Excerpts from the Monument Plan and from Judge Campbell's decision denying Kane County's highway jurisdiction on roads across federally managed lands

Excerpts from GSENM Management Plan

Record of Decision, page *ix*:

> *The discussion of R.S. 2477 assertions in footnote 1 of Chapter 2 of the Approved Plan has been clarified to emphasize that nothing in the Plan extinguishes any valid existing rights-of-way in the Grand Staircase-Escalante National Monument. Nothing in this Plan alters in any way any legal rights the Counties of Garfield and Kane or the State of Utah has to assert and protect R.S. 2477 rights, and to challenge in Federal court, or any other appropriate venue, any BLM road closures that they believe are inconsistent with their rights.* (emphasis added).

Approved Plan, page 46, footnote 1 of Chapter 2

> *Some government entities may have valid existing right to an access route under Revised Statutes (R.S.) 2477, Act of June 26, 1866, ch 26, § 8, 14 Stat. 251 [codified as amended at 43 U.S.C. § 932 until repealed in 1976 by the Federal Land Policy and Management Act of 1976 (FLPMA), Public Law 94-579, Section 706(a), Stat. 2744, 2793 (1976), which granted "[the right-of-way for the construction of highways over public lands, not reserved for public uses,]" As described in United States Department of Interior, Report to Congress on R.S. 2477 (June 1993), claims of rights-of-way under R.S. 2477 are contentious and complicated issues, which have resulted in extensive litigation. See e.g, Sierra Club v. Hodel, 848F.2d 1068 (10th Cir. 1988); Southern Utah Wilderness Alliance v. Bureau of Land Management, Consolidated Case No. 2:96-CV-836-S (D.Utah, filed Oct. 3 1996, pending). It is unknown whether any R.S. 2477 claims would be asserted in the Monument which are inconsistent with the transportation decisions made in the Approved Plan or whether any of those R.S. 2477 claims would be determined to be valid. To the extent inconsistent claims are made, the validity of those claims would have to be determined. If claims are determined to be valid R.S. 2477 highways, the Approved Plan will respect those existing rights. Otherwise, the transportation system described in the Approved Plan will be administered in the Monument. Nothing in this Plan extinguishes any valid existing right-of-way in the Grand Staircase Escalante National Monument. Nothing in this Plan alters in any way any legal rights the Counties of Garfield and Kane or the State of Utah has to assert and protect R.S. 2477 rights, and to challenge in Federal court or other appropriate venue, any BLM road closures that they believe are inconsistent with their rights.* (emphasis added).

The Wilderness Society v. Kane County, 08-cv-0854 (D. Utah)

Excerpts from Order dated May 16, 2008 (emphasis added):

"The court disagrees that the County currently has valid existing rights under R.S. 2477 for the **areas** in question, because the County has yet to establish the validity of those rights in a court of law." Page 2.

"Consequently, the County's actions, **unsupported by any valid existing right** under R.S. 2477, are preempted by the Supremacy Clause because they create an obstacle to the accomplishment and execution of Congress's land management objectives, as carried out by BLM and NPS." Page 2.

"In this case, Kane County presents claims of R.S. 2477 rights-of-ways. Accordingly, the court has proceeded, and continues to proceed, with its analysis based on the understanding that Kane County has not presented evidence of any **court adjudication that any of its claimed R.S. 2477 rights-of-way is valid**." Page 5.

"The court makes this finding (described in more detail below) despite the County's asserted R.S. 2477 rights-of-way, the validity of which have not been adjudicated in a court of law (that is**, there are no "valid existing rights" to consider** here)." Pages 20-21.

"Certainly the County correctly notes that federal land management agencies must manage the land without disturbing "valid existing rights." But this truism does not help the County, as the **court has already found that the County has not established any valid existing rights.**" Page 21.

"The court is not persuaded by the County's assertion that it has a valid existing right in the Skutumpah Road, which "vested without formal action." (Defs.' Opp'n Mem. at 36.) First, for purposes of analysis in this case, **the court does not recognize any right that the County contends "vested without formal action.""** Page 21.

"Consequently, the R.S. 2477 law does not help the County in this suit." Page 22.

"The injunction does not preclude the federal agencies from managing the lands **as they see fit** under their land management plans. If BLM, for example, decides for its own land management purposes that a particular route is an R.S. 2477 right-of-way, it can manage the land in accordance with its finding. * * * **But that does not give the County a valid existing right in the route."** Page 25.

"Kane County's Motion [for summary judgment as to ownership of Skutumpah and the Windmill Road] is problematic for three reasons. First, the United States (which **holds title to the public land absent a court adjudication that the County has a valid existing right under R.S. 2477**) is not a party to this suit." Page 31.

Excerpts from Order dated June 13, 2008 (emphasis added):

"Further, Kane County shall take no other action to invite or encourage vehicle use on any route or area closed to such use by governing federal land management plan or federal law. Kane County is enjoined from **any action described above relating to any route unless and until Kane County proves in a court of law that it possesses a right-of-way** to any such route and establishes the proper scope of such right-of-way in a court of law." Pages 1-2.

"The County contends that the last sentence of the above-quoted paragraph "effectively enjoins Kane County from exercising its governmental police powers and from the use and benefit of the State of Utah's and Kane County's transportation system roads which are almost entirely based upon congressionally granted R.S. 2477 public highway rights-of-way that have not been adjudicated." (Kane County's Mem. Supp. Mot. for Stay at 4.). The County misinterprets the court's Order and, in particular, takes the last sentence of the quoted paragraph out of context. The court said, "Kane County is enjoined from any action described above relating to any route unless and until Kane County proves in a court of law that it possesses a right-of-way to any such route and establishes the proper scope of such right-of-

way in a court of law." (May 16, 2008 Order at 33 (emphasis added).) To the extent the language needs clarifying, the court emphasizes here that it has **enjoined** any County action that purports to manage or open to vehicle use any route or area closed to such use by governing federal land management plan or federal law absent a court-validated right-of-way. That is, the court's order only applies to actions that directly conflict with federal closures and federal limitations on modes and methods of transportation on routes within federal land." Page 2.

SUMMARY: In this second Order, the district court had jurisdiction solely to modify the injunction, but no jurisdiction to modify the Order that was already on appeal. This clarification did not change the district court's Order **finding that Kane County has no valid existing R.S. 2477 rights-of-way**, including the express finding that Kane County does not have **any** right-of-way for the **open** Skutumpah Road.

The "use, occupancy or development of public lands without authorization is a prohibited trespass." 43 C.F.R. § 2808.10. *Cf.* 43 C.F.R. § 2801.6(b)(5) (trespass regulations inapplicable to R.S. 2477 public highways). The Orders found that Kane County has **no** R.S. 2477 rights-of-way.

THE QUESTION: What current authorization does Kane County have to use, occupy or develop roads on federal land?