APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22-15869

D.C. No. 3:17-cv-00444-RCJ-WGC
District of Nevada, Reno

GREGORY GARMONG,

Plaintiff-Appellant,

v.

TAHOE REGIONAL PLANNING AGENCY; JOHN MARSHALL; BRIDGET CORNELL; JOANNE MARCHETTA; JIM BAETGE; JAMES LAWRENCE; BILL YEATES; SHELLY ALDEAN; MARSHA BERKBIGLER; CASEY BEYER; TIMOTHY CASHMAN; BELINDA FAUSTINOS; AUSTIN SASS; NANCY MCDERMID; BARBARA CEGAVSKE; MARK BRUCE; SUE NOVASEL; LARRY SEVASON; MARIA KIM; COMPLETE WIRELESS CONSULTING, INC.; VERIZON WIRELESS, INC.; CROWN CASTLE,

Defendants-Appellees.

Filed Dec. 7, 2023

Before: RAWLINSON and OWENS, Circuit Judges, and PREGERSON,* District Judge.

The panel unanimously voted to deny the Petition for Rehearing.

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* The Honorable Dean D. Pregerson, United States District Judge for the Central District of California, sitting by designation.

Judges Rawlinson and Owens voted to deny, and Judge Pregerson recommended denying, the Petition for Rehearing En Banc and Appellant's Petition to En Banc Court to Reconcile Panel Decisions and for Clarification of Review Procedures.

The full court has been advised of the Petition for Rehearing En Banc and Appellant's Petition to En Banc Court to Reconcile Panel Decisions and for Clarification of Review Procedures, and no judge of the court has requested a vote.

The Petition for Panel Rehearing; Petition for Rehearing En Banc, filed November 13, 2023, is DENIED. Appellant's Petition to En Banc Court to Reconcile Panel Decisions and for Clarification of Review Procedures, filed November 14, 2023, is DENIED.

No further petitions for rehearing will be accepted in this appeal.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22-15869

D.C. No. 3:17-cv-00444-RCJ-WGC

GREGORY GARMONG,

Plaintiff-Appellant,

v.

TAHOE REGIONAL PLANNING AGENCY; *et al.*,

Defendants-Appellees.

MEMORANDUM[*]

Appeal from the United States District Court
for the District of Nevada
Robert Clive Jones, District Judge, Presiding

Submitted October 6, 2023[**]
Las Vegas, Nevada

Filed Oct. 30, 2023

Before: RAWLINSON and OWENS, Circuit Judges, and PREGERSON,[***] District Judge.

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[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[***] The Honorable Dean D. Pregerson, United States District Judge for the Central District of California, sitting by designation.

Gregory Garmong filed this action to challenge the issuance of a permit by the Tahoe Regional Planning Agency (TRPA) for a cell phone tower. The district court dismissed Garmong's initial complaint and first amended complaint for lack of standing. We reversed and remanded. *See Garmong v. Tahoe Reg'l Plan'g Agency*, 806 F. App'x 568, 571–72 (9th Cir. 2020). On remand, the district court dismissed Garmong's amended complaint with prejudice for failure to state a claim. After we affirmed the dismissal, *see Garmong v. Tahoe Reg'l Plan'g Agency*, 2022 WL 16707187 (9th Cir. Nov. 4, 2022), the district court awarded attorney's fees to Appellees under 42 U.S.C. § 1988(b). Garmong appeals the district court's fee award. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

"We review a district court's award of attorney's fees under 42 U.S.C. § 1988 for an abuse of discretion, while any element of legal analysis which figures in the district court's decision is reviewed *de novo*. . . ." *Buffin v. California*, 23 F.4th 951, 958–59 (9th Cir. 2022) (citations, alteration, and internal quotation marks omitted).

1. The district court did not abuse its discretion in deciding that Garmong's claims were frivolous. *See Tutor-Saliba Corp. v. City of Hailey*, 452 F.3d 1055, 1061 (9th Cir. 2006) (reviewing the frivolousness determination for an abuse of discretion). Contrary to Garmong's assertion, the district court's fee order and dismissal order are consistent. In both orders, the district court indicated that Garmong's claims "lacked [a] reasonable basis in law or fact." Although the dismissal order specified that "[Garmong's] constitutional claims" were frivolous, that statement was made in the context of the unavailability of fees under the Nevada

Anti-SLAPP statutes. Elsewhere, the district court characterized all of Garmong's claims as frivolous.

"An action becomes frivolous when the result appears obvious or the arguments are wholly without merit. . . ." *Galen v. County of Los Angeles*, 477 F.3d 652, 666 (9th Cir. 2007), *as amended* (citations omitted); *see also Garmong*, 2022 WL 16707187, at *1–2 (discussing the lack of merit for Garmong's claims).

Garmong's assertion that the district court did not adequately address the frivolousness of each claim is foreclosed by *Citizens for Free Speech, LLC v. County of Alameda*, 953 F.3d 655, 658–59 (9th Cir. 2020) (explaining that "the district court describ[ing] the plaintiff's action as 'frivolous at the outset' in its fees order" and characterizing the action as without merit in the dismissal order was sufficient). *Id.* As the district court explained, Garmong has a history of asserting frivolous claims. *See In re Becraft*, 885 F.2d 547, 549–50 (9th Cir. 1989) (factoring a party's litigation history into the analysis). Garmong was notified of the defects in his complaint and failed to remedy them. *See Garmong*, 2022 WL 16707187, at *1.

2. The district court did not abuse its discretion in awarding fees for all claims. Any error caused by the district court's application of *Tutor-Saliba* was harmless because our precedent supports the district court's decision. *See Cabrales v. Cnty. of Los Angeles*, 935 F.2d 1050, 1053 (9th Cir. 1991) ("If a plaintiff ultimately wins on a particular claim, she is entitled to all attorney's fees reasonably expended in pursing that claim. . . ."). And because the district court held that all of Garmong's claims were frivolous, Garmong's reliance on *Fox v. Vice*, 563 U.S. 826, 834–35 (2011) (addressing a complaint containing both frivolous and non-frivolous claims), is misplaced.

3. Garmong's contention that the district court admitted "heavily redacted" fees is forfeited. *See AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201, 1213 (9th Cir. 2020) ("[W]e generally will not consider arguments raised for the first time on appeal. . . .") (citation omitted). In any event, the redactions did not prevent the court from ascertaining the nature of the legal work performed. Garmong's arguments raised for the first time in his reply brief are also forfeited because Appellees had no opportunity to respond. *See Autotel v. Nevada Bell Telephone Co.*, 697 F.3d 846, 852 n. 3 (9th Cir. 2012).

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-16653

D.C. No. 3:17-cv-00444-RCJ-WGC

GREGORY GARMONG,

Plaintiff-Appellant,

v.

TAHOE REGIONAL PLANNING AGENCY; *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Nevada
Robert Clive Jones, District Judge, Presiding

Argued and Submitted October 21, 2022
San Francisco, California

Filed Nov. 4, 2022

MEMORANDUM[*]

Before: GILMAN,[**] CALLAHAN, and VANDYKE, Circuit Judges.

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[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The Honorable Ronald Lee Gilman, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

Plaintiff-Appellant Gregory Garmong appeals the district court's dismissal of his Amended Complaint without leave to amend and the denial of his motion for a preliminary injunction. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

"We review de novo a district court's dismissal for failure to state a claim upon which relief can be granted." *Cohen v. ConAgra Brands, Inc.*, 16 F.4th 1283, 1287 (9th Cir. 2021). "We review the denial of leave to amend for an abuse of discretion, but we review the futility of amendment de novo." *Id.* The "denial of a preliminary injunction" is reviewed "for abuse of discretion." *Env't Prot. Info. Ctr. v. Carlson*, 968 F.3d 985, 989 (9th Cir. 2020).

The district court properly dismissed claims 1–11, 13, and 29 against the Tahoe Regional Planning Agency and its officials (the "TRPA Defendants"), which challenged the TRPA's decision to approve a permit. The TRPA Compact provides that the exclusive means of challenging a TRPA permitting decision is a judicial-review claim brought under Article VI(j)(5) of the Compact, alleging "prejudicial abuse of discretion." Despite multiple motions to dismiss from the TRPA Defendants arguing that Garmong failed to bring his noncompliance claims as claims for judicial review and despite Garmong receiving multiple opportunities to amend his complaint, he never cited Article VI(j)(5) as the basis for these claims or specifically alleged that the TRPA "prejudicially abused its discretion" anywhere in his initial or Amended Complaint. Because claims 1–11, 13, and 29 of Garmong's Amended Complaint all challenge a TRPA permitting decision but fail to plead these claims as judicial-review claims under Article VI(j)(5), the district court properly dismissed these claims.

Because Garmong's state law claims (claims 12, 24–27, and 31–34) against the TRPA Defendants are all preempted by the TRPA Compact, they also fail. Although the Compact states that "the scope of judicial inquiry" over challenges to TRPA decisions to approve a project "shall extend *only* to whether there was a prejudicial abuse of discretion," each of Garmong's state-law claims—including his state constitutional claims—would challenge the permit decision through the application of other standards, such as whether the agency committed an "intentional infliction of emotional distress." Because Garmong's state-law claims require the application of standards beyond—and thus incompatible with—the exclusive test set by Congress, the claims conflict with the TRPA Compact and are preempted. *See Hillman v. Maretta*, 569 U.S. 483, 490 (2013).

Garmong's federal constitutional claims against the TRPA Defendants for procedural due process and equal protection violations (claims 14–27) also fail.[1] His procedural due process claims fail because "[p]rocedural due process protections do not extend to those who suffer indirect harm from government action." *Dumas v. Kipp*, 90 F.3d 386, 392 (9th Cir. 1996). And, where a government entity has discretion in permitting decisions, there is no constitutionally protected property interest in the denial of that permit. *Shanks v. Dressel*, 540 F.3d 1082, 1091 (9th Cir. 2008). Garmong alleged an interest in the TRPA not granting the permit, but the permitting decision harmed him only indirectly. And Garmong's "class-of-one" equal protection claims

[1] Garmong raises no objection on appeal to the district court construing his due process claims as claims for *procedural* due process, nor does he object to the district court construing claims 14–23 as raising exclusively federal constitutional claims.

fail because he is not "similarly situated to [a] proposed comparator in all material respects." *SmileDirectClub, LLC v. Tippins*, 31 F.4th 1110, 1123 (9th Cir. 2022).

Garmong's claims against Verizon Wireless, Inc., Complete Wireless Consulting, Inc., Maria Kim, and Crown Castle (the "Private-Party Defendants"), also all fail. His claim that the Private-Party Defendants conspired with the TRPA Defendants to deprive him of his constitutional rights (claim 24) fails. If his claim was based on state constitutions, it fails as preempted. If it was based on the U.S. Constitution, it fails because he didn't plausibly allege that the Private-Party Defendants conspired to deprive him of anything the Constitution guaranteed. His claim that Complete Wireless Consulting's application for a permit—and the resulting issuance of the permit—was void because it did not register to do business in Nevada (claim 30) fails because the statute requiring registration states that a failure to register "does not impair the validity of any . . . act of the corporation." Nev. Rev. Stat. § 80.055(6).

All of Garmong's remaining claims against the Private-Party Defendants (claims 13, 28, 29, 32, and 34) fail because they alleged misconduct occurring in the course of petitioning the TRPA for a permit. Such conduct is immunized by the *Noerr-Pennington* doctrine. *See Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2006). Despite Garmong's arguments, mere misrepresentations don't prevent the application of the doctrine in an adjudicatory process unless they show that the defendants' petition was a "sham." *See Kottle v. Nw. Kidney Centers*, 146 F.3d 1056, 1060 (9th Cir. 1998). Because Garmong specifically disclaimed any argument that the "sham" exception applies, the *Noerr-Pennington* doctrine bars these claims.

Nor does Garmong show that the district court erred in denying him leave to amend his complaint. The district court found that amendment would be futile, and Garmong raises no argument on appeal against the district court's analysis of futility, waiving his argument on this score. *See W. Radio Servs. Co. v. Qwest Corp.*, 678 F.3d 970, 979 (9th Cir. 2012) ("We will not do an appellant's work for it . . . by manufacturing its legal arguments.").

Finally, we affirm the denial of Garmong's motion for a preliminary injunction because his underlying complaint was properly dismissed without leave to amend. *See Sec. & Exch. Comm'n v. Mount Vernon Mem'l Park*, 664 F.2d 1358, 1361 (9th Cir. 1982).

AFFIRMED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-16824

D.C. No. 3:17-cv-00444-RCJ-WGC

GREGORY GARMONG,

Plaintiff-Appellant,

v.

TAHOE REGIONAL PLANNING AGENCY; *et al.*,

Defendants-Appellees,

and

TIM CARLSON; E. CLEMENT SHUTE, JR.,

Defendants.

MEMORANDUM[*]

Appeal from the United States District Court
for the District of Nevada
Robert Clive Jones, District Judge, Presiding

Submitted March 26, 2020[**]
Las Vegas, Nevada

Filed Mar. 30, 2020

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[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: W. FLETCHER, BYBEE, and WATFORD, Circuit Judges.

Plaintiff Gregory Garmong filed this action in district court, challenging a decision by the defendant Tahoe Regional Planning Agency ("TRPA") to issue a permit allowing a cell tower to be built in a mostly undeveloped area under the agency's purview. The district court dismissed Garmong's complaint due to his failure to establish Article III standing to bring his claims, but granted him leave to amend. Garmong filed a first amended complaint, which the district court again dismissed for lack of Article III standing. The district court dismissed with prejudice and ordered the case closed. Garmong urges that this was error, on both substantive and procedural grounds. We have jurisdiction under 28 U.S.C. § 1291, and we reverse.

1. We review de novo a district court's conclusion that a plaintiff lacks Article III standing. *Braunstein v. Ariz. Dep't of Transp.*, 683 F.3d 1177, 1184 (9th Cir. 2012). To satisfy Article III standing, a plaintiff must first show an injury in fact that is (a) concrete and particularized and (b) actual or imminent. *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 868 (9th Cir. 2002) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000)). Plaintiffs alleging a statutory violation must still establish a concrete injury. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

Garmong's first amended complaint was in part based on alleged procedural violations committed by the TRPA. Environmental plaintiffs like Garmong can establish an injury in fact "by showing a connection to the area of concern sufficient to make credible the contention that the person's future life will be less enjoyable . . . if the area in question remains or becomes

environmentally degraded." *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1149 (9th Cir. 2000). Garmong alleged that in the past he has used the area around the cell tower for personal fitness, recreation, and nature-study, and that he plans to continue doing so in the future. He further alleged that the cell tower will "interrupt the view path for one of [his] primary locations to enjoy Lake Tahoe vistas in peaceful contemplation." The TRPA's own documents support the plausibility of this allegation.

