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To: BOCC

From: Frank Hutfless

ROAD EASEMENTS UNDER REVISED STATUTES 2477 ("RS 2477")

SUMMARY

"RS 2477 roads", or "2477 roads" are terms commonly used when referring to historic federal public land law (Revised Statutes 2477, passed by Congress as part of the Mining Act of July 26, 1866). Language of 2477 pertinent to this document states that "the right of way for the construction of highways over public lands, not reserved for public uses, is granted." That language has been interpreted by the courts to mean:

    1) The federal government granted easements for the public to cross federal land. They are similar to a Colorado statutory dedication of land for public road purposes. They are often referred to as rights-of-way, or "non-possessory rights" that allow the public to travel along defined routes across federal land.

    2) The easements were accepted by the public at various times when they were placed into public use (probably from the 1857 start of the Colorado gold rush until 1976, when 2477 was repealed). As stated by the 10th Circuit Court of Appeals, they
> "result from use by those for whom the [right-of-way] was necessary or convenient. It is not required that work shall be done on such a road, or that public authorities shall take action in the premises. User is the requisite element, and it may be by any who have occasion to travel over [federal] public lands, and if the use be by only one, still it suffices."

There is no requirement that the county accept the easement by entry, application to the federal government, license, patent (as with a mining claim), written easement or deed. Public use is all that is required.

Thus, a trail, road, or similar route established by the use of one person, wagons, horses, bicycles or motorized vehicles may all qualify as 2477 "highways" or roads.

      3) 2477 easements are not abandoned or lost by subsequent unilateral action of the federal government (for example, after the easement is put into public use, making land available for homestead, establishing military or Indian reservations, or approving mining claims). Likewise, after the easement is established, neither the federal government nor private parties may legally bar easement access by gate or otherwise.

In fact, the 2477 easement would continue in existence until it was abandoned by specific action of the county after the easement is put into public use (for example, by resolution). Mere non-use of the easement, without evidence of the county's clear intent to abandon, is typically not enough.

Although the county may have accepted 2477 easements, litigation may be necessary to publicly clarify the county rights in those easements because it is unlikely such public acknowledgement will be forthcoming from the federal government without litigation.

Litigation would be filed in federal district court, where the county would be required to present "clear and convincing" evidence necessary to win. Research, preparation, motions, and trial may cost approximately $12,000 to more than $35,000 per case, depending on the complexity of the matter and whether the case was handled predominantly in-house or by retained attorneys. Each road would require a separate trial, so the foregoing costs would be multiplied by the number of cases filed.

It is not clear whether any 2477 cases are barred by statutes of limitations. That would depend on whether the county knew the 2477 easements were claimed or used exclusively by the federal government, and whether more than twelve years have elapsed since the county first "knew or should have known" of the federal government's claim to the easement. The statute of limitations was not raised in any of the court decisions reviewed for this document, so a determination of when the county "knew or should have known" about the federal government claim to the 2477 easements, when actions or events occurred that contributed to that knowledge, and when the statute of limitations started to run would be determined with reference to the facts on a case-by-case basis.