

# **RTC EXHIBIT 3-B**

# Kim Rhodemyre

Upper South East Communities  
Coalition vs. U.S. Army Corps of



Discovery + Depositions + Decisions

Job: 188927

Exhibit: 00001



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13 Attorneys for Regional Transportation Commission of Washoe County

14 IN THE UNITED STATES DISTRICT COURT  
15 FOR THE DISTRICT OF NEVADA  
16

17 UPPER SOUTH EAST COMMUNITIES  
18 COALITION,

19 Plaintiff,

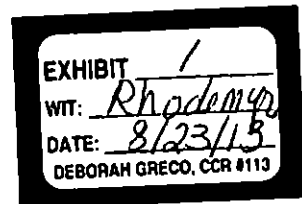
20 v.

21 U.S. ARMY CORPS OF ENGINEERS; LT.  
22 GEN. THOMAS P. BOSTICK, in his official  
capacity, Chief of Engineers and Commanding  
23 General, U.S. Army Corps of Engineers; COL.  
MICHAEL J. FARRELL, in his official  
24 capacity, District Commander, Sacramento  
District, U.S. Army Corps of Engineers;  
25 KRISTINE S. HANSEN, in her official  
capacity, Senior Project Manager, Reno Field  
26 Office, Sacramento District, U.S. Army Corps  
of Engineers; and REGIONAL  
27 TRANSPORTATION COMMISSION OF  
28 WASHOE COUNTY.

Defendants.

Case No. 3:13-cv-00403-LRH- WGC

DEPOSITION NOTICE PURSUANT TO  
FRCP 30(b)(6)



**NOTICE OF DEPOSITION PURSUANT TO FRCP 30(b)(6)**

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To: WINTER KING  
JOSEPH D. PETTA  
SHUTE, MIHALY & WEINBERGER LLP  
396 Hayes Street  
San Francisco, California 94102

And

JOHN L. MARSHALL  
570 Marsh Avenue  
Reno, Nevada 89509

Date & Time: Friday, August 23, 2013 at 10:00 a.m. PST

Place: WOODBURN AND WEDGE  
6100 Neil Road, Suite 500  
Reno, Nevada 89511

Deponent: Rule 30(b)(6) Designee(s) of Upper South East Communities  
Coalition

PLEASE TAKE NOTICE that Defendant Regional Transportation Commission of Washoe County, pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, will take the deposition of Upper South East Communities Coalition at the date, time, and place identified above. The deposition will proceed before a Notary Public or some other officer authorized to administer oaths. This deposition will be taken upon oral examination for discovery, cross examination, and all other purposes allowed by law. The deposition will continue, if not completed on this day, at a mutually agreeable time. The deposition will be taken by stenographic means.

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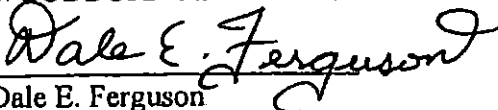
Pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, Upper South East Communities Coalition shall designate one or more persons to testify on its behalf about the topics set forth in Exhibit A attached hereto.

Respectfully submitted,  
THOMPSON COBURN LLP

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Counsel for Regional Transportation  
Commission of Washoe County

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**EXHIBIT A**

**Definitions**

The Southeast Connector ("SEC"): This is a roadway planned for the Reno/Sparks community extending from the intersection of Greg Street and Sparks Boulevard at the northern end, to South Meadows Parkway and Veterans Parkway at the southern end.

Phase I Construction Project: This is an approximately 1 mile stretch of the SEC, extending from Sparks Boulevard to just south of Clean Water Way.

Phase II Construction Project: This is approximately a 4.5 mile stretch of the SEC still in the planning and permitting phase, but anticipated to extend from Clean Water Way south to Veterans Parkway.

**Matters Designated for Examination**

Upper Southeast Communities Coalition should designate a person or persons to testify about the following matters:

1. General information about the Coalition, including but not limited to its officers and structure, the number of its members, and the approximate location of the Coalition members to the Phase I construction project (and specifically whether any Coalition members reside in or near the Phase I construction project).

2. The Coalition finances, net worth and factual basis for the statement in the Motion that, "Given its limited resources, the Coalition, or individual members of the Coalition, would be unable to post anything more than a nominal bond during the period of any preliminary injunction."

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3. The Coalition members' recreation activities, if any, in the Phase I construction project area and the aesthetic impacts of the Phase I construction project on the Coalition members.

4. Whether the Coalition contends that the Phase I construction project will "increase flooding, direct contaminated water and soil toward their communities, pollute the air they breathe, destroy wildlife and habitat and otherwise adversely impact the environment ...." And if yes, the factual basis therefore.

5. Whether the Coalition contends that the Phase I construction project will "negatively affect aquatic habitat values for fish and other aquatic wildlife and birds, decrease populations of these species (including the federally endangered Lahontan cutthroat trout and Cui-ui)...." And if yes, the factual basis therefore.

6. Whether the Coalition contends that the Phase I construction project lacks independent utility. And if yes, the factual basis therefore.

7. The reason(s) the Coalition waited to file suit until on or about July 29, 2013 while, as alleged, the construction of the Phase I project began in February 2013.

8. Whether the Coalition contends that any endangered species are affected by the Phase I construction project. And if yes, which such species are affected by the Phase I construction project and the Coalition's factual basis therefore.

