defend against substantial impairment of their
 13 significant proprietary and contractual interests, a result consistent with the liberal policies governing
 14 intervention.

15 **1. Counties Have Significantly Protectable Proprietary Interests in Their**
 16 **Broad Responsibilities, Powers, and Assets**

17 Bi-State Counties hold several significant proprietary interests that will be harmed by a listing
 18 decision. Counties are politically separate municipalities whose comprehensive land use planning and
 19 zoning authorities fall under the Constitutionally broad police power to protect the health, safety, and
 20 welfare of the community. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926). At the heart of this
 21 authority is a County's Master Plan. Once a county's Plan and its components are established, each
 22 element of county-decision making and subsequent zoning and planning ordinances or development
 23 decisions are made in "connection with the circumstances and the locality" rather than an "abstract
 24 consideration" of a thing "considered apart." *Id.* at 388; Sundheim Decl. ¶ 6-10.

25 Thus, counties hold proprietary interests in comprehensive local planning responsibilities, *City*
 26 *of Sausalito*, 386 F.3d at 1198-99; Decl. of Jerrie Tipton, filed concurrently, at ¶ 7, 15, 17; Fontaine
 27 Decl. ¶ 19-35; Sundheim Decl. ¶ 3, 4, 10, their ability to enforce land-use and health regulations, *Scotts*
 28 *Valley Band of Pomo Indians of Sugar Bowl Rancheria v. United States*, 921 F.2d 924, 928 (9th Cir.

1990); Fontaine Decl. ¶ 18-22, 27, 29-35, 45, 49, 51-52, 65, 83, 85; Sundheim Decl. ¶ 3, 4, 10, protection of their natural resources, *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 944 (9th Cir. 2002); *Def. of Wildlife v. Jewell*, 70 F. Supp. 3d 183, 189 (D.D.C. 2014); Fontaine Decl. ¶ 25, 29-39, 49-50, 55-58, 62-63, 87-92; Tipton Decl. ¶¶ 7, 11-15, 17; Sundheim Decl. ¶ 3, 4, 10, their ability to repair county roads, *United States v. Carpenter*, 298 F.3d 1122, 1125 (9th Cir. 2002); Fontaine Decl. ¶ 8, 23, 40-48, 51, 55, 58, 66, 77, 84-85; Sundheim Decl. ¶ 3, 4, 10, protection against impacts caused by federal land management practices to adjacent municipality-owned land, *Douglas County v. Babbitt*, 48 F.3d 1495, 1501 (9th Cir. 1995); Fontaine Decl. ¶ 60, 68-71; Tipton Decl. ¶ 17; Sundheim Decl. ¶ 3, 4, 10, and their powers of revenue collection, economic development and taxation. *Colorado River Indian Tribes v. Town of Parker*, 776 F.2d 846, 848-49 (9th Cir. 1985); Fontaine Decl. ¶ 17, 23, 27, 29-35, 63-75, 92; Sundheim Decl. ¶ 3-10.

2. **Counties Have Significantly Protectable Contractual Interests in the Permits, Leases, and Easements Held by Federal Land Managers in or Adjacent to BSSG Proposed Critical Habitat**

Bi-State Counties hold significant contract interests that will be harmed if Plaintiffs are granted the requested relief to list the BSSG under the ESA. A favorable outcome to Plaintiffs in this lawsuit will require the FWS to restrict the terms of BLM and USFS-issued permits and ROWs. *Sierra Club*, 995 F.2d at 1485 (9th Cir. 1993); See *Southwest Center for Biological Diversity*, 268 F.3d at 817; Sundheim Decl. ¶ 3, 4, 10; Fontaine Decl. ¶ 76-86; Tipton Decl. ¶ 17. The ESA, like the CWA, acknowledges "the unfortunate inevitability of" human impacts, "and shifts costs...by allowing" incidental take of species "only pursuant to a permit." *Sierra Club*, 995 F.2d at 1485. When federal agencies regulate these activities, it imposes costs on local government, "which costs may burden the rest of our society." *Id.*; Fontaine Decl. ¶ 76-86. Such costs necessarily relate back to the counties' proprietary interest in powers of revenue collection and taxation and in local comprehensive planning. *Id.*; Sundheim Decl. ¶ 3-10.

3. **Disposition of This Case May, as a Practical Matter, Substantially Impair or Impede Proposed Defendant-Intervenors' Interests**

1 Plaintiffs characterize critical county proprietary and contractual interests, as
 2 significant threats to the persistence of the BSSG and the outcome they seek is to restrict or control
 3 these functions. Complaint ¶¶ 54, 57, 72, 75. Each of these activities represents one or more of the
 4 several proprietary or county held contractual interests.

