

Office of  
LEGISLATIVE AUDITOR GENERAL  
State of Utah



**REPORT NUMBER 2004-08**  
**October 2004**

**A Review of  
Constitutional Defense Fund Expenditures  
and Administrative Controls**

Overall, the Constitutional Defense Fund (the Fund) appears to be utilized as directed by the state legislature. Most of the Fund's money has been appropriated to the RS-2477 Rights-of-way account within the Governor's office. Based on a limited review of this account, most expenditures appear in line with legislative intent. In fact, of the account expenditures reviewed, just a little over \$62,000 appears questionable. However, there have been problems with both the level of information exchange and the administrative control exercised by the Governor's office in its oversight of account expenditures. Consequently, many questions and concerns exist over how RS-2477 Right-of-way account monies are being spent. In our opinion, the Governor's office needs to provide detailed financial information to address these concerns.

In addition, based on available documentation, the Constitutional Defense Council (the Council) may not have met on a quarterly basis as required by statute. Further, minutes of all Council meetings have not been maintained as required by the Utah Open and Public Meetings Act. Resolution of these problems appears to be taking place, however, with the recent change in administrations.

This review was approved and prioritized by the Legislative Audit Subcommittee based on a request by Representative Jack Seitz. The

primary purpose of the review is to provide information on two questions:

- Have expenditures made from Constitutional Defense Fund appropriations met legislative intent?
- Has the Constitutional Defense Council held meetings as required by the Utah Code?

### **Most Expenditures Follow Legislative Intent**

Constitutional Defense Fund appropriations have followed legislative intent. Specifically, the vast majority of the appropriations have been placed in the RS-2477 Rights-of-way account held within the Governor's office. (*For a summary of the RS-2477 issue, see Appendix A.*) Based on a limited review, most expenditures made from the RS-2477 Rights-of-way account also appear reasonable given legislative intent. However, we did identify approximately \$62,000 in fiscal year 2003 expenditures which are questionable.

### **Fund Appropriations Comply with Legislative Intent**

Approximately 98 percent of the Fund's appropriations have been placed within the RS-2477 Rights-of-way account held within the Governor's office. This appropriation is specifically allowed by the **Utah Code**.

In fiscal year 2000, the Legislature established the Constitutional Defense Restricted Account, also called the Constitutional Defense Fund. The Fund was to serve as a source of money for the Constitutional Defense Council's activities. This Council is an advisory council to the Governor and the Legislature on states' rights issues. Money allocated to the Fund comes annually from Mineral Lease and Mineral Bonus Funds. Interest generated by the Fund is not kept by the Fund but is directed into the state's General Fund.

According to statute, the Legislature may appropriate money from the Fund to

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**Approximately \$6.7 million of the Fund's appropriations have been placed within the RS-2477 account.**

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- the Council to carry out its duties,
- the Governor’s office for the purpose of asserting, defending, or litigating state and local government rights under RS-2477 according to a plan approved by the Council and/or
- the counties to pursue issues affecting the counties and within the purpose of the council.

Figure 1 identifies overall Constitutional Defense Fund activity from fiscal year 2001 through 2004.

**Figure 1. Activity within the Constitutional Defense Fund for Fiscal Years 2001 Through 2004.**

Fiscal Year	Allocation from Mineral Lease/Bonus	RS-2477 Legislative Appropriation	Other Legislative Appropriations	Ending Balance
2001	\$ 2,270,375	\$ 1,692,800	---	\$ 577,575
2002	2,563,802	1,105,000	\$ 100,000*	1,936,376
2003	1,813,405	2,000,000	---	1,749,782
2004	702,805***	1,880,000	120,000**	452,587
<b>Total</b>	<b>\$ 7,350,387</b>	<b>\$ 6,677,800</b>	<b>\$ 220,000</b>	

\* The Department of Community and Economic Development received \$100,000 to be provided the Association of Counties to offset legal costs.  
 \*\* The Attorney General’s office received \$120,000 for public lands litigation other than RS-2477.  
 \*\*\* Due to the expiration and non-renewal of a five-year coal lease, the Mineral Bonus Account only provided \$20,000 to the Fund in 2004. Previously the Bonus account had provided amounts close to \$1 million.

Since 2001, almost all the money appropriated (approximately \$6.7 million) has been placed in the RS-2477 Rights-of-way account held within the Governor’s office. Thus, in addressing the question of whether expenditures have met legislative intent, activity within the RS-2477 Rights-of-way account was reviewed.

