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9 **UNITED STATES DISTRICT COURT**  
10 **DISTRICT OF NEVADA**

11 UNITED STATES OF AMERICA,  
12  
Plaintiff,  
13 v.  
14 JOHN C. CARPENTER, GRANT GERBER,  
and COUNTY OF ELKO,  
15  
Defendants,  
16 THE WILDERNESS SOCIETY and GREAT  
17 OLD BROADS FOR WILDERNESS,  
18  
Intervenors and Cross Claimants.

Case No. 3:99-cv-00547-MMD-WGC

**MOTION TO APPEAR AS AMICUS**

19 The State of Nevada, by and through its Attorney General ADAM PAUL LAXALT,  
20 Solicitor General LAWRENCE VANDYKE, and Senior Deputy Attorney General C. WAYNE  
21 HOWLE, submits this Motion to Appear as Amicus based upon the following points and  
22 authorities and the papers and pleadings on file herein.

23 DATED this 16th day of March, 2015.

24 ADAM PAUL LAXALT  
Attorney General

25  
26 By: /s/ Lawrence VanDyke  
LAWRENCE VANDYKE  
Solicitor General  
27 C. WAYNE HOWLE  
Senior Deputy Attorney General  
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This action presents an important question of State law in the context of a dispute over  
4 a road over public land. Nevada respectfully suggests that the Court would be well served to  
5 allow the State to appear and inform the Court about the State interests implicated by the  
6 question, as well as the State’s view of the pertinent law.

7 **II. MOTION TO APPEAR AS AMICUS**

8 Amicus participation in this Court is governed by general rules of fairness and justice,  
9 and not by any specific rule of procedure. “While Federal Rule of Appellate Procedure 29 and  
10 Supreme Court Rule 37 provide for the filing of amicus curiae briefs, the Federal Rules of Civil  
11 Procedure lack a parallel provision regulating amicus appearances at the trial level.” *Resort*  
12 *Timeshare Resales, Inc. v. Stuart*, 764 F. Supp. 1495, 1500-01 (S.D. Fla. 1991). This Court  
13 may allow a party to participate as an amicus whenever the Court believes it may be useful to  
14 the proceedings before it. *Liberty Res., Inc. v. Philadelphia Hous. Auth.*, 395 F. Supp. 2d 206,  
15 209 (E.D. Pa. 2005) (amicus participation is appropriate where, among other things, “the  
16 proffered information is timely and useful” and “the petition has a ‘special interest’ in the  
17 particular case”); *Cobell v. Norton*, 246 F. Supp. 2d 59, 62 (D.D.C. 2003) (allowing amicus  
18 participation that “may be helpful and of interest to the Court”); *Nat’l Org. for Women, Inc. v.*  
19 *Scheidler*, 223 F.3d 615 (7th Cir. 2000); *Long v. Coast Resorts, Inc.*, 49 F. Supp. 2d 1177 (D.  
20 Nev. 1999); *Ellsworth Assoc., Inc. v. U.S.*, 917 F. Supp. 841, 846 (D.D.C. 1996).

21 The State respectfully suggests that the Court’s discretion would be appropriately  
22 exercised by allowing the State to participate as amicus on the discrete state-law issues  
23 addressed in the State’s proposed amicus brief. Several factors might guide the Court’s  
24 discretion in considering the State’s request to appear as amicus.

25 **A. The Correct Interpretation of Nevada Law is Central to Intervenors’**  
26 **Summary Judgment Motion.**

27 The Intervenors in this action have moved for summary judgment, relying on the  
28 argument that there is no genuine issue of fact regarding an essential element of Elko’s claim

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1 that the South Canyon Road is a public road. The question this Court will ultimately be  
2 deciding is whether, with regard to the South Canyon Road, an acceptance was made of the  
3 United States' grant of the right of access under R.S. 2477. But that question depends on  
4 another question Intervenor's have now asked the Court to decide: whether during the  
5 relevant time period a "public road" could be established in any way other than by an  
6 affirmative act of a County Commission. This is clearly and purely a question of Nevada law,  
7 as Intervenor's themselves have acknowledged.<sup>1</sup>

8 Self-evidently, no party is better positioned to explicate Nevada law than the State of  
9 Nevada. Deference to the States in construction and application of their own laws is  
10 demonstrated in the law in innumerable ways, among them the abstention doctrines (see e.g.,  
11 *Younger v. Harris*, 401 U.S. 37 (1971); *Buford v. Sun Oil Co.*, 319 U.S. 315 (1943)), the *Erie*  
12 doctrine (based upon *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)), and the *Rooker-*  
13 *Feldman* doctrine (explained in *Vacation Village v. Clark County, Nevada*, 497 F.3d 902, 911  
14 (9th Cir.2007)).

15 Because the key question presented by Intervenor's summary judgment motion is a  
16 legal question about Nevada's law, Nevada should be heard before the issue is decided.

17 **B. Public Lands and Public Roads Are Vitally Important to the State of**  
18 **Nevada.**

19 No one is better positioned than the State of Nevada to discuss and explain Nevada  
20 law and its relevance to this case. Because Nevada affords a unique perspective based upon  
21 its profound interests in federal public lands—and the intersection of federal public lands with  
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24 <sup>1</sup> Intervenor's assert: "Nothing in [the] extensive evidentiary record shows that Elko County  
25 accepted the South Canyon Road as a public highway *under Nevada law*. . . ." Mot. at 5 (emphasis  
added). Elsewhere, they maintain:

26 Elko's theory is that public use of the South Canyon for travel prior to its reservation as a  
27 national forest in 1909 was enough to accept an R.S. 2477 right-of-way there. [Record  
reference omitted.] This theory fails because *Nevada law* prior to 1909 did not provide for  
28 establishing a highway through public use.

