



Moffat County Commissioners
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1-31-2005

Jeremy Casterson
Bureau of Land Management
455 Emerson Street
Craig, CO 81625

Jeremy,

Moffat County appreciates the chance to provide the following scoping comments as a local government, a Cooperating Agency, a member of the community and Northwest Colorado Stewardship (NWCOS). We are encouraged by the Bureau of Land Management's (BLM) effort to involve the citizen interests through NWCOS. This is an important step that we all hope proves fruitful as the Resource Management Plan (RMP) develops.

In accordance with the September 2, 2004 Memorandum of Understanding between Moffat County and the BLM, we are encouraged to assist the BLM in practical aspects of developing the RMP. The County is particularly interested in helping to create an RMP that is consistent with Moffat County planning documents, adequately balances social and economic needs with a healthy and productive landscape, uses local input to develop alternatives, and incorporates valid existing rights throughout the planning process and implementation.

The attachments accompanying these comments includes supporting documentation for positions Moffat County has taken relative to the following comments.

1) County Land Use Plan and other Local Government Plans- In addition to several state and federal Laws, the Code of Federal Regulation, and the National Environmental Policy Act (NEPA), Section 202 of the Federal Land Policy and Management Act (FLPMA) requires consistency and coordination of federal plans with local government plans. Moffat County has numerous position statements and recommended action steps to achieve the County's positions in the 2001 Land Use Plan. The County Land Use Plan highlights a significant portion of Moffat County's policies regarding federal land actions and we request full consistency by the BLM with this and the below mentioned planning documents.

The September 2002, Northwest Colorado Working Landscape Pilot Project outlines a vision for Moffat County's viability which is based on a healthy social, economic, and environmental structure. It outlines Moffat County's desire to enhance ecosystem health and local economic stability through an interactive land management decision-making

process across landscapes directly involving all stakeholders. Although this Pilot Project plan is visionary, it identifies a process by which the RMP process will involve the citizens and users of the land affected by the RMP process and outlines a vision for “Adaptive Management.”

In addition, Moffat County has a current Undesirable Plant Management Plan, a County Fire Plan, four community-specific Pre-emergency and Wildfire Mitigation Plans, a very specific “Right to Farm and Ranch Policy,” and a Master Plan. Moffat County expects full consistency in the RMP with all county planning documents, and any RMP process’ or outcomes that are not fully consistent with them shall be accompanied by a full and detailed explanation as to why consistency did not occur.

2) Social and Economic Analysis - Moffat County requests that the 2004 Economic Development Report (completed by Colorado State University, the 2005-2006 Community Indicators Project, and the regular Northwest Colorado Economic Reviews from the Associated Governments of Northwest Colorado be incorporated in the Socio Economic section of the RMP and Analysis of the Management Situation (AMS). We see it vital that cooperating agencies and NWCOS guide additional analysis than is typically performed in traditional RMP’s. We request the BLM and its contractors fully engage NWCOS and the Cooperating Agencies in supplementing the traditional types and extent of socio economic analysis performed in RMP’s.

3) Multiple Use and Special Land Designations - Moffat County supports Multiple Use on federal lands and supports prioritizing, or considering primary uses, in multiple use designated areas based on sound science, community input and fair social and economic impact evaluations. This should not be misunderstood to construe that one land use should outweigh or somehow diminish the importance of other existing multiple uses.

Moffat County is on record as opposing:

- a) 1994 Citizens Wilderness Proposal and 2001 amendments
- b) 2000 Citizen Proposed Vermillion National Monument
- c) 2001 proposed Browns Park Refuge Expansion and other executive orders creating special land designations,
- d) Representative Diana DeGette’s Wilderness Bill, which has typically been introduced to Congress annually.
- e) 2001 Re-Inventory of the Vermillion Basin for Wilderness Character.