Having satisfied the injury requirement, Garmong must also show that his injury is fairly traceable to the challenged conduct of the TRPA and that it is likely his injury will be redressed by a favorable decision of a court. *Bernhardt*, 279 F.3d at 868–69. However, "[w]here, as here, claims rest on a procedural injury, the causation and redressability requirements are relaxed." *Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 817 (9th Cir. 2017) (internal quotation marks omitted). Garmong has cleared these low barriers. He alleges that the TRPA has failed to consider its own regulations, and asks that a court prohibit the permit from being "legally . . . maintained." Accordingly, we hold that Garmong alleged facts sufficient to establish Article III standing.

Our inquiry does not end there. We must also ask whether a statute confers standing on Garmong to bring his claims. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1175 (9th Cir. 2004). The TRPA Compact, by which the agency is governed, allows "[a]ny aggrieved person [to] file an action in an appropriate court of the States of California or Nevada or of the United States alleging noncompliance with the provisions of [the] compact or with an ordinance or regulation of the agency." An "aggrieved person" includes anyone who

appeared in person before the agency at an appropriate administrative hearing to object to the action being challenged. Garmong attended the public hearing on the cell tower proposal and gave public comment, as well as appealed the resultant decision to the TRPA Board of Directors, which unanimously denied the appeal. Accordingly, we hold that Garmong had statutory standing to bring his claim.

2. Garmong's amended complaint alleged thirty-four claims for relief. When the district court dismissed Garmong's amended complaint for lack of Article III standing, it did so without conducting a claim-by-claim analysis. This was error. *See Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) ("Standing is not dispensed in gross." (internal quotation marks omitted)); *Allen v. Wright*, 468 U.S. 737, 752 (1984) ("[T]he standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted."), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). Upon remand, the district court need not repeat its standing analysis for claims that rely on the same underlying injury, but should analyze whether Garmong has standing for each category of claims asserted in his amended complaint. *See Valley Outdoor, Inc. v. City of Riverside*, 446 F.3d 948, 952–53 (9th Cir. 2006) (analyzing categories of claims on a claim-by-claim basis).

3. In a hearing prior to its dismissal of Garmong's complaint for the second and final time, the district court assured Garmong that it would grant him leave to further amend his complaint. However, it entered its dismissal without waiting for an amended complaint. This was an abuse of discretion. *See Lopez v. Smith*,

203 F.3d 1122, 1130 (9th Cir. 2000) (en banc). Federal Rule of Civil Procedure 15(a)(2) provides that courts "should freely give leave when justice so requires." More important, the district court reneged on an explicit assurance without explanation. In similar situations we have previously granted relief. *See, e.g.*, *United States v. Buchanan*, 59 F.3d 914, 918 (9th Cir. 1995) ("Litigants need to be able to trust the oral pronouncements of district court judges."). Accordingly, upon remand, the district court should give Garmong the option of further amending his complaint.

4. Finally, Garmong appeals the district court's denial of his motion for a preliminary injunction. The district court did not conduct a standalone analysis for the preliminary injunction; rather, it relied on its reasoning from an earlier decision denying a temporary restraining order requested by Garmong. Furthermore, the district court denied Garmong's motion for a preliminary injunction in the same sentence that it concluded that he lacked standing, making it difficult to determine the extent to which its standing determination factored into the denial. We therefore vacate the district court's denial and instruct the district court to conduct an appropriate analysis of the request for a preliminary injunction.

REVERSED and REMANDED. Costs are taxed against the defendants. *See* FED. R. APP. P. 39(a)(3).

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

3:17-cv-00444-RCJ

GREGORY O. GARMONG,

Plaintiff,

vs.

TAHOE REGIONAL PLANNING AGENCY, *et al.*,

Defendant.

ORDER

The Court dismissed this case finding that all of Plaintiff's thirty-four claims against all twenty-four defendants lacked reasonable bases in law or fact as they were all foreclosed by clear and binding precedent. Cumulatively, Defendants presently request an award of attorneys' fees totaling $773,897.69. The Court would ordinarily find that it is inappropriate to award attorneys' fees to a successful defendant in a civil rights case. However, given the nature of this case and Plaintiff's habit of raising frivolous claims, the Court awards Defendants' requested fee.

FACTUAL BACKGROUND

Plaintiff brought this case in 2017 with a thirty-two-page complaint that raised twenty-eight claims for relief. (ECF No. 1.) All Defendants moved to dismiss the Complaint, arguing that Plaintiff lacked standing; the Tahoe Regional Planning Agency (TRPA) Defendants are immune from suit; there is no personal jurisdiction

over the TRPA Defendants who reside in California; the Compact preempts all state law claims; Plaintiff failed to raise his claims of bias and fraud before the agency; dismissal is required under the Noerr-Pennington Doctrine and Nevada's Anti-SLAPP statute; and Plaintiff failed to state a claim upon which relief could be granted. (ECF Nos. 17, 33, 34.) The Court dismissed Plaintiff's initial complaint for lack of standing, declined to reach the arguments regarding the merits of Plaintiff's complaint, and granted leave to amend. (ECF No. 83.)

Plaintiff thereafter filed a 55-page First Amended Complaint ("FAC") that asserted thirty-four claims for relief and sought damages, attorney's fees, and other relief. (ECF No. 84). Plaintiff pressed the same claims in spite of the arguments that Defendants raised in their first motion to dismiss. In addition, Plaintiff raised six more claims based upon the same facts, which suffered from the same defects that Defendants argued in their initial set of motions to dismiss. Defendants again moved for dismissal on the same grounds. (ECF Nos. 101, 103, 104.) The Court again granted these motions for lack of standing, declining to reach the merits of Plaintiff's claims. (ECF No. 110.)

Plaintiff appealed. The Ninth Circuit reversed holding that Plaintiff could have Article III standing due to the alleged impact of the cell tower on his future use and enjoyment of the surrounding area. (ECF No. 122.) The Ninth Circuit did not address whether Plaintiff had standing to pursue any claim in particular but remanded for this Court to address each claim under this standard. (*Id.*)

On remand, the Court gave Plaintiff an opportunity to file another complaint. (ECF No. 132.) Plaintiff declined. (ECF No. 133.) The Court further gave the parties an opportunity to file briefs on the issue of

standing as well as gave Defendants leave to refile their motions for dismissal. (ECF No. 135.)

Defendants again filed motions to dismiss, raising the same arguments as before: the TRPA Defendants are immune from suit; there is no personal jurisdiction over the TRPA Defendants who reside in California; the Compact preempts all state law claims; Plaintiff failed to raise his claims of bias, fraud and equal protection before the agency; dismissal is required under the Noerr-Pennington Doctrine and Nevada's Anti-SLAPP statute; and Plaintiff failed to state a claim upon which relief could be granted. (ECF Nos. 137, 141, 147.) In these motions, Defendants requested attorney fees under 42 U.S.C. § 1988(b).[1]

The Court agreed with Defendants' arguments on the merits and dismissed the case with prejudice. (ECF No. 159.) The Court further held that Plaintiff's claims lacked reasonable bases in law and fact and directed Defendants to file a motion for attorney fees.

Presently, Defendants move for attorney fees for all of the fees and costs they incurred in litigating this case. They raise three bases for attorney fees: 42 U.S.C. § 1988(b); Nev. Rev. Stat. § 18.010; and TRPA's Rules of Procedure 10.6.2.

In addition to this case, Plaintiff has a history of bringing baseless claims. For example, Plaintiff brought suit against the Nevada Supreme Court and its justices for ruling against him in another case, which was

[1] Only the Private-Party Defendants requested attorney fees in their motions. Plaintiff claims that the TRPA Defendants cannot therefore move for attorney fees now but cites to no authority for this assertion. The TRPA Defendants could have still moved for attorney fees separately under Fed. R. Civ. P. 54(d). The Court thus denies this argument from Plaintiff.

dismissed by this District Court and affirmed by the Ninth Circuit. *Garmong v. Nevada Supreme Ct.*, 713 F. App'x 656 (9th Cir. 2018). For this reason, courts—including this one—have previously held that Plaintiff has raised frivolous claims wasting litigants' resources as well as judicial resources and awarded attorney fees on at least two occasions. *Garmong v. Lyon Cty.*, No. 3:17-CV-00701-RCJ-CBC, 2019 WL 320567, at *1 (D. Nev. Jan. 24, 2019), *aff'd sub nom. Garmong v. Cty. of Lyon*, 807 F. App'x 636 (9th Cir. 2020); *Garmong v. Rogney & Sons Const.*, 130 Nev. 1180 (2014).

LEGAL STANDARD

Courts in this country follow the American rule regarding attorney fees: that is, each party is generally responsible to pay for its own representation. *Key Tronic Corp. v. United States*, 511 U.S. 809, 814–15 (1994). This general rule may, however, be altered by contract or the legislature. *Id.* Relevant to the case at hand are three rules that do so alter this custom: 42 U.S.C. § 1988(b); Nev. Rev. Stat. § 18.010; and TRPA's Rules of Procedure 10.6.2.

Section 1988(b) allows for parties to recover reasonable attorney fees upon prevailing in a 42 U.S.C. § 1983 case. Courts should nonetheless be reluctant to award attorney fees to a prevailing § 1983 defendant because "Congress and the courts have long recognized that creating broad compliance with our civil rights laws, a policy of the 'highest priority' requires that private individuals bring their civil rights grievances to court." *Harris v. Maricopa Cty. Superior Ct.*, 631 F.3d 963, 971 (9th Cir. 2011) (quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)). To prevent discouraging potential plaintiffs from pursuing their civil rights claims, a court should therefore only award attorney fees to a prevailing defendant in such cases

in "'exceptional circumstances' where the court finds that the plaintiff's claims are 'frivolous, unreasonable, or groundless.'" *Braunstein v. Arizona Dep't of Transp.*, 683 F.3d 1177, 1187 (9th Cir. 2012) (quoting *Harris v. Maricopa Cnty. Superior Court,* 631 F.3d 963, 971 (9th Cir. 2011)).

For claims brought under Nevada law, Nevada authorizes an award of attorney fees to prevailing parties under similar circumstances. Section 18.010 states, in pertinent part:

> [T]he court may make an allowance of attorney's fees to a prevailing party . . . , when the court finds that the claim . . . of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party. The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations.

Lastly, the TRPA rules of procedure provide that certain costs shall be paid by a plaintiff in a legal action requiring such fees. Section 10.6.2 provides:

> Any Agency cost related to preparation of the administrative record, including but not limited to the use of resources or staff time to gather documents, organize and create and index to the administrative record, conduct a privilege review of the administrative record, shall be borne by the plaintiff(s) in the legal action.

In awarding attorney fees, a court needs to assess the fees' reasonableness. To make this determination, a court calculates the "lodestar" amount by multiplying "the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A

reasonable hourly rate is determined by the "prevailing market rates in the relevant community" for a practitioner with similar "experience, skill, and reputation." *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1205 (9th Cir. 2013). "The lodestar amount is presumptively the reasonable fee amount." *Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1045 (9th Cir. 2000). A court may nonetheless adjust the lodestar fee, either up or down, upon the consideration of the following factors:

> (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the 'undesirability' of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975) (abrogated on other grounds).

ANALYSIS

I. Attorney Fees Shall Be Awarded

Defendants' requested recovery of the costs and fees they incurred in litigating this case is authorized by 42 U.S.C. § 1988(b) and Nev. Rev. Stat. § 18.010.[2] First, as

[2] As the Court finds that the Defendants' requested attorney fees are authorized by these statutes, it declines to reach whether fees are proper under TRPA's Rules of Procedure 10.6.2. Defendants

the Court found in its order granting dismissal, all of Plaintiff's claims were "frivolous, unreasonable, or without foundation." (ECF No. 159 at 16.) Plaintiff challenges this conclusion of the Court, claiming his suit "raises important new issues." (ECF No. 179 at 12.) To avoid duplicating the entirety of this Court's granting dismissal, the Court will briefly explain why Plaintiff is incorrect.

Plaintiff raised fourteen constitutional claims under the theories of procedural due process and equal protection. All of these claims were barred by clear precedent on numerous occasions. In order to allege a violation of a one's procedural due process rights, a plaintiff must assert sufficient facts showing "(1) a deprivation of a constitutionally protected liberty or property interest, and (2) a denial of adequate procedural protections." *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 977 (9th Cir. 1998).

Plaintiff claimed to have a property interest in the permit not being issued but this is untrue. "A property interest arises only where there is a legitimate claim of entitlement, not merely an abstract need or desire for the particular benefit." *Roybal v. Toppenish Sch. Dist.*, 871 F.3d 927, 931 (9th Cir. 2017) (citing *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)). A constitutional property interest cannot be based upon an "an indirect impact." *Dumas v. Kipp*, 90 F.3d 386, 392 (9th Cir. 1996). As such, a government entity has "no independent constitutional duty to safeguard . . . neighbors from the negative consequences—economic, aesthetic or otherwise—of . . . [a] construction project" it permitted. *Shanks v. Dressel*, 540 F.3d 1082,

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admit this relief is an "alternative request . . . [,] not additive." (ECF No. 168 n.1.)

1088 (9th Cir. 2008). Accordingly, in *Shanks*—as here—where a government reviewing body has discretion to approve or deny a permit application, a party "is not constitutionally entitled to insist on compliance with the procedure itself." *Id.* at 1092. Based upon this clear precedent, Plaintiff has not and cannot successfully assert a property interest in the approval or denial of the Permit.

He further claimed to have a liberty interest in the denial of the Permit, a contention that was likewise defective. "Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement." *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983). An "expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause." *Id.* at 250–51 n. 12. "A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty.'" *Wilkinson*, 545 U.S. at 221. A state may also "create[] a protected liberty interest by placing substantive limitations on official discretion." *Olim*, 461 U.S. at 249. As such, the entirety of Plaintiff's procedural due process claims were nonstarters because Plaintiff could not show a protected interest.

As to the equal protection claims, Plaintiff raised a class-of-one theory. Such a claim arises where the plaintiff was (1) "intentionally treated differently from others similarly situated" and (2) "there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Under the rational basis test, the plaintiff bears the high burden of having to prove the classification is not rationally related to any legitimate government interest. *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). "[A] clas-

sification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity." *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993). Plaintiff could not possibly satisfy either element.

Plaintiff contended that he was similarly situated with the Private-Party Defendants, (*see, e.g.*, ECF No. 84 ¶ 264) but this is incorrect. Plaintiff admits these Defendants were the applicants for the Permit, while he was the opponent of the Permit. They therefore held the opposite interests in the application process.

Additionally, Plaintiff's underlying grievance for this claim is the following: "TRPA failed to give . . . notice until after the Project Review Process was substantially completed, . . . resulting in an unfair advantage to the Private-Party Defendants." (ECF No. 84 ¶ 225.) He admits, however, he received notice of the hearing before the issuance of the permit, participated in the final hearing, appealed the grant of the Permit, filed a statement on appeal and appeared before the Legal Committee and the Governing Board to advocate for his position. (*Id.* ¶¶ 28, 49, 51–52.) Despite the obvious rationality of having an initial review by TRPA before holding a public hearing to receive objections, Plaintiff nonetheless posited there was no rational basis for giving notice to the public after an initial review by TRPA.

