STATEMENTS BY THE CURRENT ADMINISTRATION ON THE PROPER INTERPRETATION OF R.S. 2477

All of the following statements are verbatim quotes. They are taken verbatim from a Tenth Circuit brief filed in June 2002 by the United States in support of the district court's ruling rejecting county R.S. 2477 claims in SUWA v. BLM, 147 F.Supp.2d 1130 (D. Utah 2001).[1/]

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"The Counties' principal challenge to the Department's administrative determinations is that the determinations were arbitrary, capricious, or otherwise not in accordance with law because the Department improperly interpreted the statutory terms "construction" and "highway" as requiring the "actual construction" of a "thoroughfare" connecting the public with identifiable destinations or places. The Counties argue instead that the Department should have ignored the "plain meaning" of the relevant statutory terms and construed the terms solely under Utah statute and common law, pursuant to which, the Counties' claim, highways could be constructed by the mere "passage" of vehicles or persons over the land without any particular destination. **While state law may play a role in interpreting federal statutory terms to the extent that law is consistent with federal law, the Counties are incorrect that the "validity of these rights-of-way is governed, as a matter of federal law, by State laws."**

(p .44-45)

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"The Department's Interpretation Of The Terms "Construction" And "Highways" Is Supported By The Language Of R.S. 2477 And The Department's Application Of The Language In This Case.

"R.S. 2477 succinctly provided that "the right of way for the construction of highways over public land, not reserved for public uses, is hereby granted." Contrary to the Counties' argument, it is a fundamental principle of statutory construction that the relevant analysis begins "with the plain language of the law." In construing the plain meaning of a statute, absent express instruction by Congress to the contrary, the relevant terms are "to be interpreted in their ordinary definitions and in the meanings commonly attributed to them." Moreover, as noted *supra*, where a federal statute grants an interest in land, the Supreme Court has held that the statute should be construed narrowly and in accordance with federal law. . . .

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

The Counties' effort to diminish R.S. 2477's "construction of highways" requirement is supported by neither the language of the statute nor the plain meaning of those statutory terms. The statute represents the offer of a right-of-way across the public lands – an offer that could be accepted 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 the 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. 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 <u>any</u> route or road across the landscape, but rather "a public road; a way open to all passengers; so called, either because it was a <u>great or public road</u>, or because the earth was raised to form a dry path. Highways open a communication from <u>one City or town to another</u>." <u>Id</u>. 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 <u>any</u> class of road.

Unlike the Counties' interpretation of "construction of highways" to include mere passage over the land with no particular destination, the Department's interpretation contained in its administrative determinations is consistent with the contemporaneous plain and ordinary meaning of these terms. **As set forth in the determinations, "construction" requires "actual construction" in so far that "[s]ome form of mechanical construction must have occurred to construct or improve the highway."** Thus, the determinations state that:

> 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**.

The determinations define a "highway" as "a thoroughfare used by the public for the passage of vehicles carrying people and goods from place to place." As further explained:

> 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 an open public nature and uses. Similarly, a highway connects the public with identifiable destinations or places. The route should lead vehicles somewhere, but it is not required that the route connect to cities. For example, a highway can allow public access to a scenic area, a trail head, a business, or other place used by and open to the public. Routes that do not lead to an identifiable destination are unlikely to qualify.

. . .

"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 for the reasonableness of the Department's interpretation in the contested determinations 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 case law interpreting R.S. 2477. See Adams v. United States, 3 F.3d 1254, 1258 (9th Cir. 1993) (to establish an R.S. 2477 right-of-way, "the [plaintiffs] must show that the road in question was built before the surrounding land lost its public character in 1906.")(emphasis added).

. . . As noted *supra*, **the Department's interpretation of "construction" and "highways" as requiring the actual construction of public thoroughfares across the public lands is consistent with the plain meaning of these terms as they were understood in 1866.**

. . .

In contrast, the Counties' interpretation based on the mere "use" and "passage" of persons or vehicles across the public lands without any particular destination has no support in the plain meaning of the terms provides no concrete standard for evaluating R.S. 2477 claims, and would subject the public lands to thousands – if not hundreds of thousands – of right-of-way claims. As noted in the Department's 1980 legal opinion concerning R.S. 2477:

> If actual use were the only criterion, innumerable jeep trails, wagon roads and other access ways – some of them ancient, and some traversed only very infrequently (but whose susceptibility to use has not deteriorated significantly because of natural aridity in much of the West) – might qualify as public highways under R.S. 2477.

There is no basis for a conclusion that Congress would have intended that the terms "construction" and "highways" be read in such a broad manner, or would have permitted the definition of rights acquired in the public lands to vary based upon the particular state in which the relevant lands are located.

(pp. 49-56)

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"The Counties claim that Utah statutory and common law alone should govern interpretation of R.S. 2477. However, R.S. 2477 is a federal statute and, therefore, must be interpreted under federal, not state law. While state law may be relied upon where it is "compatible" with the purpose of federal law and effectuates "federal policy," id., states may not, through their laws, purport to accept more than was offered by Congress in R.S. 2477. This is particularly true with regard to federal statutes granting rights to federal property, where the Supreme Court has made clear that "[t]he construction of grants by the United States is a federal not a state question." . . .

(p.56)