Moffat County has opposed the above listed proposals as they have not addressed valid existing rights, insufficiently analyzed the economic impacts to the County, do not have broad based local support, have ignored local planning efforts and federal laws and regulations. Moffat County recommends the Little Snake RMP not consider the above proposals without a full analysis of their social and economic impacts to local custom’s and cultures, full consideration of their impacts on valid existing rights, and broad based local support. Important issues have traditionally been ignored in the above listed proposals. For example, the Vermillion Basin natural gas reserves have been estimated

to produce hard cash revenue (after royalty and other deductions) between \$234,721 and \$938,885 annually to Moffat County's budget for the next 40 years. In addition, concepts of "Net Effects, Adaptive Management, or Outcome Based Management" have not been evaluated. This would include focusing on the potential effects and monitoring the progress of users (i.e. grazers, oil/gas, recreation). The concepts of "net effects" coincide with "outcome-based management" or "adaptive management", holding the users responsible for achieving desired future conditions through monitoring rather than prescribing how the users operate.

Moffat County supports special land designations that support rather than conflict with multiple use concepts and the custom and culture of Moffat County. We value undeveloped character, solitude, and other intangible characteristics that contribute to, rather than substitute for, the customs and cultures and working landscapes existing in Moffat County. The County Land Use Plan identifies these working landscapes as sustaining many uses and industries, including but not limited to:

- Agriculture (cattle/sheep ranching, small grain and hay farming)
- Mineral exploration and extraction (coal, gas, and oil, gravel)
- Electric power generation and transmission
- Motorized recreation (hunting, snowmobiles, dirt bikes, four-wheelers, jeep use, motorboats, jet-skis, etc.)
- Non-motorized recreation (hunting, hang gliding, horse packing, hiking, rafting, canoeing, fishing, bird watching, etc.)
- Rare species management (Greater Sage Grouse recovery efforts and Black-Footed Ferret reintroductions)
- Water right issues (Agricultural, industrial, and municipal etc.)

4) Endangered / Rare Species Management and "Safe Harbor"- Moffat County supports the current Black Footed Ferret Reintroduction plan and other endangered species management so long as private landowner rights have been protected and federal assurances exist to protect the multiple use of federal lands, such as the Non-Essential Experimental designation (Section 10j of the Endangered Species Act). We recognize the U.S. Fish and Wildlife Service manages endangered species, but we also acknowledge BLM manages their habitat. Therefore we recommend this RMP address "Safe Harbor" type protections be extended to all public land users that benefit endangered or rare species management (Plant or Animal). Safe harbor protections should protect the investments by public land users to improve habitat and species, and assure they are not negated by an administrative change in policy or agreements.

5) Valid Existing Rights –

Valid existing rights arise on public lands by operation of statute or an act of secretarial discretion. Solicitor's Opinion, 88 Int. Dec. 909 (1981). As such, they are not limited to Moffat County's R.S. 2477 rights-of-way, but may include oil and gas leases, right-of-way authorizations such as utility corridors, pipelines and power lines, valid mining claims, easements, grazing permits and private water rights. *See e.g., Hage v.*

United States, 35 Fed. Cl. 147 (1996); Solicitor's Opinion, 88 Int. Dec. at 914; Solicitor's Opinion, 86 Int. Dec. 89, 116 (1979); BLM Land Use Planning Manual 1601, ch.06G; 50 Fed. Reg. 31777, 31778 (1985). Valid existing rights are immune from denial or extinguishment by the exercise of secretarial discretion and may be developed to the extent authorized by the issuance of the approval document. They may not be regulated to the point where the regulation unreasonably interferes with enjoyment of the benefit of the right. 88 Int. Dec. at 914.

One of BLM's key objectives for the Little Snake RMP is to establish an active travel management program with "baseline of data describing the existing transportation routes within the planning area in order to actively manage and gauge travel, access and OHV use within the planning areas for the benefit of the public and the natural resources." Draft Analysis of the Management Situation (AMS), p. 3-103.

While the process will "include consideration" of Moffat County's RS 2477 inventory protocol, maintenance protocol and Resolution 2003-05 (January 2003), BLM claims that "[resolution of RS 2477 assertions is a legal issue beyond the scope of this RMP effort." BLM asserts that it will establish management for the transportation system "in accordance with existing policies and guidelines and with existing available information." *Id.* at 3-105. Existing agency policy, however, requires BLM to recognize and integrate the R.S. 2477 rights-of-way claimed by Moffat County in the planning process.

