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THE WILDERNESS SOCIETY

southern utah wilderness alliance

February 3, 2006

File: 515

Mr. Kent Hoffman
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Email: kent_hoffman@blm.gov
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Mr. Lawrence Jensen
Regional Solicitor, Intermountain Region
Department of the Interior
125 South State Street, Suite 6201
Salt Lake City, Utah 84138-1180
Via Fax: 801-524-4506

Re: Comments on January 12, 2006 Draft Template Road Maintenance Agreement and Request for Meeting

Dear Deputy Director Hoffman and Mr. Jensen:

On behalf of Earthjustice, the Southern Utah Wilderness Alliance, and The Wilderness Society, thank you both for continuing to seek our input concerning your negotiations of a template road maintenance agreement between the State of Utah and the Bureau of Land Management (BLM). We appreciate your requesting our input on the most recent draft of the agreement dated January 12, 2006, attached as Exhibit 1.[1]

Since our last conversation, we have learned that the Department intends to use this agreement as a template for BLM lands across the West, a development that obviously heightens the significance and import of this agreement. It also underscores the great need for an open process that involves the public nationally in the drafting of this agreement, and heightens all the more our concerns about the circumvention of existing processes for recognizing county rights, and inclusion of Class D routes, which typically have not been included in these agreements and have not been maintained in the past (each discussed in detail below).

Specifically, and as you may be aware, in a January 27 meeting with Colorado Counties, Inc., Kit Kimball, director of the Department of the Interior's (DOI's) Office of External and Intergovernmental Affairs, encouraged counties to obtain road maintenance agreements with the BLM. She distributed a handout at the meeting that acknowledged that DOI planned to implement new R.S. 2477 policy by using the road maintenance agreement being negotiated with Kane County as a "template" for other such agreements across the nation. *See* Kimball, "RS 2477 – Status Report and Potential Implementation Plan, Department of the Interior – January 26, 2006," attached as Exhibit 2. Given that the draft agreement will function as a template for the entire Department, impacting land management across the West, DOI should engage in an

[1] We request that you provide us with an opportunity to respond to any subsequent draft templates before the template is finalized.

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open and formal process nationally, rather than proceed with its negotiations behind closed doors and should vigilantly guard against the erosion of BLM authority and its ability to protect public lands against baseless "road" claims – here, the so-called Class D routes – which offer little in the way of safe, efficient transportation yet open the door to land damage on a broad scale.

As to the substance of the January 12 draft, we recognize and appreciate the changes you made which eliminate some clearly illegal provisions of prior drafts, such as a provision that could have resulted in BLM's automatic approval of major road construction projects, and a provision that would permit a county to bulldoze first and notify BLM later in a situation in which public health or safety is "at immediate risk."

However, as described in greater detail below, the January 12 draft retains illegal provisions that appear aimed at effectively granting rights-of-way in violation of either the Federal Land Policy and Management Act (FLPMA) and/or the recent Tenth Circuit decision in Southern Utah Wilderness Alliance v. Bureau of Land Management, 425 F.3d 735 (10th Cir. 2005) (SUWA v. BLM). In addition, we were disappointed to see that our core concerns regarding the inclusion of Class D routes remain unaddressed, and that the draft omits important provisions that would assist BLM in discharging its obligation to protect public lands.

We request a meeting with you to further discuss this and other concerns in the hopes that we may understand why DOI continues to include such provisions in its draft template. We request such a meeting before any draft agreement is signed or otherwise completed.

1. The draft agreement would effectively – and unlawfully – recognize certain routes as R.S. 2477 rights-of-way.

The agreement itself appears to be less a vehicle for addressing legitimate transportation needs than a way to treat numerous routes across public lands as if they were valid, court-endorsed county rights-of-way under R.S. 2477.[2] Ms. Kimball essentially admitted as much in her presentation and handout to Colorado Counties Inc. on January 27. However, BLM cannot lawfully circumvent its right-of-way procedures under Title V of FLPMA, nor can it effectively make "binding determinations" for rights-of-way pursuant to R.S. 2477 in violation of the SUWA v. BLM decision.

