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Title: Supervisor Sweeney and the Department of Transportation recommending the Board execute a Certificate of Acceptance for the easement granted by the United States Forest Service (USFS) on the Rubicon Trail. (Est. Time 30 Min.)

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Attachments: 1. A-Rubicon Easement Resolution.pdf, 2. B-Rubicon Easement.pdf, 3. C-Rubicon Certificate of Acceptance.pdf, 4. D - JRS comments 8-14-12 - 12-1031.pdf, 5. E - Recorded Easement - Rubicon Trail.pdf, 6. Fully executed Resolution 117-2012.pdf

Date	Ver.	Action By	Action	Result
8/14/2012	1	Board of Supervisors	Approved	Pass

Supervisor Sweeney and the Department of Transportation recommending the Board execute a Certificate of Acceptance for the easement granted by the United States Forest Service (USFS) on the Rubicon Trail. (Est. Time 30 Min.)

The County Department of Transportation recommends that the Board consider the following actions:

- 1) Authorize Supervisor Jack Sweeney to execute a Certificate of Acceptance for an easement granted by the United States Department of Agriculture, Forest Service, Eldorado National Forest, for those portions of the Rubicon Trail alignment adopted by the Board of Supervisors on January 26, 2010, from the Wentworth Springs Campground easterly to the El Dorado/Placer County line, which cross federal land. This easement is not intended to supplant, replace, diminish, alter, vacate or abandon whatever rights-of-way may exist under Revised Statutes section 2477.
- 2) Find that the acceptance of the easement offered by the Forest Service will not have a significant effect on the environment because the easement will memorialize a pre-existing legal right of way. The longstanding historical use of the Rubicon Trail and the County's ongoing maintenance activities will not change. Furthermore, the grant of easement is exempt under California Code of Regulations, Title 14, sections 15301 (road maintenance), and sections 15307 and 15308 (compliance with a Water Board order).
- 3) Authorize the Department of Transportation to continue to take the steps necessary to acquire easements for the Rubicon Trail alignment adopted by the Board of Supervisors on January 26, 2010, from the Wentworth Springs Campground easterly to the El Dorado/Placer County line, from the private owners of the underlying land, including ordering and paying for title and appraisal reports for the appropriate properties, including APN's: 010-100-01 (Rubicon Trail Partners) and 010-180-07 (Rubicon Soda Springs).

FUNDING: There are no direct costs associated with the acceptance of this easement from the U.S. Department of Agriculture.

Background

The El Dorado County Department of Transportation recommends that the Board of Supervisors accept an easement offered to the County by the United States Department of Agriculture, Forest Service, for those portions of the Rubicon Trail which cross federal land, from the Wentworth Springs Campground easterly to the Placer County line. The Rubicon Trail is already a public road which has been in continual use for over a century, and this easement will not change the longstanding historic use but will merely memorialize the public's right to continue to use the Rubicon Trail, will memorialize its location, will memorialize the County's maintenance obligation, and will make future maintenance efforts less costly, more efficient and quicker. The acceptance of the easement will not change or extinguish any pre-existing public right-of-way under R.S. 2477.

The Rubicon Trail is a portion of Wentworth Springs Road, a historic road dating from gold rush days which goes from Georgetown in El Dorado County over the crest of the Sierra Nevada mountain range (at an elevation just over 7,000 feet), through the Rubicon Springs on the Rubicon River, across the boundary between El Dorado County and Placer County, and to Tahoma at Lake Tahoe. The public acquired the right to use this route under an 1866 federal statute, 14 Stat. 251, sometimes called the "Mining Act of 1866," recodified at 43 U.S.C. §932, and now commonly known as Revised Statute ("R.S.") 2477. R.S. 2477 says: "And be it further enacted, that the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." Under R.S. 2477 a public right of way was created over federal land by the public use of that federal land for transportation.

R.S. 2477 remained in effect for 110 years until it was repealed by the Federal Land Policy and Management Act of 1976 (FLPMA) 43 U.S.C. §1701 et seq. When Congress repealed R.S. 2477, it specified that any valid R.S. 2477 right of way existing on the date FLPMA was enacted would continue in effect. See note following 43 U.S.C. §1701. This "savings clause" had the effect of "grandfathering" into permanent existence any R.S. 2477 rights-of-way that had been established up to October 21, 1976, and preventing any new R.S. 2477 rights from being created after that date. The express terms of R.S. 2477 only allowed rights-of-way to be created during the time that the federal land was "not reserved for public uses." The creation of the Eldorado National Forest in 1906 reserved the land within the boundaries of the Forest for public uses. Therefore in regard to the Rubicon Trail, R.S. 2477 rights of way were created by the public use of the land as a roadway from 1866 to 1906. Those rights continue undiminished today and into the future, unchanged by the proposed easement. The right of way for the Rubicon Trail was established over public land, and private landowners who later acquired their land from the federal government took it subject to any rights-of-way previously established under R.S. 2477. Subsequent public use also establishes a public right of way over private land by prescriptive easement and implied dedication. Thus the public right-of-way established under R.S. 2477 for the Rubicon Trail is the same over both the federal and the private land it crosses.

