

STATE LAND USE PLANNING ADVISORY COUNCIL

MINUTES

October 23, 2015

At the following location:

Nevada Association of Counties

304 South Minnesota Street

Carson City, NV 89701

Members Present

Lee Plemel, Carson City
Terri Pereira for Eleanor Lockwood, Churchill County
Nancy Amundsen, Clark County
Jim French, Humboldt County
Steven Stienmetz, Lander County
Jerrie Tipton, Mineral County
Austin Osborne, Storey County
Jeanne Herman, Washoe County
Roger Mancebo, Pershing (at 3:00pm)
Jake Tibbitts, Eureka County (Chair)
Nancy Boland, Esmeralda County
Dagny Stapleton, NACO
Lorinda Wichman, Nye County (Vice Chair)
Varlin Higbee, Lincoln County (term pending)

Members Absent

Dr. Don Miner, Douglas
Randy Brown, Elko County
Harold Ritter, Lyon County
Laurie Carson, White Pine County

Others Present

Micki Bates, Esmeralda County
Lee Bonner, Nevada Department of Transportation
Kenneth Brown, Western Counties Alliance, Randolph Utah
Patricia Cafferata, Special Assistant Attorney General, Nevada Attorney General's Office
Skip Canfield, NDSL, State Land Use Planning Agency
Bob Clifford, Fallon
Kathy Davis, Assistant Attorney General, Utah Attorney General's Office
Charlie Donohue, Nevada Division of State Lands (NDSL)
Jim Falk, Fallon
Rob Rule, NAS Fallon Planner
Lori Story, Deputy Attorney General, Nevada Attorney General's Office
Tori Sundheim, NACO
Patsy A. Waits, Lander County
Keith Westengard, Lander County

By Phone

Dirk Clayson, Kane County Commissioner
Shawn Welch, attorney representing Kane County

Nevada Division of State Lands

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CALL TO ORDER

The meeting was called to order at 12:25pm and self-introductions were made. The Agenda was approved unanimously. The Draft Minutes of the July 31, 2015 meeting in Stateline were also approved unanimously with a motion by **Nancy Amundsen** and a second by **Jim French**.

PUBLIC COMMENTS

None.

AGENCY REPORT

Charlie Donohue stated that after working with the BLM and US Forest Service for years, Nevada Division of State Lands (NDSL) has secured a patent for just under 3000 acres of US Forest Service land associated with Cave Lake State Park, one element of lands that are intended to come to the State as a result of the Lincoln and White Pine land bills of the 2000's. NDSL is working with the Nevada Land Trust to secure a private 42 acre in holding in Ash Canyon, west of Carson City in the Carson Range for ultimate inclusion in the Nevada Lake Tahoe State Park. NDSL will take possession of the land and assign it to State Parks. NDSL has been working closely with the City of Elko to modify a deed restriction on property that the National Guard is assigned so that the facility can be utilized for community events and allow Great Basin College to have legal access for shops and classrooms. NDSL has spent time on conservation land issues in Ruby Valley associated with Franklin Lake Wildlife Management Area and the 7H Ranch. The fire at the US Ecology – Beatty disposal site occurred in a portion of the old land fill site of the 1960's. NDEP is moving forward with its assessment, coordinated with US EPA. NDSL has been working closely in Carson City with the Eagle Valley Trails Association to formalize some access points and trails across State property.

RS 2477 ROADS

The SLUPAC members discussed RS2477 roads as a result of SB456 to develop a consistent protocol for all of Nevada's counties for perfection of those rights-of-way through quiet title or other means. SB456 designates SLUPAC, in coordination with Nevada Association of Counties (NACO) and the State Attorney General's office to conduct this process. **Jake Tibbitts** invited speakers from Utah who provided their perspectives on the matter.

Kathy Davis, Assistant Attorney General, Utah Attorney General's Office, presented a power point detailing Utah's efforts to recognize RS2477 rights-of-way and fielded questions from the members. Her presentation is summarized as follows:

Step 1 - Collect and compile GPS data for all potential roads to determine a basis of access for walking trails, horseback, OHV ATV and vehicular. The centralized GIS group was established to work closely with litigation groups, standardize a process across all counties, provide a statewide review and film all of the roads.

Step 2 - Determine which roads to be included.

Step 3 – Review rights-of-way against historic maps, aerial imagery and survey documents. County and State collaboration to identify additional evidence.

Step 4 – Preliminary witness interviews for determination of historical use. Must have pre-1976 actual knowledge, ten years of continuous use and construction evidence. Public meeting were held to review the maps.

Step 5 – Based on review and preliminary witness interviews, create a county list for inclusion in the Notice of Intent (NOI). Must have reasonable belief that the road existed and was used prior to 1976.

