

No. 08-4090

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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THE WILDERNESS SOCIETY, ET AL.,  
PLAINTIFFS-APPELLEES,

v.

KANE COUNTY, UTAH, ET AL.,  
DEFENDANTS-APPELLANTS.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF  
UTAH, CIVIL NO. 2:05-CV-0854 TC  
THE HONORABLE TENA CAMPBELL

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**BRIEF OF AMICUS CURIAE NATIONAL TRUST FOR HISTORIC  
PRESERVATION IN SUPPORT OF AFFIRMANCE AND IN SUPPORT OF  
PLAINTIFFS-APPELLEES**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1(a), Amicus Curiae National Trust for Historic Preservation in the United States hereby states it has no parent corporations, is not a publicly-traded entity that has issued stock, and therefore, there is no publicly held corporation that owns ten percent or more of its stock.

Dated November 17, 2008.

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## STATEMENT OF INTEREST

The National Trust for Historic Preservation in the United States (National Trust) is a private, nonprofit organization chartered by Congress in 1949 to further the historic preservation policies of the United States and to facilitate public participation in historic preservation. 16 U.S.C. §§ 461, 468. The Chairman of the National Trust has also been designated by Congress as a member of the Advisory Council on Historic Preservation, the agency created by Congress to administer the National Historic Preservation Act (NHPA). *Id.* § 470i(a)(8). With the strong support of more than 265,000 members nationwide, and approximately 3,000 member organizations, the National Trust works to protect significant historic sites and to advocate historic preservation as a fundamental value in programs and policies at all levels of government. In addition to its headquarters in Washington, D.C., the National Trust has nine regional offices throughout the country, including the Mountains/Plains regional office in Denver, Colorado.

The National Trust has a long-standing interest in federal agency stewardship of historic and cultural resources on the public lands, and has frequently participated as amicus curiae in cases seeking to uphold the protection of historic properties on the public lands.<sup>1</sup> The National Trust wishes to participate

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<sup>1</sup> See, e.g., Mountain States Legal Found. v. Bush, 306 F.3d 1132 (D.C. Cir. 2002); Wyo. Sawmills, Inc. v. U.S. Forest Serv., 383 F.3d 1241 (10th Cir. 2004); Natural Arch & Bridge Soc’y v. Alston, No. 02-4099, 2004 U.S. App. LEXIS 5446 (10th Cir. Mar. 23, 2004); San Juan

as amicus curiae in this case because the potential reversal of the lower court's decision in favor of the Appellants could have far-reaching implications for the management and protection of historic properties on public lands throughout the West.

All parties to this action have consented to the filing of this brief pursuant to Fed. R. App. P. Rule 29(a).

### **STATEMENT OF THE CASE**

Federal public lands contain some of America's most significant historic and prehistoric resources, including those located in the Grand Staircase-Escalante National Monument (the Monument). Federal land managers, such as the Bureau of Land Management (BLM), are required by federal law to protect and preserve these resources. See, e.g., 43 U.S.C. § 1701(a)(8) (requiring the protection of historic and archaeological values on the public lands). Restrictions on motorized vehicle developed in land use plans help BLM carry out its federal preservation requirements.

Kane County's ordinance and actions directly undermined BLM's authority to restrict motorized vehicle use in order to protect cultural and natural resources from damage or destruction. Kane County defends itself by claiming ownership

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County v. United States, 420 F.3d 1197 (10th Cir. 2005), rev'd en banc, 503 F.3d 1163 (10th Cir. 2007); State of New Mexico ex rel. Richardson v. Bureau of Land Mgmt., 459 F. Supp. 2d 1102 (D.N.M. 2006); Kane County, Utah v. Kempthorne, 495 F. Supp. 2d 1143 (D. Utah 2007).

over the affected roads under R.S. 2477. However, as the district court rightfully found, the County has never validated any of its R.S. 2477 claims in court. Consequently, the federal government still owns the public lands affected by the County's actions and federal law governs their management.

The National Trust is concerned about the potential ramifications for the Monument as well as other culturally significant areas of the public lands if this Court accepts the County's argument and reverses the lower court's decision. Such a decision would confer unprecedented management authority on local governments over the public lands and drastically limit BLM's ability to protect cultural and historic resources from damage due to motorized vehicle use.

