MOFFAT COUNTY

July 16, 2003

Public Lands Committee Members,

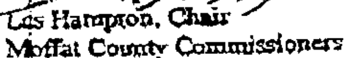
Enclosed is a DRAFT letter to the Colorado Department of Natural Resources (CDNR) providing recommendations, explanations, and legal discussions regarding Revised Statute 2477 (R.S.2477) issues, based on Colorado law

As many of you know, earlier this year the Department of Interior signed a Memorandum of Understanding with the State of Utah to begin an acknowledgement process of R.S. 2477 Rights-of-way across federal lands in Utah. Due to the differences between Colorado and Utah law, many of the agreements that were made in the Utah MOU do not apply in Colorado. On May 15 of this year Greg Walcher, Executive Director of CDNR wrote Secretary Norton a letter commending her for her *"commitment to working with western states to craft a resolution to the RS 2477 debate"* and requested that she engage Colorado in a process to reach agreement in the RS 2477 debate. Shortly after this letter was sent CDNR spoke at each of the district meetings during the June CCI conference in Steamboat Springs and requested CCI's participation and advice on the issue. The CCI Public Lands Committee has been discussing RS2477 issues for several years and now has a window of opportunity to assist the CDNR regarding a potential agreement between the Secretary of Interior and State of Colorado regarding RS 2477 issues.

During the Western Interstate Region (WIR) meetings in Reno, Nevada, RS 2477 issues were at the forefront. As representatives from Colorado were discussing the issues, it was suggested that Colorado Commissioners needed to provide some guidance to the State on what would be acceptable regarding R.S. 2477 issues. Realizing that the most important issue is allowing each county the flexibility to handle R.S. 2477 issues in manners appropriate for their respective communities, Moffat County was asked to draft a position paper, rooted in Colorado law. Enclosed is a draft of that letter which many counties have contributed, including Jackson, Rio Grand, Montrose, Routt, Rio Blanco, Otero, and Garfield Counties. Please read this draft letter so that we may discuss it and listen to your thoughts during the August 1st Public Lands Meeting.

Feel free to contact me at (970) 824-5517 prior to the Public Lands Committee meeting if you have any questions.

Sincerely,



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Greg Walcher, Executive Director
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Dear Greg Walcher,

On behalf of the 61 Colorado counties represented at Colorado Counties Incorporated (CCI), we are providing you comments and suggestions related to the potential development of an RS 2477 acknowledgment agreement with the Department of the Interior (DOI) pursuant to the Secretary of Interior's request. The Public Lands Committee from CCI has discussed this issue for several years and provides the following recommendations related to RS 2477 Rights-of-way. It is important to our organization and our county members that any agreement with the DOI regarding acknowledging RS 2477 Rights-of-way incorporate the following recommendations.

The following recommendations, explanations, and legal discussions define the extent to which R.S. 2477's Rights-of-way can be acknowledged. However, locally derived and supported R.S. 2477 Inventory and Maintenance Protocols that have been through the public process will provide each county home-tailored guidance regarding the extent to which the following nine recommendations are applied in individual counties.

1) **<u>Local Decisions Recommendation</u>**: Local Jurisdictions (*i.e.* Counties) assert their Rights-of-way based on locally derived and supported RS 2477 Inventory, Maintenance, Vacation and Abandonment Protocols.

Explanation: Any agreement between the state of Colorado and DOI should provide for state-based determination regarding construction, vacation and abandonment of RS 2477 Rights-of-way. In Colorado, state law grants counties broad authority in defining the construction, maintenance and use of a public right-of-way. Hence, it is reasonable that counties take the lead in adopting and following their own locally established protocols relative to identifying and maintaining R.S. 2477 Rights-of-way established prior to the reservation of federal lands and the repeal of R.S. 2477. Counties' leadership is crucial to identifying R.S. 2477 Rights-of-way in a manor consistent with other rights to access claimed by the State or private individuals. As described in the Legal Discussion below, if a county does not place a given R.S. 2477 Right-of-

