

# NYE COUNTY AGENDA INFORMATION FORM

Action     
  Presentation     
  Presentation & Action

<b>Department:</b> District Attorney	<b>Agenda Date:</b>
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<b>Category:</b> Regular Agenda Item	<b>July 3, 2018</b>
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<b>Contact:</b> Angela A. Bello, DA	Phone: 775-751-6277	Continued from meeting of:
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<b>Return to:</b>	<b>Location:</b> Pahrump	Phone:
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**Action requested:** (Include what, with whom, when, where, why, how much (\$) and terms)

Discussion and deliberation to: 1) acknowledge the findings of facts and conclusions of law set forth in the Order filed June 25, 2018 in case CV37545, Great Basin Water Co. v Nye County wherein the Court found the CUP remains in effect; and 2) direct the Nye County District Attorney to appeal the Order to the Nevada Supreme Court.

**Complete description of requested action:** (Include, if applicable, background, impact, long-term commitment, existing county policy, future goals, obtained by competitive bid, accountability measures)

The backup includes a copy of the Order filed June 25, 2018 in the case CV37545, Great Basin Water Co. v Nye County. The Court found that the CUP issued to Great Basin Water Co. remains in effect. The inclusion of the acknowledgement on an agenda item is for the purpose of advising the public of the Court's Order that the CUP granted to Great Basin Water Co. by the PRPC, appealed to the BoCC and then appealed to the 5<sup>th</sup> Judicial District Court remains in effect. The acknowledgment of the finding of fact and conclusions of law is not an admission of wrongdoing for the purposes of a civil action, criminal prosecution or injunctive relief (NRS 241.0395). Pursuant to NRS 244.165, "The boards of county commissioners shall have power and jurisdiction in their respective counties to control the prosecution or defense of all suits to which the county is a party." This statute establishes the power and necessity of the BoCC to direct the DA to file appeals on behalf of Nye County.

Any information provided after the agenda is published or during the meeting of the Commissioners will require you to provide 20 copies: one for each Commissioner, one for the Clerk, one for the District Attorney, one for the Public and two for the County Manager. Contracts or documents requiring signature must be submitted with three original copies.

**Expenditure Impact by FY(s):** (Provide detail on Financial Form)

No financial impact

**Routing & Approval** (Sign & Date)

1. Dept	Date	6.	Date
2.	Date	7. HR	Date
3.	Date	8. Legal	Date
4.	Date	9. Finance	Date
5.	Date	10. County Manager	Date

Place on Agenda

ITEM # 19

JUN 25 2018

**DEBRA BENNETT** Clerk  
Deputy

1 CASE NO: CV 37545  
2 DEPT NO: 1

3  
4 IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
5  
6 IN AND FOR THE COUNTY OF NYE  
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8 GREAT BASIN WATER CO., a Nevada  
9 Corporation,

10 Plaintiff,

11 v.

12 NYE COUNTY, a political subdivision of  
13 the State of Nevada, and NYE COUNTY  
14 BOARD OF COUNTY COMMISSIONERS,  
15 a political subdivision of the State of Nevada,

16 Defendant.

17 **ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S  
18 MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE, FOR A  
19 WRIT OF MANDATE, AND DENYING DEFENDANT'S COUNTERMOTION  
20 FOR SUMMARY JUDGMENT**

21 \_\_\_\_\_ Plaintiff Great Basin Water Co. formerly known as Utilities Inc. of Central Nevada  
22 (UICN) filed a Complaint, Petition For Judicial Review, And Petition For Writ Of  
23 Mandate Or Writ of Review challenging a decision of the Nye County Board of County  
24 Commissioners. Defendant Nye County filed a Response. UICN subsequently filed a  
25 Motion for Summary Judgment or in the Alternative, for a Writ of Mandate. Defendant  
26 Nye County filed an Opposition and Countermotion for Summary Judgment. UICN filed  
27 a reply in support of its motion and an opposition to Nye County's countermotion. Nye  
28 County filed a reply in support of its countermotion. The Court held multiple hearings on  
both motions. The Court subsequently requested supplemental briefing from both parties.

