deseretnews.com

Deseret Morning News, Tuesday, November 22, 2005

Kane, feds to meet soon to discuss roads issue

Feud involves hundreds of miles of routes in county

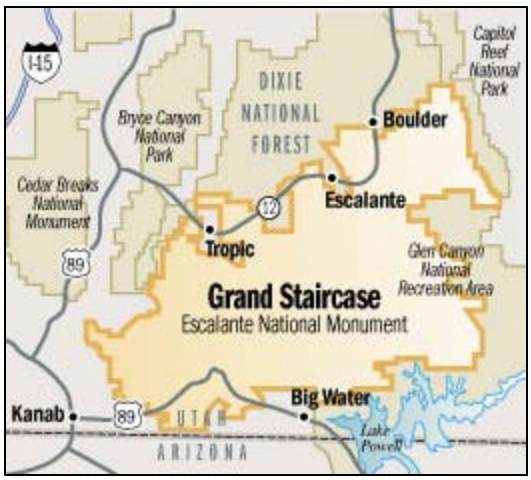
By Jerry D. Spangler and Joe Bauman
Deseret Morning News

Lawsuits and bluster notwithstanding, Kane County and the federal government will soon enter into negotiations to resolve a 2 1/2-year feud over ownership of hundreds of miles of dirt roads in Grand Staircase-Escalante National Monument. "Kane County has agreed to begin the consultation on Nov. 30, 2005," says a letter written by Gale Norton, secretary of the U.S. Interior Department.

In Kanab on Monday afternoon, Commissioner Mark Habbeshaw took a break from a County Commission meeting to confirm the upcoming session.

"I'm pretty optimistic about it," he said. "We're going to meet with Interior and the BLM (Bureau of Land Management) on Nov. 30 up there in Salt Lake, in the BLM offices, and try to see if we can't work something out."

Norton's comments came in a letter to Sen. Richard Durbin, an Illinois Democrat who demanded last June that Norton intervene in the dispute or he would hold up the confirmation of a top Norton deputy, Patricia Lynn Scarlett.



Deseret Morning News graphic

On Friday, the same day Durbin received the latest in a series of letters from Norton, Scarlett was confirmed as deputy director.

It was also the same day that Kane and Garfield counties filed a federal lawsuit challenging road closures and use restrictions in the monument's management plan. The lawsuit was described as a formality to protect the county's legal standing before the statute of limitations expired.

Durbin has been a harsh critic both of Kane County and what he saw as Interior Department inaction.

Last June he wrote, "This current situation is a direct consequence of the department's failure to take action against Kane County when the county removed over 30 BLM route signs nearly two years ago."

Norton responded Friday that she has appointed Larry Jensen, a federal regional solicitor, to negotiate with the county.

"While we cannot prejudge the outcome of this consultation, Mr. Jensen will articulate in this consultation the applicable and appropriate federal rights and responsibilities that apply in this situation," she wrote.

She also pledged that the department would follow guidelines set by the 10th Circuit Court of Appeals, which directed a "commendable spirit of mutual accommodation" and a recognition that "both levels of government have responsibility for, and a deep commitment to, the common good, which is better served by communication and cooperation than by unilateral action."

In August 2003, the BLM put up 31 signs closing off certain dirt roads in the monument. And that prompted Habbeshaw and Sheriff Lamont Smith to take the signs down, saying the county owned the routes under a 19th-century law known as RS2477.

The county then began putting up its own "road open" signs in areas the BLM had designated closed.

Earlier this year, the county began posting signs designating off-road vehicle routes in a wilderness study area, setting off another round of charges and accusations. Habbeshaw said the county plans to eventually post signs on all roads the county claims under RS2477.

Durbin wanted answers from Norton as to what specific legal steps the department intends to take to force Kane County to permanently remove all road signs placed on BLM lands in the county. There is no hint in Norton's response last Friday as to what those legal steps might be.

Rather, "We are urging Kane County to go forward with the consultation as the preferred alternative to that litigation, and the current indication is that negotiation will be their primary focus," Norton wrote.

Durbin's office could not be reached for comment Monday evening.

Habbeshaw described a two-tier process that will be followed in the negotiations.

First, the sides will address immediate issues. Then they will work "to resolve Kane County's RS2477 issues through a future process."

The 10th Circuit decision brought clarity to the matter, he said: "It created some duties and obligations on the BLM-Interior's part, and it also gave some direction to the counties that we're limited in our actions on these roads."

The sides should be able to sit at the table and come up with a solution, he said. Habbeshaw noted that the court said both have a duty to look out for the common good and that the sides need to have mutual respect in property rights issues.

"In other words," he said, "we should not infringe on public lands, resources and values, nor should the federal government infringe on rights-of-way that have been granted to the

counties by Congress."

The disagreement involved rights or easements across federal land, he said, and that's where mutual respect comes in.

"If we have a valid, existing right, the BLM has a duty to recognize that right and let us operate with the scope of that right-of-way. We, on the other hand, have a duty ... to not take action that would impair, injure, either the public lands, the resources or their values."

These are rights the county has asserted as valid under state law, Habbeshaw noted.

The federal government will most likely develop a policy that allows a process to go ahead with agency determinations concerning right-of-way claims, he predicted. If rights-of-way are recognized, "We could manage the road, sign the road, (and) with consultation with the BLM we could make future improvements to the road."

That's the plus side, according to the commissioner. On the other side, "There are undoubtedly some roads that we believe today to be valid highways ... that we may not ultimately be able to support."

Although he did not spell out what would happen then, presumably in such cases the BLM would manage the routes, closing them if the agency found they should be closed.

A criterion applied by the 10th Circuit to decide legal rights is whether the routes have been used for 10 years, prior to county road work in 1996.

That year, San Juan, Kane and Garfield counties graded 16 routes they claimed under the RS2477 law. Six of the routes were in wilderness study areas and nine in the national monument.

"Six others traverse a mesa overlooking the entrance corridor to the Needles District of Canyonlands National Park," says the 10th Circuit decision, issued on Sept. 8.

The 1996 road work triggered a suit by the Southern Utah Wilderness Alliance in October that year. That is why the 1996 date is important in the dispute.

Kane County wants to produce solid documentation to show routes were in use for 10 years prior to the grading project.

The BLM will make determinations about rights-of-way based on that public-use standard, and not earlier rules about whether roads have been maintained by mechanical equipment, the commissioner said. Also, the 10th Circuit's public-use standard means some arguments would no longer be used, he said, such as the federal government claiming land withdrawals for coal development wiped out RS2477 rights, according to the commissioner.

He is hopeful the issue can be resolved.

"We need to get this past this roads controversy," Habbeshaw said, "and on to solutions."

E-mail: spang@desnews.com ; bau@desnews.com