way into its road system, that does not invalidate a private individual's or the general public's right to claim R.S. 2477 access over that route. Most Counties have protocols (based in state law) relative to maintenance, vacation, and abandonment for their numbered county roads. For these counties that have not modified numbered county road protocols to include RS 2477 routes, it can be accomplished through a public process. These RS 2477 protocols should allow local jurisdictions to determine the degree to which they assert RS 2477 Rights-of-way within their jurisdiction as part of that county's official transportation system. An important part of the assertion process is identifying the appropriate uses for the roads and trails based on protecting public safety and county resources. Each county has a different set of public access systems crucial to that county's economic, social, and political well-being. Therefore, each county should take the lead in establishing and enforcing RS 2477 protocols in a manner appropriate for their residents and visitors and consistent with protecting other rights to public access by private individuals or the State.

Legal Discussion: Colorado statutes grant the counties broad authority to establish, maintain, and build a county road system. C.R.S. §43-2-108. State law authorizes the board of county commissioners to identify a county-wide transportation system, which consists of primary and secondary roads. C.R.S. §§43-2-109, 110. The secondary road system is to be adopted, amended, vacated, and abandoned using public notice and hearing procedures. *Id.* C.R.S. §43-2-113. Moreover, the counties assume responsibility for the primary and secondary roads, including any maintenance to be done. This delegation of comprehensive responsibility to the counties for local transportation systems makes it equally imperative that the counties take the lead in identifying and asserting easements for the specific R.S. 2477 roads that lie within each county's boundaries.

There is also case law holding that only the state or the county, rather than an individual member of the public, can claim title to an R.S. 2477 road. *Kinscherff v. United States*, 586 F.2d 159, 160-161 (10th Cir. 1978) (dismissing a quiet title action against the United States for an R.S. 2477 road). Later decisions have clarified the *Kinscherff* ruling to acknowledge that a county or state may claim title to an R.S. 2477 easement on behalf of the public. *Fairhurst Family Trust LLC v. U.S. Forest Service*, 172 F. Supp.2d 1328, 1332-1333 (D. Colo. 2001) (dismissing R.S. 2477 case against the Forest Service because individual could not claim title to public road). Private individuals may claim a right of access over a public road, (not title) even if the county does not claim the road as a public county road. *Staley v. United States*, 168 F. Supp. 2d. 1209, 1212-1215 (D. Colo. 2001) (dismissing quiet title action but allowing the access claim and holding that county is not a necessary party). The access rights of individual members of the public mean that even if a county vacates and abandons a public road, it may remain open. *Heath v. Parker*, 30 P.3d 746, 752 (2001).

2) **Federal Lands Recommendation:** R.S. 2477 Rights-of-way that exist on all DOI and U.S. Forest Service managed lands prior to reservation of those lands should be acknowledged.

Explanation: An agreement between the DOI and the State of Colorado should allow a county to assert rights-of-way on the locally determined priority routes that cross federally managed

lands to the extent that the county can demonstrate the rights-of-way existed prior to the reservation of the federally managed lands before the repeal of R.S. 2477 in the Federal Land Policy and Management Act ("FLPMA") in 1976. Federally managed lands that qualify include but are not limited to:

a. U.S. National Park Service lands; and
b. Bureau of Land Management lands; and
c. U.S. National Wildlife Refuge lands; and
d. Bureau of Indian Affairs lands; and
e. U.S. Forest Service lands

Legal Discussion: R.S. 2477 made a statutory offer for "the right-of-way for the construction of highways over public lands, not reserved for public uses. . ." Act of July 26, 1866, ch. 262, §8, 14 Stat. 251, 253 (1866) (formerly codified at 43 U.S.C. §932), repealed by Federal Land Policy Management Act ("FLPMA"), Pub. L. No. 94-579, § 706(a), 90 Stat. 2743, 2793 (1976). Upon construction of a public road, the offer was deemed to be accepted and no additional action is required by either the United States or the public. *Sierra Club v. Hodel*, 848 F.2d 1068, 1083-1084 (10th Cir. 1988) ("R.S. 2477 was an open-ended and self-executing grant. Under the BLM regulations, the right-of-way became effective upon construction or establishment by the state, see, e.g., 43 C.F.R. § 2822.2-1 (1979); and 'no action on the part of the [federal] Government [was] necessary.'").