Quiet Title Act (QTA) - "The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights." (28 USC § 2409a(a))

QTA -Notice of Intent to Litigate-

- ▶ 180 day notice given to heads of agencies
 - Basis of Claim
 - Description of lands included in the suit

QTA - Statute of Limitations/Notice-

- Action must be commenced within “12 years after the date the State received notice...”
- Notice occurs by “public communications...reasonably calculated to put the [State] on notice of the Federal claim” or by “open and notorious” use, occupancy or improvement.
- *County may be subject to different standards for notice*

Step 6 – Continued review-

- ▶ Review any additional evidence
- ▶ Limits on roads?
 - Less than 1 mile?
 - Destination?
 - Private land issues?
 - Cost/Benefit
- ▶ Remove roads as necessary

Step 7 – Statewide litigation- one of the largest collections of lawsuits ever filed by the State of Utah, 13,508 roads in 22 different counties, complaints and exhibits totaled over 120,000 pages

Potential Environmental Intervenors-

- ▶ SUWA et al. granted permissive intervention.
 - May receive disclosures of evidence
 - May attend depositions
 - May object and cross-examination - limited to 1/8 time of direct

Step 8 – Litigation management-

- ▶ Case Management Order Signed May 13, 2013
- ▶ Most cases put on hold—but allows for the preservation of the stories told by witnesses through court-admissible depositions
- ▶ A total of 225 witnesses over 2 years

Preservation depositions -

- 1) Witnesses over 70 or with health issues.
- 2) Kitchen Table Discussions (biography)
- 3) Driving roads with witnesses
- 4) Depositions

Completed depositions-

- ▶ All counties have had at least one round of depositions. Some have had two or three.
- ▶ Approximately 255 depositions have been completed.

Active RS2477 cases-

- ▶ Kane County 2 (Hole in the Rock Consolidation)
- ▶ Garfield County
 - ▶ Roads selected for Bellwether process will come from Kane and Garfield counties

Southern Utah Wilderness Alliance v. Bureau of Land Management 425 F.3d 735 (10th Cir. 2005)-

- ▶ BLM does not have authority to make binding determination on the validity of R.S. 2477 ROWs
- ▶ Holder of an R.S. 2477 ROW must consult with federal agency before undertaking improvements. Scope of improvements to ROW limited to those “reasonable and necessary” and determined by established usage as of repeal of statute. Can’t improve hiking trail into 8 lane highway destinations

- ▶ Counties bear burden of proof to establish ROW
- ▶ 2477 Rights of Way can be established by:
 - Public Use Standard
- ▶ Evidence to be considered on remand regarding identifiable destinations

Pre 2012 Utah RS2477 cases-

- ▶ Kane County v. U.S., (Quiet Title Case, 15 Roads)
 - S.J. Ruling - 5 Roads, incl. Skutumpah Road are R.S. 2477 ROWs
 - Ten years public use not only method to establish R.S. 2477 ROW
 - Final judgment granting title to 12 roads (87 of 95 miles)
- ▶ San Juan County v. U.S., (Salt Creek Road Case)
 - Single entity use not sufficient to establish “public” use
 - Motorized use for scenic travel did not meet 10 year requirement prior to reservation of Park
 - Use must be established by “clear and convincing evidence”
 - Intervention by SUWA not allowed
- ▶ Juab County v. U.S. (3 Closed Roads)
 - Case settled

Kane County appellate ruling-

- ▶ Disputed Title = US expressly disputed title or took actions that implicitly disputes it
 - A denial in an answer is not a dispute
 - Title V is not a dispute
- ▶ Statute of Limitations
 - State, receipt of notice; others, knew or should have known
 - Designation of WSA does not trigger SOL
- ▶ Public Water Reserves (PWR 107)
 - Not a reservation under R.S. 2477
- ▶ Scope= “Reasonable and Necessary” in light of pre-1976 uses

Unresolved legal issues-

- Title Dispute -10th Circuit dispute as to title v. 9th Circuit cloud on title
 - US Supreme Court denied cert.
- Statute of Limitations-
 - Does more restrictive state statute of limitations apply?
 - Utah Supreme Court to rule on issue
- Continuous Use – What frequency of use is required? (*Okleberry* standard v. San Juan case)
- Construction - as an alternate means of acceptance (versus 10 years continuous use, Utah standard)
- Public Use -are ranchers, oil company and others on the public domain by permission (permittees) still public users?
- Scope - How wide is right-of-way? Future maintenance?

Bellwether process-

- ▶ Proposed by District Court
- ▶ Special Magistrate Appointed to conduct trials in Kane and Garfield counties
- ▶ State/County and US each choose 7 roads; SUWA chooses 3
- ▶ Magistrate will then choose 12
- ▶ Purpose is to resolve issues affecting most rights-of-way

End of presentation.

