Kane County Commission

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July 8, 2009

Selma Sierra
State Director, BLM
440 West 200 South, Suite 500
Salt Lake City, Utah 84145-0155

Re: Your e-letter of June 30, 2009 regarding public safety concerns

Dear Ms Sierra:

The purpose of this letter is to respond to your communication of June 30 regarding public safety concerns in an effort to benefit and focus our scheduled meeting on July 15, 2009. The thrust of our response will be to address the facts presented in your letter and to explain the County's position in the matter.

Kane County advised the BLM a year ago that it would be removing its road signage because of federal agency and court action that, at least temporarily, has stripped the County of its highway jurisdiction established under Revised Statute 2477. Your statement that you "do not know the full extent of the county's actions to remove signage…" is surprising given the fact that the County submitted the following cooperative agency comments during the development of the Kanab FO RMP:

> *BLM contends Kane County lacks authority to perform <u>any</u> activity on roads across federal lands not adjudicated or administratively recognized. Under that premise, the County would have no dominant estate interest across federal lands and, therefore, no authority to operate any roads across federal lands that have not been adjudicated. The catastrophic effect of that premise is that Kane County would have to immediately <u>suspend</u> all maintenance and repair activities on hundreds of roads it currently manages.* ***The County would have to remove not only County road number signs but also all speed signs, curve signs, impassible when wet signs and any other regulatory or public information signs the County installed along its roads.*** [emphasis added]. *The County could not temporarily close and post roads in flooded or washed out condition. The County would be limited regarding the enforcement of state code motor vehicle regulations. Under BLM's premise, how would bridges, culverts, cattle guards, other appurtenances paid for by the County, and all the money expended by the County for the maintenance and operation of roads understood to be County roads, be equitably resolved?*
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> *All road operation requirements, such as manpower, law enforcement, equipment and operational costs for roads crossing federally managed lands would become the responsibility of the various public land management agencies. Public land management agencies would have to*

redirect funding from administration, resource management, recreation and other programs to road operation, maintenance, repair and improvement.

The BLM failed to consult with the County regarding the County's concerns as presented above and proceeded with a ROD creating the situation we are now dealing with.

The County subsequently wrote letters to you on May 19, 2008 and June 23, 2008 advising the consequences of the actions of the DOI, the BLM, and the federal court. The letter of June 23 specifically stated, "**The County will timely remove its regulatory and informational signs from roads across federally managed lands not under the jurisdiction of the County**" (emphasis added). The BLM did not respond to the County's request for consultation and did not express concerns about public safety over the prospect of County sign removal.

Approximately three weeks ago, when the BLM advised the County that it was physically closing the historic Paria Canyon road and would issue federal citations to anyone driving the road, the County again advised the BLM that it would be removing any remaining county signing on roads across federally managed lands. The BLM made no effort to coordinate public safety issues with the County at that time.

In spite of numerous requests over the past year, the BLM has refused to meet with the County to coordinate public safety issues related to the lack of federal road maintenance and snow removal on roads currently under federal jurisdiction. The BLM has posted "four-wheel drive recommended" signs on roads previously maintained to two-wheel drive standards by the County. The BLM has placed traffic cones and flagging to mark head cuts and washouts on its roads, but it has refused to put a blade on the ground to correct road hazards or remove snow in protecting the public's safety. In fact, this past winter the County took the extraordinary action to remove snow from some federal roads in order to correct hazardous snow and ice conditions after the BLM failed in its responsibilities.

It is important to consider that the BLM has taken over control of *all* county roads along R.S. 2477 rights-of-way as they cross federally managed lands in Kane County. The BLM has posted the roads with federal road numbers and federal restrictions. The BLM has physically closed roads with boulders, logs and with federal signage. The BLM has claimed ownership of the roads and has implemented total control over all roads on federally managed lands. In spite of its claimed ownership, the BLM refuses to accept its responsibilities for the public's safety related to road maintenance, repair, snow removal, and complete signage. The BLM, somehow, expects the County to accept the responsibility, liability and cost of performing menial work on roads taken from the County through a combination of federal, environmental and court actions.

