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ENVIRONMENTAL LAW CLINIC AT STANFORD UNIVERSITY

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Re: BLM Cannot Approve a Non-Binding Determination Validating Bald Knoll Road as an R.S. 2477 Right-of-Way

Dear Director Sierra and Mr. Craddock:

On behalf of The Wilderness Society, Wild Utah Project (WUP), Center for Biological Diversity, and the Southern Utah Wilderness Alliance (SUWA) (collectively "TWS"), Earthjustice submits these comments on the Utah State Office of the Bureau of Land Management's preliminary non-binding determination of the existence of an R.S. 2477 right-of-way for the Bald Knoll route in Kane County.

The Wilderness Society, its 1,250 Utah members, and 200,000 members nationwide, SUWA, its 15,000 members, the Center for Biological Diversity, WUP, and other members of the public are closely watching how the BLM addresses these applications. Utah has stated its intent to claim 10,000 or more R.S. 2477 rights-of-way on federal public lands. The State and/or its counties could submit scores – if not thousands – of additional claims under the so-called Norton policy of March 22, 2006. It is therefore imperative that BLM set a high standard for protecting the public's interest in the public's lands by establishing a fair, public-friendly, and transparent process that complies with federal land management and environmental laws, and that rigorously analyzes all publicly available evidence, not just that submitted by the applicant.

For the reasons set forth below, TWS urges BLM not to issue a non-binding determination (NBD) for the Bald Knoll route.

First and foremost, the BLM must reject the non-binding determination for the Bald Knoll route because the process and application would set a bad precedent for the agency. Kane County has trespassed across federal public lands by placing illegal road signs on BLM lands including the Grand Staircase-Escalante National Monument and wilderness study areas. It has also posted signs on the route at issue here, Bald Knoll. The BLM must resolve the larger trespassing issue before considering any request made by this County to effectively validate any R.S. 2477 claims.

Additionally, the agency has not established a rigorous process for evaluating evidence. If BLM approves this NBD on the basis of the evidence that BLM states it is relying on, the agency would set a low bar for reviewing evidence, accepting applications for NBDs, and ensuring the public has access to all evidence and agency files. The County did not even

delineate the exact contour or location of the right-of-way it wishes to have validated as an R.S. 2477 claim. On this basis alone, BLM should not have even initiated the NBD process.

This is the first application considered under the Norton policy and will therefore set a national precedent that will affect the consideration of NBDs adjacent to and through National Parks, Wildlife Refuges, and BLM lands. The Bald Knoll application itself and the BLM's process for reviewing the application fail to set a good example for DOI agencies across the country.

We wish to make clear, however, that while issuing the proposed NBD for Bald Knoll pursuant to R.S. 2477 is illegal and inappropriate, Kane County could apply for a right-of-way pursuant to Title V of FLPMA, 43 U.S.C. §§ 1761-1771. This would enable the County to pursue a time-tested, lawful course of action to obtain a permit to maintain the route while ensuring that federal environmental protections and public participation requirements remain in place.

SUMMARY.

BLM must not issue a non-binding determination for the Bald Knoll route. The application was submitted under an illegal process, a process designed to improperly lower the standards for obtaining rights to federal lands. Further, the application is accompanied by insufficient information to support a valid claim, or even a "non-binding" determination, under this process.

First, the NBD process adopted pursuant to the so-called "Norton policy" is illegal because the Norton policy itself is illegal. The Norton policy is illegal because it violates the Congressional ban on final rules related to R.S. 2477, because the policy is a rule that was promulgated without notice and comment as required by the Administrative Procedure Act, and because effectively surrendering an interest in a right-of-way exceeds BLM's legal authority.

Second, Kane County has failed to submit evidence for the route that meets the County's burden of demonstrating that an R.S. 2477 right-of-way was granted – namely that "construction" of a "highway" took place prior to the earlier of either the lands being reserved or the repeal of R.S. 2477 on October 21, 1976. It has submitted vague, unconvincing, contradictory, and irrelevant data and mere hearsay concerning the critical standards set in law.

Tellingly, Kane County admits that it has no official records at all prior to October 21, 1976 concerning highway construction or maintenance, or County funding of such activities. For this reason alone, BLM must reject the County's application.

Third, while TWS does not always have easy access to records maintained by BLM, Utah's counties, or the State, TWS located considerably more documentation concerning the route than the scant evidence provided by the County, and the additional information located and reviewed by BLM. The information TWS located raises significant legal and factual questions concerning the credibility of County's submissions and the validity of the County's claim. The evidence TWS located shows, among other things, the following:

- Coal leases along the Bald Knoll route that imply a permittee could have constructed part of the route;
- Federal, State and county maps fail to show the route or portions of the route existed before October 21, 1976;
- A letter from Kane County admits that it does not have any files that indicate it maintained or constructed the Bald Knoll route before October 21, 1976; and
- Range Improvement case files that do not mention the route, and in fact show a fence crossing the route at two locations without any means of passage (e.g., a cattle guard).

The information TWS presents here is the very type of documentation that the County and its attorneys have admitted they should submit, and that BLM has admitted it should review. The County's failure to locate or disclose the information to BLM – particularly in light of similar failures concerning Utah's first disclaimer of interest application for the Weiss Highway, which the State later withdrew – is further indication of the inadequacy of the application, and raises troubling questions concerning the quality and diligence of the County's research.

Should BLM issue an NBD for the Bald Knoll route, such approval would demonstrate the unlawfully low bar that the agency intends to set for future R.S. 2477 claims, many of which may damage ecologically sensitive or otherwise significant public lands. BLM cannot and must not effectively grant R.S. 2477 rights-of-way based on such scant evidence. The management of lands owned by all Americans is at stake. BLM must not surrender significant management control of public lands from the American people without a rigorous review of all available information and compelling evidence that a claim is valid.

Therefore, we urge BLM to deny the NBD for the Bald Knoll route, and encourage Kane County to abandon its application, and to instead to pursue a FLPMA Title V permit, something the County has already done for a portion of this route.

I. BLM SHOULD NOT REWARD KANE COUNTY FOR ITS PAST ATTEMPTS TO UNDERMINE FEDERAL AUTHORITY ON PUBLIC LANDS.

First and foremost, the BLM should not consider any request from Kane County to review the validity of R.S. 2477 claims given Kane County's long-standing and flagrant violation of law in asserting management control over federal lands. In April 2005, former State Director Wisely contacted Kane County officials after they illegally posted hundreds of road signs on BLM lands, including wilderness study areas and the Grand Staircase-Escalante National Monument. She said, "I am very concerned that such actions, which result in conflicting management directives, may likely present serious safety issues to members of the public, possibly subject them to legal exposure, and cause resource damage." Director Wisely requested that Kane County immediately remove its signs. In October 2006, then acting State Director Henri Bisson repeated Ms. Wisely's words and again told the County to remove its signs. Despite repeated requests for their removal, these signs are still in the ground (including some on the Bald Knoll claim). See pictures V1 and V3 at http://www.blm.gov/ut/st/en/prog /more/lands_and_realty/rs2477_rights-of-way/bald_knoll_road_non/supporting_informatiion/ photos___map.html). Many of these signs invite damaging and illegal use in violation of

existing BLM management plans. Despite this fact, the BLM has – to our knowledge – done nothing to remove the signs and make the county accountable for its illegal actions.

Per Instruction Memorandum (IM) 2006-159, setting out the procedures for issuing NBDs, even if the BLM issues a final written NBD to the county, "the BLM still retains its right and obligation to avoid undue degradation to the surrounding and underlying land it manages by enforcing reasonable regulations on the land and rights-of-way across it." See BLM, Instruction Memo 2006-159 (May, 26, 2006), attached as Exhibit 1. BLM has both the right and the responsibility to impose conditions as part of this NBD to ensure that our public lands are protected. However, Kane County's ongoing flagrant disregard for the BLM's authority, at the same time that the agency is considering its claim, indicates that the County will likely not comply with any such direction from the BLM. Accordingly, processing the NBD for Kane County's claim under the current circumstances is essentially an abdication of the BLM's obligation to prevent degradation of the public lands. In addition, considering an NBD for Bald Knoll while Kane County refuses to acknowledge BLM's authority appears to reward the County for its past unlawful and destructive acts. BLM should not do so and should therefore take no further action on the County's application.

II. THE NORTON POLICY IS ILLEGAL.

A. The Norton Policy and Its Implementation by BLM.

On March 22, 2006, without submitting the matter to public notice and comment under the Administrative Procedure Act (APA), 5 U.S.C. § 553(b), Department of the Interior (DOI) Secretary Gale Norton promulgated "implementation guidance" labeled "Departmental Implementation of Southern Utah Wilderness Alliance v. Bureau of Land Management; Revocation of Jan. 22, 1997 Interim Policy; Revocation of Dec. 7, 1988 Policy." See Exhibit 2, attached. Secretary Norton issued the policy guidance because, she said, the SUWA v. BLM decision "effectively require[s] the Department to alter its current administration of RS2477." Policy at 4. The guidance accomplishes a number of things. First, it repeals the 1997 "Babbitt Policy" that had been in effect. The Babbitt Policy declared that determinations of R.S. 2477 claims by DOI would be "postponed" unless there was a compelling need to make a decision, and set forth the standards under which claims would be determined when it was necessary to do so. Second, it sets forth the standards and procedures by which DOI agencies would make "nonbinding determinations" (i.e., administrative recognition) of claims when asked to do so, noting that DOI agencies should make these decisions on a "preponderance of the evidence" standard and incorporating some of the findings of the SUWA decision with respect to state law, construction, land reservations, etc.[1] Third, it noted that maintenance of a valid right of way by

[1] Secretary Norton's claim that this change in policy was "required" by the SUWA v. BLM is false. While SUWA v. BLM was clear that Interior may not adjudicate R.S. 2477 claims itself, it did not hold that DOI agencies are required to make administrative determinations whenever asked or necessarily address the standards to be used in making those determinations. Similarly, the decision does not require DOI to establish it as the governing standard for the Department across the nation; DOI simply chose to do so.

its holder (i.e., those that had either been formally adjudicated or subject to some administrative recognition) does not require coordination or permission from the Department, but that improvements do.

The Norton Policy contains instructions for subordinate Interior agencies on the handling of R.S. 2477 right-of-way claims. It explicitly rescinds earlier DOI policies on the matter, including what amounted to a moratorium on right-of-way determinations, known as the "Babbitt Policy." It also provides a new framework to be used by Interior officials in making NBDs on the validity of right-of-way claims. On May 31, 2006, BLM issued step-down guidance implementing the Norton Policy. See BLM, Instruction Memo 2006-159, Exhibit 1. BLM's preliminary NBD for Bald Knoll was developed pursuant to, and relies upon, the Norton Policy and BLM's Instruction Memorandum (IM). See BLM, Preliminary NBD, Asserted Right-of-Way Pursuant to R.S. 2477, Bald Knoll Road, Kane County, Utah (July 2007) (citing the Norton Policy and IM 2006-159 as "relevant authority")), attached as Exhibit 3.

B. The Norton Policy Is a Rule.

The Norton Policy explicitly declares that it is "guidance," not a rule or regulation. However, the label an agency chooses to place on a document is not dispositive, and it is common for courts to conclude that agency policies, guidance or statements in fact constitute "rules." See e.g., Columbia Broadcasting System v. United States, 316 U.S. 407, 416 (1942) (an agency's label is not "conclusive" – it is the "substance" of the agency's intent that matters). The Norton Policy meets the APA's broad definition of "rule" because it applies generally to how the agency will treat administrative recognition of R.S. 2477 claims in the future. It further "implements" and "interprets" R.S. 2477 and the SUWA v. BLM decision. For example, the Norton Policy and BLM IM establish a new framework for effectively validating R.S. 2477 claims, which "supplements" rather than simply "construes" either R.S. 2477, or SUWA v. BLM. See Chamber of Commerce v. OSHA, 636 F.2d 464, 469 (D.C. Cir. 1980).[2]

C. The Norton Policy Violates the Congressional Ban on Final Rules Related to R.S. 2477.

Over the past dozen years, DOI has tried to establish mechanisms for determining which R.S. 2477 claims were validly granted. Beginning in 1995, Congress relieved it of any authority to do so. In 1995, Congress passed a provision which forbade any agency of the Federal government from "tak[ing] any action to prepare, promulgate, or implement any rule or regulation addressing rights-of-way authorized pursuant to section 2477 of the Revised Statutes…." Section 349(a)(1) of the National Highway System Designation Act, Pub. L. No.

[2] For example, the Norton Policy and BLM IM order Interior agencies to apply SUWA v. BLM nationally even though it is only a Tenth Circuit decision. In doing so, Norton Policy "creates new rights or duties" for Department officials and right-of-way claimants outside of the Tenth Circuit court's jurisdiction, where the "legislative basis for agency enforcement would otherwise be inadequate." American Mining Congress v. Mine Safety and Health Administration, 995 F.2d 1106, 1109 (D.C. Cir. 1993).

104-59, 109 Stat. 568, 617-618 (1995). This moratorium was effective through September 30, 1996.

Before this provision expired, Congress took more permanent action to prohibit DOI action. Reflecting the depth of the controversy associated with this issue, there was no consensus in Congress on how to proceed with free-standing legislation on the subject. So Congress passed Section 108 of the Omnibus Interior Appropriations Bill for Fiscal Year 1997. This statute provided:

> No final rule or regulation of any agency of the Federal Government pertaining to the recognition, management, or validity of a right-of-way pursuant to Revised Statute 2477 (43 U.S.C. 932) shall take effect unless expressly authorized by an Act of Congress subsequent to the date of enactment of this Act.

110 Stat. 3009-200, attached as Exhibit 4. The Comptroller General, in a letter to numerous Congressional requesters dated August 20, 1997, # B-277719, ruled that the provision is permanent law. See Exhibit 5, attached.

The Norton Policy and the BLM IM clearly pertain to the recognition, management, or validity of R.S. 2477 rights-of-way, as forbidden by Congressional action.

Legislative history suggests that the Norton Policy is exactly the type of rule Congress meant to prohibit when it barred rules pertaining to recognition of an R.S. 2477 rights of way. The language of the relevant statutory provision first appeared as substitute language to Senate Bill 1425, 104th Cong. "Revised Statutes 2477 Rights-of-Way Settlement Act." See S. Rep. 104-261 at 1. As the Senate later explained,

> As originally written S. 1425 provided a process by which RS 2477 rights-of-way could be validated by means other than a quiet title action in the courts. Because of controversy over the legislation the Full Committee on May 1, 1996 passed a substitute amendment by voice vote. The substitute amendment placed a permanent moratorium on any agency of the federal government from issuing final regulations on RS 2477 without Congressional approval.

S. Rep. No. 160, 105th Cong., 2nd Sess. (1998) at *10-**11 (emphasis added), excerpts attached as Exhibit 6. Thus, the issue Congress wanted to address, but delayed, because of controversy and disagreement was providing a mechanism other than a suit under the Quiet Title Act for establishing the validity of claimed R.S. 2477 rights-of-way. This is precisely what Secretary Norton has attempted to do through her March 22, 2006 policy. BLM clearly intends to effectively grant R.S. 2477 rights-of-way to claimants, relieving such claimants from having to file a quiet title action to gain recognition of their rights of way.[3]

[3] While the Norton Policy itself alleges that the NBD process does not result in a "binding determination," the agency gives every indication that it will treat such a determination as binding upon the agency and the world. BLM will treat routes for which a positive NBD is made in each and every way as identical to a court-validated R.S. 2477 rights-of-way, even going

Moreover, Congressional action on R.S. 2477 in the mid-1990s was provoked by a proposed rule that would have provided an administrative process for determining the validity of claimed rights-of-way. The committee report accompanying S. 1425 cited regulations proposed by the DOI in 1994 as a reason for the moratorium. One of the main goals of the 1994 proposed regulation was to "offer[] a way to have rights validated without pursuing court actions," 59 Fed. Reg. 39,216, 39,217 (Aug. 1, 1994), precisely what BLM now intends to do through the Norton Policy.

In sum, the Norton Policy and BLM IM which make the processing of rights-of-way possible were adopted in violation of the 1997 Congressional ban on the promulgation of such rules.

D. The Norton Policy Is Illegal Because the Interior Department Failed to Provide an Opportunity for Notice and Comment as Required by the APA.

Even if the Congressional prohibition on rulemakings concerning did not apply, the Norton Policy would be illegal because all rules must be published in accordance with the APA. The APA requires agencies to provide public notice and receive public comment on any proposed substantive rule before implementation. 5 U.S.C.S. §553(b), (c). DOI provided no notice or opportunity for comment prior to issuing the Norton Policy, thereby violating the APA. See American Mining Congress v. Mine Safety and Health Administration, 995 F.2d 1106, 1109 (D.C. Cir. 1993).

E. The Norton Policy Contradicts Well-Settled Law.

Under federal caselaw, those asserting claims to rights-of-way bear the burden of proof on all R.S. 2477 claims. In general, "the established rule [is] that land grants are construed favorably to the [United States] Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." See Watt v. Western Nuclear, Inc., 462 U.S. 36, 59 (1983), quoting United States v. Union Pacific R.R. Co., 353 U.S. 112, 116 (1957).

In a section of the opinion that was dicta, and unsupported by any applicable caselaw, the SUWA v. BLM decision stated that in assessing the validity of R.S. 2477 claims, "questions of fact would be decided by the court on a preponderance of the evidence standard." 425 F.3d at 750. The Norton policy directly relies on this dicta in establishing the agency's standard of review for NBDs. Norton policy at Attachment 1, p. 7("Once it has gathered this information, the bureau should decide 'on a preponderance of the evidence standard' if it supports the existence of a right of way under State law in effect prior to the repeal of R.S. 2477. See SUWA v. BLM at 750."). See also IM 2006-159 (once BLM has gathered relevant

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so far as to modify the United States' Master Title Plats to note the burden of an easement against the U.S. In short, there will be no functional difference between a court-determined R.S. 2477 right-of-way and a route for which an NBD has been issued.

information and comments, "it should decide whether a preponderance of the evidence exists to support the claimed right-of-way use").

