

March 11, 2003

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**Certified Mail/Return Receipt Request  
No. 7099 3220 0001 2758 0252**

Kathleen Taylor, County Attorney  
Moffat County  
221 W. Victory Way  
Craig, CO 81625

Submitted via facsimile: 970-826-3408

**Re: Request for Clarification and for Notice Concerning Moffat County  
Maintenance of Alleged Rights-of-Way Across Federal Lands**

Dear Ms. Taylor:

On January 10, 2003, the Moffat County Board of County Commissioners approved Resolution No. 2003-05, which purports to “exercise [the Commissioners’] right to assert Moffat County highway rights-of-way on federal lands within Moffat County” pursuant to R.S. 2477. Moffat Co. Res. No. 2003-05 at 3. That resolution also adopted an ‘attached Maintenance Protocol for R.S. 2477 Rights-of-Way.’ Id.; see “Maintenance Protocol For R.S. 2477 Rights-Of-Way, asserted in Moffat County, Colorado,” (January 10, 2003), attached as Exhibit 1.

On behalf of Colorado Environmental Coalition, Colorado Mountain Club, Western Colorado Congress, National Parks Conservation Association, The Wilderness Society, and Sierra Club (Trappers Lake Group), Earthjustice seeks clarification from Moffat County as to its intention to maintain the rights-of-way asserted in Resolution No. 2003-05, and respectfully requests that the County provide notice of any maintenance activities contemplated in the protocol for any routes covered by the protocol. *In making these requests, we hope to improve communication and avoid potential misunderstandings concerning this controversial issue.*

Background – The Maintenance Protocol.

The Maintenance Protocols defines a number of different types of routes, including

- Primary, Class A and B (State Highways and county roads recognized by State Highway or county road numbers)
- Secondary, Class A (county roads also recognized by Moffat County road numbers)
- Secondary, Class B (“Unimproved roads, which are passable by four-wheel-drive vehicle” but which may be covered with vegetation; which “do not have county road numbers;” and which “are often referred to as two-tracks or jeep trails.”)

- Secondary, Class C (horse or livestock trails that may be impassable to motor vehicles)
- Secondary, Class D (routes which may be characterized by a “lack of current maintenance, use, or visibility”)

Maintenance Protocol for R.S. 2477 Rights-of-Way at 1. The Protocol further states:

[T]his Maintenance Protocol only applies to Secondary Roads, Classes B, C, and D. The secondary roads, Classes B, C, and D, which cover two-track roads, trails, and routes no longer clearly visible, *will receive maintenance to preserve the existing character and to maintain the desired use levels*, in accordance with the land uses and objectives identified in the County’s land use plan and any related transportation planning. Any proposed maintenance that would alter the existing character of a Secondary Class B, C, and D road will be proposed to the public and public input will be considered in such decision prior to maintaining the road. In general, the level of use and demands placed on these roads do not require regular maintenance to assure access across these roads. However, in certain cases where additional mechanical maintenance is necessary, the County Commissioners will balance the need for maintenance and associated safety concerns with funding and crew availability and recommend appropriate maintenance.

Id. (emphasis added). It thus appears that Moffat County intends to maintain each of the asserted routes to maintain “desired use levels” on routes that traverse, and are now managed by the United States government, including lands set aside by Congress and federal agencies to protect their flora and fauna, and the wild, roadless nature of certain lands.

Moffat County Maintenance of Purported R.S. 2477 Rights-of-Way Threatens Violations of Numerous Federal Laws.

We hereby request that Moffat County clarify whether the County, its designees or contractors will attempt to maintain these routes: absent review and approval by the federal land management agency at issue (following public disclosure and involvement); absent an affirmative determination by that agency that such action complies with all federal laws meant to protect natural resources, existing land use plans and land management designations; or absent a determination by the agency or a court of competent jurisdiction recognizing the existence of a right-of-way pursuant to R.S. 2477.

We make this request because, absent approval from the federal land management agency at issue following public disclosure and involvement, as well as compliance with all federal laws meant to protect natural resources, existing land use plans and land management designations, an attempt by Moffat County to maintain at least some of these routes could put the County in trespass, and potentially in violation of a number of federal laws.