As for Plaintiff's Nevada state-law claims against the Private-Party Defendants, they too are without any merit and were therefore "brought and maintained without reasonable ground." In these claims, except Claim 30, Plaintiff complained that these Defendants petitioned the government—the TRPA—to build a cell phone tower. These claims were clearly barred by the *Noerr-Pennington* Doctrine as explained

in this Court's order granting dismissal. Plaintiff made two contentions this doctrine did not apply, which were repeatedly foreclosed by binding precedent: (1) The doctrine does not apply to false claims. *But see, e.g.*, *Kottle v. Nw. Kidney Centers*, 146 F.3d 1056, 1060 (9th Cir. 1998) (affirming the grant of a motion to dismiss premised upon the *Noerr-Pennington* doctrine despite allegations of false statements). (2) The doctrine only applies to antitrust petitions. *But see, e.g.*, *Leadbetter v. Comcast Cable Commc'ns, Inc.*, No. C05-0892RSM, 2005 WL 2030799, at *4 (W.D. Wash. Aug. 22, 2005) (noting that the Supreme Court and other courts have applied the *Noerr-Pennington* Doctrine outside of the antitrust context since at least the early nineteen-eighties).

As for Claim 30, Plaintiff attempted to sue Defendant CWC alleging that it failed to register to do business in Nevada. Assuming that this is true, the claim is clearly not cognizable under the statute. The statute requiring registry of business in Nevada does not provide for a private cause of action—only fines. Nev. Rev. Stat. § 80.055.

As for the remainder of the claims, that the TRPA Defendants failed to comply with the Compact in the issuance of the permit and they violated state laws, these claims were also frivolous. As the Court explained, the Compact restricts claims against it and its agents for "challenges [of] an adjudicatory act or decision of the agency to approve or disapprove a project, the scope of judicial inquiry shall extend *only* to whether there was prejudicial abuse of discretion." (ECF No. 19 Ex. 1 at Art. VI(j)(5) (emphasis added).) The Court correctly held that this provision preempted the state

laws and effectively eliminated the various claims that these Defendants failed to comply with the Compact.[3]

For these reasons, all of Plaintiff's claims in this case were frivolous and without reasonable grounds. Plaintiff has therefore wasted numerous hours of time for the litigants in this case as well as this Court's finite resources. This finding provides that attorney fees are proper here, overcoming the policy of not wanting to discourage potential plaintiffs from asserting their civil rights. It is especially true here because Plaintiff has a record of repeatedly bringing frivolous cases and even having attorney fees awarded against him on more than one occasion.

II. Reasonable Figure

Finding that the Court has authority to issue attorney fees against Plaintiff, the Court turns to the reasonableness of the requested figure. As instructed by the Ninth Circuit, the Court starts with the lodestar figure. Defendants have calculated this figure to be $206,618.80 for the TRPA Defendants, $224,330.89 for Defendants Crown Castle and Verizon, and $342,948.00 for Defendants Complete Wireless and Maria Kim. Plaintiff neither objects to the hourly rates charged

[3] Defendants do not point to a statute authorizing recovery of fees of costs for alleged violations of the Compact. However, the TRPA Defendants' litigation of these claims overlapped with the state law claims—that the same provisions of the Compact limited suit of their issuance of the permit to judicial review in accordance with Art. VI(j)(5) of the Compact. As such, reduction of attorney fees on this basis would be improper. *See Tutor-Saliba Corp. v. City of Hailey*, 542 F.3d 1055, 1064 (9th Cir. 2006) (holding that attorney fees should not be segregated even if fees should only be awarded for litigation of some but not all claims if all of the claims were argued together).

nor the hours worked in this case. The Court also fails to find fault in Defendants' calculation of this figure.

Turning to the *Kerr* factors, the Court finds that, on the whole, the factors favor finding the lodestar figure to be reasonable and does not require adjustment.

A. The time and labor required

The Defendants (as well as this Court) spent vast amounts of time weeding through the quagmire that was Plaintiff's original and amended complaints. Plaintiff brought suit against a great multitude of parties with dozens of claims. This necessitated much time and labor favoring a finding of that the hours expended, as reflected in the lodestar, were reasonable.

B. The novelty and difficulty of the questions involved

The claims were clearing faulty from the outset as Plaintiff should have known. This factor favors a finding that the lodestar does not need to be adjusted to remain reasonable.

C. The skill requisite to perform the legal service properly

As this case was not novel and difficult, there was no special skill required in arguing this case, favoring a finding of that an upward adjustment of the lodestar is not appropriate in this matter.

D. The preclusion of other employment by the attorney due to acceptance of the case

Some counsel attests that this case precluded them from working on matters for which they charge a higher rate. (ECF No. 168 Ex. 1 ¶19 (I 0006); Ex. 2 ¶23 (II 0358).) This factor therefore favors a finding that the lodestar represents a reasonable award of fees.

E. The customary fee

The highest rate charged by an attorney in this case was $570, but he discounted roughly ten percent of his hours worked at no charge, has 25 years of experience, and is based in San Francisco. This rate as well as the others is customary, favoring a finding of reasonableness of the lodestar.

F. Whether the fee is fixed or contingent

The fees were fixed. As such, the lodestar does not need to be adjusted upward, as counsel did not undertake any financial risk in agreeing to defend this matter.

G. Time limitations imposed by the client or the circumstances

There were no client-imposed time limitations, but Plaintiff did move for emergency injunctive relief, necessitating strict deadlines imposed by this Court for part of the case. This factor overall favors a finding of that the lodestar reflects a reasonable award of fees.

H. The amount involved and the results obtained

Defendants did successfully litigate this case, obtaining a highly desirable result for their clients—dismissal of all claims. This factor favors a finding of reasonableness of the lodestar.

I. The experience, reputation, and ability of the attorneys

The Court finds that the attorneys defending this case are experienced, have good reputations, and exhibited proficiency as lawyers. (ECF No. 168 Ex. 1 ¶¶ 3–4 (I 0002); Ex. 2 ¶¶ 3–5 (II 0354); Ex. 3 ¶¶ 27–28 (III 0506); Ex. 4 ¶¶ 4–5 (III 0584).) The Court therefore

finds this factor favors a finding of reasonableness of the lodestar.

J. The 'undesirability' of the case

The Court does not find this case to be undesirable. This factor favors neither a finding that the lodestar should be adjusted upward or downward.

K. The nature and length of the professional relationship with the client

Some of the firms have represented their clients for lengthy periods of time. Snell & Wilmer has been representing Verizon Wireless for approximately twelve years. (ECF No. 168 Ex. 3 ¶ 30 (III 0507).) Newmeyer & Dillion has represented Crown Castle and its affiliated entities in at least sixty separate matters over the past ten years. (ECF No. 168 Ex. 2 ¶ 6 (III 0354).) This factor therefore favors a finding of that the lodestar is, itself, reasonable and need not be adjusted.

L. Awards in similar cases

The Court is not aware of any case that is like this one, so it finds this factor has no weight in determining whether the lodestar in this matter is reasonable.

As the Court finds that an attorney fee award is proper in this case and lodestar represents a reasonable award of attorneys' fees for the litigation of this case, it will award this figure. *Quesada v. Thomason*, 850 F.2d 537, 539 (9th Cir. 1988) (holding fees should only be changed upon limited success or the hours spent were unreasonable).

CONCLUSION

IT IS HEREBY ORDERED that Defendants' Motion for Attorney Fees (ECF No. 168) is GRANTED.

IT IS FURTHER ORDERED that Plaintiff shall pay Defendants John Marshall, Bridget Cornell, Joanne Marchetta, Jim Baetge, James Lawrence, Bill Yeates, Shelly Aldean, Marsha Berkbigler, Casey Beyer, Timothy Cashman, Belinda Faustinos, Austin Sass, Nancy McDermid, Barbara Cegavske, Mark Bruce, Sue Novasel, and Larry Sevison a total $206,618.80 in attorney fees and costs.

IT IS FURTHER ORDERED that Plaintiff shall pay Defendants Crown Castle and Verizon Wireless, Inc. a total $224,330.89 in attorney fees and costs.

IT IS FURTHER ORDERED that Plaintiff shall pay Defendants Complete Wireless Consulting, Inc. and Maria Kim a total $342,948.00 in attorney fees and costs.

IT IS SO ORDERED.

Dated May 19, 2022.

/s/ Robert C. Jones
ROBERT C. JONES
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case No. 3:17-cv-00444-RCJ-WGC

GREGORY GARMONG,

Plaintiff,

vs.

TAHOE REGIONAL PLANNING AGENCY, *et al.*,

Defendants.

ORDER

Plaintiff brings this case complaining that the Tahoe Regional Planning Agency ("TRPA"), and its agents, granted a permit to build a cell phone tower ("the Permit") near Lake Tahoe in violation of the Tahoe Regional Planning Compact ("the Compact"), the United States Constitution, and state constitutions. The parties move for dismissal for failure to state a claim (among other things), (ECF Nos. 137, 141, 147), the Court agrees and finds that Plaintiff's claims lacked reasonable basis in law or fact. The Court accordingly dismisses this case with prejudice and awards fees in favor of Defendants.

FACTUAL BACKGROUND

The operative complaint, (ECF No. 84), alleges as follows: Plaintiff Gregory Garmong resides in Douglas County, Nevada near Lake Tahoe and has a second home in Smith, Nevada. Plaintiff has sued Defendants

TRPA, Verizon Wireless, Inc. ("Verizon"), Complete Wireless Consulting, Inc. ("CWC"), Crown Castle, and eighteen individuals, listing thirty-four causes of action. His claims arise out of TRPA's grant of a permit ("the Permit") to CWC to construct a cell tower within TRPA's jurisdiction at 811 U.S. Highway 50 ("U.S. 50") in Douglas County ("the Project"). The site of the Project is directly across U.S. 50 from the Skyland neighborhood where Plaintiff lives, which is about a mile south of the Cave Rock Tunnel on US 50 and a mile north of Zephyr Cove on the east shore of Lake Tahoe. The Project is located on TRPA Plan Area Genoa Peak (060).

Plaintiff alleges TRPA mailed a notice of the February 23, 2017 hearing on the Project to property owners like him on February 9 ("the Notice"), which indicated a February 23 hearing on the Project, and that he received the Notice on February 14. The Notice indicated that Bridget Cornell was the point of contact for the Project, and that the application for the Project ("the Application") could be viewed from 9:00 a.m. to 12:00 p.m. and 1:00 p.m. to 4:00 p.m. on Mondays, Wednesdays, Thursdays, and Fridays. The Notice also indicated that a "staff summary" for the Project could be viewed at www.trpa.org and at the TRPA office as of February 16. Written comments had to be received by February 22 or they would not be considered at the February 23 hearing. When Plaintiff checked the website on 5:20 p.m. on February 16, he was unable to locate any staff summary, although it became available at some time after that for a total of less than seven days prior to the hearing.

Plaintiff does not allege that the Application was not viewable at the TRPA office on Wednesday the 15th, Thursday the 16th, Friday the 17th, Monday the 20th,

and Wednesday the 22nd. He alleges only that the weather was "very bad" on February 15–17 due to significant snowfall that made it hazardous to drive. TRPA was closed on February 20th for President's Day, however Plaintiff does not allege any such difficulties on Wednesday the 22nd. The Court previously took judicial notice that there was no recorded precipitation at the South Lake Tahoe Airport (approximately twelve miles by road from Skyland) on February 14th or 15th, 0.24 inches of snow on the 16th, and 0.08 inches of snow on the 17th, and that there was no recorded precipitation at the Heavenly Mountain Resort (a ski resort about a mile from TRPA's Stateline, Nevada office) February 14th through 16th, and three inches of snow on the 17th. Plaintiff alleges that the drive to TRPA's office would take "1–1/2 hours in good weather." The Court also previously took judicial notice that the normal driving time for the 5.3 miles between Skyland and TRPA's office at 128 Market Street, Stateline, Nevada is approximately ten minutes. Plaintiff has clarified in the FAC that he was staying at his home in Smith at the time, not his second home in Skyland, and that the snowfall occurred between Smith and Skyland.

In the Application, Plaintiff avers Private-Party Defendants made numerous material misrepresentations and misleading omissions to the TRPA. He alleges for example:

> The Staff Summary included numerous false representations, including but limited [sic] to (1) the representation that TRPA staff completed a "Project Review Conformance Checklist and Article V(g) Findings" (Staff Summary pg. 2/35); (2) the representation that TRPA Staff had completed an Initial Environmental Checklist (Staff Summary

> pg. 2/35); (3) land coverage was evaluated according to Code "Chapter 20" (Staff Summary pg. 6/35), when in fact land coverage is addressed in Code Chapter 30); (4) Staff Summary page 5/35 misrepresents that the "TRPA Initial Environmental Checklist" and "Project Review Conformance Checklist and Article V(g) Findings," were prepared in accordance with Chapter 6, Subsection 6.3.13 of the TRPA Code of Ordinances (there is no Subsection 6.3.13); (5) Staff Summary pg. 7/35, misrepresents that the "height findings" are based upon "Chapter 22–Additional Height Findings" (Chapter 22 does not deal at all with height, but instead deals with "Temporary uses, structures, and activities". Instead, height findings are set forth in Code Chapter 37) and (6) Staff Summary at pg. 19/35 misrepresents that the proposed "Wireless Monopine Project" is a permitted use in PAS 060.

(ECF No. 84 ¶ 188.)

Plaintiff also contends Private-Party Defendants were given an unfair advantage in the Permit application proceedings. He claims he was not given notice of the application until about a week before the final hearing was held where the Permit was granted. (*Id.* ¶ 28.) Nonetheless, Plaintiff still submitted a written objection to the Permit, appeared at the hearing and argued against its issuance in person, and appealed the decision to the Legal Committee and the Governing Board. (*Id.* ¶¶ 49–52.)

In spite of Plaintiff's objections, the TRPA issued the Permit on February 23, 2017. (*Id.* ¶ 51.) Plaintiff then brought this case before this Court, in July 2017. On August 28, 2017, this Court dismissed this case for lack of standing. (ECF No. 110.) The Ninth Circuit

reversed, (ECF No. 122), and now the Court will consider the merits of Plaintiff's claims.

LEGAL STANDARD

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action that fails to state a claim upon which relief can be granted. When considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the complaint is sufficient to state a claim, the court will take all material allegations as true and construe them in the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). The court, however, is not required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

A formulaic recitation of a cause of action with conclusory allegations is not sufficient; a plaintiff must plead facts pertaining to his own case making a violation "plausible," not just "possible." *Ashcroft v. Iqbal*, 556 U.S. 662, 677–79 (2009) (citing *Twombly*, 550 U.S. at 556) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."). That

is, a plaintiff must not only specify or imply a cognizable legal theory, but also must allege the facts of the plaintiff's case so that the court can determine whether the plaintiff has any basis for relief under the legal theory the plaintiff has specified or implied, assuming the facts are as the plaintiff alleges (*Twombly-Iqbal* review).

