United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

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Honorable Richard J. Durbin
United States Senator
Washington, DC 20510

Dear Senator Durbin:

I write in response to your letter of November 1, 2005, to Secretary Norton regarding road signs placed by Kane County in Southern Utah. The County's sign placement activities have been a matter of serious concern to the Department and, as your letter notes, the Department has consulted with the Department of Justice about the proper legal response.

The Department's discussions with Justice were recently affected, however, by the issuance of a comprehensive and long-awaited decision on R.S. 2477 issues by the Tenth Circuit. *See Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735, 2005 U.S. App. LEXIS 19381 (10th Cir. 2005). That decision significantly alters the R.S. 2477 legal landscape by clarifying the relative rights and responsibilities of the counties and the federal government. Accordingly, the decision has required the Department to reassess its general R.S. 2477 policies as well as its specific approach to resolving the concerns it has about the County's sign placement activities.

Among the important holdings in the Tenth Circuit's opinion is that the validity and scope of any claimed R.S. 2477 rights of way must be determined by looking to "long-established principles of state law." This means that the Department does not have the power to set its own federal standards for assessing R.S. 2477 claims, but rather must use state law to do so. Moreover, any such assessments made by the Department cannot be binding or constitute final agency action. Instead, these assessments "are useful only for limited purposes," including the Department's internal land-use planning.

The Tenth Circuit also held, however, that under Utah law, a

> right of way is not tantamount to fee simple ownership of a defined parcel of territory. Rather, it is an entitlement to use certain land in a particular way. To convert a two-track jeep trail into a graded dirt road, or a graded road into a paved one, alters the use, affects the servient estate, and may go beyond the scope of the right of way.

Quoting an earlier Tenth Circuit case, the court said, "surely no Utah case would hold that a road which had always been two-lane with marked and established fence lines could be widened to accommodate eight lanes of traffic."

The Tenth Circuit went on to say that

> when the holder of an R.S. 2477 right of way across federal land proposes to undertake any improvements along its right of way, beyond mere maintenance, it must advise the federal land management agency of the work in advance, affording the agency a fair opportunity to carry out its own duties to determine whether the proposed improvement is reasonable and necessary in light of the traditional uses of the rights of way as of October 21, 1976, to study potential effects, and if appropriate, to formulate alternatives that serve to protect the lands.

Thus, counties may undertake routine maintenance of valid R.S. 2477 rights of way without consultation, but must consult with the BLM before construction of any improvements. The Tenth Circuit adopted a definition of "routine maintenance" as work that "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."

Construction, on the other hand, involves "any 'improvement,' 'betterment,' or any change in the nature of the road that may significantly impact [federal] lands, resources, or values." Examples given by the court include "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 of the road (e.g. going from dirt to gravel, from gravel to chipseal, from chipseal to asphalt, etc.)" As the Court noted, this means that "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."

In light of these clarifications of the law, the Department has determined that the most appropriate way for us to carry out our duties as they relate to Kane County's actions is to encourage the County to begin the consultation process the Tenth Circuit rightly decided is so important in these situations. As the court said, "Bulldoze first, talk later is not a recipe for constructive intergovernmental relations or intelligent land management."

I have recommended to the Secretary, and she has agreed, that Larry Jensen, Regional Solicitor, serve as the Department's representative on these consultations. Larry is the right choice as he is knowledgeable about the R.S. 2477 issue generally and the new rules from the Tenth Circuit specifically. He has already contacted representatives from Kane County and they have agreed to begin formal consultations.

As envisioned by the Tenth Circuit, this process will allow the Department to carry out its duty to determine the validity and scope of Kane County's claimed rights of way, and whether any proposed improvements are "reasonable and necessary" in light of

traditional uses. I trust you will agree that the Department's plan is consistent with the recent clarifications of R.S. 2477 law provided by the Tenth Circuit and is an appropriate way to approach the resolution of an intergovernmental dispute.

If you have additional questions or concerns please do not hesitate to contact the Department.

Sincerely,

ACTING Chad Calvert

Assistant Secretary
Land and Minerals Management