A discussion then ensued with the SLUPAC members and the Utah representatives. **Jake Tibbitts** stated that the Utah QTA road usage requirement of 10 years differs from Nevada’s QTA usage requirement of 5 years. **Skip Canfield** asked about a table in the presentation that showed acreage figures for Utah’s RS2477 roads by county. The total acreage amounted to 13,508 acres for the State. Specifically what percentage of that total was threatened with closure? **Kathy Davis** responded that it is a small percentage of that total

threatened with closure. Utah wanted certainty so included all of the roads in the inventory. A question was asked about the depositions. **Kathy Davis** stated that the depositions were critical since many of the people being interviewed were older and those memories would be lost soon. It was imperative that the record show continuous use. It was also important to show evidence of expenditure of funds for maintenance. Counties are frustrated because BLM will not recognize maintenance without county litigation. Use by itself has not been sufficient for QTA. **Jake Tibbitts** asked if there were any options other than QTA and involving litigation. **Kathy Davis** responded that the Federal Land Management Policy Act (FLPMA) allows for perpetual Title V grants but this has not been tested in court. **Shawn Welch** discussed other options such as a Rule 27 motion to preserve testimony, and used the example of an elderly retired county road supervisor who had a wealth of historic knowledge about maintenance and expenditure of State and County funds on the roads. A court order could be obtained to take deposition prior to litigation. Grounds for this is if you have a witness and you are reasonably certain that the testimony would be lost prior to commencement of the litigation. **Dirk Clayson** stressed the importance of resolving title now so that the next 100 years are not affected. **Charlie Donohue** asked how the criteria used in the 10th Circuit Court (Utah) would be utilized in the 9th Circuit (Nevada). **Kathy Davis** responded that Utah law could be a precedent, but not binding in Nevada. **Jake Tibbitts** closed out the discussion emphasizing SLUPAC's mandate to move forward with developing a protocol for addressing RS2477 roads in Nevada, coordinated with NACO and the Nevada Attorney General's office.

COUNTY PLANNING ISSUES

Varlin Higbee, Lincoln County:

The County is dealing with the effects of the creation of the Basin and Range National Monument. Coyote Springs development is moving forward on the Clark County side with completion of a flood control system.

Jerrie Tipton, Mineral County:

The County is a cooperating agency with BLM for the Carson City Resource Management Plan (RMP) update. There are concerns about three areas identified as "lands with wilderness characteristics", grazing closures and the Bi-State sage grouse.

Nancy Boland, Esmeralda County:

There is potential for lithium demand associated with Tesla but there are concerns about the over appropriation of water in Clayton Valley.

Jim French, Humboldt County:

The Western Lithium operation is within a significant forage area (SFA) on mapping contained within the BLM Greater sage grouse record of decision and this is a concern. The BLM has been silent on whether or not an expansion of the operation will be allowed. Other areas where the County encourages economic development are being impacted with BLM's land use restrictions based on the SFA's such as a landfill expansion, several gravel pits and a shooting range that are now "withdrawn" without explanation. He also referred to an agreement between BLM and certain mining companies that appears to be outside of the record of decision process, and appears to be arbitrary and capricious. He mentioned pursuing a Freedom of Information Act (FOIA) to determine what the agreement entails.

Regarding SLUPAC's goal of participating in a statewide water management plan, he mentioned a potential concern over a proposal for water to be transferred out of basin from Mud Meadow Reservoir to Fernley. Questions need to be addressed relative to how water is utilized and transferred. Transfer fees should be established and enforced by ordinance and counties should be clear on their policies toward out of basin water transfers. Taking water out of a basin takes the potential economic activity with it. Those counties on the losing end of the transfer need to be made whole in the form of transfer fees.

Another concern is BLM's changes of land use classifications being done outside of the public process. An example cited was a grazing permittee with a winter livestock allotment, change of classification occurs, the

allotment is retired, and another person puts in a Desert Land Entry (DLE) in its place without compensation to the permittee. This is becoming more and more prevalent in Humboldt County. **Jake Tibbitts** commented that the BLM RMP does not establish what the public process is for DLEs, only that certain acres are allowed generically in each valley. **Jim French** said that the people who are already in those valleys with entitlements are being impacted and not notified or compensated. He doesn't have a problem with DLEs, just the current process that affects existing permitted uses negatively without a proper public process.

Jeanne Herman, Washoe County:

Washoe County has the same sage grouse SFA concerns as cited by **Jim French**. Development to the north of Reno is being negatively impacted by the decision and BLM's withdrawal of lands for disposal. The lawsuit championed by AG Adam Laxalt is supported. Also, the Truckee Meadows Water Authority (TMWA) is finalizing the Truckee River Operating Agreement with the outcome of more water availability to the area.