Other counties have tried – and failed – to simply bulldoze or otherwise “maintain” routes asserted to be constructed highways pursuant to R.S. 2477. See Southern Utah Wilderness Alliance v. Bureau of Land Management, 147 F.Supp.2d 1130, 1143 (D. Utah 2001) (appeal pending) (hereafter ‘SUWA v. BLM’). Even where maintenance does not involve the use of heavy equipment, and even where it seeks to maintain a ‘status quo’ condition as of 1976 (or the date of passage of the County resolution), such activities threaten federal law violations.<sup>1</sup>

*BLM Resource Protection Laws.* For example, on BLM lands, an attempt by Moffat County to maintain a route for which the purported R.S 2477 right-of-way has not been officially adjudicated may require BLM to halt such action given BLM’s duty to “take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection.” 43 U.S.C. § 1732(b). Further, maintenance of these routes within agency-designated wilderness study areas (WSAs) may require BLM to halt such action given BLM’s duty to “manage [WSAs] . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness.” 43 U.S.C. § 1782(c). Maintenance of such routes may also result in activities or damage that violate applicable and duly adopted resource management plans, which BLM has a duty to uphold. 43 C.F.R. § 1610.5-3(a) (all BLM actions “shall conform to the approved plan”).

*National Wildlife Refuge Protection Laws.* On lands within the Browns Park National Wildlife Refuge, an attempt by Moffat County to maintain a route for which the purported R.S 2477 right-of-way has not been officially adjudicated may not only violate any management plan for the Refuge, it may also violate laws and US Fish and Wildlife Service regulations which generally prohibit the removal or disturbance of any plant or animal within a Refuge. 16 U.S.C. § 668dd(c) (“No person shall disturb, injure, cut, burn, remove, destroy, or possess any real or personal property of the United States, including natural growth, in any area of the [Refuge] System”); 50 C.F.R. § 27.21; 50 C.F.R. § 51; see also 50 C.F.R. § 27.61 (“injury, defacement, disturbance, or the unauthorized removal of any public property including natural objects or private property on or from any national wildlife refuge is prohibited”). Use of vehicles off designated Refuge travel routes is also generally prohibited. 50 C.F.R. § 27.31 (“Travel in or use of any motorized or other vehicles, including those used on air, water, ice, snow, is prohibited on national wildlife refuges except on designated routes of travel”). Maintenance of such routes within the Refuge may require FWS to halt such action given FWS’s duty to “ensure that the biological integrity, diversity, and environmental health of the [Refuge] System are maintained for the benefit of present and future generations of Americans.” 16 U.S.C. § 668dd(a)(4)(B).

*National Park Service Protection Laws.* On lands within Dinosaur National Monument, an attempt by Moffat County to maintain a route for which the purported R.S 2477

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<sup>1</sup> As the SUWA v. BLM case also demonstrates, conservationists (as well as federal agencies) have sought relief from Federal courts where counties violate the law in “maintaining” questionable rights-of-way under R.S. 2477.

right-of-way has not been officially adjudicated may not only violate any management plan for the Park, it may require the National Park Service (NPS) to halt such action given NPS's paramount duty to "conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. §1; see also 36 C.F.R. § 2.1(a) (prohibiting persons from "[p]ossessing, destroying, injuring, defacing, removing, digging, or disturbing from its natural state" any flora or fauna); 36 C.F.R. § 2.31 (prohibiting trespassing, tampering and vandalism on NPS lands). Use of vehicles off designated Park travel routes is also generally prohibited. 36 C.F.R. §4.10(a). Attempting to construct routes, ways, or roads "without a valid permit, contract, or other written agreement with the United States," is also prohibited. 36 C.F.R. §5.7; see United States v. Garfield County, 122 F.Supp.2d 1201, 1248-1249 (D. Utah 2000). The vast majority of Moffat County's 240 miles of claims within Dinosaur NM occur on lands that the Secretary of the Interior recommended for wilderness protection in 1978. On these lands, "[t]he National Park Service will take no action that would diminish the wilderness suitability of an area possessing wilderness characteristics until the legislative process of wilderness designation has been completed." NPS Management Policies 2001, at Sec. 6.3.1 (on the web at [www.nps.gov/policy/mp/policies.pdf](http://www.nps.gov/policy/mp/policies.pdf)). Permitting the maintenance of routes capable of sustaining motor vehicle traffic clearly has the potential to violate this agency policy.