The R.S. 2477 offer is in the nature of an *en praesenti* grant, which takes effect immediately upon fulfillment of the statutory terms. *See e.g. Payne v. Central Pacific Rlwy Co.* 255 U.S. 228, 234 (1921) (holding that railroad selection of in lieu lands took effect immediately because DOI Secretary had no authority to approve or disapprove the selections). Thus, neither the public nor local governments were required to take any additional action to document or record the public road. Like the statutes authorizing conveyance of land to the railroads, DOI did not have the authority or discretion to approve or disapprove the establishment of public roads.

The phrase in R.S. 2477 "public lands, not reserved for public uses" is a term of art, which only applies to land owned by the United States and not subject to a withdrawal or reservation for another purpose. Examples of reservations include Indian Reservations, National Forests, National Wildlife Refuges, and National Monuments. Congressional reservations such as for a national park, would also remove the lands from the public domain. Wilderness study or wilderness designation of public domain lands does not affect R.S. 2477 Rights-of-way because there was no wilderness study or designation of public lands before Congress repealed R.S. 2477 in 1976. Any R.S. 2477 right-of-way arose before any public land wilderness designations and remain valid.

In addition, if and when land is transferred out of federal ownership, it is no longer in the public domain and is not subject to R.S. 2477. If the road were constructed or established before the date of the reservation or conveyance, then the road is still a public road, unless and until it is vacated and abandoned The case of *Heath v. Parker*, illustrates a situation when the county

vacates and abandons a road but it is not abandoned under common law doctrine.

The key question to determine whether the road in a reservation, such as a National Forest or national monument, is an R.S. 2477 road. This depends on when the road was established and the date of the reservation. For instance, in *Fairfield Family Trust LLC*, one question was whether the road predated transfer of the land to the Forest Service in 1917. 172 F. Supp.2d at 1320, n.1 ("The placement of public lands in the National Forest system is a reservation of these lands that precludes establishment of an R.S. 2477 right-of-way across them." (citing *Fitzgerald v. United States*, 932 F. Supp. 1195, 1204 (D. Ariz.1996)). This rule also applies to national monuments, wildlife refuges, and national parks.

It is unclear whether the rule also applies to withdrawals of public land that closed public lands to some of the public land laws. In *Southern Utah Wilderness Alliance v. BLM*, 147 F. Supp.2d 1130, 1144-1145 (D. Utah 2001), the district court held that a withdrawal of public land from coal development operated as a reservation and roads arising after the date of the withdrawal could not be R.S. 2477 Rights-of-way. Historically, DOI has not construed public land orders as "reserving public lands" as that term is used in R.S. 2477. The public land orders generally left the public lands open to most uses, such as grazing and mining, but closed the lands to homesteading. For instance, most of the BLM lands were withdrawn in 1935 from homestead entry pursuant to the Taylor Grazing Act. If this aspect of the district court's decision is affirmed, then many R.S. 2477 Rights-of-way will have to be re-examined in terms of applicable public land orders or withdrawals that may have been in effect before the road was established.

3) **Construction Recommendation:** The 'mere use by the public' of a right-of-way constitutes construction of that right-of-way. Bulldozers, graders or other forms of mechanical maintenance are not necessary for the construction or maintenance of an R.S.2477 Right-of-way.

