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Beware the consequences of RS 2477 right-of-way claims

By Jana and Ron Smith

RS 2477, or the Mining Law of 1866, has been a controversial issue in the news recently. Most discussions have focused on the use of this obsolete law, written decades before the automobile was invented and repealed in 1976, to claim road rights of way in national parks, BLM wilderness-study areas and other public lands.

An aspect of RS 2477 that few have spoken out about is the potential this statute has to deprive private landowners of their property rights.

More than 25 years ago, we bought a ranch in Kane County. Before doing so we carefully researched the history of the property as it was important to us that we could maintain its remote and wild character, which included very limited access. We had never heard of RS 2477 and had no concerns about public roads through our property. Until 1997, that is, when we came home from a trip to find that our county attorney had taken the liberty to drive through our property, cut a chain off our locked gate and remove half a dozen "Private Property" signs.

With no notification, no explanation of the county's position, and certainly in violation of our constitutional right to due process, Kane County was claiming RS 2477 "highways" through our property.

For the next two and a half years we tried to settle this issue with county officials -- some of whom were sympathetic and helpful -- outside of a courtroom. We attended county commission meetings, wrote letters to county officials and the governor, provided complete documentation of our property rights -- all the time thinking that someone would realize the mistake that had been made.

We got nothing but a run-around.

As a result of having our roads declared open to the public, local citizens were confused about whether or not we could control access. Some hunters and ORV users, believing that we were denying access, became angry and cut our fences, tore down signs and left our gates open.

After Kane County ran a road grader through our property in 1999, it was painfully clear that further efforts to avoid litigation were useless. We were forced to hire an attorney and file a lawsuit. One year later the courts permanently stopped the RS 2477 proponents, awarding us the rights and title to our property that we knew we had in the first place.

RS 2477 is potentially a serious threat to other western land owners. Utah state and county officials pushing RS 2477 claims in an effort to gain control over federal land, particularly wilderness, are also asserting that if a wagon, a horse or a motorized vehicle made a trail years ago across land that is now privately owned, the owner may unknowingly have a public road through his property.

As we discovered, a very ambiguous statute is being interpreted to declare trails and

two-track roads that begin and end nowhere and serve no purpose to the public as RS 2477 public highways. Proponents claim that once these rights of way are established, they cannot be abandoned.

In light of what we experienced regarding RS 2477, we are extremely troubled at the recent memorandum of understanding signed between Utah Gov. Mike Leavitt and Interior Secretary Gale Norton. The memorandum states there will be no RS 2477 right-of-way claims in some areas, such as national parks and wilderness, yet it is not at all clear if such claims can be made in the future, leaving the long-term protection of public lands in question.

The governor claims the memorandum works toward resolving the roads issue, but much is left open to interpretation and potential abuse. While the memorandum states that it will settle the roads debate by focusing only on "real roads," these "real roads" are not defined. Without clear and sensible criteria by which RS 2477 claims can be established, all western lands, private and public, will remain subject to right-of-way claims, legitimate or not.

In our dispute with Kane County, no one could define clearly for us what constitutes a public road. Evidence of construction and maintenance? The mere existence of tire tracks, regardless of how old and how overgrown by sagebrush? The fact that a road leaves private property and enters public land? Do legitimate public roads include creek bottoms and wagon trails?

These are questions that must be answered before RS 2477 claims are processed. We urge Gov. Leavitt to set the needed standards. Just as importantly, a process should be in place that allows public input on each RS 2477 claim asserted to ensure that all of us who enjoy the spectacular and beautiful landscape we call Utah have a say in the future of our public lands, and in the protection of our private property rights.

Ron and Jana Smith live on the ranch they operate outside Kanab.