## **ARGUMENT**

### **I. THE COUNTY VIOLATED THE SUPREMACY CLAUSE.**

This appeal raises the question of whether unproven claims to R.S. 2477 rights-of-way (ROWs) can override the presumption of federal ownership on the public lands.<sup>2</sup> The County asks this Court to answer this question in the

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<sup>2</sup> "Public lands" is defined in the Federal Land Policy and Management Act as:

any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership, except—

- (1) lands located on the Outer Continental Shelf; and
- (2) lands held for the benefit of Indians, Aleuts, and Eskimos.

43 U.S.C. § 1702(e).

affirmative and, in doing so, seeks a new and unprecedented exception to the presumption of federal ownership – the “established rule” that resolves doubts in favor of “the Government, not against it.” United States v. Union Pac. R.R. Co., 353 U.S. 112, 116 (1957); S. Utah Wilderness Alliance v. Bureau of Land Mgmt., 425 F.3d 735, 769 (10th Cir. 2005) [hereinafter SUWA v. BLM]. This Court should reject the County’s request because, as this Court has previously held, the presumption applies notwithstanding the untested R.S. 2477 claims of county governments under R.S. 2477. SUWA v. BLM, 425 F.3d at 769. In any event, the County has not rebutted the presumption of federal ownership by showing that a court has previously validated any of its ROW claims. Thus, this Court should affirm.

**A. The Presumption Of Federal Ownership Governs This Dispute.**

The presumption of federal ownership over the R.S. 2477 claims of the County controls. When doubts are raised in disputes that involve questions of title in federal land, courts presume federal ownership. Union Pac. R.R. Co., 353 U.S. at 116. Although limited exceptions do exist to this rule, none apply here. See, e.g., State of Utah v. Kleppe, 586 F.2d 756, 761 (10th Cir. 1978) rev’d on other grounds sub nom. Andrus v. Utah, 446 U.S. 500 (1980) (presumption not applicable to school land grants); Gov’t of Guam, ex rel. Guam Econ. Dev. Auth. v. United States, 179 F.3d 630, 638 (9th Cir. 1999) (presumption not applicable to

Native American land grants). The County argues for a new exception, Appellant’s Br. at 30–32, one that would allow the County to defeat the presumption of federal ownership by merely claiming ownership over ROWs on the public lands, without any requirement to prove the validity of such claims in court. This Court has already rejected that argument in SUWA v. BLM, and it should do so again here.

In SUWA v. BLM, this Court extended the presumption of federal ownership to R.S. 2477 cases like the one now before it. 425 F.3d at 769. This Court did so after deciding the question of which party bore the burden of proof under R.S. 2477 by allocating that burden to “those parties seeking to enforce rights-of-way against the federal government.” Id. at 768 (quotations omitted). “This allocation of the burden of proof to the R.S. 2477 claimant is consonant with federal law and federal interests.” Id. at 769. The County provides no valid reason why this Court should not follow its previous ruling in SUWA v. BLM and apply the presumption of federal ownership to the County’s R.S. 2477 claims.

**B. The County Has Not Carried Its Burden of Proof.**

The County has not overcome the presumption of federal ownership in the roads that are the subject of the County’s R.S. 2477 claims. As the district court found, the “County has not presented evidence of any court adjudication that any of its claimed R.S. 2477 rights-of-way is valid.” The Wilderness Society v. Kane

County, Utah, 560 F. Supp. 2d 1147, 1151 (D. Utah 2008); see also Kane County, Utah v. Kempthorne, 495 F. Supp. 2d 1143, 1159 (D. Utah 2007) (same).

Consequently, this Court must presume that the federal government retains title to the County's R.S. 2477 claims unless and until the County proffers evidence showing that a court has previously validated these claims.

On point here is Montanans for Multiple Use v. Barbouletos. 542 F. Supp. 2d 9 (D.D.C. 2008). In Barbouletos, plaintiffs claimed that roads closed by the U.S. Forest Service in Montana's Flathead National Forest were actually valid R.S. 2477 ROWs. Id. at 18. Because the Federal Land Policy and Management Act (FLPMA) expressly preserves "valid existing rights," including ROWs under R.S. 2477, plaintiffs alleged that the Forest Service's decision was *ultra vires*. Id. The district court rejected this contention, concluding that

[t]he Supreme Court made abundantly clear in Block [v. North Dakota], 461 U.S. 273 (1983) that the [Quiet Title Act] QTA provides the exclusive means to challenge the United States' title to real property, and despite their attempt to characterize it otherwise, plaintiffs here seek to challenge the United States' title to real property outside the QTA and its strictures.