The January 12 draft contains troublesome language that would explicitly recognize certain county rights to public land, rights that a county cannot obtain simply through a maintenance agreement. Paragraph 1 of the January 12 draft states in part:

> It is agreed that the County is ***entitled*** to perform maintenance on the roads listed in Exhibit "A" in such manner as to preserve the status quo of the roads.

The agreement also uses the word "entitled" again in the draft's next paragraph: "Routine maintenance work the County is ***entitled*** to perform on roads under this agreement includes work reasonably necessary to preserve the existing roads…." January 12 draft at ¶ 3. To state that a county is "entitled" to maintain a route would appear to recognize that a county has certain legal

[2] This is especially troubling in the context of Class D routes, discussed further below.

rights to do so. According to Black's Law Dictionary (5th Ed. 1979), "in its usual sense, to entitle is to give a right or legal title to."

Through this agreement, DOI appears to be recognizing a county right to maintain roads, a right that the county could not otherwise obtain except through the Title V permitting process or through recognition of an R.S. 2477 right-of-way after a court determination. This approach is certainly different from an agency agreement to permit a county to undertake such maintenance.

In addition, the draft agreement explicitly relies on definitions of "maintenance" and "improvement" of routes in Exhibit B contained in the SUWA v. BLM decision in reference to R.S. 2477 rights-of-way, further reflecting the draft agreement's intent to treat routes covered by the agreement as such rights-of-way. The draft agreement's provisions permitting a county to perform "improvement projects" or "construction projects" on the routes listed in Exhibit A fail to reference (and appear to establish a new and separate process distinct from) FLPMA's Title V provisions and 43 C.F.R. Part 2800 governing transportation rights-of-way. January 12 draft at ¶¶ 4-6. The agreement's requirement that a county provide certain minimal information concerning a proposed construction project does not appear to be coextensive with, and in some respects are more relaxed than, the information required by BLM of Title V permit applicants. In short, BLM would appear to effectively treat routes under the agreement, in terms of maintenance and construction, as if they were R.S. 2477 rights-of-way, for 20-40 years (which is to say, indefinitely). This treatment appears little different than a BLM "binding determination" that a route is a right-of-way under R.S. 2477, a type of determination that the Tenth Circuit Court of Appeals explicitly forbade the agency from making in SUWA v. BLM.[3]

At least one federal court has held that federal agencies may not enter into an agreement that has the effect of treating a route as an R.S. 2477 right-of-way, particularly where no evidence exists supporting the effective recognition of such a right-of-way, because effectively recognizing the right-of-way circumvented agency procedures and federal law. See United States v. Carpenter, CV-N-99-0547 (order of May 3, 2004). There the court also gave little weight to the agency's contention that the agreement did not really fix R.S. 2477 rights, a disclaimer the draft agreement contains as well. January 12 draft at ¶ 10.

In sum, this agreement, as now drafted, appears to be an illegal attempt to effectively validate R.S. 2477 claims, in violation of the Tenth Circuit's rule that the agency cannot make binding determinations concerning the validity of rights-of-way. In this way, the agreement would appear to grant the counties entitlements that they could only obtain in court after proving beyond doubt that such claimed rights-of-way are valid. Finally, the agreement as drafted appears to be an attempt to circumvent BLM procedures under FLPMA that regulate the construction and improvement of travel routes across public lands.

For these reasons, DOI cannot approve this agreement unless and until it eliminates any references to county "entitlements" and provides explicitly that construction and improvement of

[3] If BLM or DOI believes that the agreement treats routes listed on Exhibit A in a manner different than valid, court-determined R.S. 2477 rights-of-way, we would appreciate the agencies' explanation.

routes on BLM land will require compliance with FLPMA's Title V and other applicable laws meant to protect natural and cultural resources on public land.

2. The continuing inclusion of Class D routes is unnecessary and leaves BLM lands vulnerable to damage.

We continue to oppose strongly the inclusion of Class D routes in any road maintenance agreement, an issue we addressed in our December 21 letter. See January 12 draft agreement at ¶ 1; letter of E. Zukoski to K. Hoffman, et al. (Dec. 21, 2005) (hereafter "December 21 letter") at 6-7.

