

RESOLUTION NO. 2000-11

A RESOLUTION APPROVING [RATIFYING] EXECUTION OF THE QUIET TITLE LITIGATION AGREEMENT AND THE PLAN FOR R.S. 2477 RIGHTS

RECITALS

**WHEREAS**, the Utah State Legislature authorized a plan for a good faith, cooperative effort between the state and participating counties for asserting, defending, or litigating state and local government rights under R.S. 2477 that allows a county to formally agree to participate in the plan by adopting a resolution and provides that the state and a 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; and

**WHEREAS**, it is in the best interests of Tooele County that its R.S. 2477 rights are asserted, defended and litigated, as necessary; and

**WHEREAS**, Tooele County has reviewed the Plan for R.S. 2477 Rights and desires to participate in the plan; and

**WHEREAS**, Tooele County has reviewed and desires to execute the Quiet Title Litigation Agreement.

**NOW, THEREFORE, BE IT RESOLVED**, as follows:

Tooele County hereby agrees to participate in the Plan for R.S. 2477 Rights, attached hereto and incorporated herein by this reference.

Tooele County hereby approves [ratifies] the execution of the Quiet Title Litigation Agreement.

Tooele County hereby appoints \_\_\_\_\_ to serve as its representative for coordination with counsel on the quiet title litigation.

20<sup>th</sup> **PASSED** and **APPROVED** by the Board of Tooele County Commissioners this day of June, 2000.

TOOELE COUNTY

  
\_\_\_\_\_  
Chairman  
Tooele County Commission



(SEAL)

Attest.

*James W. [Signature]*  
County Clerk

The vote of the Board of County Commissioners of Tooele County was as follows:

Commissioner	<u><i>Stuppitt</i></u>	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>
Commissioner	<u><i>Rockwell</i></u>	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>
Commissioner	<u><i>Hunsaker</i></u>	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>

## PLAN FOR R.S. 2477 RIGHTS

### Introduction

The state of Utah and the counties of Utah have a joint, undivided interest in R.S. 2477 highways. The following document is a plan that outlines the broad framework of a working relationship between the state of Utah and participating counties of Utah collectively for the purpose of working together in asserting, defending, or litigating state and local government rights under R.S. 2477. In its 2000 general session, the Utah Legislature provided authorization and a means for funding this collaborative effort. It is anticipated that this effort will require litigation against the federal government.

Although the state and counties may consider filing various causes of action or arguing more than one legal theory in court, at present they intend to file a large-scale, statewide quiet title action. This lawsuit would seek to establish the state and counties as holding title to R.S. 2477 highways in Utah. In addition, the action would seek to determine the scope of the highways for purposes of use, maintenance, and improvement. The quiet title action would be amended from time to time to add additional highways to the list of those being litigated, with the ultimate goal of quieting title to as many R.S. 2477 highways as reasonably possible.

Pursuant to Section 63C-4-104 of the Utah Code, this plan is subject to approval by the Constitutional Defense Council established under Title 63C, Chapter 4 of the Utah Code. Once approved, the plan will be submitted to each county. A county chooses to participate in the plan by adopting a resolution ratifying the plan and its supporting documents, which include a binding agreement requiring full disclosure of data and strict confidentiality of information among participants.

### Good Faith, Cooperation, and Equal Partnership

The working relationship described in this plan contemplates a cooperative relationship between the state on the one hand and all participating counties collectively on the other. However, by statute, the duties and rights of that relationship exist on an individual county basis rather than on the basis of all counties collectively.

This plan provides for a good faith, cooperative effort and an equal partnership between the state and each participating county in determining litigation strategy and the expenditure of resources with respect to that county's rights under R.S. 2477. The equal partnership is implemented through the attorney-client relationship, the contractual commitments of full disclosure and confidentiality, and coordination through the Statewide Strategy Committee.

The state and each participating county have an equal role in the implementation of the plan through legal counsel, who work together to coordinate and carry out the general course of action and provide for unity of action. The state and participating counties have an equal role as clients who are represented by counsel, with the traditional duties and loyalties that implies.

All participating counties and the state commit to a timely and full disclosure of information, communications, and other activities relevant to asserting, defending, litigating, compromising, or otherwise determining the disposition of state and local government rights under R.S. 2477, and shall not act unilaterally on any matter relevant to such rights. All participating counties and the state are also bound by a common interest and confidentiality agreement, which not only supports full disclosure and protects the attorney-client privilege but is also intended to reflect the unity of interests of the parties in R.S. 2477 highways.

