# STATE OF COLORADO

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DEPARTMENT OF NATURAL RESOURCES

Bill Owens
Governor

Greg E. Walcher
Executive Director

May 15, 2003

The Honorable Gale Norton
Secretary
U.S. Department of Interior
1849 C St., NW
Washington, D.C. 20240

Dear Secretary Norton:

Governor Owens asked me to follow-up his letter regarding the Utah agreement about RS-2477 issues. The State of Colorado has a different legal history on this issue than Utah, as you know, and some of the details in an RS-2477 agreement must be different if we hope to resolve the issues here. We would very much like to work with the Department of Interior on a solution for Colorado. We commend DOI for its commitment to work with western states to craft a resolution to the RS-2477 debate, though several points in the Utah MOU are contrary to Colorado law. We would ask that DOI engage Colorado in a separate process to identify where potential agreement can be reached here, too.

As you know, the process of validating and quantifying RS-2477 claims varies from state to state, because individual state constitutions and laws interpret differently who is responsible for the construction, maintenance and use of a public right of way. Also it is important to note that throughout the case law history on RS-2477, federal courts have deferred to state law on many of the related issues. Colorado law explicitly states that such responsibility is delegated to local jurisdictions (i.e. county government) and in the case of an RS-2477 claim, it is up to that jurisdiction to provide evidence that the road or trail in question was established by public use prior to reservation. Colorado law is clear that public rights-of-way are established by public use, not by some arbitrary standard of what constitutes "construction" or "highway." There is a clear historical reason for that. A standard of construction that assumes mechanical methods, or any surface treatments, is not consistent with the realities of rugged mountain areas, where in many cases crossing solid rock resulted in a public right-of-way without the need for gravel, or the ability to move the mountain. As most modern RS-2477 claims originate out of the need to protect public safety and resources, the State of Colorado will continue to work closely with our counties to make sure any resolution to this issue has their complete support.

Colorado has identified the following points in the Utah MOU that would conflict with Colorado law or with on-the-ground facts if applied here, and therefore, will serve as the basis for discussion we hope to pursue with DOI:

1. Requiring Title V (FLPMA) permits for road upgrades beyond what is defined as the original scope of RS-2477 would diminish precedents already set by some Colorado counties with the federal government on the scope and nature of existing right-of-way grants, and is contrary to Colorado law defining those right-of-way.

2. The "reasonable and necessary" cost of processing RS-2477 candidate roads is not defined in the Utah MOU. Without specific clarification from DOI on what is meant by "reasonable and necessary" cost, Colorado is concerned that the federal government could require states or counties to cover all processing and administrative costs, including staff time. Such costs are the responsibility of the federal government, and there is no legal authority to pass to local government the costs of doing what the law requires DOI to do. Further, an RS-2477 right-of-way arises from a statutory grant and is not a right-of-way permit for which DOI is authorized to charge processing fees. Even for right-of-way permits, counties and states are exempt from cost recovery by law.

3. The width of ground disturbance is not a legal basis to define the width of the rights-of-way under Colorado law. Colorado courts have consistently ruled that a right-of-way for a public highway (RS-2477) includes the land "reasonably necessary to accommodate the established use" and is not limited to what is currently disturbed. DOI has already agreed to a different standard in Colorado. Defining the width of ground disturbance is arbitrary and would certainly lead to additional legal argument. Colorado law recognizes that road maintenance commonly requires right-of-way wider than that actually disturbed by the road itself.

4. The Utah MOU does not acknowledge the existence of RS-2477 rights-of-way unless the road is capable of accommodating four-wheel vehicles, and is subject to periodic maintenance. Colorado law has consistently held that construction as that term is used in RS-2477 and any maintenance or construction can be the "mere passage of vehicles." Our laws are clear that bulldozers, graders, or other forms of mechanical means are not necessary to demonstrate construction or maintenance.

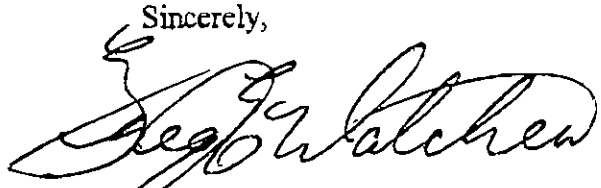
5. The Utah MOU does not provide for any RS-2477 right-of-way to be acknowledged within a Wilderness Study Area, on National Park Service lands, or within a National Wildlife Refuge. But in Colorado valid RS-2477 claims have been, and could continue to be, made on rights-of-way that exist on all three of these categories of lands. This exclusion will also create conflicts where the same road crosses from BLM land onto wildlife refuges, WSA's, or national monuments. Since the legal criteria are the same, we fear it is a mistake not to resolve the status of all these roads at the same time.

6. Under Colorado and federal law, exact meets and bounds, or centerline identification, is not necessary for the mere recognition of the existence of a right-of-way. If a photograph, affidavit, survey or government record (*i.e.* USGS map) recognizes the existence of a historic right-of-way, there is no requirement for DOI to "surplus" the route in order to clarify its existence. The grant of a right-of-way does not need to imply the grant of land title. Thus, no meets and bounds or centerline description is necessary.

7. As we understand the MOU, the Babbitt Policy which changed the procedures with respect to recognition of RS-2477 rights-of-way, as well as the moratorium on the recognition of these roads, has been suspended in Utah, rather than revoked. The State of Colorado would prefer to see the Babbitt policy revoked, since it is inconsistent with the law. Suspending this policy allows a future Administration to undo the good faith efforts and common sense approach this Administration has committed to undertake. It would be far better to simply resolve these issues once and for allnow.

The State of Colorado and the Department of Natural Resources look forward to working with your team to resolve our long-standing disputes with DOI on the RS-2477 issue. Please accept these comments in the spirit of cooperation in which they are intended, and accept our thanks for your stated willingness to work with us to devise a Colorado solution. We await your direction on the next steps, and look forward to hearing from you.

Sincerely,



Greg E. Walcher,
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