

ADDITIONAL LEGAL CONSIDERATION
REGARDING BRAC RECOMMENDATIONS:
CONGRESSIONAL ADD MONEY

In its prior submission, the 152nd Airlift Wing identified certain procedural and substantive legal issues in the Base Realignment and Closure process. Those legal issues included the Constitutional and statutory prohibition against relocating a unit of the National Guard without the approval of the Governor of the state, the statutory violation in failing to involve the Governors and/or the State Adjutant Generals in the decision making process, the violation of the rule that a State Guard must be left with the capacity to respond to local emergencies {as directed by the Supreme Court in the case of Perpich v. Dept of Defense, 496 U.S. 334, 110 S. Ct. 2418 (1990)} and the violation of policy considerations such as the Total Force Concept. Many of those same legal concerns were also raised in the legal opinion prepared by Major Daniel Cowhig, Deputy General Counsel to the Defense Base Closure and Realignment Commission. See Discussion of Legal and Policy Considerations Related to Certain Base Closure and realignment Recommendations, Dan Cowhig, July 14, 2005.

Maj Cowhig pointed out that the “Base Closure Act does not grant the Commission the authority to change how a unit is equipped or organized.” Cowhig opinion, pg. 10. In addition, Maj Cowhig advised the Commission that:

Further, Congress alone is granted the authority by the Constitution to equip the Armed Forces of the United States. Congress did not delegate this power to the Commission through the language of the Base Closure Act. Where Congress has authorized the purchase of certain aircraft with the express purpose of equipping the Air Guard of a particular state or territory, the Commission may not approve any recommendation action that would contravene the intent of Congress.

Cowhig opinion, pages 17-18, emphasis added.

Maj Cowhig has identified that the Constitution specifies the role of Congress *vis a vis* the Executive Branch, and only Congress has the authority to authorize the expenditure of funds to equip the military services. If Congress has specifically directed that funds shall be spent on a particular piece of military equipment, including military equipment owned by a state National Guard unit, it is impermissible for the Executive branch to override that clear Congressional direction. Additionally, Maj Cowhig has highlighted the fact that the Base Closure Act has certain specific statutory responsibilities, and that many of the DoD recommendations exceed the scope of the Base Closure Act.

While Maj Cowhig’s opinion addresses specifically the purchase of aircraft with Congressional add-on money, the same principle applies to the purchase of equipment with Congressional add-on money to be applied to specific aircraft. The airplanes currently belonging to the Nevada Air National Guard have specialized equipment that

has been purchased at the specific direction of Congress with Congressional add-on money.

Since fiscal year 2002, Congress has authorized and directed that \$40,750,000 be spent on specialized equipment for the aircraft belonging to the Nevada Air National Guard.

All 8 of the C-130s belonging to the Nevada Air National Guard are (or will be prior to September 05) installed with APN-241 Low Power Radar. Since FY 2002, Congress authorized and directed that \$5,000,000 be spent for the installation of APN-241 radar on the aircraft belonging to the Nevada Air National Guard. Congress authorized and directed that four of the eight aircraft be installed with Large Aircraft Infrared Counter Measure (LAIRCM) at a cost of \$12,000,000. Congress authorized and directed that \$12,000,000 be spent on Ku Band Antennae and Line of Sight Data links. Finally, Congress authorized and directed that \$750,000 be authorized and spent for dual auto pilot for the C-130s.

The DoD recommendation to relocate the Reno Air National Guard aircraft to another installation, when that aircraft has received equipment as a result of Congressional direction, violates the principle that only Congress has the authority to equip the military.

**PROCEDURAL AND SUBSTANTIVE LEGAL ISSUES
IN THE BRAC PROCESS AND RECOMMENDATIONS**

The BRAC recommendation to relocate the 152AW violates both the specific language, as well as the intent, of the U.S. Constitution, several federal statutes, and the direction of the U.S. Supreme Court. By focusing on federal active duty needs, and ignoring the State role of the National Guard, the Department of Defense failed to acknowledge and recognize the unique, hybrid nature of the National Guard.