*Forest Service Protection Laws.* On lands within the Routt National Forest, an attempt by Moffat County to maintain a route for which the purported R.S. 2477 right-of-way has not been officially adjudicated may violate the 1997 management plan for the Forest. 16 U.S.C. § 1604(i) (requiring all actions on forest to comply with the Forest Plan). A number of the claimed routes cross areas found to be roadless in the most recent (1997) revision of the Routt National Forest Plan. Some routes traverse lands within the 1.32 management prescription designation, which the Forest must manage for nonmotorized summer use. Routt NF, Land & Resource Management Plan (1997) at 2-13 - 2-15. In addition, constructing or maintaining any kind of road or trail on Forest Service lands "without a special-use authorization, contract, or approved operating plan" is prohibited. 36 C.F.R. §261.10(a). Forest Service guidance also requires that the agency must "[e]nsure that the Government's servient estate does not suffer unnecessary degradation as a result of any actions by the holder of the [R.S. 2477] right-of-way. Activities on a right-of-way, which *potentially may affect* the servient estate, are subject to the National Environmental Policy Act (Tenth Circuit Court of Appeals ruling in *Sierra Club v. Hodel*, 848 F.2d 1068)." FS Manual 2734.51 (emphasis added).

*Other Resource Protection Laws.* On all of these lands, any action to maintain these routes may result in the violations of the Endangered Species Act, and may result in violation of laws designed to protect cultural and archeological resources.

No doubt Moffat County is aware that similar attempts by San Juan, Kane, and Garfield counties in Utah to maintain or "upgrade" roads without agency approval have resulted in the issuance of trespass citations, as well as costly and time-consuming litigation, which has only

resulted in judgments adverse to the counties. See SUWA v. BLM, 147 F.Supp.2d at 1138 (upholding BLM's decision finding without merit R.S. 2477 claims on more than a dozen routes).

The Vast Majority of Moffat County's Claims Are Likely Invalid.

Moffat County appears to have taken the position that R.S. 2477 permits the County to maintain these routes absent a determination of the validity of the grant from the United States pursuant to R.S. 2477.<sup>2</sup> We do not agree with this position. When the Federal Government disposes of or grants property, that action must be construed in favor of the Government. "[N]othing passes except what is conveyed in clear language, and . . . if there are doubts, they are resolved for the Government, not against it." United States v. Union Pacific R.R., 353 U.S. 112, 116 (1957). Courts have applied this principle to grants made under R.S. 2477. United States v. Gates of the Mountain Lakeshore Homes, 732 F.2d 1411, 1413 (9<sup>th</sup> Cir. 1984); Adams v. United States, 3 F.3d 1254, 1258 (9<sup>th</sup> Cir. 1993). Without a determination of the validity of the purported grant, and without a determination of the *scope* of any grant, any maintenance activity by Moffat County would be premature, and, as noted above, may violate federal law.

Moffat County's claims, as presently asserted, fail to demonstrate that the vast majority of the routes claimed meet any of the criteria established by the plain language of R.S. 2477.

As you know, Revised Statute 2477 (R.S. 2477) states, "The right-of-way for the construction of highways over public land, not reserved for public uses, is hereby granted." This law was repealed in 1976 as part of the Federal Land Management Policy Act (FLPMA). However short, the statute does provide standards that must be met for it to apply, and there is little indication from the resolution or related documents that Moffat County addressed these standards.

Construction. First, for a right-of-way (ROW) to be valid, a highway must have been *constructed*. BLM has 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.

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If our impression in this matter is not accurate, we would appreciate being corrected.