**Most RS-2477 Rights-of-way Expenditures Appear Reasonable**

Overall, the expenditures in fiscal years 2002 and 2003 appear consistent with legislative intent. Specifically, the expenditures reviewed

The Utah Code and an RS-2477 plan developed by the Association of Counties and the state define appropriate RS-2477 expenditures.

appear in line with moving the state forward in its ability to assert, defend, and litigate state and local RS-2477 rights.

By statute, money placed within the RS-2477 Rights-of-way account is for asserting, defending and litigating RS-2477 Rights-of-way according to a plan developed jointly by the Association of Counties and the state and approved by the Council. According to the May 2000 approved Plan for RS-2477 Rights (the Plan):

*Funds appropriated by the Legislature to the Office of the Governor for this effort are for the legal and support expenses of the state and participating counties. Using these funds, the Office of the Governor will provide office space, equipment, and other necessary facilities for the legal counsel and their salaries or hourly rates; expert and other witness fees; and other necessary legal expenditures consistent with this plan and within available budget.*

In short, this plan allows for the support of an office of attorneys plus other expenditures that support asserting, defending, and litigating state and local government rights under RS-2477.

While the Fund has supplied money to the RS-2477 Rights-of-way account since fiscal year 2001, the Governor's office reported revenues and expenditures within this account beginning in fiscal year 2000. Figure 2 identifies total revenue, total expenses, and year-end balances for fiscal years 2000 through 2004.

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**Essentially, the RS-2477 Plan allows for the support of an office of attorneys.**

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**Figure 2. Historical Activity within RS-2477 Rights-of-way Account.**

Fiscal Year	Total Revenue	Total Expenses	Year-end Balance
2000	\$ 327,617*	\$ 20,405	\$ 307,212
2001	1,752,800**	1,233,269	826,743
2002	2,000,000***	1,795,188	1,031,555
2003	2,000,000	1,865,699	1,165,856
2004	1,880,000	746,688	2,299,168

\* Revenue source reported as Mineral Bonus Fund by Governor's Office.

\*\* In addition to the 2001 appropriation from the Fund, a \$60,000 revenue transfer from the Department of Natural Resources was reported.

\*\*\* The General Fund supplied \$895,000 to the RS-2477 effort in addition to the appropriation from the Constitutional Defense Fund.

We reviewed in more detail RS-2477 expenditures for fiscal years 2002 and 2003. Based on this review, we believe that most expenditures reasonably relate to legislative intent as defined by the May 2000 Plan for RS-2477 Rights.

Figure 3 shows, by broad categories, how RS-2477 Rights-of-way funds have been spent in fiscal years 2002 and 2003.

**Figure 3. Expenditures from the RS-2477 Rights-of-way Account by General Expenditure Categories for Fiscal Years 2002 and 2003.**

Expenditure Category	Fiscal Year 2002	Fiscal Year 2003
Wages and Benefits	\$ 408,200	\$ 432,054
In-state Travel	5,085	2,331
Out-state Travel	11,430	16,077
Mapping/Data Gathering	1, 237,131	1,125,545
Consultants	53,178	55,512
Office Expense	25,175	14,466
DP Equipment under \$5000	29,015	4,949
DP Services and Maintenance	25,974	18,770
DP Capital Equipment	0	195,995
<b>Total Expenditures</b>	<b>\$ 1,795,188</b>	<b>\$ 1,865,699</b>

*To maintain comparative consistency between years, a service provider's expense was always reported in the same category. For example, Automated Geographic Reference Center (AGRC) expenses are consistently reported here within mapping/data gathering. The Governor's office did not always report expenditures in this way.*

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**A few RS-2477 account expenditures were related to public lands litigation rather than RS-2477.**

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For our analysis, we focused on the areas of mapping/data gathering, wages and benefits, consultants and out-of-state travel because these categories contain the areas of concern reported by legislators and other interested parties. Further, these categories account for 95 and 87 percent of total expenditures in fiscal years 2002 and 2003, respectively.

We noticed a few expenditures which were related to public lands litigation other than RS-2477 (e.g., wilderness re-inventory, gas and mining issues on federal land). While these expenses are relevant issues and expenditures for the Council, they are not RS-2477 expenses and, thus, are questionable charges in the RS-2477 Rights-of-way account. Either a new account should be created through which these expenses can be charged or the intent of the RS- 2477 account should be broadened to include other public lands issues.

