

PLAN FOR R.S. 2477 RIGHTS-OF-WAY

Introduction

The State of Utah and its respective counties own a joint, undivided interest in R.S. 2477 rights-of-way. This document outlines the broad framework of a working relationship between the State of Utah and each participating county for the purpose of working together in identifying, evaluating, recognizing, recording, defending, negotiating, lobbying, or litigating state and local government rights-of-way established pursuant to R.S. 2477.

In its 2009 General Session, the Utah Legislature enacted H.B. 169, which restructured the Constitutional Defense Council (CDC). H.B.169 further provided that the Public Lands Policy Coordinating Office (PLPCO) will submit various reports and an annual update to this Plan for R.S. 2477 Rights-of-Way to the CDC and others. This Updated Plan is in compliance with this statutory requirement.

The main objective of this working relationship between the State of Utah and its counties is to obtain federal recognition of state and county R.S. 2477 rights-of-way. In the past, this effort involved lobbying, negotiation, and recording R.S. 2477 right-of-way claims against the United States. In addition, Utah filed actions in federal courts against the United States over closed roads. Beginning in 2010, the State and counties commenced a comprehensive end game plan to bring the R.S. 2477 issue to a head and an eventual resolution.

In 2012, the State and counties filed lawsuits over R.S. 2477 rights-of-way in 22 counties. The total number sued upon was over 12,500 rights-of-way. In 2013, the State and counties entered into an agreement with the United States to file a Joint Consolidated Case Management Order ("CMO"). This CMO was entered in all 22 pending cases (In Re: Jointly Managed R.S. 2477 Road Cases Litigation) and governed how the R.S. 2477 cases and discovery conducted in those cases would proceed, which includes the ongoing taking of depositions for the preservation of witness testimony in all 22 counties.

The CMO was extended through December 31, 2016. A new Discovery and Amended Case Management Order ("Amended CMO") was entered on September 16, 2016 and superseded and replaced the original CMO. The Amended CMO, among other things, sets forth certain requirements for the ongoing taking of preservation depositions, including the dropping of the threshold age limit of witnesses to 60 years and increasing the total number of depositions to be taken to 65 in up to six counties for each six-month block. (The length of blocks may be extended, if necessary). Additionally, to effect judicial economy, the Amended CMO is ongoing, so that the State is not required to seek further approval from the Court to continue to take depositions. The Amended CMO provides that "This [Amended] CMO will continue in force and effect until its purposes are fulfilled, including its purpose of preserving the deposition

testimony of witnesses at risk of not being available to testify at the time the Plaintiffs' claims are being resolved on the merits."¹ The Amended CMO is incorporated into this Updated Plan.

Pursuant to Section 63C-4a-403 of the Utah Code, this Updated Plan is subject to approval by the Constitutional Defense Council as established under Title 63C, Chapter 4a of the Utah Code. Unless a county indicates otherwise, each county that has already approved the original and prior amended R.S. 2477 plans will be deemed to have approved this Updated Plan without the necessity of additional ratification, and all aforementioned agreements regarding disclosure and confidentiality are deemed to be still in force and part of this Updated Plan. This Updated Plan is to be submitted to the Legislature's Natural Resources, Agriculture, and Environment Interim Committee by July 1 of each calendar year, after providing the R.S. 2477 plan to the committee at least seven days before the presentation. UTAH CODE ANN. § 63C-4a-403(4)(c)(i).

Good Faith, Cooperation and Equal Partnership

This Updated Plan provides for a good faith, cooperative effort and an equal partnership between the State and each participating county in determining litigation strategy, negotiation strategy, strategy regarding legislation, and the expenditure of resources with respect to each county's rights under R.S. 2477. This equal partnership is implemented through a government-to-government relationship, the attorney-client relationship, the contractual commitments of full disclosure and confidentiality, and coordination through the R.S. 2477 Client Committee (Client Committee). The State and each participating county are equal partners in determining litigation strategy and the expenditure of resources with respect to that county's rights under R.S. 2477.

Public Lands Policy Coordinator and Legal Counsel

PLPCO is responsible for coordinating all R.S. 2477 efforts and providing general direction to legal counsel of the Attorney General's Office, Public Lands Section. Legal counsel in this effort have traditional professional responsibilities to their clients, including those duties and responsibilities set forth in Section 67-5-17 of the Utah Code, in addition to which, by agreement of their clients, they endeavor to maintain cooperation and unity of interest of all participants. PLPCO and legal counsel will keep the CDC, the Governor's Office, the Attorney General, the School and Institutional Trust Lands Administration, and individual counties (normally through a designated contact) reasonably informed about the status of a matter and promptly comply with reasonable requests for information; will explain a matter to the extent reasonably necessary to enable the informed decisions regarding the effort and representation; and will follow the joint decisions concerning the objectives of the representation and the means by which they are to be pursued.