### **Legal Counsel**

Legal advisors in this effort have traditional professional responsibilities to their clients, in addition to which, by agreement of their clients, they endeavor to maintain cooperation and unity of interest of all participants. Counsel will keep their clients (normally through a designated client contact) reasonably informed about the status of a matter and promptly comply with reasonable requests for information; explain a matter to the extent reasonably necessary to enable the client to make informed decisions regarding the representation; abide by the client's decisions concerning the objectives of the representation; and consult with the client as to the means by which they are to be pursued.

Legal counsel will coordinate and carry out the plan's implementation and will pursue amendments to the plan and related documents as they may be called for by unfolding events. Counsel will review expenditures and other resource allocations with their clients on a regular basis. Counsel shall seek to preserve the unity of interests among the participants through regular and joint consultation with their clients or designated client contacts. By maintaining this unified approach, counsel will receive guidance and input to protect the joint interests of the parties. Counsel will also address with their clients disputes which may arise, in an effort to resolve them before resorting to the statutory dispute resolution process outlined in Section 63C-4-104 of the Utah Code.

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 clients), plan and conduct litigation, as called for, 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 work together to provide expertise with regard to general issues and to keep their clients apprized of the progress of the case.

Counsel will propose amendments, as necessary, to this plan and to supporting agreements of the parties for the purpose of supporting full mutual disclosure, maintaining confidentiality and cooperation among the parties, and preserving the parties' unity of interest so that counsel may

work productively and confidently for the benefit of the project as a whole without violating any duty to an individual client.

Counsel as used in this Plan will consist of Stephen G. Boyden, managing attorney, assigned from the Office of the Attorney General; Barbara Hjelle and the law firm of Thompson and Urquhart, contract attorneys; John S. Boyden, Jr., senior attorney employed by the Office of the Attorney General; and additional attorneys employed by the Office of the Attorney General as needed and as budget allows. All attorneys not working full-time for the Office of the Attorney General will be designated special assistant attorneys general.

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 is 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.

### **Facilities, Funding, and Administration**

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 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. Support expenses also include general assistance to the counties that is intended to enhance the quality of, coordinate, standardize, and facilitate the gathering of evidence state-wide.

Counsel will review the complete budget, including expenditures 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. 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 or funds appropriated for the collective effort.

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

### **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. In the event the disagreement is not resolved through discussion with counsel, the process for resolving a disagreement is as follows:

(1) The governor or the governor's designee and a representative of the Utah Association of Counties shall first attempt to resolve the disagreement;

(2) If the county and the state continue to disagree, the county, the governor, and the Utah Association of Counties shall present their recommendations to the Constitutional Defense Council for a final decision about the strategy, funding or resource allocation in question; and

(3) The county may pursue a strategy or make an expenditure contrary to the final decision of the Constitutional Defense Council only if the county does not claim resources provided to fund the plan.

### **Statewide Strategy Committee**

The governor shall select three persons to represent the state and the counties shall select three persons to represent the counties on a Statewide Strategy Committee that shall meet monthly, or at other intervals as they choose, with the legal counsel to discuss and determine matters of general legal strategy, information gathering, resource allocations, and funding. This Committee is a representative of the clients in such matters, but is not the client. The members of the committee shall inform the governor and the counties with respect to their discussions with the legal counsel subject to restraints of confidentiality.

### **Legislative and Congressional Liaison**

The Utah Legislature may select a staff member to serve as liaison with legal counsel regarding pending litigation. Each member of the Utah Congressional Delegation may also select a staff member to serve as liaison with legal counsel. Legal counsel shall update and inform such persons of the status of the litigation, without breaching duties of confidentiality or attorney client privilege. Legislative and Congressional liaison may communicate with counsel at such times and places as may be convenient.

### **Anticipated Litigation**

The counties will be presented with a resolution, which will approve the plan and approve or ratify a Quiet Title Litigation Agreement, copies of which are attached to this plan and are considered intrinsic to it. Upon execution of the Quiet Title Litigation Agreement, authorized representatives will engage in discussion regarding issues pertaining to the scope of R.S. 2477 highways in Utah.

As soon as possible, counsel will begin to coordinate the gathering together of data pertaining to R.S. 2477 highways in Utah and work will commence to assert, defend, or litigate state and local government rights under R.S. 2477, including by filing the quiet title litigation described below.

The quiet title litigation will proceed under the direction of managing counsel. Other legal, paralegal, and support staff will work under the managing counsel's direction. Counsel and legal staff will work with a contact designated by each client to develop the facts and other elements of the case. In the case of the state, the client's contact is designated by the governor. The governing body of each county shall designate the client contact for that county. A client contact may represent more than one participating county.