**Most Mapping and Data Gathering Expenditures Appear Reasonable.** The expenditures in this category are devoted to documenting, throughout the state, the existence and historical use of roads prior to 1976, mapping the specifics of each road (e.g., its center line, its width from the center line, its specific contours, its surface qualities, etc.), and then putting the information in a computerized form that can be presented in court. Our review of these expenditures found one \$2,940 consulting expenditure that was questionable in terms of legislative intent. This expense will be discussed later. The remainder of the expenditures appeared reasonable. For more detail on these expenditures and the consultants involved see Appendix B.

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The RS-2477 Plan allows for the payment of legal salaries as well as other support expenses.

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**Wage and Benefit Expenditures Generally Appear Reasonable.** The expenditures in the wages and benefits category cover the attorneys performing RS-2477 work and some support staff ( i.e., one paralegal, 5 part-time law clerks and 2 part-time non-attorney staff). The attorneys were primarily focused on RS-2477 efforts. However, some work on public lands litigation issues other than RS-2477 was also reported. The paralegal/office manager and the non-attorney staff provided support to the attorneys while the law clerks traveled throughout the state gathering historical data on road use.

These expenditures generally appeared reasonable in terms of legislative intent. The RS-2477 Plan specifically allows payment for legal salaries and other support expenses. For more detail on wage and benefit expenditures and the number of employees involved see Appendix C.

**Fiscal Year 2002 Consulting Expenditures Appear Reasonable.** The expenditures within the consulting category for fiscal year 2002 were primarily for the consulting services of two attorneys. Both attorneys had experience in public lands issues and were specifically identified in the RS-2477 Plan as counsel that would be used in the RS-2477 effort. In fiscal year 2003, most of the money went to a consultant who performed work on the San Rafael Monument issue. We do have a concern with this expenditure and will discuss it later.

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Most out-of-state travel reviewed was to Washington, DC to negotiate new RS-2477 policies.

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**Most Out-of-state Travel Appears Reasonable.** In fiscal year 2002, travel expenditures totaling \$8,800 were reviewed. These expenditures covered five trips made to Washington, DC, for the purpose of negotiating new RS-2477 policies with the Department of Interior.

For fiscal year 2003, travel expenditures totaling \$13,400 were reviewed. Again, five trips were made to Washington, DC, at a cost of \$5,775. Three of the trips were made to negotiate an RS-2477 Memorandum of Understanding (MOU) with the Department of Interior while the other two were made to support litigation efforts on other public lands issues. The latter two trips which cost \$1,900 appear questionable in terms of legislative intent specific to the RS-2477 Rights-of-way account.

Also questionable are \$3,500 paid for five trips made from Boston to Salt Lake City by the San Rafael Monument consultant and \$4,100 paid for two undocumented trips made in the state plane by the former governor and his staff. These expenditures are discussed in the next section.

### **Some Fiscal Year 2003 Expenditures Are Questionable**

Given legislative intent, a little over \$62,000 of fiscal year 2003 expenditures are questionable. Specifically questioned are \$53,500 spent on the San Rafael Monument Study, \$4,800 spent on various public lands issues, and \$4,100 spent on two trips by the Governor for an undocumented reason. It is not clear that these expenditures were focused on asserting, defending and litigating state and local government rights under RS-2477.

**San Rafael Monument Expenditures Are Questionable.** The Utah Code and the approved RS-2477 plan require that money within the RS-2477 Rights-of-way account be used for the purpose of asserting, defending and litigating state and local government rights under RS-2477. However, this was not the purpose of the San Rafael Monument Study. Instead, this study was essentially a public opinion study regarding the establishment of some type of monument in the San Rafael area. Nonetheless, representatives of the Governor's office believe payment from the RS-2477 account was appropriate because the ultimate creation of a San Rafael Monument could have resolved some RS-2477 road issues within the San Rafael area. While part of the study was done, completion became unnecessary when Emery County voters rejected the monument idea in November 2002.

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**The purpose of the San Rafael Monument Study was not to assert, defend, or litigate RS-2477 rights.**

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The 2003 Legislature did designate \$50,000 of the funds appropriated for RS-2477 Rights-of-way to be used for the San Rafael study. However, this appropriation language appears in conflict with the **Utah Code** and the approved RS-2477 plan. The consultant's work to study the monument was performed in August and September 2002. Approximately six months after the work was completed, the Legislature appropriated \$50,000 to cover the costs of the study. However, when the \$3,500 of travel expense is included, the total cost of the San Rafael Monument study exceeded the authorized amount of \$50,000.