Austin Osborne, Storey County:

Storey County shares the same concern over protecting grazing allotments.

A portion of the Tesla facility is open and manufacturing in phase one has started.

Aqua Metals has opened with 45 employees using a new technology to recycle lead acid batteries with no emissions.

The Switch data server farm is being built. Significant is the super loop of fiber optic being built between Storey County, Reno and Las Vegas, Los Angeles and San Francisco. This will allow the west coast to day trade slightly faster than other parts of the world, a competitive edge. Schools and public facilities will benefit because they will be tied into the system.

The Fulcrum garbage separation facility (USDA-funded program) will commence construction in Spring 2016. Garbage will be turned into jet fuel using a non-incineration process.

USA Parkway is now an NDOT highway with construction scheduled for completion in 2017. There has been a noticeable positive culture change in the area in regards to working with State agencies (NDOT, NDEP, etc.) because of the fast track nature of the project. Efficiency is much improved.

The Master Plan is 6 months to completion, zoning is being streamlined and the BLM land conveyance process is moving forward.

Lee Plemel, Carson City:

The last segment of I-580 to Spooner Junction is planned for completion in 2017.

Active trail associations are building non-motorized trails, coordinating with the City, State and Federal agencies to legitimize some trails. One new trail in particular is very popular, and has brought national interest in the form of a large mountain biking event to be held next spring and the next 4 years after that.

Terri Pereira, Churchill County:

A contractor has been hired to conduct an RS2477 road inventory that will tie into the BLM travel management plan that will start in 2016.

The Master Plan is being updated and a consultant is being sought to do the Public Land Policy Plan element.

Steven Stienmetz, Lander County:

The Phoenix mine is doing a large expansion, not changing the footprint very much, going deeper underground.

The County is pursuing an ordinance for OHVs for use of the County roads. An issue is crossing State routes and **Lorinda Wichman** commented that Nye County has an ordinance in place that addresses that and would provide the wording.

Nancy Amundsen, Clark County:

Tule Springs National Monument was established in 2014. The National Park Service has transferred in staff to manage the site and is seeking SNPLMA funds to run the monument. The County has a concern about this new, added competition for limited funds.

Food scrap management program ordinance – (all the food scraps from the resort corridor are taken to a pig farm for feeding source.) Ordinance would address areas outside of townships or established towns, a landfill over 500 acres could accommodate food scrap management.

Interstate 11 groundbreaking occurred, highway will be good for the area, however, negative attention on naturally-occurring asbestos could impede the process forward.

Related to travel management plans, BLM came to the County a few years ago and asked for some of Clark County's habitat conservation plan (HCP) funding to go out and identify roads that are being utilized, have been there for some time, and newly created ones. The County mapped all of those, at BLM's request, on the HCPs and the BLM has accepted those maps. It is hoped that when the travel management planning is done, BLM will recognize these already accepted roads. Clark County is not calling these RS2477 roads but taking the position that BLM already asked for, and accepted these roads, looking at this as a test case.

New resort coming in on the old Frontier property.

Currently Clark County has 22 zoning district land use categories, process ongoing to consolidate.

Roger Mancebo, Pershing County:

Conversations being had with Burning Man and BLM to shift the focus of the role of BLM law enforcement and allow Pershing County to take the lead on public safety.

Lorinda Wichman, Nye County:

A bill is before Congress to expand the boundaries of tribal lands, supported by Nye County subject to continued access being allowed.

Manufactured homes regulations ordinance being developed in Pahrump.

Beatty bike trail being developed, and new mountain biking trail north of Pahrump.

New solar application.

Nye County hospital/clinic will reopen.

Jake Tibbitts, Eureka County:

Same concerns as Humboldt and other counties on the sage grouse SFAs. Mapping discrepancies are abundant, for example, the entire town of Eureka is mapped as priority habitat.

Diamond Valley has been designated as the first Critical Management Area in the State pursuant to the statute put into place in the 2011 Legislative session. Ten year timeframe in place to do the groundwater management plan and moving forward to get it done.

County is 98% complete on the County Water Resources Master Plan.

COUNCIL MEMBER COMMENTS**COUNCIL DISCUSSION AND RECOMMENDATIONS/CHECK IN ON SLUPAC GOALS**

Next meeting will be January 29, 2016 in Battle Mountain.

PUBLIC COMMENT

Rob Rule, planner from NAS Fallon, introduced himself.

ADJOURNMENT

The meeting was adjourned at 3:50pm.

Respectfully submitted,

Skip Canfield

/s/

Meeting Recorder

Please note that minutes should be considered draft minutes pending their approval at a future meeting of the State Land Use Planning Advisory Council. Corrections and changes could be made before approval.

The meeting was digitally recorded. Anyone wishing to receive or review the recording may call (775) 684-2723. The recording will be retained for three years.