June 18, 2007

Re: Request to Support Rep. Mark Udall's Amendment to Protect Public Lands from Interior Department's RS 2477 Policy

Dear Representative:

I am a former Solicitor (General Counsel) of the Interior Department, serving under Secretary Babbitt throughout the Clinton Presidency. I have taught and written about public land law for many years (co-authoring the standard teaching text on the subject, Federal Public Land and Resources Law, the sixth edition of which is being published next month). I am not representing anyone on the subject of this letter, but rather write as a concerned, knowledgeable citizen.

We tried hard in the Clinton years to craft a sensible policy to deal with claims of rights-of-way asserted under an obscure federal law known as RS 2477, enacted as part of the Mining Act of 1866. Although Congress repealed RS 2477 more than thirty years ago, it preserved "valid existing rights" and, unfortunately, did not establish a time limit for asserting claims to such rights.

In recent years, opponents of conservation measures on federal lands have seized on RS 2477 as a tool to control how federal lands are managed. They have made numerous, expansive RS 2477 claims, which create the potential for old paths, cattle trails and other tracks to become improved roads -- and even paved highways -- proliferating willy-nilly across many federal and formerly federal lands.

Much mischief would follow if the executive branch did not rigorously scrutinize every such claim, for they could threaten military bases, national parks, monuments, wildlife refuges, forests, conservation areas, and wilderness areas. They could also undermine private property rights, because RS 2477 claims also attach to lands that, while once federal, are now in private ownership.

Despite these well-understood concerns, in March 2006, as a kind of parting shot on the eve of her leaving office, Interior Secretary Gale Norton announced a new policy that was unnecessarily hospitable to RS 2477 claims. The policy reflects the apparent inclination of this Administration to recognize as many of these claims as it can before it exits the national stage.

The Interior Department attempts to downplay the significance of the Norton policy by characterizing the decisions it would make under this policy as "non-binding." This is, frankly, nonsense. An Interior Department decision to recognize a RS 2477 claim certainly binds the Department. It also effectively

empowers the RS 2477 claimant to resist otherwise applicable constraints of federal law, regulation, or federal land management plans. Damage on the ground and to federal and affected private property interests could be immediate. Moreover, any such decisions will not be easy for any future Administration to reverse, and even harder to overturn in court.

Nothing in federal law or any court decision (including the Tenth Circuit's 2005 decision in SUWA v. BLM, 425 F. 3d 735), requires the Department to make these determinations, or otherwise to facilitate mischief-making RS 2477 claims. As the Baltimore Sun editorialized last year, "Interior Secretary Gale A. Norton, who gave notice of her resignation two weeks ago, could simply have ridden off quietly into the sunset. Instead, she chose to launch one final, potentially devastating assault on the vast and precious public lands within her domain."

Secretary of the Interior Kempthorne has shown no interest in overturning this policy. In fact, I understand the Interior Department is currently processing a number of RS 2477 claims under the Norton policy.

In these circumstances, I believe it is imperative that Congress act. Representative Mark Udall has proposed an amendment to the Interior Appropriations bill to halt implementation of the Norton/Bush policy. I strongly urge you to support it.

Sincerely,

S/

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[for identification only]
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