The Public Lands Policy Coordinator ("Coordinator") and legal counsel will coordinate and carry out this Updated Plan's implementation through regular coordination with the Client

¹ The CMO and the Amended CMO do not apply to the R.S. 2477 case pending in Kane County, *Kane Co. v. U.S.*, 2:10-cv-01073 CW (D. Utah).

Committee and will pursue additional updates to the Plan and related documents as they may be called for by unfolding events. The Coordinator will review expenditures and other resource allocations with the State Planning Coordinator, the Client Committee, and the CDC on a regular basis. The Coordinator and legal counsel will gather, organize, and maintain data pertaining to highways; manage expert and other witnesses; conduct settlement negotiations (in concert with others who may be designated to do so by the R.S. 2477 Client Committee); plan and conduct litigation in state and federal courts and administrative tribunals as called for; manage negotiations with the Federal Government for the issuance of recordable disclaimers of interest or other remedies, relief, or action in settlement of R.S. 2477 claims or litigation; plan and conduct efforts and activities to pursue relevant federal and state legislation; carry out other duties and responsibilities as may be requested from time to time by the R.S. 2477 Client Committee; and generally conduct those kinds of activities normally expected of counsel in a matter being prepared for potential or intended litigation. Counsel will maintain files in an office that is not open to the general public and that is designated as the central office for the R.S. 2477 efforts and will take all lawful actions necessary to maintain the confidentiality of records. Counsel will provide expertise with regard to general issues and to keep the counties informed of the progress of the case as well as other duties as assigned by the Coordinator, Client Committee, or CDC.

Legal counsel will consist of attorneys employed by either the Office of the Utah Attorney General or PLPCO, the number and identity of which will be determined by the Attorney General in consultation with the Coordinator and as budget allows. Attorneys not working full-time for the Office of the Attorney General have been and may continue to be designated special assistant attorneys general in behalf of part or all of the clients as determined by the Coordinator, and under the direction of the Attorney General or his designee.

The Attorney General represents the State and participating counties as counsel. A participating county may, using its own resources, designate additional counsel to represent its interests as part of the collective effort, so long as such counsel, together with counsel for the State, are subject to all the constraints of full mutual disclosure, confidentiality, cooperation, and preservation of the parties' unity of interest. Paralegal and other legal support staff will be hired as budget allows.

R.S. 2477 Court Approved Stipulated Consolidated Case Management Litigation Plan

In 2013, the District Courts approved a CMO for all but two of the pending cases. The plan provided for up to four active cases, in Kane and Garfield Counties, with the rest being stayed for a period of two years. The CMO was extended for an additional six months.

A new Discovery and Amended Case Management Order ("Amended CMO") was entered on September 16, 2016 to supersede and replace the original CMO. The Amended CMO, among other things, sets forth certain requirements for the ongoing taking of preservation depositions, including the dropping of the age limit of witnesses to 60 years and increasing the number of depositions to be taken to a total of 65 in six counties for each six month block. Additionally, to increase judicial economy, the Amended CMO is ongoing, providing that "This [Amended] CMO will continue in force and effect until its purposes are fulfilled, including its

purpose of preserving the deposition testimony of witnesses at risk of not being available to testify at the time the Plaintiffs' claims are being resolved on the merits.”

Since the implementation of the original CMO in 2013, the State and counties have taken approximately 433 preservation depositions of elderly (first over age 70, then 65, now 60) and/or infirm witnesses. No more than 25 such depositions were taken in any one county.

It is the intent of this Litigation Plan to provide for preservation depositions of witnesses statewide while obtaining clarification of legal issues at the trial court level and on appeal in the active cases in Kane and Garfield counties. The State will continue to vigorously prosecute its claims at trial and on appeal in these active cases. Nonetheless, the State and counties will continue to examine and explore alternatives to litigation.

Bellwether Initiative

On July, 31, 2015, and on its own initiative, the District Court entered an order establishing a process designed to ultimately result in a more efficient way of processing the 12,500 right-of-way claims throughout the state. The order creates a "Bellwether" process by which the Court will select 12 rights-of-way in Kane County for expedited trial. The parties have identified the legal issues that remain to be decided by the courts. The Court presently has under advisement these several issues and will determine which of the submitted issues will actually be included in the process. Next the parties will jointly select 17 rights-of-way in Kane County that will together place at issue the legal questions selected by the Court. The Court will then pare the list down to 12 rights-of-way for trial and, ultimately, appeal. If, after completion of this process, there remain legal issues to be determined, the same process will be followed for 12 rights-of-way in Garfield County. Once all legal issues have been resolved, one or more special masters will be appointed by the Court to more expeditiously resolve all RS 2477 right-of-way claims throughout the state.