9. Whether the Coalition contends that any Waters of the United States (also known as "jurisdictional waters" and also sometimes referred to in the Clean Water Act context as "navigable waters") have been impacted by the Phase I construction project. And if yes, the factual basis therefore.

1 10. Whether the Coalition contends that the Phase I construction project has caused or will  
2 cause “discharges” of any dredge, fill or pollutant into any Waters of the United States (also  
3 known as “jurisdictional waters” and also sometimes referred to in the Clean Water Act context  
4 as “navigable waters”). And if yes, the factual basis therefore. (“Discharge”, as used herein, is  
5 intended to be used in the manner used by Plaintiff in Paragraph 54 of the Complaint.)

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7 11. Whether the Coalition contends that any statements, reports, studies or conclusions in  
8 the RTC’s July 19, 2013 Section 404 submission for the Phase II construction project are false,  
9 inaccurate, or based on flawed science or scientific methodology. And if yes, the factual basis  
10 therefore.

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12 12. Whether the Coalition disagrees with or disputes any statements made in the RTC letter  
13 of July 24, 2013 responding the Coalition’s Notice of Intent to Sue letter (copy attached as  
14 Exhibit B). And if yes, the factual basis therefore.

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16 13. The factual basis for the statement on page 19 of the Motion that “any delay caused by  
17 the preliminary injunction . . . be short and thus will have minimal or no effect on the ultimate  
18 completion date of the SEC.”

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20 14. Whether the Coalition contends that the construction of Phase 1 will prevent the  
21 consideration of reasonable and potentially less environmentally adverse alternatives with  
22 respect to future phases of the SEC’s construction. And if yes, the factual basis thereof.

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EXHIBIT B



**REGIONAL TRANSPORTATION COMMISSION**  
*Public Transportation • Streets and Highways • Planning*

July 24, 2013

*Via electronic mail*

Winter King, Esq.  
Joseph Petta, Esq.  
Shute, Mihaly & Weinberger  
396 Hayes Street  
San Francisco, CA 94102

Response to May 29, 2013, Notice of Intent to Sue Letter

Dear Ms. King:

On behalf of the Regional Transportation Commission of Washoe County, we want to respond to your Notice of Intent to Sue letter of May 29, 2013. The letter reflects a significant misunderstanding of the SouthEast Connector (SEC) project, which provides necessary and important transportation enhancements as well as environmental and community benefits. Although no response to your letter is legally required, we feel compelled to provide you with the facts, as substantiated by the public record, as well as to demonstrate that the RTC has fully complied with both the spirit and letter of the Clean Water Act and has proceeded in accordance with the United States Army Corps of Engineers (Corps) process. We believe this response is necessary and appropriate to ensure that you understand the background of the planning, design and development of this most important regional transportation facility and undertaking.

As explained more fully below, the SEC provides necessary and substantial transportation benefits for our region; it also provides substantial environmental benefits to our community. Simply put, Phase 1 impacts no jurisdictional waters. The Corps has already determined it has no jurisdiction and the Corps is legally entitled to deference on this issue. The SEC Project is using no federal funds and is not "federalized." The project, as currently configured, already reflects substantial input and collaboration provided by the stakeholders. The Phase 1 bridge and work have a clear independent utility and do not restrict the Corps' options. The jurisdictional waters impacted in Phase 2 comprise a very small facet of the overall project; specifically, the impacted jurisdictional waters comprise about 1,700 feet of the approximately 29,040 feet of the alignment. In sum, the public process has worked well in the development of the project and the RTC and SEC project are in full compliance with all applicable laws.

As background, the RTC is a public agency created under the laws of the State of Nevada and is comprised of elected representatives from Washoe County, the City of Reno and the City of Sparks. Functionally, the RTC serves as the Metropolitan Planning Organization (MPO), Public Transit Authority and Street and Highway agency for Washoe County. The RTC is legally empowered to spend countywide motor fuel taxes on regional roadways consistent with the Regional Transportation Plan (RTP), in addition to spending sales taxes for both highway and public transit services.

RTC Board: Bonnie Wober (Chair) • Dwight Dertch (Vice Chair) • Sharon Zadra • David Humko • Ron Smith  
PO Box 30002, Reno, NV 89520 • 2050 Villanova Drive, Reno, NV 89502 • 775-348-0400 • rtcwashoe.com

Response to May 29, 2013, Notice of Intent to Sue Letter  
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As the MPO for our community, the RTC adopted a new RTP on April 19, 2013. The RTP includes guiding principles that focus the RTC's selection of projects on mobility, safety, economic diversification, sustainability, and choices for transportation. These guiding principles have been and are the foundation used by the RTC to develop multimodal projects to address our region's long term transportation challenges.

The SEC is needed by and will provide significant benefits to our community. As explained in more detail below, these benefits to our community are both transportation and environmental in scope. The SEC's purpose and need was once again ratified by the RTC when we adopted the new RTP. The RTP shows that the SEC is a project that substantially improves regional mobility and connectivity – especially for neighborhoods and businesses east of I-580; is part of the road network that contributes to the attainment of air quality standards as required by the Clean Air Act Amendments of 1990; and is fully funded through local bond sales made possible by the voter approved RTC-5 initiative of November 2008.