If the court grants a motion to dismiss a complaint, it must then decide whether to grant leave to amend. The court should "freely give" leave to amend when there is no "undue delay, bad faith or dilatory motive on the part of the movant . . . undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment." Fed. R. Civ. P. 15(a)(2); *Foman v. Davis*, 371 U.S. 178, 182 (1962). Generally, leave to amend is denied only when it is clear that the deficiencies of the complaint cannot be cured by amendment. *See DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

ANALYSIS

I. TRPA Defendants' Motion to Dismiss (ECF No. 137)

A. Alleged Violations of State Law

Plaintiff contends the TRPA Defendants violated a number of state laws in the following claims:

- Claim 12 titled "Fraudulent Misrepresentation and Concealment by TRPA"
- Claim 24 titled "Conspiracy and Joint Action of TRPA and the Private-Party Defendants to Deny

Plaintiff's Due Process and Equal Protection Rights"[1]

- Claim 25 titled "General Constitutional Challenge to TRPA Failure and refusal to Follow Its Own Codes"
- Claim 26 titled "General Constitutional Challenge to TRPA Notice Procedures"
- Claim 27 titled "General Constitutional Challenge to TRPA's Failure to Provide Reasons and Explanations"
- Claim 31 titled "Petition for Judicial Review Pursuant to Nevada Administrative Procedures Act, NRS Chapter 233B"
- Claim 32 titled "Intentional Infliction of Emotional Distress"
- Claim 33 titled "Unjust Enrichment"
- Claim 34 titled "Doubling of Damages Pursuant to NRS 41.1395"

(ECF No. 84.) Inasmuch as these claims rely upon state law and relate to the issuance of the Permit by the TRPA Defendants, these Defendants argue the claims are preempted. This Court agrees.

While the Compact is an agreement between Nevada and California, it functions as federal law because it has the blessing of Congress. *Jacobson v. TRPA*, 566 F.2d 1353, 1358 (9th Cir. 1977) (reversed on other grounds). "Unless [a compact between states] is unconstitutional, no court may order relief inconsistent with

[1] Claims 24, 25, 26, and 27 are premised upon alleged violations of the Constitution of the United States as well as the Nevadan and Californian constitutions.

its express terms." *New York v. New Jersey*, 523 U.S. 767, 768 (1998). As federal law, the Compact preempts state law if they are in conflict. *See O'Hara v. Teamsters Union Local # 856*, 151 F.3d 1152, 1160–61 (9th Cir.1998) (citing *Brown v. Hotel & Rest. Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 500–01 (1984)). A conflict exists when it is impossible to comply with both state and federal law, or where the state law is an "obstacle" to the full purposes and objectives of Congress. *Id.*

The version of the Compact in effect at the time regulates which legal actions may be filed against the TRPA. Subdivision (j) in Article VI of the Compact states, in part, "Legal actions arising out of or alleging a violation of the provisions of this compact, of the regional plan or of an ordinance or regulation of the agency or of a permit or a condition of a permit issued by the agency are governed by the following . . . ." (ECF No. 19 Ex. 1 at Art. VI(j).) The subdivision proceeds to list a number of restrictions to legal actions and contains the following provision:

> In any legal action filed pursuant to this subdivision which challenges an adjudicatory act or decision of the agency to approve or disapprove a project, the scope of judicial inquiry shall extend only to whether there was prejudicial abuse of discretion. Prejudicial abuse of discretion is established if the agency has not proceeded in a manner required by law or if the act or decision of the agency was not supported by substantial evidence in light of the whole record. In making such a determination the court shall not exercise its independent judgment on evidence but shall only determine whether the act or decision was

> supported by substantial evidence in light of the whole record.

(*Id.* at Art. VI(j)(5).) The subdivision specifies it applies to the following actions: "Actions arising out of activities directly undertaken by the agency," "Actions arising out of the issuance to a person of a lease, permit, license or other entitlement for use by the agency," and "Actions arising out of any other act or failure to act by any person or public agency." (*Id.* at Art. VI(j)(1).)

Under the Compact, claims against the TRPA Defendants for failing to comply with various state laws in issuing a permit are simply not cognizable. Art. VI(j) restricts lawsuits "by any person or public agency" related to "a permit . . . issued by the [TRPA]" only to "judicial inquiry [to the extent] whether there was prejudicial abuse of discretion." As Plaintiff is suing the TRPA Defendants claiming that their issuance of the Permit violated a number of state laws, the claims are preempted—they are foreclosed by the Compact. The Court consequently dismisses them with prejudice.

B. Alleged Violations of the Compact

Plaintiff alleges the TRPA Defendants failed to comply with the Compact in their issuance of the permit in the following claims:

- Claim 1 titled "The Proposed 'Wireless Monopole Project' Is Not a Permitted Special Use in Plan Area Statement 060"
- Claim 2 titled "TRPA Did Not Evaluate Noise as Required by the Code"
- Claim 3 titled "TRPA Did Not Make Required Findings for Noise"

- Claim 4 titled "TRPA Did Not Evaluate Safety and General Welfare"
- Claim 5 titled "Required Special Use Findings for Safety and General Welfare are not made"
- Claim 6 titled "TRPA Staff Did Not Properly Evaluate Land Coverage Limits as Required by the Code"
- Claim 7 titled "TRPA Did Not Evaluate Alternatives for Land Coverage Limits"
- Claim 8 titled "Permissible Cell Tower Height Limits Are Exceeded"
- Claim 9 titled "TRPA Did Not Evaluate Whether the Proposed Cell Tower Was the Minimum Height Necessary, and Did Not Evaluate Alternatives Having Less Height"
- Claim 10 titled "Failure to Prepare Environmental Impact Statement"
- Claim 11 titled "The Hearing Officer Did Not Make the Required Motions and Findings"
- Claim 13 titled "Violations by Defendants of Provisions of TRPA Compact, Ordinance or Regulations of the Agency"
- Claim 29 titled "Construction of Project in Violation of the TRPA Compact, Code, and PAS 060"

The TRPA Defendants contend these claims are likewise incognizable as Article VI(j)(5) limits claims against them to judicial review. This is correct. Plaintiff points to Article VI(l) as a basis for these causes of action, which reads:

> Any person who violates any provision of this compact or of any ordinance or regulation of the agency or any condition of approval imposed by the agency is subject to a civil penalty not to exceed $5,000. Any such person is subject to an additional civil penalty not to exceed $5,000 per day, for each day on which such a violation persists. In imposing the penalties authorized by this subdivision, the court shall consider the nature of the violation and shall impose a greater penalty if it was willful or resulted from gross negligence than if it resulted from inadvertence or simple negligence.

This provision authorizes the TRPA to issue fines against violators of the Compact—not people against the TRPA. *See, e.g.*, *Tahoe Reg'l Plan. Agency v. Terrace Land Co.*, 772 F. Supp. 506, 512 (D. Nev. 1991) (assessing fines pursuant to this subdivision in favor of the TRPA). Disallowing suits for money damages against a government agency is the usual course of procedure. *See, e.g.*, *Calif. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1095 (9th Cir. 2011) ("When a court determines that an agency's action failed to follow Congress's clear mandate the appropriate remedy is to vacate that action."). The Court accordingly also dismisses these claims with prejudice.

C. Alleged Violations of the United States Constitution

The only remaining claims against the TRPA Defendants are the federal constitutional claims:

- Claim 14 titled "Denial of Constitutional Protections by Actual Absence of Impartiality"

- Claim 15 titled "Denial of Constitutional Protections by High Probability of Actual Impartiality"
- Claim 16 titled "Denial of Constitutional Protection by Failure to Disclose Lack of Impartiality in Ongoing Relation to Verizon and Other Cellular Companies"
- Claim 17 titled "Denial of Constitutional Protection of Right to Fair Notice and Opportunity to Be Heard During Project Review Process"
- Claim 18 titled "Denial of Constitutional Protections by TRPA's Arbitrary Action and Failure to Give Reasons and Explanation for Action During, and Resulting from, the Project Review Process"
- Claim 19 titled "Denial of Constitutional Protection of Right to Fair Notice and Opportunity to Be Heard Before Hearing Officer"
- Claim 20 titled "Denial of Constitutional Protection of Right to Reasons and Explanation for Action by Hearing Officer"
- Claim 21 titled "Denial of Constitutional Protection of Reasons and Explanation for Action at Board Level"
- Claim 22 titled "Denial of Equal Protection"
- Claim 23 titled "Denial of Constitutional Protection by TRPA's Combining of Investigative and Decision-making Functions"
- Claim 24 titled "Conspiracy and Joint Action of TRPA and the Private-Party Defendants to Deny Plaintiff's Due Process and Equal Protection Rights"

- Claim 25 titled "General Constitutional Challenge to TRPA Failure and Refusal to Follow Its Own Codes"
- Claim 26 titled "General Constitutional Challenge to TRPA Notice Procedures"
- Claim 27 titled "General Constitutional Challenge to TRPA's Failure to Provide Reasons And Explanations"

Overall, these claims amount to only procedural due process and equal protection causes of action. The TRPA Defendants argue Plaintiff has failed to state either claim. The Court agrees.

i. Procedural Due Process

In order to allege a violation of a one's procedural due process rights, a plaintiff must assert sufficient facts showing "(1) a deprivation of a constitutionally protected liberty or property interest, and (2) a denial of adequate procedural protections." *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 977 (9th Cir. 1998). Here, Plaintiff has not pleaded facts showing a deprivation of a constitutionally protected interest.

Plaintiff merely claims he had a property interest in the permit not being issued but this is untrue. "A property interest arises only where there is a legitimate claim of entitlement, not merely an abstract need or desire for the particular benefit." *Roybal v. Toppenish Sch. Dist.*, 871 F.3d 927, 931 (9th Cir. 2017) (citing *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)). A constitutional property interest cannot be based upon an "an indirect impact." *Dumas v. Kipp*, 90 F.3d 386, 392 (9th Cir. 1996). As such, a government entity has "no independent constitutional

duty to safeguard . . . neighbors from the negative consequences—economic, aesthetic or otherwise—of . . . [a] construction project" it permitted. *Shanks v. Dressel*, 540 F.3d 1082, 1088 (9th Cir. 2008). Accordingly, in *Shanks*—as here—where a government reviewing body has discretion to approve or deny a permit application, a party "is not constitutionally entitled to insist on compliance with the procedure itself." *Id.* at 1092. Based upon this clear precedent, Plaintiff has not and cannot successfully assert a property interest in the approval of the Permit.

He also purports to have a liberty interest in the denial of the Permit, this contention is likewise defective. "Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement." *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983). An "expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause." *Id.* at 250–51 n. 12. "A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty.'" *Wilkinson*, 545 U.S. at 221. A state may also "create[] a protected liberty interest by placing substantive limitations on official discretion." *Olim*, 461 U.S. at 249. Plaintiff provides no such claim; he purports the cell phone tower could possibly fall, which could possibly obstruct "the primary hiking trail that Plaintiff uses" or damage the nearby water tower, which could possibly affect Plaintiff's water supply, which could possibly limit available water to fight forest fires endangering his "safety." (ECF No. 84 ¶ 88.) This argument is wholly unpersuasive as it is far "too attenuated to invoke the procedural guarantees of the Due Process Clause." *Sandin v. Conner*, 515 U.S. 472, 487 (1995). As Plaintiff cannot state a property or

liberty interest, the Court dismisses his procedural due process claims with prejudice.

ii. Equal Protection

Plaintiff asserts equal protection claims under a class-of-one theory—not that he is a member of a suspect class. Such a claim arises where the plaintiff was (1) "intentionally treated differently from others similarly situated" and (2) "there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). For this claim, Plaintiff alleges he was similarly situated with the Private-Party Defendants, (*see, e.g.*, ECF No. 84 ¶ 264) but this is incorrect. It is uncontended these defendants—as the applicants for the Permit—were subject to the different rules and held the opposite interests as the opponents to the Permit. ROP § 5.15.8 (describing applicant's procedures and TRPA's project review process).

Moreover, the only differential treatment that Plaintiff appears to rely upon is that he was given notice late in the application process. (*See, e.g.*, ECF No. 84 ¶ 225 ("TRPA failed to give . . . notice until after the Project Review Process was substantially completed, . . . resulting in an unfair advantage to the Private-Party Defendants."). He admits, however, he received notice of the hearing before the issuance of the permit, participated in the final hearing, appealed the grant of the Permit, filed a statement on appeal and appeared before the Legal Committee and the Governing Board to advocate for his position. (ECF No. 84 ¶¶ 28, 49, 51–52.) Having permit applicants participate in initial review process without the general public's involvement to be followed by a final hearing with the public's input is reasonable. If permit applicants provided false statement to the TRPA in the initial process, the residents may present these allegations at the final

hearing and appeal the decision to the Legal Committee and the Governing Board, both of which Plaintiff did. The differential treatment does not violate the equal protection clause, so the Court denies the claim with prejudice.

D. The Private-Party Defendants Joinder

The Private-Party Defendants have joined this motion. (ECF No. 140.) The successful arguments in this motion also dictate the Court dismiss Claim 24 alleged against the Private-Party Defendants. Here, Plaintiff alleges the TRPA Defendants and the Private-Party Defendants conspired to deprive him of his due process and equal protections rights. Inasmuch as this claim is based upon Nevadan and Californian constitutions (the complaint does not specify), these theories are preempted. As for the United States Constitution, Plaintiff cannot state these claims since he does not have a protected property or liberty interest and cannot state facts showing that he was treating differently without a rational basis.

II. Private Defendants' Special Anti-SLAPP Motion to Dismiss (ECF No. 142)

Private-Party Defendants move for dismissal in a special motion on the grounds Plaintiff's claims violate Nevada Anti-SLAPP laws. Essential to this defense is whether Private-Party Defendants' petition was made in good faith. NRS 41.650. In this motion, Private-Party Defendants rely upon evidence (specifically Maria Kim's declaration) to demonstrate that they acted in good faith. "[W]hen an anti-SLAPP motion to strike challenges the factual sufficiency of a claim, then the Federal Rule of Civil Procedure 56 standard will apply. But in such a case, discovery must be allowed, with opportunities to supplement evidence

based on the factual challenges, before any decision is made by the court." *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 834 (9th Cir.), amended, 897 F.3d 1224 (9th Cir. 2018). As such, the Court would deny this motion without prejudice, however, as the Court finds Private-Party Defendants' other motion to dismiss persuasive, the Court denies this motion as moot.