1. The United States Constitution and federal statutes.

The National Guard is a hybrid Federal and State organization, and has been since the inception of the country. The United States Constitution states, at Article I, Section 8 (known as the "militia clause"), that the Federal Congress will provide for organizing, arming, and disciplining, the militia, but specifically reserves "...to the state's respectively, the appointment of officers, and the authority of training the Militia according to the discipline prescribed by Congress." In recognition of this constitutional basis that the militia (now National Guard) is a hybrid Federal-State entity, the Federal Congress has passed several statutes to ensure that the Guard is treated in a constitutional fashion, and to ensure that the National Guard can carry out its dual roles of serving as a reserve component of the federal military and as the militia of each state.

One statute recognizes the authority of the Governor on the specific issue of the relocation of Guard units. Title 10 USC 18238 states:

A unit of the Army National Guard of the United States or the Air National Guard of the United States may not be relocated or withdrawn under this chapter without the consent of the Governor of the state or, in the case of the District of Columbia, Commanding General of the National Guard of the District of Columbia.

This plainly worded statute clearly requires that a Governor provide his or her prior consent before relocating a unit of the Air National Guard and would prevent, and in this instance, the relocation of the 152nd Airlift Wing from the State of Nevada. The Governor of Nevada, Kenny Guinn, has expressed his concern about this in a letter to Secretary Rumsfeld, a copy of which is located at Exhibit "___" in this package.

Another federal statute was violated in the BRAC recommendation process. 10 USC Section 10501(b) requires that the National Guard Bureau serve as a "channel of communication" between the Department of the Army and the Department of the Air Force and the several states on matters pertaining to the National Guard. This statute recognizes the dual responsibilities of each state's Guard and is designed to ensure that the interests of each state would be adequately considered and protected. NGB failed to fulfill this statutory responsibility, in that no information on the BRAC process was provided to the Governors of the states (or to the Adjutant Generals of any states) by the Department of Defense during the BRAC recommendation process. This prohibited the states and Governors from being actively involved in the DoD recommendation, contrary to 10 USC 10501(b).

2. The United State Supreme Court.

The U. S. Supreme Court, in the case of *Perpich v. Department of Defense*, 496 U.S. 334, 110 S.Ct. 2418 (1990), also recognized the dual role of the National Guard and the legal right and responsibility of the Governor.

Perpich recognized the Governor's right to veto certain federal training missions if those federal training missions interfered with the state guard's capacity to respond to local emergencies. Sections (b) and (d) of 10 USC 12301 prohibit the Secretary of Defense from ordering "units and members of the Army National Guard of the United States or the Air National Guard of the United States" to active duty "without the consent of the governor of the State...". The Montgomery Amendment {now codified at 10 USC 12301(f)} was passed by Congress to allow state guard soldiers and airmen to train overseas without obtaining the consent of the Governor. The Montgomery Amendment states:

The consent of a Governor described in subsections (b) and (d) may not be withheld (in whole or in part) with regard to active duty outside the United States, its territories, and its possessions, because of any objection to the location, purpose, type, or schedule of such active duty.

While the U.S. Supreme Court upheld the Montgomery Amendment in the *Perpich* case, the Court recognized that the Amendment only deprived the Governor of certain veto powers, while the Governor retained the rest. The Court upheld this Amendment because of its narrow application, and the fact that depriving the Governor of these specific veto powers would not effect the Governor's ability to respond to local emergencies. The Supreme Court stated that a Governor retains the veto power if federal training missions substantially impact the Governor's ability to respond to local emergencies. The U. S. Supreme Court stated:

The Minnesota Unit, which includes about 13,000 members, is affected only slightly when a few dozen, or at most a few hundred, soldiers are ordered into active service for brief periods of time. Neither the state's basic training responsibility, nor its ability to rely on its guard and state emergency situations is significantly effected. Indeed, if the federal training mission were to interfere with the state guard's capacity to respond to local emergencies, the Montgomery Amendment would permit the Governor to veto the proposed mission.

Perpich at 351 (emphasis added).

