

**IN THE THIRD JUDICIAL DISTRICT COURT  
SALT LAKE COUNTY, STATE OF UTAH  
SALT LAKE DEPARTMENT**

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**IN THE MATTER OF THE UNITED  
EFFORT PLAN TRUST**

**RULING AND ORDER ON MOTION  
TO AWARD COSTS AND EXPENSES  
CHARGEABLE TO THE STATE OF  
UTAH**

Case No. 053900848

Judge Denise P. Lindberg

Date: July 29, 2011

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This matter is before the Court on the Special Fiduciary's Motion to Award Costs and Expenses from the State of Utah. Having fully considered the memoranda submitted by the Special Fiduciary and Utah Attorney General, the Court GRANTS the Fiduciary's Motion.

As an initial matter, the Court rejects the State's argument that consideration of this Motion violates either the voluntary stay the Court imposed in this case on April 11, 2011 or the Tenth Circuit's reliance upon that stay. On April 11, 2011, the Court directed the Special Fiduciary not to take any action in this case "other than those actions necessary to preserve and protect the assets of the Trust." Ruling and Order Directing the Special Fiduciary to Retain UEP Trust Assets Pending Further Order of this Court, at 4. Consideration of this Motion *is* necessary to preserve and protect the assets of the Trust. Since early 2008 the Special Fiduciary, the Trust's attorneys, and the other professionals retained by the Special Fiduciary have received only a fraction of the payments due to them, if they have been paid at all. The Trust now faces the real and substantial threat that it will be left without someone to manage it, attorneys to defend it, or other professional assistance. Although the Trust was already in dire financial circumstances before the federal litigation began, the drain on Trust resources has only increased due to the demands of defending that lawsuit and the on-going failure of occupants of Trust lands to pay the modest occupancy fees authorized by this Court. Moreover, the fact that aspects of that litigation are now on interlocutory appeal means that there is little likelihood that the Trust assets will reasonably be available in the near future to pay past and present administrative fees and costs. If the interim relief sought is not granted, the Special Fiduciary and others with whom he has contracted on the Trust's behalf are unlikely to continue rendering necessary services to the Trust. Finally, consideration of this Motion does not implicate any of the issues pending either in the federal district court or the U.S. Court of Appeals for the Tenth Circuit.

Pursuant to Utah Code Annotated § 75-7-1004(1), the Special Fiduciary argues that it is now just and equitable to require the State of Utah pay costs and expenses of the Fiduciary, including the reasonable attorneys' fees he has incurred. The Court agrees.

Section 75-7-1004(1) provides:

In a judicial proceeding involving the administration of a trust, the court may, as justice and equity may require, award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.

At the outset of this case the Court ordered that the costs and expenses of Trust administration be borne by the Trust. Since then, however, changed circumstances have caused the Court to re-examine how the financial obligations incurred on the Trust's behalf should be addressed. The Court concludes that justice and equity require that, as between the State and the Special Fiduciary, the State should be required to cover the costs and expenses of Trust administration until such time as the Trust can again bear those costs or Trust assets can be sold to meet its financial obligations.

The relevant considerations that have led the Court to this conclusion are as follow:

1. The State, through the Utah Attorney General (Utah AG), instituted this action by filing a probate Petition and moving for the issuance of a Temporary Restraining Order (TRO) to remove the then-existing UEP trustees and to appoint Bruce Wisan as a Special Fiduciary to administer the Trust. Mr. Wisan was known to the Utah AG because Mr. Wisan had done work on another (unrelated) case at the request of the Utah AG. As a result, Mr. Wisan's was the only name recommended by the Utah AG for appointment by the Court. Presumably, the Utah AG made that recommendation because he was convinced that Mr. Wisan had the knowledge, skill, and experience necessary to carry out this assignment. Nowhere in the Court submissions recommending his appointment did the Utah AG suggest that Mr. Wisan had agreed to render services to the Trust without expectation of timely payment. On the contrary, the Utah AG's Petition (in which he sought Mr. Wisan's appointment among other things) specifically noted that the Special Fiduciary's fees of \$205.00 per hour should be paid as a "priority claim" under Utah Code §75-7-511. <sup>1</sup> See Utah Attorney General's Petition for (i) Removal of Current Trustees and Appointment of New Trustees; (ii) the Suspension of the Current Trustees Pending a Hearing on their Removal; (iii) an Inventory, Accounting and Final Report of the Current Trustees; (iv) the Appointment of a Special Fiduciary; (v) A Hearing for the Appointment of New Trustees Proposed by Interested Parties; (vi) Special Notice for Hearings ("Petition"), at ¶¶ 61-67. There is no evidence that either Mr. Wisan or his lawyers ever agreed to

