Colorado Central Magazine

RS-2477: Old roads and new controversies

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Public Roads – March 2001 – Colorado Central Magazine

WHILE OTHER AMERICANS may be debating the merits and morality of RU-486, the hot issue in our part of the world is more likely to be RS-2477.

It's not a pill like RU-486, nor is it an electronic standard like RS-232. It's a federal law that was adopted in 1866 and repealed in 1976, and its name is happenstance. The "RS" stands for "Revised Statutes," and it happened to be statute number 2,477 when that book was published.

Federal laws do not enjoy a reputation for brevity, but this one is only 19 words in its entirety: "The right-of-way for construction of highways over public lands, not reserved for public uses, is hereby granted."

One word that seems odd at first is "highway," since we think of that as something that involves pavement and guardrails. But it's an old legal term for a public road — recall that there were "highwaymen" who robbed stagecoaches long before there were any speed-limit signs in the West.

On the surface, RS-2477 looks like a matter of simple justice. Suppose you discovered a lode deposit on public land in 1877, and you built a road to your claim and the resulting silver mine. It's a public road, since it is open to anyone who wants to traverse it, and it carries traffic to other mines near yours.

But in 1882, a rancher homesteads on land your road crosses. RS-2477 says there's still a public right-of-way across his homestead, and so your ore wagons and the like can still come and go.

If the rancher does try to block your wagons, you can ask the county government to enforce the public right-of-way there.

There are some important things to note in this little tale, though. One is that dates matter. If the homestead came first, then there isn't an RS-2477 right-of-way across it. You (or the county government) would have to negotiate with the rancher for access to your claim, and if his price was too high, you'd need to find another route.

Another is that it has to be a public road — say, a road that serves several mines, or one that was part of a postal route, or one that was on a county map, that sort of thing.

And finally, your county government will usually have to administer the right-of-way and the road. This is mostly due to an accident of history — in the days of yore, there weren't state highway departments, and rural roads were entirely a county concern.

RS-2477 is a federal law, but it leaves much to lower levels of government. The state government defines a highway and the extent of a right-of-way, and in turn, the state government delegates the administration of its back roads to its counties.

Thus RS-2477 is open to a variety of interpretations, interpretations that now appear in conflicts between motorized and non-motorized recreational interests.

For instance, if a "highway" in 1866 meant a route that could accommodate a pack-burro train, does it still mean just a pack trail in 2001? Or should it be modernized to include trail bikes, off-road vehicles, pickups and spewts, or log trucks, or motor homes?

Does "construction" mean actually building bridges and the like, or does it mean merely developing a passage by continued use, the way that the Oregon and Santa Fé trails were formed? And in that case, how much use is required? Is one set of wagon ruts enough?

Is the "right-of-way" 10 feet wide or 200 feet wide, and does it cover the spring-time detour around a seasonal bog? Is it a precise course, or just a general route between two locations.

And when it is "hereby granted" — to whom is it granted? Who acts on behalf of the public to claim, maintain and protect this right-of-way? And when and how was the right-of-way defined in the first place?

Besides that, what is "public land?" In our day, land owned by major public entities comes in many forms: national forests, Bureau of Land Management tracts, national monuments and parks, state parks, wildlife refuges, state school trust properties …

BUT IT WASN'T ALWAYS THAT WAY. Go back to the first half of the 19th century. When territory was added to the United States by purchase (Louisiana Purchase of 1803) or conquest (Mexican War of 1846-48), most of it became "unappropriated public domain," and that's what they meant by "public land" in 1866.

There were many ways for that "unappropriated public domain" to become appropriated private land. Congress appropriated land grants to the early transcontinental railroads. Homesteading was another method of appropriation, as were mining claims. As soon as it was surveyed, much land was just sold outright through the General Land Office. And states were given "school sections" by the federal government when they came into the union, which the states could sell or lease.

Land could also be "reserved" by the federal government — that is, reserved from appropriation through homesteading and mining claims. Thus the terms "Indian reservation" and "military reservation" — you couldn't file a mining or homestead claim on those lands because they were reserved for other purposes.

Those reservations weren't significant factors in Central Colorado, but another kind of reservation — the "forest reservation" — covers much of our map.