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History of Case

1  
2 UICN provides wastewater treatment services for approximately 43 square miles of  
3 Nye County, Nevada near Pahrump. (*Motion For Summary Judgment*, Ex. 1, NYE 031)  
4 UICN's facilities servicing this area include a wastewater treatment plant referred to as Plant  
5 3 that is located adjacent to a property known as the former Willow Creek Golf Course (the  
6 "Willow Creek Property"). (*Id.*) Plant 3 treats wastewater to Reuse Category B, including  
7 denitrifying and disinfecting the water, allowing for the treated effluent to be used for  
8 irrigation purposes on the Willow Creek Property and the Lakeview Golf Course (the  
9 "Lakeview Property"), another nearby golf course. (*Motion For Summary Judgment*, Ex. 1,  
10 NYE 015, NYE 032) The unused water is stored in ponds at the two courses, including two  
11 unlined ponds at the Willow Creek Property where the treated effluent safely infiltrated into  
12 the ground and also evaporated. The Nevada Division of Environmental Protection  
13 ("NDEP") monitors effluent discharged from Plant 3. (*Motion For Summary Judgment*, Ex.  
14 2, UICN-RIBS 000191; Ex. 4, NYE 218)

15 In November 2012, the Willow Creek Property's owner declared bankruptcy.  
16 (*Motion For Summary Judgment*, Ex. 1, NYE 031) At that time, the Willow Creek Property,  
17 the ponds on the Willow Creek Property, and associated facilities were in poor condition,  
18 having seriously degraded during the owner's operation and management of the Willow  
19 Creek Property. (*Motion For Summary Judgment*, Ex. 4, NYE 219) In August 2013, the  
20 U.S. Bankruptcy Court for the District of Nevada approved a plan whereby UICN (or its  
21 assignee) would take ownership of the Willow Creek Property to ensure safe operation of  
22 Plant 3 (providing a plan for remediation of the ponds the prior owner had not properly  
23 maintained), to ensure proper disposal of effluent from Plant 3, and to remediate other  
24 deficiencies on the Willow Creek Property. (*Motion For Summary Judgment*, Ex. 1, NYE  
25 031)

26 UICN's plan to remediate the Willow Creek Property included the modification of  
27 two existing effluent ponds to create two rapid infiltration basins ("RIBs"). (*Motion For*  
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1 *Summary Judgment*, Ex. 1, NYE 006-007) A RIB is a permeable earthen basin, designed  
2 and operated to further treat and disperse wastewater. The location of the proposed RIBs is  
3 the same general location where two unlined overflow ponds that receive treated water from  
4 Plant 3 are currently located. (*Motion For Summary Judgment*, Ex. 1, NYE 013, NYE 025)  
5 The RIBs at the Willow Creek Property were designed to provide an alternative means of  
6 disposing of Plant 3's treated wastewater in the event the Lakeview Property ever closed.  
7 (*Motion For Summary Judgment*, Ex. 1, NYE 025) Together with spray irrigation at the  
8 Lakeview and Willow Creek Properties, the RIBs would provide adequate disposal for the  
9 treated effluent from Plant 3. (*Id.*) UICN's remediation plan for the Willow Creek Property,  
10 including the RIBs, received approvals from the Public Utilities Commission of Nevada on  
11 April 7, 2015 and the Nevada Division of Environmental Protection on June 20, 2014. (*Id.*)  
12 The only remaining approval required for UICN to proceed with this remediation project is  
13 the CUP.

14 UICN applied to the Nye County Pahrump Regional Planning Commission (the  
15 "RPC") for a CUP to approve construction of the RIBs. (*Motion For Summary Judgment*,  
16 Ex. 1, NYE 013) UICN supported its CUP application with a Remediation Design Report  
17 prepared by Valentine Environmental Engineers and a Geotechnical Evaluation prepared by  
18 Western Technologies, Inc. (*Motion For Summary Judgment*, Ex. 1, NYE 028-107). At a  
19 January 13, 2016 hearing, after discussion among the RPC commissioners, RPC staff, UICN  
20 representatives, and the public, the RPC approved UICN's CUP application for the RIBs  
21 subject to conditions of approval that included a requirement for UICN to share with RPC  
22 the results of water sampling that UICN is required to provide to NDEP. (*Motion For*  
23 *Summary Judgment*, Ex. 1, NYE 009-11)