Finally, we are concerned that this study was performed without a contract in place. It is our understanding that the study had several components and may have had a total projected cost of over \$200,000. In spite of this, no contract was in place outlining the scope of the work, the cost of each study component, the time-frame under which each component would be completed and what the final work product would be.

**Public Lands Expenditures Are Questionable.** Expenditures totaling a little over \$4,800 were identified in fiscal year 2003 as concerning public lands issues which were not RS-2477 related. Specifically, a \$2,940 consulting expenditure was made which involved the possible re-inventory of federal lands within Utah while two out-of-state trip expenditures totaling \$1,900 were made to support lawsuits involving use of federal land within Utah. According to the attorney involved, none of these three expenditures were made to assert, defend and litigate state and local RS-2477 rights.

**Two Travel Expenses Lack Documentation.** Two charges totaling \$4,100 were made against the RS-2477 account. However, the purpose of two trips taken by the governor, the governor's chief of staff and the governor's communication's deputy in the state plane was not documented.

The first trip went from Salt Lake to Santa Monica to Phoenix and then back to Salt Lake. The second trip, made the next day, went from Salt Lake to Phoenix to Denver and then back to Salt Lake. While the purpose of these two trips was not stated on the travel forms, there is a note indicating that the governor's chief counsel approved these two trips as RS-2477 Rights-of-way expenditures.

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**Two trips taken by the former governor and two staff are not documented as to their purpose.**

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Later, staff from the Governor's office indicated that these trips were for public relations relating to the Memorandum of Understanding (MOU) negotiated by the governor and the Secretary of the Department of Interior. This MOU defined a new administrative process through which RS-2477 issues could be resolved. The MOU was publically signed on April 9, 2003 and the two trips in question occurred on April 7<sup>th</sup> and 8<sup>th</sup>.

While the vast majority of expenditures reviewed appear consistent with legislative intent, it is still the case that expenditure concerns and questions exist. In fact, these questions and concerns are what lead to this review. Had the provision of RS-2477 expenditure information from the state to the counties been adequate, we believe this review would not have been requested.

## **Sharing of Financial Information Can Improve**

According to a former RS-2477 managing attorney as well as Utah Association of Counties' staff, summary financial information provided by the Governor's office has not been adequate to address county needs and concerns. The counties want specific monthly transaction data that identifies what was paid, to whom it was paid, and for what purpose. Since the counties and the state are equal partners in this RS-2477 effort, their request for detailed expenditure information seems reasonable and necessary.

### **Inequity Has Hindered Sharing of Information**

The RS-2477 plan identifies the state and the counties as equal partners. However, the Plan's vision of an equal partnership is difficult to actualize. In particular, the RS-2477 Rights-of-way account is, by statute, located in the Governor's Office. Further, the Plan establishes that the Governor's Office is responsible for RS-2477 accounting.

The Plan for RS-2477 Rights states the following:

*This plan provides for a good faith, cooperative effort and an equal partnership between the state and each participating county in*

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**The state and the counties are equal partners in the RS-2477 effort.**

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*determining litigation strategy and the expenditure of resources with respect to that county's rights under RS-2477. The equal partnership is implemented through the attorney-client relationship, the contractual commitments of full disclosure and confidentiality, and the coordination through the Statewide Strategy Committee.*

*The Office of the Governor retains responsibility for accounting for funds appropriated by the Legislature. Counsel will review the complete budget, including expenditure and other resource allocations, with the state and the counties on a regular basis. All participating counties and the state will have access to financial and other records of the effort, subject to the constraints of maintaining confidentiality.*

The Plan does not specifically lay out the level of expenditure detail that should be provided to counsel and to the counties. However, a former RS-2477 managing attorney reported that he and the county client were both dissatisfied with the financial detail that was provided by the Governor's office.

