

**STATE LAND USE PLANNING ADVISORY COUNCIL – RS2477 WORKSHOP**  
**MINUTES**

October 29, 2018

Nevada Attorney General Building, Moot Courtroom – Second Floor  
100 N. Carson Street, Carson City, Nevada 89701

**Members Present**

Laurie Carson, White Pine County  
Jim French, Humboldt County  
Jeanne Herman, Washoe County  
Varlin Higbee, Lincoln County  
Sandy Hoover, NACO  
Ralph Keyes, Esmeralda  
Nancy McDermid, Douglas County  
Austin Osborne, Storey County  
Lee Plemel, Carson City  
Jake Tibbitts, Eureka County (Chair)  
Jerrie Tipton, Mineral County  
Lorinda Wichman, Nye County (Vice Chair)

**Members Absent**

Don Alt, Lyon County  
Delmo Andreozzi, Elko County  
Art Clark, Lander County  
Michael Johnson, Churchill County  
Roger Mancebo, Pershing County  
Sami Real, Clark County

**Others Present**

Kyla Bright, Lander County  
Jennifer Budge, Carson City  
Bill Calderwood, White Pine County  
Skip Canfield, State Land Use Planning Agency  
Jeremy Drew, Resource Concepts, Inc., Carson City  
Eric Hamrey, Mineral County  
Stephanie Hicks, Carson City  
Wayne Howle, Nevada Attorney General's Office  
Ben Johnson, Carson City  
Chuck Kendricks, Shining K Ranch, Pershing County  
Kristin McQueary, Elko District Attorney's Office  
Dagny Stapleton, NACO  
Rex Steninger, Elko County  
Lori Story, Nevada Attorney General's Office  
Iris Yowell, Carson City

**CALL TO ORDER**

The meeting was called to order at 11:00am and self-introductions were made. The Agenda was reviewed and approved.

**PUBLIC COMMENTS**

None.

**RS2477 ROADS WORK SESSION**

**Jake Tibbitts** led the discussion referencing the original SB 456 designating SLUPAC, NACO and the State Attorney General's Office to work together in developing a protocol for resolving RS2477 road status in Nevada. This special public workshop was scheduled in Carson City at the Attorney General's office to move forward with a work plan to develop the protocol, and to receive an update from **Wayne Howle**, Chief Deputy Attorney General.

**Wayne Howle** provided an update on his research into development of the protocol and latest developments in the region. He mentioned recent developments including:

**Kane County, Utah litigation set for trial February 4, 2019**

- Issues for trial:
  - Effects of statutes of limitation.
  - Decision of title disputes.
  - Definition of continuous use.
  - Definition of reservation of land.
  - Who may accept by public user.
  - Definition of construction.
- Fifteen roads at issue... to serve as a bellwether for 12,500 statewide claims
- Bills in Congress:
  - HR3270 (Cook CA)
  - S468 (Flake AZ)

**Storey County litigation – Thomas vs. Zachary**

Test - To establish existence and acceptance of an RS2477 road a claimant must show (1) that the alleged road was located over public lands and (2) that the character of its use was such as to constitute acceptance by the public of the statutory grant. *Hamerly vs. Denton* (Alaska 1961)

Evidence – Historical maps are direct evidence of public use and are sufficient, in and of themselves, to establish acceptance of an RS2477 road. *Anderson vs. Richards* (Nevada 1980). In *Anderson*, the Nevada Supreme Court found an RS2477 road based solely on the road's presence on maps and surveys.

Court recognizes four affidavits from individuals who used the road prior to 1968 and have continued to use the road in a manner consistent with the land since that time, such as accessing hot springs, trips for hunting, mining and reaching public land for camping and other outdoor activities. Further, homeowner defendants presented their own declarations to the court establishing their own personal use of the road for decades prior to Thomas' purchase of the property: 34 years in case of defendant Harper and 44 years in the case of Zachary. The court found that this evidence is also sufficient to establish continuous public use of the road to constitute acceptance of an RS2477 road across underlying property.

**Jarbidge: United States vs. Carpenter Society**

Burden of proof: clear and convincing.  
Appeal pending but stayed.

**Wayne Howle** summarized that a "road by road" litigation process is simply too onerous. Legislation by Congress or a possible Presidential Executive Order are two options to consider further, in lieu of the ongoing and challenging court cases. He said that the 9<sup>th</sup> Circuit Court which includes Nevada is looking for direction from the 10<sup>th</sup> Circuit in Utah. **Jake Tibbitts** reminded the Council that Utah is only pursuing roads under BLM jurisdiction, they are not including any US Forest Service lands. **Jerrie Tipton** mentioned that typically only about 20% of the roads are in question. **Kristin McQueary** stated that burden of proof is a huge issue for Elko County in the Jarbidge case, where a higher standard is needed than simply a preponderance of evidence. **Rex Steninger** said that it is an almost impossible standard to meet especially since the Jarbidge case relates to US Forest Service lands. **Jerrie Tipton** mentioned an important example regarding reclamation bonds for a road to a mine. The County disagreed and prevailed in not paying the bond because

