

Post Independent RS2477

Old law drives push to open roads

By Donna Gray
Post Independent Staff
6/28/2005

In Moffat County, commissioners have claimed 240 miles of roads on federal lands as county rights of way. Some of those roads travel through the Browns Park National Wildlife Refuge and Dinosaur National Monument.

In Utah, county commissioners have opened Bureau of Land Management Wilderness Study Areas to off-road vehicles in such popular recreation areas as Behind the Rocks, near Moab; and Arch Canyon, Grand Gulch and Cedar Mesa, southwest of Blanding.

Counties across the country have laid claim to roadways on federal lands under a historic law passed after the Civil War to encourage settlement of the western frontier. They've also used it to foil private property owners' attempts to block access to public lands.

Revised Statute 2477 is a one-sentence provision of the Lode Mining Act of 1866, whose simple language has created a hornet's nest of interpretation that is buzzing across the West.

Congress passed the Federal Land Policy and Management Act in 1976, which defined rights of way across federal lands. No roads constructed after the passage of FLPMA are eligible for consideration under RS 2477.

RS 2477 granted rights of way to local governments for the construction of highways over public lands not reserved for other uses such as an Indian reservation. In essence, the statute says that if states, counties or individuals can prove a road has been in use before 1976 or before the land it crossed was reserved, it could still be claimed as a legitimate right of way.

Since then, the law has pitted local governments against the feds, counties against private landowners, with environmental groups and off-road groups, among others, joining the fray.

According to John Lancelot, realty specialist with the Bureau of Land Management state office in Lakewood, RS 2477 claims have been in force for as long as the law has. However, it's come up on the public's radar in recent times because there are more demands on public lands, notably by recreationists and private landowners.

Recreationists and others press RS 2477 claims because of "the lack of access to a lot of areas where recreationists want get to, and I think for that reason there has been more demand on recognizing RS 2477 rights than there might have been in the past," he said.

Some counties have used the statute to carve out access through public lands but shy away from doing so on private lands.

"If a road is going to be RS 2477 on BLM, why not on private lands? A lot of these counties are trying to steer clear of private property and claiming public roads there because private landowners might not want a public road on their property," Lancelot said.

Environmentalists argue that counties are claiming the merest shadow of a road – from game trails to streambeds – as historic roads, and have used the statute to block proposed wilderness areas where motorized vehicles are prohibited.

Last year, the federal Department of the Interior signed an agreement with Utah confirming the state's, and by association, the counties', rights to claim roads under RS 2477. However, it excluded rights of way in national parks, forests and refuges. That agreement is being contested.

During the 2003-2004 legislative session, U.S. Rep. Mark Udall, D-Colo., proposed a bill that would set nationwide standards for rights of way under RS 2477. No action was taken on the bill, and Udall's office is working with Colorado Counties Inc. on another similar bill to reintroduce in the present session, said Udall spokesman Doug Young.

However, if it passes, it would effectively take away the county's right to claim historic roadways, said Garfield County Commissioner John Martin. Martin is the co-chairman of CCI's Colorado Public Lands Steering Committee and sits on the board of directors of the Western Interstate Region of Public Lands of the National Association of Counties.

"It would overturn state law," he said. The legislation, if it passes, would take the right to claim rights of way under RS 2477 out of the hands of states and counties, require road surveys, and set a minimum standard width for roads.

"It would totally be against what is in the original law," Martin said. "It's a one-policy-fits-all with administrative review by the Department of the Interior."

With a significant amount of federal lands within Garfield County and increasing pressure from natural-gas development, RS 2477 is likely to become an issue here.

While the county has not formally claimed any roads on federal land, it has used the statute to settle disputes over access to public land north of Rifle.

"A couple years ago around Big Mountain, a road was closed off (to hunters) by a landowner," said County Commissioner Larry McCown. "We convinced him to open it back up because we said it could qualify under RS 2477."

The county, Martin said, still has on its books a historic toll road that once ran from Sweetwater Lake, in the northeast corner of the county, across the Flat Tops to Trappers Lake. The road was used to haul timber, was deeded to the county and was closed down in 1920 or 1922, he said.

When the Flat Tops Wilderness Area was created in 1975, the area was closed to vehicle traffic.

"The Forest Service said it's closed, and that's just not so," Martin said. However, Martin added, the county would not claim its right of way unless there was "a public necessity."

He also acknowledged that the county could ensure access to natural-gas development areas using RS 2477; however, "nobody's pushing that right now."

Although the county reserves the right to claim rights of way under the statute, McCown said it's not likely it would do so in anything but a piecemeal fashion as issues come up over individual roads.

Researching the history and ownership of each road in the county is very expensive and would be too time-consuming, he added.

"Under the present makeup of the board, we would probably support RS 2477 roads on public land, but we would probably not support it on private land," he said.

As part of the post-Civil War western expansion, Garfield County, which was first settled in the 1880s, is criss-crossed by "horse-and-buggy trails," McCown said. There are many historic mining and land patents that have since reverted to the federal government, many of them in what has been set aside as roadless areas in the White River National Forest, he added.

"It's something we're preserving the right to, but not pursuing at this time. We acknowledge there could be a lot of them in Garfield County."

Road right law can backfire

A historic mining law has proven to be a Pandora's box for some who invoke it.

While county governments in Utah and Colorado have used Revised Statute 2477 to claim rights of way across federal lands – sometimes through wilderness study areas and national parks – federal land management agencies like the U.S. Forest Service have seen another side of the issue.

The law has come into play when a landowner uses it to gain access to private property across national forest lands.

“Often times, what comes before us are private landowners who claim RS 2477 to get access (to their property),” said Ray Langstaff, road specialist with the White River National Forest in Glenwood Springs. What they don’t realize is if the road qualifies under RS 2477 as a right of way across federal lands, then it is also open to the public.

“They use it as a weapon against public agencies, but don’t consider they’re creating a right of way for the public to use,” he said.

However, such a scenario has not played out in the White River, Langstaff added.

To establish a right of way under RS 2477, states, counties or individuals must prove a road has been in use before 1976 or before the land it crossed was reserved or removed from public domain as a national park or forest, for example.

RS 2477 has not been “a big issue” in the White River, Langstaff said. What might prevent it from being used to claim roads across the forest is the history of the White River, he added.

The White River Timber Reserve was created in 1891 and evolved into the national forest, created in 1911. Lands within the reserve were homesteaded at the turn of the century, but because they were within the public domain at the time, access into those homesteads was never established as a public thoroughfare, Langstaff said.

So anyone trying to prove a claim to right of way across the former timber reserve, on much of what is now the White River National Forest, would not have a basis under RS 2477.

Contact Donna Gray: 945-8515, ext. 510

dgray@postindependent.com