24 Kenneth ("Kenny") Bent timely appealed the RPC's approval of UICN's CUP to the  
25 BOCC. (*Motion For Summary Judgment*, Ex. 1, NYE 113-114). Mr. Bent's appeal to the  
26 BOCC was heard on March 15, 2016. (*Motion For Summary Judgment*, Ex. 3, NYE 125-  
27 132 (Minutes); Ex. 4, NYE 152-246 (Transcript)). BOCC issued an agenda on this item for  
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1 possible action regarding Mr. Bent's appeal of RPC's approval of the CUP. (*Motion For*  
2 *Summary Judgment*, Ex. 5, NYE 001-005) The BOCC's hearing was memorialized by  
3 video, audio, and transcription. (*Motion For Summary Judgment*, Ex. 6, Video (downloaded  
4 from Nye County's website) at 1:39:10 to 3:16:00; *id.* at 3:49:50 to 3:56:50; Ex. 3, NYE  
5 125-132; Ex. 4, NYE 152-246)

6 At the hearing, the BOCC allowed more than an hour of public comments including  
7 comments from Mr. Bent. (*Motion For Summary Judgment*, Ex. 6, at 1:39:10 to 3:16:00;  
8 Ex. 3, NYE 125-131; Ex. 4, NYE 152-237) Since this was an appeal from an RPC Decision,  
9 no new evidence could be considered by the BOCC. Instead, the BOCC was limited to  
10 determining whether there was substantial evidence in the record to support the RPC's  
11 decision. Most of the information presented to the BOCC by the public was not information  
12 that was presented to the RPC, a point that the Chair and the district attorney repeatedly  
13 brought up during the hearing. (*Motion For Summary Judgment*, Ex. 6 at 1:42:15-1:43:19,  
14 2:02:35-2:03:15, 2:08:05-2:08:13, 2:14:13-2:14:45, 2:40:15-2:41:18; Ex. 3, NYE 125, NYE  
15 127; Ex. 4, NYE 155-157, NYE 172, NYE 175, NYE 181, NYE 205-206). The BOCC could  
16 affirm, modify or reverse the RPC's decision.

17 When the BOCC closed the public comment period related to Mr. Bent's appeal,  
18 Commissioner Schinhofen motioned to approve the RPC's decision on UIEN's CUP.  
19 (*Motion For Summary Judgment*, Ex. 6 at 3:01:00; Ex. 3, NYE 131; Ex. 4, NYE 225). That  
20 motion was seconded and a vote taken, resulting in a vote of three to two against  
21 Commissioner Schinhofen's motion. (*Motion For Summary Judgment*, Ex. 6 at 3:11:25;  
22 NYE131; NYE 225-233.) Following the failure to pass of Commissioner Schinhofen's  
23 motion, Commissioner Borasky made a motion to "deny" without prejudice. (*Motion For*  
24 *Summary Judgment*, Ex. 6 at 3:11:50; NYE131; NYE 233-234). That motion was seconded,  
25 but the vote on that motion was not completed and Commissioner Borasky withdrew the  
26 motion. (*Motion For Summary Judgment*, Ex. 6 at 3:15:15; Ex. 3, NYE 131-132; Ex. 4,  
27 NYE 232-236.) The BOCC then declared the public hearing on Mr. Bent's appeal "done"  
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1 and took a lunch break. (*Motion For Summary Judgment*, Ex. 6 at 3:15:44; Ex. 3, NYE 132;  
2 Ex. 4, NYE 237).

3 After lunch, the BOCC re-convened, and District Attorney Angela Bello expressed  
4 procedural concerns about what had happened during the morning agenda item on the UICN  
5 CUP vote. DA Bello wanted clarification from the BOCC as to what they thought had  
6 happened with the agenda item, and a discussion ensued regarding whether the BOCC  
7 thought that the failure to affirm vote was understood by the BOCC to mean the BOCC had  
8 reversed the RPC. Commissioner Wichman expressed concern that the BOCC could not re-  
9 address the issue now, after the public hearing had closed, noting: "You can't hear it now  
10 because everybody from the public is gone." (*Motion For Summary Judgment*, Ex. 4, NYE  
11 243) Nevertheless, Commissioner Borasky made a new motion to deny the RPC's decision  
12 and set forth the basis for his motion. Commissioner Cox seconded the motion. This new  
13 Motion passed 3-2 with Commissioners Borasky, Carbone, and Cox voting in favor of the  
14 new motion, and Commissioners Schinhofen and Wichman voting in opposition. (*Motion  
15 For Summary Judgment*, Ex. 4, Nye 243-245)

16 UICN timely petitioned the District Court for Judicial Review of the BOCC's  
17 determination. UICN also filed a Motion For Summary Judgment, Or in the Alternative, For  
18 Writ of Mandate. Nye County filed an Opposition and Counter Motion For Summary  
19 Judgment. The Court requested supplemental briefing and hearing on the matter. The Court  
20 also requested Nye County provide the Court with the legislative history of Nye County  
21 Code 16.36.080.