Id. at 20. The district court then dismissed plaintiffs' claim.

The County now stands in the shoes of the Barbouletos plaintiffs. It has neither brought a QTA claim during the pendency of this lawsuit, nor has it previously established title in any ROWs through a QTA action against the United States. The Wilderness Society, 560 F. Supp. 2d at 1149. Although the County

may continue to assert ROW claims under R.S. 2477, those interests are not “valid” – and are therefore not preserved by FLPMA – unless and until proven in court. Kemphorne, 495 F. Supp. 2d at 1159; see also Block v. North Dakota, 461 U.S. 273, 291–92 (1983) (“Nothing prevents the claimant from continuing to assert his title, in hope of inducing the United States to file its own quiet title suit. . . .”). Thus, the County has not met its burden.

### **C. The County’s Actions Are In Conflict with Federal Law.**

The County’s actions as they affect routes and areas closed to motorized vehicle use in the federal management plan for the Monument violate the Constitution’s Supremacy Clause. Under the Supremacy Clause, state and local laws and actions are preempted to the extent “actual conflict” exists with federal law. English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990); see also Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 605 (1991) (extending the Supremacy Clause to local ordinances). Here, the Monument’s management plan represents the controlling legal authority for motorized vehicle use on the public lands within the Monument. BLM, Grand Staircase-Escalante National Monument Management Plan 3 (Nov. 1999) [hereinafter Monument Plan], available at [http://www.blm.gov/pgdata/etc/medialib/blm/ut/grand\\_staircase-escalante/planning/monument\\_management.Par.83655.File.dat/GSENM%20Management%20Plan.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/ut/grand_staircase-escalante/planning/monument_management.Par.83655.File.dat/GSENM%20Management%20Plan.pdf) (last visited Nov. 17, 2008). The map accompanying this plan depicts the areas and routes on the

public lands that are closed to motorized vehicle use. *Id.* at Map 2. By actively encouraging motorized vehicle use in these areas and on these routes, the County's actions and ordinance directly conflict with the Monument's management plan. Consequently, these actions are preempted by federal law under the Supremacy Clause.

## **II. FEDERAL PRESERVATION INTERESTS ARE VINDICATED WHEN COURTS INSIST ON PRIOR ADJUDICATION OF THE VALIDITY OF R.S. 2477 ROW CLAIMS.**

The district court's decision vindicates the federal interest in protecting and preserving historic properties. Over 271,000 cultural resources have so far been identified on the public lands managed by BLM nationwide, many of which are significant and thus eligible for or listed in the National Register of Historic Places. BLM, "Preserve America" Report 11 (Sept. 2005), available at [http://www.blm.gov/heritage/docum/PreserveAmerica/EO13x2\\_30Nov05.pdf](http://www.blm.gov/heritage/docum/PreserveAmerica/EO13x2_30Nov05.pdf) (last visited Nov. 17, 2008). Millions more likely exist as only 7 percent of the public lands have been inventoried for cultural resources. U.S. Dep't of the Interior, Budget Justification and Performance Information for Fiscal Year 2009: Bureau of Land Management III-93 (undated), available at [http://www.doi.gov/budget/2009/data/greenbook/FY2009\\_BLM\\_Greenbook.pdf](http://www.doi.gov/budget/2009/data/greenbook/FY2009_BLM_Greenbook.pdf) (last visited Nov. 17, 2008). The decision below ensures that the federal interest in preserving these resources through restrictions on motorized vehicle use will not be overridden by the unproven claims of local

governments to R.S. 2477 ROWs. If the County seeks management authority over the ROWs, then it must first comply with this Court’s decision in SUWA v. BLM and prove ownership in court. 425 F.3d at 769. The County has not yet done so, and this Court must affirm.

