

FY 2020 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 2020 Updated State R.S. 2477 Plan (“2020 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 2020 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 2020 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 2020 Updated Plan. This 2020 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 2020 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 2020 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 2020 Updated Plan's implementation through regular coordination with the Client Committee and will pursue additional updates to the 2020 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. Such counsel must consult with attorneys in the Public Lands Section of the Attorney General's Office and such counsel's efforts must substantially advance the interests of both the state and the participating county. 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.

subsequent 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.”

A new Discovery and Amended Case Management Order was signed by Judge Waddoups on September 9, 2017 and entered into the docket on September 8, 2017. The September 9, 2017 Order stated: “Considering prejudice to the Plaintiffs resulting from illness, death, and unavailability of witnesses and considering as the driving factor in its decision the number of the witnesses whose depositions remain to be taken....that as long as the parties take no more than seventy-six depositions during no more than fourteen weeks in the seven-month block, the Amended Case Management Order permits the parties to take parallel depositions. The parties may not take more than fourteen weeks of depositions.” Preservation depositions were taken through March 2020, when they were discontinued as a result of COVID19 considerations. The preservation depositions will continue and will be rescheduled when adequate precautions can be taken to protect the health and safety of elderly

and/or infirm witnesses.

Since the implementation of the original CMO in 2013, the state and counties have taken over 660 preservation depositions of elderly and/or infirm witnesses in rotating Blocks in all participating counties. It is the intent of this 2020 Updated Plan to provide for continuing preservation depositions of witnesses statewide, seeking alternative deposition strategies while COVID19 is a concern, while obtaining clarification of remaining 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. This trial date was stricken by the court as a result of the

decision of the Tenth Circuit Court of Appeals in the case of *Kane Cnty v. United States*, 928 F.3d 877 (10th Cir.2019) (the “Bald Knoll Case”), in which the Tenth Circuit held that Southern Utah Wilderness Alliance (“SUWA”) was entitled to participate as a intervenor “as of right” in the remanded case where title was quieted in the state and Kane County, but the scope of the rights-of-way remained to be determined by the district court. Because the Tenth Circuit decision could have implications for SUWA’s participation the Bellwether Trial, the parties agreed to reset the August 2019 trial dates pending the decision of the Tenth Circuit on the state’s and the county’s Petition for Rehearing in the Bald Knoll Case. The Bellwether Case proceeded to a three-week trial before Judge Waddoups from February 3 through February 24, 2020. Judge Waddoups limited SUWA’s participation in the trial; SUWA was allowed to act only through the United States. At the Bellwether trial, numerous witnesses testified, including experts regarding the existence and scope of the rights-of-way at issue and fact witnesses (previously deposed in preservation depositions) as to historic and their own uses of the rights-of-way. Subsequent to trial, attorneys for the state and county are in the process of preparing proposed Findings of Fact and Conclusions of Law for the evidence presented at trial and are also preparing post-trial briefs. The federal government will have the opportunity to also submit and counter the proposed Findings of Fact and Conclusions of Law, with the state and county having the last say with a Reply to the federal government’s submission.

The Petition for Rehearing in the Bald Knoll Case was denied on February 27, 2020. SUWA now has moved to intervene “as of right” in the Bellwether Case as to all issues, including acceptance and actual determination of title. The state and county have argued that SUWA was adequately represented at trial by the United States; alternatively, should SUWA

be allowed some intervention, that intervention should be limited solely to the issues of scope. Briefing on the Motion to Intervene is nearly complete. That issue will be argued when the other post trial issues are fully briefed and are ready to be heard 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. The RDI application was filed in May 2019; no concrete action has yet been taken by the Bureau of Land Management.

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 2020 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 25th day of June 2020.

CONSTITUTIONAL DEFENSE COUNCIL

By: 
CHAIR