Critically, however, the BLM cannot have it both ways. Either the BLM needs to accept all of the responsibilities and liabilities attendant with highway ownership or it should give the roads back to the County.

The letter's reference to "Class B roads traversing public lands" is a misstatement of the BLM's actual position. The Kanab Field Office Resource Management Plan (RMP) maps identify the Hancock and Sand Dunes (Yellow Jacket) roads as "Class Three roads" - not as Class B roads as stated in the letter. The term "Class Three roads" refers to a newly invented federal designation denoting federal ownership. Again, the BLM cannot have it both ways. The BLM cannot justifiably claim the roads are "Class Three roads" for legal purposes in court while simultaneously insisting that the same roads are Class B roads in this matter. If the BLM referred to the roads as Class B roads in court arguments, the County would soon enjoy R.S. 2477 quiet title jurisdiction over the roads. In addition, the RMP and the monument plan establish federal control over all local roads across federally managed lands. There is no operation

of R.S. 2477 (which is the foundation of Class B roads across federally managed lands) in either the Kanab FO RMP or the monument plan.

It is frankly disingenuous to suggest that the old road maintenance agreements are still in effect. The agreements were unilaterally revoked by federal action premised on the assertion that the agreements were unlawful (and therefore void). The revocation occurred approximately fifteen (15) years ago shortly before the BLM sued Garfield, San Juan and Kane Counties for trespass in *SUWA v. BLM*. At the time of revocation, the BLM refused to provide requested written notice, apparently in an effort to avoid final agency action issues. The County recently provided the BLM a letter with two affidavits and a deposition evidencing federal revocation of the agreements. The County asked for any documentation supporting the operation of the agreements after the federal revocation in the mid 1990s. The BLM did not provide any documentation supporting its position. If the BLM were sincere in its claim the maintenance agreements have been operational since the 1990s, it could (and almost certainly would) obtain documentation and statements from managers and employees establishing the continued operation of the old agreements. But that hasn't happened, and we don't expect that it will.

In any event, the BLM cannot plausibly support its claim that Kane County is responsible for road maintenance under the old agreements. Accordingly, the County strongly requests that the BLM stop relying on (and claiming the continued operation of) old maintenance agreements that were revoked by federal action roughly fifteen years ago.

Notwithstanding their revocation, the road maintenance agreements constitute persuasive (if not conclusive) evidence of the establishment of R.S. 2477 rights-of-way prior to 1976. Indeed, the agreements document federal recognition that the County adopted the roads identified in the agreements as part of its pre-FLPMA transportation system when R. S. 2477 was still in effect. The agreements document not only the expenditure of local and state funds with respect to those roads, but also the fact that the County performed routine maintenance on the roads well before 1976. Because R.S. 2477 defers to state law regarding the establishment of R.S. 2477 rights-of-way, and because Utah law establishes public highways under the terms and conditions expressed in the agreements, the roads identified in the agreements were established as legitimate R.S. 2477 rights-of-way prior to October 21, 1976. In many instances, the agreements provide conclusive documentation supporting quiet title. In order to save all of the wrangling, controversy, and costs associated with quiet title litigation, the DOI and the BLM could simply process RDIs based on the facts documented by the maintenance agreements.

The letter's assumption that the County maintained the roads "through the summer of 2008" is incorrect. That assumption, examined in light of the letter's reference to the maintenance agreements, infers the County maintained the roads as a responsibility under the old agreements until 2008. That inference, like the assumption upon which it rests, is incorrect. The County managed and maintained its transportation system across federally managed lands under the jurisdiction of R.S. 2477 until June 2008, when it was stripped of its road jurisdiction by Judge Campbell's May 2008 ruling in *TWS v. Kane County*.

The County correctly interpreted that ruling. Judge Campbell broadly held that Kane County has <u>NO</u> R.S. 2477 rights-of-way unless or until those rights-of-way have been adjudicated. Judge Campbell reiterated Kane County's R.S. 2477 right-of-way status in denying the County's Motion for Summary Judgment on the Skutumpah road - an open road in federal planning - and reasoning that the County has no R.S. 2477 rights-of-way on that road unless or until those rights-of-way have been adjudicated. Kane County cannot risk relying on R.S. 2477 claims or assertions as a defense to trespass or other federal violations regarding use, occupancy, or development of public lands.