As soon as practicable, a quiet title notice letter will be sent to the federal government in accordance with applicable law. The letter shall affirmatively state that other highways may be added in later notices (i.e., the first notice is not intended to identify the entire "universe" of R.S. 2477 highways in the state of Utah) and that the notice is sent on behalf of the state and participating, listed counties. The letter shall be signed by counsel representing state and counties.

The quiet title action will be filed on behalf of the state and participating counties. The selection of highways for the initial complaint will be derived from the data gathering and quiet title notice efforts, after consultation by counsel with participating county and state client contacts. As litigation proceeds on the first set of highways, the process set forth above will continue with other highways to be added in later filings.

In addition to the quiet title action, other actions whose purpose is to assert, defend, or litigate state and local government rights under R.S. 2477 may also be pursued cooperatively by the state and counties under this plan, as agreed by the parties.

### **Highway Selection Process**

In an effort to give all counties an equal opportunity to participate in the litigation, each county shall be given the authority to choose up to twenty highways within its jurisdiction that it deems most appropriate to include in the initial Complaint. Each county should compile its list of highways to be litigated in order of priority. Legal counsel shall subsequently choose from said lists no less than ten highways, insofar as practicable, per county to include in the initial Complaint, and shall work with each county to insure the final selection of highways to be included in the Complaint meets with the approval of the county.

## QUIET TITLE LITIGATION AGREEMENT

### Introduction

1. This Quiet Title Litigation Agreement (hereafter "Agreement") sets forth the understanding among the Attorney General's Office (hereafter "ATTORNEY GENERAL") and its clients, the State of Utah (hereafter "STATE") and Tooele County (hereafter "COUNTY") in connection with a lawsuit to be filed in the United States District Court for the District of Utah, to quiet title in the STATE and COUNTY to R.S. 2477 (43 U.S.C. § 932) highways traversing federal lands.
2. The quiet title litigation will proceed according to the Plan for R.S. 2477 Rights approved by the Constitutional Defense Council on May 30, 2000, attached hereto and incorporated herein by reference, the provisions of which set forth the mutual obligations of the parties with relation to the quiet title action and disposition of R.S. 2477 highways within the State of Utah.
3. The STATE shall provide funding on a continuing basis through the conclusion of the litigation which will include those highways selected by the COUNTY for adjudication under the Plan.
4. The ATTORNEY GENERAL shall represent both the STATE and the COUNTY in the quiet title action. State law provides that the interests of the STATE and the COUNTY are in unity. The State and participating Counties have an equal role as clients who are represented by counsel, with the traditional duties and loyalties that implies. In the event the parties cannot agree on the inclusion of any particular highways in the quiet title action, the COUNTY may pursue the dispute resolution process outlined in the Plan, and that failing, may commence separate litigation on such highways at its own expense and with its own attorneys.
5. The parties have mutually concluded that the proposed litigation raises matters of common interest and that the sharing of information would facilitate the rendition of professional legal services

i. "Parties to this Agreement" shall mean the ATTORNEY GENERAL, the STATE and the COUNTY and any other County which has executed the same agreement with the ATTORNEY GENERAL and the STATE.

The above defined terms shall be construed to effectuate the purposes of the Agreement.

### **Mutual Understanding and Agreement**

7. The parties shall timely provide full disclosure of information, communications, and other activities relevant to asserting, defending, litigating, compromising, or otherwise determining the disposition of state and local government rights under R.S. 2477, and shall not act unilaterally on any matter relevant to such rights.

8. The COUNTY shall designate, by resolution, a representative who shall be charged with representing the COUNTY in dealing with counsel, coordinating with and keeping other COUNTY authorities informed regarding the course of the litigation, and gathering and facilitating the gathering of necessary evidence.

9. The Governor shall designate a representative who shall be charged with representing the STATE in dealing with counsel, coordinating, and facilitating the gathering of necessary evidence.

10. It is our mutual understanding and Agreement that the oral or written sharing or disclosure of common interest materials between the parties to this Agreement will not diminish in any way the confidentiality of such material and will not constitute a waiver of any applicable privilege or protection. Unless expressly stated in writing to the contrary, any communications concerning the litigation or common interest material between or among any of the Parties to this Agreement is confidential and protected from disclosure to any third party by the common interest privilege and the work-product doctrine.

11. We have further agreed that we will not disclose common interest material whether received from the other parties to this Agreement or jointly developed, or the contents of any such

common interest materials, to anyone except designated representatives who agree to be bound by the terms of this Agreement.