R.S. 2477 created thousands of miles of public roadways across federal land during its 110 year existence. The existence, location, nature and extent of those thousands of miles of public roadway have generated some controversy over the decades, partly because the establishment of a road under R.S. 2477 required no formal action by the federal government or by any local jurisdiction. Therefore, public rights-of-way sprang into existence without the typical formalities and documentation that most people are used to when important property rights are established. This

situation frequently leaves the precise location of an R.S. 2477 right-of-way somewhat obscure.

The U.S. government has not questioned the existence or validity of the public right-of-way for the Rubicon Trail established under RS 2477, and recently acknowledged that “it is generally accepted by the Forest Service and others that the Rubicon Trail qualifies as a public right of way in accordance with RS 2477” (Rubicon Trail Final EIS). However, there have been some occasional disagreements over the precise location of the main Rubicon Trail and its short variant routes.

On April 30, 2009, the Central Valley Regional Water Quality Control Board (Water Board) issued Clean Up and Abatement Order (CAO) No. R5-2009-0030, which requires the County and the United States Forest Service (USFS) to take a number of actions on the Rubicon Trail to cleanup and abate some of the problems that vehicles have created over the years. The CAO noted that a legal easement for the Rubicon Trail has not been recorded (except for a FRTA easement for an intersecting route commonly called the Ellis Creek Intertie), and the exact location and width of the Rubicon Trail has not been fully defined. The CAO specifically orders the “Responsible Parties” (i.e., both County and the USFS) to “document the actual location of the Rubicon Trail within El Dorado County, including the centerline and an agreed-upon width from each side of that line that shall be easily understood by both the public and law enforcement officials.” Once the route is defined and memorialized in an easement, then the various other activities required by the CAO, such as maintenance and remediation, can be concentrated on the identified trail location.

In order to satisfy the CAO, at its January 26, 2010 regular meeting (Board Item #10-0049) the Board of Supervisors selected and approved a “preferred route” for the Rubicon Trail. The Board emphasized that this preferred route was selected for the purpose of complying with the CAO and for maintenance only, and was not intended to supplant, replace, diminish, alter, vacate or abandon any legal rights-of-way that might exist, including those previously established under RS 2477. At the June 29, 2010 regular Board meeting (Board Item #10-0686) the Department of Transportation received approval from the Board to undertake a formal plan for maintenance and related work on the Rubicon Trail along the preferred route.

El Dorado County and the Eldorado National Forest have spent the past few years taking a variety of steps to comply with the CAO along the Rubicon Trail. These efforts stimulated a discussion concerning potential ways to formalize the location of the Rubicon Trail and clarify the rights and responsibilities of the parties in relation to the Trail and the CAO. The Forest Service has expressed in writing that an RS 2477 right-of-way is the legal equivalent of an easement, and that the existence of an RS 2477 right-of-way imposes a maintenance obligation on the County. Thus the Forest Service urged the County to apply to it for a formal written easement under the Forest Road and Trail Act (FRTA), 16 U.S. C. §532-538. Both the County and the Forest Service agreed that this process was preferable to the alternatives, such as costly and time consuming litigation to legally establish an RS 2477 right-of-way in court, and the end result would be the same.

The County was familiar with the FRTA easement process because in 2004 it was granted a FRTA easement for the “Ellis Tie” route (also known as the Ellis Creek Intertie), which connects the end of a paved road at the second Loon Lake dam to the Rubicon Trail near where it crosses Ellis Creek. The Ellis Creek Intertie allows easier and quicker access to the Rubicon Trail for most users, and is the most popular western access point to the Rubicon Trail, and in the mind of most users, is considered a part of the Rubicon Trail.