The Supreme Court has clearly stated that a state guard must be left with the capacity to respond to local emergencies. In this case, the complete removal of any air lift capacity for the State of Nevada has a drastic effect on the Governor's ability to respond to local emergencies (as argued elsewhere in this document). Thus, the BRAC's recommendation to relocate the only Air Guard Wing in Nevada violates the *Perpich* case.

3. Policy Considerations.

This particular BRAC recommendation also violates the 1973 Total Force Policy issued during Secretary of Defense Melvin Laird's term. That Total Force Policy was designed to involve a large portion of the American public by mobilizing the National Guard from its thousands of locations throughout the United States when needed. The Total Force Policy required that all active and reserve military organizations of the United States be treated as a single integrated force. The benefit of the Total Force Policy approach is to permit elected officials to have a better sense of public support or opposition to any major military operation. The Total Force Policy follows the intentions of the founding fathers for a small standing army complemented by citizen-soldiers. Again, the recommendation of BRAC that removes the entire airlift capacity of an entire state violates the Total Force Policy, a policy which has never been retracted.

4. Summary.

The DoD recommendation to eliminate all Air National Guard aircraft from the State of Nevada is contrary to the historical role of the National Guard as a hybrid state/federal entity. DoD failed to involve the State of Nevada in the process of making its recommendation (as is expected by 10 USC 10501), and this failure led to the DoD ignoring the Constitutional and statutory role of the State. The requirement of obtaining the consent of the Governor (as required by 10 USC 18238) was by-passed. By removing all Air Guard airlift capacity from the State of Nevada, the DoD recommendation inhibits the Governor of the State of Nevada from carrying out his responsibility to respond to local emergencies (contrary to the direction of the U.S. Supreme Court as revealed in the *Perpich* case).

Finally, Congress has recognized the importance of maintaining the strength of the National Guard. 32 USC 102 states, in part:

In accordance with the traditional military policy of the United States, it is essential that the strength and organization of the Army National Guard and the Air National Guard as an integral part of the first line defenses of the United States be maintained and assured at all times.

The DoD recommendation to eliminate all Air National Guard aircraft from the State of Nevada clearly effects the strength and ability of the Nevada Air National Guard to be an integral part of the first line defenses of the United States.



OFFICE OF THE GOVERNOR

KENNY C. GUINN
Governor

June 2, 2005

The Honorable Donald Rumsfeld, Secretary
Department of Defense
1000 Defense, The Pentagon
Washington, D. C. 20301-1000

Dear Secretary Rumsfeld:

The Department of Defense recommendations for the 2005 Base Realignment and Closure (BRAC) process included a recommendation to relocate the eight C-130 aircraft from the Nevada Air National Guard shutting down the 152nd Operations Support Flight, the 152nd Maintenance Group, the 152nd Aircraft Generation Squadron, the 152nd Maintenance Squadron, the 152nd Aerial Port Flight, and the firefighters associated with the 152nd Civil Engineering Squadron.

I am writing to advise you that as Governor of Nevada, I have great concern with the relocation of these units and federal law may prohibit the relocation of units of the Air National Guard without consent of the governor of the state. This is clearly outlined in Title 10, United States Code as follows:

Title 10 USC 18238:

"A unit of the Army National Guard of the United States or the Air National Guard of the United States may not be relocated or withdrawn under this chapter without the consent of the governor of the state or, in the case of the District of Columbia, the commanding general of the National Guard of the District of Columbia."

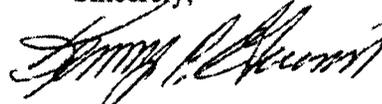
The recommended relocation of the units has not been coordinated with me, my Adjutant General or members of his staff. No one in authority in the Nevada Air National Guard had been consulted or even briefed about this recommended action before it was announced publicly. Further, the impact on homeland security appears to have been completely absent from recommendation by the Department of Defense.

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The Honorable Donald Rumsfeld
June 2, 2005
Page Two

Mr. Secretary, the recommended relocation of the units appears to be the result of a seriously flawed process that has completely overlooked the important role of the states with regard to their Air National Guard units, both in terms of the military and homeland defense.

