

**REPORT/RECOMMENDATION TO THE BOARD OF SUPERVISORS
OF SAN BERNARDINO COUNTY
AND RECORD OF ACTION**

March 12, 2024

FROM

NOEL CASTILLO, Director, Department of Public Works - Transportation

SUBJECT

Special Use Permit for the Stanfield Cutoff at State Route 38 Project in the Unincorporated Area of Big Bear City

RECOMMENDATION(S)

1. Approve Special Use Permit (**Agreement No. 24-240**) from the United States Department of Agriculture Forest Service, including non-standard terms, necessary for the Stanfield Cutoff at State Route 38 Project in the Unincorporated Area of Big Bear City, effective upon final signature through December 31, 2026.
2. Authorize the Chair of the Board of Supervisors to execute the Special Use Permit from the United States Department of Agriculture Forest Service necessary for the Stanfield Cutoff at State Route 38 Project in the Unincorporated Area of Big Bear City.
3. Authorize the Director of the Department of Public Works to approve and execute any other documents and payments necessary to execute the Special Use Permit to complete the Stanfield Cutoff at State Route 38 Project in the Unincorporated Area of Big Bear City, subject to County Counsel review.

(Presenter: Noel Castillo, Director, 387-8040)

COUNTY AND CHIEF EXECUTIVE OFFICER GOALS & OBJECTIVES

Ensure Development of a Well-Planned, Balanced, and Sustainable County.

Provide for the Safety, Health and Social Service Needs of County Residents.

FINANCIAL IMPACT

Approval of this item will not result in the use of Discretionary General Funding (Net County Cost). The Stanfield Cutoff at State Route 38 Project in the Unincorporated Area of Big Bear City (Project) is funded by Measure "I" 2010-2040 Mountains Subarea Major Local Highways Program, which is administered by the San Bernardino County Transportation Authority (SBCTA), the State of California, and the State Highway Operations and Protection Program Minor B funds. The cost to acquire the Special Use Permit is \$1,443 plus a fee estimated to be \$154 for an approximately two-year permit duration, which is effective upon final signature (anticipated to be late spring 2024) and shall expire on December 31, 2026. Sufficient appropriation and revenue are included in the Department of Public Works (Department) 2023-24 Road Operations budget (6650002000 14H15055) and will be included in future recommended budgets.

BACKGROUND INFORMATION

The Project involves construction of a roundabout at the intersection of State Route 38, also known as North Shore Drive and Stanfield Cutoff, to improve the intersection's efficiency, traffic

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flow, and pedestrian and general public safety. The Project scope includes pavement reconstruction, construction of a single-lane roundabout with multi-use path, crosswalks and sidewalks, curb and gutter, curb ramps in accordance with current design standards and pursuant to the Americans with Disabilities Act (ADA) guidelines, utility relocations, street lighting, tree and vegetation removal, installation of drainage features, and new signage and striping to accommodate the roundabout intersection.

On September 29, 2020 (Item No. 48), the Board of Supervisors (Board) approved Cooperative Agreement No. 20-945 between the County, the City of Big Bear Lake, and SBCTA for the Project. On March 2, 2021 (Item No. 33), the Board approved Cooperative Agreement No. 21-155 between the County and the California Department of Transportation (Caltrans) for the Project.

The Project requires the Department to obtain a Special Use Permit (SUP), which contains non-standard terms, from the United States Department of Agriculture Forest Service (USDA Forest Service) to construct an ADA ramp and to complete minor construction activities on 4,900 square feet of USDA Forest Service property (Assessor's Parcel Number 0304-431-02) needed for the Project.

The SUP includes terms that differ from, and omit, certain County standard contract language. The non-standard and missing terms include the following:

1. The SUP shifts all risk of loss of the authorized improvements and all risk of loss of use and occupancy of the SUP area, in whole or in part, due to public health and safety or environmental hazards onto the permittee, which is the County. Such risk includes theft, vandalism, fire and any firefighting activities, environmental contamination, avalanches, rising waters, winds, fire limbs or trees, and other forces of nature.
 - The County standard language does not limit or shift risk of loss or limitation of liability.
 - Potential Impact: Claims could exceed the limitations on risk of loss and limitation of liability and SUP amount leaving the County financially liable for such risk of loss.
2. The SUP requires permittee to assume an affirmative duty to protect from damage the land, property, and other interests of the United States that are associated with use and occupancy authorized by the SUP. This includes permittee being liable for all injury loss or damage including fire suppression costs, prevention and control of spread of invasive species, and costs of rehabilitation or restoration of natural resources, resulting from the permittees use and occupancy of the SUP area. This also includes damage to all roads and trails of the United States caused by the permittee's heirs, assignees, agents, employees, or contractors to the exact same extent provided, except that liability shall not include reasonable and ordinary wear and tear.
 - The County standard language does not require the County to assume affirmative duties or assume liability for all injury or loss.
 - Potential Impact: Claims for liability could exceed the SUP amount leaving the County financially liable.
3. The SUP provides for recovery attorneys' fees and costs in connection with any costs arising out of any injury, loss, or damage to United States Property.