III. Private-Party Defendants' Motion to Dismiss (ECF No. 141)

As the Court dismisses Claim 24 against the Private-Party Defendants based upon their joinder to the TRPA's motion to dismiss, there are six remaining claims asserted them:

- Claim 13 titled "Violations by Defendants of Provisions of TRPA Compact, Ordinance, or Regulation of the Agency"
- Claim 28 titled "Fraudulent Misrepresentation by Private-Party Defendants"
- Claim 29 titled "Construction of Project in Violation of the TRPA Compact, Code, and PAS 060"
- Claim 30 titled "Complete Wireless Consulting, Inc. Was Not Qualified to do Business in Nevada"
- Claim 32 titled "Intentional Infliction of Emotional Distress"
- Claim 34 titled "Doubling of Damages Pursuant to NRS 41.1395"

Because these claims are either barred by the *Noerr-Pennington* doctrine or not legally cognizable, the Court dismisses them with prejudice.

A. The *Noerr-Pennington* Doctrine

All of the remaining claims against the Private-Party Defendants, except Claims 30, are based on their petitioning of the TRPA for the Permit. For example, the allegations include such assertions as the following:

> During the course of the Project Review Process, the Private-Party defendants made representations to TRPA, and thence to the public and to Plaintiff, that were either false or not relevant under the Compact, the Code, the ROP, and PAS 060, in order to give the appearance of conformance with the Compact, the Code, the ROP, and PAS 060. These misrepresentations included, but are not limited to, (a) conformance of the Project with PAS 060; (b) noise levels associated with the Project; (c) the actual area of Assessor's Parcel No: 1318-03-000-001; (d) the calculation of land-area coverage, (e) height of the cellular tower of the Project; (f) absence of alternatives to the placement of the Project; and (g) safety of the Project.

(ECF No. 84 ¶ 307.) In the same fashion, every allegation against these defendants is in regard to their petition for the Permit, with the singular exception that Defendant CWC, Inc. failed to register to do business in Nevada. Private-Party Defendants therefore move to dismiss all claims against them, except for Claim 30, on the basis of the *Noerr-Pennington* Doctrine. The Court grants this request.

Under the *Noerr-Pennington* Doctrine, persons or entities who petition any part of government are immune from liability for their petitioning activity, including any conduct that is merely "incidental" to any effort to influence government. *Sosa v. DIRECTV Inc.*, 437 F.3d 923, 934–35 (9th Cir. 2006). "The doctrine

immunizes petitions directed at any branch of government, including the executive, legislative, judicial and administrative agencies." *Manistee Town Ctr. v. City of Glendale*, 227 F.3d 1090,1092 (9th Cir. 2000). The doctrine "bars any claim, federal or state, common law or statutory, that has as its gravamen constitutionally-protected petitioning activity." *Gen-Probe, Inc. v. Amoco Corp.*, 926 F. Supp. 948, 956 (S.D. Cal. 1996). Petitioning the government encompasses efforts to obtain or oppose land use or other government permits, including meeting with, furnishing information to, and communicating with government officials in connection with such activities. *Empress LLC v. City and County of San Francisco*, 419 F.3d 1052, 1056–57 (9th Cir. 2005).

For the *Noerr-Pennington* doctrine, there is an exception for "sham" petitions. *E. R. R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961). "A 'sham' situation involves a defendant whose activities are not genuinely aimed at procuring favorable government action at all, not one who genuinely seeks to achieve his governmental result but does so through improper means." *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380 (1991). False statements alone are insufficient to render a petition a sham. *See, e.g.*, *Kottle v. Nw. Kidney Centers*, 146 F.3d 1056, 1060 (9th Cir. 1998) (affirming the grant of a motion to dismiss premised upon the *Noerr-Pennington* doctrine despite allegations of false statements); *Boone v. Redevelopment Agency of City of San Jose*, 841 F.2d 886 (9th Cir. 1988) (same); *see also Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 58 (1993) ("[A] successful effort to influence governmental action . . . certainly cannot be characterized as a sham." (internal quotation marks and citation omitted)).

The exception applies here as the claims arise out of Private-Party Defendants' petitioning of the government for the Permit. Plaintiff appears to suggest that the exception does not apply here as he characterizes it as "an antitrust exemption." (ECF No. 151 at 14.) While the doctrine may have originated in the antitrust context, courts have extended the doctrine to "bar[] any claim, federal or state, common law or statutory, that has as its gravamen constitutionally-protected petitioning activity." *Gen-Probe, Inc. v. Amoco Corp.*, 926 F. Supp. 948, 956 (S.D. Cal. 1996). Plaintiff also argues the exception does not apply since his complaint contains allegations Private-Party Defendants made material misrepresentations in their petition and advocacy for the Permit. This argument is unavailing as the allegations, even if true, fail to show that the Permit petition was a sham. In fact, the allegations could not, Plaintiff merely claims his harm is from the outcome of the petition for the Permit, not the process, and the fact that the efforts in acquiring the Permit were successful demonstrate the petition was not a sham.

B. Failure to Register to Do Business in Nevada

Plaintiff raises a cause of action against Defendant CWC alleging that it failed to register to do business in Nevada. Assuming this is true, this cause of action must still fail. The statute requiring registry of business in Nevada does not provide for a private cause of action—only fines. NRS 80.055. Consequently, the Court dismisses this cause of action, and in sum, it dismisses all causes of action against Defendants.

IV. Leave to Amend

Plaintiff argues the Court should grant him leave to amend to remedy any defect this Court finds. The

Court disagrees. No allegations could remedy the defects of preemption and the lack of causes of action for violating the TRPA or for failing to register to do business in Nevada. Furthermore, Plaintiff's allegations in the operative complaint make clear that he lacks a protected property or liberty interest in the Permit, that he was not unreasonably treated differently, and that the *Noerr-Pennington* doctrine applies to the remaining claims against the Private-Party Defendants. Lastly, Plaintiff could have brought a claim against the TRPA for judicial review of its approval of the Permit for a "prejudicial abuse of discretion" pursuant to the Compact. (ECF No. 19 Ex. 1 at Art. VI(j)(5).) Plaintiff was informed of this claim in the TRPA's prior motions to dismiss, (ECF Nos. 17, 101), yet Plaintiff has declined to raise this claim despite two grants for leave to amend, (ECF Nos. 83, 132). Accordingly, the Court finds amendment would be futile. It therefore dismisses this case with prejudice and denies the remaining motions as moot.

VI. Attorney Fees

Lastly, Private-Party Defendants request an award of attorney fees in their motions to dismiss pursuant to 42 U.S.C. § 1988 and Nevada Anti-SLAPP statutes. The Court does not find attorney fees to be proper under the Nevada Anti-SLAPP statutes as the Court denies that basis for dismissal. On the other hand, the Court does agree that Plaintiff's constitutional claims were "frivolous, unreasonable, or without foundation." *Hughes v. Rowe*, 449 U.S. 5, 14 (1980) (per curiam) (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978)). Pursuant to § 1988, Defendants are therefore entitled to an award of reasonable attorney fees and costs in litigating these claims. Defendants shall file a motion for attorney fees

providing a basis for such a reasonable award within thirty days of the issuance of this order. Briefing shall follow LR 7-2(b).

CONCLUSION

IT IS HEREBY ORDERED that Plaintiff's Motion for Preliminary Injunction (ECF No. 89) is DENIED AS MOOT.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss (ECF No. 137) is GRANTED.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss (ECF No. 141) is GRANTED.

IT IS FURTHER ORDERED that Defendants' Special Motion to Dismiss (ECF No. 142) is DENIED AS MOOT.

IT IS FURTHER ORDERED that Plaintiff's Motion to Extend Time to File a Reply to Defendants' Joint Response to the Motion for Preliminary Injunction (ECF No. 145) is DENIED AS MOOT.

IT IS FURTHER ORDERED that Defendants are entitled to an award of reasonable attorney fees and costs pursuant to 42 U.S.C. § 1988. Defendants shall file a motion within thirty days of the entry of this Order for such a reasonable fee.

IT IS FURTHER ORDERED that all of the claims are dismissed with prejudice.

IT IS FURTHER ORDERED that the Clerk of the Court shall enter judgment accordingly and close the case.

IT IS SO ORDERED.

Dated September 9, 2021.

/s/ Robert C. Jones
ROBERT C. JONES
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

3:17-cv-00444-RCJ-WGC

GREGORY O. GARMONG,

Plaintiff,

vs.

TAHOE REGIONAL PLANNING AGENCY *et al.*,

Defendants.

ORDER

This case arises out of the approval of a cell tower project in the Lake Tahoe area. Pending before the Court are a motion for a preliminary injunction and two motions to dismiss.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff Gregory Garmong resides in Douglas County, Nevada near Lake Tahoe and has a second home in Smith, Nevada. In the First Amended Complaint ("FAC"), he has sued the Tahoe Regional Planning Agency ("TRPA"), Verizon Wireless, Inc. ("Verizon"), Complete Wireless Consulting, Inc. ("CWC"), Crown Castle, and eighteen individuals in this Court, listing thirty-four causes of action. His claims arise out of TRPA's grant of a permit ("the Permit") to CWC to construct a cell tower within TRPA's jurisdiction at 811 U.S. Highway 50 ("US 50") in Douglas County ("the Project"). The Court has taken judicial notice that the

site of the Project is directly across US 50 from the Skyland neighborhood where Plaintiff lives, which is about a mile south of the Cave Rock Tunnel on US 50 and a mile north of Zephyr Cove on the east shore of Lake Tahoe. The site currently appears free from development except for a water tower.

Plaintiff alleges TRPA mailed a notice of the February 23, 2017 hearing on the Project to property owners like him on February 9 ("the Notice"), which indicated a February 23 hearing on the Project, and that he received the Notice on February 14. The Court takes judicial notice that February 14 was a Tuesday. The Notice indicated that Bridget Cornell was the point of contact for the Project, and that the application for the Project ("the Application") could be viewed from 9:00 a.m. to 12:00 p.m. and 1:00 p.m. to 4:00 p.m. on Mondays, Wednesdays, Thursdays, and Fridays. The Notice also indicated that a "staff summary" for the Project could be viewed at www.trpa.org ("the Website") and at the TRPA office as of February 16. Written comments had to be received by February 22 or they would not be considered at the February 23 hearing. When Plaintiff checked the Website on 5:20 p.m. on February 16, he was unable to locate any staff summary, although it became available at some time after that for a total of less than seven days prior to the hearing.

Plaintiff does not allege that the Application was not viewable at the TRPA office on Wednesday the 15th, Thursday the 16th, Friday the 17th, Monday the 20th, and Wednesday the 22nd. He alleges only that the weather was "very bad" on February 15–17 due to significant snowfall that made it hazardous to drive. Plaintiff does not allege any such difficulties on Monday the 20th or Wednesday the 22nd, although

TRPA was closed on the 20th for President's Day. The Court previously took judicial notice that there was no recorded precipitation at the South Lake Tahoe Airport (approximately twelve miles by road from Skyland) on February 14th or 15th, 0.24 inches of snow on the 16th, and 0.08 inches of snow on the 17th, and that there was no recorded precipitation at the Heavenly Mountain Resort (a ski resort about a mile from TRPA's Stateline, Nevada office) February 14th through 16th, and three inches of snow on the 17th. Plaintiff alleges that the drive to TRPA's office would take "1-1/2 hours in good weather." The Court previously took judicial notice that the normal driving time for the 5.3 miles between Skyland and TRPA's office at 128 Market Street, Stateline, Nevada is approximately ten minutes. Plaintiff has clarified in the FAC that he was staying at his home in Smith at the time, not his second home in Skyland, and that the snowfall occurred between Smith and Skyland.

The Court granted a motion to dismiss the Complaint, because Plaintiff had not alleged facts indicating standing. Specifically, he had only alleged that he used the affected area in the past, not that he had any particular plans to use it in the future. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–64 (1992). In the FAC, Plaintiff alleges that he has visited Genoa Peak Plan Area 060 (TRPA's designation for the area) 24 times in 2018, passing the site of the Project 17 times, and that he plans to continue using the area. The Court denied a motion for a temporary restraining order because of a low chance of success on the merits and because the balance of hardships did not favor him. The Court now denies the motion for a preliminary injunction for the same reasons and again dismisses for lack of standing.

II. DISCUSSSION

Article III of the Constitution grants judicial power to the United States to determine "Cases" and "Controversies" between various parties. *See* U.S. Const. art. III, § 2. This limits the matters judiciable by federal courts to those under which a plaintiff has "standing" to sue. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–60 (1992). The "irreducible constitutional minimum of standing" is: (1) an "injury in fact"; that is (2) "fairly traceable" to the challenged action of the defendant; and which can (3) "likely" be "redressed by a favorable decision." *Id.* at 560–61 (internal quotations marks and alterations omitted). Congress may not waive or reduce these requirements, but it may enact statutes creating legal rights that would not otherwise exist and the invasion of which constitutes an intangible yet "concrete" injury—an injury that "actually exist[s]"—constituting an "injury in fact" for the purposes of standing. *Spokeo v. Robins*, 136 S. Ct. 1540, 1547–49 (2016). "[A] bare procedural violation, divorced from any concrete harm," however, is insufficient to show injury in fact. *Id.* at 1549.

The Court previously ruled that standing must be based on actual harm, not the bare violation of a procedural right as against TRPA (any violation of which was doubtful based on the Complaint, in any case). Plaintiff has now alleged that he has in the past hiked in the area of the Project and intends to continue hiking in the area of the Project. Defendants are correct that Plaintiff appears mainly aggrieved over the alleged failure of TRPA to follow the law generally and certain speculative injuries. He has alleged specific plans to use the affected area, but the Court agrees with Defendants that Plaintiff has not alleged that the Project will cause him any concrete harm,

even assuming he continues to use the area. It is not alleged that the Project will prevent Plaintiff from hiking in the area. Nor does he allege that the future cell tower—which is to be constructed to resemble nearby pine trees and blend into them—will affect the view of the lake or mountains from the area apart from the psychological affect Plaintiff might experience simply by knowing there is a cell tower nearby. Plaintiff also acknowledges a gigantic water tower in the immediate area of the Project that already interferes with the natural appearance of the area much more than a camouflaged cell tower would. Indeed, as Defendants note, Plaintiff's primary complaint is his speculative fear that the cell tower might someday fall over onto the water tower and damage it. Plaintiff's allegations that the aesthetic and recreational values of the area will be lessened by the challenged activity are conclusory. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 183 (2000). He has so concluded, but he has not alleged facts that if true would lead to that conclusion. He alleges the introduction of a cell tower resembling a tree in the midst of an ocean of trees near an already existing unconcealed water tower. That, even if true, does not indicate that the aesthetic and recreational values of the area will be lessened.

CONCLUSION

IT IS HEREBY ORDERED that the Motion for Preliminary Injunction (ECF No. 89) is DENIED.

IT IS FURTHER ORDERED that the Motion for Leave to File Excess Pages (ECF No. 97) and the Motion to Dismiss (ECF No. 101) are GRANTED.

IT IS FURTHER ORDERED that the Motion to Dismiss (ECF No. 104) is DENIED as moot.

IT IS FURTHER ORDERED that the Clerk shall enter judgment and close the case.

IT IS SO ORDERED.