Mot. at 9 (emphasis added).

1 state law—it bears permitting the State, through its Attorney General, to bring it forth for  
2 consideration.

3 Not least among the State’s interests here is the broad effect that a decision in this  
4 case on the question presented by Intervenors’ motion may have. Public roads under R.S.  
5 2477 are important to the entire State. Every one of Nevada’s seventeen counties contains  
6 extensive federal public lands. The manner in which the law is interpreted here could affect  
7 not just this case, but other cases involving every kind of use made of public roads, including  
8 mining, ranching, hunting, fishing, and other outdoor recreation uses.

9 Public roads and public lands access have always—since statehood—been important  
10 subjects in Nevada law. See, e.g., *Webster v. Fish*, 5 Nev. 190 (1869) (approving funds for  
11 public roads and bridges); *State v. Vaughan*, 39 P. 733. 734 (Nev. 1895) (citizens’ dispute  
12 over public road); *State v. Board of Comm’rs of Douglas Cnty.*, 77 P. 984 (Nev. 1904)  
13 (acknowledging higher importance of keeping roads open “when essential to the convenience  
14 of the public than [having] them closed for the benefit of individuals”).

15 **C. The State, Through Its Attorney General, is a Proper Amicus.**

16 Nevada’s voice deserves to be heard, and it is best heard through the State’s Attorney  
17 General. The States occupy a unique place in the nation’s jurisprudence, and in recognition  
18 of the unique and important position that they hold—ordinarily speaking through their  
19 attorneys general—they are authorized in the appellate courts to appear as amici without  
20 leave. Fed. R. Civ. P. 29(a), Sup. Ct. R. 37.4; Nev. R. App. P. 29. The Nevada Attorney  
21 General is the chief legal officer of the State, elected statewide to hold a constitutional office.  
22 NEV. CONST. art. 5, §§ 19 and 22; see also NEV. REV. STAT. ch. 228. The Attorney General  
23 has a long tradition of appearing as amicus in order to further the interests of the public in  
24 legal proceedings. See, e.g., *In re Report of Ormsby Cnty. Grand Jury*, 322 P.2d 1099 (Nev.  
25 1958) (attorney general as amicus curiae filed a brief in support of appellants); *McCormick v.*  
26 *Sixth Judicial Dist. Court*, 246 P.2d 805 (Nev. 1952). See also, e.g., *Young Ams. For*  
27 *Freedom v. Gorton*, 588 P.2d 195 (Wash. 1978) (attorney general’s authority is broad enough  
28 to appear as amicus curiae before federal courts in cases which may directly or indirectly

1 impact upon state functions or administrative procedures and operations). The Nevada  
2 Attorney General has been previously approved to appear as amicus in other federal actions  
3 involving public lands. See Order Granting Motion, *Earth Works v. U.S. Dept. of Interior*, Case  
4 No. 09-01972 (D.D.C.) (Aug. 16, 2010); Order Granting Motion, *W. Watersheds Project v.*  
5 *Salazar*, Case No. 08-435 (D. Idaho) (Jan. 25, 2010). See also, e.g., *Cnty. of Lewis v. Allen*,  
6 163 F.3d 509 (9th Cir. 1998) (State of Nevada amicus brief on behalf of several western  
7 states).

8 **D. Nevada’s Amicus Motion is Timely.**

9 Timeliness is a factor for determining whether to grant an amicus motion. *Long*, 49 F.  
10 Supp. 2d 1177 (D. Nev. 1999). Nevada’s motion is timely. Intervenors’ motion for summary  
11 judgment has recently raised an issue before this Court regarding how a Nevada state law  
12 should be interpreted. Nevada is filing its proposed amicus brief on that issue concurrently  
13 with Elko County’s Opposition to Intervenors’ motion, which will allow Intervenors the  
14 opportunity to address Nevada’s arguments in their Reply. Nevada’s motion is presented in  
15 the regular course of briefing on the motion for summary judgment and therefore would not, by  
16 virtue of the timing, prejudice any party.

17 **III. CONCLUSION**

18 More than any other state in the contiguous 48 states, Nevada is a public land state.  
19 And it has an undeniably compelling interest in how the law affecting public lands is  
20 interpreted—especially the State’s own law, which gives definition to the federal law in  
21 question, R.S. 2477. Nevada can provide the Court and the parties with valuable information  
22 and an important perspective that pertains to the legal issues in this case and that also  
23 explains how the State might be affected by the decision and holdings which will result from

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1 the case. It would be improper to make such decisions without taking account of this  
2 information. The Attorney General therefore respectfully requests that the State's Motion to  
3 Appear as Amicus be granted.

4 DATED this 16th day of March, 2015.

5 ADAM PAUL LAXALT  
6 Attorney General

7 By: /s/ Lawrence VanDyke  
8 LAWRENCE VANDYKE  
9 Solicitor General  
10 C. WAYNE HOWLE  
11 Senior Deputy Attorney General

12 *Attorneys for State of Nevada as*  
13 *Proposed Amicus Curiae*

**CERTIFICATE OF SERVICE**

I, Janice M. Riherd, certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 16th day of March, 2015, I electronically filed the foregoing, **MOTION TO APPEAR AS AMICUS**, via electronic filing to which the Clerk of the Court will notify the following via their internet and/or email address:

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/s/ Janice M. Riherd  
JANICE M. RIHERD  
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