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- The County standard contract requires each party to bear its own costs and attorney fees, regardless of who is the prevailing party.
 - Potential Impact: If the USDA Forest Service initiates any legal proceeding related to the SUP, it may be entitled to recover costs including reasonable attorneys' fees, which could exceed the total SUP amount.
4. The SUP requires the County to indemnify, defend, and hold harmless the United States for any costs, damages, claims, liabilities, and judgements arising from past, present, and future acts or omissions of the permittee in connection with the use or occupancy authorized by the SUP. The indemnification requirement also includes, but is not limited to, acts and omissions of the County or the County's heirs, assigns, agents, employees, or contractors in connection with the use or occupancy authorized by the SUP. The indemnification further includes violation of any laws and regulations, judgments, claims, demands, penalties, or fees assessed against the United States, costs, expenses, and damage incurred by the United States, or the release or threatened release of any solid waste, hazardous waste, hazardous materials, pollutant, contaminant, oil in any form, or petroleum product into the environment.
- The County standard contract does not include any indemnification or defense by the County of another party.
 - Potential Impact: By agreeing to indemnify, the County could be contractually waiving the protection of sovereign immunity. Claims that may otherwise be barred against the County, time limited, or expense limited could be brought against United States without such limitations and the County would be responsible to defend and reimburse the United States for costs, expenses, and damages, which could exceed the total SUP amount.
5. The SUP does not require the United States to indemnify the County, as required by County Policy 11-07.
- The County standard contract indemnity provision requires the contracting party to indemnify, defend, and hold County harmless from third party claims arising out of the acts, errors or omissions of any person.
 - Potential Impact: The United States is not required to defend, indemnify or hold the County harmless from any claims, including indemnification for claims arising from the United States' negligent or intentional acts. If the County is sued for any claim, the County may be solely liable for the costs of defense and damages, which could exceed the SUP amount.
6. The SUP does not require the United States to meet the County's insurance standards, as required by County Policy 11-07.
- County Policy requires contractors to carry appropriate insurance at limits and under conditions determined by the County's Risk Management Department and set forth in the County standard contract.
 - Potential Impact: The County has no assurance that the United States will be financially responsible for claims that may arise in connection with the SUP, which could result in expenses to the County that exceed the total SUP amount.
7. Payment terms are net 30 from the date of receipt with late payment interest of the higher of the Prompt Payment Act rate or the rate of the current value of funds to the United states treasury (i.e., the Treasury tax and loan account rate), as prescribed and

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published annually or quarterly by the Secretary of the Treasury and the Federal Register and the Treasury Fiscal Requirements Manual Bulletins. Additionally, a penalty of 6% per annum shall be assessed on the total amount that is more than 90 days delinquent and shall accrue from the same date on which interest charges begin to accrue. If the account becomes delinquent, an administrative cost, to cover processing and handling the delinquency, shall also be assessed.

- County standard payment terms are Net 60 days with no interest or late payment penalties.
- Potential Impact: County standard processing time is 60 days or more. Failing to pay net 30 days will result in a material breach of the SUP, which would allow the United States to terminate the SUP and seek other legal remedies, including charging the County interest, penalty percentage, and administrative costs, which could exceed the SUP amount.

8. The County may not terminate the SUP for convenience and agrees to payment obligation and non-refundable fees.

- The County standard contract gives the County the right to terminate a permit, for any reason, with a 30-day written notice of termination without any obligation other than to pay amounts for services rendered and expenses reasonably incurred prior to the effective date of termination.
- Potential Impact: There is no County termination for convenience clause. Upon any termination of the SUP by either party, regardless of cause, the County is required to pay the SUP fees, which could result in a payment liability where no funds are available due to lack of allocation or loss of funding.

The Department recommends Board approval of the SUP, including the non-standard terms, in order to acquire the necessary permit rights to complete the Project and to help meet the County's goals and objectives.

USDA Forest Service required the Department to pay \$1,443 for cost recovery per the Code of Federal Regulations (CFR) § 251.58 before issuance of the SUP, therefore payment for the full cost recovery was processed by the Department on February 1, 2024. Additionally, issuance of the SUP will require the Department to pay an annual fee of approximately \$77 per year for an estimated total of \$154 for the approximate two-year duration of the SUP. No refunds are issued if the work is completed before the SUP expires.

The Project partially involves a state highway. Therefore, on October 6, 2022, Caltrans, acting as the Lead Agency for the Project, reviewed and approved compliance with the California Environmental Quality Act (CEQA) and determined this Project is Categorical Exempt as it has no significant impacts on the environment. The County, as the Responsible Agency for the Project, concurs with Caltrans' findings. Additionally, pursuant to the delegated authority from the USDA Forest Service, Caltrans reviewed the Project for compliance under the National Environmental Policy Act (NEPA) and determined the Project is Categorical Excluded pursuant to Title 23 of the Code of Federal Regulations, section 771.117(c).

On November 15, 2022 (Item No. 63), the Board approved the Project and considered a categorical exemption in accordance with CEQA. The Clerk of the Board was directed to file and post a Notice of Exemption. Accordingly, no further action is required under CEQA.

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PROCUREMENT

The Department plans to bring the Project's plans and specifications, as well as a recommendation to advertise for competitive bids, to the Board for consideration in Summer 2024, which allows the time required to certify the right-of-way for the Project.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Aaron Gest, Deputy County Counsel, 387-5455) on February 14, 2024; Risk Management (Victor Tordesillas, Deputy Executive Officer, 386-8623) on February 15, 2024; Finance (Carl Lofton, Administrative Analyst, 387-5404) on February 23, 2024; and County Finance and Administration (Paloma Hernandez-Barker, Deputy Executive Officer, 387-5423) on February 26, 2024.

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Record of Action of the Board of Supervisors
San Bernardino County

APPROVED (CONSENT CALENDAR)

Moved: Joe Baca, Jr. Seconded: Jesse Armendarez

Ayes: Col. Paul Cook (Ret.), Jesse Armendarez, Dawn Rowe, Curt Hagman, Joe Baca, Jr.

Lynna Monell, CLERK OF THE BOARD

BY 
DATED: March 12, 2024



cc: Transportation - Nguyen w/ agrees for sign.
Contractor c/o Transportation
File w/ agree
JLL 03/20/2024