See SUWA v. BLM, 147 F.Supp.2d at 1138 (supporting BLM's rejection of multiple counties' assertions that continued use amounted to construction).<sup>3</sup> The inventory protocol developed by Moffat County contains no recognition of the need for purposeful construction. For example, the inventory protocol includes categories of identified routes such as "dirt," "two-track," "ATV," "livestock," and "no physical evidence." Moffat County, "R.S. 2477 Inventory Protocol" (Jan. 10, 2003). None of the descriptions of these categories include any mandate that intentional, physical construction occurred. "Dirt" routes are identified as those where "Vegetation has been mechanically removed to bare soil." However, the protocol contains no mandate that the "mechanical removal" have occurred incident to purposeful construction; it could have occurred by the passage of vehicles. Meandering two-tracks and ATV routes often result from the passage of vehicles, not purposeful construction of a highway; livestock routes as used here appear to be routes created by livestock or horses – hardly routes that meet the definition of "construction."

Thus, for many of the routes identified by the Moffat County protocol, there is no attempt to address evidence concerning construction, a key prerequisite to making any potentially valid R.S. 2477 claim. Indeed, a spot check of one of the purportedly "constructed" highways through the Skull Creek Wilderness Study Area found a steep canyon bottom that would likely be difficult for a horse and rider to navigate. See photos attached as Exhibit 3.

Highway. Second, for R.S. 2477 to apply, the route constructed must be a *highway*. 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 (quoting BLM determination). The Moffat County protocol states that the use of a claimed R.S. 2477 right-of-way claims can be identified in several ways, including:

connects road "a" with road "b"  
motorcycle route for recreational use  
access to cabin  
maintenance of barbed wire fence  
access to hang gliding launch pad  
access to water reservoir

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<sup>3</sup> This case includes a discussion of the most recent interpretation of R.S. 2477 from the Department of the Interior. That interpretation is supported by briefs filed in 2002 by the Department of the Interior before the Tenth Circuit Court of Appeals. Excerpts of the Department of Justice's brief are attached as Exhibit 2.

access to windmill  
access to scenic overlook  
alternative route to “a” during heavy snow

Therefore, the protocol fails to address the issues BLM has identified as critical: whether the route was *open to the public*, and whether the route accessed an *identifiable destination* open to such use. For example, a motorcycle recreational route may be little more than an off-road vehicle playground, as opposed to a highway. A route to maintain a barbed wire fence, or to access a water reservoir or windmill for the benefit of a livestock permit-holder (and not the general public) does not meet the definition of a “highway.” Access to a private cabin similarly fails to meet this definition.

Thus, the Moffat County protocol fails to identify or assist in the gathering of important evidence concerning the existence of a highway, another key prerequisite to making any potentially valid R.S. 2477 claim.

Public Lands Not Reserved for Public Uses. Third, for an R.S. 2477 claim to be valid, the highway must have been constructed prior to 1976 (the date of the statute’s repeal), or prior to the time that the public land was set aside for another use, such as a national wildlife refuge, national park, or national monument, whichever is earlier. Moffat County’s inventory includes a number of asserted routes that traverse the Dinosaur National Monument (designated Oct. 4, 1915, expanded 1938, boundary modifications in the 1960s). In addition, much of the Browns Park National Wildlife Refuge was purchased from private landowners. Those landowners likely acquired those lands under the Homestead Act or similar land settlement statute. Thus, any R.S. 2477 claim on those lands would have to pre-date the lands’ acquisition by the private owners. Parts of the Refuge were also set aside from public domain lands, apparently in the early 1960s. Any claim related to those lands would have to pre-date the setting aside of those lands for wildlife protection purposes.

Despite the requirements of R.S. 2477, the Moffat County protocols fail to address or recognize these restrictions.

Even if a Right-of-Way Is Granted, County Maintenance Is Still Subject to Federal Legal Requirements.

Even if a route claimed by Moffat County does meet the standards set out in R.S. 2477, and an adjudication concluded that a right-of-way had been granted, Moffat County’s ability to maintain such routes would still be subject to federal laws requiring the protection of the lands of the United States. Federal caselaw and regulations are clear that federal agencies do not surrender all authority to regulate use or other County activities on a route just because a valid R.S. 2477 right-of-way has been recognized. See Sierra Club v Hodel, 848 F.2d 1068, 1083 (10<sup>th</sup> Cir. 1988) (general rule is that owners of the dominant and servient states must exercise rights so as not to unreasonably interfere with one another); id. at 1087-88 (BLM has some

