COLORADO ENVIRONMENTAL COALITION
COLORADO MOUNTAIN CLUB
EARTHJUSTICE
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SIERRA CLUB
THE WILDERNESS SOCIETY

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Re: R.S. 2477 and Colorado

Dear Director Walcher and Mr. Swarthout:

On behalf of the hundreds of thousands of members represented by the undersigned individuals, we would like to thank you and your staff for meeting with us on July 24th. We appreciate your concern over the Revised Statute 2477 (R.S. 2477) issue, and your willingness to discuss this critical federal land management issue with us.

We were pleased to find at our meeting that we share some common objectives with you in regard to the R.S. 2477 issue. Specifically, at the meeting we all agreed that:

- the R.S. 2477 issue needs to be settled in a timely and equitable fashion;
- roads negatively impact wildlife and degrade habitat;
- we should not be constructing new roads on Colorado's federal lands in the absence of a significantly compelling land management need; and
- the Moffat County R.S. 2477 assertions made in January 2003 include inappropriate claims.

Your staff expressed some frustration with the polarized state of the debate, and asked how we in Colorado can overcome the emotion and politics to achieve a fair resolution.

We responded by reiterating that the R.S. 2477 issue must be resolved through an open and fair public process that:

(1) adheres to standards for R.S. 2477 that have been upheld by the courts, described below, that will result in consistent, national standards for assessing claims that recognize only true "highways" that were truly "constructed;"
(2) defines a deadline by which claims must be asserted; and
(3) provides a high level of protection for National Parks, National Monuments, National Wildlife Refuges, Wilderness Areas, Wilderness Study Areas, and other proposed wilderness areas and wildlands.

We believe that the R.S. 2477 issue is a national one requiring resolution by Congress. However, if Colorado chooses nonetheless to pursue its own process, we strongly urge that the principles listed below be the basis for proceeding. Although we recognize that certain counties have urged a far more permissive interpretation of the requirements of R.S. 2477, we believe that such an interpretation is contrary to federal law and to the positions taken by the George W. Bush administration ("Bush administration").

1) Standards for R.S. 2477 Claims Should Adhere to Standards Upheld by Federal Courts

Although the R.S. 2477 statute is short ("The right-of-way for the construction of highways over public land, not reserved for public uses, is hereby granted."), it does provide standards that must be met for it to apply. Below we outline the major standards that have been applied by the Federal courts and the current administration to R.S. 2477 assertions as well as congressional legislation governing this issue. We believe that any resolution regarding R.S. 2477 proposed highways in Colorado must comply with these standards.

A. "Construction" Requires Actual Physical Construction.

For a right-of-way to be valid, a highway must have been constructed. The term "construction" has a clear meaning, a meaning upon which the Bureau of Land Management (BLM) and the Bush administration have agreed requires more than "mere use" of a path.

The BLM has quite properly interpreted the term "construction" in R.S. 2477 to require some form of purposeful, physical building or improving:

> Some form of mechanical construction must have occurred to construct or improve the highway. A highway right-of-way cannot be established by haphazard, unintentional, or incomplete actions. For example, the mere passage of vehicles across the land, in the absence of any other evidence, is not sufficient to meet the construction criteria of R.S. 2477 and to establish that a highway right-of-way was granted.

See Southern Utah Wilderness Alliance v. Bureau of Land Management, 147 F.Supp. 2nd 1130, 1138 (D. Utah 2001) (hereafter SUWA v. BLM) (supporting BLM's rejection of multiple counties' assertions that continued use amounted to construction).

Federal caselaw supports the conclusion that actual construction – not mere use – must occur before a grant under R.S. 2477 can have been granted. BLM and the federal courts have read R.S. 2477 in accordance with its plain language as requiring construction of a highway.

Moffat County and others have attempted to essentially read "construction" out of the statute. They contend that an R.S. 2477 grant may be effected by "mere use by the public," with no construction whatever. This reading cannot be supported in law, because it violates the plain language of R.S. 2477 by transforming the word "construction" into "use." As the Tenth Circuit Court of Appeals noted in Sierra Club v. Hodel, 848 F.2d 1068, 1080 (10th Cir. 1988): "'[c]onstruction' indisputably does not include the beaten path; rather there must be some evidence of maintenance, e.g., grading, drainage, ditches, culverts."

