

R.S. 2477: THE LEGAL BATTLE CONTINUES

Although most of the American public doesn't realize it, an R.S. 2477 Right-of-Way is their only guaranteed access across public lands. All other access rights are at the discretion of politically appointed bureaucrats, who often live far away from the lands at issue. If you understand this, you understand the importance of continued vigilance in the defense of these road rights.

"R.S. 2477" refers to a now-repealed portion of the 1866 Mining Act, which states "the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." While the grant was repealed in 1976, rights of way previously created under the statute can effectively remain "grandfathered" in and available to the public today. R.S. 2477 claims have engendered great passion and confusion throughout the West, where state and local governments, federal land managers, public access proponents, Wilderness advocates and private property owners have regularly taken irreconcilable positions on the issue.

On September 8, 2005, a three-judge panel of the 10th Circuit Court of Appeals issued a decision that could bolster the efforts of local governments and public access proponents to protect R.S. 2477 rights-o-way. The decision represents a huge victory for millions of Americans who value access to public lands.

The ruling came in an appeal from a US District of Utah decision in *SUWA V. BLM* (DC NO. 2:96-CV-836-TC). The litigation began in 1996 when road crews employed by Utah's San Juan, Kane and Garfield Counties graded sixteen roads located in southern Utah. The Southern Utah Wilderness Alliance (SUWA) and other anti-access groups filed suit against the three counties and the Bureau of Land Management (BLM), alleging that the counties had engaged in unlawful road construction activities and that the BLM had violated the law by not taking more aggressive action against road maintenance. The BLM subsequently filed cross-claims against the counties, alleging their activities constituted trespass and degradation of federal property. The counties claim the road maintenance activities were lawful because the activities took place within valid R.S. 2477 rights-of-way.

The legislation wound its way through the US District Court in Utah for years until 2001, when Judge Tina Campbell issued a ruling that basically adopted SUWA's line of legal reasoning. Judge Campbell thus granted SUWA and BLM's request, ruling the counties did not have R.S. 2477 rights of way on fifteen of the sixteen roads at issue, and the counties' maintenance work violated the law and constituted trespass under federal regulations.

The three-judge panel of the 10th Circuit reversed that ruling, finding that state law, not federal regulation, properly guides interpretation of the existence and scope of any R.S. 2477 roads. The case was remanded to the District Court for new proceedings to address the validity of the counties' right of way claims, the scope of any such rights of way, and whether their actions constitute "trespass" on federal lands.

It will take some time to evaluate the impact of this important decision, but it appears the Circuit Court has reversed the District Court's deviation from the previously-established precedent and reminded the parties to focus on state law concepts in evaluating the counties' actions. R.S. 2477 claims have always presented complex legal, factual and political challenges. While this ruling will help clarify the rules of the game, it also leaves many thorny challenges for future debate.

To multiple-use advocates, this ruling was not unexpected. From the minute the ruling was made in the Utah District Court, it was assumed that much, if not all of the ruling would be overturned on appeal. But the ruling was made in 2001, and we've since had to endure the anti-access crowd waving it in our face and working hard to represent Campbell's ruling as settled precedent.

It has been a test of resolve, and not just for motorized access activists. County commissioners, state legislators, Governors and multiple use advocates across the West have had their determination and patience tested. Indeed, using Campbell's ruling, many county commissioners have been courted by the federal agencies to take actions that would diminish public rights of way. County commissioners were threatened with the prospect of Campbell's ruling becoming settled law, which was used as a reason to quit fighting for R.S. 2477 rights.

To the anti-access groups, this fight is a key step toward eliminating public access to public lands. Wealthy foundations are funding this effort, and their lobbyists have convinced the highest levels of the federal government to support it. The fight has put pro-access groups in the situation of defending principles that should be settled law, and fighting the federal agencies whose job it is to support and defend that law.

BRC wants to express our sincere thanks to our partners in Utah who kept the pressure on local and state governments to vigorously defend these access rights. Each time you mention 2477 in your comments, each time you mention 2477 in your talks with politicians, and each time you join and contribute to organizations that support public access to public lands, you are doing your part to protect these road rights.

The lawsuit would not have been supported if politicians didn't realize their constituents want them to defend our road rights. Sometimes it's necessary to remind them, and now may be a great opportunity to do so by placing a phone call to your county commissioner and telling them, "Thanks for supporting the 2477 legal battle!"

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