



**The Road More or Less Traveled: The Debate Over RS 2477 Access**

Rocky Mountain Land Use Institute

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Moderator's Overview

*“The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted.”*

Why does this single sentence, enacted by Congress as part of the Mining Law in 1866 (codified as Revised Statute 2477), and repealed by the Federal Land Policy and Management Act of 1976, still matter? This panel will try to answer that question.

“RS 2477” may sound obscure, but the names of the areas it affects surely do not. Trail Ridge Road was established under RS 2477 before Congress set aside Rocky Mountain National Park. *State of Colorado v. Toll*, 268 U.S. 228 (1925). RS 2477 has generated “highway” claims or judgments for roads in Colorado National Monument, *Wilkenson v. Department of Interior*, 634 F. Supp. 1265 (D.Colo. 1982), in national parks in Alaska, *U.S. v. Vogler*, 859 F.2d 638 (9<sup>th</sup> Cir. 1988), in national forests, *Humboldt County v. U.S.*, 684 F.2d 1276 (9<sup>th</sup> Cir. 1982), and in proposed wilderness areas across the American west. *See e.g., Sierra Club v. Hodel*, 848 F.2d 1068 (10<sup>th</sup> Cir. 1988); *Southern Utah Wilderness Alliance v. BLM* (“SUWA”), 147 F. Supp.2d 1130 (D. Utah 2001) *appeal dismissed*, 2003 WL 21480689 (10<sup>th</sup> Cir. 2003).

No matter what your perspective – as a developer needing access across federally owned land, as a County regulating development and requiring access roads at certain standards, as a citizen advocating public land preservation – RS 2477 is a legal force to be reckoned with. It may tie a proposed project up in knots, or threaten to create a highway over a dirt track in wilderness, or solve all of a project’s access problems, or create confusion about overlapping federal and local authority. Therein lies its ongoing importance, and its controversy.

Adding to the controversy is the fact that RS 2477 issues can have a long dormancy period. For example, a wagon road or four-wheel drive track created on unreserved public domain land at the turn of the 20<sup>th</sup> century may have fallen into disuse, only to spring to life 100 years later with the assertion of an RS 2477-based claim to improve that track or road to present-day highway standards. Assume that after the wagon road was created, Congress reserved the federal land on which the track lies as a national park, forest or wilderness area. As a result, the public expects that the land is protected from building of new or improved roads or highways. The claimant

expects that the right-of-way constitutes a valid existing right and can be maintained, modernized and expanded. The land manager is squarely in the cross-fire, sometimes resisting assertions of RS 2477 access, as in the *Humboldt County* case, and sometimes facilitating those claims, as in the *SUWA* case.

RS 2477 itself provides few answers to the host of legal issues it raises. The panelists will debate what those answers are, or should be.