it was proven that the road was in existence and used since well before FLPMA, and proven by historical photographs provided by the Mineral County Museum. **Jake Tibbitts** mentioned that Utah cannot be compared to Nevada in all respects. Utah has a dedicated staff whose sole responsibility is resolution of RS2477 conflicts. **Jim French** reminded the Council about the important connection between RS2477 and Federal Land Policy and Management Act of 1976 (FLPMA) Title V rights of way. FLPMA Title V rights of way are those a county applies to BLM for acknowledgement in perpetuity for those roads whose footprint has changed with an important caveat that the underlying RS2477 status shall remain. For RS2477 roads, the county outright asserts its jurisdiction. **Jake Tibbitts** cautioned the Council about Title V rights of way since this is a BLM discretionary action that includes stipulations that a county may not agree with, especially now with the sage grouse restrictions. **Jerrie Tipton** mentioned that sometimes "maintained by use" requires emergency maintenance by the county of an RS2477 road for repairs, **Wayne Howle** stated that this maintenance should be included in the definition/acceptance of an RS2477 road. **Lorinda Wichman** mentioned that in the 1980's, the US Forest Service submitted many water rights applications that specifically included detailed background information on the historical public use of RS2477 roads, and this documentation should be included as valuable justification and historical documentation. **Charlie Donohue** asked why BLM can't be more involved in RS2477 roads. **Jake Tibbitts** replied that BLM is authorized under FLPMA to issue rights-of-way; they don't recognize RS2477. Only a Federal court can adjudicate RS2477 roads. He also mentioned, using the Utah example, how important it is for the State to be involved, and how important SB456 is where allowing the State Attorney General to be involved and assist the counties. Under the Quiet Title Act, any civil action, except for an action brought by the State (private action or county action), the 12-year statute of limitations applies when the plaintiff or his predecessor in interest knew or should have known of the claim of the United States. BLM will claim a county should have known. But for any civil action brought by the State, the 12-year statute expires after the State receiving notice of the Federal claims to the lands, a substantial difference that allows for strong State standing to argue notice. This was key in Utah where they claimed BLM was inadequate in notification.

**Lorinda Wichman** was asked the cost for the inventory of Nye County's RS2477 roads. She replied that the cost to the County was \$449,329 and created 1,949 individual road files (@6,000 miles), sent to NDOT and accepted. All of the data files are stored on the county's updated server and thumb drives stored in the vault. Nye County has an established protocol with BLM for a quarterly meeting to go over any RS2477 issues. Updated shape files are provided to BLM. Nye County also upgraded software to seamlessly fit with BLM and US Forest Service software. BLM is asked if there are any issues and if so, a field visit is scheduled. **Laurie Carson** thought proactive collaboration with the BLM is so important.

**Ellery Stahler** asked what staff resources were available for this undertaking. **Lorinda Wichman** replied that a contractor was obtained and provided with County funded high tech Trimble surveying/camera equipment. The County road protocol manual was written in house. BLM assisted with the provision of USGS mapping information.

**Jake Tibbitts** reminded the Council that an RS2477 subgroup has been established at a previous meeting including himself, **Lorinda Wichman**, and **Austin Osborne**. The subgroup will continue to report back to the Council as the process continues.

Takeaways from discussion:

Pending further court proceedings, the Council should continue to pursue establishing a protocol. Each county should pursue their inventories at the pace and staffing levels allow. It is important to continue establishing a protocol, as even in the event of a Congressional solution or Presidential action, the county will still be required to provide documentation of RS2477 roads. Existing examples should be used rather than reinventing the wheel. All counties have the Nye County example and also can follow processes in Utah.

There are two other potential avenues for resolution (1) Congressional action and (2) Presidential Executive Order. Either one could resolve the RS2477 conflicts in a one-time action depending on how they are written.

Congressional Action including some or all of:

- Allow Department of Justice discretion to settle RS2477 conflicts.
- Work with National NACO and Western Interstate Region to resolve.
- Edit and amend HR3270 (Historic Roads Preservation Act) with DOJ authority to settle.
- Adjudication outside of Federal agency framework.
- Broaden historical documentation definition to allow more county/local/state flexibility.
- Shift the burden of proof to the Feds to prove not RS2477.

Presidential Executive Order:

Some or all of items above under Congressional action.

Address Travel Management Planning process whereby BLM cannot close any road without clear and convincing evidence and specific documentation of County/State notification and coordination.

**Skip Canfield** was directed to write a draft SLUPAC Resolution stating support for consideration of a Congressional Action or Presidential Executive Order outcome.

### **PUBLIC COMMENT**

None.

### **ADJOURNMENT**

Meeting adjourned at 2:37pm.

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.