**A. Federal Law Requires The Protection and Preservation Of Historic Properties On the Public Lands.**

Federal law protects and requires BLM to preserve historic properties on the public lands. Under the NHPA, BLM must “assume responsibility for the preservation of historic properties” under its jurisdiction. 16 U.S.C. § 470h-2(a)(1). Similarly, FLPMA instructs BLM to manage the public lands in a manner that will protect “historical” and “archeological” values. 43 U.S.C. § 1701(a)(8). Still other authorities contain preservation mandates that provide specific areas of the public lands with added federal protection. See, e.g., Proclamation No. 6920, 61 Fed. Reg. 50,223 (Sept. 24, 1996) (establishing the Grand Staircase-Escalante National Monument and requiring BLM to manage the Monument for the primary purpose of protecting prehistoric, historic and scientific objects of interest).

In the NHPA, Congress recognized that “historic properties significant to the Nation’s heritage are being lost or substantially altered,” and that “the preservation of this irreplaceable heritage is in the public interest.” 16 U.S.C. §§ 470(b)(3), 470(b)(4). The NHPA established the federal government’s policy to “administer federally owned, administered, or controlled prehistoric and historic resources in a

spirit of stewardship for the inspiration and benefit of present and future generations.” Id. § 470-1(3). To effectuate this policy, Congress requires all federal agencies to “take into account” the effects of their actions on historic properties prior to approving any proposed undertaking. 16 U.S.C. § 470f; see also Pueblo of Sandia v. U.S. Forest Serv., 50 F.3d 856, 859 (10th Cir. 1995) (outlining how federal agencies are to “take into account” historic properties under Section 106 of the NHPA). Congress also mandated that federal agencies “establish . . . a preservation program for the identification, evaluation, and nomination to the National Register of Historic Places, and protection of historic properties.” 16 U.S.C. § 470h-2(a)(2). Finally, Congress required federal agencies to ensure that historic properties under the “jurisdiction or control” of the agency are “managed and maintained in a way that considers the preservation of their historic, archaeological, architectural, and cultural values” and gives “special consideration to the preservation of such values in the case of properties designated as having National significance.” Id.

In FLPMA, Congress determined that the public lands should be managed “in a manner that will protect,” among other values, those that are “historical” and “archeological.” 43 U.S.C. § 1701(a)(8). Congress ordered BLM to implement this policy by undertaking inventories of “all public lands and their resource and other values,” id. § 1711(a), and to utilize the information garnered through the

inventories in the development of land use plans. Id. § 1712; see also id. § 1701(a)(2) (“the national interest will be best realized if the public lands . . . and their present and future use is projected through a land use planning process”). Congress also directed BLM to identify areas with “important historic, cultural, or scenic values” and “give priority to the[ir] designation and protection” as “areas of critical environmental concern” during land use planning. Id. § 1712(c)(3). Finally, Congress instructed BLM to “take any action necessary to prevent unnecessary or undue degradation” of historic properties on the public lands. Id. § 1732(b).

While the NHPA and FLPMA apply generally to the public lands, other federal authorities govern the management of specific resources and areas. For instance, the proclamation establishing the Monument states that BLM “shall manage the monument . . . to implement the purposes of this proclamation,” which include “protecting the objects identified” in the proclamation. 61 Fed. Reg. at 50,225; see also Jennifer J. Walt Box D Ranch, 172 IBLA 300, 312–13 (2007) (requiring the protection of objects identified in presidential proclamations issued under the Antiquities Act). Among the objects identified for protection in the proclamation are the “[h]undreds of recorded sites include[ing] rock art panels, occupation sites, campsites and granaries” as well as the numerous “undocumented sites that exist within the monument. . . .” 61 Fed. Reg. at 50,224. The

proclamation also declared that these sites are of “significant scientific and historic value worthy of preservation for future study.” Id.

Federal preservation mandates require BLM to preserve and protect historic properties on the public lands. If accepted by this Court, the County’s arguments would prevent BLM from fulfilling these mandates for areas subject to unadjudicated R.S. 2477 claims. Therefore, this Court should affirm.