In addition, federal policy and planning decisions require R.S. 2477 adjudication. The BLM letter of

June 30, 2009 affirms the County's position in stating, "We acknowledge the County's position with respect to RS2477 right-of-way claims and agree that is desirable to timely and finally adjudicate those claims."

The letter states that *TWS v. Kane County* "…does not preclude maintenance of roads which have been historically maintained by the county and in no way inhibits the status, development or execution or road maintenance agreements (RMA's) or rights-of-way (ROW) grants." This statement further corroborates the County's correct interpretation that it currently lacks highway jurisdiction and must acquire such authorization through RMAs, Title Vs or QTs.

The BLM misunderstands the issue. It is not about the County's ability to provide uncompensated maintenance and other menial services on "federal roads." Rather, it is about the refusal of the DOI and the BLM to recognize and accept the highway rights granted to Kane County and the State of Utah by the U.S. Congress. Those rights were granted over a period of 110 years, were grandfathered by FLPMA, and were respected for 130 years until Secretary Babbitt, in league with others, created the roads controversy by trying to redefine R.S. 2477 rights in a way that threatens to obliterate their very existence.

The BLM's offer of RMAs and Title V permits is inconsistent with congressional provisions in FLPMA §§ 509(a) and 701(a)(h) and is a continuation of the effort to redefine R.S. 2477 rights out of existence. In any event, that offer is illusory and cannot be taken seriously.

The letter states, "Completing an RMA or acceptance of a ROW would in no way affect the County's RS2477 rights." If the BLM is serious about not affecting the County's R.S. 2477 rights it could simply administratively recognize established R.S. 2477 rights in Kane County, in the State of Utah, and throughout the West. Why did Secretary Babbitt issue a directive to ignore R.S. 2477 rights in 1997? Why did the monument plan take over all administrative control of roads in the monument and require adjudication prior to the operation of R.S. 2477 rights? Why did the State Office of the BLM direct planners to ignore R.S. 2477 rights in the recent RMPs? Why is the BLM closing and restricting R.S. 2477 roads, in Kane County, throughout Utah and across the West? Why is the BLM issuing third party Title V permits over R. S. 2477 rights-of-way, and in so doing ignoring the vested property interests of the County and the State of Utah? Why did the BLM refuse to make any final decisions on NBDs submitted under *SUWA v. BLM* and Secretary Norton's implementation of that binding case law? Why did the BLM specifically refuse to process the County's request for an NBD for the Paria Canyon road as authorized regarding proposed road closures under the Norton Policy? Why did the BLM subsequently close the Paria Canyon road based on petitions submitted by third parties? Why is the BLM, while claiming that it is necessary and "desirable to timely and finally adjudicate" R.S. 2477 claims", simultaneously opposing the County's standing to bring a quiet title suit to resolve the highway controversy? Why did recent BLM policy formally revoke any administrative recognition of R.S. 2477 rights (as supported by FLPMA) and offer only Title V permits for highway authority?

These rhetorical questions lead inevitable to a single, uncomfortable observation: the BLM has failed to abide by its obligation, recognized by the Tenth Circuit in S*UWA v. BLM*, to give due regard to R.S. 2477 rights-of-way and cooperate with those that own them. The lack of cooperation we have received from the BLM is unacceptable, and must come to an end.

Under the terms of the BLM's offer, the BLM could unilaterally close and restrict local roads under RMAs and Title V permits - just as the BLM did on the Johnson Canyon road along a Title V (in designating type of vehicle use). The BLM can change the terms and conditions, can cancel RMAs and Title V permits at any time, and would not issue RMAs and Title Vs to roads it did not want open. We therefore respectfully decline the BLM's offer.

Under R.S. 2477 jurisdiction, the BLM would have to go to court before taking adverse action to close or restrict a local road. Kane County needs the certainty of R.S. 2477 rights in order to operate and manage its transportation system across lands (of multiple statuses) for the benefit of the travelling public. In addition, a previous Kane County Commission was enjoined from resolving the R.S. 2477 issue through the improper use of Title Vs. The current Commission does not intend to repeat that error.