Sincerely,



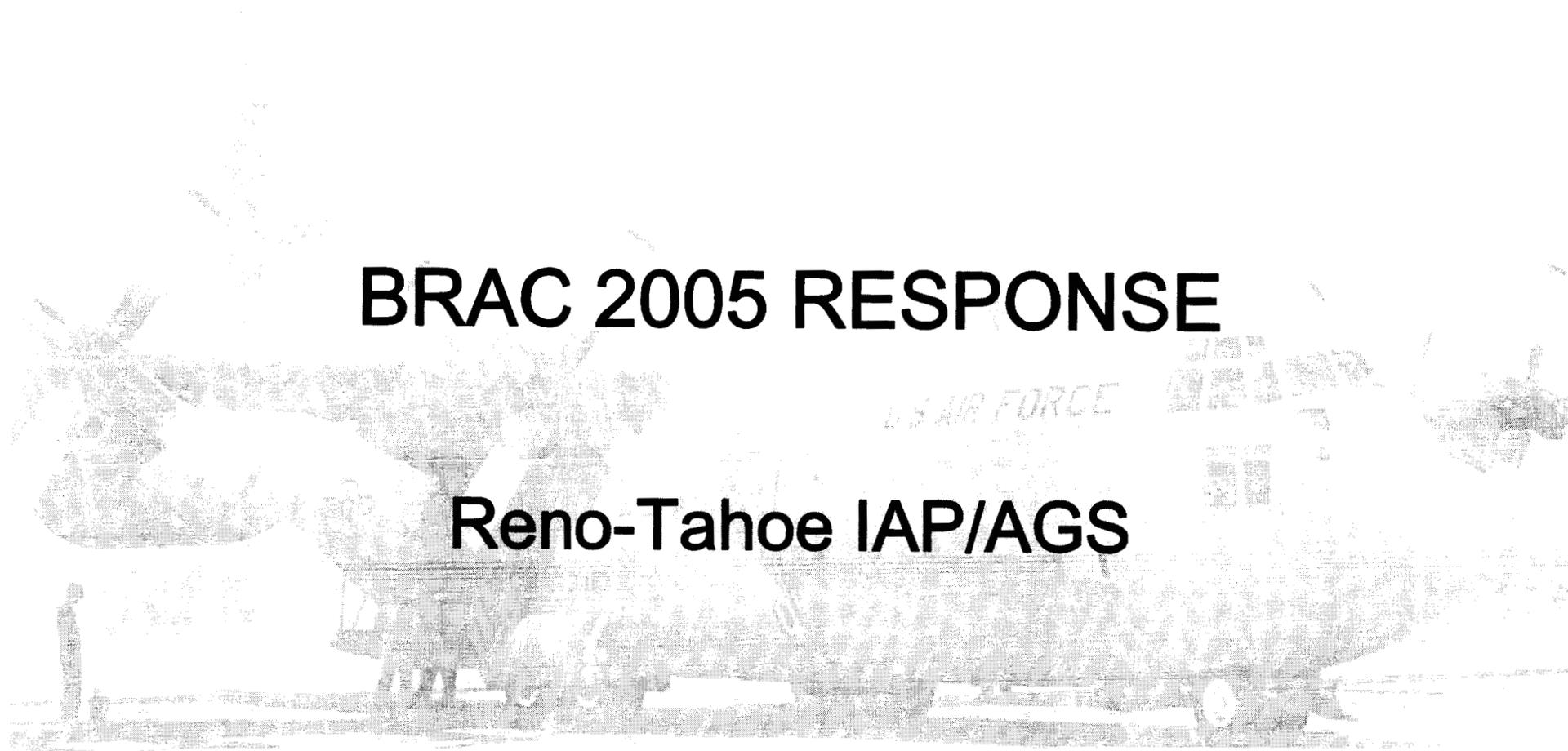
KENNY C. GUINN
Governor

SR:sc

cc: BRAC Commission Members as follows:
Anthony J. Principi
James H. Bilbray
Philip Coyle
Admiral Harold W. Gehman, Jr. USN (Ret.)
James V. Hansen
General James T. Hill, USA (Ret.)
General Lloyd Warren Newton, USA (Ret.)
Samuel Knox Skinner
Brigadier General Sue Ellen Turner, USAF (Ret.)
Major General Giles E. Vanderhoof, The Adjutant General
Nevada Office of the Military