IN ESSENCE, all federal land hereabouts was "unappropriated public domain" until the 1890s. In 1891, the U.S. Congress passed a reform of the land laws, and one provision of that bill gave the executive some broad powers over public land: "The President of the United States may, from time to time, set apart and reserve … any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations…"

Presidential action soon followed. Forests around Yellowstone National Park were the first to be so reserved, on Sept. 10, 1891.

But the second forest reserve proclaimed by President Benjamin Harrison was in Colorado: White River Plateau, 1,198,080 acres on Oct. 17, 1891. That's up by Meeker, but the reserves that soon followed were closer — Pike's Peak timber-land reserve, 184,320 acres on March 18, 1892; Plum Creek timber-land reserve, 179,200 acres on June 23, 1892; South Platte forest reserve, 683,520 acres on Dec. 9, 1892.

OTHERS, EVEN CLOSER TO HOME, were proclaimed after Harrison left office in 1893, to be succeeded by Grover Cleveland, William McKinley, and most notably, Theodore Roosevelt, who reserved forests on such a grand scale that Congress changed the law as constituents complained that T.R. was "locking up" public lands.

Among Roosevelt's relevant proclamations were the San Isabel Forest Reserve on April 11, 1902; Gunnison Forest Reserve and Leadville Forest Reserve on May 12, 1905; Holy Cross Forest Reserve on Aug. 25, 1905; Cochetopa Forest Reserve on July 1, 1908.

(These reserves were the ancestors of our modern national forests. Over the years, they have been renamed, consolidated, and pieced out — for instance, the Cochetopa was divided among Gunnison, San Isabel, and Rio Grande national forests in 1944, and the Leadville Forest Reserve was pieced out to other national forests in 1930.)

Why all these dates?

Because before a given date, the land in question was "unappropriated public domain," and thus existing public rights-of-way fell under RS-2477. After that date, the land was "reserved for public purposes," and there was no automatic grant of right-of-way for any roads that might develop.

Thus a road across public land above Leadville established in 1888 is an RS-2477 road. But if it didn't go into use until 1907, after the proclamation of the Leadville Forest Reserve, then it's not an RS-2477 road.

What about the public lands that didn't go into the forest reserves and then the national forests a century ago? Some of it was homesteaded or mined, but most of it remained in federal hands to be sold by the General Land Office (if there were any takers) or leased by the Federal Grazing Service.

These agencies were combined into the U.S. Bureau of Land Management. Despite the "Management" in its title, the BLM had little authority over the land until the Federal Land Policy Management Act went into effect on October 21, 1976. That law gave the BLM more power, and it also specifically repealed RS-2477 — but all existing RS-2477 rights-of-way were to be honored.

So that's another important date. A "highway" across BLM land is a public right-of-way if it existed before 1976, but it can be closed by federal administrative action if it came after that date. The pre-1976 right-of-way can be claimed by a county government; one after that would have go through various administrative processes to be granted to a county.

As you can see, determining whether a route falls under RS-2477 is no simple matter.

THE DATE IS IMPORTANT, and the relevant date varies, depending on whether the route is on BLM or Forest Service land. If it's on Forest Service land, then the date of the "forest reservation" matters.

Another date-related consideration is the definition of a "road" or "highway" at the time the route was created. That falls under state law, and in Colorado the legislature has changed the definition over the years. From 1881 to 1893, for instance, all roads of any sort were defined as public roads with a 60-foot-wide right-of-way. The legislature later made the definition more restrictive, but expanded the width of the right-of-way.

And then there's the matter of showing that there was a road there, and just where it ran — an exercise in local history.

Nobody was in much of a hurry about documenting any of this, or claiming RS-2477 rights of way for roads that were not in regular use, until the Clinton Administration took office in 1993.

The previous policy had been formalized by Donald Hodel of Oregon, who served as Secretary of the Interior under President Ronald Reagan in 1988. That December, Hodel issued a memorandum that one environmentalist writer characterized as "stating that virtually any route ever traveled by man or pack animal qualifies as a pre-existing RS-2477 right-of-way."