The Bush administration emphatically asserted that "construction" requires actual physical work, and not mere use of a trail, in a successful brief filed before the 10th Circuit Court of Appeals last year. In that brief, the Bush administration stated:

> Contrary to the [Utah] Counties' 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 with no particular destination. 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 thereby required a purposeful, physical act to establish a defined route across the public lands.

Brief of Federal Appellees, SUWA v. BLM, Tenth Cir. No. 01-4173 (June 2002) at 50-51.

R.S. 2477 did not provide that a "right-of-way for the use of cowpaths, pedestrian trails and streambeds" is granted. Instead, to spur investment in and development of internal improvements, Congress granted land for "construction" of highways. We believe, therefore, that any discussion of the standards governing R.S. 2477 claims in Colorado – or anywhere on America's public lands – must start from this premise.

B. Federal Law Governs Interpretation of Federal Laws Concerning Federal Land.

Your letter of May 15, and that of some counties, appears to assert that state law controls the interpretation of rights-of-way under R.S. 2477. While state law has a role to play

where the federal law is silent, state law cannot contradict or contravene clear statements of federal law. On this point, we again agree with the Bush administration and federal caselaw.

Where Congress has legislated on a subject within its powers – such as disposition of federal lands – that legislation displaces any conflicting state law: See United States v. Board of Comm'rs of Fremont County, 145 F.2d 329, 330 (10th Cir. 1944). Thus, where Congress has prescribed a condition for the transfer of an easement on federal land, any contrary state law enactment must give way.

R.S. 2477 expressly required "construction" as a precondition for the transfer from the United States of a right-of-way across public lands. The plain meaning of "construction" requires expenditure of labor to create a highway. To the extent that Colorado law purports to effect a grant of public lands without meeting that "construction" requirement (such as through the mere use of a route), the state law directly conflicts with a valid and express federal statutory requirement and is thus pre-empted and without effect.

The Department of Interior itself has long made clear that state law cannot undercut R.S. 2477's plain-language requirements. As early as 1898, the Interior Solicitor rendered an opinion that an ordinance declaring section lines to be R.S. 2477 rights-of-way (as Colorado law purports to do) was invalid, because it did not comply with the requirements for a valid grant laid down by Congress in the statute.

The Bush administration once again agrees. In a brief filed before the Tenth Circuit last year, the Bush administration argued: "While state law may play a role in interpreting federal statutory terms to the extent that law is consistent with federal law, the [Utah] Counties are incorrect that the 'validity of these rights-of-way is governed, as a matter of federal law, by State laws.'" Brief of Federal Appellees, SUWA v. BLM, Tenth Cir. No. 01-4173 (June 2002) at 50-51.

C. A "Highway" Must Be a Major Route Open to the Public, Not a Foot or Horse Path Going Nowhere.

For R.S. 2477 to apply, the route constructed must be a highway; that is it must be open to the public and connect identifiable destinations such as cities. Again, on this, we agree with BLM and the Bush administration. BLM has previously concluded that:

> The claimed highway right-of-way must be public in nature and must have served as a highway when the underlying public lands were available for R.S. 2477 purposes. It is unlikely that a route used by a single entity or used only a few times would qualify as a highway, since the route [must have] open public nature and uses. Similarly, a highway connects the public with identifiable destinations or places.

SUWA v. BLM, 147 F.Supp.2d at 1143.

Your letter of May 15 to Interior Secretary Gale Norton argues, in part, that routes that terminate in the middle of nowhere or that trail off into the desert, or that are impassable to the general public may still be considered "highways" for purposes of R.S. 2477. This interpretation goes far beyond the Bush administration's view of the definition of "highway." In its brief before the Tenth Circuit in SUWA v. BLM, the Department of Justice argued that:

> 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 path. Highways open a communication from one City or town to another." [Webster's Dictionary of the English Language (1860)] 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.

Brief of Federal Appellees, SUWA v. BLM, Tenth Cir. No. 01-4173 (June 2002) at 51.

Thus, any discussion of R.S. 2477 in Colorado – or anywhere in the nation – must begin from the premise that a "highway" includes only a major avenue of transportation to a significant public destination (such as a city or town) that was open to the public.