5 First, the failure of counties to provide statutorily mandated services could result in legal
 6 liability and conflicts with State and federal land managers, or private property owners. *City of*
 7 *Sausalito*, 386 F.3d at 1198-99; Fontaine Decl. ¶¶ 71, 85, 94. Under Nevada law, NRS 278.160, counties
 8 are required to develop a Master Plan. This Master Plan represents a comprehensive planning effort so
 9 that counties can provide cohesive and efficient services while simultaneously accounting for the
 10 important complementary services provided by other governmental entities. Master Plans direct the
 11 policies using maps, policy statements, goals and objectives addressing a number of issues relating to
 12 growth, housing, economic development, transportation, environment, parks, recreation, pathways, and
 13 open space, among others. Fontaine Decl. ¶¶ 19-25; Sundheim Decl. ¶¶ 3, 4, 10. This Plan provides long-
 14 term guidance to county decision makers on land use issues, such as where residential, commercial and
 15 industrial development should occur in the future, and at what densities. *Id.* This, in turn, becomes the
 16 basis by which the county issues zoning and ordinances. Fontaine Decl. ¶¶ 19-25, 67.

17 Bi-State Counties specifically address or manage each of the activities plaintiffs seek to restrict,
 18 including urbanization (economic growth plans), Fontaine Decl. ¶¶ 64-67; infrastructure (fences, power
 19 lines, roads, airports), Fontaine Decl. ¶¶ 53-54, 66, 76; mining; renewable energy development, Fontaine
 20 Decl. ¶¶ 72-75; nonnative and native, invasive plants (e.g. pinyon-juniper encroachment, cheatgrass),
 21 Fontaine Decl. ¶¶ 38-39; wildfires and altered fire regime, Fontaine Decl. ¶¶ 36-37, 51-52; recreation
 22 Fontaine Decl. ¶¶ 55-58; contaminants (cemeteries, landfills, sewage), Fontaine Decl. ¶¶ 59-61; grazing
 23 or ranching activities, Complaint ¶¶ 54, 57, 72, 75; Fontaine Decl. ¶¶ 22, 74; Sundheim Decl. ¶¶ 6-10. As a
 24 policy consideration, all 17 of Nevada's counties have an interest in the legal defensibility of the BSAP
 25 as a state-wide mode for conservation plans. *Def's. of Wildlife v. Jewell*, 70 F. Supp. 3d at 189; Fontaine
 26 Decl. ¶¶ 87-92; Tipton Decl. ¶¶ 11-16.

27 Plaintiffs identify "urbanization," or economic development as a threat and allege that the 11
 28 percent of "suitable sage-grouse habitat" under county management may be "targeted for development

1 because of their proximity to recreation sites, aesthetics, or water rights." Complaint ¶ 72. This
2 characterizes as negative how counties develop comprehensive planning and carefully consider the
3 appropriate areas for further economic development. Fontaine Decl. ¶ 64-67. The allegation similarly
4 illustrates how conservation efforts like the BSAP are valuable for incorporation into comprehensive
5 planning efforts, for example, as Mineral County has done. Tipton Decl. ¶ 15; Fontaine Decl. ¶ 87-92.

6 Second, there are significant staffing, logistical, and resource costs associated with ESA section
7 7 consultation and take permitting requirements. Fontaine Decl. ¶ 76-86. These constitute harms to
8 county contract interests. *Sierra Club*, 995 F.2d at 1485. In counties with such an enormous percentage
9 of federally managed proposed critical habitat, for Bi-State Counties, 40.39 percent of Carson City,
10 66.7 percent of Douglas, 35.6 percent of Esmeralda, 43 percent of Lyon, and 37.24 percent of Mineral
11 from 46.2 to 98.3 percent, most of what the counties are responsible for require some sort of
12 authorization by the BLM or USFS. Complaint ¶ 1, 44, 72; Fontaine Decl. ¶ 76-86. Bi-State counties
13 therefore hold permits and ROWs within the proposed critical habitat for the BSSG on federal land.
14 Sundheim Decl. ¶ 3, 4, 10; Fontaine Decl. ¶ 76-86. These permits and ROWs authorize public interest
15 activities on federal lands subject to federal regulations, 43 C.F.R. 2800 et seq., such as transportation
16 systems and roads, transmission lines, water facilities, landfills and sewage, and recreation, among
17 others. *Id.*

18 Permit and ROW applications and renewals, and federal land management actions, are subject
19 to ESA consultation requirements. *Application of the Endangered Species Act to proposals for access to*
20 *non-federal lands across lands administered by the Bureau of Land Management and the Forest*
21 *Service*, Bureau of Land Management (January 27, 2003). A listing decision for the BSSG will result in
22 additional staffing requirements on top of what is already a lengthy process, and in season of use
23 restrictions that could render some permits valueless and leave a county without a means to provide the
24 critical service at issue. For example, the use of gravel pits necessary for emergency road repair may be
25 restricted to use when it is not needed due to brood rearing habitat restrictions. Fontaine Decl. ¶ 48, 84.
26 Mineral County is concerned that it would be denied an application to expand its landfill because it is
27 adjacent to proposed critical habitat. Tipton Decl. ¶ 17. Similar concerns span permitting needs.
28 Fontaine Decl. ¶ 76-86.