Hodel's memorandum said the BLM would recognize RS-2477 claims that met three conditions:

1. They were on non-reserved public lands at the time they went into use.

2. There was some sort of construction. "Removing high vegetation, moving large rocks out of the way, or filling low spots" could qualify, as could "the passage of vehicles by users over time."

3. The route was open to public use. "It need not necessarily be open to vehicular traffic, for a pedestrian or pack animal trail may qualify. A toll road or trail is still a public highway if the only limitation is the payment of the toll by all users."

If it was on a state or county road system, or if construction or maintenance funds were spent on the route, that is also "evidence of the highway being a public highway," and "absent evidence to the contrary, a statement by an appropriate public body that the highway was and still is considered a public highway will be accepted."

That policy stayed in effect during the next four years of the administration of George Bush the Elder. But the election of Bill Clinton in 1992 meant a new interior secretary, Bruce Babbitt of Arizona, in 1993. Babbitt, a former governor who had strong support from anti-road environmentalists, issued draft regulations in 1994 that would have tightened the standards considerably.

But Congress stopped that and forbade the Interior Department from issuing new regulations unless they had been approved by Congress. What followed was a Babbitt memorandum in 1997 that set a temporary policy until new formal rules could be adopted and approved by Congress.

BABBITT'S MEMORANDUM raised the standard. For instance, where Hodel had said a pack-trail might qualify, Babbitt said, "a thoroughfare used .. by [the] public for the passage of vehicles carrying people or goods from place to place."

Hodel didn't mention anything about inspecting a route — a statement from a board of county commissioners was enough — but Babbitt said the BLM shall "perform an on-site examination to determine whether construction of the alleged right-of-way had occurred …"

Babbitt's memorandum was intended to be a temporary policy until formal rules could be written and approved by Congress.

But that was enough to inspire a flurry of activity in public-land counties, primarily in southern Utah, where counties hastened to document every possible road, and the state legislature appropriated $1.5 million in assistance so counties could use Global Positioning Satellites to map their roads.

Politically, southern Utah is conservative country without much use for federal wilderness designation, and the BLM was at the time conducting a congressionally-mandated inventory to determine which parcels might qualify for wilderness designation.

By legal and common definition, wilderness is roadless. So if there was a valid RS-2477 claim across a given parcel, then there was a right-of-way for a road, and then wilderness opponents could argue that the parcel was not roadless, and therefore should not even be considered for wilderness designation.

While Utah counties were attempting to map and document their RS-2477 claims, however, there were people in the field collecting information with the opposite idea in mind. They wanted to debunk the claims. In 1996, 285 volunteers from several environmental groups assembled maps of Utah county RS-2477 claims, and began walking the routes, where they found things like eroded gulleys that had been claimed as "highways."

Everyone involved figured some federal action was imminent, and it would probably take the form of a deadline for RS-2477 claims, as well as requiring more documentation than just a letter from a board of county commissioners.

It's easy to understand why the BLM would want a deadline — how's it supposed to manage a given parcel if, one morning ten years hence, someone shows up with a 1903 map that shows a county road running across it?

So with a deadline looking quite possible, one Colorado county decided to be ready, with full documentation of every public road ever used.

That was Saguache County, where Ellen Cox in the road and bridge department was put in charge of collecting and documenting a full history of local transportation routes.

Unlike certain Utah counties, Saguache County wasn't trying to forestall wilderness designation, or attempt to build roads into wilderness areas. "Our main goal," Cox said, "was and is to preserve public access to public lands."

Such research is "not a cut-and-dried process," she said, since "there's no one place to look."

HER STARTING POINT was a hand-drawn map from 1909, but it wasn't all that accurate — "some of the roads were drawn half a mile from their real locations."

In Colorado, a valid RS-2477 claim has to cover the exact route, according to Rikki Santarelli, who's been around this block a few times. He's currently the Chaffee County attorney, and he has served as a county commissioner and as the county attorney in Gunnison County.

"You can't just look at an old list of post roads and note that there was one from Salida to Turret, and thereby claim an RS-2477 right-of-way," he told the Chaffee County Commissioners last fall. "You have to know exactly where it went."

In Saguache County, Cox focused her research on routes used by wheeled vehicles — stagecoaches and wagons — although "that gets tricky. People would bring in old letters and diaries, and of course there were county records."