This standard has no basis in law, and in fact is directly contradicted by other precedent, much of it also cited in the SUWA v. BLM opinion. Supreme Court and appeals court precedent requires that all doubt as to whether and R.S. 2477 right-of-way exists must be resolved in favor of the United States. An R.S. 2477 claimant has the burden of establishing that each route claimed meets the criteria set down by the law. As the SUWA v. BLM decision recognizes:

> This allocation of the burden of proof to the R.S. 2477 claimant is consonant with federal law and federal interests. As the district court noted, "[T]he established rule [is] that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." [SUWA v. BLM,] 147 F.Supp.2d [1130 (D. Utah 2001)] at 1136 (quoting Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983), in turn quoting United States v. Union Pac. R.R. Co., 353 U.S. 112, 116 (1957)) (brackets in district court opinion).

425 F.3d at 769.

The Tenth Circuit's conclusion is bolstered by additional Supreme Court precedent requiring that all doubt as to whether a land grant – such as a right-of-way under R.S. 2477 – has been conveyed is resolved in favor of the United States. Northern Pacific Ry. v. Soderberg, 188 U.S. 526, 534 (1903) ("Nothing passes by implication, and unless the language of the grant be clear and explicit as to the property conveyed, that construction will be adopted which favors the sovereign rather than the grantee"); Caldwell v. United States, 250 U.S. 14, 20 (1919) (land grants must be construed "favorably to the government. . . . [N]othing passes but what is conveyed in clear and explicit language – *inferences being resolved not against but for the government*" (emphasis added)); Andrus v. Charlestone Stone Products, 436 U.S. 604, 617 (1978) (quoting Union Pacific R.R. Co.).

Federal courts have applied this not only to the interpretation of law concerning R.S. 2477 but to the burden placed on claimants as well. Thus, this principle applies to the determination and scope of individual R.S. 2477 rights-of-way. For example, in Fitzgerald v. United States, 932 F. Supp. 1195, 1201 (D. Ariz. 1996), the court stated:

> To establish an R.S. 2477 easement, plaintiffs must show that the road in question was built before the surrounding land was reserved for a National Forest. Adams v. U.S., 3 F.3d 1254, 1257 (9th Cir. 1993). Any doubt must be resolved in favor of the government. U.S. v. Gates of the Mountains Lakeshore Homes, Inc., 732 F.2d 1411, 1413 (9th Cir. 1984).

See also Humboldt County v. United States, 684 F.2d 1276, 1280 (9th Cir. 1982) ("Any doubt as to the extent of the grant must be resolved in the government's favor"); Southwest Four Wheel Drive Ass'n v. BLM, 271 F. Supp. 2d 1308, 1313-14, (D. N.M. 2003) ("Doubts as to whether land was reserved for public use is resolved in favor of the government"); United States v. Balliet, 133 F. Supp. 2d 1120, 1129 (W.D.Ark. 2001) ("Any doubt as to the scope of the grant

under R.S. 2477 must be resolved in favor of the government").

Supreme Court and other precedent thus requires that when weighing whether an R.S. 2477 right-of-way exists, the court must resolve all doubts in favor of the United States. This means that if any doubt exists as to whether an R.S. 2477 right-of-way exists, the courts cannot rule in favor of the claimant.

BLM, of course, is not a court, and can, if it chooses, adopt a different standard for making an NBD, which is merely a conclusion that a right-of-way *likely* exists and the agency will *in its discretion* treat a route as if a right-of-way *does* exist. However, it would not be prudent for BLM to surrender significant control over maintenance and use of a route to a county or State, as it apparently intends to do in issuing an NBD, by using a standard of review that is far more generous than one established by the courts. Because BLM's process will be less rigorous than that of a court (in terms of the rules of evidence required), BLM must use an abundance of caution in making NBDs including conducting gathering all proof necessary to demonstrate that there is absolutely no doubt as to the outcome.

III. BLM MUST ESTABLISH A RIGOROUS, EXACTING PROCESS IN ADDRESSING THIS AND FUTURE NBD APPLICATIONS.

If BLM truly intends to resolve alleged R.S. 2477 right-of-way claims, the agency needs to propose to Congress a process that, at the very least, meets the minimum standards for recognizing that a right-of-way was granted under the plain language of R.S. 2477. In such a process, BLM must apply a standard of proof that requires that claimants meet their burden of demonstrating that a highway was constructed over unreserved public lands.

A. BLM should protect its authority, the public lands, and effectively involve the interested public.

In the event that the BLM intends to proceed with validity determinations in the face of the policies' failings and illegality, the BLM should protect its authority, the public lands, and effectively involve the interested public. Our concerns are discussed in greater detail in our letter sent on August 25, 2006 to acting State Director Bisson (Exhibit 7). In sum:

- We believe that BLM should use a rigorous, inclusive, and law-based process that places the burden squarely on the claimant to prove that a right-of-way was granted. We recommend that BLM develop a process similar to that used by the agency in reviewing the R.S. 2477 rights-of-way alleged to exist by Garfield, Kane, and San Juan Counties at issue in the SUWA v. BLM case. That process provided an opportunity for all interested parties to participate, utilized reasonable and transparent standards, and reached sound conclusions based on the evidence before the agency and the applicable law at the time.

- Because BLM is exercising its discretion in making these decisions, and because these decisions can lead to a change in conditions on the ground, State offices must

comply with the National Environmental Policy Act and other laws prior to making its decision.

- The State offices must adopt safeguards to ensure that it does not make decisions that undermine the ability of adjacent land-owners to protect their lands from potential claims. Therefore, the State offices must not process any claims that may impact adjacent land-owners without their consent.

- In order to ensure that BLM retains the necessary flexibility to protect public lands, the State offices should not delay closing areas or routes to vehicle travel, or making other transportation management decisions, while considering NBDs. BLM's guidance specifically permits this result.

- NBDs will require considerable staff time and money to complete. The State offices should make no NBDs unless funding is available to do so. We strongly recommend recovering costs from the State or county requesting NBDs.

- Matters concerning the use of alleged public highways on public lands will be of great interest to the public. The State offices should adopt specific measures to ensure that robust and effective public comment can occur. For example, the State offices should ensure that the public has access to draft determinations and evidence concerning claims in a timely manner by promptly posting such documents on their websites, and conducting public outreach beyond press releases including publishing a Federal Register notice.

- State offices must not misinterpret the key holdings of the Tenth Circuit's recent decision in making NBDs. That decision requires that state law not be used where it would conflict with federal law, and did not reach the issue of whether R.S. 2477 rights-of-way could include non-vehicular routes.

- State offices must gather a broad range of evidence before making NBDs, and must weigh it in such a manner that all doubts are resolved in favor of a finding that no right-of-way exists, as required by Supreme Court precedent.

- Because NBDs are discretionary agency determinations, and because it is unlikely that BLM will use all the safeguards that a court would use – such as the Federal Rules of Evidence, live witnesses subject to cross-examination, etc. – the State offices must use an abundance of caution in making NBDs.

BLM can better serve the public and ensure more effective and meaningful public participation by adopting procedures similar to those it has used in the past. In its consideration of county R.S. 2477 claims at issue in the SUWA v. BLM case, BLM adopted procedures that: (a) provided for an initial public comment period, within which both the proponent and the public were required to reply; (b) required BLM – by itself, and not with the applicant looking over its shoulder – to review all of the submitted information; (c) required BLM to issue an initial decision (a draft), together with the proposed basis for that decision, of which it would

notify the public; and (d) provided that the public would have an additional opportunity to comment on BLM's proposed recommendation. See BLM, Instruction Memorandum No. UT 98-56 (June 19, 1998), attached as Exhibit 8. In practice, when the counties involved failed to provide any information concerning the claimed rights-of-way, BLM extended the comment period for everyone, and stressed the importance of the county's involvement. When the counties eventually provided information, BLM permitted the public to comment on it.[4] In addition, BLM's final determination included within it responses to public comments. See Administrative Determinations on San Juan County Claims (Exhibit 9) at 6-7. This process enabled the public a chance to comment on the basis and rationale for BLM's decision, and enabled members of the public to see and understand how the comments they submitted were addressed by BLM as part of that decision.

We urge BLM to adopt a similar process to ensure fairness, an accurate interpretation of law and caselaw, cost recovery, and meaningful public participation.

B. In the Alternative, BLM Should Encourage the State and Counties to Submit Applications for Rights-of-Way Permits Pursuant to Title V of FLPMA.

Rather than address applications for NBD pursuant to the illegally-promulgated and flawed Norton policy, BLM, the State, and counties have a valid, tested procedure to address key issues concerning route maintenance and right-of-way use responsibilities. The Title V process ensures public involvement, continued oversight by the land management agency, and – something that BLM has so far refused to consider as part of the NBD process – a review of potential environmental impacts related to maintenance or expansion activities.

Utah's counties have used and continue to use the Title V process as an effective way to address right-of-way concerns. For example, Garfield County, Utah last year stated that "[r]ecent conflicts regarding long standing County rights of way will be eliminated with the issuance of a [Title V] right of way to the County."[5] Further, Kane County previously sought and received a right-of-way under Title V to access at least a portion of the Bald Knoll Road, the very route at issue here.[6]

We therefore urge the BLM, the State, and counties to address right-of-way issues through the proven FLPMA Title V process instead.

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[4] E. Zukoski, pers. comm. with Heidi McIntosh, Southern Utah Wilderness Alliance (May 5, 2004).

[5] Garfield County Title V permit application (Dec. 2, 2004) at 2 (emphasis added), excerpts attached as Exhibit 10; see also id. at 5 ("Expected public benefits [of the Title V permit] include … elimination of conflict between Bureau of Land Management and Garfield County regarding the operational, maintenance, and jurisdictional status of the existing road").

[6] See the LR2000 Serial Register page for BLM Right-of-Way Grant Serial Number UTU-082147 (March 6, 2007), attached as Exhibit 11.

C. BLM Should Rely on the June 25, 2003 Memo of Jim Hughes to the Utah State Director to Guide an Accurate Description of Rights-of-Way and to Obtain Cost Reimbursement.

The Interior Department designed a process to review R.S. 2477 right-of-way claims under the revisions to the disclaimer of interest regulation. This process was illegal and flawed, but DOI elaborated on the basic information and considerations needed to begin a process of review for R.S. 2477 claims. IM 2006-159 references guidance provided under the disclaimer rule when it states, "earlier instructions provided as guidance in processing various R.S. 2477 actions including … the Deputy Director's Memorandum provided to the Utah State Office date June 25, 2003 should not be followed, but these documents are a valuable source of background information and should be retained for that purpose." See Exhibit 1. The thrust of then-BLM Deputy Director Jim Hughes's memo centers on information required to process an R.S. 2477 claim application and on cost recovery.

First, the Hughes memo indicates the information necessary to identify an R.S. 2477 claim. Memo. of J. Hughes, BLM Deputy Dir. to Utah State Dir. (June 25, 2003) ("Hughes memo"), available at http://www.rs2477.com/documents/UtahProcedures_6-25-03.pdf (paginated); see also http://www.ut.blm.gov/RS2477/bgmemo.htm (same, without page numbers). The memo states: "Each application should identify the name of the claimed right-of-way and include a brief description of its location, length, and other characteristics that could be used in the description of the route that BLM will publish in the Federal Register notice of the application. Each application should contain information demonstrating that the claimed right-of-way existed prior to October 21, 1976,…a legal description of the claimed right-of-way by aliquot parts (e.g., a ¼ ¼ section), as well as a centerline description..." Hughes memo at 2. Under the non-binding determination process, the BLM accepted Kane County's request to review the Bald Knoll route with only the name of the route and no specifications on the length, width, surface, or legal description, rely only upon a map. This appears to be at odds with the Interior Department's earlier policy to get a full description of the right-of-way in question. We do not understand how BLM can presume what a county is claiming without the specific information required by the Hughes memo.

Second, the Hughes memo outlines a process for cost reimbursement in order to review R.S. 2477 claim applications. Hughes memo at 3-4. We believe BLM should insist on cost reimbursement rather than making it voluntary. The IM states, "the impact on the budget may be unnoticeable to significant depending upon how many NBDs are requested and the availability of funding resources." Id. at 4. Evaluating the validity of R.S. 2477 claims has required Utah BLM to expend considerable staff time and expense. For instance, BLM stated that the review of the Weiss Highway disclaimer application, which was later withdrawn by the State, cost $8,000. Thankfully, BLM required the State of Utah to cover the agency's costs. Since Kane County requested the review of Bald Knoll's validity under R.S. 2477, we believe it should pay for the review as the State of Utah has paid for similar reviews in the past. If the Hughes memo is intended to be used as a guideline for the NBD process, BLM should institute a cost recovery process beginning with the Bald Knoll claim.

IV. THE EVIDENCE SUBMITTED BY KANE COUNTY FAILS TO DEMONSTRATE THAT AN R.S. 2477 RIGHT-OF-WAY EXISTS FOR THE BALD KNOLL ROUTE.

TWS believes that the NBD process is illegal and that BLM must abandon it. However, if BLM chooses nevertheless to proceed, it must adhere to certain minimal standards for weighing evidence. Therefore, in order to establish that there exists a right-of-way across federal land established by operation of R.S. 2477, an applicant must demonstrate that: (a) a **highway** (b) was **constructed** (c) across **unreserved federal land** (d) prior to the land being reserved or October 21, 1976, whichever is earlier. The Tenth Circuit, in SUWA v. BLM, 425 F.3d 735 (10th Cir. 2005) further held that:

- The interpretation of R.S. 2477 "is a federal not a state question." 425 F.3d at 762.

- Courts can look to state law to help *interpret* the terms of the statute, but federal law "alone control[s] the disposition of title to [federal] lands." States are "powerless to place any limitation or restriction on that control." Id.

- State law cannot *override* federal requirements. Id. at 766.

The Tenth Circuit further agreed that states are free to add to, but not subtract from, the minimum requirements of the grant. Id. at 763 n.15, 766. Because acceptance of a right-of-way can entail public responsibilities for upkeep, states can impose a higher standard for acceptance, such as requiring that highways be recorded in county records. Id. at 763 n.15.

Utah state law – which the Tenth Circuit said federal courts in Utah should incorporate – defines a highway as a route that has had continuous public use for ten years. The court quoted a number of state law cases without reaching any conclusions as to what "continuous" or "public use" might mean, although it cited caselaw that use for a single purpose (such as for a sawmill) might not constitute sufficient "public use" to establish a public highway. Id. at 773 (quoting Lindsay Land & Live Stock Co. v. Churnos, 285 P. 646, 648 (Utah 1929)).

The information submitted by Kane County thus far fails to establish these elements for the Bald Knoll claim.

Kane County failed to submit evidence demonstrating either by a preponderance or any other standard that an R.S. 2477 right-of-way existed for the Bald Knoll route. The entire sum of evidence provided to support the purported validity of an R.S. 2477 right-of-way for Bald Knoll is: (1) two recent letters from the Kane County Commission, making summary allegations that a right-of-way exists; (2) four duplicative, fill-in-the-blank affidavits, that include vague and sometimes contradictory statements, that are based in part on hearsay, and that fail to identify precisely the timing of the affiant's alleged use of the route; (3) two virtually indecipherable copies of aerial photos of unknown origin; and (4) an undated, apparently recent excerpt of a map of the area. Kane County presents no evidence at all concerning whether or when the lands at issue were reserved. Kane County has not met the burden that it must – even under a

"preponderance of the evidence" standard – in order to wrest from the American people a right-of-way under R.S. 2477.

Additionally, as described below, the affidavits and other information submitted by Kane County are so riddled with significant evidentiary problems that their credibility is gravely compromised. Thus, Kane County's submitted evidence cannot form the basis for an NBD concerning the likelihood that the route is an R.S. 2477 right-of-way. The County's numerous violations of basic evidentiary rules are not simply minor technical violations. The rules of evidence ensure that information submitted in support of a claim is credible, and that there is some basis for having confidence that the statements made support the existence of a right-of-way. Because the County has failed to submit such credible evidence, BLM cannot conclude that the County has met its burden of demonstrating that Bald Knoll is likely a valid R.S. 2477 right-of-way.

A. Kane County Fails to Submit an Application that Meets the Requirements of the BLM's Instruction Memorandum.

BLM guidance suggests some of the kinds of evidence that the agency should obtain in assessing whether a route may be an R.S. 2477 right-of-way for purposes of an NBD. The list of evidence is far from comprehensive, but Kane County has not provided the information outlined in the BLM guidance. BLM guidance contains "examples" of "the type of information [supplied by the claimant] that would assist BLM in its determination." These "examples" include:

- Narrative as to when and by whom the claimed right-of-way was constructed and supporting evidence;
- Maintenance records or other evidence of periodic maintenance;
- Affidavits and/or other legally cognizable documents evidencing how the claimed right-of-way was established, its history, and usage;
- Historic maps and photographs of the claimed right-of-way (pre October 21, 1976);
- Current maps and photographs of the claimed right-of-way; and/or
- Information about which Federal land managing agency or agencies administers the land underlying the claimed right-of-way

According to the preliminary NBD posted on the Utah BLM's website, Kane County provided the following information:

- August 9, 2006 Letter to BLM Kanab Field Office
- October 13, 2006 Letter to BLM Utah State Office
- Four affidavits from individuals, signed and notarized between August 3, 2006 and September 21, 2006, alleging knowledge of the location, age and uses of the Bald Knoll Road
- Photocopies of aerial photographs dated June 28, 1960 and July 16, 1960 (Kane County obtained these copies from the BLM Kanab Field Office). The BLM Kanab

Field Office was unable to identify the source of the photos, but determined that they were not BLM photos and, based on the numbering convention on the photos, they were likely prepared by USGS (although this assumption is incorrect, see infra at footnote 31 & page 50).

- Undated copy of excerpts of a map of Kane County roads with County Road Numbers and with Class "B" Roads labeled

Notably absent from this list is material that, if it existed, would be within the County's control, and that BLM's guidance identified as important for the County to submit, such as maintenance records, and historic maps and photos.