BRAC 2005 RESPONSE

Reno-Tahoe IAP/AGS





U.S. AIR FORCE

OVERVIEW



- Reno's Recalculation
- Unique Missions
- Costs
- Legal Opinion
- Recruiting
- Homeland Defense/Security



U.S. AIR FORCE

Re-calculation of Reno-Tahoe IAP/AGS Military Capability Index



- **Current and Future Missions (46%)**
 - MCI increase of 9.79
 - DZ/LZ
 - Low-level mission
- **Condition of Infrastructure (41.5%)**
 - Increase of 1.83
 - Airspace Attributes of DZ/LZ
- **Contingency/Mobilization/Future Forces (10%)**
 - Increase of .01
 - Build-able Acres for Air Ops Growth
- **Summary: MCI 52.51 and Military Value of 46**



U.S. AIR FORCE

Unique Mission Capabilities Scathe View, Senior Scout, Fire Fighting



- The Scathe View mission is a capability that provides a live television picture and direct communication to the soldiers on the ground. The 152nd AW is the only SV unit in the Air Force.
- Senior Scout is a signals collection capability unique to the Air National Guard.
- Scathe View used in support of fire fighting efforts is a unique application of a military capability used to support a state and regional mission.



U.S. AIR FORCE

Cost Issues

DCN 12462



- Eliminating the entire aviation element at Reno-Tahoe IAP/AGS incurs unaddressed costs of \$96M in 2005 dollars over a 20 year period.
- Significant departure from DoD's purported cost savings of \$22.7M over the same period.
- Other unidentified costs result from re-aligning the Aerial Port Flight and the Base Fire Department also incurred.

**U.S. AIR FORCE**

Procedural and Substantive Legal Issues in the BRAC Process and Recommendations



The DoD/Air Force recommendation to relocate the 152AW violates:

- the U.S. Constitution
- several federal statutes
- the direction of the U.S. Supreme Court

By focusing on federal active duty needs and ignoring the state role of the National Guard, the Department of Defense failed to acknowledge and recognize the unique, hybrid nature of the National Guard.

**U.S. AIR FORCE**

Procedural and Substantive Legal Issues in the BRAC Process and Recommendations



Neither the Governor of Nevada, nor the Adjutant General of Nevada was consulted with regard to the DoD/Air Force recommendation to realign the Reno-Tahoe IAP/AGS.

- See Governor's letter**
- See legal opinion Nevada Staff Judge Advocate**



U.S. AIR FORCE

Procedural and Substantive Legal Issues in the BRAC Process and Recommendations



DCN 12462

-
- Nevada Air National Guard modified its C-130 aircraft using Congressional adds to support assigned missions of airlift and Scathe View.
- LAIRCM (Large Aircraft Infrared Counter Measure)
- \$12 million
- AN-241 low-power radar - \$5 million
 - Ku-Band antennae and line-of-site data links
- \$12 million
 - Dual auto-pilot (unique in the C-130 fleet)
- \$750 thousand
- **Total: \$29,750,000**



U.S. AIR FORCE



Recruiting

BRAC Principle #1: Recruiting and Retention

- The Nevada Air National Guard has manning to meet all current mission requirements and the ability to recruit to 12 or 16 aircraft.
- Additionally, Nevada Air Guard is the only C-130 Guard unit west of the Mississippi to meet the 97% manning threshold set by the National Guard Bureau.
- Negative Impact on Recruiting and Retention already demonstrated.

**U.S. AIR FORCE**

Recruiting cont.

- The average experience level of the personnel in the 152 AW affected by the DoD/Air Force recommendation is 13.7 years.
- A dilution or outright loss of this experience as a result of the DoD/Air Force recommendations would be unrecoverable.