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<sup>1</sup>The early record of this case is silent on the question whether Mr. Wisan's professional fee would be subject to adjustment over time. At this point the Court is not making any determination, one way or another, on that question. However, the Court notes that nearly all professional fees are periodically adjusted to reflect changing market rates for comparable services.

assume the risk that they would not be paid for services rendered to the Trust.<sup>2</sup>

2. It was the Utah AG who further suggested to the Court that Mr. Wisan's role be expanded from the initial duties outlined in the Petition. See Appointment Order dated June 22, 2005. Therefore, the Utah AG cannot argue that Mr. Wisan improperly expanded his role by undertaking duties beyond the AG's contemplation at the time he nominated Mr. Wisan.
3. A representative of the Utah AG has attended every Court hearing, including every hearing at which the Court received, reviewed, and approved the fee requests submitted by the Fiduciary and/or his attorneys. The Utah AG's representative never expressed to the Court any concern with the fee submissions, and made no protest when, following review of the fee requests, the Court approved those fees for payment. In fact, the Utah AG has *never* argued that the Special Fiduciary has incurred fees or expenses in violation of the authority given to him by this Court. On this record it is clear that the Utah AG, as the State's representative, has tacitly agreed that the fees and expenses incurred by the Trust have been reasonable and appropriate for the services rendered. Having acquiesced at each step of the process with the fee and expense requests, the State of Utah must now stand behind the obligations incurred as part of the Trust's administration.
4. Legal and professional fees incurred in this action have generally resulted from (a) costs incident to Trust reformation and administration, (b) Court-sanctioned litigation by the Special Fiduciary in order to protect Trust assets from dissipation, or (c) litigation required to defend the Trust against a multi-front legal attack from FLDS-affiliated individuals and entities, including the cities of Hildale and Colorado City. Additionally, under Court-approval, professional fees have also been incurred in order to evaluate available water resources and to pursue the platting of UEP land in order to fairly apportion property taxes to users of UEP land. In the Court's judgment, all of these are legitimate purposes that were or should have been contemplated by the Utah AG either at the time he filed the probate Petition asking for removal of the UEP trustees, or when his representatives supported the Fiduciary's fee requests.
5. Although the Utah AG now complains about the fees and expenses that have accrued in this case, he fails to credit the fact that as a direct result of actions by the Special Fiduciary to recover assets that had been improperly removed from the Trust, the Trust *res* has actually expanded from what it was when the Special Fiduciary assumed administrative duties over the Trust.
6. Having brought the Special Fiduciary and his attorneys into this complex case, it is noteworthy that

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<sup>2</sup>It bears noting that Mr. Wisan did not seek this appointment, but accepted it at the request of the Utah AG. See Report and Recommendation of Bruce Wisan, the Court-Appointed Special Fiduciary, Dated August 2, 2005, at 1, ¶¶ 4-6.

the Utah AG has made few, if any, efforts to assist Mr. Wisan in recouping his fees and costs from the limited sources available to the Trust. In fact, at times, the Utah AG has taken actions that have undercut the Special Fiduciary's ability to obtain payments owed to the Trust. For example, in 2009 the Utah AG agreed with FLDS representatives not to disburse to the Special Fiduciary occupancy fee payments without FLDS approval. It was only when the Court stepped in and ordered the Utah AG to turn over without delay the funds the AG was holding, that the Trust finally received payments promised as an inducement to the Court to stay the case and allow settlement discussions to proceed. Also in 2009, the Utah AG entered into a proposed settlement with FLDS representatives which would have undone all the work the Court had done and would have returned the property to the FLDS church without any guarantees that all those who had rendered services to the Trust would ever be paid for their work. Not surprisingly, the Court rejected that proposed settlement. More recently, in the federal litigation, the Utah AG backed away from his prior support of the Special Fiduciary and of this Court's orders, and agreed with Plaintiffs that Trust property should be immediately turned over to the Corporation of the President of the FLDS Church (COP), a non-party to the federal action. Had this Court (and the Arizona AG) not opposed it, the Utah AG's agreement with the federal Plaintiffs likely would have meant that neither the Special Fiduciary nor those with whom he has contracted on the Trust's behalf would be paid.

