2019 R.S. 2477 PLAN SUMMARY

Ongoing Discovery

- The Court has entered a series of orders allowing the state to take preservation depositions of older or infirm witnesses in rotating blocks. All cases, except the cases in Kane and Garfield Counties are currently stayed except for the taking of these preservation depositions.

- Block 11 commenced on March 1, 2019. Approximately 600 depositions have been taken to date.

Bellwether Case

- On July 31, 2015, and on its own initiative, the District Court established a process designed to more efficiently resolve the 12,500 right-of-way claims throughout the state.

- In accordance with this Bellwether Order, a total of fifteen (15) R.S. 2477 rights-of-way in Kane County representing outstanding legal issues were selected by the parties.

- Each R.S. 2477 right-of-way selected represents at least one outstanding legal issue relating to the ultimate determination of an R.S. 2477 right-of-way on which there is no present judicial precedent, and which requires judicial resolution.

- The 15 roads and outstanding issues will proceed to a two-week trial commencing August 12, 2019.

- Once the outstanding legal issues have been resolved, one or more special masters will be appointed by the Court to more expeditiously process all R.S. 2477 right-of-way claims throughout the state.

Going Forward

- The State and counties continue to examine and explore alternatives to litigation, including administrative and congressional solutions.

- The State will continue to vigorously prosecute its claims at trial and on appeal in the currently active cases and to continue preservation depositions in the currently stayed cases.

FY 2019 UPDATED PLAN FOR R.S. 2477 RIGHTS-OF-WAY

Introduction

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 to the CDC various reports and an annual update to the State Plan regarding R.S. 2477 Rights-of-Way ("State R.S. 2477 Plan"). This 2019 Updated State R.S. 2477 Plan ("2019 Updated Plan") is in fulfillment of this statutory requirement.

The State of Utah and its respective counties own a joint, undivided interest in R.S. 2477 rights-of-way throughout the state. 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, defending, negotiating, lobbying, or litigating state and county rights-of-way established pursuant to R.S. 2477.

The main objective of this state/county working relationship is to obtain federal recognition of these R.S. 2477 rights-of-way. In 2012, the State and counties filed lawsuits seeking recognition of over 12,500 R.S. 2477 rights-of-way over land managed by the United States Bureau of Land Management ("BLM") in 22 of Utah's 29 counties.[1]

Pursuant to Section 63C-4a-403 of the Utah Code, this 2019 Updated Plan is subject to approval by the CDC 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

[1] The following seven counties in the state contain few or no R.S. 2477 right-of-way claims over land managed by the BLM: Cache, Davis, Morgan, Salt Lake, Summit, Wasatch, and Weber Counties. Consequently, no R.S. 2477 cases have been filed presently in those counties.

amended State R.S. 2477 Plans will be deemed to have approved this 2019 Updated Plan without the necessity of additional ratification, and all agreements regarding disclosure and confidentiality are deemed to be still in force and part of this 2019 Updated Plan. This 2019 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 2019 Updated 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 2019 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 ("SITLA"), 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 2019 Updated Plan's implementation through regular coordination with the Client Committee and will pursue additional updates to the 2019 Updated 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 regarding general issues 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 but for PLPCO have been, and may continue to be, designated special assistant attorneys general in behalf of part or all 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 Stipulated Case Management Order ("CMO") for all but two of the pending cases. The litigation 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 original CMO was through December 31, 2016. The CMO also provided for the taking of preservation depositions of older (72 years or older) or infirm witnesses throughout the state.

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 over 600 preservation depositions of elderly and/or infirm witnesses in rotating Blocks in all participating counties. It is the intent of this 2019 Updated Plan to provide for continuing preservation depositions of witnesses statewide, while obtaining clarification of remining legal issues throughout the active cases at the trial court level and on appeal. 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 Case

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 resolving the 12,500 right-of-way claims throughout the state. The order created a "Bellwether" process by which the Court would select a limited number of rights-of-way in Kane County for expedited trial. Once outstanding legal issues have been resolved in the Bellwether Case, one or more special masters will be appointed by the Court to more expeditiously process all R.S. 2477 right-of-way claims throughout the state.

The parties have stipulated as to the legal issues that remain to be decided by the courts and have identified 15 rights-of-way that will raise those legal issues. A stipulated schedule setting pretrial deadlines and a trial date in February 2019 was approved by the court. The February 2019 trial date was stricken as a result of the federal "shut-down" in January 2019. A new schedule setting pretrial deadlines and a two-week trial date commencing August 12, 2019 was approved by the court.

Disclaimers of Interest

Section 315 of the Federal Land Policy and Management Act ("FLPMA") and the Code of Federal Regulations 43 CFR 1864 allow the Secretary of the Interior, under certain conditions, to issue a disclaimer of interest in certain property. A disclaimer is a recordable document that can help remove a cloud from land title because it has the same effect as if the United States had conveyed the interest in question. "The objective of the disclaimer is to eliminate the necessity for court action or private legislation in those instances where the United States asserts no ownership or record interest, based upon a determination by the Secretary of the Interior that there is a cloud on the title to the lands, attributable to the United States where the disclaimer will help remove a cloud on the title of such lands." 43 CFR 1864.0-2(a).

Pursuant to FLPMA, the state and Washington County have prepared and submitted to the Bureau of Land Management an Application for a Recordable Disclaimer of Interest ("RDI Application") covering the Manganese Road in Washington County. This RDI Application is intended to be used as a test vehicle of the RDI process and validity of the RDI once issued.

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 2019 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. 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. 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 May 2019.

CONSTITUTIONAL DEFENSE COUNCIL

By: _____
CHAIR

DRAFT