**B. Reversing The Decision Below Would Jeopardize BLM’s Ability To Implement And Enforce Motorized Travel Restrictions In Land Use Plans For Other Areas With Significant Cultural Resources.**

The Monument’s management plan closed areas and routes to motorized travel in part to protect cultural resources. See Monument Plan at 46 (closing routes based on the protection of “Monument resources”). Other land use plans recently enacted or proposed by BLM contain similar restrictions. See, e.g., BLM, Moab Field Office Record of Decision (ROD) and Approved Resource Management Plan (RMP) 19 (Oct. 2008), available at [http://www.blm.gov/pgdata/etc/medialib/blm/ut/moab\\_fo/rmp/rod\\_approved\\_rmp.Par.12919.File.dat/Moab%20ROD-Approved%20RMP.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/ut/moab_fo/rmp/rod_approved_rmp.Par.12919.File.dat/Moab%20ROD-Approved%20RMP.pdf) (last visited Nov. 17, 2008) (closing 2,079 miles of motorized vehicle routes, 16.6 of which were closed due to cultural resource “conflicts”); BLM, Draft RMP & Draft Environmental Impact Statement, Canyons of the Ancients National Monument 2-123, 4-288 (Sept. 2007) [hereinafter CANM Draft RMP], available at <http://www.blm.gov/rmp/canm/deis.html> (last visited

Nov. 17, 2008) (closing 86 miles of roads to motorized vehicle use in Draft RMP's preferred alternative); BLM, Monticello Field Office Proposed RMP and Final EIS ES-5 (Aug. 2008), [hereinafter Monticello Proposed RMP], available at [http:// www.w.blm.gov/ut/st/en/fo/monticello/planning/draft\\_rmp\\_eis.html](http://www.blm.gov/ut/st/en/fo/monticello/planning/draft_rmp_eis.html) (last visited Nov. 17, 2008) (closing 219 miles of motorized vehicle routes). If the County were to prevail in this dispute, then local governments throughout the West could prevent BLM from implementing and enforcing motorized travel restrictions in land use plans through R.S. 2477. This could adversely affect historic properties on public lands throughout the West, because local governments are not bound by the requirements of federal historic preservation laws.

One of the other areas where BLM has recently proposed restrictions on motorized travel to protect historic properties is Canyons of the Ancients National Monument (Canyons of the Ancients). Established by proclamation in 2000, Canyons of the Ancients contains "the highest known density of archaeological sites in the Nation" as well as a "rugged landscape" with "intertwined natural and cultural resources. . . ." Proclamation No. 7317, 65 Fed. Reg. 37,243 (June 13, 2000). "The monument offers an unparalleled opportunity to observe, study, and experience how cultures lived and adapted over time in the American Southwest." Id. Like the Monument, BLM must manage Canyons of the Ancients for the

primary purpose of protecting the historic, prehistoric and scientific objects identified in the proclamation. Id. at 37,244.

In October 2007, BLM issued for public notice and comment a draft RMP and EIS for Canyons of the Ancients. Notice of Availability of the Canyons of the Ancients Draft RMP and Draft EIS, Colorado, 72 Fed. Reg. 60,877 (Oct. 26, 2007). The draft RMP includes a transportation plan outlining the “actions, including road closures and travel restrictions, necessary to protect the objects of the Monument. . . .” CANM Draft RMP at 1-8. The travel plan, if adopted and implemented as proposed, would: (1) close 86 miles of existing roads to motorized vehicle use; (2) “[p]rohibit cross-country motorized and mechanized (e.g., mountain bike) travel” throughout the monument; and (3) close “[m]ost existing user-created roads. . . .” Id. at 2-124; 4-288. Consequently,

[t]he majority of the Monument . . . would be promoted as an outdoor museum, allowing visitors to experience the Monument through self-discovery. This alternative would protect cultural resource communities and/or sites to protect the potential for archaeological information at the landscape level. Protecting large blocks of land may prevent future road development from weaving between cultural sites.

Id. at 4-492. We believe these stewardship and management initiatives at Canyons of the Ancients would be threatened if this Court were to reverse the lower court’s decision and adopt the County’s argument.

Another area that we believe would be threatened by a decision in favor of the County is Cedar Mesa, a broad plateau in southeastern Utah under the

jurisdiction of BLM's Monticello Field Office. Cedar Mesa houses the "greatest concentration of Anasazi Indian cultural remnants" on the public lands.