As discussed in greater detail below, Kane County has not adequately provided evidence to the BLM to prove a valid R.S. 2477 right-of-way exists on the Bald Knoll route. The letter dated August 9, 2006 does not include a narrative about the presence of a valid R.S. 2477 claim nor does it include evidence proving an R.S. 2477 claim exists. The letter includes information about a potential road construction project and Kane County's flawed interpretation of the 10th Circuit decision from which the Norton policy was derived. The letter dated October 13, 2006 does contain a list of paperwork. It would be difficult to describe this paperwork as evidence since the affidavits do no support a valid R.S. 2477 claim, the photocopied photography are illegible, and the map does not have a date on it. Most importantly, the letters of request do not specify the location of the route being claimed including, at a minimum, the mileage. With virtually no evidence put forth by the county, the BLM should have stopped this process as its guidance indicates.

According to the BLM Instruction Memorandum No. 2006-159, the BLM should have never drafted a preliminary NBD because the county did not present the *substantial evidence* required. The IM states, "if the claimant fails to provide substantial evidence to support the claim, the claim should be presumed invalid, the claimant should be so informed, and the State or Field Office should undertake no further review of the claim unless additional evidence is provided. The claimant should be sent a certified letter indicating that the evidence provided does not support the claim and therefore the claim is presumed invalid." The County's request to the BLM to review the Bald Knoll claim did not provide *sufficient* let alone *substantial* evidence to prove its validity under R.S. 2477. The BLM should have sent the certified letter to the county and requested more information according to the IM.

B. Two Letters Submitted by Kane County Contain No Evidence Supporting a Determination of the Existence of a Right-of-Way.

BLM states that it reviewed two letters submitted by Kane County in support of the Bald Knoll NBD. See Preliminary NBD. Neither letter contains any evidence supporting the Bald Knoll claim. In addition, both letters reference information allegedly provided to BLM that the agency apparently does not rely on in support of its preliminary NBD. If the agency intends to rely on such information, it must disclose it to the public immediately and permit the public to review it.

The August 6, 2006 letter from Kane County Commissioner Mark Habbeshaw makes a number of allegations concerning the route, but none of them are substantiated in any way, and at least one is contradicted by other evidence. For example, Commissioner Habbeshaw states that: "The County's transportation system, which includes the Bald Knoll … Road[], is based largely on R.S. 2477 rights-of-way and is a historic part of the County's planning as documented on maps and in files over the years."[7] None of the maps and files are incorporated into the letter, and none are apparently referenced or relied upon by BLM.

Commissioner Habbeshaw further alleges that Bald Knoll was "continuously used by the public for at least ten years prior to October 21, 1976, and [was] used by many and different persons for a variety of purposes. The road[] [was] open to all who desired to use [it] and [its] use was as general and extensive as the situation and surroundings would permit."[8] Again, no evidence was cited or provided to support this statement.

Finally, Mr. Habbeshaw alleges that Bald Knoll is "on the County's B road system and [has] been routinely mechanically maintained by the County for a number of years."[9] This statement appears to be false and contradicted by evidence on file with the State and County. As discussed below, Kane County has no records dated prior to the repeal of R.S. 2477 demonstrating County route maintenance in the area of the claimed route. See infra at 30-31. Further, County Class B road maps submitted to and maintained by the Utah Department of Transportation show that the County only claims to have maintained a portion of the route from 1965 to the present, and that the County has never claimed to have maintained the route's central portion. See infra at 46-47.[10] Similarly, Kane County's own General Highway Maps, acquired by TWS from Kane County, show none of the route prior to 1965, and only a portion of the route from 1965 to the present. See infra at 47-48. While several affiants claim that Kane County maintained the route at one time, none of them specify when such maintenance occurred, or if it ever occurred before 1976.[11] The condition of the road today, with its steep drop-offs and eroding gullies, does not give the impression of a "routinely … maintained" route. See letter of

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[7] Letter of M. Habbeshaw, Kane Co. to R. Smart, BLM Kanab (Aug. 6, 2006) at 5, available at www.blm.gov/style/medialib/blm/ut/lands_and_minerals/lands/test/bald_knoll_rd_nbd.Par.91053.File.dat/KaneCo08092006letter.pdf.

[8] Id. at 11-12.

[9] Id. at 12.

[10] Commissioner Habbeshaw also alleges that "[t]he Bald Knoll Road is, in fact, commonly known as the 'Coal Road' and was constructed for coal development uses." He provides no evidence supporting his statement. Id. at 12. However, if the route was constructed for coal exploration, the route is likely not a valid R.S. 2477 right-of-way. See infra at 51-54.

[11] See Leach Aff. at ¶ 7 (discussing County maintenance "in later years," but not identifying when or how often such maintenance may have occurred); A. Goulding Aff. at ¶ 7 (claiming personal knowledge of County maintenance "two or three times" at an unspecified date); C. Goulding Sep. 2006 Aff. at ¶ 7 (claiming personal knowledge of County maintenance and describing one example of such activity at an undisclosed location on the route 17 years ago).

J. Catlin, WUP to The Wilderness Society (Oct. 10, 2007), attached as Exhibit 12. ; see also photos on next page.[12]

Commissioner Habbeshaw's short letter of October 13, 2006 is equally irrelevant.[13] The letter alleges that the County has "enclosed an inventory of a complete list of documentation submitted to the BLM as of this date and we have also identified the documentation submitted with this letter."[14] Attached to Mr. Habbeshaw's letter is a memo from Marilyn Lawson, a Kane County contractor, listing the documentation. The memo identifies affidavits from six individuals, including Roy Machelprang and Kurt Brinkerhoff. However, neither Mr. Machelprang's nor Mr. Brinkerhoff's affidavit are posted on BLM's website identifying information supporting the preliminary NBD, nor does the preliminary NBD itself identify these affidavits as among the information BLM reviewed.[15] Further, TWS did not receive either affidavit in response to Freedom of Information Act requests to BLM's Kanab and Utah State Office concerning the Bald Knoll route. If BLM locates or intends to rely on these affidavits, it must provide the public a reasonable time, beyond the current comment deadline if necessary, to review any such supplemental information.

C. Kane County's Declarations Are Tainted by Hearsay, and Are Contradictory, and Vague.

Kane County submitted four declarations in support of its application. However, these documents do not meet the evidentiary standards that must be met before a property interest of the United States can be effectively surrendered to another entity.

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[12] The route, at present is at best a backcountry, four-wheel drive, high clearance vehicle access trail or track. It lacks the engineering construction demanded by all public highways. For example, the route does not have a raised road prism. It does not have drainage ditches on each side of the route. Very few stream-crossings have culverts; streams simply cross (and erode) the route surface in most cases. The route does not have a stable road bed made from appropriate base materials. The route traverses hills that exceed highway grade standards.

The current state of the Bald Knoll route also begs the question of whether Kane County has been using funds Class B road funds provided by the State of Utah to maintain the route, or using them for some other purpose.

[13] Letter of M. Habbeshaw, Kane Co. to R. Smart, BLM Kanab (Oct. 13, 2006), available at www.blm.gov/style/medialib/blm/ut/lands_and_minerals/lands/test/bald_knoll_rd_nbd.Par.56784.File.dat/KaneCo10132006letter.pdf.

[14] Id. at 1.

[15] See http://www.blm.gov/ut/st/en/prog/more/lands_and_realty/rs2477_rights-of-way/bald_knoll_road_non/supporting_informatiion.html (website providing access to "supporting information"); preliminary NBD (listing "Documents and Information Reviewed" by BLM).

Bald Knoll Road, as it appeared on September 21, 2007. Photos (c) Jim Catlin (see Exh. 12). The route does not appear to be "regularly maintained."

1. The Application's Supporting Documents Contain Unsubstantiated Hearsay.

The letters and affidavits supporting the NBD application contain information that would not be admissible in court as probative evidence because it is hearsay. BLM must reject this "evidence" as lacking credibility for the same, common-sense reasons as would a court.

In general, hearsay is "not admissible" as evidence in court. See, e.g., Fed. R. Evid. 802. Those presenting evidence (as the affiants do here) are required to testify about that which they have firsthand knowledge. "[W]itnesses are qualified to testify to facts susceptible of observation only if it appears that they had a reasonable opportunity to observe the facts." McCormick on Evidence (5th ed. 1999) at § 247. "[W]hen … the witness appears to be testifying on the basis of reports from others, … courts may simply apply the label 'hearsay.'" Id. The basis for this rule is the common-sense notion that people are most believable (and most likely to be accurate) when they speak about what they have observed first-hand, and less believable (and less likely to be accurate) when they speak of things they do not know based on their own experience.

All of the affidavits submitted by Kane County contain hearsay because they contain statements that are not based on the first-hand knowledge of the affiants. The affiants provide no basis for the origin, or validity, of the information. Such "evidence" cannot be relied upon by BLM as the basis for effectively surrendering rights-of-way over public lands, since it would likely not be admissible in any court as evidence.

We note that BLM previously found similar declarations insufficient to establish construction of a right-of-way. In its administrative determination regarding a claim in San Juan County, BLM considered a declaration of an individual who alleged that the route in question there was bulldozed in the late 1950's or early 1960's. Administrative Determinations on San Juan County Claims (Exhibit 9) at 16-17. BLM concluded that these bare allegations, without additional confirming evidence, constituted "insufficient reliable evidence for the establishment of a claim under R.S. 2477." Id. at 17.

Numerous examples of this hearsay may be identified in the affidavits.

First, two of the affidavits contain statements that describe the use of the routes since before the affiant observed the route. Mr. Clyde Goulding asserts that "the road has long been in use before 1930" when he also asserts that his first travel on the road was "about 1942." C. Goulding Sep. 2006 Aff. at ¶ 3.[16] He further asserts that "[t]he road has been open to the public for all to use, to come and go as they pleased, since at least as early as the early 1930's," also prior to his stated first observation of the route. C. Goulding Sep. 2006 Aff. at ¶ 4.

[16] Mr. Goulding's September 2006 affidavit is available at http://www.blm.gov/style/medialib/blm/ut/lands_and_minerals/lands/test/bald_knoll_rd_nbd.Par.58807.File.dat/CGouldingAffidavit.pdf

Mr. Trevor Leach asserts that "[t]he part of the road from the south to section 13 or 14, has been used at least as early as the late 1800's" when he had also asserted that his first travel on the route was "in about 1926 or 1927." Leach Aff. at ¶ 3.[17] He further asserts that "[t]he road from section 34 to section 13, has been open to the public for all to use, to come and go as they pleased, since at least as early as the late 1800's and early 1900's," again prior to his stated first observation of the route. Leach Aff. at ¶ 4.

As these statements concern events that took place before the affiants had even seen the route, it is impossible that they have first hand knowledge of the events, and the statements are therefore unequivocally hearsay. In a related fashion, one of the affidavits contains a statement whose basis appears to be second hand (at best) knowledge of the situation and for which no supporting evidence is provided. Clyde Goulding recounts the experiences of his wife when she was a two-month old baby. C. Goulding Sep. 2006 Aff. at ¶ 4 (stating that "her family first took her and her twin sister on that road in an old pickup truck."). This is the very essence of hearsay. Like the other hearsay statements, BLM cannot grant these statements any weight in its consideration of the NBD.

Second, all of the affidavits contain statements about the "reputation in the community" of the claimed route, and similarly provide no basis for such statements. For example, Ms. Arlene Goulding and Mr. Wayne Robinson assert that it is the "reputation in the community" that the route has been in use "since at least as early as the early 1960's" and that certain uses "have occurred at various times during the indicated period." A. Goulding Aff. at ¶¶ 3, 5; Robinson Aff. at ¶¶ 3, 5.[18] They fail to provide an explanation of what the extent of the "community" is, how it came to such an understanding, or indeed, what their personal knowledge of this "reputation" is. They fail to establish that this "reputation" is grounded in any personal observation, whether by the affiant or another, of sufficient rigor to establish it as meaningful evidence. Similarly, and with the same defects, Clyde Goulding asserts "reputation in the community" to support claims of certain uses.[19] C. Goulding Sep. 2006 Aff. at ¶ 5. Mr. Leach also uses "reputation in the community" to establish use of the route as a travel way for store supplies to Marysvale at an unstated time and with an unknown frequency. Leach Aff. at ¶ 3. He supplies no supporting information for this story, making it irrelevant to BLM's determination.

Further, the contradictions in what the affiants allege constitutes the "reputation in the community" undermines the very notion that there exists a coherent community narrative

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[17] Mr. Leach's affidavit is available at http://www.blm.gov/style/medialib/blm/ut/lands_and_minerals/lands/test/bald_knoll_rd_nbd.Par.63259.File.dat/LeachAffidavit.pdf.

[18] Ms. Goulding's affidavit is available at http://www.blm.gov/style/medialib/blm/ut/lands_and_minerals/lands/test/bald_knoll_rd_nbd.Par.40832.File.dat/AGouldingAffidavit.pdf; Mr. Robinson's affidavit is available at http://www.blm.gov/style/medialib/blm/ut/lands_and_minerals/lands/test/bald_knoll_rd_nbd.Par.2725.File.dat/RobinsonAffidavit.pdf.

[19] Mr. Goulding does assert that he personally engaged in all of the uses during a portion of the time period in question. C. Goulding Sep. 2006 Aff. at ¶5.

concerning the route. All four affiants assert that the "reputation in the community" establishes use of the route for a specified period time. However, depending on the affiant, this reputation refers to three different periods: "at least as early as the early 1960's and continuing through 1976" (Arlene Goulding and Mr. Robinson, and Mr. Leach for the eastern portion of the route), "at least as early as the early 1930's and continuing through 1976" (Clyde Goulding), and "at least as early as the late 1800's and early 1900's and continuing through 1976" (Mr. Leach for the western portion of the route). A. Goulding Aff. at ¶ 5, C. Goulding Sep. 2006 Aff. at ¶ 5, Leach Aff. at ¶ 5, Robinson Aff. at ¶ 5. Clearly, there is no single "reputation" concerning the question of when use of the route begin, and one is left to wonder what dates other members of the "community" might provide. Similarly, all of the affiants, in the same paragraph and using language that is close to identical across documents, assert uses of the route know through "reputation in the community." However, these assertions are not consistent. For example, Ms. Goulding and Mr. Goulding both assert that "weed control" is a use recognized by the community, although Mr. Leach and Mr. Robinson do not. Conversely, Mr. Leach and Mr. Robinson assert the reputation in the community that "farming" was one use of the route; neither of the Gouldings mention this use. See A. Goulding Aff. at ¶ 4, 5, C. Goulding Sep. 2006 Aff. at ¶ 4, 5, Leach Aff. at ¶ 4, 5, Robinson Aff. at ¶ 4, 5.[20]

Third, all of the affidavits contain at least one statement that appears to be based on personal knowledge but for which the affiant provides no support or logical basis. Claims concerning frequency of use is a common problem in the affidavits. Mr. Goulding states: "To my knowledge, the route was used daily for more than ten years prior to 1976." C. Goulding Sep. 2006 Aff. at ¶ 6. Arlene Goulding uses a similar phrase, although she can only state that use occurred "monthly." A. Goulding Aff. at ¶ 6 ("To my knowledge, the route was used at least monthly for more than ten years prior to 1976."). Mr. Leach and Mr. Robinson make nearly identical statements. Leach Aff. at ¶ 6 ("The road was used daily for more than ten years prior to 1976"), Robinson Aff. at ¶ 6 (same).

What is remarkable about these statements is that none of the affiants state that they personally observed, or engaged in, such use during the period, or even which ten-year period they are talking about. The use of the passive voice – "the road was used daily" – in Mr. Leach's and Mr. Robinson's affidavits begs the question of how they came by this knowledge. Were they personally using the route (although this seems unlikely, for why use the passive voice)? Were they observing the use (it also seems unlikely that they would have observed traffic on this remote route for 3,652 days or more in a row)? Or did someone tell them they were using the route (in which case the affidavit is inadmissible and untrustworthy hearsay)? Similar, Mr. and Ms. Goulding's statements that "To my knowledge," the route was regularly used for ten years begs numerous questions. Which ten years? Where does that knowledge come from? Was Mr.

[20] Courts have stated that for a "reputation in the community" to have probative value, it must have "reached the condition of definite decision … and … become settled with fair finality." Kent County Road Commission v. Hunting, 428 N.W. 353, 360 (Mich.App. 1983) (citation and quotations omitted). The discrepancies in the four affidavits concerning Bald Knoll's "reputation in the community" mean that no recognizable "reputation" can be considered to exist.

Goulding really observing the route every day of his life for more than ten years? Ms. Goulding's statement that she knows the route was used "at least monthly for more than ten years prior to 1976" cannot be based on her personal observation since she states that she would drive on the route only "a couple of times a year." A. Goulding Aff. at ¶ 3.[21]

Fourth, a variety of claims concerning road construction and maintenance lack support or a stated basis in personal observation. Arlene Goulding asserts that "[c]onstruction and maintenance on the road before 1976 was performed by hand tools, such as shovels" (again note the use of passive voice – "was performed") and that she had "personal knowledge that the Kane County road crew maintained this road at least two or three times." A. Goulding Aff. at ¶ 7. She fails to explain how she obtained this personal knowledge.[22] Clyde Goulding also claims that construction and maintenance "was performed" by hand tools but also includes road building equipment. C. Goulding Sep. 2006 Aff. at ¶ 7. Again, Mr. Goulding uses the passive voice and again he gives no indication for the basis of his statement. He indicates that he personally saw Kane County "bulldozing and grading the road" but fails to provide even a general idea of when such an operation occurred, e.g., whether it occurred before or after October 21, 1976, how he knew who the parties were, or where on the route he observed this activity. Id. Mr. Robinson claims: that the road was constructed by Utah International Inc.; that road graders and bulldozers were used to construct and maintain the road; and that he personally saw Utah International use bulldozers and road graders during the construction and subsequent maintenance of the road. Robinson Aff. at ¶ 7. He fails to provide even a general idea of when such operations occurred, or to indicate how he knew that Utah International Inc. conducted the operation.

