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Memorandum

To : All Members of the Assembly Judiciary Committee

- ▶ Bernie Anderson, Chairman
- ▶ John Ocegüera
- ▶ Barbara Buckley
- ▶ William Horne
- ▶ Genie Ohrenschall
- ▶ Harry Mortenson
- ▶ Jerry Claborn
- ▶ David Brown
- ▶ Rod Sherer
- ▶ Jason Geddes
- ▶ Marcus Conklin
- ▶ Garn Mabey
- ▶ John Carpenter
- ▶ Sharon Angle
- ▶ Don Gustavson

From : James Jackson, on behalf of Jim Leavitt, Law Offices of Kermitt Waters

Re : Follow up on AB 397 Testimony

This message is sent in response to the two arguments presented in the government's witnesses regarding AB 397.

1. ***The government entities claim that AB 397 should not apply retroactively.***

Response:

AB 397 does not apply retroactively to all prior actions. It only applies to actions "pending on or after October 1, 2003" and the Bill specifically states that it does not apply to cases for which a final judgment has been entered and from which no appeal may be taken. The reason for this is many cases are now pending and an offer of judgment has not yet been made in those cases. AB 397 should be applied to protect each of those Nevada landowners from the coercive effect of an offer of judgment in their eminent domain actions. As stated, the principle reason for adopting AB 397 is to prevent the government from using its resources to coerce landowners whose property

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SUBMITTED BY: JJ Jackson

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is taken to settle their cases for less than just compensation. AB 397 allows landowners to present their right to payment of just compensation before an unbiased jury without the threat of being subject to paying the government's considerable attorney fees and costs.

Additionally, AB 397 protects Nevada landowners' just compensation awards by preventing the government from subtracting the government's attorney fees and costs from the award. This assures compliance with the constitutional mandate in the Fifth Amendment to pay the landowner just compensation which is real, ample, full, and substantial. This rule is needed to protect all landowners including those with future cases as well as those with cases currently pending. The landowners whose cases are currently pending should not lose this protection merely because the government filed its lawsuit to take their property prior to the date of adoption of AB 397.

2. ***The government entities claim that the offer of judgment rule in Nevada reduces court congestion and, therefore, should continue to apply in eminent domain actions.***

Response:

A policy to reduce court congestion certainly does not justify giving the government the coercive power to force Nevada landowners to accept less than just compensation. Currently, the Nevada offer of judgment rule may be used to impose on Nevada landowners the government's attorney fees and costs which can exceed the entire just compensation award, meaning the landowner would lose his or her land, receive no payment for the land, and ultimately end up owing the government money. Certainly Nevada landowner's Fifth Amendment constitutional right to payment of just compensation should not be subject to this coercive power to alleviate court congestion.

Moreover, eminent domain actions make up a very small fraction of cases pending before the Nevada courts. The courts are dominated by criminal, tort and other civil actions. It should also be noted that in "typical" civil actions, one party sues another strictly to recover money damages for negligent conduct. In eminent domain matters, the landowner stands to lose property through no fault of their own, and have the constitutionally guaranteed right to oppose the taking of their land without just compensation. Allowing the government or other entity to take the property, and then further punish the landowner for exercising their right to challenge the taking and to seek what they believe to be just compensation, by reducing their recovery by operation of the offer of judgment causes them to lose twice, and leave them far less than wholly compensated. The fundamental unfairness of that scenario is obvious on its face.

Finally, AB 397 proposes to change the offer of judgment rules so that penalties for not accepting an offer may not be imposed on Nevada landowners or the government. This is a rule that applies equally to both sides of litigation in eminent domain actions. So, why would the government entities oppose this rule? Because, the entities know that the Nevada offer of judgment rules as they currently exist work to the great disadvantage of Nevada landowners. It is a tool the government can use to coerce settlements for less than just compensation. This tool should not be allowed in a constitutional proceeding such as an eminent domain action.

We look forward to being present for the work session on this bill.