Explanation: Many agencies and organizations now define construction of a route as being limited to 'mechanical' means. To the contrary, many rural R.S. 2477 Rights-of-way were constructed in Colorado across rock surfaces or areas that mechanical means (i.e. bulldozers or motor graders) were not necessary. Many rural routes were constructed by the mere passage of people, some without mechanized transport (i.e. horseback). At this point, it is often very difficult to locate the evidence of construction, even when the historical context suggests that some mechanical work occurred. For instance, many roads in Colorado were developed in connection with early mining. It is possible to document mining in Colorado from historical records and DOI land records. The files rarely have direct evidence of road construction using mechanical equipment, even though records of gold or silver production support a strong assumption that the road was "built."

Legal Discussion: The Colorado Supreme Court in *Leach v. Manhart*, 77 P. 2d 652, 653 (1938) defined the word "construction" as used in R.S. 2477 to include establishment or a road or way by public use.

> The sum of our holdings is that the statute is an express dedication of a right-of-

> way for roads over unappropriated government lands, acceptance of which by the public results from 'use by those for whom it was necessary or convenient.' It is not required that 'work' shall be done on such a road, or that public authorities shall take action in the premises. User is the requisite element, and it may be by any who have occasion to travel over public lands, and if the use be by only one, still it suffices. 'A road may be a highway though it reaches but one property owner. 29 C.J. 367. He has a right to access to other roads and the public has a right of access to him. *Pagels v. Oakes*, 64 Iowa 198, 19 N.W. 905, 907. Its character is not determined by the fact that but few persons use it.'

The Colorado interpretation of the word 'construction' in R.S. 2477 has been affirmed on several occasions, including a recent federal court decision against federal Defendants. *Barker v. Bd. of County Commissioners, La Plata County*, 24 F. Supp.2d 1120, 1127 (D. Colo. 1998).

The position of the Bureau of Land Management ("BLM") or the Forest Service that a road could not be an R.S. 2477 road without conclusive evidence of mechanical construction tries to equate a public right-of-way under R.S. 2477 with the definition of a 'road' found in the legislative history of the Wilderness Act of 1964, 16 U.S.C. §1131. This is incorrect for several reasons.

First, an R.S. 2477 right-of-way is a valid existing right under the Wilderness Act and thus any definition of a road in the Wilderness Act was never intended to define or redefine a valid R.S. 2477 right.

Second, the laws use different words in different contexts and rules of statutory construction do not permit agencies to simply combine the two laws into a single modernized definition. R.S. 2477 uses the term "highway" and was intended to promote public access and road construction. The Wilderness Act uses the word road or roadless in order to protect only the most scenic and unspoiled parcels of land. Moreover, the legislative history cited in the Wilderness Act was not written with respect to the public domain lands, because the 1964 Wilderness Act only applied to the designation and study of lands within the National Forest, National Park, and National Wildlife Refuge Systems. 16 U.S.C. §1132(a).

Third, the recent introduction of a definition requiring mechanical work contradicts long-standing interpretation of state law and essentially tries to impose a more modern definition when Congress never amended R.S. 2477 before its repeal in 1976.

4) **Maintenance / Width Recommendation:** The counties' right, title, and interest in R.S. 2477 Rights-of-way include the right to evaluate and perform construction, reconstruction, and maintenance which is reasonable and necessary for safe passage. The width of a Right-of-way is also a product of state law. In Colorado, the Department of Transportation never adopted rules imposing a specific numerical width for various classes of roads. Instead, the Colorado courts have held that in the context of R.S. 2477 the width of the right-of-way is what is a reasonable and necessary to accommodate a similar type of traffic along a given route. Restricting the width to the mechanically disturbed portion of a road is inconsistent with Colorado law.