The RTC implements projects through an annual Interlocal Cooperative Agreement executed between the RTC and its member entities. In October of 2012, and in express confirmation of the community's desire to proceed with the SEC Project, the RTC along with Washoe County, the City of Reno and the City of Sparks executed an agreement that tasks the RTC to proceed with the design, right-of-way acquisition, and construction of the SEC. In contrast to the unfounded statements in your letter, the SEC Project has consistently been shown to be a meritorious transportation project. The point is simple: our community overwhelming supports this project because it provides important and substantial benefits to mobility.

The SEC Project is the result of a long and robust planning process and ~~community engagement effort~~. Unfortunately, your letter reflects outdated information about the design concept and scope of the SEC Project. As explained more below and as part of the productive stakeholder engagement during the ongoing administrative process with the Corps, pertinent aspects of the project have changed substantially since the RTC submitted the original Section 404 permit application to the Corps in the summer of 2011. *Specifically, the project's design for Phase 1 no longer impacts the jurisdictional waters of the United States and thus the Corps correctly concluded that it had no jurisdiction over the current Phase 1 work.* This decision by the Corps for Phase 1 work, in turn, allowed the RTC to begin Phase 1 construction without a 404 permit. Further, and very importantly, an updated 404 permit application for the Phase 2 work was submitted to the Corps on July 19, 2013, and, as part of the Corps' regulatory process, will be available on the Corps' website and subject to a public comment process. The RTC will begin construction on Phase 2 after a decision of the Corps on the permit application.

The RTC, consistent with its mission, purpose and ethos, has followed all applicable laws regarding Phase 1 and, where required, consulted and coordinated with the Corps for both Phase 1 and Phase 2 development. The RTC is in full compliance with the Clean Water Act ("CWA"). The RTC will not cease Phase 1 construction activities based on the incorrect assertions in your letter. The facts and the law, as explained more fully below, clearly demonstrate that the RTC has proceeded in accordance with applicable legal requirements. Indeed, the RTC takes great pride in its environmental and regulatory compliance with all its projects and, in fact, the SEC will serve as a national model for sustainable highway design.

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The RTC has undertaken substantial efforts to communicate with the interested stakeholders the design concept, issues, and benefits of the SEC Project. The RTC prides itself on its ~~extensive public~~ outreach efforts for planning and project development. We strive to include recommendations from project stakeholders in the design concepts of the roadways we build. In fact, this grassroots public outreach is in part why the Reno-Sparks area today enjoys over 111 miles of dedicated bicycle lanes on our regional roadways. A consistent process has been created for the SEC Project and the RTC established a Community Working Group to assist in the design of the facility. We have invited the Upper Southeast Communities Coalition to participate in our stakeholder meetings. In fact, we have invited members of your organization to join this group – even recognizing your client's very public desire to stop the project.

As you read our response letter, please bear in mind that we are conveying *facts*, all of which are readily verifiable. As is evident, the RTC has acted in a legally responsible and appropriate manner and a lawsuit would be frivolous. The RTC is indeed striving to construct a regional roadway that enhances accessibility and supports economic recovery of our region, while incorporating the latest design methods that demonstrate the RTC's commitment to environmental sustainability.

- I. The SEC Project is the result of years of planning and substantial public outreach, and provides substantial benefits to and is overwhelmingly supported by the community.

The SEC Project concept dates back to the late 1950's. The SEC Project was first approved by decision makers in the Truckee Meadows Area Urban Transportation Plan that was finalized and adopted in 1965 (the "1965 UTP"). Although various corridors (that is, routes for the roadway) have been discussed and analyzed over the many years, the Valley Corridor, which is the corridor the SEC alignment resides in today, has consistently shown the most travel benefit with the least cost throughout the years of study and planning. A detailed twenty-eight page chronology of this extensive planning history is attached for your convenience as Exhibit A. This exhibit also sets forth the RTC's substantial community outreach regarding this project.

Importantly, during an RTC Board Meeting in January 2007, as part of updating the Regional Transportation Plan ("RTP"), the RTC solicited comments about selecting one corridor for the SEC. Every time the RTP is updated (every 3 years), public open houses, committee meetings, and opportunities for public comment are provided, and that was the case leading up to the January 2007 RTC Board Meeting. After obtaining and considering public input, the RTC Board voted to approve the Valley Corridor for the SEC on January 19, 2007. More importantly, after hearing public input from supporters and detractors who consistently complained about the decades of discussion and the need to "make up your mind," the Board directed RTC staff to develop an actual roadway alignment within the selected Valley Corridor.

Implementation of the SEC and other regional roadway work had been hampered for some time due to a lack of sufficient funding. However, in 2008, the voters approved a ballot initiative encouraging the Nevada Legislature to move forward with legislation which would allow the RTC to index fuel taxes to inflation and thereby obtain additional funding to build major projects – including the SEC. The voters' message from the RTC-5 referendum was that citizens were tired and frustrated with the delays in building major projects. More importantly, voters saw the RTC-5 initiative would create jobs at a time when the community needed jobs, while offering our community a first class infrastructure that would revitalize and restructure the regional economy. With new fiscal capacity in place through

indexing, the RTC proceeded with four bond sales to obtain the monies necessary to build a number of regionally significant projects, including the SEC.

