



**EARTHJUSTICE**

*Because the earth needs a good lawyer*

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October 27, 2006

The Honorable Ted Stewart  
U.S. District Court, District of Utah  
350 South Main Street  
Salt Lake City, UT 84101-2180

**Re: Kane County v. Kempthorne, Case No. 2:05-cv-941 TS**

Dear Judge Stewart:

At yesterday's hearing concerning the Defendants Department of the Interior *et al.*'s (DOI's) Motion to Dismiss (Docket #17) and Defendant-Intervenor Southern Utah Wilderness Alliance *et al.*'s (SUWA's) Motion for Judgment on the Pleadings (Docket #23), this Court asked counsel to provide citation to legal precedent concerning the authority of federal land management agencies to limit the type of use within a valid R.S. 2477 right-of-way. Pursuant to the Court's request, we hereby submit additional citation.<sup>1</sup>

In *Clouser v. Espy*, 42 F.3d 1522, 1538 (9th Cir. 1994), *abrogation on other grounds recognized in Fed. Lands Legal Consortium v. United States*, 195 F.3d 1190, 1195 (10th Cir. 1999), the plaintiff challenged a Forest Service decision prohibiting the use of motor vehicles on a route alleged to be an R.S. 2477 right-of-way. The Ninth Circuit held that *even if* the routes were valid rights-of-way, the Forest Service had authority to bar motorized vehicle use on alleged R.S. 2477 route: "regardless whether the trails in question are public highways under R.S. § 2477, they are nonetheless subject to the Forest Service regulation." *Clouser*, 42 F.3d at 1538. *See also San Juan County v. United States*, 420 F.3d 1197, 1210 & n.7 (10<sup>th</sup> Cir. 2005), *rehearing en banc pending* (citing cases as supporting National Park Service's statement that the agency "will still be able to regulate [motor vehicle] traffic to some extent even if San Juan [County] has a[n R.S. 2477] right-of-way"); *United States v. Jenks*, 22 F.3d 1513, 1518 (10<sup>th</sup> Cir. 1994) (in case in which agency sought to impose conditions regulating the use of roads to which plaintiff claimed easement rights, court held: "Under basic principles of property law, these [easement] rights would still be subject to regulation by the Forest Service as the owner of the servient estate"); *Wilkenson v. Dep't of Interior*, 634 F.Supp. 1265, 1278-80 (D. Colo. 1986) (indicating that the National Park Service could regulate vehicle size, cargo, speed, *etc.* of motor vehicle traffic within national monument).

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<sup>1</sup> The Court's request arose in the context of a discussion concerning the breadth of the Plaintiffs' Complaint. If this Court denies the pending motions, SUWA respectfully requests that this Court clarify the scope of any surviving claims so that the parties can pursue this litigation in as efficient and straightforward fashion as possible.

**Attachment 4**



**CERTIFICATE OF SERVICE**

I hereby certify that on this 27<sup>th</sup> day of October 2006, I filed a true and exact copy of letter of October 27, 2006 with the Court's CM/ECF system, which will generate a Notice of Filing and Service on the following:

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s/ Edward B. Zukoski