In days of yore, residents in a given locale might decide they needed a county-maintained road to get their cattle to market. They would petition the county commissioners, who would send out a "road viewer" to establish a route and negotiate a right-of-way across private land.

"He could offer to pay, when necessary, but that didn't happen often," Santarelli said, "since the landowners wanted the road and it would increase the value of the rest of their property."

ON SUCH ROUTES, there's usually some solid documentation, though that was complicated in Saguache's case by a turn-of-the-century courthouse fire that destroyed many old records.

Once Saguache County had accumulated its list of present and past roads, the commissioners formally vacated any rights-of-way they had in wilderness areas.

“The idea wasn’t to fight wilderness or to try to put roads in wilderness areas,” Cox said. “A lot of people see this as a motorized versus non-motorized issue, but as I said, it’s more a matter of preserving access — including access across private lands that abut national forest and BLM land.”

Her research naturally put her in contact with federal land personnel, among them John Lancelot, Colorado realty access specialist with the BLM.

Lancelot has worked with counties all over the state, and notes that there are some common problems. Many county roads exist by “prescriptive use,” and have never been formally surveyed. Nor did the Post Office issue many formal descriptions when it established “post roads” for carrying mail between settlements. Nobody seems to be sure whether a “stock driveway” is a public highway. And counties do vacate roads, which means a lot of searching in the records to be sure a possible RS-2477 claim was not vacated at some point in the past century or so.

“But if we can find the documentation, we’ll help support an RS-2477 claim,” Lancelot said.

That is, his agency will, but that doesn’t necessarily mean the federal government will. He recalled a case in Garfield County, Colorado, where hunters customarily used a road that crossed private property to reach 22,000 acres of public land.

The private land changed hands and the new owner blocked the road. The hunters complained. “Our research showed that it was a public road and should stay open. We put together a briefing and gave it to the U.S. attorney in Denver.”

But “they kind of dropped the ball,” Lancelot said. He didn’t argue when it was suggested that political pressure from the landowner might have had something to do with that decision by the federal attorney. But, of course, he didn’t agree either.

Another case had a happier ending, at least for _Lancelot. The University of Northern Colorado (based in Greeley) inherited some land on the edge of Rocky Mountain National Park near Estes Park, and the university planned to use it for a mountain campus. A bridle trail crossed the land, but the university attempted to close it.

Elkhorn Stables, a nearby outfitter, had used that trail to take clients into the national park, and it asked the BLM to help get a ruling that the bridle trail was an RS-2477 right of way, open to the public.

The court held that the bridle path was a valid right-of-way, open to the public and in use before the land had been put into private hands before eventually being given to the university, and so Elkhorn’s equestrians — and every one else — had the right to use it.

But could Larimer County or the State of Colorado decide to convert that bridle path into a paved road for cars and trucks?

“That’s a good question,” Lancelot said, “and one the courts would probably have to sort out. Courts will almost always support existing uses for a right of way, but expanding the use is a different matter. I suspect the county or state would have to demonstrate a need, and go through an environmental review.”

In his work as Gunnison County attorney and as a commissioner, Santarelli said he has been involved in about half a dozen lawsuits based on RS-2477 claims since 1974.

None of them has involved road construction or claims in wilderness area. They were all about private parties closing roads that the general public had been using.

“The commissioners got quite a few complaints about this,” Santarelli said, “but the county didn’t chose to litigate them all. We had to be selective about which ones to pursue, and so we had an informal checklist.”

FOR INSTANCE, if there was another convenient access to public lands, the county would be unlikely to pursue its claim. If it was used only by a couple of hunters in the fall, rather than by the general public during most of the year, the county would likely avoid involvement. And if there wasn’t good documentation, the county would stay out of it, because the litigation would be unlikely to succeed.

Gunnison County never commissioned a full-scale research project like Saguache County’s, Santarelli said. “We looked at them on a case-by-case basis, and documentation was important.”

For instance, the commissioners were asked to assert a right-of-way based on an old toll-road charter. “But the charter just listed each terminus — Gunnison and Irwin — and there was nothing else on record concerning the route between them,” Santarelli said, “so that was an easy decision.”