In January 2010, there was an RTC Board Retreat that produced a number of questions regarding the SEC, including whether there was a need for the SEC, whether it could be done in phases, and how the SEC relates to other large roadway projects within the community. RTC staff developed a report that was presented to the Board on April 16, 2010. The synopsis of the staff report stated that the SEC is a very much needed project and the failure to build the project would result in:

- Significant increases in congestion/delay on I-580, I-80, McCarran Blvd, Longley Lane, Greg Street, and Double R Blvd.;
- 8,600 hours of delay per day equating to \$4.43 million a month in lost productivity costs using accepted costs of delay criteria; and
- Degradation of regional air quality by adding up to 262,000 pounds of carbon monoxide and over 10,500 pounds of particulate matter on an annual basis. These increases would jeopardize the ability to conform to applicable air quality standards, among other consequences.

The staff report also explained that while the project could be constructed in phases, the entire project is needed and justified. The RTC fully intends to complete the entire remaining stretch of this north-south connector, which was first publically documented in 1965, 48 years ago.

Another Board Retreat occurred in August 2010. Here, staff presented options to utilize bonds and accelerate construction of the SEC in an effort to save further public funds by eliminating construction inflation and also employing hundreds of construction workers during the severe local recession. The Board voted to move forward with additional bond sales in order to expedite construction of the SEC. In September 2010, the RTC Finance Department presented options for bond sales, which the Board ultimately approved. RTC staff came back to the Board in October 2010 and received direction to begin purchasing right-of-way and activities to submit a Section 404 Permit with the Corps.

On November 21, 2008, the RTC approved an alignment of the SEC within the Valley Corridor as the preferred corridor for the SEC. The purpose and need of the project was again reviewed by the RTC in 2010. At that time, the RTC reevaluated the travel demand forecasts used to design and develop the SEC because a question was raised whether the impacts of the recession diminished the need for the project. The RTC's analysis, as presented to the Board on April 16, 2010, showed that the SEC remained valuable by providing significant regional mobility benefits, among other attributes. While the traffic volume projections on the SEC did decrease, the reduced traffic volume projections are still within the guidelines of a 6 lane facility. After reviewing this information, the Board authorized staff to negotiate a contract for professional services to do preliminary design and submit the necessary permits for the SEC.


The culmination of the overwhelming public support for the SEC is further evidenced by actions by the City of Sparks and City of Reno in November 2012. Sparks and Reno are the fee owners of much of the property comprising the alignment within Phase 1. On November 26, 2012, Sparks and Reno granted a construction easement to the RTC for the Phase 1 construction. This is yet another form and demonstration of express community approval for the SEC Project. Also, each RTC Board meeting is publically noticed and open to the public, not only for attendance but also for comment.

Response to May 29, 2013, Notice of Intent to Sue Letter  
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In addition to the environmental benefits of the SEC Project discussed below, the SEC has numerous and significant transportation and mobility benefits to the surrounding community. These benefits, which are outlined on the webpage for the SEC Project<sup>1</sup>, include but are not limited to:

- Improving connectivity for north/south travel by providing an alternative to the heavily travelled US 395/I-580
- Reducing traffic volumes on portions of I-80, I-580, Southeast McCarran, Longley Lane, Greg Street, Double R Boulevard, and other significant regional routes
- Providing an efficient route for commuters from the south
- Adding safety features of a high-speed roadway, including barrier rail, wide shoulders, longer distances for merging on and off the facility, and separation of pedestrian/bicycle travel
- In the event of a major flood, the surrounding regional roads are subject to flooding. The design of the SEC maintains one dry lane in each direction. This allows for emergency access and evacuation should the need arise. The Project will remedy the absence of emergency vehicle access to Hidden Valley/Meadows, the Water Treatment Plant, and areas east of Steamboat Creek during Truckee River and Steamboat Creek flood events.

It is little surprise that the community supports the SEC Project.

 Your letter suggested the SEC was not needed because McCarran Boulevard is also a north-south connector. However, during the last flood warning on December 2, 2012, the McCarran Boulevard Bridge over the Truckee River was closed. The Phase 1 bridge over the Truckee River is designed to be utilized safely during flood events up to a 117-year event (which far exceeds the McCarran Boulevard Bridge tolerance for flood conditions). This Phase 1 bridge will provide emergency access and an evacuation route that does not currently exist for a segment of our community (such as the Hidden Valley/Meadows neighborhood) that is now literally cut off from all egress during floods. The bridge and Phase 1 serve an important and very necessary safety function for our community. As you can see, this is certainly not a bridge to nowhere but instead an important lifeline that will protect lives and property.

McCarran Boulevard is not a north-south connector; it, in fact, only runs more or less parallel with the SEC for a relatively short distance. McCarran Boulevard is a circumferential ring road that curves west just south of Mira Loma Drive. The SEC will be a true north-south connector extending much further south of McCarran, connecting the South Meadows and Damonte Ranch areas to the I-80, Sparks Boulevard area, and will allow accessibility for residents in these respective areas to jobs and retailing opportunities which help economic growth. Widening McCarran Boulevard alone will not meet the community's transportation needs and certainly will not relieve any traffic congestion on I-80.

- II. The Phase 1 bridge does not tie the Corps' hands as alleged and it has a clear independent utility.


