



April 2007
R.S. 2477 ROW Update
for
County Commissioners, Highway District
Commissioners and BLM District Managers

Over the past several years, the Idaho Association of Counties, Idaho Association of Highway Districts, Local Highway Technical Assistance Council and the Bureau of Land Management (BLM) have been working closely and successfully on road and transportation issues. In our continuing effort to keep you informed, we would like to update you on a road issue that is important to all of us.

This issue involves the 1866 federal statute known as Revised Statute 2477 (R.S. 2477). The Revised Statute states: "The right of way for the construction of highways across public land, not reserved for public uses, is hereby granted." The Revised Statute was revoked by Congress in 1976; however, unspecified and undocumented rights were grandfathered and, to this day, remain a source of controversy and litigation across the western United States.

A long-running dispute in Utah concerning R.S. 2477 rights resulted in litigation, *Southern Utah Wilderness Alliance vs. Bureau of Land Management (SUWA vs. BLM)*, 425 F.3d 735. On September 8, 2005, the United States Tenth Circuit Court of Appeals issued a precedent-setting decision in this case which impacts the way we address R.S. 2477 issues. We support the court's dicta: "Both levels of government have a responsibility for and a deep commitment to, the common good, which is better served by communication and cooperation than unilateral action." The full text of the decision can be found on the Web at: <http://www.kscourts.org/ca10/cases/2005/09/04-4071.htm>.

Based on the *SUWA vs. BLM* decision, the Secretary of the Interior issued instructions on March 22, 2006 that directs BLM and other Departmental agencies to revise their R.S. 2477 policies consistent with the legal principles in *SUWA v. BLM*. The full text of the Secretary's guidance can be found on the Web at: <http://www.blm.gov/nhp/efoia/wo/fy06/im2006-159attach1.pdf>. Briefly, the Secretary outlined several administrative options available to resolve most road and transportation issues when R.S. 2477 rights have not been legally established by a federal court. They are:

Option 1: BLM has the authority to issue a right of way under Title V of the Federal Land Policy and Management Act at no cost to the other government agency. This option must be used when the counties or highway districts wish to make improvements (i.e., change the status quo) to an existing road and may be used if the county or highway district wishes to do maintenance. Please note that this option and those discussed below do not extinguish or negate R.S. 2477 rights that may exist.

Option 2: A road maintenance agreement (RMA) between the counties/highway districts and BLM is a good tool when parties only wish to maintain the existing status quo of a road.

Option 3: BLM has the discretion to make an administrative non-binding determination (NBD) for planning purposes. If the county and/or highway district request BLM to pursue this option, they must be aware that the research, including burden of proof, rests with the county or highway district as noted in *SUWA v. BLM*. Additionally, BLM's NBDs are not binding and could be subject to legal challenge from other public.

Bulletin
Vol. 9, No 1
April 2007
Page 2

Option 4: The counties/highway districts may file a recordable disclaimer of interest application with BLM. Disclaimers of interest have the same effect as a quitclaim deed. However, processing disclaimers are fully cost recoverable, which requires BLM to bill the applicant for the costs incurred in processing the application. Additionally, disclaimers are time-consuming for both parties and may or may not result in a favorable decision.

Note: Options 2, 3, and 4 only allow routine road maintenance. Any construction or improvement of the road requires additional consultation/approval from the BLM.

If a county/highway district needs a final adjudication and a binding determination of their R.S. 2477 rights, they must file a claim with a Federal Court under the Quiet Title Act, 28 USC 2409. Although this course of action is viable, it can be expensive and time-consuming for all parties.

In those situations (court decree, prior BLM acknowledgement, BLM disclaimer of interest and NBD) in which it is agreed that an R.S. 2477 right of way exists and the holder of the R.S. 2477 right of way that crosses public land is proposing to make "improvements" beyond routine maintenance, *SUWA V.* BLM held that the ROW holder must consult with BLM in advance of making these improvements. This consultation process allows BLM the opportunity: 1) to carry out its duties to determine whether the proposed improvement, in light of the traditional uses of the rights of way as of October 21, 1976, is reasonable and necessary, 2) to study potential effects, and 3) if appropriate, to formulate alternatives that serve to protect the public land. This is in accordance with Departmental policy which states that federal land managers "may [and will] take reasonable steps to ensure that the use of roads within federal land does not violate the federal landowners' duty to protect the surrounding and underlying land, even if the roads are valid rights of way."

With these principles in place, the Department's policy makes it clear that any unilateral attempts by a R.S. 2477 rights of way holder to develop or improve those rights of ways without first consulting with the federal manager will be considered unlawful, and the federal agencies will seek to enjoin the action.

To ensure efficient and effective management of highways/roads on public land in Idaho, we recommend that the counties, highway districts, and BLM continue to communicate at the local level on a regular basis. This frequent coordination allows all involved to mutually explore strategies to resolve specific "on-the-ground" issues or concerns together and an option could be chosen that would benefit all parties involved.

Again, we thank you for your cooperation and work on road and transportation issues. Should you have questions, please direct them to your respective organizational contact.

Idaho Association of Counties
Daniel G. Chadwick, Executive Director

U.S. Bureau of Land Management
Thomas H. Dyer, State Director

Idaho Association of Highway Districts
Stuart O. Davis, Executive Director

Local Highway Technical Assistance Council
Joseph K. Haynes, Administrator