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**A former RS-2477 attorney reported that he and the counties were dissatisfied with financial detail provided by the Governor's office.**

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This attorney reported that he met with the county clients on a monthly basis, and for these meetings the Governor's Office would provide summary expenditure data. The attorney and the counties had difficulty using the provided information because it lacked detail—a point reiterated by the Utah Association of Counties' staff. This former RS-2477 attorney indicated that while he and the counties would request detailed transaction expenditures, it never seemed to come—another point reiterated by the Utah Association of Counties' staff. As a result, the former managing attorney believed he was unable to adequately review expenditure data with his county clients. According to an attorney currently involved in the RS-2477 effort, lack of detailed RS-2477 expenditure data continues today.

### **Expenditure Control Can Be Improved**

In order to comply with the spirit of the Plan—that of client equality—the Governor's office could provide detailed financial information to the managing RS-2477 attorney. In providing this information, the managing RS-2477 attorney could ensure that both his clients, the state and the counties, have equal and full knowledge of RS-2477 expenditures.

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**The managing RS-2477 attorney should be well versed in the RS-2477 budget and actual expenditures.**

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Some of the lack of expenditure controls may be attributed to the Plan not specifically addressing budgeting procedures. Currently, the Fund's budget is developed by the Governor's Office with little input from the counties or the managing RS-2477 attorney. Including the RS-2477 managing attorney in the budgeting process may alleviate some of the counties' concerns and would better fit the Plan's directive.

The Plan states that the attorney will review the complete budget with both clients (the state and the counties) on a regular basis. This directive can only be attained if the attorney is well versed on the complete budget and actual expenditures. However, a former RS-2477 managing attorney stated that he was not included in the budgeting process and, as a result, was unaware of any budgeting specifics. An attorney currently involved in the RS-2477 effort indicated that this condition is unchanged.

In addition to expenditure concerns, legislative concern was also fueled by the former governor's resistance to convene the Constitutional Defense Council. The **Utah Code** required that the Council meet at least quarterly, and we were asked to determine compliance.

### **Documentation of Council Meetings Is Poor**

The Constitutional Defense Council (the Council) does not appear to have met quarterly as required by the **Utah Code**. Further, detailed meeting minutes of all closed Constitutional Defense Council sessions are not available as required by the Utah Open and Public Meetings Act.

The 2000 Legislature amended **Utah Code** 63C-4-101 (5)(a) to require the Constitutional Defense Council to meet at least quarterly or more frequently as needed. This amendment was made in an effort by the Legislature and the counties to insure the Council met on a regular basis, a concern because the former governor appeared resistant to convening the Council. Although the Council was created in fiscal year 1995, the former governor did not convene the Council until fiscal year 2000— five years later. While four meetings were held in fiscal year 2000, the Council had actually agreed to meet monthly. This regularity, however, did not happen.

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**Council meeting minutes do not exist between the time periods of August 2001 and October 2002.**

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Thus, beginning in fiscal year 2001, the Council was required to meet on a quarterly basis. Based on the meeting minutes maintained by the Attorney General's Office, which provides staff for the Council, the Constitutional Defense Council has not met quarterly as required by the **Utah Code**. In fiscal year 2001, meeting minutes exist for only three meetings while in fiscal years 2002 and 2003, meeting minutes exist for one and three meetings, respectively. In fact, meeting minutes do not exist between the time periods of August 9, 2001 and October 28, 2002.

It is possible that the Council actually met more often than is documented. However, if this is the case, then the Council would be out of compliance with the Utah Open and Public Meetings Act. This act requires minutes, either written or recorded, to be kept of all open meetings.

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**Meeting minutes were only found for three of eight known closed meetings.**

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In addition, the Utah Open and Public Meetings Act requires in section 52-4-7.5(2)(a) that detailed meeting minutes, either written or taped, be kept of all closed meetings. The Council often closes a portion of its open meeting but was unable to provide evidence of minutes for all its closed meetings. For the documented Constitutional Defense Council open meetings, we noted eight times in which the Council closed a portion of the meeting to discuss litigation, but documentation for what was discussed was only provided for three of these meetings (38 percent).

Based on minutes provided, it appears the Council was not convened quarterly as required by the **Utah Code** and that meeting minutes were not kept of all closed sessions, again as required by the **Utah Code**.

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**Counties view the current administration as more receptive to the mission of the Council.**

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We did note that the current administration is viewed as being much more receptive to the mission of the Constitutional Defense Council. Both an involved RS-2477 attorney and a Utah Association of Counties representative made positive statements about the current frequency of meetings and also noted the increased quality of the Council meetings. Specifically, meetings were described as being substantive with input solicited from all members. Thus, this particular issue appears to be in the process of resolution.