2. The Affidavits Fail to Contain Specific Information about the Claim, and Contain Irrelevant or Questionable Information.

Much of the information contained in the sometimes identically-worded affidavits can best be described as vague or imprecise. Much of it is irrelevant as it relates only to the period after R.S. 2477 was repealed.

With respect to the claimed route, the supporting affidavits generally do not specify where on, or upon what portion of, the routes alleged construction and/or maintenance took place. The affidavits contain no exact dates for when any such activities – or affiants' use of the route – took place; the activities are generally described only by decade or year. Some of the allegedly observed activities on the route are so vaguely described that they all could have occurred after R.S. 2477 was repealed in 1976. And some activities definitely took place after 1976.

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[21] Other information in the affidavits is similarly poorly explained. For example, Mr. Leach claims that Art and Frank Mackelprang ran goats and camped all along the road but fails to explain whether he personally observed this use or whether he has some other basis for this assertion. Leach Aff. at ¶ 3.

[22] Importantly for the purpose of demonstrating the existence of a right-of-way, she does not state when this maintenance occurred. A. Goulding Aff. at ¶ 7.

Three of the affidavits contain no reference to any particular portion of the claimed route and instead refer universally to the "road." See, e.g., A. Goulding Aff. at ¶¶ 3-8; C. Goulding Sep. 2006 Aff. at ¶¶ 3-8, Robinson Aff. at ¶¶ 3-8. The remaining affidavit provides only a division of the road into two parts (roughly east and west halves) for discussion purposes. See, e.g., Leach Aff. at ¶¶ 3, 4 (describing different uses on the portion of the route from the south to Section 13 (presumably in T 40 S, R 5 W) and that east of Ssection 13). This division is not applied throughout Leach's statement however. See, e.g., Leach Aff. at ¶¶ 5-8. As a consequence of the generality of all of the affiants statements, neither BLM nor anyone else can gain from the affidavits consistent, specific information concerning the construction, maintenance, or use of the claimed route.

The affiants are similarly vague concerning dates. Arlene Goulding and Mr. Robinson claim first use in "the early 1960's" but fail to provide a more specific date. A. Goulding Aff. at ¶ 3, Robinson Aff. at ¶ 3. Given the uncertainty of the role of possible road construction by Utah International, also allegedly in the early 1960s, specificity in this date range is essential to understanding the situation. Clyde Goulding asserts a first use "about 1942" and Mr. Leach in "about 1926 or 1927." C. Goulding Sep. 2006 Aff. at ¶ 3, Leach Aff. at ¶ 3. These vague recollections are strangely out of step with their assertions that they retain sufficient detail of their experiences to compare the route alignment 60-80 years ago with its current path. See C. Goulding Sep. 2006 Aff. at ¶ 8 (claiming "[w]hen I first used and observed the road, it followed the same route as in 2005"); Leach Aff. at ¶ 8 (making exact same claim).

Arlene Goulding also asserts that she used the route "a couple times a year; mostly during hunting season and fall" and that her use continued for "many years." A. Goulding Aff. at ¶¶ 3, 5. Again, her affidavit provides insufficient information to determine if a standard of continuous public use is met. Perhaps most importantly, her affidavit does not disclose if "many years" exceeds ten years, or whether that "many years" of use occurred before or after 1976. Clyde Goulding states that he herded sheep along the route one summer, sprayed for weeds along the road at some point, has gathered wood along the route, and engaged in various uses at unspecified times. C. Goulding Sep. 2006 Aff. at ¶¶ 3, 5, 6. He fails, however, to provide any specific dates or even an approximate count of the number of times he has used the route (and what the portion of the route he used for each activity). Mr. Leach claims to have engaged in a variety of activities along the road but provides only a single general date range ("the early 1960's") for one of these activities. Id. Again, the affidavit provides none of the necessary specifics. Mr. Robinson fails to provide even any general dates for his many claimed activities (other than providing a broad range for his first use of the route). Robinson Aff. at ¶¶ 3, 5

All of the affidavits contain general statements concerning the use of the route after repeal of R.S. 2477. See, e.g., A. Goulding Aff. at ¶¶ 4, 5 (discussing husband's use of the route in 1990); C. Goulding Sep. 2006 Aff. at ¶¶ 4, 7 (discussing County maintenance of route in 1990); Leach Aff. at ¶ 4, Robinson Aff. at ¶ 4. None of these are relevant to consideration of Kane County's claim. Further, all of the claims of post-1976 use and maintenance call into doubt other assertions of use and maintenance for which no date is provided. See, e.g., A. Goulding Aff. at ¶ 7 (stating that she had personal knowledge that the "Kane County road crew maintained the road at least two or three times"); C. Goulding Sep. 2006 Aff. at ¶ 3 (stating that "I have sprayed weeds along the road for Kane County"); Leach Aff. at ¶ 7 (stating that "Kane

County, in later years, started to blade the road"); Robinson Aff. at ¶ 7 (stating that "I have personally seen Utah International Inc. use bulldozers and road graders"). Since the affiants used the route for up to 30 years since the repeal of R.S. 2477, experiences for which they cannot recall a date may well have occurred after 1976.

Perhaps most troubling are the statements in all of the affidavits that the referenced uses, included to show a range of use of the route, occurred at "various times throughout the period indicated" when that period extends to the present. A. Goulding Aff. at ¶ 5 ("the period indicated in Paragraph 4" where that period is "the early 1960's and continuing through 1976 to the present"); C. Goulding Sep. 2006 Aff. at ¶ 5 ("the period indicated in Paragraph 4" where that period is "the early 1930's and continuing through 1976 to the present"); Leach Aff. at ¶ 5 ("the period indicated in Paragraph 4" where that period is both "the late 1800's and early 1900's and continuing through 1976 until the present" and "the early 1960's and continuing through 1976 until the present"); Robinson Aff. at ¶ 5 ("the period indicated in Paragraph 4" where that period is "the early 1960's and continuing through 1976 to the present"). The affidavits' imprecision makes it impossible to tell when alleged uses of the route occurred.

In addition, some of the statements are of dubious credibility. One of the affiants states that he had been observing the route since he was six years old (nearly eighty-five years ago); another recounts the condition and the "same" alignment of the route nearly sixty-five years ago (when he was 18 years old). Leach Aff. at ¶¶ 3, 8; C. Goulding Sep. 2006 Aff. at ¶¶ 3, 8. At that age and since, the affiants swear, they recall observing the route in sufficient detail to know that the route has remained unchanged during the intervening years. Is it credible for a six-year-old, or even a young man, to recall such detail over such a long period, especially when numerous additional experiences with the route are alleged? It is possible, although it seems unlikely.[23]

Also unsupported, and straining credibility, are assertions by Messrs. Leach and Robinson that they have observed a wealth of uses of the route for a wide period of time. In particular, Mr. Leach, who asserts that he was born in 1920, states that "I have personally observed vehicles using the road for all of the above-named uses all my life, until the present," when the list of uses which he refers to is: prospecting for minerals and coal, livestock operations, farming, tourism, wood gathering and post cutting, hunting, recreation such as camping sightseeing, accessing private property, and traveling in and through the area. Leach Aff. at ¶ 1, 5. Mr. Leach also states that he first observed the route in 1926 or 1927, so clearly he has not observed these uses for "all my life[.]" Leach Aff. at ¶ 3. Mr. Robinson, in nearly identical language, asserts, "I have personally observed vehicles using the road for all of the above named uses since the 1960's" for a similar set of uses (although he does not include non-coal mineral exploration). Robinson Aff at ¶ 5. Neither of these affiants establish how they

[23] In addition, all of the affidavits contain a statement that the "road descriptions herein pertain to the above-named road as shown on the accompanying map reflecting the GPS location of the road." A. Goulding Aff. at ¶ 2, C. Goulding Sep. 2006 Aff. at ¶ 2, Leach Aff. at ¶ 2, Robinson Aff. at ¶ 2. There is no supporting information on the map, in the affidavits, or submitted separately that the map is derived from a GPS survey, nor any information concerning how the affiants could have known the information was derived from a GPS survey.

knew which of the above uses each vehicle was engaged in, and fail to provide any accounting of frequency of the above uses. Do they mean that they once saw a vehicle, possibly after 1976, that they assumed was engaged in one of the uses? The assertions simply fail to provide a meaningful accounting of the history of the route.

Similarly, all of the affiants use the phrase, "By my observation, travelers on the road from [earliest observation] and continuing thereafter included those who went by means of" and continue with a list of vehicles. A. Goulding Aff. at ¶ 6, C. Goulding Sep. 2006 Aff. at ¶ 6, Leach Aff. at ¶ 6, Robinson Aff. at ¶ 6. None of the affiants supply an accounting of which vehicle was observed when or how frequently, leaving us to assume that all of the vehicle types were observed from the first date stated. This is problematic with the Clyde Goulding and Mr. Leach affidavits, where the affiants identify, respectively, jeeps in 1940[24] (which were not available commercially until the late 1940s) and 4X4s, ATVs, semi-trucks, and caterpillars in 1925. C. Goulding Sep. 2006 Aff. at ¶ 6, Leach Aff. at ¶ 6. Mr. Goulding's assertion is further undermined by his earlier statement that at the time of his first observation ("about 1942"), he observed only pickup trucks and wagons. C. Goulding Sep. 2006 Aff. at 3 (stating "pickup trucks were about the only vehicles traveling the road. On occasion there were wagon [sic] also traveling the road.")

3. The Affidavits Contain Contradictory Information.

The affidavits contain a number of contradictory statements concerning the origin of the route, the date of its first use, and its maintenance.

Concerning when the route became open, Arlene Goulding asserts that the road was "recently opened" in the early 1960's. A. Goulding Aff. at ¶¶ 3, 7; see also Robinson Aff. at ¶¶ 3, 4 (road open since at least the 1960s). Clyde Goulding apparently disagrees, stating that the route was "in use long before 1930." C. Goulding Sep. 2006 Aff. at ¶ 3. Mr. Leach tells another story, claiming that a portion of the road was used "at least as early as the late 1800's" while the remainder of the road has been "open to the public […] from at least as early as the early 1960's[.]" Leach Aff. at ¶¶ 3, 4.

Affiants also disagree on the method of the route's construction. Ms. Goulding states that "[c]onstruction … was performed by hand tools, such as shovels" prior to 1976. A. Goulding Aff. at ¶ 7. Mr. Robinson disagrees, claiming that the route was constructed, and maintained, by Utah International Inc. using "[r]oad graders and bulldozers." Robinson Aff. at ¶ 3, 7. Clyde Goulding states that shovels and "road building equipment" were used to maintain the route prior to 1976, contradicting Ms. Goulding who only mentions hand tools. C. Goulding Sep. 2006 Aff. at ¶ 7.

Messrs. Goulding, Leach, and Robinson assert the route was used "daily for more than ten years prior to 1976[.]" C. Goulding Sep. 2006 Aff. at ¶ 6, Leach Aff. at ¶ 6, Robinson Aff. at

[24] It is also worth noting that Mr. Goulding had previously stated that his first observation of the route was about 1942, not 1940. C. Goulding Sep. 2006 Aff. at ¶ 3.

¶ 6. Arlene Goulding has a very different impression, asserting only that the route was used "at least monthly for more than ten years prior to 1976[.]" A. Goulding Aff. at ¶ 6. That is a significant difference in observation.

Obviously, these differing versions of the route's creation, maintenance, and use cannot all be correct. These contradictions call into question the credibility of the affidavits in general.

4. The Affidavits Appear to Conflict with Other Information.

Some of the alleged observations seem to conflict with fact or geography. For example, Clyde Goulding states that in about 1942, the surface of the route was "black rock and dirt." C. Goulding Sep. 2006 Aff. at ¶ 3. None of BLM's recent photos of the route give any indication of a black rock surface on or adjacent to the route.[25] There is no evidence that the route is anything but native dirt. This raises a question as to whether Mr. Goulding may have confused this route with another one.

In addition, Mr. Leach asserts that the route was used as a travel path between Kanab and Marysvale, a destination more than fifty miles north of the route. Leach Aff. at ¶ 3. Traveling the entire route from south to north would actually take a traveler away from the most logical path to Marysvale, any of the continuations of the present-day Johnson Canyon Road up the Long Valley noted on the many available historical maps. See, e.g., 1877 plat of Township 40 South Range 5 West. Mr. Leach's route also bypasses the more obvious, and apparently better developed, routes that were in use as at least as early as 1935 — U.S. Highway 89 and State Highway 136. See Exhibit 13, H.M. Gousha Co., Road Map of Utah, Utah Road Commission (1935). Mr. Leach provides no explanation for why a traveler would have ignored the major highways in the area and set off down a remote track heading in the wrong direction.

For unstated reasons, a second affidavit concerning the Bald Knoll route was executed by Clyde Goulding on May 15, 2007 and retained by the State of Utah. See C. Goulding May 2007 Aff. (obtained from the State of Utah through open records act request), attached as Exhibit 14. There are a number of contradictions between the two documents representing Mr. Goulding's observations of the claimed route. In the May 2007 affidavit, Mr. Goulding states that he first used the route in 1942, apparently resolving his uncertainty about the exact date. C. Goulding May 2007 Aff. at ¶ 2, C. Goulding Sep. 2006 Aff. at ¶ 3 (stating that his first use was in "about 1942"). In the May 2007 affidavit he asserts that the route has been open to the public "since at least as early as 1942" while in the September 2006 affidavit he asserted that the date was "at least as early as the early 1930's[.]" C. Goulding May 2007 Aff. at ¶ 3, C. Goulding Sep. 2006 Aff. at ¶ 4. In the May 2007 affidavit Mr. Goulding states that travel on the route was by "various means, including maintenance vehicles, trucks, jeeps and ATV's." C. Goulding May 2007 Aff. at ¶ 3. In the September 2006 affudavit, he stated that travel was "by means of car, jeep, team & wagon, sheep wagon, horseback, 2-ton cattle truck, and pickup trucks, and pickup trucks pulling horse trailers." C. Goulding Sep. 2006 Aff. at ¶ 6. No explanation is provided for

[25] See http://www.blm.gov/ut/st/en/prog/more/lands_and_realty/rs2477_rights-of-way/bald_knoll_road_non/supporting_informatiion/photos___map.html.

these discrepancies. Similarly, the problematic "reputation in the community" phrase (discussed above) refers to use of the route beginning "at least as early as the early 1900s" in the May 2007 affidavit but "at least as early as the early 1930's" in the September 2006 affidavit. C. Goulding May 2007 Aff. at ¶ 6, C. Goulding Sep. 2006 Aff. at ¶¶ 4, 5. It is unclear how or why the route's "reputation in the community" would have changed so between the September 2006 and May 2007.

Gone in the more recent affidavit are Mr. Goulding's assertions that "the road was black rock and dirt" (C. Goulding Sep. 2006 Aff. at ¶ 3); that the route was "in use long before 1930" based on his observation (or hearsay) rather than reputation in the community (C. Goulding Sep. 2006 Aff. at ¶ 3); reference to his wife's family's property at the eastern end of the route, which was the only (hearsay) statement that might imply use of the eastern half of the route prior to coal exploration work (C. Goulding Sep. 2006 Aff. at ¶ 3); claims of use for picnicking, hiking, sightseeing, and accessing private property (id. at ¶ 5); observations concerning construction and maintenance techniques (id. at ¶ 7); and, an assertion that he had personally seen a Kane County crew "bulldozing and grading the road and installing a cattle guard and culverts" (id.).

One contradiction is, however, most striking. In the May 2007 affidavit, Mr. Goulding states that "the road has been used daily in the summer months and weather permitting in the winter months, for more than ten continuous years prior to 1976[.]" C. Goulding May 2007 Aff. at ¶ 3. In the September 2006 affidavit, he stated that the route was used "daily for more than ten years prior to 1976[.]" C. Goulding Sep. 2006 Aff. at ¶ 6. It is unclear why Mr. Goulding's sworn testimony would vary so after the passage of just eight months. Whatever the reasons for his change of testimony about the route, they cast grave doubts on the truthfulness and reliability of either affidavit.

5. Even Where the Affidavits Report Personal Observations, They Do Not Support the Conclusion that the Route Was Created through Public Use.

Where information relevant to the origin of the route is provided in the affidavits, that information supports the theory that the route, or a significant portion of it, was constructed and originally maintained by a coal mining company prospecting or developing infrastructure under a federal permit. See infra at 51-54. Messrs. Leach and Robinson specifically state that the route was constructed and maintained, at least prior to 1976, by Utah International, a coal company operating under a BLM lease. Leach Aff. at ¶ 7; Robinson Aff. at ¶ 7; see also infra at 51-54 (discussing coal lease). Mr. Leach indicates that Utah International was conducting coal exploration activities from the route. Leach Aff. at ¶¶ 3, 5. Arlene Goulding, along with Mr. Robinson, assert that the road was opened in the early 1960s, the time when Mr. Leach claims to have been conducting coal exploration work. A. Goulding Aff. at ¶ 3; Leach Aff. at ¶ 3; Robinson Aff. at ¶ 3. Only Mr. Leach states that this work only related to the eastern portion of the route. Leach Aff. at ¶ 3, 4. All of the affiants except Ms. Goulding acknowledge that at least a portion of the route was not open to the public until the era of coal exploration (the early 1960s). A. Goulding Aff. at ¶ 4, C. Goulding Sep. 2006 Aff. at ¶ 4, Leach Aff. at ¶ 4, Robinson Aff. at ¶ 4.

Conclusion. The affidavits submitted to demonstrate the validity of the route have, at best, little evidentiary or persuasive value. They are so riddled with hearsay, contradictions, and irrelevant or unclear data that they cannot be used to support a conclusion that an R.S. 2477 right-of-way was established. The obvious credibility problems inherent in these affidavits make it even more important that the other purported supporting evidence hew strictly to universally accepted standards of admissibility and credibility, as described below.