Explanation: Colorado law charges counties to maintain public roads and ensure safe and efficient travel. It would be difficult to restrict the width of an RS 2477 Right-of-way to only the mechanically disturbed portion of a road since reasonable and safe travel standards change as time progresses. For instance, segments of I-70 were once horse pack trails, however, reasonable standards and public demand for access across Colorado required upgrading and widening the original right-of-way. An agreement between the DOI and the State of Colorado should identify that a reasonably necessary standard shall apply to any maintenance and upgrading necessary to provide for the continued use of rights-of-way to meet the demands of the public. Dating back to Colorado statutes in 1883, 60 feet minimum standards were often used for what became county roads established by petition, acceptance and plat process. However, over the last 120 years, the Colorado transportation statutes have been amended, recodified, and repealed in part with the net effect of removing any minimum or maximum width for public roads. Some roads in Colorado that may be "owned" by counties and have numerical width standards as part of their establishment. In many cases, R.S. 2477 Rights-of-way widths are defined with the reasonable and necessary standards now recognized in C.R.S. 43-2-201.

Opponents of the 'reasonable and safe' standards have often misinterpreted this to somehow provide authority for counties to upgrade roads such as paving jeep trails or livestock trails. Simply asserting and requesting recognition of an RS 2477 Right-of-way does not give a county such powers. Moreover, Colorado law requires the counties to use thorough public input processes to document or upgrade the existing use of any public road, including an R.S. 2477 Right-of-way. Therefore, the intent of this recommendation is to protect the existing character and maintain the desired use levels of routes of travel consistent with objectives identified in local planning documents. Colorado law delegates to local jurisdictions the authority to make decisions regarding the maintaining and upgrading essential public access systems. In heavily populated areas, standards for maintenance and upgrading of R.S. 2477 Rights-of-way are significantly different than remote and rural areas where it is unpractical and undesirable to perform any maintenance or reconstruction. Many local planning documents recognize that the need for remote areas with relatively low traffic and no mechanical maintenance or upgrading of routes is not, nor ever will be, necessary. An agreement with DOI should allow the people most directly affected (i.e. counties) to determine the maintenance criteria that should be applied to the rights-of-way within their jurisdictions.

Legal Discussion: The Colorado courts hold that the width of a public road is the width that is reasonably necessary to maintain historical uses. In the case of *Goluba v. Griffith*, 830 P.2d 1090, 1092 (Ct. App. 1992), the court held that in a dispute between two property owners that one landowner's widening the road to 32 feet was reasonable. The road in question was adopted as a public road by Colorado law in 1921, which declared all roads then in existence to be public roads under R.S. 2477 and part of the state highway system. C.R.S. § 43-2-201(1). The work done could include what is necessary to accommodate the historical use of the highway. The term 'historical use' is adjusted to reflect modern times, so in *Goluba*, a road which was originally used by wagon for commercial traffic could be improved to accommodate truck traffic.

This same decision also explains the reason that a declaration of an R.S. 2477 right-of-way for a footpath would not support upgrading the route to a two-lane paved highway. In most cases the "historical use" of the land as a footpath is unlikely to translate into a paved road suitable for motor vehicle access. Moreover, the historical use test limits future expansion to what is consistent with historical uses.

Other states use a similar standard. For instance, in *Sierra Club v. Hodel*, 848 F. 2d at 1083, the Tenth Circuit affirmed the decision of the Utah federal court concluding that state law determined the scope or width of an R.S. 2477. The court went on to conclude that in Utah the scope of an R.S. 2477 right-of-way is the amount of land reasonable and necessary based on the traditional uses of the road. *Id.* The "traditional uses" were not frozen at what the original use of the road was but rather what existed up until R.S. 2477 was repealed. "Applying the "reasonable and necessary" standard in light of traditional uses does not mean, however, that the County's right-of-way is limited to the uses to which the Burr Trail was being put when it first became an R.S. 2477 road. R.S. 2477 was an open-ended and self-executing grant." *Id.*

5) **Routes Exist at All Scales Recommendation:** Acknowledge the existence of valid existing R.S. 2477 Rights-of-way constructed prior to the repeal of R.S. 2477 by FLPMA or the reservation of federally managed lands, such as: footpaths, livestock trails, wagon roads, routes that no longer show physical evidence of existence (so long as they have not been vacated and abandoned), gravel roads, and paved roads.