## Recommendations

1. We recommend that only expenditures which meet legislative intent as stated in the **Utah Code** and the RS-2477 Plan be charged to the RS-2477 Rights-of-way account.
2. We recommend that the managing RS-2477 attorney and representatives from both the state and the counties identify
  - all financial statements which should be generated by the Governor's office,
  - the level of detail for each financial statement, and
  - the reporting schedule for each statement.

At a minimum, this financial information should be provided to the managing RS-2477 attorney to enable Plan requirements to be met.

3. We recommend that the RS-2477 Plan be amended to outline RS-2477 budgeting procedures which would maintain an equal partnership between the state and the counties and allow Plan requirements of the managing RS-2477 attorney to be met.
4. We recommend that the Constitutional Defense Council insure that meeting minutes of both open and closed meetings are maintained as required by the Utah Open and Public Meetings Act.
5. We recommend that the Constitutional Defense Council be convened as required by the **Utah Code**.

## **Appendices**

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## **Appendix A**

### **Summary of RS-2477**

Revised Statute 2477 (RS-2477) was made a federal law in 1873 and, in essence, granted rights-of-way for the construction of highways over unreserved federal lands. RS-2477 was repealed in 1976 and replaced by the Federal Land Policy and Management Act (FLPMA). However, any RS-2477 right-of-way which existed before 1976 was not affected.

The rights which are conveyed under RS-2477 and FLPMA are different in at least one significant way. An RS-2477 right is an ownership right whereas a right under FLPMA is not.

An established RS-2477 right-of-way is a vested property right. As such, it is an ownership right that comes with an associated bundle of rights such as the right to maintain the road and, in some circumstances, improve the road. This vested property right cannot be taken away without due process and some form of compensation.

On the other hand, a Title 5 designation under FLPMA simply gives permission to use the road. Unlike ownership, permission can be withdrawn without due process. Further, the National Environmental Policy Act (NEPA) applies to all Title 5 roads. So, any modifications to a Title 5 road would have to go through the NEPA process.

The state in general and the counties in particular are interested in successfully proving ownership of RS-2477 rights-of-way because this can help ensure federal lands within their boundaries would be governed by the federal Multiple Use Sustained Yield Act. This act provides for multiple uses (e.g., mining, grazing, hiking, camping) occurring simultaneously on the same federal lands.

Since approximately 70 percent of Utah's lands are federal lands, rural counties believe that maintaining multiple use is vital to their economic well-being. If a county is successful in proving ownership of an RS-2477 right-of-way, then a wilderness designation, which eliminates multiple use, would be difficult to obtain since wilderness areas are, by definition, roadless.

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## Appendix B

### Detail of Mapping and Data Gathering Expenditure Category for Fiscal Years 2002 and 2003.

Purpose	Consultants	Fiscal Year 2002	Fiscal Year 2003
County mapping grants		\$ 658,725	-0-
AGRC mapping efforts	AGRC	398,539	\$ 719,972
Development of 1 and 5-meter high resolution digital photo computer database	Utah State University Remote Sensing and GIS lab & ESRI	64,793	352,919
Collection of historical road use data	American West Center, Hart West, D. Minson & R Minson	115,074	52,654
<b>Total Spent</b>		<b>\$ 1, 237,131</b>	<b>\$ 1,125,545</b>

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## Appendix C

### Detail of Wage and Benefit Category for Fiscal Years 2002 and 2003.

<b>2002 Personnel</b>	<b>Expenditures</b>	<b>2003 Personnel</b>	<b>Expenditures</b>
Attorneys (5)	\$ 298,551	Attorneys (4)	\$ 367,197
Paralegal/Office Manager (2)	80,529	Paralegal/Office Manager (1)	58,605
Law Clerks (5)	20,103	Law Clerks (1)	144
Other (1)	<u>9,017</u>	Other (2)	<u>6,108</u>
<b>Total</b>	<b>\$ 408,200</b>		<b>\$ 432,054</b>

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**Agency Response**

October 13, 2004

John M. Schaff  
Acting Legislative Auditor General  
W-315, State Capitol Complex  
P.O. Box 145315  
Salt Lake City, UT 84114-5315

Dear Mr. Schaff:

Please consider this letter the response of the Governor's Office to the Review of Constitutional Defense Fund Expenditures and Administrative Controls (Report No. 2004-8).