**U.S. AIR FORCE**

Homeland Security/Defense Issues



**National Security Strategy: Homeland Defense
nation's number one priority.**

- **DoD/Air Force calculations did not address Nevada's unique requirements and location for homeland defense.**
- **Eliminating C-130s from this state absolutely cripples its ability to respond to any large-scale emergency.**
- **Geographically large state: annual flooding, large-scale wildfires, lies on major fault lines, the largest dam in the nation, a unique tourist destination, special consideration must be given to Nevada.**



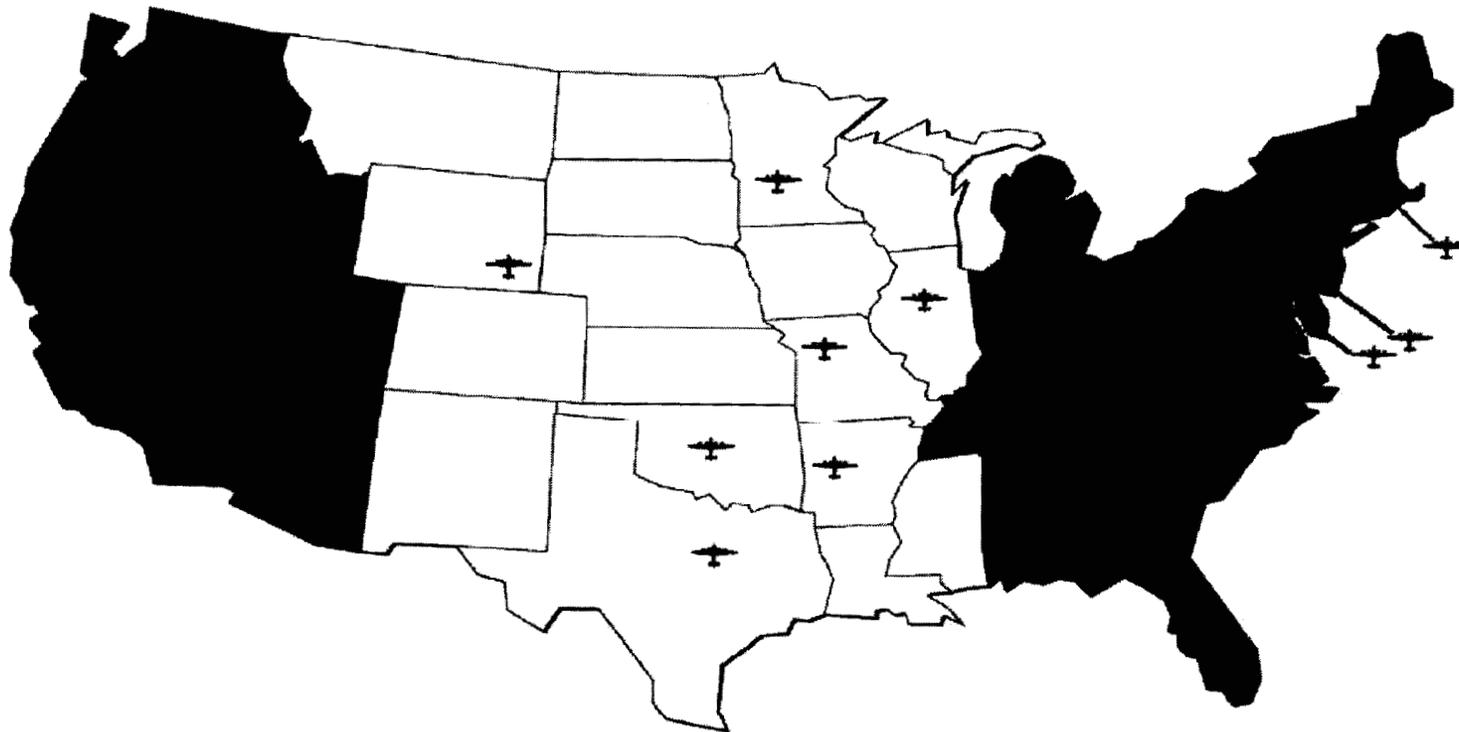
ACTUAL LAND SIZE OF NEVADA



U.S. AIR FORCE



**PRE-BRAC DISTRIBUTION OF
AIR NATIONAL GUARD
C-130 AIRLIFT AIRCRAFT**

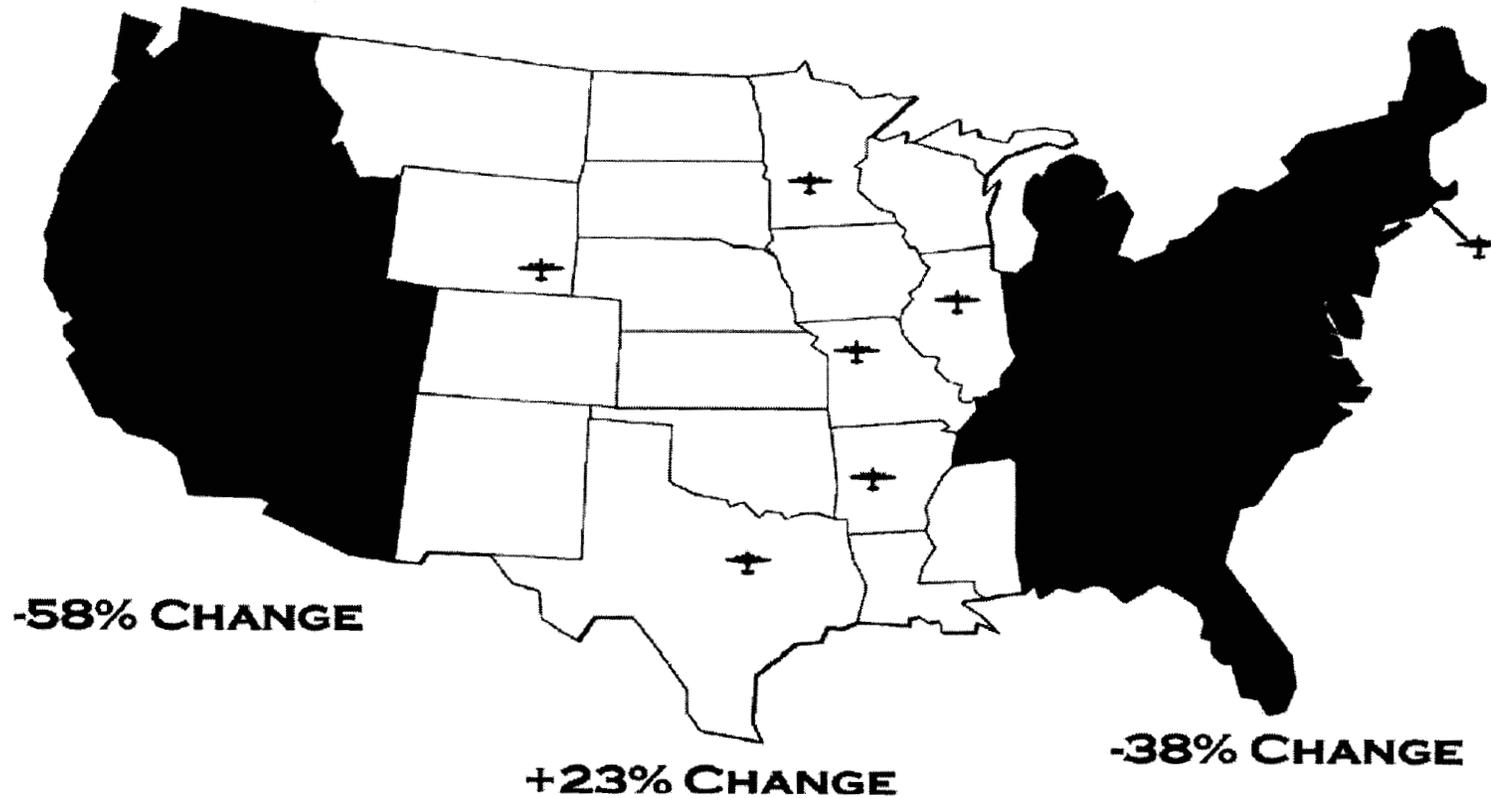




U.S. AIR FORCE



**POST-BRAC DISTRIBUTION OF
AIR NATIONAL GUARD
C-130 AIRLIFT AIRCRAFT**



152 Airlift Wing/Nevada Air National Guard

**Thank you for your time.
Questions?**