RMAs are not necessary under R.S. 2477. The Tenth Circuit has held that counties do not have to consult with the BLM regarding the maintenance of roads along R.S. 2477 rights-of-way, although the County supports regular consultation. Title Vs are not necessary under R.S. 2477. Title Vs are congressionally intended for rights-of-way established after October 21, 1976. FLPMA § 509(a) does not support the coexistence of Title Vs and R.S. 2477 rights-of-way. Most importantly, there is absolutely no operation of R.S. 2477 under a Title V. The terms and conditions of the Title Vs are controlling and the established R.S. 2477 rights are constructively abandoned, with the County's consent. The BLM is fully aware of these conditions. It is also aware, that the likelihood of a county ever administratively or judicially securing R.S. 2477 rights after operating its roads under a FLPMA Title V (or the new version of maintenance agreements that establishes the roads under federal jurisdiction) is slim to none.

The BLM has revoked all previous administrative determinations. It has revoked previous maintenance agreements. It has closed and restricted local highways without consideration of county and state highway rights. It has taken over historic local transportation system roads where the roads cross federally managed lands. In spite of these actions, the BLM offers RMAs and Title Vs with a straight face, as if the BLM were doing the counties a favor by giving them the privilege of providing uncompensated maintenance on "federal roads." With all due respect, we cannot help but find that offer a bit insulting.

Moreover, given the history of the County's interaction with the DOI and the BLM on the roads issue, the County cannot trust the promissory assurances of federal land managers. Federal action recognizing the County's established highway rights under R. S. 2477 is necessary to restore trust and a working relationship with the BLM's land managers.

The County fully intends to resume jurisdiction, management and maintenance on its public highways as soon as its legal rights are restored through current and future litigation, as necessary. Once the legal cloud on its title has been lifted, the County will resume its rights and responsibilities in managing public highways across federally managed lands. The County will do so on county roads established by congressionally granted R.S. 2477 rights-of-way. We are confident, at the end of the day, the validity of our rights-of-way will be recognized by courts of competent jurisdiction (or by recordable disclaimers of interest (RDIs)), as provided for in FLPMA.

The County will augment its transportation system founded upon R.S. 2477 rights with the appropriate use of Title Vs for post-1976 road segments of roads or realignments that improve an existing road. In light of recent events, however, we have concluded that it is not feasible for the County to operate and to be responsible for short segments of Title Vs that only connect to "federal roads." Accordingly, the County hereby renounces and relinquishes the following Title V permits: UTU-82147, UTU-82110, UTU-55664, UTU-52882, and UTU-45699. The County intends to pursue some of these Title Vs as being within the scope of R.S. 2477 rights-of-way in current and future quiet title adjudication.

In the meantime, unadjudicated roads across federally managed lands in Kane County are a federal responsibility and liability not only with respect to federal planning decisions, numbering, restrictions and closure, but also with respect to traffic regulations, signage, maintenance, repair, improvements and

all other, related-highway-management responsibilities.

Should the County not be successful in retaking jurisdiction of its long-standing roads, the question of county property in the form of culverts, cattle guards, bridges, road base, hard surface installations, and other appurtenances will need to be resolved. In addition, the millions of dollars we have spent maintaining, improving, and regulating traffic on our roads - relying on the assumption (long perpetuated by the BLM) that the County was operating public highways pursuant to a property right granted by the U.S. Congress - will need to be addressed.

The County hopes this information will be helpful as we move forward toward resolution of the roads issue, which must be resolved before we achieve any meaningful, lasting resolution of the public-safety issues we discussed a few days ago, relating to signage, maintenance, repair, improvement, snow removal, etc.

If the Commission can be of any further assistance prior to the meeting on July 15, 2009, please contact Commissioner Habbeshaw who is over the County's Transportation System.

Sincerely,

(e-signature)
Daniel W. Hulet
Commission Chair

(e-signature)
Doug Heaton
Commissioner

(e-signature)
Mark W. Habbeshaw
Commissioner

cc: Secretary Salazar
Lt. Governor Herbert
Utah Association of Counties