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<sup>1</sup>  
<http://www.southeastconnector.com/benefits-of-the-Project/>



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Your "bridge to nowhere" assertion has no factual basis. First, the currently adopted RTP – as well as previous RTPs – contain a Mill Street Extension from McCarran Boulevard to the SEC. This connection will help move substantial volumes of traffic between the Reno and Sparks industrial areas. Moreover, the RTC owns the right-of-way to construct the SEC to Pembroke Drive, another regional road and again capable of moving substantial volumes of traffic. The Phase 1 component currently under construction could extend to either a Mill Street Extension or to Pembroke Drive and serve regional travel demands (without impacting any waters of the United States). While the greatest benefit to the community is to complete the entire SEC Project (in accordance with the current plans), these options clearly ensure that the Phase 1 work and the Truckee River Bridge have important independent utility – especially when taking into account its increased safety aspects during flood events (discussed above). The bridge and Phase 1 have not only a clear independent utility but also serve an important and very necessary safety function for our community.

 Relying on inapplicable legal authority, your letter voices a concern with the Phase 1 bridge somehow limiting the Corps' options when the Corps is analyzing the 404 permit for Phase 2. Again, this reveals a lack of understanding of the pertinent facts; the Phase 1 bridge and construction in no way limits options available regarding Phase 2. The four corridors meeting the purpose and need of the Project that were most recently analyzed (Valley Corridor, Sparks Industrial Corridor, Foothill Corridor, and Ridgetop Corridor) *all* would require a bridge over the Truckee River and would connect at Sparks Boulevard and Greg Street (just as the current Phase 1 is doing). The bridge does not limit the Corps' options. Thus, all four corridors remain as available options. And, the currently planned alignment within the Valley Corridor (that is, the location of the roadway within the corridor) is yet another option the Corps could examine for Phase 2, and this pertains to approximately 80% of the SEC Project. As a matter of fact, the Corps' hands are not in any way tied by the commencement of Phase 1 construction. But, to be clear, the RTC believes the Phase 2 plans currently contemplated (and squarely addressed in the July 19, 2013, permit submission) reflect the better alternative.

- III. The Phase 1 work does not impact jurisdictional waters, the Corps declined jurisdiction, and a 404 permit is not then necessary or appropriate for Phase 1.

Both the Phase 1 and Phase 2 portions of the SEC Project were included in the 404 permit application to the Corps on May 31, 2011, and the Section 401 Water Quality Certification Application to the State of Nevada on May 31, 2011. These original 2011 applications included plans to fill jurisdictional wetlands in Phase 1 as well as Phase 2. In addition, the mitigation plan submitted with the original 404 permit application included a complete restoration and relocation of Steamboat Creek within the 5.5 mile project limits. With that situation and with that plan, a 404 permit would have been necessary prior to commencement of either Phase 1 or Phase 2.

However, that original May 2011 permit application commenced the Corps' administrative process through which stakeholders provided comments – precisely as the administrative process is intended to function. The Corps and the RTC received comments and concerns with the May 2011 approach, including specific concerns from a tribe and the Truckee Meadows Water Reclamation Facility (TMWRF), particularly focused on the effects of the stream realignment. Again, consistent with the permit process and as a result of these iterative steps, the RTC sought to be responsive to these comments and redouble its effort to develop an alignment (a specific route for the roadway within a corridor) that addressed the well-reasoned concerns expressed by stakeholders. The RTC engaged an additional environmental consulting firm for assistance, and with its staff and this new firm, the RTC engaged in substantial efforts to address the legitimate concerns raised with the May 2011 approach.

Response to May 29, 2013, Notice of Intent to Sue Letter  
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Among other things, the RTC responded by completely eliminating the May 2011 concept of realigning the 5.5 miles of Steamboat Creek. Other changes were made as well to accommodate the reason-based input the Corps and the RTC received. The changes not only eliminated the complete realignment of the Steamboat Creek, they ultimately simplified the project and, in the RTC's view, made the project simpler to construct. With that said, the proposed mitigation plan has numerous environmental benefits that are spelled out in the Section 404 Permit application submitted to the Corps on July 19, 2013. These changes met with the approval of a number of important stakeholders, who now support the current alignment. Noteworthy is the fact that the Corps' administrative process (which is still underway) worked to encourage and support what, frankly, is a better design than what was originally proposed in May 2011. Most importantly relative to the issues raised in your letter, these changes from the May 2011 approach had the effect of removing all impacts to jurisdictional waters that previously existed with earlier version of the Phase 1 design concept and scope.

On September 26, 2012, the RTC wrote a letter to the Corps explaining the changes in this SEC Project and describing why the revised Phase 1 design concept no longer had any impacts to jurisdictional waters. The letter correctly and transparently advised that Phase 1 was a project with independent utility and would result in no impact to jurisdictional waters. (Phase 1 is approximately two miles away from the jurisdictional waters that the Phase 2 work will impact.) *In a letter dated November 16, 2012, the Corps concurred with the redesign and stated that it had no jurisdiction over the redesigned Phase 1 portion of the SEC Project.* This allowed the RTC to proceed with obtaining the necessary permits from state and local agencies and to begin construction of Phase 1. The letters to and from the Corps related to this issue are included with this letter as Exhibits B and C, respectively.