authority to manage R.S. 2477 ROW through wilderness study area); United States v. Garfield County, 122 F.Supp.2d 1201, 1242-43 (D. Utah 2000) (also concluding that owners of the dominant and servient states must exercise rights so as not to unreasonably interfere with one another); *id.* at 1253 (analyzing the difference between maintenance and construction, and concluding that where activity occurs within the scope of an existing ROW, the County “will *likely* be able to proceed”) (emphasis added); Barker v. Board of County Com'rs of County of La Plata, Colo., 49 F.Supp.2d 1203, 1220 (D. Colo. 1999) (noting the Forest Service’s “right to reasonably regulate” portions of easement that traverses the agency’s lands).

Moffat County Has Lawful Alternatives to Maintaining Alleged Rights-of-Way.

Moffat County has alternative courses of action to take that do not threaten to violate federal laws. For example, Moffat County can use available lawful means – through the Quiet Title Act, 28 U.S.C. § 2409a, or Title V of the Federal Land Policy and Management Act, 43 U.S.C. §§ 1761-1771 – to adjudicate or otherwise obtain a valid right-of-way.<sup>4</sup> We encourage Moffat County to explore such alternatives.

Conclusion: Request for Clarification Concerning ‘Maintenance’ and Request for Notice Prior to County Maintenance of Routes Governed by January 10, 2003 Protocol.

The protected federal lands in Moffat County are an invaluable resource treasured not only by Moffat County residents but by Americans across the country. Motor vehicle use on or maintenance of the County’s claimed rights-of-way across protected federal lands threatens the integrity of these resources.

We therefore request that Moffat County clarify whether the County, its designees or contractors will attempt to maintain these routes:

- (a) absent review and approval by the federal land management agency at issue (following public disclosure and involvement);
- (b) absent an affirmative determination by that agency that such action complies with all federal laws meant to protect natural resources, existing land use plans and land management designations; or

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<sup>4</sup> The Department of the Interior, however, cannot process Moffat County’s R.S. 2477 claims under recently-adopted changes to the so-called ‘Disclaimer Rule,’ 43 C.F.R. Part 1864, for two reasons. First, the Department of the Interior has in place a moratorium dating back to 1997 that generally restricts the Department from processing R.S. 2477 claims. Second, the Disclaimer Rule was adopted in violation of law. By its plain language, Section 315 of FLPMA does not permit the Department of the Interior to disclaim an interest where the US retains any interest in property, as it does when another party holds a right-of-way over federal land. 43 U.S.C. § 1745. This is a point that at least one county – Nye County, Nevada – understood, as is reflected in its comments on the proposed rule. See 68 Fed. Reg. 498 (Jan. 6, 2002).



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(c) absent a determination by the agency or a court of competent jurisdiction recognizing the existence of a right-of-way pursuant to R.S. 2477.

We also hereby request that Moffat County provide us with at least 10 days notice prior to undertaking any action to maintain routes alleged by the County to constitute R.S. 2477 rights-of-way. This will enable us to determine whether legal violations are threatened, and whether negotiations between my clients and Moffat County can resolve misunderstandings without the need for recourse to more formal action. We certainly believe that an opportunity for dialogue will increase the opportunity for agreement, and reduce the chance for conflict.

We look forward to your reply, and hope that it will clear up many of our concerns. Please contact me at 303-623-9466 if I can be of any assistance in this matter.

Sincerely,

Edward B. Zukoski, Project Attorney

Attorney for  
Colorado Environmental Coalition, Colorado  
Mountain Club, Western Colorado Congress,  
National Parks Conservation Association,  
The Wilderness Society, and  
Sierra Club, Trappers Lake Group

cc: Les Hampton, Moffat County Board of County Commissioners  
Marianna Raftopoulos, Moffat County Board of County Commissioners  
Darryl Steele, Moffat County Board of County Commissioners  
The Hon. Gale Norton, Secretary, US Department of Interior  
The Hon. Scott McInnis, US House of Representatives  
Kit Caples Kimball, Director, Office of External and Gov't Affairs, US Dep't of Interior  
Chas Cartwright, Superintendent, Dinosaur National Monument  
Jerry Rodriguez, Manager, Browns Park National Wildlife Refuge  
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