Dated this 28 day of August, 2018.

/s/ Robert C. Jones
ROBERT C. JONES
United States District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

3:17-cv-00444-RCJ-WGC

GREGORY O. GARMONG,

Petitioner,

vs.

TAHOE REGIONAL PLANNING AGENCY,

Respondent.

ORDER

This case arises out of the approval of a cell tower project in the Lake Tahoe area. Pending before the Court is a motion for a temporary restraining order ("TRO").

I. FACTS AND PROCEDURAL HISTORY

Plaintiff Gregory Garmong resides in Douglas County, Nevada near Lake Tahoe and has a second home in Smith, Nevada. (First Am. Compl. ¶¶ 1, 33, ECF No. 84). In the Amended Complaint ("AC"), he has sued the Tahoe Regional Planning Agency ("TRPA"), Verizon Wireless, Inc. ("Verizon"), Complete Wireless Consulting, Inc. ("CWC"), Crown Castle, and eighteen individuals in this Court, listing thirty-four causes of action. His claims arise out of TRPA's grant of a permit ("the Permit") to CWC to construct a cell tower within TRPA's jurisdiction at 811 U.S. Highway 50 ("US 50") in Douglas County ("the Project"). (*Id.* ¶¶ 32– 33). The

Court has taken judicial notice that the site of the Project is directly across US 50 from the Skyland neighborhood where Plaintiff lives, which is about a mile south of the Cave Rock Tunnel on US 50 and a mile north of Zephyr Cove on the east shore of Lake Tahoe. The site currently appears free from development except for a water tower.

Plaintiff alleges TRPA mailed a notice of the February 23, 2017 hearing on the Project to property owners like him on February 9 ("the Notice"), which indicated a February 23 hearing on the Project, and that he received the Notice on February 14. (*Id.* ¶¶ 28–30). The Court takes judicial notice that February 14 was a Tuesday. The Notice indicated that Bridget Cornell was the point of contact for the Project, and that the application for the Project ("the Application") could be viewed from 9:00 a.m. to 12:00 p.m. and 1:00 p.m. to 4:00 p.m. on Mondays, Wednesdays, Thursdays, and Fridays. (*Id.* ¶ 28). The Notice also indicated that a "staff summary" for the Project could be viewed at www.trpa.org ("the Website") and at the TRPA office as of February 16. (*Id.*). Written comments had to be received by February 22 or they would not be considered at the February 23 hearing. (*Id.*). When Plaintiff checked the Website on 5:20 p.m. on February 16, he was unable to locate any staff summary, although it became available at some time after that for a total of less than seven days prior to the hearing. (*Id.* ¶ 31).

Plaintiff does not allege that the Application was not viewable at the TRPA office on Wednesday the 15th, Thursday the 16th, Friday the 17th, Monday the 20th, and Wednesday the 22nd. He alleges only that the weather was "very bad" on February 15–17 due to significant snowfall that made it hazardous to drive. (*Id.* ¶ 32). Plaintiff does not allege any such difficulties

on Monday the 20th or Wednesday the 22nd, although TRPA was closed on the 20th for President's Day. (*Id.* ¶ 43). The Court previously took judicial notice that there was no recorded precipitation at the South Lake Tahoe Airport (approximately twelve miles by road from Skyland) on February 14th or 15th, 0.24 inches of snow on the 16th, and 0.08 inches of snow on the 17th, and that there was no recorded precipitation at the Heavenly Mountain Resort (a ski resort about a mile from TRPA's Stateline, Nevada office) February 14th through 16th, and three inches of snow on the 17th. Plaintiff also alleges that the drive to TRPA's office would take "1- 1/2 hours in good weather." (*Id.* ¶ 37). But the Court previously took judicial notice that the normal driving time for the 5.3 miles between Skyland and TRPA's office at 128 Market Street, Stateline, Nevada is approximately ten minutes. Plaintiff has clarified in the FAC that he was staying at his home in Smith at the time, not his home in Skyland.

The Court granted a motion to dismiss the Complaint, because Plaintiff had not alleged facts indicating standing. Specifically, he had only alleged that he used the affected area in the past, not that he had any particular plans to use it in the future. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–64 (1992). Plaintiff filed the FAC, alleging that he has visited Genoa Peak Plan Area 060 (TRPA's designation for the area) 24 times in 2018, passing the site of the Project 17 times, and that he plans to continue using the area. (First Am. Compl. ¶ 80). Plaintiff has filed a motion for a temporary restraining order. He has also filed a motion for a preliminary injunction, but the Court will address only the motion for a TRO in the present order.

II. LEGAL STANDARDS

The Court of Appeals has established two alternative sets of criteria for obtaining preliminary injunctive relief:

> Under the traditional test, a plaintiff must show: (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases). The alternative test requires that a plaintiff demonstrate either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor.

Taylor v. Westly, 488 F.3d 1197, 1200 (9th Cir. 2007). The Supreme Court later ruled, however, that a plaintiff seeking a preliminary injunction must demonstrate that irreparable harm is "likely," not just possible. *Winter v. NRDC*, 555 U.S. 7, 19–23 (2008) (rejecting the alternative "sliding scale" test, at least as to the irreparable harm requirement). The Court of Appeals has recognized that the "possibility" test was "definitively refuted" in *Winter*, and that "[t]he proper legal standard for preliminary injunctive relief requires a party to demonstrate 'that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009) (quoting *Winter*, 555 U.S. at 20) (reversing a district court's use of the Court of Appeals' pre-*Winter*, "sliding-scale" standard and remanding for application of the proper standard).

The Court of Appeals later held that although irreparable harm must be more likely than not, the sliding scale approach remains viable as to the other requirements, and a plaintiff needn't be more likely than not to succeed on the merits, so long as there are "serious questions" on the merits. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011) ("That is, 'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest."). *Cottrell* presents some difficulty in light of *Winter* and *Stormans*. To the extent *Cottrell*'s interpretation of *Winter* is inconsistent with *Stormans*, *Stormans* controls. *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc). The Supreme Court stated in *Winter* that "[a] plaintiff seeking a preliminary injunction must establish that he is *likely* to succeed on the merits, that he is *likely* to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, *and* that an injunction is in the public interest." *Winter*, 555 U.S. at 20. As a matter of grammar, the Supreme Court has laid out four conjunctive tests, not a four-factor balancing test, using the word "likely" to modify the success-on-the-merits test in exactly the same way as the irreparable-harm test. In finding the "possibility" of irreparable harm to be insufficient, the *Winter* Court itself emphasized (with italics) the fact that the word "*likely*" modifies the irreparable-harm prong. *Id.* at 22. The word "likely" modifies the success-on-themerits prong in a textually identical way. *Id.* at 20.

In summary, to satisfy *Winter*, a movant must show that he is "likely" to succeed on the merits and to suffer irreparable harm. As to the irreparable-harm test,

Winter is clear that "likely" means what it normally means, i.e., more probable than not. There is tension in the case law as to the meaning of "likely" as applied to the success-on-the-merits test. Black's Law Dictionary defines the "likelihood-of-success-on-the-merits test" as "[t]he rule that a litigant who seeks [preliminary relief] must show a reasonable probability of success . . . ." *Black's Law Dictionary* 1069 (10th ed. 2014). A Court of Appeals case predating *Cottrell* restates "[s]erious questions" as "a fair chance of success on the merits." *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1985). The Court of Appeals has reiterated the "fair chance" language since *Cottrell*. *See, e.g.*, *Arc of Cal. v. Douglas*, 757 F.3d 975, 993 (9th Cir. 2014).

To obtain a temporary restraining order Under Fed. R. Civ. P. 65(b), a plaintiff must make a showing that immediate and irreparable injury, loss, or damage will result to plaintiff without a temporary restraining order. The standard for obtaining *ex parte* relief under Rule 65 is very stringent. *Reno Air Racing Ass'n v. McCord*, 452 F.3d 1126, 1130 (9th Cir. 2006). The temporary restraining order "should be restricted to serving [its] underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer." *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 439 (1974).

III. DISCUSSION

Plaintiff requests a TRO not simply against construction on the Project, which he notes began in October 2017 and has now resumed after a winter pause, but against the issuance of the Permit itself (which would also require a halt to construction). The basis for the motion is the first claim in the FAC,

wherein Plaintiff alleges the Project is illegal under TRPA's own code ("the Code"). "Public Service . . . transmission and receiving facilities" constitutes a "special use" in Area 060. (TRPA Plan Area Statement 060 Genoa Peak 2, ECF No. 88-3). Plaintiff then argues that although the Project is a transmission and receiving facility, it does not qualify as a "public service" under Chapter 90 of TRPA's Code:

> Public Service
>
> Public or quasi-public uses or activities pertaining to communication, transportation, utilities, government, religion, public assembly, education, health and welfare, or cultural and civic support. It does not include such uses or activities that are primarily involved in commercial enterprises.

(TRPA Code of Ordinances Ch. 90, ECF No. 88-5, at 12). Plaintiff argues that although a cell tower pertains to communication, it is a "commercial cellular facility" whose primary purpose is the retail or wholesale sale or rental of telecommunications services, so it is excluded from the definition of a "public service" and it is therefore not a permitted special use in Area 060. But the Code further defines "Quasi-Public" as:

> Having the purpose of providing a public service as a utility and under regulation of state, local, or federal law, such as a telephone company, electric power company, TV cable company, and natural gas supplier . . . .

(*Id.*). A cell tower for a federally regulated company like Verizon is probably a "quasi-public" use, and therefore a "public service," under the Code. The definition of "public service" distinguishes what it calls "quasi-public" uses from what it calls "commercial enterprises," and a communications facility that

services the customers of a federally regulated telephone company would appear to fall under the former category. Such uses are "quasi-public" as opposed to "public," because although they are not tax-funded, government-operated public services, they are utilities companies open to use by the general public that are regulated by governmental entities, as opposed to private commercial facilities not open to use by the general public.

The Court denies the motion for a TRO. As Plaintiff notes, he has been aware of construction in the area for many months. The Court will not abruptly interrupt the Project before Defendants can be heard where the chance of success on the merits is low and Plaintiff has long been aware of construction.

CONCLUSION

IT IS HEREBY ORDERED that the Motion for a Temporary Restraining Order (ECF No. 88) is DENIED.

IT IS FURTHER ORDERED that the Motion for Summary Judgment (ECF No. 76), the Motion to Extend Time (ECF No. 77), and the Motion to Strike (ECF No. 81) are DENIED as moot.

IT IS FURTHER ORDERED that the parties shall contact the Court to propose a mutually agreeable time for a hearing on the motion for a preliminary injunction.

IT IS SO ORDERED.

Dated this 2nd day of July, 2018.

/s/ Robert C. Jones
ROBERT C. JONES
United States District Judge

APPENDIX I

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

GREGORY O. GARMONG,

Plaintiff,

vs.

TAHOE REGIONAL PLANNING AGENCY, JOHN MARSHALL, in his official and individual capacities; BRIDGET CORNELL, in her official and individual capacities; JOANNE MARCHETTA, in her official and individual capacities; JIM BAETGE, in his official and individual capacities; JAMES LAWRENCE, in his official and individual capacities; BILL YEATES, in his official and individual capacities; SHELLY ALDEAN, in her official and individual capacities; MARSHA BERKBIGLER, in her official and individual capacities; CASEY BEYER, in his official and individual capacities; TIMOTHY CASHMAN, in his official and individual capacities; BELINDA FAUSTINOS, in her official and individual capacities; AUSTIN SASS, in his official and individual capacities; NANCY MCDERMID, in her official and individual capacities; BARBARA CEGAVSKE, in her official and individual capacities; MARK BRUCE, in his official and individual capacities; SUE NOVASEL, in his official and individual capacities; LARRY SEVASON, in his official and individual capacities; MARIA KIM; VERIZON WIRELESS, INC.; COMPLETE WIRELESS CONSULTING, INC., and CROWN CASTLE,

Defendants.

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Attorney for Plaintiff Garmong

FIRST AMENDED COMPLAINT

Plaintiff Gregory Garmong, by and through his counsel of record, Carl M. Hebert, Esq., and for his First Amended Complaint ("FAC") against the defendants alleges:

JURISDICTION

1. At all times material to this FAC, Plaintiff was a citizen of the State of Nevada, with a residence in Douglas County. Since 1992, Plaintiff has owned and enjoyed a home in the Skyland neighborhood of the Lake Tahoe Basin in Douglas County, Nevada. Plaintiff plans and expects to continue to own and enjoy his home in the Skyland neighborhood into the future.

2. Defendant Tahoe Regional Planning Agency ("TRPA"), in violation of its own rules and procedures, approved a Permit for a cellular wireless communication facility ("Project"). The plaintiff challenges the granting of the permit.

3. The legislatures of Nevada and California adopted the Tahoe Regional Planning Compact. See California Government Code § 66801 et seq., Nevada Revised Statute § 277.200 et seq. The United States consented to the Tahoe Regional Planning Compact, see act of December 19, 1980, Pub. L. No. 96–551, 94 Stat. 3233. The original and amended Compacts are termed "TRPA Compact" or "Compact" throughout this FAC.

4. The Compact is "federal law" for purposes of jurisdiction under 28 U.S.C. § 1331, and this Court has jurisdiction under 28 U.S.C. § 1331.

5. Actions taken by TRPA and the other defendants in violation of 42 U.S.C. § 1983 are "under color of state law." Jurisdiction of this Court of such claims is proper pursuant to 28 U.S.C. § 1343.

6. This Court has supplemental jurisdiction for state law claims set forth in this FAC pursuant to 28 U.S.C. § 1367.

VENUE

7. Venue is proper in this Court because the land upon which the Project is situated lies in this Court's judicial district, as does Plaintiff's Skyland home, as does TRPA Plan Area 060. TRPA Compact Art. VI(j)(2)(A).

PLAINTIFF

8. At all times relevant, the plaintiff was an individual, a citizen of the State of Nevada and a resident of Douglas County, Nevada.

DEFENDANTS

9 Defendant TRPA is a bi-state governmental agency established under the terms of the Compact and the laws of Nevada and California, and has regulatory powers over certain actions in the Lake Tahoe Basin. TRPA is governed by the general laws, by the TRPA Compact, by a Code of Ordinances ("Code") adopted by TRPA pursuant to the TRPA Compact, and by a Code of Ordinances Rules of Procedure ("ROP") adopted by TRPA pursuant to the TRPA Compact.

10. Defendant Joanne Marchetta ("Marchetta") is an employee and Executive Director of TRPA.

11. Defendant John Marshall ("Marshall") is an employee and General Counsel of TRPA.

12. Defendant Bridget Cornell ("Cornell") is a Staff Associate Planner employee of TRPA and author of a Staff Summary (also sometimes termed "Memorandum" or "Staff Memorandum") bearing on its face a date of February 16, 2017.

13. Defendant Jim Baetge ("Baetge") is a Hearing Officer with TRPA.

14. Defendants Bill Yeates ("Yeates"), Shelly Aldean ("Aldean"), Marsha Berkbigler ("Berkbigler") and Nancy McDermid ("McDermid") are members of the Legal Committee of TRPA.