As you know, most Class D routes are seldom-used jeep or cattle tracks that abut or traverse sensitive lands with values the agency must protect under FLPMA such as wilderness study areas (WSAs). Some of these routes resemble hiking trails, many are in washes and stream bottoms, and some are not apparent on the surface of the ground at all. In part because the BLM has not typically recognized these routes as "roads," these routes have not previously been included in past road maintenance agreements.

The continuing inclusion of a provision permitting counties to maintain Class D routes is especially troubling because the agreement still contemplates permitting counties to upgrade (through alleged "maintenance") Class D routes which have regained their natural appearance through "natural or other causes." See January 12 draft at Exhibit B. Such an outcome would facilitate the creation of new roads where mere tracks exist now, and is particularly noxious given the recent Utah law which provides that the current appearance and character of the route is relevant to the validity of a state or county R.S. 2477 claim.[4]

Inclusion of the Class D routes will also prejudice or corrupt travel management plans, raising the possibility that BLM and the counties, through this agreement, will undermine the travel management planning process that usually involves extensive public comment and full environmental review. This raises the specter of counties using the road maintenance agreement to circumvent the established travel management planning processes, resulting in the opening lands for purely recreational off-road vehicle use. For example, the 1977 Kane County Class D map proposed for use as the basis for the agreement includes hiking trails in Zion and Bryce National Parks – hardly "roads" that would require maintenance – and scores of routes that are impassible by any vehicle other than an ATV. As we understand it, road maintenance agreements were traditionally established to address BLM budget constraints, coupled with a desire to protect public safety. It was a way for counties to help the BLM keep main roads open

[4] See Utah Code Ann. 72-5-310(6)(ii), which purports to create a rebuttable presumption of acceptance of an R.S. 2477 grant "if the highway currently exists in a condition suitable for public use." This provision, together with much of the remainder of the statute, is clearly an illegal state intrusion into an area reserved for federal authority. Nonetheless, it provides troubling insight into the State of Utah's ultimate goals and the destructive purposes to which a provision allowing the maintenance and "repair" of Class D roads may be put.

and safe for the public's travel — not to manage recreation or encourage the growth of a recreation type which the agency is already struggling to manage.

Moreover, the inclusion of Class D routes in the draft agreement, and the recognition that some of the routes covered may be mere two-tracks (see January 12 draft at Exhibit B) plainly conflicts with Mr. Hoffman's commitment to us that "it is not the two-tracks in WSAs that will ever, ever get on the list" of routes covered by the maintenance agreement. See December 21 letter at 6.[5] We also believe that this aspect of the draft undermines the purpose of the agreement, which, as Mr. Jensen expressed, was to facilitate maintenance on noncontroversial routes. We remain fully supportive of an agreement reached in the spirit and service of this goal, and strongly urge you to include only those routes on which either the counties or the BLM had performed routine, mechanical maintenance in the past. Such routes would include – generously, in our view – thousands of miles of noncontroversial Class B routes throughout the state.

We continue to strongly oppose inclusion of Class D routes in any road maintenance agreement. While we appreciate the provision which provides for an undefined opportunity for public comment (see further discussion below), that provision does not allay our concerns, particularly in light of the significance of the threat to public lands it would create. Our concerns regarding the potential impact of the inclusion of Class D routes in the agreement are well-founded. The State of Utah and several counties, in a series of recently filed lawsuits, have attacked decisions to protect WSAs and other sensitive lands managed by the BLM and by the National Park Service by claiming that various primitive and little-used trails, designated as Class D "roads," are actually R.S. 2477 rights of way.

In sum, in order to protect sensitive public lands, which FLPMA requires BLM to do, BLM cannot enter into an agreement that permits counties to maintain these routes.

3. Any agreement must recognize BLM's duty to protect natural resources and comply with the full range of applicable environmental laws.

The January 12 draft, like its predecessors, contains only the most cursory notice of BLM's superceding authority and duty to protect the nation's public lands. DOI and BLM have an obligation to follow all federal laws, policies, and regulations governing federal land management, and the agreement must make this clear to all parties, as we stated in our December 21 letter (at pages 7-8). To ensure that the parties to the agreement are fully aware that BLM will discharge its federal duties, we urge BLM to acknowledge in its template agreement its duty to undertake NEPA (and other environmental law) compliance prior to signing any road maintenance agreement.