D. No Change in Regulations or Policy Can Occur Absent Congressional Action.

Some counties have suggested that the State of Colorado should work with the Department of the Interior to adopt new rules, policy, or regulations concerning the standards relating to whether an R.S. 2477 right-of-way has been granted. While we agree that uniform standards are necessary, the process pushed by those counties is illegal.

Reflecting the depth of the controversy associated with the R.S. 2477 issue in Congress in the mid-1990s, Congress failed to adopt freestanding legislation on the subject. Instead, Congress adopted Section 108 of the Interior Appropriations Bill for Fiscal Year 1997, which provided:

> No final rule or regulation of any agency of the Federal Government pertaining to the recognition, management, or validity of a right-of-way pursuant to Revised Statute 2477 (43 U.S.C. 932) shall take effect unless expressly authorized by an Act of Congress subsequent to the date of enactment of this Act.

110 Stat. 3009-200 (1996). The Comptroller General, in a letter to numerous Congressional requesters dated August 20, 1997, # B-277719, ruled that this provision is permanent law, and thus continues to bind the federal government.

Thus, any process that has as its goal the promulgation of regulations by the Interior Department on R.S. 2477 is doomed to fail.

2) There Must Be a Time Limit for Adjudication of Claims

Some counties have proposed an open-ended process for addressing R.S. 2477 claims with no set date by which claims may be terminated if not proved to exist. Such a course would result in an interminable threat hanging over federal land managers, to the detriment of the protection of America's public lands in Colorado. By far the better course is to require a set period – for example, four years as proposed by H.R. 1639 – within which counties or other claimants must provide evidence of the existence of a constructed highway. R.S. 2477 was repealed 27 years ago; various Interior Department proposals to set a deadline for providing evidence of purported highways were presented to the public as long ago as 1994. Giving claimants a total of 30 or so years (including the 27 already passed) to provide evidence of claims seems more than generous.

3) Colorado Should Not Support the Adjudication of Claims through National Parks and Other Special Places

In our meeting, we requested a commitment from you that Colorado not press R.S. 2477 claims in National Parks, National Monuments, National Wildlife Refuges, Wilderness Areas, Wilderness Study Areas, and other proposed wilderness areas. You declined to give such a commitment, saying that the counties such as Moffat County had already put such proposed highways on the table. As discussed earlier, just because counties may have asserted road claims, we do not feel that it is in the interest of the State of Colorado to include claims that are illegitimate or inappropriate in a statewide process. The counties can always use the process under Title V of the Federal Lands Policy and Management Act (where applicable) or use the courts to settle any such claims.

We urge you, on behalf of the people of Colorado, to renounce any claims to R.S. 2477 rights-of-way through through National Parks, National Monuments, National Wildlife Refuges, Wilderness Areas, Wilderness Study Areas, and other proposed wilderness areas. The values these lands hold are too important to be compromised by a process, such as R.S. 2477, that leaves no room for consideration of the resources that road use, improvement, or construction may damage or destroy. Indeed, Colorado's entire House delegation supported an amendment to the House Interior Appropriations bill for 2004 that stripped funding for the disclaimer rule processing of R.S. 2477 claims in National Parks, National Monuments, National Wildlife Refuges, Wilderness Areas, and Wilderness Study Areas. We urge you to recognize the importance of these areas to the people of Colorado and the United States, and to renounce any claim to R.S. 2477 rights-of-way within National Parks, National Monuments, National Wildlife Refuges, Wilderness Areas, Wilderness Study Areas, and other proposed wilderness areas.

Conclusion.

We appreciate your commitment to a public process concerning R.S. 2477 claims in Colorado, and agree that the State and local government have a role to play in some aspects relating to the scope of R.S. 2477 claims. We also believe that matters involving federal laws and impacting federal lands owned by all Americans require a national and uniform solution. We remain very concerned that any effort by the State of Colorado to negotiate a Memorandum of Understanding with the Department of Interior will fail to address the critical issue of national standards required to protect America's public lands. We further urge you to recognize the special values associated with National Parks, National Monuments, National Wildlife Refuges, Wilderness Areas, Wilderness Study Areas, and other proposed wilderness areas, and renounce the use of R.S. 2477 in those special places.

We appreciate this opportunity to provide our input. Again, thank you for meeting with us. We look forward to your reply.

Sincerely,

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