On October 19, 2010 (Board Item #10-1118) the Board of Supervisors directed the County Department of Transportation to apply to seek an easement on the preferred route of the Rubicon Trail from the owners of the underlying land over which that portion of the Trail crosses, that is, the Eldorado National Forest and two private landowners. County DOT completed a survey of the preferred route adopted by the Board, and that survey is the basis for the property description in the proposed FRTA easement. The USFS performed an environmental analysis under the National Environmental Policy Act (NEPA) for the easement and several associated projects required by the CAO such as the proposed new bridge over Ellis Creek, replacement of the FOTR bridge, etc. That NEPA analysis was completed in early 2012 and a Record of Decision (ROD) was issued (ROD, Rubicon Trail Easement and Resource Improvement Project, April 19, 2012). Several interested parties (including El Dorado County) filed administrative appeals to the ROD. Those appeals were recently resolved by the agreement of all parties to the addition of a condition to the easement requiring annual monitoring of the condition of the Trail during the time it is the most susceptible to damage by vehicular use (saturated soil conditions in the spring when the snow melts) and possible closure during those conditions if unacceptable environmental damage is occurring. That condition is Exhibit C to the proposed easement.

The legal authority by which the U.S. Forest Service can grant an easement for a road right-of-way across federal land is the Forest Road and Trail Act (FRTA), 16 U.S.C. §532-538. A standard FRTA easement contains a requirement that the easement holder maintain the right of way. Thus by the USFS granting, and the County accepting the easement, the County and the USFS will each be complying with three specific orders from the Water Board in the CAO: (1) clarifying each party's responsibilities for maintaining the Rubicon Trail, (2) documenting the actual location of the Rubicon Trail, and (3) proceeding with the proposed new bridge near where the Rubicon Trail currently crosses Ellis Creek.

Once the FRTA easement from the USFS is in place, then the County Department of Transportation can commence the process of obtaining connecting easements from the owners of the private property over which the Rubicon Trail passes. The survey work has already been performed, and the process is expected to proceed in a manner similar to the easement the County obtained in 2004 from the owners of private land under the Ellis Creek Intertie. Just like the FRTA easement over federal land, the expected future easements over private land are not intended to supplant, replace, diminish, alter, vacate or abandon whatever rights-of-way may currently exist, under RS 2477, or by prescriptive easement, or by implied dedication, or any other manner.

Under State law (Government Code §27281) the conveyance of an easement to the County is not effective and cannot be recorded unless and until it has been formally accepted by board action. Normally a certificate of acceptance is signed by the current Chair of the Board, but Supervisor Briggs has asked that the Board formally delegate the authority to execute the certificate of acceptance to Supervisor Jack Sweeney, in recognition of his unwavering personal commitment to the Rubicon Trail, and his herculean efforts to preserve the public use of the Rubicon Trail for future generations to enjoy. The proposed Certificate of Acceptance accompanying this agenda item has Supervisor Sweeney's name as signatory on behalf of the County.

CEQA

The decision to be made by the Board of Supervisors outlined in this staff report to authorize Supervisor Sweeney to execute a Certificate of Acceptance of a FRTA easement from the Eldorado National Forest for the Rubicon Trail is not a project under CEQA since the action simply

memorializes the existing legal status and does not have the potential to alter the existing physical situation on the ground.

The proposed easement offered by the Eldorado National Forest does not create new rights or obligations, it simply memorializes and specifically locates what all parties agree is a pre-existing public right of way that has been in continual public use for over a century, and it memorializes and clarifies the pre-existing maintenance obligation of the County. The proposed FRTA easement says at paragraph 2: “The easement herein granted is limited to use of the described right-of-way for the purpose of construction, operation, and maintenance of a highway and does not include the grant of any rights for nonhighway purposes or facilities.” The historical and current use of the Rubicon Trail will not change if the easement is accepted or rejected. The County’s previously approved and ongoing maintenance plan for the Rubicon Trail will not change if the easement is accepted or rejected. The acceptance of the easement does not approve or authorize any specific County activity that isn’t already allowable by right. Exhibit C to the proposed easement notes that the ongoing maintenance will be performed to an existing Forest Road Agreement dated October 6, 1992.

In addition, even if for argument’s sake the County and the U.S. agreed that the acceptance of the proposed easement is a project under CEQA, the project is categorically exempt for two separate reasons. First, the express purpose of the proposed federal FRTA easement is so that the historic right of way along the Board-adopted preferred route can be continue to be maintained in compliance with the County’s Saturated Soil Water Quality Protection Plan previously adopted by the Board of Supervisors at its regular meeting of December 14, 2010 (Board Item #10-1279). The operation, repair, maintenance and minor alteration of existing highways, streets, sidewalks, gutters, bicycle and pedestrian trails and similar facilities, including road grading for the purpose of public safety, is categorically exempt from CEQA under the CEQA Guidelines, California Code of Regulations, Title 14, §15301(c).