12. A Party shall not commence settlement discussions without first advising other Parties of its intention to do so and shall not finalize any settlement without first providing complete disclosure to other Parties of all communications which may be relevant to other Parties' interests. Any settlement shall affirmatively state that no binding precedent is set with respect to Counties not a party to that settlement.

#### **Limitation Upon Use of Common Interest Materials**

13. We mutually understand and agree that common interest materials received from another party to this Agreement, and the contents of such common interest materials, will not be used at any time against the originating party who provided the common interest materials, even if the originating party develops adverse interests in litigation or otherwise.

#### **Obligations of Parties to Protect Common Interest Materials**

14. We mutually understand and agree that if any person or entity requests or demands, by subpoena or otherwise, any common interest materials whether jointly developed or obtained from Parties to this Agreement, the party receiving the request or demand will immediately notify the originating party. The person or entity seeking the common interest materials shall be informed that the materials are privileged and may not be disclosed without the consent of the originating party, if applicable, or the parties to this Agreement in the case of jointly developed common interest materials, unless ordered by the court after the court is advised of the terms of this Agreement. Before any disclosure is made by a party to this Agreement, that party will take all steps necessary and appropriate to facilitate the assertion of all applicable rights and privileges with respect to such common interest materials, including permitting any other affected party a reasonable opportunity to intervene and be

heard, and otherwise cooperating with the other affected party to enable it to take any other appropriate steps to protect its rights under this Agreement.

15. We mutually understand and agree that common interest materials will not be disseminated to individuals or entities who are not Parties to this Agreement unless all parties with rights to said material consent and such individuals or entities have executed a copy of this Agreement. It is further understood and agreed that if COUNTY retains other counsel, common interest materials will not be disclosed to such other counsel until that counsel has executed a copy of this Agreement. It is our further mutual understanding and agreement that any disclosure in accordance with this paragraph will not diminish in any way the confidentiality of the common interest materials disclosed and will not constitute a waiver of any applicable privilege or protection. In order to facilitate the requirements of this Agreement, ATTORNEY GENERAL shall maintain custody and control of the physical media of all common interest materials received under this Agreement and shall take all reasonable steps to ensure that any duplications of said materials does not frustrate the intent of this Agreement.

16. We mutually understand and agree that, without limiting any other remedies, specific performance and/or injunctive relief is an appropriate remedy to compel compliance with the provisions of this Agreement.

17. This Agreement memorializes prior oral agreements pursuant to which common interest materials have been exchanged. All common interest material previously exchanged among the undersigned counsel are subject to the provisions of this Agreement.

### **Counsel Not Disqualified By Agreement**

18. We mutually understand and agree that, should any officers of the STATE or COUNTY testify in any proceeding, whether as a witness in the client's own case or for an adverse party, ATTORNEY GENERAL will not be disqualified from cross-examining the testifying officer for any reason arising out of the existence of this Agreement, including the ground that ATTORNEY GENERAL has been privy to attorney-client communications pursuant to this Agreement. Except as specifically provided in this paragraph, this Agreement is not intended to and does not waive or compromise in any manner any attorney-client or work product privilege.

### **Representations of Parties to this Agreement**

19. By executing this Agreement effective June 1, 2000, each party certifies that it has reviewed the contents of this Agreement, has consulted with independent counsel, and that said party understands the Agreement, including the waiver of any conflict of interest related to the sharing of information and the joint representation by the ATTORNEY GENERAL, and agrees to be bound as a party to this Agreement. Any party who chooses to cooperate with another party's adversary, specifically waives any claim of conflict of interest that may arise on account of this Agreement, such as, without limitation, the right of counsel for another party to cross examine the waiving party at any future proceeding on the basis of information derived from the common interest material originating with the waiving party or jointly developed pursuant to this Agreement.

### **Duration of Agreement**

20. This Agreement shall remain in full force and effect until terminated by the mutual written consent of the STATE and all participating COUNTIES.

**ATTORNEY GENERAL**

By: *Jan Graham*  
JAN GRAHAM  
Attorney General

Dated 6-6-2000

**STATE OF UTAH**

By: \_\_\_\_\_  
MICHAEL O. LEAVITT  
Governor

Dated \_\_\_\_\_

**TOOELE COUNTY**

By: *[Signature]*  
Chairman  
Tooele County Commission

Dated \_\_\_\_\_

ATTEST:

*[Signature]*  
BENNIS D. EWING  
TOOELE COUNTY CLERK