To the extent that BLM, in its preliminary NBD, relies on these affidavits to establish that use of the claimed route occurred for a period of ten years prior to 1976, the BLM analysis is fatally flawed. None of the affidavits affirmatively state a personal use of the route for the necessary period. In fact, none of the affidavits supply specific information, dates and/or frequency of use, that would be necessary to make a reasonable determination. As discussed above, reliance upon unsupported assertions of what others were doing or a vague "reputation in the community" fails to meet the standards that BLM should meet.

D. Aerial Photos Submitted by Kane County Do Not Support a Determination of the Existence of a Right-of-Way.

The photocopies of aerial photos submitted by Kane County fail to provide any information relevant to the claim. The photography is dark and essentially unintelligible, no qualified interpretation of the photography is provided, and the authenticity of the photography is not established. And, even if the above errors were overcome, BLM has previously held that aerial photography does not provide sufficient evidence to demonstrate the existence of a valid R.S. 2477 claim. Merely locating a line on an aerial photograph — when such a line can be found — is not sufficient to determine the existence of a road. In this case, no such line can be discerned. And even if the imagery were of better quality, it would not show that any particular line amounts to a "constructed highway" as required by R.S. 2477. Nor would they show what use, if any, at what frequency over what period occurred on the route.

The photocopy of photography submitted by Kane County is at best difficult to interpret. The submitted photocopy of photography appears on three pages. The first page appears to be a photocopy of a single photo, identified as DSA-4 AA-12 (6/28/60). The second page appears to be a mosaic of four photos, identified as DSA-10 AA-18 (7/16/60), DSA-10 AA-19 (7/16/60), DSA-10 AA-21 (7/16/60), and DSA-10 AA-22 (7/16/60). The third page appears to be a mosaic of two photos, DSA-10 AA-18 (7/16/60) on the bottom four-fifths of the page, and an unidentified photo (probably DSA-10 AA-19 (7/16/60)) on the top one-fifth of the page. An Earthjustice staff member with aerial photography interpretation experience reviewed the images and was unable to discern any features that could be described definitely as a disturbed travel route. See Declaration of Douglass Pflugh (Oct. 25, 2007), attached as Exhibit 15. The numerous lighter, somewhat-linear features on the photo might be roads, trails, pipeline construction clearance, power lines, or, as appears to be evident on the lower portion of DSA-4 AA-12, an artifact of photo handling and possibly scanning. Id. at ¶ 11-12. Kane County route designations noted in the margin of one of the images do not provide any useful information. Interpretation is compromised not only by the poor quality of the images but also by the many markings covering one of the image sets (apparently related to a classification process). Id. The Earthjustice staff member was not even able to confirm that the photography covered the area of

the claimed route. Id. at ¶ 13. In short, these photocopies of images are useless for interpretation tasks, including identification of roads or other travel routes.[26]

Aerial photos are taken from thousands of feet up in the air. While they present a view of what is on the ground, what they show is subject to interpretation. Interpretation requires both useful source data (the photographs) and a trained and experienced interpreter. Kane County has here failed to provide either useable source data (in the form of legible images) or interpretation by a qualified individual. Aerial photography interpretation is aided by reviewing stereoscopic pairs of photographs using a stereoscope. The three-dimensional effect of this technique allows the interpreter to gather greater information from the photography and also helps identify artifacts related to terrain distortion. As Kane County has failed to provide a complete set of photography for the area, interpretation is further compromised by the inability to pursue stereoscopic analysis.

The dark and essentially illegible photocopies of aerial photos submitted by Kane County are not only un-readable, they are also from an unknown source and have not been authenticated. See Preliminary NBD ("BLM … was unable to identify the source of the photos"). In fact, BLM has incorrectly "guessed" the source of the photography and, by failing to follow-up sufficiently, has not identified that error.[27] Neither Kane County nor BLM provides anything in the public record to verify the authenticity of the aerial photographs with respect to the date taken. Kane County fails to provide evidence as to who took any of the photos. As such, this "evidence" cannot be accepted by BLM as proof of anything.

Even if all of the above technical issues were overcome, this photography would still be of limited utility in the determination of the claim. BLM has reviewed similar aerial photographs before and found them to not provide sufficient evidence to demonstrate the existence of a valid R.S. 2477 claim. In reviewing the validity of a R.S. 2477 claims in San Juan County near the Hart's Point Road, BLM concluded: "While aerial photographs reveal the existence of the disturbance claimed by the county, analysis of those photographs fails to reveal how the disturbance was created or whether it serves to access a specific destination or place." See Exhibit 9 at 14; see also id. at 17 ("BLM concludes that the [aerial] photographs offer no evidence that the claim was mechanically constructed or improved. They simply demonstrate that a disturbance appears in full or in part at different times"); id. at 27 ("Careful analysis of these [aerial] photographs fails to offer proof regarding whether the claim was mechanically constructed or improved").

[26] Review of a set of the same photography from the original source indicates that the photography presented by BLM does not cover the entire claimed route and does not document any of the claimed route east of Township 40 South Range 5 West Section 14. See infra at pp. 50-51; Exhibit 15 at ¶ 15.

[27] See discussion infra at footnote 31 & p. 51.

E. An Undated Map Submitted by Kane County Cannot Support a Determination of the Existence of a Right-of-Way.

Maps created by Kane County – or anyone else – long after the repeal of R.S. 2477, or at an unknown date, cannot establish the existence of highway before October 21, 1976. Kane County submitted in support of its application an undated map of the general area of Bald Knoll displaying a number of routes.[28] Given that the map identifies the routes with a "K" followed by four digit number – a system that Kane County developed only after 1996 – it is almost certain that this map was created at least two decades after the repeal of R.S. 2477. This map does not support a determination of the existence of an alleged R.S. 2477 highway at Bald Knoll.

F. Kane County Admits That It Has No Construction, Maintenance, or Funding Records Concerning the Alleged Rights-of-Way Prior to 1976.

No evidence concerning construction, budgeting, funding, or road maintenance was submitted with the Kane County's application to BLM beyond the statements of a few individuals who allegedly observed such activities. BLM has previously concluded that: "Records of road construction and maintenance generated by a county can often be excellent evidence for determining whether right-of-way claims were mechanically constructed or improved." Administrative Determinations on San Juan County Claims (Exhibit 9) at 8.[29]

The fact that Kane County has no official records of any kind demonstrating that the County funded work on, constructed, or maintained the Bald Knoll "road" prior to October 21, 1976 strongly implies that the County never performed such work. It is also strong evidence that Bald Knoll was of such little importance to the County that it did not constitute a "highway."

On September 13, 2007, Earthjustice submitted to Kane County a request pursuant to Utah's Government Records Access and Management Act (GRAMA), seeking all records generated, modified or acquired by Kane County concerning "maintenance or construction (including funding of such maintenance or construction) of roads in Kane County dated before October 21, 1976." See letter of E. Zukoski to M. Habbeshaw, et al. (Sep. 13, 2007) at 1-2, attached as Exhibit 16. Earthjustice limited this request, identified as request #2, to "only those records for routes located within the following townships and ranges in the Salt Lake Base Meridian: Township 40 South, Range 4 ½ West, and Township 40 South, Range 5 West." Id. The Bald Knoll route is located within this area.

The Kane County Commission, on behalf of itself and the County Roads Department, responded to this request as follows: "No records were located." Letter of M. Habbeshaw to

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[28] BLM identifies this submission as "Undated copy of excerpts of a map of Kane County roads with County Road Numbers and with Class "B" Roads labeled." The map is posted at http://www.blm.gov/style/medialib/blm/ut/lands_and_minerals/lands/test/bald_knoll_rd_nbd.Par.70897.File.dat/KaneCo.Road.pdf.

[29] The State of Utah has also admitted the relevance and importance of such data. See infra at pp. 32-33.

E. Zukoski (Sep. 27, 2007) (emphasis added), attached as Exhibit 17. The Kane County Attorney's office also could locate no such records. Letter of W. Bernard to E. Zukoski (Sep. 14, 2007), attached as Exhibit 18.[30]

G. Kane County Has Not Submitted Any Evidence Specifying the Scope of the Right-of-Way it is Claiming, Rather it Submitted Contradictory and Ill-Substantiated Evidence Concerning the Scope of the Right-of-Way.

The County did not submit any records that delineate the exact length, width, or surface of the alleged Bald Knoll right-of-way it is claiming under R.S. 2477. This information is critical for the BLM to understand the County's request for a non-binding determination and determine the validity of the alleged R.S. 2477 right-of-way. In fact, the BLM should not have presumed which route or length of route was requested by the County. We strongly recommend that BLM obtain and disseminate this information immediately if it chooses to review the Bald Knoll claim under its NBD policy.

The only data the County submitted that references the scope of the route are affidavits that say nothing about the width of the route. In addition, the vast majority of references to types of use are not tied to any specific date – whether before 1976 or after – making it nearly impossible to determine the scope of the route in 1976. The uses of a route may be relevant to scope, but the only evidence of uses of the route comes from affidavits, and the descriptions of the types of uses that took place are often described in such a manner that it is difficult to determine when those uses may have become established. It is therefore nearly impossible for BLM to adduce anything about the scope of the route in October, 1976, the key date for determining scope. Finally, the affidavits make contradictory statements about the nature of maintenance and construction as discussed above.

A major reason for the BLM to request and understand the specific scope requested by the County is to understand if it is claiming the half-mile of the route at its seemingly eastern terminus. BLM this year granted the County a Title V permit that allowed the County to build a half-mile of new road connecting the Mill Creek route to the Bald Knoll route in a significantly different location than the current eastern-most half mile of the Bald Knoll route. Therefore, it seems odd for BLM to make an NBD for a part of the route that is at least partially blocked or recently rendered obsolete, when the purpose of the Title V permit was to reduce environmental impacts and improve safety on the route.

Also, since Kane County is unlikely to be interested in improving the easternmost half-mile of the Bald Knoll claimed route – given that it has spent the time and money to create a new road that bypasses that portion of the route – it is unclear why BLM must perform an NBD for that section of the route. BLM's IM 2006-159 states: "An NBD finding that the right-of-way exists must be made prior to completing the required consultation process with states or counties

[30] Kane County's lack of records concerning maintenance of Bald Knoll prior to 1976 casts doubt on the designation of the a portion of the route as a Class B road. See discussion of Class B road maps, infra at pp. 47-50.

over proposed improvements – i.e., any work beyond routine maintenance – to claimed R.S. 2477 rights-of-way." The Preliminary NBD states that "BLM will use this NBD to determine whether subsequent consultation with Kane County on certain improvements it has proposed to undertake on the Bald Knoll Road is appropriate." Since Kane County does not appear interested in doing any work at all to the easternmost half-mile of the claimed route, since it has completed work that bypasses that part of the route, it is unclear what purpose BLM could have in an NBD for that easternmost half-mile of route. What is the purpose of approving an NBD for the final half-mile of the route, particularly given that it could create duplicative routes? Why would BLM give Kane County a right to something the County doesn't want or think is safe enough to facilitate traffic?

H. BLM Must Require Kane County to Gather Essential Factual Information that the State of Utah Admits Is Relevant.

The sparse, contradictory, and/or irrelevant information submitted by Kane County does not demonstrate that a right-of-way was granted under R.S. 2477 for the claimed route. What Kane County omits, however, is the type of information that is essential to shedding important light on the existence or non-existence of a valid R.S. 2477 right-of-way.

For example, in addition to county maintenance, construction, and road funding records (which the counties admit that they do not have), Kane County fails to provide the following types of information that BLM has in the past found relevant:

- historic, official government maps (including those generated by the County)
- U.S public land records
- Public Land Survey System records
- wilderness inventory records
- BLM planning, grazing and maintenance records
- other federal agency records

See Administrative Determinations on San Juan County Claims (Exhibit 9) at 8-10.

Indeed, the State of Utah – which acts as one of Kane County's lawyers on R.S. 2477 matters – itself has admitted that this type of information is relevant and important to establishing an R.S. 2477 claim. In response to a Freedom of Information Act request and litigation, DOI provided to The Wilderness Society and SUWA records provided to the agency by the State of Utah as part of settlement negotiations over R.S. 2477 claims in the State. See The Wilderness Society v. Bureau of Land Management, 2003 WL 255971 (D.D.C. 2003). Among the documents released were template declarations apparently prepared by the State for presentation to BLM. See "R.S. 2477 Roads, Oral History Interview Questions and Affidavits," (no date) (hereafter "Utah R.S. 2477 Affidavit Template"), attached to Declaration of Keith Bauerle (Apr. 15, 2005), attached hereto as Exhibit 19 (identifying source of document). That document, clearly prepared by the State, contains "Questions (To ask of present or former public officials or employees)." Utah R.S. 2477 Affidavit Template at un-numbered page 8. The State recommends that it be determined from such employees: "What documentation is available for the period before 1976?" and recommends that the following type of documents be located:

- Photographs ...
- County resolutions
- County planning documents
- Commission meeting minutes
- Budget documents
- Contracts/Memoranda of understanding
- Correspondence
- Diaries
- Class B road maps
- Class D road maps
- BLM maps ...
- USGS maps ....

Id. at un-numbered page 9. Despite the fact that the State – which acts as the County's lawyers on R.S. 2477 matters – has admitted that the type of evidence listed above is important to establishing the validity of an R.S. 2477 right-of-way, Kane County provided BLM with virtually none of these types of information to support its applications. Therefore, it can be assumed that none of this type of admittedly relevant information could be located by Kane County employees in support of its applications.

TWS believes that review of historic and agency records above is essential, and that BLM must either require that Kane County submit such information in the future or commit the agency to gathering the information and making it available to the public before the commencement of the public comment period. This is particularly important given that Kane County did not submit all of relevant records concerning the route in its possession. For example, Kane County provided Federal and County maps to TWS in response to a GRAMA request that it did not provide to BLM. See infra at pp. 47-48.

V. BLM MUST UNDERTAKE A COMPREHENSIVE SEARCH FOR DOCUMENTS PERTAINING TO THE BALD KNOLL APPLICATION.

BLM guidance suggests some of the kinds of evidence that the agency should obtain in assessing whether a route may be an R.S. 2477 right-of-way for purposes of an NBD. The list of evidence is, however, far from comprehensive. We therefore urge BLM to consider broader range of evidence in order to complete a thorough review prior to making any NBD.

BLM guidance contains "examples" of "the type of information [supplied by the claimant] that would assist BLM in its determination." These "examples" include:

- Narrative as to when and by whom the claimed right-of-way was constructed and supporting evidence;
- Maintenance records or other evidence of periodic maintenance;
- Affidavits and/or other legally cognizable documents evidencing how the claimed right-of-way was established, its history, and usage;
- Historic maps and photographs of the claimed right-of-way (pre October 21,1976);

- Current maps and photographs of the claimed right-of-way; and/or
- Information about which Federal land managing agency or agencies administers the land underlying the claimed right-of-way

Exhibit 1, IM 2006-159 at 1. That guidance also contains "[e]xamples of BLM records that may contain relevant evidence," including

- Maps
- Aerial photos
- Land Use Plan Information and Maps (Resource Management Plans (RMP), Travel Plans, etc.)
- Range Management and Grazing Files
- Title and Survey Records
- Maintenance Records

Id.

While this list is a start, it does not capture the many sources and types of evidence that may assist BLM in making a reasoned, defensible decision as to the existence (or lack thereof) of an alleged right-of-way. Therefore, BLM must undertake additional research by examining, at a minimum, the following types of evidence prior to completing any credible determination concerning an NBD:

- Government Land Office surveys and re-surveys
- All U.S. Geologic Survey maps and notes
- Affidavits which recount, ***without reliance on hearsay***, continuous use of the route
- Historical information relating to the use of the route and its surrounding area (such as County histories, records in the local historical society, etc.)
- Any activities in the area which are primarily conducted by federal authorities or under the auspices of federal law, including, for example, the construction of the route by the Civilian Conservation Corps or other federal entity (this may require an archival search for public lands records that could be located in another State)
- Records (or the lack thereof) relating to the expenditure of public funds for the use or construction of the route
- The extent or frequency of the use of the route during the 10-year period of use supporting the right of way claim, which would define the permissible use of the route today
- All County road maps, and county construction and/or maintenance records
- BLM records concerning the nature or presence of the routes, including records created during its review of lands for wilderness character
- Mineral leasing records which may have reserved public lands in the area where R.S. 2477 rights are claimed
- Documentation of the termini or purpose for the claimed routes (which would be relevant to the claim that they are "highways")
- Documentation concerning whether the claimed routes are continuous and uninterrupted. (Gaps in the claimed "highway" result in isolated, unconnected

strands of claims and would not meet the definition of highway. Such gaps may occur as a result of intervening oil and gas leases, parcels of private or state-owned lands, or lands reserved for other public purposes.)

- Evidence related to whether the route had been abandoned
- Evidence relating to changes in the use and character of the route
- Evidence of acceptance by public authorities of the grant of the right of way, including the expenditure of public funding for the use or construction of the right of way
- Evidence as to the uses of the route for diverse purposes or by diverse interests
- Evidence as to the traditional uses to which the route had been put

We emphasize the importance of BLM's independent, critical review of the evidence submitted by claimants, in addition to a thorough review of BLM's own files, and those of other federal agencies, counties, and those of the State in which the State Office is located. Our emphasis on a thorough review of all relevant files in this regard stems from BLM's experience relating to materials submitted by the State of Utah in support of applications for recordable disclaimers of interest in 2004. The State of Utah was forced to withdraw its initial application for a route known as the Weiss Highway in Juab County when conservation groups discovered: (1) federal archival records showing that the U.S. Civilian Conservation Corps constructed the route using federal funds and federal employees to serve a federal purpose; and (2) records in the Juab County clerk's office showing that the County had sold part of the highway right-of-way to the DOI for $1. In short, the County and the BLM failed to review their own record which would have quickly disproved the legitimacy of the recordable disclaimer application. . This aptly illustrates why BLM must perform its own skeptical review of County records submitted, why BLM must conduct an independent search of County records, and why BLM must thoroughly research its own files, archived records, and those of other federal agencies.