22 **Discussion**

23 Chapter 16.36 of the Nye County Code governs appeals from decisions by the  
24 Regional Planning Commission for Conditional Use Permits (CUPS). When an appeal is  
25 filed from a decision of the Regional Planning Commission, the BOCC is required to hold a  
26 public hearing within 60 days of receipt of the appeal. The BOCC, in considering the appeal  
27 shall act to affirm, modify or reverse the decision made by the Regional Planning  
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Commission. In acting on the appeal, the BOCC shall grant the planning commission's decision a presumption of correctness, placing the burden of error on the Appellant.

In rendering its decision within 60 days of the receipt of the appeal, the BOCC may affirm, modify, or reverse the decision of the planning commission.

Meetings of the BOCC for Nye County fall under, and are governed by, Nevada's Opening Meeting law, which is set forth in Chapter 241 of the Nevada Revised Statutes. NRS 241.020 requires that, except as otherwise provided by statute, all meetings must be open and public, and all persons must be permitted to attend any meeting. The action of any public body taken in violation of any provision of Nevada's Open Meeting Law is void, i.e. has no legal or binding effect. NRS 241.036.

**Findings of the Court**

The Court after carefully reviewing all pleadings in the file, and after hearing the arguments of counsel finds as follows:

1. The action of a new afternoon motion made after the agenda item concluded, the public hearing had closed, and members of the public who appeared for that hearing had left, violates the Nevada Open Meeting Law and required a new public notice and hearing on the contested matter at issue.
2. The attempt to take action on agenda item 8 in the afternoon session after the public meeting had closed, and the agenda item was done, was invalid under Nevada's Open Meeting Law and is void. In other words, the vote on Commissioner Borasky's motion made in the afternoon session, after the agenda item had closed, is void.
3. After reviewing the transcript from the BOCC meeting at issue, the BOCC took no action on the matter at issue during the morning session. The Motion made by Commissioner Schinhoffen failed as the vote was 2 Aye's and 3 Nay's to affirm the decision of the RPC. Therefore, the Court finds that a majority vote in favor of the action did not happen.



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4. Pursuant to Nye County Code 16.36.80(B)(3), any appeal of the Conditional Use Permit (CUP) has to be decided by the BOCC with 60 days after receipt of the appeal. Based on the undisputable facts documented in the transcript of the March 15, 2016 BOCC meeting, it is clear that the BOCC did not take any valid action to affirm, reverse, or modify the decision of the Nye County Regional Planning Commission which had approved the CUP, within the 60 day time frame. Therefore, as a matter of law, the RPC's approval of the CUP remains in effect.

5. Because of the Open Meeting Law violation, the Court does not get to consider the merits of Mr. Bent's appeal of the RPC's decision approving the CUP. Instead, the Court is bound to correctly apply the law to the conduct and actions taken by the BOCC on March 15, 2016.

**IT IS HEREBY ORDERED:** that Plaintiff's Motion For Summary Judgment for a declaratory order that the BOCC's purported action on agenda item 8 is void is GRANTED and the CUP remains in effect as ordered by the Regional Planning Commission. Plaintiff's Motion for Summary Judgment on its Petition For Judicial Review is denied as moot, as there was no final decision of the BOCC for appeal to the District Court as required by Nye County Code Section 16.36.080(B)(5).

~~**IT IS FURTHER ORDERED:** that Defendant's Countermotion for Summary Judgment is denied.~~

**DATED** this 25<sup>th</sup> day of June 2018.

  
KIMBERLY A. WANKER,  
DISTRICT COURT JUDGE





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**CERTIFICATION OF SERVICE**

The undersigned hereby certifies that on the 25<sup>th</sup> day of June 2018, she sent via US mail a copy of the foregoing **ORDER** to the following:

Laura K. Granier, Esq.  
5441 Kietzke Lane, 2<sup>nd</sup> Floor  
Reno, NV 89511

Nye County District Attorney  
1520 East Basin  
Pahrump, NV 89060  
(Hand Delivered)

Christel Raimondo  
CHRISTEL RAIMONDO, Clerk to  
DISTRICT JUDGE

**AFFIRMATION**

The undersigned hereby affirms that this Court Order does not contain the social security number of any person.

Christel Raimondo  
CHRISTEL RAIMONDO, Clerk to  
DISTRICT JUDGE