[5] BLM could make a good start at meeting Mr. Hoffman's commitment and at ensuring that the agreement was not used to legitimize and upgrade little-used or abandoned routes by explicitly stating in the agreement that Exhibit A could not include Class D routes. This, obviously, would prohibit the inclusion of any route that was within the boundaries of a wilderness area, wilderness study area, or area determined by BLM to be "roadless" in its 1996-99 wilderness inventory.

In addition, BLM must make explicit that BLM retains the authority to remove a route from the list in Exhibit A at any time in order to protect resources and to comply with the agency's duties under law. As noted previously, notwithstanding any agreement, BLM retains the authority and the duty to limit or prohibit motor vehicle use of public lands in order to protect BLM resources. See Executive Order 11644 (Feb. 8, 1972); Executive Order 11989 (requiring agencies to restrict ORV use on public lands "whenever [they] determine[] that the use of off-road vehicles will cause or is causing considerable adverse effects" to a wide variety of natural and historic resources); 43 C.F.R. § 8342.2; 43 C.F.R. § 8364.1(a) (authorizing BLM to "close or restrict use of designated public lands" in order to "protect persons, property, and public lands and resources"). DOI should not give Utah's counties the impression that identifying the route for county maintenance deprives the BLM of the authority to restrict or prohibit the maintenance and use of the route at any time**.**

In short, we believe the agreement should contain a more frank statement of BLM's authority over the lands and routes, a clear statement that BLM can deny and restrict the State or County the ability to maintain or undertake construction on any route listed at an attached Exhibit A at any time, and a clear statement that BLM may take enforcement action against any county for activities undertaken by the county that exceed the scope of the agreement. This will avoid future misunderstanding between BLM and the counties and will ensure that local BLM officials understand that routes can be removed the list by BLM as needed.[6] These specific statements would not replace the catch-all disclaimer included in the January 12 draft (at ¶ 11) whose meaning is not clear.

4. Any agreement must be terminable by BLM upon request.

Only DOI and BLM are responsible for managing BLM land, not the State or county. No agreement can bind BLM in a way that limits the agency's duties to lawfully manage lands including protecting the public's resources. To that end, and to ensure that the State and counties understand BLM's authority, we again urge that any agreement must explicitly state that BLM may, at its request and discretion, terminate any agreement.

The January 12 draft contains absolutely no mention of whether or how the agreement can be terminated. We hope in a subsequent meeting with you to obtain your response as to why, whether, and how you believe BLM can terminate the agreement as drafted, and any consequences that BLM might face from such a decision.

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[6] In a similar vein, we were disappointed that the provision in the 9-26 draft (at ¶ 13) – requiring "[a]ll notices and other communications" between the parties concerning the agreement "shall be in writing" – was apparently abandoned in the 12-8 and in the January 12 draft. Written communications would ensure: (1) clarity of communications; and (2) a paper trail that will ensure that each party – and the public – can track exactly how the counties and BLM interpret and implement the agreement. See December 21 letter at 10. We would appreciate an explanation as to why BLM abandoned its prior, reasonable position.

5. Any agreement should not permit maintenance outside the traveled width of the route absent an agreed-to inventory of existing features outside that width.

The current draft of the agreement, as with its immediate predecessor, includes no defined limit in terms of the width of the footprint of maintenance activities. Exhibit B to the January 12 draft permits "[r]easonable and necessary use of land proximate to the road … for routine maintenance," which includes "upkeep and repair of existing road features outside of the traveled way such as turnouts, cuts [sic] slopes, fill slopes, drainage structures, bridges," etc. The term "reasonable and necessary use" is unnecessarily subjective, and is far too elastic; the agreement places no limits whatsoever on the extent of structures or disturbance that may constitute such "use." Whether the terms "upkeep and repair" are meant to be the same as "maintenance" is not clear.