All decisions made in land use plans must be subject to valid existing rights, which include rights-of-way. Land Use Planning Manual 1601, ch.06G. State law is used to determine whether a public right of way has been established, and under Colorado law, acceptance of the R.S. 2477 right of way is determined by use prior to withdrawal from the public domain, not construction. *Barker v. Board of County Commissioners of the County of La Plata, Colorado*, 49 F. Supp.2d 1203, 1214 (D. Colo. 1999); *Wilkinson v. DOI*, 634 F. Supp. 1265, 1272 (D. Colo. 1986); *Leach v. Manhart*, 77 P.2d 652, 653 (Colo. 1938).

Given the record evidence Moffat County has compiled in demonstrating perfected rights-of-way, the BLM must account for the County's claimed R.S. 2477 rights-of-way in the Little Snake RMP. See *Sierra Club v. Hodel*, 848 F. 2d 1068, 1088 (10th Cir. 1988) (R.S. 2477 rights-of-way are "valid existing rights"). This is not to say that BLM must adjudicate or resolve Moffat County's R.S. 2477 assertions; rather, BLM must identify and recognize the claimed rights-of-way in developing comprehensive travel management.

Otherwise, BLM's objective to "actively manage and gauge travel, access and OHV use" cannot be achieved. Without the recognition of county roads, for example, how else could BLM determine what roads and trails should be designated and added to the official road system, or what roads and trails should be maintained, upgraded, abandoned, or constructed. Preparation Plan Analysis for the Little Snake Field Office RMP Revision, p. 20.

Recognition of Moffat County's claimed R.S. 244 rights-of-way is entirely consistent with BLM travel management policy which recognizes that "most existing roads and trails on public lands **were created by use over time**, rather than planned and constructed for specific activities or needs." As a result, "BLM is directed to consider a broader range of possibilities for management of individual roads and trails" in the land

use planning process. BLM Instruction Memorandum No. 2004-005, *Clarification of OHV Designations and Travel Management in the BLM Land Use Planning Process*, Attachment 2-3 (October 1, 2003).

In this context, “Road and trail access (and OHV management) guidance will be incorporated in every RMP to ensure public and resource needs are met.” Thus, BLM must “use road and trail inventory information from all available sources including counties in identifying a transportation network. *Id.* at 1, Attachment 2-3. In Colorado, such transportation planning specifically includes the consideration “all valid, existing rights including RS 2477.” Response to Public Comment to the Recreation Management Guidelines to Meet Public Land Health Standards on BLM Lands in Colorado, p.9. (December 11, 2000).

Consequently, Moffat County believes that BLM must incorporate the identified R.S. 2477 rights-of way in the development of comprehensive travel management for the Little Snake Resource Area. To ignore such claims not only contradicts BLM policy but contravenes federal law requiring BLM to assure that its land use plans are consistent with local plans, to the extent they conform to federal law. 43 U.S.C. §1712(c)(9).

In this regard, the congressional moratorium pertaining to the recognition, management or validity of R.S. 2477 rights-of-way is limited to rule or regulation, and does not prohibit BLM from addressing public road issues in the planning process. Moreover, as previously stated, the record developed by Moffat County is based on and consistent with federal law, including Colorado federal case law regarding roads across federal land. To the extent Moffat County’s claims may be inconsistent with Secretary Babbitt’s 1997 R.S. 2477 direction, it is merely policy, not law.

Please contact the Moffat County Commissioners at 970.824.9141 or Jeff Comstock at 970.826.3400 if there are further questions regarding these comments.

Darryl Steele, Chairman
Moffat County Commissioner

Tom Gray, District 1
Moffat County Commissioner

Saed Tayyara, District 2
Moffat County Commissioner

Enclosures / Attachments

Moffat County Land Use Plan
Moffat County RS 2477 Resolution
Moffat County RS 2477 Maintenance Protocol
Moffat County RS 2477 Map
Report to the White House regarding the proposed Vermillion National Monument
Letter to Gale Norton regarding the proposed Vermillion National Monument
Right to Farm and Ranch Policy
Moffat County Comments on the Vermillion Basin Wilderness Character Re-Inventory