7. The Utah AG has done little to lessen materially the legal obligations the Special Fiduciary has had to bear. Instead of defending the Special Fiduciary appointed at his request, of late the Utah AG has taken positions that undermine the Special Fiduciary in this (and in the federal) litigation.<sup>3</sup>
8. The Special Fiduciary is an officer of the Court. Although the Court has committed the day-to-day administration of the Trust to the business judgment of the Special Fiduciary, major decisions are still subject to Court-imposed limits and oversight. Consistent with this arrangement, in the discharge of his administrative duties the Special Fiduciary has brought for the Court's approval all major actions and expenditures required to administer the Trust. As such, the expenditures incurred and approved by the Court bear the Court's imprimatur and the State must stand behind those obligations and ensure that those who have in good faith rendered services to the Trust will be fully

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<sup>3</sup> As noted in the main text, the actions of the Utah AG over the past two years stand in marked contrast to his earlier intervention in this matter. It also stands in contrast to the support that the Arizona AG continues to offer to this Court and to the Special Fiduciary. The Court does not view this as a shift in the Special Fiduciary's or Arizona's position. Rather, for reasons of his own, in recent years the Utah AG has substantially altered the State's position with respect to this Court's administration of the Trust. Certainly the Utah AG has the right to alter his position in any way he finds to be legally defensible. However, this shift in position has left the Special Fiduciary without Utah's support, thereby substantially increasing the fees the Special Fiduciary has had to incur.

compensated for their work.<sup>4</sup>

9. Largely because of (a) the continuing and proliferating FLDS litigation and (b) the failure of the FLDS to honor commitments given by their representatives that they would pay modest occupancy fees for their use of UEP land, for over three years now the Trust has not been able to pay costs as they have accrued. As a result, the Special Fiduciary, the attorneys he has engaged, and other professionals with whom he has contracted have received at most, only partial payment for their services. Nevertheless, these individuals have continued in good faith to render services to the Trust. Because of the pending federal litigation, it is unclear when the Trust may be in the position to have assets available to pay its debts. It is unreasonable to ask those individuals and businesses to continue bearing these costs and still render services. It is equally unreasonable to say that they can simply quit doing so. Clearly, the Trust cannot be abandoned. If the Trust must terminate, such termination must occur in an orderly manner under Court oversight. Until such time as there is a final disposition of the Trust, those services must continue.<sup>5</sup>

The Court disagrees with the Utah AG's argument that the law does not support the Special Fiduciary's request. As discussed previously, Utah Code Ann. § 75-7-1004(1) specifically contemplates that another party to a trust action can be held liable for fees and costs if justice and equity so require. In this case there is no doubt in the Court's mind that justice and equity so require. This is one of those admittedly rare instances in which, "because of their special circumstance, it is equitable to require the parties, at whose

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<sup>4</sup>Although services have continued to be rendered to the Trust, fee requests have not been filed for some time. The Court will need to review those requests before payment will be due from the State. However, there are a number of fee requests that the Court has already reviewed and approved, but which have not been paid. The State's obligation to pay those previously-approved expenditures has now matured.

<sup>5</sup>The Court categorically rejects the AG's suggestion that the Special Fiduciary has the option to resign if he is unhappy with the fact he's not been paid. Even if that were the case, that would not solve the problem of the already-incurred fees and costs. All who have rendered services to the Trust have a right under law to be fully compensated for their work. Moreover, the Trust still needs to be administered, something this Court cannot realistically do without the assistance of another Special Fiduciary. A new Fiduciary, in turn, would also require the assistance of others. Given all the problems that have arisen in recent years, the Court would be hard pressed to find anyone willing to undertake those responsibilities. In short, whether with this or another Special Fiduciary, the costs of administration will remain until such time as a final resolution is reached in this case. In the meantime, the Trust would lose the invaluable knowledge and experience that the present Special Fiduciary has acquired over the past 6 years. The Court cannot state strongly enough its view that no resolution to this case will be acceptable to the Court until all the obligations of the Trust have been fully paid.

instance a receiver of the property was appointed, to meet the expenses of the receivership.” *Atlantic Trust Co v. Chapman*, 208 U.S. 360 (1908). As noted earlier, the Special Fiduciary, who effectively acts in a receivership role, was appointed upon the recommendation of the State of Utah acting through its Attorney General. Thus, it is entirely consistent with binding precedent for the Special Fiduciary to bring this request, and for this Court to grant it.