This approach begs the question as to whether BLM has inventories of each route, and whether BLM has identified each individual feature outside the driving width of each route so that the agency will know whether a particular action amounts to "maintenance" (or "upkeep and repair," all of which may be permitted under the agreement without prior BLM approval) or new "construction" (which does not appear covered by the agreement). This is not a hypothetical scenario. In SUWA v. BLM, the Skutumpah Road, where scope, not validity, was at issue, became the focus of controversy precisely because Kane County's maintenance-related work extended far beyond the road, scarring an adjoining WSA. The provision permitting "reasonable and necessary use of land proximate to the road" should be removed from the agreement. It is simply too ambiguous and vulnerable to abuse or misunderstanding. A clearer site-specific approach which identifies routes and their existing character and adjacent land features should be utilized instead.

DOI failed to address our prior statements of concern regarding this issue. We look forward to discussing with you the reason for DOI's decision.

6. Any agreement must be preceded by environmental review and opportunities for public involvement.

BLM also failed to address our concern that the agency must undertake at least an environmental assessment pursuant to NEPA prior to signing any road maintenance agreement with any county. Again, we would appreciate discussing more fully with you the agency's position.

7. BLM should clarify that it will provide opportunities for public comment on the choice of routes subject to the agreement.

The January 12 draft contains a new sentence that states: "Exhibit 'A' shall not become final until the public has had an opportunity to comment on the Exhibit." January 12 draft at ¶ 1. Exhibit A would include the list of all routes that are subject to the agreement.

We have stated repeatedly that the public should have an opportunity to review and comment upon agency actions including draft road maintenance agreements, and appreciate the inclusion of this provision. However, the provision fails to specify how and under what circumstances the

required public comment opportunity would take place, to whom the public should present its comments, and who would have the authority to respond to questions and make decisions in response to the comments. We strongly urge that the draft agreement make clear that BLM will use its standard, time-tested methods for alerting and involving the public, including its electronic bulletin board system. This will ensure that the public can assist in identifying those routes that should be subject to the agreement so that they remain open, and those routes that should not be maintained or open.

BLM cannot rely on county commission meetings to provide for adequate public comment since it would not likely be effective in involving the broad spectrum of the public that use and enjoy public lands in Utah. Some Utah counties generally notify the public of commission meetings through legal notices in local newspapers which are difficult for the public outside those counties to access. The BLM must cast a wide net for comments where, as here, land belonging to all Americans is at stake. In addition, the State of Utah and some of its counties have shown abject contempt for public involvement related to the management of routes on public lands. For example, the State dismantled a website meant to inform the public about its R.S. 2477 claims, had to be sued to release relevant data concerning those same claims, and adopted an agreement with Utah's counties to prevent the counties from disclosing to county residents the details of its claims. It is thus unlikely that the State or individual counties can be relied upon to effectively involve the public concerning routes that are to be the subject of road maintenance agreements.

In conclusion, we respectfully request that you take these comments under advisement and provide a written reply to our stated concerns and suggestions. In addition, we request an opportunity to meet with you to address why the Interior Department declined to adopt a number of our suggestions. Please consider this letter a preliminary assessment of the January 12 draft. We may provide supplemental comments in the near future.

If you have any questions in this matter, please contact Ted Zukoski at 303-623-9466, Heidi McIntosh at 801-486-3161, or Kristen Brengel at 202-429-2694.

Sincerely,

Edward B. Zukoski	Heidi McIntosh	Kristen Brengel
Earthjustice	Southern Utah Wilderness Alliance	The Wilderness Society

cc: Senator Richard Durbin
Senator Jeff Bingaman
Representative Mark Udall
Representative Maurice Hinchey
Brian Waidmann, Chief of Staff, Secretary of the Interior
Chad Calvert, Deputy Assistant Secretary, Lands and Minerals Management
Gene Terland, Acting State Director, BLM, Utah State Office
Joe Incardine, Chief, Realty Branch, BLM, Utah State Office
Mike DeKeyrel, Realty Specialist, BLM, Utah State Office
Steve Boyden, Esq., State of Utah, Office of the Attorney General
Lawson LeGate, Sierra Club

EXHIBITS

Exhibit 1.	Draft Road Maintenance Agreement (Jan. 12, 2006)
Exhibit 2.	Kimball, "RS 2477 – Status Report and Potential Implementation Plan, Department of the Interior – January 26, 2006"

EXHIBIT 1

TELEFAX TRANSMITION

U.S. DEPARTMENT OF THE INTERIOR

Office of the Solicitor
1849 C Street, N.W., MS 6352
Washington, D.C. 20240
202-208-4423
Fax # 202-208-5584

To: Kristin Brengel **Fax #:** 202/429-3945

Office #:

From: Larry Jensen

Date: **Number of pages to follow:**

Subject: As promised, here is the latest dratt of Utah's template for a Road Maintenance Agreement.