Requirement for Special Recreation Permit and Fee for Non-commercial Recreation Use of the Grand Gulch portion of the Cedar Mesa Special Recreation Management Area, 56 Fed. Reg. 46,440 (Sept. 12, 1991). In places, site densities range from 20 to 200 sites per square mile. Compare BLM, San Juan Resource Management Plan Management Situation Analysis 4333-12 (Sept. 1985)<sup>3</sup> with CANM Draft RMP at 3-149 ("Portions of the Monument have very high site densities, exceeding 100 site per square mile.").

In recent years, many of the historic properties on and around Cedar Mesa have been damaged by motorized vehicle use. According to BLM,

OHV activity on the Mesa is resulting in both primary and secondary impacts to cultural resource sites. Primary impacts are the result of OHV use on cultural resource sites. For example, OHV riders both create and follow trails that pass directly through cultural sites. Similarly, the central depression and walls of at least one partially buried prehistoric kiva have been repeatedly used for the loading and unloading of OHVs. Secondary impacts include increased scouring and erosion of cultural resource sites as a result of vegetation loss from OHV use and dispersed camping related to OHV use.

Monticello BLM Field Office, Analysis of Management Situation 4-33 (Jan. 2005), available at <http://www.blm.gov/ut/st/en/fo/monticello/planning/2.html> (last visited Nov. 17, 2008); see also Notice of Closure of Public Lands to Off-Highway

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<sup>3</sup> BLM formerly referred to the public lands now within the Monticello Field Office as the San Juan Resource Area.

Vehicle (OHV) Use, 72 Fed. Reg. 57,067 (Oct. 5, 2007) (closing portions of Recapture Canyon near Cedar Mesa due to “considerable adverse effects from unauthorized trail construction and OHV use to cultural resources”). Accordingly, in a recent revision to the RMP for the Monticello Field Office, BLM proposed closing several areas within Cedar Mesa to motorized vehicle use, including a 37,388-acre area encompassing the Grand Gulch National Historic District. Monticello Proposed RMP at 2-37, 39. In the portions of Cedar Mesa outside the closed areas, BLM has also proposed to limit motorized travel to designated routes and close several routes to protect cultural resources. *Id.* at ES-3, Map 63.

Granting local governments the authority to manage unproven R.S. 2477 ROWs in places like Canyons of the Ancients and Cedar Mesa would emasculate motorized travel restrictions in BLM land use plans. The integrity of historic properties on the public lands in the West could experience severe adverse effects, because local governments, unlike BLM, are not required to manage historic properties in “a spirit of stewardship for the inspiration and benefit of present and future generations” 16 U.S.C. § 470-1(3), or in any way that gives “special consideration” to the “preservation of their historic, archaeological, architectural, and cultural values,” *id.* § 470h-2(a)(2)(B). Thus, this Court should affirm.

**C. Local Control Over Unadjudicated R.S. 2477 Claims Discourages The Issuance and Enforcement Of Temporary Closure Orders.**

This case arose in the context of an alleged conflict between motorized travel restrictions in a BLM land use plan and unproven R.S. 2477 ROW claims in areas subject to the restrictions. Land use plans, however, are not the sole means by which BLM can restrict motorized travel on the public lands. BLM may also do so through temporary closure orders when OHVs “are causing or will cause considerable adverse effects” on cultural, historical or other resources. 43 C.F.R. § 8341.2(a); Utah Shared Access Alliance v. Carpenter, 463 F.3d 1125, 1135–36 (10th Cir. 2006) (upholding the use of temporary closure orders as a means of restricting motorized vehicle travel on the public lands). Conferring local governments with management authority over unproven R.S. 2477 ROWs would have an enormous chilling effect on the use of this essential land management tool.

In 1978, President Carter issued Executive Order No. 11989 and provided BLM with the closure authority now codified at 43 C.F.R § 8341.2. This order “strengthened . . . considerably” the oversight of OHV use on the public lands by allowing BLM to close areas immediately and without resort to the time-intensive procedural requirements of the land use planning process. Utah Shared Access Alliance, 463 F.3d at 1130, 1136; see also Sierra Club v. Clark, 756 F.2d 686, 690 (9th Cir. 1985) (noting that 43 C.F.R. § 8341.2 creates “a separate duty to close without regard to the designation process” of land use planning). Temporary closure orders are expedient because they do not require the preparation of an

environmental analysis before BLM renders the decision to close. Utah Shared Access Alliance, 463 F.3d at 1136. Nor must the closure order undergo public notice and comment prior to issuance. Id. at 1135. In short, temporary closure orders “reflect[] the realities of public land management” and allow BLM to respond immediately when OHVs are endangering or harming historic and cultural resources. Id. at 1136.