The issues in the Bellwether Initiative have not been moved forward in the District Court since the filing of the issues statements by the parties - most probably because of pending issues that require a decision from the Utah Supreme Court. (See next paragraph).

Certified Question – Utah Supreme Court

Also at issue in the R.S. 2477 context is a question that has been certified by the federal District Court to the Utah Supreme Court. This question deals with a Utah statute and the time within which an action by the state relating to real property must be commenced. Section 78B-2-201 of the Utah Code provides:

The state may not bring an action against any person for or with respect to any real property, its issues or profits, based upon the state's right or title to the real property, unless:

- (a) the right or title to the property accrued within seven years before any action or other proceeding is commenced

The United States and SUWA (representing a number of environmental NGOs) have asserted that the State is time-barred by the provisions of this statute from bringing any R.S. 2477 claims. They argue that the statute was triggered by the passage of FLPMA and that any action to assert an R.S. 2477 claim must have been brought by the state by October 21, 1983 at the latest. The federal District Court has asked the Utah Supreme Court to answer whether this Utah statute is a statute of limitations or a statute of repose.² That question was argued before the Utah Supreme Court on April 3, 2016. Recently, the Utah Supreme Court asked for supplemental briefing on a corollary issue of whether the United States should be considered to be a “person” within the meaning of the Utah statute. This issue addressed in the supplemental briefing was argued before the Utah Supreme Court on May 10, 2017.

Facilities, Funding and Administration

Funds appropriated by the Legislature for this effort are for the legal and support expenses of the combined effort. PLPCO will provide office space, equipment, and other necessary facilities for legal counsel as well as their salaries or hourly rates; expert and other witness fees; and other necessary legal expenditures consistent with this Updated Plan and within available budget.

The Coordinator will review expenditures and 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. Each participating county will provide personnel and resources as necessary and available to gather evidence and data for this effort. Each individual county is ultimately responsible for gathering the evidence and data concerning highways in its own county and does not have claim upon the state for funds appropriated for the collective effort.

PLPCO retains responsibility to account for funds appropriated by the Legislature, along with the Attorney General's Office responsibility to account for funds appropriated to it for the effort. All participating parties will have access to financial and other records of the effort, subject to the constraints of maintaining confidentiality. The Coordinator has authority to pay all necessary expenses of litigation, including deposition costs, filing fees, expert witness fees, travel expenses, CLE expenses deemed by the Coordinator to benefit the effort, and other daily expenses without approval of the CDC or Client Committee, though a summary of these expenses will be given to both on a regular basis. Decisions regarding hiring of outside counsel will be made after consultation with the Client Committee. The use of discretionary funds will be made after consultation with the CDC, unless it delegates this authority to the R.S. 2477 Client Committee.

² A statute of limitations sets a time limit for filing a lawsuit based on when a harm occurs or a claim arises; a statute of repose sets a deadline based on the mere passage of time or the occurrence of a certain event that doesn't in itself cause harm or give rise to a potential lawsuit. A statute of repose is a stricter deadline than a statute of limitations because it may not be tolled by fraud, discovery of injury, etc. The case law distinguishing between the two types of statutes is confused and the definitions by courts are sometimes interchangeable.

Quarterly financial reports will be provided to the CDC unless the CDC elects to meet less than 4 times per year, at which point semi-annual or annual reports will be provided depending on the length of time between meetings.

Dispute Resolution Process

Any disagreements, including those regarding plan implementation, litigation strategy, and resource allocations, are subject to joint discussion of counsel and their clients, in an effort to resolve differences before resorting to the dispute resolution process outlined in Section 63C-4-104 of the Utah Code, which is hereby incorporated by reference.

R.S. 2477 Client Committee

Advice to PLPCO and legal counsel in all matters herein shall be given by the CDC or R.S. 2477 Client Committee, subject to review and oversight by the CDC upon the request by any member of the CDC, the State, or any county affected by any decision of the Client Committee. Because all R.S. 2477 roads claimed by State of Utah and its counties are now in litigation in the United States District Court for the District of Utah, the Client Committee's role will be limited to focus on road closures on BLM and other federally-owned and managed lands, as well as review of settlement proposals. All Client Committee meetings are confidential and are protected by the attorney-client privilege and attorney work product privilege.

The Governor shall select five persons, including one from SITLA, to represent the State, and the Executive Director of the Utah Association of Counties shall select five persons to represent the counties on the Client Committee. The five committee members representing the State shall select a co-chair from one of their own, and the five committee members representing the counties shall select another co-chair from one of their own. The Client Committee shall meet as needed to discuss and determine matters of general legal strategy, information gathering, and other matters relating to the objectives and scope of this amended plan. The Coordinator shall inform the Governor and the counties with respect to their discussions with legal counsel subject to restraints of confidentiality.

Approved this ____ day of June, 2017.

CONSTITUTIONAL DEFENSE COUNCIL

By: _____
Chair