MODEL ROAD MAINTENANCE AGREEMENT

Between

The United States of America
Department of the Interior
Bureau of Land Management
_____ Field Office

and

_____ County
by and through the
Board of County Commissioners

THIS ROAD MAINTENANCE AGREEMENT entered into this ___ day of _____, 2005 by and between the United States of America, Department of the Interior, Bureau of Land Management _____ Field Office, hereinafter referred to as the "Bureau", and the Board of County Commissioners, _____ County, Utah, hereinafter referred to as the "County."

WITNESSETH THAT:

WHEREAS, the Bureau is responsible for the orderly administration and management of public lands and natural resources thereon in the County; and

WHEREAS, the County is responsible for the construction and maintenance of certain roads within the County, including roads on or across public lands, according to its established County transportation plan, duly adopted on _____; and

WHEREAS, the Bureau and the County desire to formulate an agreement with respect to the routine maintenance of certain roads located on public lands without prejudicing the right of the parties either to claim, contest, or disclaim the existence of R.S. 2477 rights-of-way granted by Congress and the rights attendant to R.S. 2477 right-of-way ownership; and

WHEREAS, the Bureau is authorized to enter into cooperative agreements by Section 307 of the Federal Land Policy and Management Act (FLPMA) of 1976 (43 U.S.C. 1737), as needed to carry out the purpose of the Act, and the County is authorized to enter into cooperative agreements under Sections 11-13-101, et seq., of the Utah Code; and

WHEREAS, Section 701(a) of FLPMA provides that nothing in FLPMA "shall be construed as terminating any valid . . . right-of-way, or other land use right or authorization existing on the date of approval of [FLPMA]" and Section 701(h) of

FLPMA provides that "[a]ll actions by the Secretary concerned under this Act shall be subject to valid existing rights";

THEREFORE IT IS MUTUALLY AGREED as follows:

1. The County has adopted a transportation plan that identifies all roads within the County it deems it has the right to maintain, including Class B and Class D roads. The map of these roads has been submitted to the Bureau by the County. From among those roads and the Bureau road system, the roads shown on Exhibit "A," attached hereto and incorporated herein by reference, are the subject of this Agreement. Exhibit "A" shall not become final until the public has had an opportunity to comment on the Exhibit. The omission of a road or roads from the list provided in Exhibit "A" does not prejudice the rights under law, including R.S. 2477, of any party as to such road or roads. Each road identified in Exhibit "A" is given a County-transportation-plan number, corresponding to the centerline description shared electronically by the County with the Bureau, and is assigned a Road Category as described in Exhibit "B." It is agreed that the County is entitled to perform routine maintenance on the roads listed in Exhibit "A" in such manner as to preserve the status quo of the roads.

2. Routine maintenance work the County is entitled to perform on roads under this Agreement includes work reasonably necessary to preserve the existing roads, including the physical upkeep or repair of wear or damage whether from natural or other causes, maintaining the shape of the road, regrading it, making sure that the shape of the road permits drainage, and keeping drainage features open and operable, consistent with law. No changes beyond routine maintenance, as defined herein and in Exhibit "B," may be undertaken by either party without prior consultation with the other party, and in the absence of agreement, court decree.

3. Should the County decide that a road should no longer be on the County transportation system, the County will so advise the Bureau and may abandon the road as provided by state law.

4. The Bureau and the County shall meet at least annually to consult regarding improvement projects beyond routine maintenance for roads on the County's transportation system, identified or not identified in Exhibit "A." The County shall advise the Bureau in writing of any County proposals to undertake improvement projects beyond routine maintenance for the roads identified in Exhibit "A." The Bureau will use its best efforts to process the proposal within 180 days of its receipt. No later than 180 days after receiving the proposal, the Bureau shall inform the county in writing whether the proposal is approved, disapproved, or, if the Bureau has not completed processing the proposal, the date by which the Bureau expects to have a final decision.

