STATEMENTS BY THE CURRENT ADMINISTRATION ON THE PROPER INTERPRETATION OF R.S. 2477 – IN FEDERAL COURT - 2003

All of the following statements are verbatim quotes. They are taken verbatim from a Tenth Circuit brief filed in October 2003 by the United States in support of the district court's ruling rejecting an attempt by off-road vehicle groups to overturn vehicle closures that protect the Robledo Mountain Wilderness Study Area in New Mexico. See Southwest Four Wheel Drive Ass'n v. Bureau of Land Management, 271 F. Supp. 2d 1308 (D.N.M. 2003) (appeal pending).[1/]

But the linchpin of Southwest's argument – which the government does dispute – is that state law determines the existence of an R.S. 2477 right-of-way over federal lands and that New Mexico state law permits unimproved trails created by mere use to be deemed R.S. 2477 rights-of-way. ….

[Appellant] Southwest is simply incorrect: since R.S. 2477 is a federal statutory grant, state law is only determinative to the extent that it does not conflict with federal law. Pursuant to the plain meaning of R.S. 2477, and in keeping with BLM's interpretation, in order to be eligible to be considered an R.S. 2477 right-of-way, a "highway" must be "constructed," regardless of a how a state might under its own law require the establishment of a right-of-way. Thus, to the degree that New Mexico state law conflicts with the federal law requirements of a "constructed highway," it is not controlling.

Brief of Federal Appellees, Southwest Four Wheel Drive Ass'n v. Bureau of Land Management, 10th Cir. No. 03-2138 (Oct. 15, 2003) at 37-38.

This provision [R.S. 2477] has been construed as a federal offer of rights-of-way across unreserved federal lands which may be accepted by the states by meeting the requirements contained in the statute, namely the (1) "construction" of (2) "highways" over (3) "public lands, not reserved for public uses." **Contrary to Southwest's argument, the statutory language selected by Congress did not provide for the establishment of a right-of-way based on the public's mere "use" or "passage" over the public lands**. Rather, Congress selected the phrase "construction of highways" as the predicate for establishment of a right-of-way.

Consistent with the commonly understood meaning of these terms at the time R.S. 2477 was enacted, Congress required purposeful, physical acts to establish a defined route across the public lands. Webster's Dictionary from 1860 defines "construction" as "[t]he act of building, or of devising and forming, fabrication." Webster's Dictionary of the English Language at 256 (1860). Similarly, the ordinary meaning of the term "highway" in the 1860s was not merely any route or road across the landscape, but rather "a public road; a way open to all passengers; so called, either because it was a great or public road, or because the earth was raised to form a dry

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[1/] Internal citations in the briefs have been shortened or omitted. Emphasis in bold has been added.

path. Highways open a communication from one City or town to another." *Id.* at 552 (emphasis added). In fact, as noted by the Congressional Research Service in its 1993 Report, Congress' use of the term "highways" rather than "roads" indicates an intent to limit R.S. 2477 rights-of-way to "significant" or "principal" public roads rather than broadly apply to any class of road. CRS Report at 7-8.

The [Interior] Department's interpretation has historically embraced the three critical statutory elements of "construction" and "highways" over "unreserved public lands." …. In contrast, **Southwest's interpretation based on the mere "use" and "passage" of persons or vehicles across the public lands destination [sic] has no support in the plain meaning of the terms [of R.S. 2477] and provides no concrete standards for evaluating R.S. 2477 claims. Thus, there is no basis for a conclusion that Congress would have intended the terms "construction" and "highways" be read in such a broad manner as alleged by Southwest, or would have permitted the definition of rights acquired in public lands to vary based upon the particular state in which the relevant lands are located.**

Brief of Federal Appellees, Southwest Four Wheel Drive Ass'n v. Bureau of Land Management, 10th Cir. No. 03-2138 (Oct. 15, 2003) at 39-41 (footnotes omitted).

The Supreme Court's decision construing the term "construction" as used in section 9 of the 1866 Act to require a physical act fully supports the reasonableness of the Department's interpretation of **R.S. 2477, which similarly requires actual, physical construction as a prerequisite to establishing an R.S. 2477 right-of-way under section 8 of that same Act**. …. This interpretation is likewise consistent with federal caselaw interpreting R.S. 2477.

Brief of Federal Appellees, Southwest Four Wheel Drive Ass'n v. Bureau of Land Management, 10th Cir. No. 03-2138 (Oct. 15, 2003) at 43 (citations omitted).

Southwest errs in contending that state law properly applies the rule of decision for the R.S. 2477 questions at issue in this case – namely, the necessary conditions for establishing R.S. 2477 rights-of-way. …. State laws may be relevant, particularly in determining the scope of an R.S. 2477 right-of-way, but federal law governs the question of the validity of a right-of-way and whether it was perfected prior to the 1976 revocation of R.S. 2477.

R.S. 2477 is a federal statute and, therefore, must be interpreted under federal, not state law. …. **R.S. 2477, enacted as Section 8 of the Act of July 26, 1866, contained no indication that state law should define its terms, in contrast to Congress' explicit references to adoption of state or local law in several other sections of that same Act**. ….

Because R.S. 2477 was a federal offer of rights-of-way "for the construction of highways over public land," these terms are not subject to unilateral deletion or expansion by any state. Thus, while state laws not inconsistent with the terms of the R.S. 2477 grant might be permissible, states may not – through legislation or judicial construction – alter the terms of the grant by asserting rights-of-way where elements in the grant are missing. R.S. 2477 provides no

authority for a right-of-way either (1) where there was no "construction"; (2) where there was construction of something other than a "highway"; or (3) where the servient land was not unreserved public land ….

Contrary to Southwest's theory, there is no legal basis for construing Congress' limitations on the federal grant in R.S. 2477 according to state-law standards that are fundamentally at odds with Congress' terms or are hostile to federal land management policies.

Brief of Federal Appellees, Southwest Four Wheel Drive Ass'n v. Bureau of Land Management, 10th Cir. No. 03-2138 (Oct. 15, 2003) at 45-48 (citations and footnotes omitted).