On October 19, 2012, the RTC Board approved the most recent Amendment to the Transportation Improvement Program (TIP), which clearly defines the phases of the SEC and allows for continued funding for the project. As part of the RTC's standard operating procedure, every TIP Amendment – including this one – is publicly noticed for twenty-one (21) days to allow for the solicitation of any comments regarding the TIP or any specific item within the TIP. A chronologic listing of the TIP Amendments relating to the SEC is provided for your convenience as Exhibit D. Not one comment was received during any of these TIP amendments that voiced opposition to the SEC.

Your letter implies that phasing of the SEC Project was somehow conjured up in late 2012 to try to shirk environmental obligations. Again, you have been misinformed of the facts. As explained above, the changes to the May 2011 project (including no longer realigning the creek) arose from a dialogue with stakeholders. It was an improvement. But, the concept of phasing did not arise in late 2012. Rather, throughout its history, constructing the SEC in phases has been discussed. The 1965 UTP described the original State Route 27 as a longer roadway that has already been completed in phases over the last 48 years. Developers built a southern section, approximately 4 miles in length, over a period of about 5-7 years in the 2000's. The current SEC Project is the last 5.5 miles of the overall 16 mile roadway identified in 1965. The passage of RTC-5 enabled the RTC to examine ways to construct the entire 5.5 miles solely with local funds and to help stimulate the local construction economy. (No portion of the SEC will be constructed using federal funds.)

In November 2010, the RTC conducted a Cost and Risk Assessment of the SEC and analyzed various scenarios of constructing and permitting the SEC. As a result, the RTC decided to design the northern part of the Project (Phase 1) as a separate design package. By completing the design for Phase 1 in this manner, the RTC hoped to have a design for Phase 1 complete, or very close to complete, by the time that the Corps permit was issued. The north end of the Project was chosen to provide a northern point

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of access to the overall Project from I-80, which would otherwise be unavailable because of the physical barrier presented by the Truckee River. From a design standpoint, the southern limit of Phase 1 was chosen at 800 feet south of Clean Water Way in order to provide a sufficient platform and work area to construct the bridge over Clean Water Way. Your letter implies phasing nefariously originated in September of 2012; any such assertion is misplaced.

Although the Phase 1 work does not include any discharges to waters under the Corps' jurisdiction, it nevertheless does address flood mitigation. The flood mitigation basins are indentations in the ground that gradually get deeper and have a very wide opening for water to sheet flow drain toward the creek. The sheet flow edge is above the ordinary high water mark of the creek. Importantly, substantial modeling and calculations were performed to ensure the design of Phase 1 had zero net impact on flooding; this was very important to the RTC and our stakeholders. As part of the flood management planning currently in place in the community, the City of Sparks has formally approved our zero net impact on flooding for Phase 1 work (as Phase 1 is within Sparks' zone of responsibility for such approvals), and Sparks issued a variance from the flood management ordinance and certified the net zero impact of the Phase 1 project.

IV. The impact of Phase 2 work on jurisdictional waters will be very limited.

While not necessarily relevant to your letter, it is noteworthy that the impacts to jurisdictional waters in Phase 2 will be very limited. The RTC and its team have made an enormous effort to avoid and minimize impacts to jurisdictional waters in the re-design of its Phase 2 work. Early work on selecting an alignment utilized a computer program called Quantm. After identifying the locations of jurisdictional waters, this information was input into the program as well as other factors, and thousands of alignments were analyzed. The selected alignment was a hybrid that further reduced impacts to jurisdictional waters while still meeting the Project's needs.

The RTC submitted an almost completely revised Section 404 application to the Corps for Phase 2 on July 19, 2013. We believe that objective reviewers of these materials will be extremely impressed with the scope and detail of the extensive technical efforts taken to analyze and set forth a wide range of pertinent studies and information. We look forward to all comments submitted as part of the Corps' administrative process under the CWA for our permit and invite you to participate. The threat of a citizen suit at this juncture simply jumps the gun on the Corps' administrative process that is now underway.

The Section 404 application submitted on July 19 covers the entire length of Phase 2. However, it is important to put this in perspective. In actuality, only about 1,700 feet of the approximately 4.5 miles of Phase 2 will include potential impacts to jurisdictional waters. In fact, only approximately 11.23 acres of jurisdictional waters will actually be permanently impacted, out of approximately 173 acres of jurisdictional waters within the Valley Corridor. This stands in stark contrast to the approximately 1,000 acres that comprise the SEC Project. Also, approximately 75% of the approximately 11 acres of impacted jurisdictional waters were constructed (not natural) wetlands, and some of those may not technically even be "waters of the United States" because they are wetlands solely because of agricultural irrigation. Importantly, the jurisdictional waters that will be impacted are not interconnected in any sense, so that impacts to waters in one area will not impact waters in another. An honest and fair evaluation of the facts leaves only one conclusion: the impacts to jurisdictional waters are a very small piece of Phase 2 scope and an even smaller facet (percentage) of the overall



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Project. Despite the small impact that the Phase 2 Project will have on jurisdictional waters; however, we fully anticipate that the Corps will evaluate all issues as required by the Corps' regulations when it considers the RTC's permit application.