15. Defendants James Lawrence ("Lawrence"), Yeates, Aldean, Berkbigler, Casey Beyer ("Beyer"), Belinda Faustinos ("Faustinos"), Timothy Cashman ("Cashman"), Austin Sass ("Sass"), McDermid, Barbara Cegavske ("Cegavske"), Mark Bruce ("Bruce"), Sue Novasel ("Novasel") and Larry Sevason ("Sevason") are members of the Governing Board of TRPA.

16. Defendant Verizon Wireless ("Verizon") is a corporation licensed to do business in Nevada.

17. Defendant Complete Wireless Consulting, Inc. ("Complete Wireless") is a California corporation which was, at the time it was serving as an advocate for the Project, not licensed to do business in Nevada. Complete Wireless is the agent for Defendants Verizon and Crown Castle on the Project.

18. Defendant Maria Kim ("Kim") is an employee of defendant Complete Wireless.

19. Defendant Crown Castle is the listed applicant on the application for the TRPA Permit to build the Project.

20. Defendants Verizon, Complete Wireless, Kim, and Crown Castle are termed the "Private-Party Defendants" herein. Some or all of the Private-Party Defendants were the actual applicants for the Permit to build the Project.

THE PROJECT

21. In about 2006 Complete Wireless began work on a "Complete Wireless Monopole Project" (the "Project") which is a cellular wireless communication facility. Some or all of the Private-Party Defendants thereafter filed an application with TRPA for a Permit to build the Project. The Project was assigned TRPA Project Number/File Number 1318-03-000-001/ERSP2015-0778. The Private-Party Defendants have an interest in the Project.

22. The Project is located at 811 US Highway 50, Douglas County, Nevada; Assessor's Parcel No: 1318-03-000-001. This location is within TRPA's Plan Area 060-Genoa Peak.

23. The Staff Summary asserts that the Project is a "Public Service" facility. TRPA analyzed the Project as a "Public Service" facility, specifically a "Transmission and receiving facility (S)." The "S" indicates a special use that requires a noticed public hearing prior to approval of a Permit from TRPA to build the Project. However, according to the definitions and provisions of TRPA's Code, the Project is not a "Public Service" facility.

24. Defendant Verizon started physical construction of the Project in the fall of 2017, pursuant to an issued Permit.

RELEVANT CHRONOLOGY

25. Complete Wireless began working on the Project in about 2006. Complete Wireless submitted first papers concerning the Project to TRPA no later than about February 19, 2014. The Project was assigned to TRPA Staff Associate Planner Defendant Cornell on October 28, 2015.

26. TRPA and Defendant Cornell thereafter began evaluating the application for the Project for possible issuance of a Permit, termed herein the "Project Review Process." There was extensive communication between Defendants during the Project Review Process.

27. TRPA did not notify the affected property owners, including Plaintiff, of the existence of the Project during the Project Review Process by letters directed to the affected property owners early in the project review process, in direct violation of ROP §§ 12.5 and 12.6. ROP § 12.6 mandates, "Notice shall be given reasonably early in the project review process." In the case of the Project, TRPA failed to give such notice until after the Project Review Process was substantially completed, resulting in an unfair advantage to the Private-Party Defendants.

28. Pursuant to ROP § 12.5, entitled "Projects Requiring Notice to Affected Property Owners," a Notice of Application and Public Hearing ("Notice") bearing a facial date of February 9, 2017 was mailed to affected property owners, addressed "Dear Property Owner." The Notice identified Defendant Cornell as the proper person to contact about the Notice, the Staff Summary and the Project. The Notice stated that a public hearing was scheduled for February 23, 2017. The Notice stated that the application (the "Application File" or "Project File") for the Project "may be reviewed

during regular front counter office hours (9:00 a.m. to 12:00 p.m. and 1:00 to 4:00 p.m.), Monday, Wednesday, Thursday, and Friday, except legal holidays. Please note that the front counter is closed on Tuesdays. The staff summary for this project will be available for review on the TRPA website (www.trpa.org) and at the TRPA office seven calendar days prior to the meeting (February 16, 2017)." The Notice further stated "If written comment are not received prior to the date of the meeting, then they will not be considered." That is, written comments had to be received by TRPA no later than February 22, 2017, or they would not be considered.

29. As a result of sending the Notice to Plaintiff pursuant to ROP Ch. 12 acknowledging that Plaintiff was a property owner affected by the Project, Defendants are estopped to deny that Plaintiff is an affected property owner, and has a property interest in the matter of the application for Permit, all TRPA proceedings concerning the issuance of the Permit, and the Project. Defendants are also estopped to deny that Defendants were obligated to give notice to Plaintiff in the manner required by ROP Ch. 12.

30. Plaintiff received the Notice on February 14, 2017. Prior to that date, Plaintiff was not aware of the Project and the Project Review Process.

31. Plaintiff checked the TRPA website several times on February 16, 2017 to see if any Staff Summary had been posted, the last time at about 5:20 pm on February 16, 2017, and no Staff Summary for the Project had been posted. Plaintiff concluded that the hearing of February 23, 2017 was postponed. The Staff Summary became available at some time after 5:20 pm on February 16, 2017. The Staff Summary was not available on the TRPA website during working

hours seven calendar days prior to the Hearing date. The Staff Summary in paper format was not available at the TRPA office during working hours seven calendar days prior to the Hearing date.

32. The weather in the Tahoe Basin during the period February 16-17, 2017 was very bad, with a major winter storm having significant precipitation and snowfall that made driving conditions hazardous. The National Weather Service issued a Winter Weather Advisories for the Lake Tahoe area for the periods from 4am to 4pm on February 16, 2017 and from 7am February 17, 2017 to 10am February 18, 2017. The second Winter Weather Advisory for the period 7am February 17, 2017 to 10am February 18, 2017 predicted snow accumulations of 4 to 8 inches below 7000 feet, and snow accumulations of 8-16 inches above 7000 feet. This second Winter Weather Advisory stated, "Expect rapidly worsening conditions Friday with travel delays and chain controls." where "Friday" referred to February 17, 2017.

33. On February 16-17, 2017, Plaintiff was at his second home in Smith, Nevada because of the ongoing bad weather in the Tahoe Basin. The Smith home is the address that TRPA had used to mail the Notice bearing a facial date of February 9, 2017. Plaintiff has personally measured the road distance between the [sic] his Smith home and the TRPA office in Stateline, Nevada at about 56 miles, and the driving time at about 1-1/2 hours in good driving conditions and substantially no traffic. It was at a neighbor's home in Smith, Nevada that Plaintiff checked the TRPA website at 5:20 pm on February 16, 2017, and found that no Staff Summary or Staff Memorandum had been posted. At the same time, plaintiff checked the weather forecast for the Tahoe Basin and found the

second Winter Weather Advisory. Because the promised Staff Memorandum was not posted and was not available in paper format during business hours on February 16, 2017, and because of the weather, plaintiff decided to stay at the Smith home for the evening of February 16-17, 2017.

34. To reach the TRPA office from his home in Smith Nevada, Plaintiff would have had to travel over the crest of the mountains at above 7000 feet altitude, most directly over Daggett summit at 7334 feet altitude. If Plaintiff had attempted this trip on February 17, 2017, Plaintiff would have been subjected to the 8 to 16 inch snowfall accumulation and the "rapidly worsening conditions" predicted by the National Weather Service. Plaintiff, who was 73 years old at the time, concluded that he could not safely get to the TRPA offices from his home in Smith, Nevada, on February 17, 2017.

35. Plaintiff called the TRPA offices several times early on the morning of February 17, 2017 from the Smith home, and was told that Defendant Cornell does not work at TRPA on Fridays. Plaintiff was also told that Defendant Cornell's supervisor, Ms. Jepson, was not in the office that day. Plaintiff asked that a message be sent to Ms. Jepson with a request that she call him. Plaintiff received no response from Ms. Jepson, then or ever. Plaintiff was also told that Hearing Officer Baetge was not available.

36. Plaintiff has no internet service at his Smith home, and must use the internet service at the Smith Valley Public Library. Apparently because of the bad weather, internet service was not available at the Smith Valley Public Library until early afternoon on February 17, 2017. At about 1:30pm on February 17,

2017, Plaintiff was finally able to access the Staff Summary on the internet.

37. At this point, about 1:30 p.m. on Friday, February 17, 2017, Plaintiff was in Smith, Nevada, and had to decide whether to attempt the trip in bad weather over Daggett Summit to the TRPA office to view the Application File in conjunction with the 35-page Staff Summary, which he had not yet had the opportunity to read. The trip takes about 1-1/2 hours in good weather, and some unknown, but greater, time in the bad weather that was continuing. Plaintiff decided not to attempt the trip under these conditions, because the TRPA office closes at 4pm, and Plaintiff would have had at most 1 hour to view the Staff Summary in conjunction with the Application File.

38. Many of the provisions of the Code require that statements and findings of the Staff Summary have support in the Application File. Plaintiff needed to view the Application File for the Project together with the Staff Summary in order to make properly informed and knowledgeable comments about the Project, to present evidence, and have a reasonable opportunity to know the claims of TRPA and Private-Party Defendants, and to meet those claims. The Application File has never been posted on the internet, to Plaintiff's knowledge. To review the Staff Summary without access to the Application File, or review the Application File without access to the Staff Summary, would have been inadequate. Plaintiff had never viewed a Staff Summary or an Application File before and needed assistance and guidance from either Defendant Cornell or her supervisor, Ms. Jepson, on the relation between the two documents and their interpretation. Because neither Cornell nor Jepson were available on February 17, 2017, because the

TRPA office front desk closed at 4:00 p.m., and because he had not even had time to read the 35-page Staff Summary at this point, Plaintiff decided not to risk the trip "in the rapidly worsening conditions" for at most 1 hour of viewing of the Application File together with the unread Staff Summary.

39. During the course of the present litigation, TRPA has made the Application File available to Plaintiff in digital format. The Application File has at least about 380 pages, including at least about 148 pages of complex technical documents, such as Geotechnical Investigation dated December 19, 2002 (38 pages), Wireless communications analysis (5 pages), Environmental Noise Analysis (5 pages), Geotechnical Investigation Report dated November 3, 2015 (52 pages), and Site Plans (48 pages). About 125 pages of the Application File is identified as "loose documents in folder" and thence not organized.

40. Plaintiff later discovered that the Staff Summary was prepared with extensive misrepresentations, omissions, and misdirections to make it difficult for the public to decipher and understand. Plaintiff had never before attempted to understand a Staff Summary in relation to an Application File. The knowledgeable TRPA personnel, Defendant Cornell and Ms. Jepson, were not present to provide guidance concerning the Staff Summary and the Application File. Even if Plaintiff had managed to travel to the TRPA office on the afternoon of February 17, 2017, the trip would have been futile because Plaintiff could not have evaluated the 35-page Staff Summary and the 380-page Application File together in the period of at most one hour available to him prior to the closing of the TRPA front desk at 4pm.

41. By failing to give Notice "reasonably early in the project review process" as required by ROP § 12.6, by failing to make the Staff Summary available the promised full seven days prior to the hearing date of February 23, 2017, by filing the Staff Summary with misrepresentations, omissions, and misdirections, by making the lengthy Staff Summary and Application File together available only a short time prior to the deadline for filing comments of February 22, 2017, and by refusing plaintiff's request for additional time, TRPA made the weather and the personal circumstances of the public, including Plaintiff, in reaching TRPA to review the Application File together with the Staff Summary, highly relevant to the constitutional due process issue of sufficient notice. TRPA could have and should have anticipated that in scheduling the hearing of February 23, 2017, less than 7 days after the Staff Summary was issued, in midwinter in the Tahoe Basin where storms are expected at this time of year and the winter of 2016-2017 had already been unusually severe, that it was denying the public, including plaintiff, sufficient time to review the Staff Summary in conjunction with the Application File.

42. February 18-19, 2017 was a weekend and TRPA was closed.

43. February 20, 2017 was the Presidents' Day holiday, and TRPA was closed.

44. On February 20, 2017 plaintiff faxed a five-page letter to Hearing Officer Baetge at TRPA, asking for additional time to investigate the Application File in conjunction with the Staff Summary, asking for a continuance in the hearing scheduled for February 23, 2017, and explaining both the reasons that he needed more time and the prejudice to him if more time were not granted. Plaintiff received no reply to this letter.

45. February 21, 2017 was a Tuesday, and, according to the Notice of February 9, 2017, the Application File was not available on that day because the TRPA front counter was closed.

46. February 22, 2017 was the deadline for submitting written comments or "they will not be considered," according to the Notice of February 9, 2017.

47. Plaintiff considered attempting to travel from his home in Smith, Nevada to TRPA on the morning of February 22, 2017 to view the Staff Summary in conjunction with the Application File, before the deadline for filing comments of February 22, 2017. On the morning of February 22, 2017, Plaintiff checked the weather news for the weather prediction for the Tahoe Basin. The National Weather Service predicted even worse weather for February 22, 2017 than for February 16-17, 2017. The National Weather Service had issued a "Winter Storm Warning," a higher level of warning than a "Winter Weather Advisory," for 10pm on February 19, 2017 to 10am on February 22, 2017, with 1-3 feet of snow above 6500 feet, 3-5 feet of snow above 7500 feet up to February 21, 2017 and additional snow on February 22, 2017. The extension of the Winter Storm Warning for the morning of February 22, 2017 predicted winds of 25 to 35 mph with gusts to 55 mph and Sierra ridge gusts up to 80 mph. The Winter Storm Warning predicted hazardous travel conditions.

48. Having extensive outdoor experience, including during severe weather, Plaintiff decided not to attempt to travel to TRPA on February 22, 2017. It was not feasible for Plaintiff to travel to TRPA to view the Application File in conjunction with the Staff Summary on February 22, 2017, because the predicted weather conditions to travel over the mountain passes were just too severe. Even if Plaintiff had been able to reach

TRPA on February 22, 2017 and view the Staff Summary in conjunction with the Application File, Plaintiff would not have had time to return to his home in Smith, where his word-processing computer was located, and prepare and submit his comments based upon that viewing, prior to the deadline for submission of written comments of February 22, 2017.

49. Plaintiff faxed written comments to TRPA on February 22, 2017. When Plaintiff prepared his written comments, he had not had an opportunity to view the Application File or the Staff Summary in conjunction with the Application File, for the reasons stated above. Plaintiff's comments were necessarily incomplete because Plaintiff had not been able to view the Application File in conjunction with the Staff Summary at all prior to the submission of written comments.

50. On February 23, 2017, Plaintiff arrived at the TRPA office about 2 hours before the Hearing started. Plaintiff was allowed to view the approximately 380-page Application File presented as a disorganized, non-indexed pile of paper, and having about 148 pages of highly technical matter, for only about two hours. During that two hours, Defendant Kim was constantly chattering her arguments at him and preventing Plaintiff from concentrating on the Application File.