Explanation: It is often easy for people to acknowledge the need for Rights-of-way that are paved or graveled. However, because a route is used by fewer public it does not lessen its importance to the economy or culture of an area. For instance, regularly used trails to move livestock from low country to high country are crucial to the sustainability of agriculture operations. Travel by emergency management services (*i.e.* ambulance or police) is crucial to public health and safety, and footpaths through Wilderness Study Areas provide a vital link to recreational opportunities. Unless a county pursues vacation and abandonment process established in local protocol and there is independent evidence that the public road has been abandoned, R.S. 2477 Rights-of-way remain valid and are not abandoned, even when vegetation has grown over them.

Legal Discussion: Colorado Revised Statutes provide for formal county procedure to vacate and abandon a public road, which is part of the county's primary road system. C.R.S. §43-2-113. A public road cannot be deemed to be abandoned unless there is clear intent on the part of the county and the public to abandon the right-of-way. In *Wilkenson v. DOI*, 634 F. Supp. 1265, 1274 (D. Colo. 1986), the court held that Mesa County's removal of the road from its list of county roads was not abandonment, because there was no "clear intent." Two years ago, the Colorado Supreme Court clarified and affirmed its previous decisions that a public road cannot be abandoned unless there is clear intent on the part of the local government and the public <u>and</u> no one needs the road for access. *Heath v. Parker*, 30 P.3d 746, 752 (2001). The *Heath* case is significant for two reasons. First, it affirms earlier Supreme Court cases holdings that once a

public road is established, the local government's classification or decision to vacate and abandon a road does not determine the fate of the road, because the ultimate question is whether the road is used by the public and public can be defined by a single individual. Second, the decision affirms earlier holdings that the period of nonuse can be as long as 30 years depending on the facts and circumstances. *Id.* at 749 citing *Koenig v. Gaines*, 165 Colo. 371, 440 P.2d 155 (1968).

6) **Documenting Existence Recommendation:** Identification of R.S. 2477 Rights-of-way using Government maps, aerial photos, affidavits, or photographs to represent the physical location provides the accuracy necessary to document the existence of the right-of-way. A requirement to identify the exact meets and bounds or a centerline should not be necessary.

Explanation: In most cases where RS 2477 Rights-of-way exist in rural areas, government records, aerial photos, or affidavits provide the necessary accuracy to represent and determine the location of a route on the ground. It is often stated that if a route is not marked through a Global Positioning System (GPS) that its existence cannot be proved. This is untrue. GPS is a valuable mapping tool in cases where government maps, aerial photos, and affidavits do not reveal a detailed description of the route or its exact location or boundaries are in question. However, it is often not necessary to obtain these sub-meter GPS measurements to define the existence of RS 2477 routes unless special circumstances arise to demand this level of detail.

Legal Discussion: The decisions regarding public roads have never required any level of maintenance that would maintain visibility. As noted above, periods of nonuse and, thus, no maintenance do not mean that the road has been formally vacated and abandoned by the county or that is abandoned under the common law doctrine articulated in *Heath v. Parker*. Instead, the operative question is whether the road is needed by the public and that need is not one of frequency nor does it translate into mechanical maintenance.

7) **No Additional Permitting Required Recommendation:** Since a Congressionally authorized grant (i.e. R.S. 2477 Rights-of-way) exists, it is unnecessary to apply for a Federal Land Policy and Management Act (FLPMA) Title V Right-of-way permit for the regular use or maintenance of existing R.S. 2477 Rights-of-way and a Title V permit contradicts the existence of an R.S. 2477 right-of-way.

Explanation: Counties are charged with and responsible for providing safe routes of travel along the heavier used roads (*i.e.* paved and graveled roads). To conduct routine maintenance and upgrading of heavily traveled roads, counties should rely on locally established maintenance protocols that define the level of maintenance that is required on various classes of roads. Many road classes in rural area do not require any maintenance whatsoever. The mere use of the R.S. 2477 Right-of-way keeps the route open for travel.