The Court does not, however, disagree with the Utah AG’s argument that the fees incurred in administering the Trust should ultimately be paid from Trust assets if at all possible. The issue is one of timing. Presently, individuals or businesses (e.g., the Special Fiduciary, his attorneys/law firms, and others with whom the Fiduciary has contracted) have been carrying the burden of non-payment for over 3 years. As the Court sees it, as between the State on the one hand, and these businesses on the other, the State is clearly better situated to bear this burden while Trust administration issues are finally resolved through Court processes. To be sure, the depth of the State’s coffers is not determinative of who should be required to reimburse the Special Fiduciary and those he has retained to assist him. The State is not being ordered to pay these fees solely because the State has a greater financial ability to meet these obligations than the Special Fiduciary. Instead, the aforementioned considerations show that the equities weigh substantially in favor of the State bearing these costs and fees *in the interim*. It bears repeating that this is not a permanent allocation of financial responsibility to the State. Rather, it is just a temporary requirement until the disposition of the Trust is finally resolved.

Based on the foregoing, the Court concludes that the only reasonable alternative is to require the State to make whole those individuals and businesses that have in good faith rendered services to the Trust. The State’s interests are still protected because the State can seek repayment from Trust assets and, in the meantime, the State can receive a lien against Trust property to ensure repayment. Once all litigation is resolved, Trust assets can be sold or other arrangements made to reimburse the State. It is entirely proper for the State to expect recoupment from Trust assets and/or those who use Trust assets.

The Court also agrees with the Utah AG that others who have benefitted from the Special Fiduciary’s efforts in administering the Trust should also bear some of that cost. Nothing in the Court’s ruling prohibits the State from seeking such contribution. In this Motion the Court is only asked to weigh who should bear the cost as between the State of Utah and the Special Fiduciary. The Court has not considered whether other individuals or entities should also bear part responsibility for paying those costs. The State of Utah is free to seek indemnification or contribution from other parties and non-parties as it sees fit.

The Utah AG complains that the Special Fiduciary has not submitted an annual accounting for any of the claimed fees or costs for more than three years. See *supra* note 4. While true, this issue is irrelevant to whether the State should be ordered to make these payments pending resolution of this case. Given the dire financial circumstances of the Trust, it would have been unreasonable for the Fiduciary to expend limited resources to compile and submit claims for fees that could not, in any event, be paid. With respect to fee requests that have not yet been approved by the Court, if the State wishes to challenge individual requests, it may do so by filing its objections with the Court and allowing the Court to resolve those concerns

before payment is required.

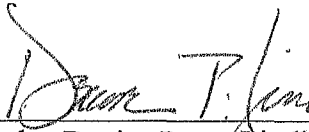
Finally, the Court finds no merit to the Utah AG's suggestion that the Special Fiduciary should not have objected to the settlement proposal negotiated between his office and the FLDS in 2009. As the Utah AG well knows, the Court rejected the State's settlement proposal for reasons stated in its various Rulings. The Special Fiduciary's (and the Arizona AG's) objections to that proposed settlement were well-taken. Even if the Special Fiduciary had not opposed that proposed settlement, the Court would still have rejected it. It is not the Special Fiduciary's fault that Utah AG agreed to settlement terms that were unreasonable, unworkable and, in this Court's view, contrary to law.

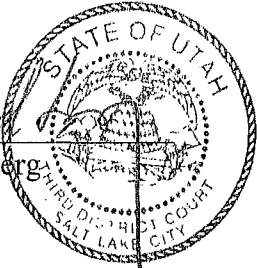
ORDER

The Special Fiduciary's Motion is GRANTED. As to those fees previously approved by the Court but not paid because of the financial straits of the Trust, the Special Fiduciary is directed to submit those to the Utah AG for prompt payment.

As to the expenditures incurred after the Court's last review of fee requests, the Special Fiduciary is ordered to file an accounting containing a complete listing of all unpaid expenditures for the Court's and State's review. The Court will consider any objections by the State and make a determination whether to approve, modify or reject some or all of the fee requests. Once the Court has made that determination, it will be the State's duty to pay the obligation timely. Specifically, it shall be the duty and obligation of the Utah AG, as the State's agent and representative, to take all necessary action to secure prompt payment of the amounts approved by the Court.

DATED this 1st day of August, 2011.

  
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Judge Denise Posse Lindberg  
District Court Judge



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 053900848 by the method and on the date specified.

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BY HAND: JONI J JONES  
BY HAND: DAVID N WOLF

Date: 7/29/11

KF

Deputy Court Clerk