



**Kane County Commission**  
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## **KANE COUNTY RESOLUTION**

2008-16

**A Resolution to protect and preserve Kane County’s rights-of-way and highway access across federally managed lands as granted by the United States Congress and to affirm the authority and jurisdiction granted under Revised Statute 2477 in the management of the County’s Transportation System of public highways**

WHEREAS, in 1866, the U.S. Congress passed legislation offering an open-ended grant of “the right of way for the construction of highways over public lands, not reserved for public uses.” *See* Revised Statute (R.S.) 2477, Act of June 26, 1866, ch. 262, § 8, 14 Stat. 251 [codified as amended at 43 U.S.C. § 932 until repealed in 1976 by the Federal Land Policy and Management Act of 1976 (FLPMA), Public Law 94-579, Section 706(a), Stat 2744 (June 1976); and

WHEREAS, the grant of rights-of-way, commonly called “R.S. 2477,” remained in effect for 110 years, and most of the transportation routes of the West were established under its authority; and

WHEREAS, Congress protected all existing R.S. 2477 rights-of-way in sections 509(a) and 701(a)(h) of the Federal Land Policy Management Act (FLPMA) when it repealed R.S. 2477 on October 21, 1976; and

WHEREAS, unlike any other federal land statute, the establishment of R.S. 2477 rights-of-way required no administrative formalities: no entry, no application, no license, no patent, and no deed on the federal side; no formal act of public acceptance on the part of the states or localities in whom the right was vested; and

WHEREAS, the Kane County General Plan, developed pursuant to Section 17-27-301 of the Utah Code and adopted June 22, 1998 states,

*Kane County will take the lead in providing a safe, efficient and functional transportation system which emphasizes the circulation of residents and visitors between communities, as well as to the scenic wonders found in the county. The system will stress a wide range of transportation methods, and will be founded upon the ability of the county to utilize rights of way on public lands asserted under the authority of Revised Statute 2477. (emphasis added); and*

WHEREAS, federal land management agencies are ill-equipped to provide the same level of public highway management services as has been historically and traditionally provided by the County; and

WHEREAS, the Tenth Circuit Court of Appeals' recognition that most of the transportation routes of the West were established under the authority of R.S. 2477 is inconsistent with the decision of federal land management agencies to not recognize any R.S. 2477 rights-of-way in Kane County or the State of Utah and to ignore valid existing rights in attempting to close and restrict the use of county transportation system highways, *See SUWA v. BLM*; and

WHEREAS, federal land management agencies have a duty and obligation to act in accordance with FLPMA §§ 509(a) and 701(a)(h) and other lawful requirements but are instead attempting to establish federal control over actions taken by local governments exercising the rights which vested under R.S. 2477; and

WHEREAS, R.S. 2477 has become one of the more contentious land use issues in the West because of efforts by federal land management agencies and environmental advocacy groups to eviscerate the historical rights of access to and across federally managed lands; and

WHEREAS, in *The Wilderness Society and Southern Utah Wilderness Alliance v. Kane County* the U.S. District Court held:

*...the Court need only recognize that the presumption on federal land is that ownership and management authority lies with the federal government and that any adverse claimant, like the County here perhaps, is not entitled to win title or exercise unilateral management authority until it successfully has carried its burden of proof in a court of law; and*

WHEREAS, FLPMA § 303(g) states:

*The use, occupancy, or development of any portion of the public lands contrary to any regulation of the Secretary or other responsible authority, or contrary to any order issued pursuant to any such regulation, is unlawful and prohibited. 43 U.S.C. § 1733. (See also 43 C.F.R. § 2808.10 (use, occupancy or development of public lands without authorization is a prohibited trespass), and 43 C.F.R. § 2801.6(b)(5) (trespass regulations inapplicable to R.S. 2477 public highways)); and*

WHEREAS, the Utah Department of Transportation Regulations Governing Class B & Class C Road Funds states,

*UDOT shall recognize claim of jurisdiction over any road...by either a declaration of local governing officials or certification by a representative*

*empowered with this authority by local governing officials.* (emphasis added);  
and

WHEREAS, UDOT Regulations require that Class B & C funds “may be used only for construction, maintenance and highway related purposes on eligible B & C roads”; and

WHEREAS, the court’s rulings in *The Wilderness Society and the Southern Utah Wilderness Alliance v. Kane County* preclude the County from certifying a ‘claim of jurisdiction’ for roads across federally managed lands or that such roads are ‘eligible [Class] B roads’ based solely on claims and assertions; and

WHEREAS, the County has been temporarily ejected from its historic public highways across federally managed lands and is currently unable to perform maintenance, repair, improvements, or regulate such roads; and

WHEREAS, the Commission has a fiduciary duty to protect the County’s transportation system, which was founded under the authority of R.S. 2477 property right-based rights-of-way, rather than substitute its property rights with FLPMA Title V permitted use-based rights-of-way or long-term maintenance agreements evading recognition of the County’s property rights, See, People for the USA, Color Country Chapter v. Kane County Commission, Utah 6<sup>th</sup> District, No. 000600060; and

WHEREAS, public highways established under R.S. 2477 are important to the continuance of a cohesive county transportation system providing safe, efficient, and functional public access to and across lands of varied ownership and status consistent with local tradition, culture and economic needs; therefore be it

RESOLVED, that the Commission will continue its efforts to seek 10<sup>th</sup> Circuit Court of Appeals affirmation of the County’s rights-of-way across federally managed lands in *The Wilderness Society and Southern Utah Wilderness Alliance v. Kane County* and in *Kane County v. Kempthorne*, and by expanded Quiet Title adjudication as necessary”; and

RESOLVED, that the Commission supports and encourages State legislation being developed by Representative Mike Noel for the 2009 Legislative Session authorizing the use of a portion of State Class B road funding when necessary to preserve the jurisdiction of rights-of-way for public highways through Quiet Title or other protracted litigation; and

RESOLVED, that the Commission will seek federal administrative recognition of its rights-of-way across federally managed lands through continued coordination and consultation with federal land management agencies, the State of Utah, the Utah Association of Counties, and the Utah Congressional Delegation; and

RESOLVED, that because of its fiduciary duty to protect rights it manages in trust for the people, the Commission will not resolve the BLM’s failure to accept R.S. 2477 rights-of-way by accepting offers of maintenance agreements and permitted use rights-of-way

resulting in the County providing free, uncompensated maintenance, repair, and improvements to “federal roads” as a delegated responsibility while the BLM retains the ultimate control over the operation of the roads, including whether roads remain open or closed and how the roads’ use should be restricted; and

RESOLVED, that the County will continue to respond to public safety incidents anywhere in the county irrespective of highway jurisdiction to rescue people in trouble during the pendency of appeal or other resolution of highway jurisdiction.

The Board of Commission this 11th day of August 2008, hereby approves Resolution 2008-16,

(e-version, signed)  
Daniel W. Hulet  
Commission Chair

(signed)  
Duke Cox  
Commissioner

(signed)  
Mark W. Habbeshaw  
Commissioner