

Group to consider each R.S. 2477 claim

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by John Q. Murray

Mineral County commissioners gained a new appreciation this week for the complexities of weighing multiple interests as they discussed preserving access to public lands by claiming R.S. 2477 rights of way.

Weeds, wildlife, historic and cultural values, private property rights, and the public process itself must also be considered carefully, citizens said at Monday's meeting.

The commissioners opted to take a close look at all of these issues. They created a working group to consider each potential claim on a case-by-case basis.

Under Revised Statute 2477, the county can choose to claim the right of way along roads, trails, and ways that predate the existence of the U.S. Forest Service. The issue has acquired urgency as the Forest Service moves toward adopting its new forest plan, which outlines goals for future road decommissioning. By invoking claims under R.S. 2477, the county has a greater voice in keeping roads open and ensuring access.

The issue has been under study by the county since 2004, when the commissioners appointed the Mineral County Resource Advisory Group (McRAG) to consider a broad range of issues involving public land management in the county.

Among its projects, the group researched roads in common use before the creation of the Forest Service, producing a list and map of eligible R.S. 2477 routes throughout the county.

During a meeting last month, Commissioner Judy Stang expressed concern over the county's liability for accidents on any roads claimed under the law. She also asked whether the county would be required to maintain the roads.

On Monday, rancher Kerry White from Gallatin County assured Judy that while the county has no control over litigation, posting signs offers a way to reduce the county's exposure.

Kerry said he is a member of his county's planning board and has taken a close interest in Montana road law over the past 10 years, attending seminars on public road law.

The Forest Service defines five standards of roads, from a gated road with no path beyond the gate, to a paved highway. "You release your liability on the road by your signage," he said.

Kerry said he also attended a seminar on R.S. 2477 taught by Matthew Lodine, the associate regional attorney for Forest Service Region One, and provided the commissioners with a packet describing the history and outlining the protocol for making R.S. 2477 claims.

The 1866 law was written at a time when pioneers were coming out and accessing mining claims or homesteads that required them to cross other land. To enable development of the lands, R.S. 2477 said a highway created to access the lands became a public roadway, and those using the public way were not trespassing.

The definition of a "highway" is very broad, he said, including any avenue of travel open to the public, including foot paths, horse paths, motorcycle paths, ATV trails, and cross-country ski trails. "Any of those would qualify as a highway under R.S. 2477," he said.

To claim the rights, the highway had to exist before the forest was put in reserve, must not have been abandoned, and must have been maintained. Some courts have ruled that traveling on the road itself is

maintenance, while others have ruled that removing rocks and logs from the road is sufficient, he said.

The law has been used on BLM land in Utah and elsewhere in the west, but no county in Montana has yet claimed roads under R.S. 2477 on Forest Service land. Kerry said he thought any such roads claimed by the county might qualify for gas tax money. It could increase county revenues, he said.

County Attorney M. Shaun Donovan said he has talked with Jim Cyr, a member of the local historical society who is the resident expert on road history. Jim indicated that based on his research, there were just two wagon roads and one railroad in the county, as well as five trails that crossed over the divide into Idaho. The map of eligible R.S. 2477 roads shows four times as many routes, Shaun said.

He advocated looking at each particular right of way. "All of this has to be looked at real carefully in terms of the particular facts," he said.

Brooke Lincoln said she understood that the ultimate goal was greater access, and that the claims could provide an economic benefit to the county by marketing its backcountry riding loops. "We would be able to say to people in Shoshone County, 'Come on over and ride the Deer Creek Loop or the Big Creek Loop and have a great time,'" she said.

But she said she was concerned about how the R.S. 2477 claims would affect private property. "If these roads are acquired by the county, is that a taking?" she asked. And if she has to install a gate to prevent access to the road, the general public would be mad at the property owners who exercise their property rights.

One of the eligible roads appeared to be Camels Hump Road, she pointed out. Rather than accepting all of the R.S. 2477 roads lock, stock, and barrel, the commissioners should examine the location of each road, its condition, and whether it crossed public property or accessed a sensitive resource, such as a wetlands. "Do we want a four-wheeler to drive through Savenac Pond? I think you need to let common sense prevail," she said.

McRAG members Alan Amborn and Mike Byrnes cited the Resource Use Plan adopted by the county, which states that the R.S. 2477 claims would apply only to public land, not to private land.

Denley Loge said he was concerned about the county acquiring obligations by invoking the R.S. 2477 claims, especially when the county doesn't have a lot of money to spend. Extending Kerry's remarks about limiting liability, Denley suggested the county would ultimately need to create a complete travel management plan and weed management plan for any claimed roads. The planning would also have to account for impacts on wildlife.

"You can't just say we're going to take them over and let anything go on," Denley said. "As Brooke says, common sense has to prevail."

Jim Cyr expressed concern about the possible destruction of pioneer-era roads and trails. He said while researching the Mullan Road and other historic county roads, it is difficult to determine whether a given section is original, relocated, or improved. "We find very few spots where it is still the original road," he said. "I'm afraid this would do the same to any original trails."

Shaun recommended that citizens work closely with the Forest Service. "An enormous number of legal, financial, private property, management, historical, and other kinds of implications are going to be coming up on most of these roads. Some of those issues could be dealt with in a much more streamlined way if citizens could talk to the Forest Service directly and say, 'Here's a road we'd like to establish.'"

Alan Amborn, Larry Price, and Jim Schultz expressed frustration over working with the Forest Service in the past. Shaun suggested that there have been recent personnel changes at the Forest Service, and the county has an obligation to consider alternatives "before it makes a decision which may require it to jump into something litigious."

New Superior District Ranger Sharon Sweeney said her personal emphasis will be to create partnerships with user groups to maintain as many miles of trail as possible. She said she already has plans to meet with horse and snowmobile groups.

Pam Reed and Katie Thompson said they were new to the issue and expressed concern over the public process, questioning whether the county had fully evaluated the effects of opening all of these roads to motorized use. Katie urged the commissioners to postpone any decision and to consider each road individually. "What is the push? Can't we change our minds later?" she asked.

Ollie St. Clair encouraged the commissioners to identify all potential costs before making a decision.

Commissioner Stang asked interested citizens to sign up for a working group to consider each individual road. "Before we spend a lot of time and a lot of money and possible litigation, we want to know there's an interest on certain ones," she said.

The Clark Fork Chronicle produced reference maps showing the extent of R.S. 2477 ways in the county, and relative to property ownership.

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