The authority to manage unproven R.S. 2477 ROWs now sought by the County would negate the effectiveness of temporary closure orders. No longer could BLM act quickly when motorized vehicle use endangered or harmed cultural or historical resources on the public lands. Rather, BLM would be forced to pursue a more time consuming course of action, counter to the intent of E.O. 11989. For example, BLM could decide to issue a closure order but, before doing so, engage local governments in potentially lengthy consultation over whether the closure would affect any ROWs claimed by these entities under R.S. 2477. Meanwhile, motorized vehicle use in the areas subject to the proposed closure would continue and possibly cause or compound the very adverse effects on cultural or historic resources that initially moved BLM to act. Further, this course of action would provide local governments with de facto veto authority over BLM closure decisions, because an R.S. 2477 claim within an area proposed for closure would effectively disqualify this area from the closure order.

Alternatively, BLM could issue and implement the closure order without consulting with local governments about potentially affected R.S. 2477 ROWs. This particular course of action could engender conflict between BLM and local governments of the kind that led to the present dispute, and could prospectively discourage these parties from pursuing the “communication and cooperation” over R.S. 2477 claims previously recommended by this Court, SUWA v. BLM, 425 F.3d at 748, particularly if local governments took affirmative actions in opposition to the closure.

Finally, BLM could do nothing at all in response to motorized vehicle use that causes or threatens to cause damage to cultural or historic resources. This scenario would clearly frustrate the purpose of E.O. 11989, because public lands experiencing the “considerable adverse effects” of motorized vehicle use would remain open to this use. Additionally, if BLM failed to act after making a “considerable adverse effect” determination pursuant to the regulation, the federal government would be exposed to litigation by parties with an interest in the regulation’s enforcement. See Utah Shared Access Alliance, 463 F.3d at 1130 (describing the duty to close under 43 C.F.R. § 8341.2 upon a “considerable adverse effect” finding as “nondiscretionary”).

None of the scenarios described above would serve the federal government’s interests and stewardship responsibilities for historic preservation. Yet, each is a

plausible outcome of providing local governments with management authority over unadjudicated R.S. 2477 ROWs. A better rule and one that serves federal preservation interests would instead require local governments to prove their R.S. 2477 claims through a QTA action against the United States before management authority over ROWs on the public lands passed to them. This bright line rule would clarify the relative rights and responsibilities of each level of government concerning the management of unproven R.S. 2477 ROWs, and would also promote respect for federal restrictions on motorized vehicle use enacted for the purpose of protecting historic properties on the public lands.

### CONCLUSION

For the reasons set forth above, amicus curiae requests that the Court affirm the order of the district court.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32(a)(7)(B)(i), I hereby certify that the foregoing brief is in compliance with Fed. R. App. P. 29(d), 32(a)(5), and 32(a)(7) since it is written in a proportionally spaced typeface of 14 points and contains 4,438 words.

/s/ Elizabeth S. Merritt

Elizabeth S. Merritt

## **CERTIFICATE OF DIGITAL SUBMISSION**

Pursuant to the Tenth Circuit's General Order No. 95-01, dated August 10, 2007, I hereby certify that:

- (1) all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF is an exact copy of the written document filed with the Clerk, and
- (2) the digital submissions have been scanned for viruses with the most recent version of commercial virus scanning program (McAfee VirusScan, v.8.5.0.781, updated Nov. 17, 2008) and, according to the program, are free of viruses.

/s/ Elizabeth S. Merritt

Elizabeth S. Merritt

## CERTIFICATE OF SERVICE

I certify that, therefore, Brief of Amicus Curiae National Trust for Historic Preservation has been served on the Clerk of the U.S. Court of Appeals on November 17, 2008, via electronic mail (esubmission@ca10.uscourts.gov). The original and seven (7) copies of this brief will be delivered to the Clerk of the U.S. Court of Appeals within two (2) business days pursuant to the Tenth Circuit's General Order No. 95-01, dated August 10, 2007. Finally, I certify that the foregoing amicus curiae brief was served upon all parties of record via electronic mail on November 17, 2008.

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