But in another case, “we had the surveyor’s original field notes from when the road was laid out. We sent out a modern surveyor, and he was able to recreate the exact route, based on those notes. And we were able to maintain the public’s right-of-way.”

Santerelli and Ellen Cox, who was joined by Saguache County Commissioner Mike Oliver, all spoke to the Chaffee County Commissioners last fall. That meeting wasn’t exactly a hearing — it was more like a discussion to see whether Chaffee should consider launching a research effort like Saguache County’s.

Although there were some present who questioned the need for it — after all, it might not be the best way to spend scarce public funds when the sheriff says he can’t keep deputies unless they get a pay raise — the consensus appeared to be that it was worth pursuing.

But nothing has happened since then. There doesn't appear to be much controversy about the county acting to preserve access to public land in cases where traditional routes have crossed private property, and the property owners decide to block the route.

That could change, though. It isn't hard to imagine a situation where a person of considerable means buys such a parcel, and blocks the road, and a lengthy and extensive court battle looms. The commissioners would need political support then, and would they get it?

THEY WOULD ALSO NEED the support of federal land agencies, and their policies vary with who's in charge in Washington. We could reasonably expect Gale Norton to be more road-friendly than Bruce Babbitt was, but will she be willing to push a federal attorney to assist in claiming a public right-of-way? Especially if the opponent, the land-owner, is a major contributor to the right campaigns, or has good political connections?

And even if most RS-2477 issues hereabouts have involved rights-of-way across private lands that had public roads on them before the land was transferred, not all of them have. Some have involved the common American question of whether local or federal authority is in charge, and they've revolved around the motorized vs. non-motorized issue.

For instance, an environmental newsletter from 1997 bitterly attacked the U.S. Forest Service, which "is pushing a policy that would permit counties to claim a highway had been constructed where someone had kicked rocks or trampled weeds on a trail."

This policy, the Road-RIPorter charged, "is bearing bitter fruit. This May, the Rio Grande National Forest in southern Colorado 'validated' a county right-of-way under RS-2477 to a jeep trail, part of which the Forest had closed to motorized use 18 months ago to protect alpine tundra and lakes! Based only on a few maps and surveys presented by motorized vehicle lobbyists, the Forest Supervisor surrendered management of the trail to Alamosa County without public involvement or notification. The Rio Grande National Forest is now working to surrender up to 65 more roads and trails to other counties."

Note the word "surrender," as though the county had gone to war and taken the road from the Forest Service.

On the other side, it's easy to find explanations that these rights-of-way have belonged to the counties since the first wagon rumbled along in 1871 or whenever, and the counties have a right to maintain these corridors as they see fit.

THE ARGUMENTS are full of assumptions and stereotypes. County commissioners are presumed to be "road friendly," although it's hard to imagine the Pitkin or San Miguel county commissioners wanting to open a foot trail to vehicles.

Federal agencies are presumed to be "road hostile," although that could change with the change of administrations in Washington — and then again, it might not. The Bush Administration supports more energy production from public lands, but that doesn't automatically translate into encouraging counties to allow vehicles to enter areas where they aren't welcome now.

And in some ways, it doesn't matter. If Great Grandpa had the right to establish a pack-burro trail across public land in 1883, don't we still enjoy the same right (with rare exceptions) to take pack burros across BLM or national forest lands? In that respect, RS-2477 doesn't matter at all, as long as you're allowed to walk or ride a horse wherever you wish on public land.

But if he took a wagon, does that translate into being able to drive your pickup there now? That question propels much of the RS-2477 controversy, even though motorized land travel was limited to railroads when the law was adopted.

Most of the rest of the controversy, at least when it gets to local courtrooms, concerns access through private land. When county governments act to save that access, they're probably on safe political ground — although the wealthy purchaser of a vast estate for his trophy house can be expected to try to make that parcel as private as possible by trying to block a traditional right-of-way.

RS-2477 is a classic conflict: federal vs. local government; motorized vs. non-motorized transportation; recreation and environmental lobbies vs. development interests; and private vs. public property rights. So it won't go away until we all agree on all those matters — and that's not going to happen during this millennium.

Ed Quillen both drives and walks on RS-2477 rights-of-way, but not nearly often enough — he's usually indoors in Salida working on Colorado Central or some other writing.