5. A County proposal to undertake improvement projects shall include the anticipated time of commencement and completion of the proposed work, a map showing the location of the proposed work, a description of the proposed work, a brief statement describing the need for the proposed work, the approximate date when the County last maintained the road and a brief description of the work performed at that time.

6. The Bureau and the County recognize that some construction projects may need to be performed on an emergency basis to prevent harm or substantial inconvenience to the public. In such a situation, the Bureau agrees to use its best efforts to expedite the approval process.

7. This Agreement shall be effective as of the date shown in the first paragraph of this document, and shall supersede any previous road maintenance agreement.

8. This Agreement shall be in effect for a period of twenty (20) years and may be renewed for an additional twenty (20) years with the mutual consent of the parties.

9. This Agreement may be amended by mutual agreement. Such amendment shall be in writing and shall be effective when signed by both parties.

10. This Agreement does not constitute abandonment, waiver or other termination or modification of any rights under R.S. 2477, with respect to the roads on Exhibit "A," nor shall it be construed as an acceptance or determination of such rights by the Bureau or prejudice in any way the Bureau's the right to contest any assertion of such rights under R.S. 2477~~, or constitute a waiver of~~

11. Nothing in this Agreement establishes precedent regarding the Bureau's future management or administration of the public lands under its jurisdiction or the County's or State of Utah's management or administration of transportation systems under their jurisdictions, and nothing herein shall preclude or limit any authority the Bureau, the State or the County has under law.

IN WITNESS WHEREOF, the parties have executed this Road Maintenance Agreement in duplicate originals on the day and year first above written.

_____COUNTY COMMISSION	BUREAU OF LAND MANAGEMENT
	_____ Field Office
By_____	By_____
[name and title]	[name and title]

Exhibit A – Map of Roads in Agreement with accompanying list of road numbers and names.
Exhibit B – Scope of Routine Road Maintenance

Exhibit "B"
Scope of Routine Road Maintenance

Road Category	Frequency of Maintenance	Road Character*	Representative Maintenance Activities**
1 (High)	As Needed	Paved	Upkeep and repair of existing pavement, guardrails, striping, signing, clear zones, borrow areas, drainage facilities, bridges, culverts and riprap, and removal of snow.
11 (Medium)	As Needed	Graveled	Upkeep and repair of existing graveled surface, drainage facilities, bridges, culverts and riprap.
111 (Low)	As Needed	Natural graded	Upkeep and repair of graded natural surface, including upkeep and repair of existing culverts, and hardened crossings.
1V (Minimal)	As Needed	2-track	Upkeep and repair of natural surface by removing rocks and fallen trees and filling holes using hand tools only.***

The term "routine maintenance" used in this Agreement, is controlled by the September 8, 2005, opinion of United States Court of Appeals, Tenth Circuit in SUWA v. BLM. Under that opinion, "construction or improvement" requires advance consultation with the Bureau, and 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, roto-mill or tar sands from chipseal roto-mill or tar sands to asphalt, etc.) , or any "improvement," "betterment," or any other change in the nature of the road that may significantly impact public lands, resources, or values. "Routine 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.

* Reasonable and necessary use of land proximate to the road is allowed to facilitate routine maintenance activities, i.e., using land to turnaround or operate maintenance vehicles. Routine maintenance includes upkeep and repair of existing site-specific road features outside of the traveled way such as turnouts, cuts slopes, fill slopes, drainage structures, bridges and so forth. Expansion or addition of features requires prior consultation between the parties to determine if any additional authorization is necessary.

** Listed maintenance activities are non-exclusive and are only intended to be representative of the nature and degree of routine maintenance activities.

*** Extreme circumstances such as landslides and washouts may require mechanized maintenance to restore the traveled way at a specific site or sites. Such restoration activities will take place on Road Category IV only after consultation between the parties.

EXHIBIT 2

RS 2477 – Status Report and Potential Implementation Plan
Department of the Interior – January 26, 2006

1. **Review of 10th Circuit Opinion** – *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735 (10th 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 (10th 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.