A review of emails acquired by TWS through a FOIA request establishes that BLM made a less than enthusiastic attempt to acquire records relevant to the NBD determination. The Utah State Office apparently first requested information from the District Office in January, 2007. See Exhibit 20 (email of M. Dekeyrel to R. Smart (Jan. 11, 2007)). At the end of June 2007, the State Office was still waiting on information regarding grazing improvements in the area. See Exhibit 21(email of H. Wolfe to M. Dekeyrel, June 28, 2007, in BLM email string beginning Jan. 10, 2007). A series of emails spanning December 2006 to June 2007, document BLM's ineffective attempts to get aerial photography of the area. See Exhibit 21 (Julie Casper to Michael Dekeyrel, December 19, 2006 (forwarded with below January 10, 2007, email); Julie Casper to Michael Dekeyrel, January 10, 2007; Julie Casper to Michael Dekeyrel, January 18, 2007; Hugh Wolfe (CCDO) to Michael Dekeyrel, January 25, 2007; Hugh Wolfe (CCDO) to Michael Dekeyrel, June 28, 2007). These emails illustrate that BLM was aware of aerial photography available for the area at relevant times ("60s vintage" later refined to "1963/64," and "1974/75") but failed to include any of these data in their analysis. The emails also illustrate BLM's inability to determine the source of the illegible 1960 photography that was included with the application; in the end, the agency relies on an incorrect assumption of the photos' source. (TWS, by contrast, was able to locate the source of the photos in less than an hour of internet

research.[31]) BLM's expediency compromises one of the few pieces of evidence considered for the NBD.

Additionally, TWS identified several Federally-produced maps, including two BLM maps, that should have been readily available to BLM and reviewed prior to the agency making a preliminary determination. See infra at p. 49. BLM's has apparently failed to undertake even a modest search of its own files for relevant materials.

VI. BLM CANNOT RELY ON KANE COUNTY'S SUBMISSIONS TO ISSUE A NON-BINDING DETERMINATION FOR BALD KNOLL, BECAUSE TO DO SO WOULD VIOLATE THE INFORMATION QUALITY ACT.

A. Legal Background.

The Information Quality Act (IQA), adopted by Congress in late 2000, requires that the Office of Management and Budget (OMB) issue "policy and procedural guidance to federal agencies" requiring that the other agencies in turn issue their own guidelines with the goal of "ensuring and maximizing the quality, objectivity, utility, and integrity of information ... disseminated." P.L. 106-554; Sec. 515 of H.R. 5658. OMB issued its guidelines on February 22, 2002, and DOI and BLM issued their own guidelines as required shortly thereafter. See 67 Fed. Reg. 8452 (Feb. 22, 2002) (OMB guidelines); 67 Fed. Reg. 36,642 (May 24, 2002) (announcing DOI guidelines); www.doi.gov/ocio/guidelines/515Guides.pdf (last viewed June 9. 2005) (hereafter "DOI guidelines"); BLM website at www.blm.gov/nhp/efoia/data_quality/guidelines.pdf (last viewed June 9, 2005) (hereafter "BLM guidelines").

The IQA (sometimes referred to as the "Data Quality Act") was meant to ensure that agencies, including the BLM, did not disseminate to the public or rely on information of dubious quality in the agency's public pronouncements or decision-making. The DOI and BLM guidelines make clear that when the agency makes a decision, the IQA's guidelines would apply to that decision and dissemination of information allegedly supporting that decision. DOI guidelines at 3; BLM guidelines at 4. DOI guidelines state that to ensure the "quality" of information the agency relies upon or disseminates, the agency must ensure that the information is "accurate, reliable, and unbiased," and is "presented in an accurate, clear, complete, and

[31] The NBD states that the probable source is the USGS (despite the fact that USGS stated to BLM that they had no such photography on file; see Exhibit 21 (Hugh Wolfe (CCDO) to Michael Dekeyrel, June 28, 2007), stating that "USGS […] said that they have DSA projects in the area but none dated 1960."). TWS's investigation of this photography has identified the source as the USDA Farm Services Agency ("FSA"). See Exhibit 15 at ¶ 14. TWS reviewed FSA's online aerial photography catalog (www.fsa.usda.gov/Internet/FSA_File/catalog.txt), identified a set of 1960 photography for Kane County (six photos, 1:20,000, black and white), and ordered the photography corresponding to those presented with the NBD. Id. TWS acquired and reviewed this set and confirmed that it is the same photography as that presented with the NBD. Id. Reproductions of the photography are attached as Exhibit 15(A).

unbiased manner." DOI guidelines at 8; see also BLM guidelines at 6. Where the information at stake is "influential," the agency must more rigorously evaluate the information to ensure its integrity. DOI guidelines at 10; BLM guidelines at 4-5. DOI defines "influential information" to include that data that will have a "clear and substantial impact on important public policies." DOI guidelines at 10; see also BLM guidelines at 4 (influential information is that which is "expected to have a genuinely clear and substantial impact at the national level").

B. A BLM Decision to Rely upon Information Provided by Kane County – as Well as BLM's Dissemination of the Information Itself – Is Subject to the IQA.

IQA guidelines make clear that BLM must ensure the objectivity of information provided to the agency by third parties that may form the basis for the agency's decision. DOI's guidelines state that if DOI "relies upon technical [or other] information submitted or developed by a third party, that information is subject to the appropriate standards of objectivity and utility" under the IQA. DOI guidelines at 7; see also BLM guidelines at 2 (IQA applies to information submitted by a third party where BLM's use of the data "suggests that BLM endorses or adopts the information, or indicates in its distribution that it is using or proposing to use the information to formulate or support a ... DOI decision ....").

BLM has already published and disseminated to the public information contained in Kane County's application, and by proposing to issue an NBD based upon that material;, has effectively endorsed the information contained therein. See 70 Fed. Reg. 9094 (Feb. 22, 2005) (relying upon and stating as fact information contained in Utah's applications). Thus, BLM's decision to publish that information on the internet was subject to the IQA. Further, a BLM decision to issue an NBD based on Kane County's submissions would, under DOI's and BLM's guidelines, also require that BLM review that data and vouch for its objectivity before disseminating such a decision. Finally, because a decision to issue an NBD for Bald Knoll will set a national precedent as to how BLM will effectively recognize R.S. 2477 rights-of-way under the Norton policy – an issue of great national import considering its potential impact on BLM land across the country – the information relied upon must be considered "influential" and subject to the higher standards for such information in BLM and DOI guidelines.

C. Kane County's Affidavits – and Other Submissions – Fail to Meet the Standards of the IQA.

BLM cannot rely upon – or disseminate in support of a final decision based upon – the affidavits and other information submitted by Kane County because such information does not meet the standards for "accurate, reliable" information that is "presented in an accurate, clear, [and] complete" manner in the IQA and implementing guidelines. As discussed in detail in Section IV, supra, for each of the alleged right-of-ways:

- Kane County has submitted affidavits that contain hearsay, are vague, fail to provide any basis for statements made, and contradict other information submitted by the County;

- Kane County has submitted maps and photos that are of marginal – if any – relevance, and for which the County provides no evidence or verification as to their authenticity;
- Kane County has submitted almost no information to actually support a conclusion that a public highway was constructed or subject to ten years of continuous use during the relevant time period; and
- Kane County has admitted that there are other types of persuasive evidence that it either does not possess or which it has failed to submit.

As such, BLM cannot rely upon – or disseminate in support of an NBD based upon – the County's submissions. To do so would plainly violate BLM's duty to rely on "accurate, reliable" information as required by the IQA. This is especially true given that the information could be considered "influential," and thus merits a higher level of scrutiny from BLM.

This section of TWS's comments should be considered by BLM to be a "request for correction" of data disseminated by the BLM pursuant to the IQA. See BLM guidelines at 7-8. This letter meets all the requirements for such a valid request pursuant to the agency's guidelines.[32] We look forward to BLM's explanation of its response to this request for correction within 60 day, as the agency requires. Id. at 8. BLM should provide TWS with a "separate response" to this request for correction, as the agency's IQA guidance suggests. BLM guidelines at 8.[33]

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[32] First, TWS provides contact information at bottom of the first page of this letter, and at the end of this letter.

Second, TWS explains in this section that the County's submissions generally – and its declarations specifically – do not comply with agency IQA guidelines, and thus cannot be relied upon by BLM to support a decision to issue disclaimers of interest, and why the County's submissions cannot be republished by BLM.

Third, the remedy, or "correction," that TWS seeks is that BLM cannot rely upon (or use as the basis for any published decision) information submitted by the County to issue an NBD, and thus that BLM cease dissemination the County's submissions.

Finally, TWS is and will be an "affected person" for purposes of these guidelines, since BLM's dissemination of or reliance upon non-credible information from the Kane County in reaching a decision on the County's applications for an NBD may harm TWS's and its members' long-standing and well-recognized interests in protecting the environment of the public lands directly abutting and affected by the claimed route.

[33] BLM guidelines state that a separate response is unnecessary in cases such as rulemakings because "BLM rulemaking includes a comprehensive public comment process and impose a legal obligation on BLM to respond to comments on all aspects of the action." BLM guidelines at 8. Unlike BLM rulemakings, however, guidance on BLM responding to comments on applications for NBDs hardly establishes a "comprehensive" process. BLM's guidance on the NBD process requires no response to comments submitted by the public – which is required by both rulemaking regulations and the National Environmental Policy Act.

VII. EVIDENCE IDENTIFIED BY BLM IN ITS FILES DOES NOT SUPPORT A DETERMINATION THAT A RIGHT-OF-WAY EXISTS AT BALD KNOLL.

A. Images and Maps Created After October 21, 1976 Do Not Support a Determination of the Existence of a Right-of-Way.

1. Ground Photos Taken After 1976 Do Not Support a Determination of the Existence of a Right-of-Way.

Among the materials listed as "supporting information" for the NBD on BLM's website are a set of photos, apparently taken by BLM staff on a June 1, 2007 "field inspection."[34] Photos of the current condition of the claimed route from the ground may be relevant to the existing scope of disturbance of each route. Such photos are, however, not dispositive of or even convincing concerning the question of whether a highway right-of-way existed along the highway's current route prior to October 21, 1976 or the date the land was reserved, whichever is earlier. Such photos cannot show the condition of the route in October 1976, the last possible date relevant for establishing the existence of such a right-of-way.

Such photos could be offered to show that certain features photographed (such as a culvert or cattle-guard) contain a notice or some other evidence that they were erected prior to 1976, or whenever the land was otherwise reserved.[35] None of BLM's June 1, 2007 photos contain such evidence. The photos do contain evidence of several culverts, two of which are described by BLM as "old."[36] The photos themselves contain no information that would enable the observer to determine whether the culverts were installed prior to October 1976. Another feature – an apparent BLM livestock grazing exclosure – is listed being approved or erected in the "Mid 1970s?"[37] While the caption identifies a BLM file number, BLM does not provide any additional information as to the date – or significance – of the construction of this facility.

BLM has previously concluded that evidence concerning the "present and near present conditions of [] claims" were "not persuasive" in addressing whether a right-of-way was granted

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[34] BLM's preliminary NBD states: "BLM personnel conducted field inspections of the Bald Knoll Road on August 17, 2006 and June 1, 2007. The August 17, 2006 examination was a general reconnaissance and photographs and measurements were not taken. The June 1, 2007 examination was more detailed, and the road and adjacent features were measured and photographed at 23 locations. …. The 34 photographs in Attachment 2 were taken by BLM personnel on June 1, 2007, and show the physical characteristics and condition of the Bald Knoll Road at 22 points along the road."

[35] Photos taken after the date of repeal or reservation may also be useful for showing an absence of features associated with construction, particularly given that the burden is on the applicant to show that evidence supporting construction exists.

[36] See Preliminary NBD, Attachment 2, photos G4, L1, and L2 and captions (describing culverts as "old").

[37] See Preliminary NBD, Attachment 2, photo O and caption.

because they "did not provide evidence as to the conditions of the claims at a time deemed relevant [i.e., before reservation or repeal of R.S. 2477] to the determination of the claims." Administrative Determinations on San Juan County Claims (Exhibit 9) at 6-7.

In addition, photos of the existing nature of the route, or of the scope of the route in the last year, are irrelevant to the determination of the scope of the route at the time of the land's reservation or R.S. 2477's repeal, whichever is earlier. Kane County provides no ground photos from 1976 or earlier, and BLM apparently located none; as such, the photos in the record are not helpful to the discussion of the scope of the route at the time any alleged right-of-way was created.

Finally, BLM could have and should have provided additional material to bolster the credibility of the ground level photos, whatever their relevance. BLM provides no evidence that the photos asserted to be of the route at a certain point on the map were in fact taken at those locations. No declarations or affidavits accompany the photos; captions do not always identify which direction the photos face; route location could be more precisely fixed by linking photo data to GPS information, etc.

2. Maps Created after 1976 Do Not Support a Determination of the Existence of a Right-of-Way.

Maps created after the repeal of R.S. 2477 cannot establish the existence of highway before October 21, 1976. For this reason, two of the maps listed as "supporting information" from BLM's files are irrelevant and do not support a determination that the route was validly established as an R.S. 2477 right-of-way.

First, a topographic map dated identified by BLM as the "2002 BLM Kanab 1:100,000 Scale Surface Management Status Map" – prepared 25 years after R.S. 2477 expired – is not relevant evidence for a determination of the existence of an R.S. 2477 right-of-way, or the scope of any such right-of-way as of October 21, 1976.[38]

Second, BLM identifies as "supporting evidence" a map prepared by the State of Utah to support a June 2000 notice of intent to sue the Department of the Interior concerning the existence of alleged R.S. 2477 rights-of-way. Because this map was prepared nearly 23 years after R.S. 2477's repeal, it, too, is irrelevant.[39]

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[38] See Preliminary NBD, "Information and Documents in BLM Utah State Office and Kanab Field Office Files and Records"; map posted on BLM's website of "supporting information" at http://www.blm.gov/style/medialib/blm/ut/lands_and_minerals/lands/test/bald_knoll_rd_nbd.Par.1415.File.dat/BLMKanabmap.pdf.

[39] BLM identified this piece of "supporting information" in its preliminary NBD as "Map of roads that was attached as an Exhibit to the letter dated June 16, 2000 from the State of Utah to the Secretary of the Department of the Interior providing notice of the State's intention to file suit under the Quiet Title Act, 28 U.S.C. § 2409a, concerning certain asserted rights-of-way under R.S. 2477 (Notice of Intent to Sue)." The map is posted at http://www.blm.gov/style/

B. BLM Planning and Road Maintenance Documents Do Not Support a Determination of the Existence of a Right-of-Way.

BLM identifies several documents as "supporting information" located in various BLM offices that either do not support or undermine any determination of a right-of-way or potentially undermine such a determination.

1. The 1980 Zion MFP Excerpt Does Not Support a Determination of the Existence of a Right-of-Way.

BLM identifies as "supporting information" an excerpt from BLM's 1981 Zion Management Framework Plan (MFP), specifically "Lands Program Recommendation and Decision L-2.1"[40] This recommendation and decision provides no support whatsoever for the existence of the alleged Bald Knoll right-of-way.

The "rationale" for the proposed decision reads as follows:

> Rationale: The lands in question are already in use by the county which maintains a road across them. The authorization of RS-4477 [sic] under which the county has claimed these roads, in fact, does not operate on these lands which have been withdrawn since 1910 pending their classification for coal values. Because of the segregative effect of these withdrawals, Kane County will require a right-of-way under Title V of FLPMA in order to properly authorize the continued use of these roads.
>
> ….
>
> Comparative analysis – This county road already exists, although not in a legally authorized manner. BLM is going to have to take some step to see that it is given such authorization.

Zion MFP excerpt, L-2.1. It is unclear exactly what route – or routes – this MFP excerpt refers to. The "rationale" discusses "a road" in the first sentence and "these roads" in the succeeding sentences. The "comparative analysis" again discusses a singular "road." No map accompanies this analysis of decision.

However, the routes at issue cannot be the Bald Knoll route. BLM identifies the area traversed by the non-conforming route or routes to be "T. 40 S., R 4.5 W. SLBM, Section 19, 20, 21, 29, 30 & 33." Zion MFP excerpt, Table L-2. None of the Bald Knoll claim as depicted by

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medialib/blm/ut/lands_and_minerals/lands/test/bald_knoll_rd_nbd.Par.15529.File.dat/Kane2000NOImaps.pdf.

[40] See http://www.blm.gov/style/medialib/blm/ut/lands_and_minerals/lands/test/bald_knoll_rd_nbd.Par.20030.File.dat/ZionMFPexcerpt.pdf.

the BLM in the preliminary NBD lies in any of these sections. The easternmost part of the route lies in sections 8, 16 and 17 of Township 40 South, Range 4.5 West, between a half-mile and a mile north of the lands identified in the MFP. If anything, the MFP provision should weigh against the finding of a right-of-way for Bald Knoll, since the Bald Knoll route cut across the same 1910 coal withdrawal area and is not mentioned at all as a non-conforming use that must be properly authorized.

2. The 1972 BLM-Kane County Road Maintenance Agreement Does Not Support a Determination of the Existence of a Right-of-Way.

BLM includes a 1972 memorandum of understanding (MOU) between BLM and Kane County concerning road maintenance as "supporting information."[41] However, the MOU does not contain any reference to either a "Bald Knoll" route or a "Coal Road," the two common names for the claimed route. Nor do any of the routes "Termination Points" in the MOU definitively match those of the claimed route.

We note that the MOU itself and the cover memo attached to it reference an attached map, which BLM apparently did not review or rely upon.[42] BLM cannot rely upon such a map, unless it makes the map available to the public for review and comment prior to making any determination.

C. The Cadastral Survey Plats Do Not Support a Determination of the Existence of a Right-of-Way.

BLM identifies as "supporting information" "Cadastral Survey Plats from 1876 to 1974 for T. 40 S., R. 4½ W., SLBM and T. 40 S., R. 5 W., SLBM." This data provides almost no support for a determination that a right-of-way exists in the area. The cited maps, at best, show only routes corresponding to portions of the claimed route. It must also be remembered that the surveyors' task was to locate and map the boundaries of the Townships and their subdivisions, not cultural features such as roads. The routes located on these maps should be viewed as sketches by individuals passing through the area, not as authoritatively mapped features. The indication of a "road" or "trail road" does not indicate any particular level of construction or even use.