Legal Discussion: When Congress passed FLPMA and repealed R.S. 2477, it consolidated the numerous rights-of-way statutes into a single law, found in Title V of FLPMA. 43 U.S.C. §§1761-1769. The right-of-way under FLPMA is a new statutory easement that is entirely

different from an R.S. 2477 right-of-way, which is expressly distinguished and saved. *Id.* at §1769(a). With a Title V right-of-way, BLM enjoys substantial discretion to approve or deny the right-of-way, to impose terms and conditions, and to assess fees (except for local governments). FLPMA treats the R.S. 2477 right-of-way separate from Title V right-of-way but BLM has attempted to convert the public roads to Title V in order to exercise greater regulatory control and, in many cases, to close the roads.

8) **Processing Fee Recommendation:** Cost of processing RS 2477 assertions is the responsibility of the organization processing or challenging the assertions.

Explanation: The roads and trails identified under R.S. 2477 in the State of Colorado are not new and do not break new ground. These roads and trails have been developed since early settlement and reflect valid existing rights granted by Congress at their creation, under the 1866 Mining Law, for purposes of development and settlement of the West. Once the public established a road or trail it became the public's vested right. The burden of processing or formally recognizing the vested rights that are asserted by counties should fall upon the agency or organization that must implement regulations to address the long existing rights. This should not be construed to mean that parties asserting R.S. 2477 Rights-of-way do not have an obligation to demonstrate the legitimacy of any given R.S. 2477 right, but the party asserting the Right-of-way certainly should not pay for federal agencies to develop a process to recognize these Congressionally granted rights.

Legal Discussion: As noted above, the open offer for a public road did not require the public or county to take any action other than to establish the road and R.S. 2477 did not authorize DOI to approve or deny public roads. *Sierra Club v. Hodel*, 848 F.2d at 1083-1084. Thus, the proposed process that would require the counties to carry the burden of proof to "prove up" the public roads is at odds with the past century of case law and BLM's own regulations.

More to the point, FLPMA only authorizes right-of-way cost recovery for private entities and expressly excepts local government. 43 U.S.C. §1764(g). The proposed processing fee is cost recovery and assessing it against local government violates FLPMA, which exempts local governments from such fees.

9) **DOI Policy Recommendation:** A Policy issued by Secretary Norton applying to DOI is the preferred method to recognize RS 2477 Rights-of-way.

Explanation: CCI recommends the Babbitt Policy be replaced with a new policy from Secretary Norton addressing the points included in this letter. A policy is needed from the DOI to provide the binding direction necessary to ensure R.S. 2477 Rights-of-way are recognized beyond the current administration. A memorandum of understanding does not carry the weight of policy, is more easily revoked by future administrations, and does not accomplish the future protection of R.S. 2477 Rights-of-way. In the event that a policy is not possible, we request a contract with the State of Colorado to provide the conduit to acknowledge RS 2477 Rights-of-way consistent with the above recommendations.

Legal Discussion: A memorandum of understanding is an unenforceable agreement unless it expressly provides for enforcement. Most federal land memoranda of understanding establish a cooperative process but do not agree to binding terms and conditions and this is also true for the Utah Memorandum of Understanding on R.S. 2477. Thus, a memorandum of understanding is unlikely to resolve the conflicts and contradictions regarding how DOI treats and acknowledges public road rights. Any BLM official can cancel an MOU and an MOU cannot override an agency's policies or litigation positions.

At a minimum, DOI needs to revoke the Babbitt policy. It is inconsistent with most of the R.S. 2477 case law and has never been implemented, since DOI adopted a moratorium on R.S. 2477 adjudications. While rulemaking is more costly and burdensome, it would establish and clarify these issues. Alternatively, DOI should adopt departmental manual direction, which reflects the case law and will provide much needed direction to the respective federal agencies.

Thank you for considering the above mentioned recommendations. If you have questions regarding this letter, please contact the CCI Public Lands Committee.