1 Further, when Plaintiffs discuss the "managerial discretion" of federal land managers, they refer
 2 directly to the "discretion" of the BLM and USFS to issue and maintain county-held permits and
 3 ROWs. Complaint ¶¶ 57, 68; Sundheim Decl. ¶¶ 3, 4, 10; Fontaine Decl. ¶¶ 76-86. Also referenced are the
 4 land use plan amendments that programmatically restrict federal agency permits, and to which counties
 5 are procedurally entitled cooperating agency status and consistency review with county planning efforts
 6 and policies under federal land use and planning laws. *Id*; *City of Sausalito*, 386 F.3d at 1198-99
 7 (procedural harms to counties under NEPA, FLPMA, and NFMA are justiciable due to disruption of
 8 local comprehensive planning). Thus, counties pay for staff to help process permits and renewals, or the
 9 reports and studies needed to engage in the responsibilities granted them by FLPMA and NEPA.
 10 Fontaine Decl. ¶¶ 22, 78, 80, 98. If the BSSG is listed under the ESA, the application, approval, and
 11 renewal costs of these permits is likely to increase significantly. *Id*.

12 Finally, counties' ability to provide these services would be harmed from a reduction in tax base
 13 due to an impact on grazing, mineral exploration and development, recreation, renewable energy
 14 development, and other public lands-based economies. *City of Sausalito*, 386 F.3d at 1198-99;
 15 Fontaine Decl. ¶¶ 74-75.

16 **C. Proposed Defendant-Intervenors' Interests are Not Represented by the Existing**
 17 **Parties**

18 County interests cannot be represented by any existing party to this action or by any other
 19 governmental entity that does not share the same proprietary or contractual interests as do counties.
 20 *Scotts Valley Band of Pomo Indians of Sugar Bowl Rancheria*, 921 F.2d at 928(A party that does not
 21 directly share a taxing or regulatory interest will not necessarily act to protect that interest.) Nevada's
 22 counties carry out different responsibilities and have different authorities, policies, and assets compared
 23 to State or federal agencies, which are not the focus of those entities concerns. Fontaine Decl. ¶¶ 93-98.
 24 This similarly applies to counties in another state subject to different legislative directives. *Id*. County
 25 and state interests diverge over responsibilities similar to the ways in which state and federal interests
 26 often diverge, including over legislative authority, interpretation, and implementation, cost sharing,
 27 taxing authority, and liability associated with a failure to provide essential statutorily mandated
 28 services. *Id*.

1 It is irrelevant that NACO here seeks the same legal result as federal Defendants. The standard
 2 set by the Ninth Circuit goes instead to whether an existing entity can be expected to protect Defendant-
 3 Intervenor's interests. *Scotts Valley Band of Pomo Indians of Sugar Bowl Rancheria*, 921 F.2d at 928.
 4 Here, they cannot. This case is whether the FWS should regulate the activities counties are specifically
 5 mandated to perform and for which they are held legally liable. Therefore, it cannot be presumed that
 6 any other governmental entity would act to protect Nevada counties' interests.

7 **II. Proposed Defendant-Intervenors Satisfy the Requirements of Rule 24(b) for Permissive**
 8 **Intervention**

9 As detailed above, Applicants meet all requirements for intervention as of right under Fed. R.
 10 Civ. P. 24(a). If this Court denies intervention as of right, it should grant permission to intervene under
 11 Fed. R. Civ. P. 24(b), which provides for permissive intervention when an applicant's timely "claim or
 12 defense ... share with the main action a common question of law or fact." Permissive intervention is a
 13 matter within the court's broad discretion. *Cty. of Orange v. Air Cal.*, 799 F.2d 535, 537 (9th Cir. 1986).
 14 Given the important issues involved, Applicants' stake in the issues, and the early stage of the litigation,
 15 the Court should allow permissive intervention.

16 **III. Conclusion**

17 For the reasons set forth in this Memorandum, Applicant Defendant-Intervenor respectfully
 18 requests that the Court grant the motion to intervene as of right. In the alternative, Applicants request
 19 permissive intervention and permit the Answer to be filed. Should this Court deny Applicants'
 20 permission to intervene in any form, Applicants respectfully request they be granted status as an *amicus*
 21 *curiae*.

22 DATED this 8th day of November, 2016.

23 /s/ Tori N. Sundheim
 24 Tori N. Sundheim (SBN 294559)
 25 Nevada Association of Counties
 26 304 S. Minnesota St.
 27 Carson City, Nevada 89701
 28 Tel: (775) 548-6081
 Fax: (775) 887-2057
 tsundheim@nvnaco.org

*Attorney for Proposed Defendant-
 Intervenor Nevada Association of Counties*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I, Tori N. Sundheim, hereby certify that I caused the foregoing to be served upon counsel of record through the Court's electronic service system.

DATED this 8th day of November, 2016.

/s/ Tori N. Sundheim
Tori N. Sundheim (SBN 294559)
Nevada Association of Counties
304 S. Minnesota St.
Carson City, Nevada 89701
Tel: (775) 883-7863
Fax: (775) 887-2057
tsundheim@nvnaco.org

*Attorney for Proposed Defendant-
Intervenor Nevada Association of Counties*

The following links and/or pages are support for agenda
Item 7c

<https://www.gpo.gov/fdsys/pkg/BILLS-114hr1484ih/pdf/BILLS-114hr1484ih.pdf>