V. The SEC Project provides *substantial environmental benefits* to our community.

As explained above, the SEC provides significant transportation-related benefits to the community. But that is not the whole story: the Project also provides substantial environmental benefits. The alignment of the SEC not only avoids and minimizes impacts to jurisdictional waters, the SEC Project also has several other significant environmental benefits. The environmental benefits include reduced air pollution, wetland mitigation over and above what is required by the Corps, reduced sediment loading to the Truckee River, and placement of existing (historic) mercury contamination under the road so it does not continue to spread when floods occur (in the manner that it otherwise does presently).

The SEC will reduce air pollution by alleviating traffic congestion on the regional roadway network. The Project also includes a 10 foot wide multi-use path that will connect the extensive network of bike lanes in south Reno to the popular Truckee River Trail.

Wetlands mitigation ratios that are typically approved by the Sacramento District of the Corps are in the neighborhood of 2 to 1. The proposed mitigation plan for the SEC is 3 to 1 for obligate wetlands, 2 to 1 for agriculture induced wetlands, and 1.5 to 1 for the whitetop infested wetlands. Besides the net increase in quantity of wetlands, it is noteworthy that the mitigated wetlands are of a higher environmental value because they are contiguous, as opposed to the currently existing ones, which are separate and distinct from each other.

To account for the volume of fill needed for the roadway, an equal or greater amount of volume will be excavated to offset the fill. This excavation in Phase 2 is planned to occur alongside Steamboat Creek, which allows the creek to return to a more natural floodplain. Currently, the creek is severely incised and the water from smaller flood events is not able to spread out over a natural floodplain, which, in turn, confines the water and increases flow velocities, increasing bank erosion and sediment transport downstream. This sediment decreases water quality both within the creek and within the Truckee River. The Phase 2 design will ameliorate this problem by allowing the creek to utilize a more natural floodplain, which will reduce sediment transport by retarding the flow velocities. This is important to stakeholders and was in response to concerns voiced pursuant to the Corps' process.

Historic mercury exists within the corridor of the roadway (and pretty much throughout the surrounding area). The SEC Project is not a mercury clean-up project. However, the RTC did conduct a three dimensional analysis of the locations and concentrations of mercury in the SEC Project area. The project will permanently sequester existing mercury contamination within the project limits by encapsulating the mercury-containing soils within the roadway prism. This too has been very important to our stakeholders.

VI. The legal authority cited in your letter is inapplicable to the SEC project.

Your letter incorrectly asserts that the RTC has violated the CWA, 33 U.S.C. §§ 1311(a) and 1344(a), by beginning construction of Phase 1 without a Section 404 permit from the Corps. Under Section 1311(a), however, it is the "discharge" of any pollutant without a Section 404 permit that is unlawful.

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"The conclusion is inescapable. The existence of discharge is critical. The discharge must be of effluent or dredged or fill material. The discharge of effluent is not . . . merely an aggravating factor when addressing whether or not a section 404 permit is required. On the face of the statute, it is the requirement for statutory coverage." *Save Our Community v. U.S. EPA*, 971 F.2d 1155, 1163 (5<sup>th</sup> Cir. 1992). Because Phase 1 does not involve the discharge of any pollutants or dredge or fill material, no permit under Section 404 is necessary for any portion of the Phase 1 work. As discussed above, no Phase 2 work will occur until after the Corps concludes its process for the July 19 permit application submitted by the RTC.

Courts have generally found that state or private action on an entire project should not be prohibited from going forward when the Corps' permitting jurisdiction over a portion of the project is relatively small, as is the case with the SEC Project. In *Macht v. Skinner*, 916 F.2d 13, 19 (D.C. Cir. 1990), a case that your letter failed to mention, the court rejected an argument that Maryland had illegally divided a rail project to avoid NEPA review. Although Maryland transit officials had originally planned to build a 27-mile light rail transit system funded in part with federal funds, the officials later decided to build a smaller, 22.5-mile light rail line with no federal funds after realizing that the original Project would be delayed as a result of NEPA requirements. The decision was challenged under NEPA anyway. The court held that neither federal funding for preliminary studies, nor the fact that Maryland was considering using federal funds to pay for extensions of the Project, nor the Army Corps' jurisdiction over "a negligible portion of the entire Project" (3.58 acres of the 22.5-mile Project) were sufficient to "federalize" the entire project. The court found that Maryland had neither entered into a "joint venture" nor a "partnership" with the federal government with respect to the light rail project. Other cases have similarly found that limited federal permitting jurisdiction over a portion of a project is not enough to require a NEPA analysis covering non-federal aspects of the project.

Because no SEC Phase 1 work will impact jurisdictional waters to be addressed by the Corps when it evaluates the Section 404 permit application for the Phase 2 work, your cases cited are simply not relevant. In fact, the Ninth Circuit has found that even splitting a federal project for purposes of NEPA analysis is acceptable in circumstances similar to those presented in this matter. See *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (9<sup>th</sup> Cir. 2006) (applying an "independent utility" test to uphold a decision not to treat two mining projects in a joint EIS).

On June 19, 2013, you apparently wrote to the Corp's District Engineer about the Draft EIS for the Truckee River Flood Control Project. Although the issues raised in that letter about the SEC were not raised in your May 29 Notice of Intent letter, your June 19 letter contains additional incorrect factual and legal information that cannot go unaddressed.