The Cadastral Survey Plat information shows that the interior of Township 40 South, Range 4 ½ West was surveyed in 1911 (with exterior lines surveyed as far back as 1876). The plat itself is dated 1914. The sketch does not illustrate any portion of the claimed route in section 8, 16, or 17 of Township 40 South, Range 4 ½ West.

The Cadastral Survey Plat information for Township 40 South Range 5 West is based on multiple surveys completed in 1877 (survey dated 1876), 1914 (survey dated 1911), and 1978

[41] See http://www.blm.gov/style/medialib/blm/ut/lands_and_minerals/lands/test/bald_knoll_rd_nbd.Par.72909.File.dat/BLMKaneCoMOU.pdf.

[42] Road Maintenance Agreement Summary at 1; Memorandum of Understanding at 2.

(survey dated 1974). The 1877 plat shows only part of the township traversed by the claimed route, namely the southwest quarter of section 14, section 15, 22, 27 and 34. Nothing that corresponds to the claimed route is depicted in sections 14 or 15. A route approximating the general direction of the claimed route is depicted running south from the junction at Bald Knoll in Section 22 for about 2 miles through Section 27 into the very northern portion of section 34, where the route on the survey plat turns to the east, diverging sharply from the claimed route. In the southern ¾ of section 34, the claimed route is not depicted. In short, except for a short stretch of route, the 1877 plat provides no support for the existence of the claimed route.

The 1914 plat illustrates most of section 13 and all of section 14 of Township 40 South Range 5, where the claimed route is now located. While the map displays a number of other routes, it displays nothing that corresponds to the claimed route. Review of the survey notes suggests that the single dashed line on the map corresponds to washes rather than travel routes. Compare 1914 Survey Plat of Township 40 South Range 5 West on BLM's Bald Knoll NBD website (http://www.blm.gov/style/medialib/blm/ut/lands_and_minerals/lands/test/bald_knoll_rd_nbd.Par.87985.File.dat/BLMSurveyPlats.pdf) with Exhibit 22 (1911 survey notes, Book A-397, Township 40 South, Range 5 West (partial)). The map displays a route along the western branch of Thompson Creek in the western half Section 14 that may correspond roughly with a few hundred yards of the claimed route. No additional portion of the route are shown in Sections 13 or 14.

The 1978 plat does shows a route corresponding to the claimed route from Section 15 south to Section 34 in Township 40 South Range 5 West, which is the extent of the mapped portion of the township relevant to the claim. However, the map is limited in its support of the claim since it displays only a portion of the route. The survey notes accompanying the survey plat describe the route as a "trail road." Compare 1978 Dependent Resurvey Plat of Township 40 South Range 5 West on BLM's Bald Knoll NBD website (http://www.blm.gov/style/medialib/blm/ut/lands_and_minerals/lands/test/bald_knoll_rd_nbd.Par.87985.File.dat/BLMSurveyPlats.pdf) with Exhibit 23 (1976 survey notes, Township 40 South, Range 5 West (partial)).

D. Master Title Plats and Related Information Do Not Support a Determination of the Existence of a Right-of-Way.

BLM states that it reviewed information in its Utah State Office including "Master Title Plats, Historical Index, and Control Document Index documents." See Preliminary NBD. The Preliminary NBD does not state which exact documents BLM reviewed, nor does BLM provide any of these documents online through the Bald Knoll NBD website. BLM should not and cannot rely upon these documents to support its position unless and until the agency makes them available to the public through the Bald Knoll website.

In any event, TWS submitted a FOIA request for numerous BLM files in the Utah State Office and in the Kanab State Office concerning all of the leases, permits, withdrawals, and other notations listed on the Historical Index in the area traversed by the route. Based upon our review, none of these files contain maps dated October 21, 1966 or before displaying the route. None of these files contain information that affirms that construction of a route in the area took

place prior to October 21, 1976. Therefore, these files cannot support a determination of the existence of a right-of-way at Bald Knoll.

In fact, a review of several Range Improvement case files (identified from the Historical Index and therefore possibly considered by BLM) revealed evidence casting doubt upon the existence of the route as late as the mid-1950s. Two files, Serial Files #274 and #342, describe grazing fences constructed on public lands and across the claimed route.[43] Neither of the Final Project Reports, or the accompanying sketch maps, discuss or describe roads that the fences might impact. See Exhibit 24 (BLM livestock grazing serial files). The failure to include a discussion of road crossings contrasts with another Final Project Report on a grazing fence that was constructed at the same time and in the same general area[44], which specifically mentions that "[a] cattle guard with concrete box and grill of R.R. rails was constructed at point where county road intersects fence line."

E. The 1966 U.S.G.S. Maps, by Themselves, Do Not Demonstrate Public Use or Construction.

BLM relies upon two 1966 U.S.G.S. 7.5 minute maps. These maps appear to show the route at the location claimed in the preliminary NBD. These maps were produced from aerial photography collected in 1964, and were field checked and published in 1966.

These maps are not, by themselves, conclusive evidence of the existence of an R.S. 2477 right-of-way for several reasons. First, the Bald Knoll and Skutumpah Creek quads show all of the Bald Knoll route as an "unimproved dirt" road, rather than as an "improved" or constructed route. Second, the maps provide no evidence as to the nature and extent (if any) of use of the route, and whether such use was by the public, was continuous, etc.

Courts have declined to find the existence of an easement based on the existence of a route on a map. Petersen v. Combe, 20 Utah 2d 376, 438 P.2d 545, 547 (1968) ("aerial maps, and … other charts and maps" held not sufficient to prove existence of easement); Whelan v. Boyd, 29 P.2d 69 (Cal. 1892) (map alone not sufficient to establish acceptance of public road); Galli v. Idaho County, Idaho (2nd Judicial Dist., Idaho cv 36692 (June 2, 2006)) at pp. 38-42

[43] The fence approved for construction in Serial File #274, also noted as #0350 and "Brinkerhoff Allotment Fence," crosses the route as the boundary between Sections 8 and 17, Township 40 South Range 4 ½ West. This fence was completed in October 1954. The fence approved for construction in Serial File # 342, "Fuller Springs Fence," crosses the route at the boundary of Sections 22 and 27, Township 40 South Range 5 West. This fence was completed in April 1957. See Exhibit 24. BLM's Utah State Office provided Serial File #274 in response to a FOIA request. Earthjustice staff acquired Serial File #342 from the National Archive and Records Administration Rocky Mountain Region's Federal Records Center in Denver.

[44] The fence approved for construction in Serial File # 346, "J.G. Robinson Fence & Cattle Guard," is partially located in Section 33, Township 40 South Range 4 ½ West. This fence was completed in October 1954. This file was acquired from the National Archive and Records Administration Rocky Mountain Region's Federal Records Center.

(available at http://www.rs2477.com/documents/Galli_v_Idaho_County.pdf) (finding that route on a government map might show that a route existed but could not demonstrate continuous public use). BLM can do no different.

VIII. OTHER EVIDENCE UNDERMINES A DETERMINATION OF AN ALLEGED RIGHT-OF-WAY FOR THE BALD KNOLL ROUTE.

A. Maps, Aerial Photography, and Other Data Do Not Support a Finding that Bald Knoll Became a Valid R.S. 2477 Right-of-way before 1976.

The materials submitted by Kane County (which is based upon hearsay, and contains vague or contradictory statements) contains little to no credible evidence to support the contention that Bald Knoll met the standards necessary to establish a valid R.S. 2477 right-of-way before October 21, 1976. As noted above, the County admits it has no records showing that it constructed or maintained of the route prior to that date.

Other evidence available in State, County, and BLM files further undermines Utah's application. First and foremost, some or all of the route is absent on numerous official maps prepared before October 21, 1976. As claimed by Kane County, Bald Knoll has its eastern (or northern) terminus on Skutumpah Creek on the border of sections 8 and 17 in Township 40 south, range 4.5 west. The route traverses section 17 and 18 of this township in a southwesterly direction, and then crosses into section 13 of Township 40 south, range 5 west, heading west where it crosses Thompson Creek and makes two hairpin turns. The route continues west through section 14, and into section 15, where it crosses a small stretch of private land and then heads south into sections 22, 27, and 34. Just north of the southern border of section 34, the route connects to another road. This is the route's western (or southern) terminus. On numerous maps prepared by the State or by the federal government prior to 1976, and even long after, some or all of the Bald Knoll route does not appear.

State-filed County Maps. The Utah Department of Transportation (UDOT) has on file maps submitted by counties detailing where counties claimed Class B (county road) or Class C (city street) routes existed for purposes of obtaining route maintenance funds. See UDOT Regulations Governing Class B and C Road Funds, Sec. III(2)(C) (July 2001) (requiring counties to submit a hard copy map documenting the location and surface type of all mileage claimed for purposes of maintenance funding requests); id. at Sec. VI (2)(A) (describing "minimum standard" for route maintenance) available at http://www.udot.utah.gov/index.php/m=c/tid=134 (last visited October 1, 2007)). Where counties claimed that they intended to maintain a route to certain minimum standards, routes were marked in blue, and usually identified by number.[45] A review of maps entitled "General Highway Map, Kane County, Utah," prepared in cooperation with the "Utah State Department of Highways" on file at UDOT showed the following[46]:

[45] Declaration of Jeff Kessler (June 15, 2005) at ¶ 3 and Exhibit A attached thereto (including statement of UDOT staff concerning maps), attached as Exhibit 25.

[46] Excerpts of the Kane County / UDOT General Highway maps from 1937, 1950, 1965, 1970, and1975 are attached as Exhibits 26-30.

Year of Kane County / UDOT map	Route on Kane County General Highway Map?	Route listed as intended for County maintenance?
1937	NONE of route displayed	No
1950	NONE of route displayed	No
1965	Eastern ½ mile of the claimed route appears in T 40 S, R 4 ½ W, Sections 8 and 17 as numbered route 13602. In T 40 S, R 4 ½ W, section 18 and T 40 S, R 5 W, Section 13 and the eastern part of Section 14, the route may appear as numbered route 13602, though it is located approximately one-half mile to the west of the claimed route. Route 13602 then continues through Sections 22, 23, 27, and 28, about 1-2 miles southeast of the center portion of the claimed route. NONE of the claimed route that runs through the western half of sections 14, nor any in Sections 15 and 22, nor the northern half of Sections 27, appears on this map. Finally, the western end of the route may appear on this map, though this is located approximately one-half mile to the west of the claimed route. For example, the claimed route runs through Section 34; on the 1965 map, a similar route is located in Section 33.	Route 13602 is listed as intended for maintenance.
1970	Same as 1965 map	Same as 1965 map
1975	This map displays a route numbered 10002. Route 10002 corresponds to a portion of the claimed route from T 40 S, R 4 ½ W, Sections 17 and 18 in the east to the eastern border of Section 14, T 40 S, R 5 W. The eastern most half mile of the route deviates to the south of the claimed route in Section 17. From the eastern border of Section 14, route 10002 veers 1-2 miles to the southeast of the claimed route. Route 10002 follows the claimed route from the southern half of Section 27 to the southern boundary of Section 34 in T 40 S, R 5 W.	Route 10002 is listed as intended for County maintenance

In short, from 1937 to 1965, no part of the route appeared on Kane County maps. From 1965 to 1975, portions of the route appeared, but even some of those portions that did appear did

not appear in the same location as the now-claimed route.[47] Further, for all of the period prior to the repeal of R.S. 2477, the middle section of the route – from the western half of sections 14 to the southern half of section 27 - does not appear on County maps. Finally, the center portion of the route is also not displayed on subsequent Kane County / UDOT maps, for the years 1977, 1981, 1984, 1993, and 2006.[48]

County General Highway Maps. Kane County furnished TWS with seven sets of historic County General Highway Maps in response to a GRAMA request. As the County apparently failed to record maintenance records and failed to provide to BLM records supporting the construction and/or existence of the claimed route, (see supra at pp. 30-31), the County maps, along with the State-filed County maps discussed above (see supra at pp. 45-46), may be important evidence of what "roads" the County considered to be public highways. And yet not one of these maps supports the assertion that the entirety of the Bald Knoll route existed as claimed prior to 1976.

Neither the 1956 nor the 1961 Kane County General Highway Maps shows any portion of the route. See Exhibits 36(A) and 36(B).

The 1965 General Highway Maps appear to be reproductions of the same base maps as the 1965 "General Highway Map, Kane County, Utah" acquired from UDOT and discussed above (see supra at p. 46), although they feature a different numbering system and lack the color coding. As with the maps obtained from UDOT, the County's 1965 maps fail to depict the central portion of the route through the western half of sections 14, Sections 15 and 22, and through the northern half of Sections 27.[49] The portions of the route depicted are hand labeled "515" although this labeling occurred at an unknown date.[50] See Exhibit 36(C).

Similarly, the 1975 General Highway Maps obtained from the County appear to be reproductions of the same base maps as the 1975 "General Highway Map, Kane County, Utah" that was acquired from UDOT and is discussed above (see supra at p. 46 and Exhibit 30), although they feature a different numbering system and lack the color coding. The portion of the

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[47] Utah State courts have declined to conclude that merely designating a route as a Class B road is sufficient to demonstrate that a right-of-way exists. See Thomson v. Condas, 493 P.2d 639, 642 (1972) (dissent acknowledging majority's finding that there was no public thoroughfare despite the fact that the county was receiving Class B money for the road); Heber City Corporation v. Simpson, 942 P.2d 307, 309, 311 (1997).

[48] Excerpts of the Kane County / UDOT Class B maps from 1977, 1981, 1984, 1993, and 2006 are attached as Exhibits 31-35.

[49] Kane County supplied no legend with the General Highway Maps provided pursuant to the GRAMA request so it is not possible to determine the nature of the routes illustrated. This analysis must therefore be confined to a discussion of whether any line is present in the appropriate location.

[50] Kane County provided TWS with an un-annotated sheet of the map set in addition to the two sheets that are hand numbered and reproduced in the exhibit.

route illustrated is here hand labeled, again at an unknown date, "15W3."[51] See Exhibit 36(D). As with the 1975 (and 1965 and 1970) maps on file with UDOT, the 1975 General Highway maps obtained from Kane County fail to depict the central portion of the route through the western half of sections 14, Sections 15 and 22, and through the northern half of Sections 27. Compare id. with Exhibits 28-30. And, as with the 1975 maps on file with UDOT, the 1975 General Highway Maps obtained from Kane County display a significant variation from the claimed route at the route's eastern terminus. See supra at p. 46; compare Exhibit 36(D) with Exhibit 30.

Kane County provided three versions of the 1977 General Highway Maps, two of which are stamped as being revised in 1980. Although these maps date from after the repeal of R.S. 2477, they contain some useful information. One of these map sets, one that bears the 1980 revision stamp, shows the same alignment of routes as the on the 1975 map, but adds the words "Bald Knoll" as hand labeling at two points: across the portions of the route through Sections 23 and 26 of Township 40 South Range 5 West — a portion that significantly deviates from the claimed route — and at the western edge of Section 17 of Township 40 South Range 4 ½ West. See Exhibit 36(E). Further, this map set adds additional lines, which may be inferred to represent the County's asserted Class "D" routes based on a notation at the base of the map, in the location of the current claimed route in Sections 14, 15, 22, and 27 of Township 40 South Range 5 West and at the extreme eastern end of the route. See id. These added lines are not labeled "Bald Knoll." The other 1977 map set bearing the 1980 revision stamp, shows the same alignment, but includes other hand labeling, again from an unknown date. See Exhibit 36(F). The entirety of the claimed route is composed of segments of the routes labeled 513, 514, 515, and possibly 516, although this portion of the map (the eastern end of the claimed route) has been smudged or otherwise distorted and is difficult to read. See id.

Not one of these maps supports the assertion that the Bald Knoll route existed as claimed prior to 1976. No portion of the claimed route appears on the County's maps until 1965, and after that date a large portion of the route – the central part of it – is missing. A significant deviation, away from the claimed route at the entry into the Skutumpah Creek drainage, occurs between 1965 and 1975. The claimed route remains incomplete on the 1975 and 1977 County maps that bracket the 1976 deadline. It is not until a 1980 revision of the 1977 County map that lines in approximately the same location as the entire alignment of the claimed route can be found. And even then the claimed route appears to be stitched together from a number of different routes that are likely of different County road classifications. Further, on the 1980 revision of the 1977 map, a different route, following a significantly different alignment, is labeled "Bald Knoll."

[51] Kane County provided TWS with an un-annotated (with the exception of what appears to be series numbers written in the margin) map set (not attached here) in addition to the set that is hand numbered and reproduced in the exhibit.

Maps Prepared by the State of Utah or the Federal Government. Maps prepared by or for the U.S. government before October 1976, as well as Utah state highway maps, also fail to show some or all of the Bald Knoll route.[52]

Date of Map	Map Description	Is Bald Knoll Route Depicted?
1935	Utah State Road Commission	NONE of route is depicted.
1953 (revised 1971)	USGS 1:250,000 Cedar City map	Only a small PORTION of the claimed route is depicted. The map displays routes in the Bald Knoll as "fair or dry weather, unimproved surface." Approximately 1.5 miles of the route is depicted, from the west side Thompson Creek in T 40 S, R 5 W, very western portion of Section 13, to the northeastern quarter of Section 22. The remainder of the claimed route does NOT appear on this map.
1970	BLM, Kanab District[53]	Only a PORTION of the claimed route is depicted. This map displays the same portion of the routes as on the 1953 (revised 1971) USGS 1:250,000 map (as a "four wheel drive" route). The remainder of the claimed route does not appear on this map.
1971	BLM Recreation Map, Kanab District	Only a PORTION of the claimed route is depicted. This map displays the same portion of the routes as on the 1953 (revised 1971) USGS 1:250,000 map (as a "four wheel drive" route). This map also displays the extreme southern 1.5 miles of the route as a "seasonal road," although this section does not connect to the other section. The remainder of the claimed route does not appear on this map.
1977	UDOT State Highway Map	NONE of the claimed route is depicted on this standard state highway map that was given free to the public.