First, we thank you and the staff from the legislative auditor's office for the courteous and professional way in which our office was treated during the conduct of the audit and during the exit interview following our review of the exposure draft of the report.

The Governor's Office concurs in the factual findings of the report, except we offer the following explanation and comments which we believe helps with context and accuracy in understanding the facts.

I.

As to the \$50,000 to pay the consultant in connection with the San Rafael Monument Study referred to on pages 8 and 9 of the report we submit the following comments:

The report is accurate that the consultant did not have a contract with the state. When the consultant was initially retained his fees were to have been shared by Emery County, the Utah Association of Counties, and the state. When the effort to create the monument failed and new leadership in Emery County rejected the proposal there was no one willing to pay the consultant. County people and legislators came to the Governor's Office with the proposal that RS 2477 funds be used to make a settlement since the state and counties were viewed as partners in those funds. The proposal was forwarded to the Legislature, which approved the payment of \$50,000 for payment of the consultant for work he had previously performed.



Had the San Rafael Monument proposal succeeded, the county and state claims on RS 2477 roads within its boundaries would have been resolved. Because it failed, the RS 2477 project will be litigating the county and state claims on ten Emery county roads in the area. The notice of intent to file suit on those roads was filed with the U.S. Bureau of Land Management and lawsuits to resolve the claims will be filed upon the expiration of the six month mandatory waiting period after giving the notice of intent.

## II.

As to the issue of the expenditure of RS 2477 funds in connection with the re-inventory of federal lands within Utah set forth on page 9 of the report, the Governor's Office offers comments as follow:

The challenge to the re-inventory of federal lands became a matter of high concern to the rural part of the state and the Attorney General's Office was pressed to provide legal assistance on that matter.

The Attorney General's Office had no one working on public lands issues but agreed that Mark Ward could be made available if funds could be provided. Legislators went to work to find funding and found it by directing funds from the RS 2477 account to the Department of Natural Resources in the amount of \$185,000. Mark Ward was assigned there to work on public lands issues. Apparently before the permanent funds were available the expenditures referred to in the report were paid out of the account. In the end there was \$185,000 removed by the Legislature from the RS 2477 project fund and re-assigned to the Department of Natural Resources, in addition to the moneys described in the report.

## III.

The concern about documentation of the two trips taken in connection with the signing of the Memorandum of Understanding (MOU) between the State and the U.S. Department of the Interior is recognized and the Governor's Office has looked for additional documentation and have supplied what could be found. Staff persons who are still in the Governor's Office who worked here at the time recall that the purpose of the two trips was to explain the MOU to the news media and correct erroneous news reports about it.

## IV.

As to the sharing of information by the Governor's Office with the Attorney General's Office, we recognize that because of past relationship problems, information was not as readily available to the county representatives and the Attorney General's Office, as those persons wished. We believe that problem has been resolved by adoption of a new RS 2477 plan, which created an Executive Committee made up of 5 representatives from the counties, and 5 persons appointed by the governor; The Executive Committee is staffed by the Attorney General's Office. All financial and other information about the project is available to that committee which is now meeting twice a month. The committee reports to the Constitutional Defense Council regularly.

The Executive Committee acts as the client of the RS 2477 attorneys representing both the state and the counties. The committee meetings are closed to the public because the purpose of the committee is to direct litigation and when reports to the Constitutional Defense Council are made they are made in closed session to preserve the attorney-client confidentiality privilege. The Executive Committee is now involved in the development of the budget and monitoring of expenditures.

As to the convening of the meetings for the Constitutional Defense Council, the statute now requires a monthly meeting unless determined unnecessary by the Council. The meeting dates and times are scheduled months in advance on regular dates each month. The members are polled regarding planned attendance and agenda items prior to setting the agenda for each meeting and the meetings are held unless the polling discloses less than a quorum plan to attend or no items are requested to be put on the agenda.

The statute makes the Attorney General's Office the staff for the council and Mark Ward has been assigned to that function. He has been fulfilling that responsibility, and he and his staff have prepared the minutes of the meetings.

The Governor's Office agrees with all the recommendations made in the report. We believe that the adoption of the new plan, which has been in place since the beginning of calendar year 2004, as well as the other actions described above, has implemented all the recommendations made in the report.

Thank you for your courtesies.

Very Truly Yours,

Gayle McKeachnie  
Lieutenant Governor