51. The Hearing Officer conducted the Hearing on February 23, 2017. At the Hearing, Plaintiff asked orally that the Hearing be continued so that Plaintiff would have a fair opportunity to review the Application File together with the Staff Summary and present a more complete set of written comments about the Project before the Hearing Office made a decision on granting to [sic] application. The Hearing Officer refused the request. The Hearing Officer apparently decided in favor of granting the Permit for

the Project, although no written decision, findings of fact and conclusions of law, and reasons/explanation were ever provided to Plaintiff, despite Plaintiff's request for such papers from TRPA. The ruling of Hearing Officer Baetge was completely arbitrary and without support in the Compact, the Code, the ROP, Plan Area Statement ("PAS") 060-Genoa Peak, and the Application File. The Hearing Officer did not make the motions to approve the required finding and to approve the Project subject to the special conditions.

52. Plaintiff timely appealed the decision of the Hearing Officer to the TRPA Board, and the Appeal was apparently rejected. No written decision, findings of fact and conclusions of law, and reasons/explanation were ever provided to Plaintiff, despite Plaintiff's request for such papers from TRPA. The ruling of the TRPA Board was completely arbitrary and without support in the Compact, the Code, the ROP, PAS 060, and the Application File.

53. In summary, the Private-Party Defendants had about 10 years to prepare their position on the Project, prior to the Hearing of February 23, 2017. TRPA had about 3 years to prepare its position on the Project, prior to the Hearing of February 23, 2017. Staff Associate Planner Cornell of TRPA had about 16 months to prepare her position on the Project, prior to the Hearing of February 23, 2017. In defiance of ROP §§ 12.5-12.6, TRPA did not give notice to the affected property owners "reasonably early in the project review process," and instead gave notice after the review process was substantially completed. The public, including plaintiff, had less than 6 hours to view the Application File together with the Staff Summary prior to the date it was required to submit written comments. Plaintiff was not able to view the

Application File together with the Staff Summary at all before the written comments were due, because of the delay in making the confusingly written Staff Summary available, and because of the weather on February 17, 2017 and February 22, 2017. TRPA violated its own unreasonably short seven-day availability period by making its Staff Summary available only six days prior to the Hearing. Of those six days, on one day the weather was so bad that none of the responsible staff planners came to the TRPA office and Plaintiff could not travel to the TRPA office safely, two days were weekend days and TRPA was closed, one day was a national holiday and TRPA was closed, one day was a Tuesday and the TRPA front desk was closed so that the Application File was not available, and the last day the written comments were due or they would not be considered and, again, the weather was so bad that Plaintiff could not safely travel to the TRPA office.

54. TRPA's strategy was to prevent the public, including Plaintiff, from having a fair opportunity to be heard in opposition to the Project at the Hearing of February 23, 2017, when the decision was made to grant the application for the Permit. That strategy included failing to give written notice to affected property owners "reasonably early in the project review process;" writing the Staff Summary in a manner designed to be obscure and confusing to the reader; setting an unreasonably short seven-calendar-day time for public review of the Staff Summary prior to the Hearing date and six calendar-day's time for public review prior to the deadline for submission of written comments; violating its own rules in making the Staff Summary available only six calendar days prior to the Hearing and five calendar days prior to the deadline date for submission of written comments; and

setting the schedule so that of the five calendar days prior to the deadline date for submission of written comments, the TRPA front desk was closed for four of those days.

PLAINTIFF'S STANDING TO SUE

Plaintiff has multiple bases for Art. III and prudential standing. Any one of these bases is sufficient to establish Art. III and prudential standing.

First basis

55. TRPA Compact, Art. I(a), approved by Congress, Nevada and California, characterizes the Tahoe region as follows:

* * *

63. At the hearing on February 23, 2017, Hearing Officer Baetge ruled in favor of granting a Permit for the Project. There was no written decision or explanation from this hearing, and no written findings of fact and conclusions of law. Plaintiff requested a written decision and was informed by Defendant Marshall that there would be none. The ruling of Hearing Officer Baetge was completely arbitrary and without support in the Compact, the Code, the ROP, and the Application File.

64. Plaintiff timely appealed from the decision of Hearing Officer Baetge of February 23, 2017. After the hearing on February 23, 2017, Plaintiff finally had an opportunity to review the Staff Summary and the Application File. Plaintiff filed a detailed 52-page Statement of Appeal.

65. At the hearing on May 24, 2017, the Legal Committee of the TRPA Board Directors unanimously recommended denying plaintiff's appeal.

66. At the hearing on May 24, 2017, the TRPA Board of Directors unanimously denied plaintiff's appeal. There were no oral or written decision or explanation from this hearing, and no written findings of fact and conclusions of law. Plaintiff request [sic] a written decision and was informed by Defendant Marshall that there would be none. The ruling of the Board was completely arbitrary and without support in the Compact, the Code, the ROP and Application File.

67. There was no further appeal possible within TRPA, and Plaintiff brought the present lawsuit.

68. In view of the importance of preserving Lake Tahoe as set forth in TRPA Compact Art. I (a)-(c), Congress, Nevada and California recognized that TRPA might fail or refuse to follow its mandate, and gave "aggrieved persons" private-party standing and also private attorney-general, public standing to bring suit to force TRPA to act as required by law. Compact Art. VI.(b)(3).

69. Compact Art. VI.(j)(3) provides, in relevant part:

> Any aggrieved person may file an action in an appropriate court of the States of California or Nevada or of the United States alleging noncompliance with the provisions of this compact or with an ordinance or regulation of the agency . . . In the case of any person other than a governmental agency who challenges an action of the Tahoe Regional Planning Agency, 'aggrieved person' means any person who has appeared, either in person, through an authorized representative, or in writing, before the agency at an appropriate administrative hearing to register objection to the action which is being challenged, or who had good cause for not making such an appearance.

70. Plaintiff is such an "aggrieved person" who appeared in person and in writing before TRPA's Hearing Officer, Legal Committee, and Board to challenge the action of granting the application for a permit. He was injured in fact by the Hearing Officer having approved the application for Permit, and the Board having denied his appeal, in both instances in violation of TRPA's Compact, Code, and ROP. He was also injured in fact by the construction of the Project in violation of the Compact, Code, ROP and PAS 060.

71. Plaintiff has met the Art. III and prudential standing requirements established by Congress in TRPA Compact Art. VI.(j)(3), because he is an "aggrieved person," authorized by Congress to bring an action to enforce a private right in federal court based upon TRPA's failure to follow the Compact, Code, and ROP, and has suffered the injury in fact of the permit being granted and the construction of the Project, an injury within the zone of interests that the Compact, particularly Compact Art. VI.(j)(3), seeks to protect.

Third basis

72. Plaintiff has a constitutionally protected property interest in the denial of the application for Permit by TRPA for the construction of the Project. The constitutionally protected property interest arises pursuant to the mandatory provisions of each of Compact §§ V.(g) (findings), and VI.(b) (approval); ROP §§ 12.5-12.6 (proper notice "reasonably early in the project review process"); Code §§ 4.1-4.4 (making proper findings); 4.4.1.C (standards shall be attained, maintained, or exceeded pursuant to Article V(d) of the Compact); 21.2.4 (prohibited special uses); 30.1, 30.2, and 30.4.1.C.2.a.ii (land coverage); 37.6-37.7 (structure height); and 68.5.3.B (noise); and PAS 060 (forbidding new uses), all interpreted in light of the relevant

definitions in Code § 90.2. Plaintiff suffered injury in fact to his constitutionally protected property interest by the granting of the Permit contrary to the Compact, the Code, the ROP, and PAS 060. TRPA had no discretion to grant the Permit in light of the mandatory requirements of one or more of these provisions.

73. Additional injury in fact is as stated in the preceding paragraphs, which discussion is incorporated here.

74. Plaintiff has Art. III and prudential standing because his due process rights were violated by TRPA not following each of these provisions, by rejection of his appeal, by granting the application for Permit, and by construction of the Project.

Fourth basis

75. Plaintiff has had a deep, longstanding personal and professional interest for over 25 years in the ecology of the Tahoe Basin, and particularly the lands within Plan Area 060, which largely lies within a National Forest. These interests include, but are not limited to, Plan Area 060's geography, geology, history, historical significance, environment, scenery, flora, fauna, and opportunities for mental serenity and physical exercise. One of the primary reasons that Plaintiff purchased his home in Skyland in 1992 was its proximity to the National Forest, particularly Plan Area 060. The Skyland neighborhood, where Plaintiff's home is located, is directly across highway 50 from the site of the Project, 811 US Highway 50, Douglas County, Nevada; Assessor's Parcel No: 1318-03-000-001; and Plan Area 060, which are easily reached by foot. Additionally, the water tank for Skyland that supplies Plaintiff's home on a daily basis and for emergency fire fighting is in Plan Area 060. The site of

the Project was intentionally selected to be immediately adjacent to the Skyland water tank and poses a safety risk to it.

76. At all times material, the plaintiff was an avid hiker and snowshoer, and since 1992 has used the land in the area of the Project, TRPA Plan Area 060, for personal fitness, recreational, contemplation and nature-study purposes, and to enjoy its opportunities for wildlife, mountain, forest, and Lake Tahoe vistas. For the period 1992 to 2005, Plaintiff estimates that he hiked or snowshoed in Plan Area 060 approximately 250 times each year, in all seasons. For the period 2006 to present, Plaintiff estimates that he hiked in Plan Area 060 about 100 times each year, in all seasons but primarily in spring, summer, and fall. The uses each averaged about 2-3 hours in duration, for a total use of

* * *

defend her methods, content, and conclusions, even when demonstrably contrary to law. It is a also natural human trait for Defendants Baetge and Board to favor and defend members of one's own organization over outsiders such as Plaintiff.

275. After the Staff Summary was prepared based upon incomplete, and in some cases false and misleading information, and was not in compliance with the Compact, Code, ROP, and PAS 060, TRPA defended its noncompliant result against any outsider, and specifically against Plaintiff.

276. The result of the denial of Due Process to Plaintiff during the Project Review Process was that the Hearing Officer, the Legal Committee and the TRPA Board were predisposed to favor the position of Defendant Cornell, and thus the Private-Party Defendants.

277. Plaintiff was denied his due process and equal protection Constitutional rights to fair notice, opportunity to be heard, equal protection of the laws, and decisions by an impartial tribunal.

278. The Permit may not be legally issued or maintained.

279. The conduct of the Defendants has required Plaintiff to engage the services of an attorney to pursue these claims, and Plaintiff is therefore entitled to recover the reasonable value of attorneys fees and services he has incurred, as allowed by 42 U.S.C. § 1988.

280. Plaintiff has suffered damages in an amount to be proven at time of trial.

TWENTY-FOURTH CLAIM FOR RELIEF
(CONSPIRACY AND JOINT ACTION OF TRPA AND THE PRIVATE-PARTY DEFENDANTS TO DENY PLAINTIFF'S DUE PROCESS AND EQUAL PROTECTION RIGHTS)

281. Plaintiff incorporates by reference the other paragraphs of the FAC.

282. The Private-Party Defendants made, and conspired and acted jointly to make, false representations to TRPA that were concealed, so that the Permit for the Project could be obtained directly contrary to the TRPA Compact, Code, ROP, and PAS 060. The Private-Party Defendants also concealed material information from the public and from Plaintiff.

283. When TRPA learned of the false representations, it joined the conspiracy and joint action to deprive Plaintiff of due process and equal protection Constitutional rights by devising, implementing and practicing an approach which did not allow Plaintiff sufficient notice of proceedings that would affect his

life, liberty and/or property; which presented the Staff Summary with numerous errors that impeded Plaintiff's attempts to understand it in time to submit meaningful comments by the deadline date of February 22, 2017; which would fail to follow the law, the Compact, the Code, the ROP, and PAS 060; which would fail to give reasons and explanations for their actions; which would suppress pertinent information; and which would allow those lacking in impartiality to be the ultimate decisionmakers for the Project.

284. As part of the conspiracy and joint action, the Private-Party Defendants presented materially different versions of the same Project to TRPA and to the United States Forest Service. TRPA did not act to investigate and resolve those materially different versions even after Plaintiff informed TRPA about the differences.

285. Defendants further conspired and acted jointly by changing the nature, content and scope of the Permit, without notice to Plaintiff, after it had been approved by the Hearing Officer.

286. One objective of the conspiracy and joint action was to deceive the public, affected property owners, and Plaintiff into believing that the Project conformed to the laws, the Compact, the Code, the ROP, and PAS 060, and to cover up the fact that the Project did not conform to the laws, the Compact, the Code, the ROP, and PAS 060. Another objective was to obtain approval of a Permit for the Project that was illegal under the laws, the Compact, the Code, the ROP, and PAS 060.

287. The Permit may not be legally issued or maintained.

288. The conduct of the Defendants has required Plaintiff to engage the services of an attorney to pursue these claims, and Plaintiff is therefore entitled

to recover the reasonable value of attorneys fees and services he has incurred, as allowed by 42 U.S.C. § 1988.

289. Plaintiff has suffered damages in an amount to be proven at time of trial.

TWENTY-FIFTH CLAIM FOR RELIEF
(GENERAL CONSTITUTIONAL CHALLENGE TO TRPA FAILURE AND REFUSAL TO FOLLOW ITS OWN CODES)

290. Plaintiff incorporates by reference the other paragraphs of the FAC.

291. Defendant TRPA has established a practice whereby it fails and refuses to follow the Constitutions of the United States, California, and Nevada, the law, and its own Compact, Codes, ROP, and plan area statements, the effect of which is to deny those who oppose permit applications rights of Due Process and Equal Protection of law as guaranteed by the Fourteenth Amendment to the United States Constitution, Art. I, § 8(5) of the Nevada Constitution, and Art I, § 7 of the California Constitution.

292. This TRPA practice resulted in injury to Plaintiff by denying him Constitutionally guaranteed rights.

293. This TRPA practice remain in effect, and unless enjoined by the Court will result in future denial of Constitutionally guaranteed rights to plaintiff and others.

294. The Court should enjoin Defendant TRPA from continuing to fail and refuse to follow the Constitutions, the law, and the Compact, Codes, ROP, and other documents such as plans and plan area statements, to avoid future denial of Constitutionally guaranteed rights to plaintiff and others.

TWENTY-SIXTH CLAIM FOR RELIEF
(GENERAL CONSTITUTIONAL CHALLENGE TO TRPA NOTICE PROCEDURES)

295. Plaintiff incorporates by reference the other paragraphs of the FAC.

296. Defendant TRPA refuses to follow notice procedures found in its own Code, specifically the requirement of ROP § 12.6 that "Notice shall be given [to affected property owners] reasonably early in the project review process."

297. Defendant TRPA has also established a set of notice procedures whose effect is to deny affected property owners rights of Due Process and Equal Protection of law as guaranteed by the Fourteenth Amendment to the United States Constitution, Art.

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