Your June 19 letter asserts that the Draft EIS for the Truckee River Flood Control Project does not properly consider the cumulative impacts of the SEC Project as required by 40 C.F.R. § 1508.25(a)(2). Your assertion is perplexing. As you point out, the Corps discusses the SEC Project in the cumulative impacts section of the draft EIS. In any event, if the Corps agrees with your comment that the analysis is insufficient (and we doubt the Corps will so conclude), then the Corps will decide whether the draft EIS needs to be revised before it is finalized. Until the Corps takes final action on its pending administrative process as to that project, however, no further action is warranted.

Whether or not the Corps decides to revise the draft EIS for the Truckee River Flood Control Project, however, is unrelated to the ongoing SEC Phase 1 work. The lengthy history of the SEC Project is discussed above. The Truckee River Flood Control Project has an equally lengthy history. The two

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Projects have *never* been considered to be directly related projects during that entire history. As discussed above, potential flooding impacts associated with Phase 2 of the SEC Project are addressed in the July 19 submittal to the Corps and will be addressed by the Corps as part of the SEC Phase 2 analysis. Implying, as your June 19 letter does, that the Corps should combine EISs for the two projects merely because they are in the same area, or that the SEC Phase 1 work should be stopped until the Corps' EIS is completed for the Corps' Truckee River Flood Control Project, is without basis.

Importantly, the RTC has already addressed flood-related issues pertinent to the Phase 1 construction. As a result, a variance from the provisions of the Sparks Municipal Code, Title 15 (Sections 15.11.0310 – 15.11.0350, Floodways) was necessary. The City Council for the City of Sparks approved the variance at its regular meeting on February 11, 2013. No other approvals or authorizations to begin the Phase 1 work were required on this issue. Significantly, this approval first required RTC to establish (with good science and good engineering) that Phase 1 created no adverse impacts to the flood plain. Thus, because of the no adverse impact designation, Phase 1 can have no material bearing on the Corps' Truckee River Flood Control Project.

VII. There is no legitimate legal or factual basis for seeking to interrupt the construction of Phase 1.

The SEC Project is a project with a long history and multiple benefits to the community. Unfortunately, your notice letter ignores that rich history and those significant benefits and instead focuses on erroneous and outdated information, and ignores the fact the Corps has found no basis for jurisdiction over Phase 1. Also, the notice letter jumped the gun because the RTC's July 19 submission to the Corps initiates the Corps' administrative process for the requisite 404 permit for Phase 2. This 404 permit submission was a massive undertaking but the RTC was determined to use good science and perform all potentially relevant environmental and engineering studies.

Phase 1 impacts no jurisdictional waters. The Corps has already determined it has no jurisdiction and the Corps is entitled to deference on this issue. *City of Arlington, Texas v. Federal Communications Commission*, 133 S. Ct. 1863 (2013). Also, the basis for the Corps' express conclusion on its lack of jurisdiction over Phase 1 is beyond debate on the clear facts. The SEC Project is using no federal funds and is not "federalized." The project, as currently configured, already reflects substantial input and collaboration provided by the stakeholders. The Phase 1 bridge and work have a clear independent utility and do not tie the Corps' hands. The jurisdictional waters impacted in Phase 2 are a very small facet of the overall project (though those areas are nevertheless being treated with special care); specifically, the impacted jurisdictional waters comprise about 1,700 feet of the approximately 29,040 feet of the alignment. The community supports this project, which has substantial environmental and other benefits for our region.

The RTC sincerely hopes that you review the information contained in this letter and in the July 19 submittal to the Corps before you file suit or take any other actions.<sup>2</sup> As you should undoubtedly

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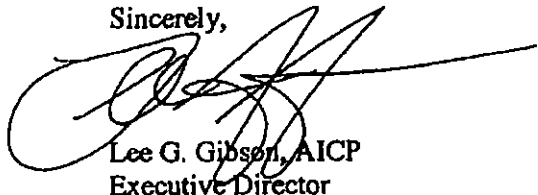
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We note that the CWA's prevailing party standard has allowed deserving defendants to obtain their attorneys' fees from baseless citizen suit claims. Also, because you have threatened litigation, we assume you have instructed your clients on the importance of preserving all documents and e-mails in their possession that in any way pertain to the SEC Project.

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conclude, the RTC's work on the SEC Project has not only been in compliance with the letter and spirit of the CWA and all other legal requirements, but also has involved a massive effort to use good science and good engineering to develop a project providing net improvements to the environment and substantial transportation benefits to the community. We remain willing to address any legitimate concerns that your clients may have. However, should you instead pursue legal action, please be assured that the RTC will defend its actions and our community vigorously.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lee G. Gibson', is written over a horizontal line. The signature is stylized and cursive.

Lee G. Gibson, AICP  
Executive Director

Attachments

Cc: Kristine Hansen, Senior Project Manager  
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U.S. Army Corp of Engineers  
300 Booth Street, Room 3060  
Reno, Nevada 89509

**CERTIFICATE OF SERVICE**

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I certify that I am an employee of Woodburn and Wedge and that on the 16th day of August, 2013, I served true copies of the foregoing *Notice of Deposition Pursuant to FRCP 30(b)(6)* by Regular U.S. Mail upon the following persons:

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by depositing correct copies in sealed envelopes with postage prepaid for collection and mailing following ordinary business practices, and by electronic mail as indicated.

  
Candace Kelley