

## **RS 2477 – Status Report and Potential Implementation Plan**

### **Department of the Interior – January 26, 2006**

1. **Review of 10<sup>th</sup> Circuit Opinion** – *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735 (10<sup>th</sup> Cir. 2005)
  - Only courts have authority to make binding determinations of validity and scope of RS 2477 claims
  - Federal law borrows from long established principles of state law to determine validity of rights of way
  - DOI may make non-binding determinations for administrative and planning purposes
  - Holder of right of way must consult with owner of surrounding land before undertaking construction
  
2. **Department of the Interior – implementation**
  - Review of existing policies, guidance, instructions, MOU's to determine conformity with new ruling
  - Develop new guidance to the field on application of ruling's standards in making validity and scope determinations for administrative purposes
  - Establish road maintenance agreements for majority of roads; Kane County as template
  
3. **Options for Counties**
  - Road Maintenance Agreements: BLM (or other federal landowner) and county can negotiate an agreement to allow routine maintenance and continued public use of most roads. Would not involve a determination of validity of any RS 2477 claim. Would simply allow continuation of status quo.
  - Informal validity and scope determination: If county wishes to alter status quo by performing construction or by expanding use beyond status quo, it must consult with bureau (and/or any private landowners affected). BLM, applying state law, can make an informal determination regarding the validity and scope of any right of way, which it will then use for planning documents, signage decisions, etc. Bureau could also initiate an informal determination if necessary for internal planning or administration purposes.
  - Title V right of way: Filing and approval by BLM for right of way under Title V of FLPMA. This is completely independent of RS 2477.
  - Recordable Disclaimer: Claim filed pursuant to FLPMA and BLM regulations. If granted, federal government disclaims any interest in the right of way.
  - Quiet Title Action: Final, binding determination of RS 2477 right of way. Burden of proof is on claimant.

### Routine Maintenance v. Construction

Quoting from *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735 (10<sup>th</sup> Cir. 2005), pages \*29-32:

In drawing the line between routine maintenance, which does not require consultation with the BLM, and construction of improvements, which does, we endorse the definition crafted by the district court in *Garfield County*:

Defined in terms of the nature of the work, "construction" for purposes of 36 C.F.R. § 5.7 includes the widening of the road, the horizontal or vertical realignment of the road, the installation (as distinguished from cleaning, repair, or replacement in kind) of bridges, culverts and other drainage structures, as well as any significant change in the surface composition of the road (e.g., going from dirt to gravel, from gravel to chipseal, from chipseal to asphalt, etc.), or any "improvement," "betterment," or any other change in the nature of the road that may significantly impact Park lands, resources, or values. "Maintenance" preserves the existing road, including the physical upkeep or repair of wear or damage whether from natural or other causes, maintaining the shape of the road, grading it, making sure that the shape of the road permits drainage [, and] keeping drainage features open and operable--essentially preserving the status quo.

*122 F. Supp. 2d at 1253* (footnote omitted). Under this definition, grading or blading a road for the first time would constitute "construction" and would require advance consultation, though grading or blading a road to preserve the character of the road in accordance with prior practice would not. Although drawn as an interpretation of 36 C.F.R. § 5.7, which applies within national parks, the district court noted that: "This construction comports with the commonly understood meanings of the words, the pertinent statutes, agency interpretations, and the past experience of the parties on the Capitol Reef segment, including the experience leading up to February 13, 1996." *Id.* We therefore find it applicable to distinguishing between routine maintenance and actual improvement of R.S. 2477 claims across federal lands more generally.

Drawing the line between maintenance and construction based on "preserving the status quo" promotes the congressional policy of "freezing" R.S. 2477 rights of way as of the uses established as of October 21, 1976. *Hodel*, 848 F.2d at 1081. It protects existing uses without interfering unduly with federal land management and protection. As long as the Counties act within the existing scope of their rights of way, performing maintenance and repair that preserves the existing state of the road, they have no legal obligation to consult with the BLM (though notice of what they are doing might well avoid misunderstanding or friction). If changes are contemplated, it is necessary to consult, and the failure to do so will provide a basis for prompt injunctive relief. "Bulldoze first, talk later" is not a recipe for constructive intergovernmental relations or intelligent land management.