Second, the implementation of a cleanup order issued by a regional water board is also exempt under the CEQA Guidelines, California Code of Regulations, Title 14, §15307 (Actions by Regulatory Agencies for Protection of Natural Resources) and §15308 (Actions by Regulatory Agencies for Protection of the Environment). As noted above, the current CAO expressly requires the County to provide “[d]ocumentation of the actual location of the Rubicon Trail within El Dorado County, including the centerline and an agreed-upon width from each side of that line,” and also orders both the County and the USFS to reach a “clear definition of each party’s responsibilities for the Rubicon Trail, including maintenance activities . . .,” and also orders the County to continue with preliminary engineering and environmental review for the construction of a bridge at Ellis Creek. The CAO further notes that the “implementation of this Order is also an action to assure the restoration of natural resources and/or the environment and is exempt from the provisions of CEQA, in accordance with California Code of Regulations, title 14, sections 15307 and 15308.”

The one instance in which the proposed FRTA easement conveys a right of way that is arguably not in historic or present vehicular use is the short section that will be used for the approaches to and construction of the new bridge that will be built across Ellis Creek about 75 feet downstream from the current crossing, which is expected to be completed either this season or perhaps next. Historically, and currently, vehicles cross Ellis Creek at grade. A new steel truss bridge across the creek will be constructed about 75 feet downstream to raise vehicles out of the watercourse, and the current grade crossing will be removed from use. The County believes that an R.S. 2477 right of way can change to accommodate small variations in the route that become necessary over time to accommodate situations like this. The proposed new Ellis Creek bridge (including the short easement necessary for

its approaches) was the subject of a joint CEQA and NEPA analysis last year, which has become final without challenge, so there is no reason for that project to be analyzed under CEQA as part of the analysis for the acceptance of the whole Rubicon Trail easement including the bridge approaches.

Continued Existence of R.S. 2477 Right of Way

As has been repeated above in this document and in prior Board actions, the Forest Service's grant of an FRTA easement for the Rubicon Trail, or the County's acceptance of the easement, does not alter, extinguish, supplant, diminish, replace, vacate or abandon the pre-existing public right-of-way under R.S. 2477. Neither the Forest Service nor the County intend that the grant or acceptance of the proposed FRTA easement will alter the underlying R.S. 2477 right of way in any manner. There is nothing incompatible about the grant or acceptance of a FRTA easement over the same land on which an RS 2477 right of way already exists. In fact, the proposed easement in paragraph number 1 specifically states that the easement is subject to "[o]utstanding valid claims, if any, existing on the date of this grant," and this provision ensures that the easement is subject to the public's pre-existing valid claim under R.S. 2477.

The Forest Service is not authorized by federal law to create or extinguish an RS 2477 easement, so the grant of the easement for the Rubicon Trail cannot by law extinguish the underlying RS 2477 right of way. PL 104-208, Section 108 (1996). The County cannot legally abandon a public right of way without first following the specific procedures mandated by State law. Under California law, a public right of way in a county can only be considered extinguished if the County Board of Supervisors formally vacates it at a public hearing noticed for that specific purpose, at which substantial evidence that the road is no longer necessary for use by the public is introduced, and abandonment of the right of way is in the public interest. Streets & Highways Code §8324(b); Vehicle Code §21101(a)(1); *Heist v. County of Colusa* (1984) 163 Cal. App. 3d 841. Since a statutory vacation can only be done on the finding that the road is not needed for vehicular use, a vacation in the face of evidence that the road is in fact needed could be set aside as arbitrary, capricious and not in accordance with law. In the case of the Rubicon Trail, it is undisputed that it has been in continual public use since the 1860s, it is in continual public use today, and it will be in continual public use for the foreseeable future. The purpose of the FRTA easement offered by the Forest Service and accepted by the County is to foster the current and future public use, not extinguish any pre-existing legal right to that use. If the easement is later reconveyed or otherwise becomes ineffective or inoperative for any reason, the public will still have its historic legal right to use the Rubicon Trail under the auspices of R.S. 2477.

Reason for Recommendation

The formal easement over federal land crossed by the Rubicon Trail will memorialize a historic pre-existing public use, will clarify the location at which the County's maintenance efforts will be concentrated, and will satisfy express conditions in the CAO

Action to be Taken Following Board Approval

- 1) Supervisor Sweeney will execute the Board Resolution and will execute the Certificate of Acceptance on behalf of the County. County Department of Transportation staff will record it and report to the Water Board the successful completion of this task.
- 2) The Department of Transportation staff will proceed to obtain easements for the Rubicon Trail from the owners of the private property over which it passes, and once they have been obtained, will

return to the Board with Certificates of Acceptance.