The fact that none of these maps display the route tends to undermine any finding that the Bald Knoll route existed at the location claimed.

[52] The 1935 Utah State Road Commission map is attached as Exhibit 13. The 1953 (revised 1971) USGS 1:250,000 Cedar City map is attached as Exhibit 37. The 1970 Kanab District map is attached as Exhibit 36(G). The 1971 BLM Recreation Map for the Kanab District is attached as Exhibit 38. The 1977 UDOT State Highway Map is attached as Exhibit 39.

[53] This map was provided to TWS by Kane County in response to a GRAMA request. See Exhibit 36 (Zukoski Dec.) at ¶¶ 5, 13 and Exhibit 36(G).

Aerial Photography. TWS acquired a set of original prints of the 1960 aerial photography that Kane County photocopied and submitted to support the NBD.[54] Reproductions of the photography are attached as Exhibit 15(A). This publicly available set, composed of five individual frames (four from one flight line and one from an adjacent flight line), is legible and partially suitable for stereoscopic analysis.[55] The following analysis is based on a review of the photography by an Earthjustice staff member trained and experienced in aerial photography interpretation. See Declaration of Douglas C. Pflugh, attached as Exhibit 15 at ¶¶ 4-5, 11-19.

The photography covers only a portion of the area through which the claimed route passes, roughly encompassing the area from the southeast quarter of Section 22, Township 40 South Range 5 West, through the eastern terminus of the claimed route. DSA-4 AA-12 is the western most photograph; the other four photographs comprise a north-south line, where DSA-10 AA-21 is roughly level with DSA-4 AA-12. None of these photographs appear to show any portion of Township 40 South Range 5 West Sections 27 or 34. Id. at ¶¶ 15-16.[56]

A landscape scar roughly corresponding to the claimed route is visible from the northeast quarter of the southeast quarter of Section 22 through the northwest quarter of the southeast quarter of Section 14 (Township 40 South Range 5 West). No additional landscape scars, with approximately equivalent image signatures, corresponding to the claimed route are visible. See Id. at ¶ 18.[57] In contrast, other roads and trails indicated on the 1966 USGS topographic maps are visible throughout the area. Id. at ¶ 19.

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[54] See supra at pp. 28-29; see also Exhibit 15 (Pflugh Dec.) at ¶¶ 14-15.

[55] As noted above, these photos can be ordered by the public for a fee from the USDA Farm Services Agency. See supra at footnote 31; Exhibit 15 at ¶ 14. Three of the photographs (DSA-4 AA-12, DSA-10 AA-21, and DSA-10 AA-22) are sufficient for stereoscopic analysis of the subset of the area traversed by the route: from the southeast quarter of Section 13 (Township 40 South Range 5 West) east to the location of the eastern terminus of the route. Additional photography from the DSA-4 flight would be necessary for stereoscopic coverage of the western area of the claimed route. See id. at ¶ 15.

[56] The exact extent of the southwest corner of DSA-4 AA-12 is difficult to determine due to lens distortion and a darkened image. See Exhibit 15 at ¶ 15.

[57] According to Mr. Pflugh's analysis, a faint landscape scar (only readily visible with magnification) in the northwest quarter of Township 40 South Range 5 West Section 13 roughly corresponds to the claimed route for approximately one-quarter mile. See Exhibit 15 at ¶ 18. According to Mr. Pflugh, this scar may be a continuation of a route from the last point observed of the claimed route (northwest quarter of the southeast quarter of Township 40 South Range 5 West Section 14) but follows a different alignment from the path of the Bald Knoll route as claimed by Kane County from that point to the area of overlap and continues northeast where the claimed route turns sharply south. Id. In addition, Mr. Pflugh observed three non-continuous landscape scars that overlap very short portions (less than one-quarter mile each) of the claimed route, two in the Thompson Creek drainage in Township 40 South Range 5 West Section 13 and one in the southeast quarter of the northwest quarter and the northeast quarter of the southeast quarter of Township 40 South Range 4 West Section 18. Id. None of these appear to be travel

In summary, this photography does not document the existence, as of 1960, of any portion of the claimed route east of Township 40 South Range 5 West Section 14. This calls into question any testimony regarding the route's use at earlier times, and further supports the theory that if the route was constructed, it may have been for coal exploration under Federal permit.

B. Even if Bald Knoll Was Constructed before October 21, 1976, It Was Likely Constructed by a Coal Exploration Company Pursuant to a Lease Agreement, Not as Public Highways Pursuant to R.S. 2477.

Evidence from BLM's files, and that submitted by Kane County, indicates that much of the area traversed by the Bald Knoll route was withdrawn for coal mining from 1910 to 1982, and that prospecting for coal took place in the early 1960s and later.

Coal Land Withdrawal Utah No. 1 withdrew all of the area crossed by the Bald Knoll claim from "settlement, location, sale or entry[,]" reserving it instead for "classification and appraisement with respect to coal values" in July, 1910. See Exhibit 40 (Dep't of Interior, Coal Land Withdrawal No. 1 (June 21, 1910)). Although some of the lands in Township 40 South Range 5 West were restored by Coal Land Restoration – Utah No. 3, all of all of Township 40 South Range 4 ½ West remained under this withdrawal until 1982. See Exhibit 41 (Dep't of Interior, Coal Land Restoration No. 3 (Dec. 13, 1910)) and Exhibit 42 (Historical Index page noting that "Wdl. Coal Land" "U 1" was revoked by PLO 6313 in 1982).

At least seven coal leases, covering or in the vicinity of the claimed route, were active in the early- to mid-1960s. See Exhibit 43 (BLM, Serial Register Page). Three of these leases (UTU 098774, UTU 098775, and UTU 105404), all of which originated as coal prospecting permits in 1963, cover five miles of the route—including all of the route east of Thompson Creek (from the route's eastern terminus to Section 15, Township 40 South Range 5 West). See Exhibit 44 (Coal Prospecting Permits for UTU 098774 (Mar. 1, 1963) and UTU 098775 (Feb. 1, 1963)); Exhibit 45 (Memo of Dir., Geological Survey to Mgr., Land Office, Salt Lake City (May 4, 1965), stating that "prospecting operations were conducted on the lands in accordance with the terms of the permits" for the three leases), and Exhibit 46 (Coal Leases for UTU 098774 (June 1, 1965) and UTU 098775 (June 1, 1965)).[58] That is, all of the eastern portion of the route passes

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routes; all appear to be of fluvial process origin (washouts, drainages, etc.). Id. Other than these short segments, however, Mr. Pflugh found no landscape scars corresponding to the claimed route in Township 40 South Range 4 ½ West Sections 8, 17, and 18 and Township 40 South Range 5 West Section 13. Id.

[58] Due to uncertainty concerning the geographic extent of Kane County's R.S. 2477 claim, UTU 105404 was not included in TWS' FOIA request of November 9, 2006. Given the delay in obtaining the coal lease files which were included in this FOIA request (TWS received them in August 2007), it was impractical to submit an additional FOIA request for UTU 105404 following BLM's posting of the draft NBD. TWS is confident, however, that if BLM chooses to research its own files, it will find that the documents for UTU 105404 are similar if not identical to those for UTU 098874 and UTU 098875.

through areas where coal exploration was Federally permitted prior to the collection of the 1964 aerial photographs. This, along with affidavit accounts of road building in the early 1960s,[59] strongly suggests that the eastern portion of the route (at least) was constructed under the auspices of Federal permits.

An interest in, and possibly permitted development of, Federal coal resources in the area is documented to have continued at least up to almost the repeal of R.S. 2477. A 1974 letter from the Area Mining Supervisor (USGS) to the Kanab District Manager (BLM) requests information on "a cooperative drilling program under EMRIA between Bureau of Land Management and the Bureau of Reclamation" to be conducted on lands including leases UTU 098774 and UTU 098775. See Exhibit 47 (letter of J. Moffitt, USGS to M. Jensen, BLM (June 28, 1974)).

Given that the County has admitted that it has no evidence that it constructed the routes, that the earliest the eastern and western portion of the route appears on Class B maps is 1965, and the USGS 1966 map is the first one we have found that shows the entirety of the route, it seems likely that the route – whenever and to what extent it was constructed – was built to facilitate access to coal mining on lands under lease for prospecting and/or coal development.[60]

Under the Mineral Leasing Act of 1920, the federal government granted leases for the exploitation of federal lands for a variety of purposes, including the development of coal deposits. 41 Stat. 437, P.L. No. 66-146 (1920). In issuing leases under the Act, including the leases at issue here, the federal government has consistently granted to the lessee the right to "construct all such works … [and] structures … as may be necessary and convenient for the mining and preparation of the coal for market" on the lease property. See Exhibit 46 (Coal Leases for UTU 098774 and UTU 098775) Section 1. The fact that the lease grants the lessee the right to construct all "works" and "structures" indicates that coal lessees had an independent right to construct roads on their leaseholds separate and apart from R.S. 2477 – otherwise, there would have been no need for the lease to grant this authority.

The grant of separate authority to leaseholders to construct roads on oil and gas leases makes sense. Unlike an R.S. 2477 right-of-way for a public highway, which is controlled and managed by the state or local government, the leaseholder retains control over the constructed road, allowing her or him to restrict access to the public if necessary to prevent vandalism of the oil and gas facilities or danger to the public. Indeed, Section 29 of the Mineral Leasing Act allows the Secretary to require "joint or several use" of easements or rights-of-way on leased lands, indicating that Congress believed that rights-of-way on leased lands would generally be

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[59] See supra at pp. 27-28.

[60] This is not inconsistent with Kane County's statement – and the header on three of the four affidavits – that the claimed route is also known as the "Coal Road." See letter of M. Habbesham, Kane County to R. Smart, BLM (Aug. 6, 2006) at 12 ("The Bald Knoll Road is, in fact, known as the 'Coal Road' and was constructed for coal development uses"); affidavits of A. Goulding, Leach and Robinson (header of affidavit concerning "Bald Knoll" "AKA" (or "(AKA)" or "aka") "Coal Road").

closed to the public unless the Secretary took affirmative action to open them to third parties or the public. 41 Stat. at 449 § 29. The leaseholder also apparently retains the right to control whether the road remains open or closed.

This is different from an R.S. 2477 right-of-way, which is controlled by the local government and which can be closed at the choice of that government – which creates the risk that the oil and gas lessee might lose control of access to its lease. In short, it would simply not make sense for a leaseholder to immediately lose control over a road the leaseholder constructed to access an oil and gas lease, because the route became a State and/or County highway under R.S. 2477 upon construction. Such a result would undermine the investment that coal companies made to access their leasehold.

Coal leaseholders would reasonably desire some measure of control over their ability to access their facilities. Accordingly, it must be presumed that the limited right-of-way obtained by the leaseholder was constructed pursuant to the grant of authority under the Mineral Leasing Act lease, and was intended to be a limited easement remaining under the control and authority of the lessee. Thus Bald Knoll does not qualify as an R.S. 2477 right-of-way.[61]

Moreover, in return for additional control over the right-of-way, the leaseholder is restricted to constructing those roads that are "reasonably necessary to the full enjoyment" of the rights granted by the lease. U.S. Dep't of Interior, Opinions of the Solicitor M-36575, Duty of Oil and Gas Lessee With Respect to Injury to Land (Aug. 26, 1959) at 5, attached as Exhibit 48. This Solicitor's Opinion is consistent with long-standing principles of property law. The rights that a coal lessee has, like those of the oil and gas leaseholder, to construct roads on the lease are easement rights. See 1 Howard R. Williams & Charles J. Meyers, Oil and Gas Law § 218 (2004). However, the use of an easement is limited. In particular, the use of an easement may not be increased beyond what is reasonably necessary to fulfill the purposes of the easement. Restatement of Property (Third) § 4.10 cmt. d; 7 Thompson on Real Property § 60.04(a)(1)(iii) at 453-54 (1994); Jon W. Bruce & James W. Ely, Jr., The Law of Easements and Licenses In Land § 8.3 (2003). Federal coal leases like those at issue here only granted the right to construct roads and other improvements on the lease to the extent "necessary and convenient for the mining and preparation of the coal for market" on the lease. Exhibit 46 (Coal Leases for UTU 098774 and UTU 098775) at 1. Thus, the easement for road construction on coal leases must be considered limited to that which is necessary for full enjoyment of the oil and gas lease. Because opening the roads to public use – which would entail an increase in the use of the easement – would not be reasonably necessary for the lessee's enjoyment of the lease property for oil and gas development, public use of the roads (without the permission of the BLM) would be outside the scope of the easement.[62] Therefore, a road constructed over a federal coal lease by the leaseholder cannot be a "public" highway that qualifies for R.S. 2477.

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[61] Simply because members of the public have used the road cannot convert a route from one built pursuant to a limited easement for purposes of a mineral lease into an R.S. 2477 highway controlled by another entity.

[62] Additionally, the lessee's opening of a road on its coal lease to the public would allow the use of the easement by third parties to benefit other pieces of property besides the lease area.

Moreover, DOI has recognized that the agency cannot, by granting a right to construct roads for oil and gas development, give away more than just that: "the broad authority given to the Secretary to 'do any and all things necessary to carry out and accomplish the purposes of this [Mineral Leasing] Act' cannot be stretched to include authority to dispose of property of the United States, other than oil and gas, under an oil and gas lease." Solicitor Opinion M-36575 (Exhibit 48) at 4. Given that oil and gas leasing prior to 1976 was regulated under the same law as coal leasing – namely, the Mineral Leasing Act of 1920 – this interpretation should apply to coal lease as well. Thus, by permitting the lessor a temporary right to build roads to access the leasehold for the purposes of removing coal, the United States could not give-away permanently a right-of-way for a constructed highway under R.S. 2477.

In sum, even if the routes were constructed between the early 1960s and 1976, they were almost certainly constructed as private routes to access oil and gas facilities pursuant to a mineral lease, and not as public highways. Therefore, no public highway rights-of-way exist under R.S. 2477.

IX. IF THE ROUTE WAS CONSTRUCTED, NO EVIDENCE SUPPORTS ITS CONSTRUCTION PRIOR TO THE LANDS BEING RESERVED BY THE TAYLOR GRAZING ACT.

A. The 1934 Taylor Grazing Act, Executive Order 6910, and 1936 Taylor Grazing Act Amendments Withdrew Nearly All BLM Lands in the West.

Withdrawals and classifications associated with the creation of grazing districts under the 1934 Taylor Grazing Act and its 1936 amendments reserved lands sufficiently to preclude establishment of an R.S. 2477 right of way.

In 1934, Congress enacted the Taylor Grazing Act "[t]o stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, to stabilize the livestock industry dependent upon the public range, and for other purposes." Act of June 28, 1934, ch. 865, 48 Stat. 1269, codified at 43 U.S.C. §§ 315 et seq. Section 1 authorized the Secretary of the Interior to establish grazing districts in up to 80 million acres of unappropriated federal lands. The establishment of such a district had the effect of withdrawing all lands within its boundaries "from all forms of entry or settlement." See Utah v. Andrus, 446 U.S. 500, 511-12 (1980). The Taylor Grazing Act also

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However, an easement may only be used to access the piece of property which it was created to access – other pieces of property may not be accessed across the easement. See 7 Thompson on Real Property § 60.04(a)(1)(ii); Bruce and Ely, The Law of Easements and Licenses in Land § 8:11; see also id. § 8:10 at 8-31 ("an easement holder may not expand a private driveway into a public drive" (citing Cheatham v. Melton, 593 S.W.2d 900, 903-904 (Mo. Ct. App. E.D. 1980)). Allowing the public to use the access roads to reach other properties besides the lease would violate this principle.

provided that: "Nothing contained in this chapter shall restrict the acquisition, granting or use of ... rights-of-way within grazing districts under existing law...." 43 U.S.C. § 315e.

Because the Taylor Grazing Act as originally passed in 1934 applied to less than half of the federal lands in need of more orderly regulation, President Roosevelt shortly thereafter issued Executive Order No. 6910 (Nov. 26, 1934) withdrawing all of the unappropriated and unreserved public lands in 12 Western States, including Utah, from "settlement, location, sale or entry" pending a determination of the best use of the land.[63] The withdrawal affected the land covered by the Taylor Grazing Act as well as land not covered by the statute. The President's authority to issue Executive Order No. 6910 was expressly conferred by the Pickett Act. Ch. 421, 36 Stat. 847; see also Utah v. Andrus, 446 U.S. at 513-15.

On June 26, 1936, Congress responded to Executive Order 6910 by enacting amendments to the Taylor Grazing Act to permit the Secretary of Interior, in his discretion, to classify both lands within grazing districts and lands withdrawn by the Executive Order as proper for homesteading. 43 U.S.C. § 315f. That section (Sec. 7) provided that the affected lands "shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry." See Humboldt County v. United States, 684 F.2d 1276, 1281 (9th Cir. 1982); Andrus v. Utah, 446 at 515-17.

The combination of these executive and Congressional actions, the Supreme Court has held,

> "locked up" all of the federal lands in the Western States pending further action by Congress or the President, except as otherwise permitted in the discretion of the Secretary of the Interior for the limited purposes specified in § 7 [of the 1936 Taylor Grazing Act amendments].

Andrus v. Utah, 446 at 519 (emphasis added); see also id., 446 U.S. at 511 ("By means of these actions, all unappropriated federal lands were withdrawn from every form of entry or selection"). The "limited purposes" specified in amended § 7 of the Taylor Grazing Act included only the purposes approved by "classification" and location and entry under the mining laws. In addressing the impact of the Congressional and presidential withdrawals of the mid-1930s on "in lieu" selections by states, the Supreme Court concluded:

> The withdrawal[s] did not affect the original school land grants in place, whether or not surveyed, but did include all lands then available for school indemnity selections. The lands thus withdrawn were thereafter available for indemnity selections only as permitted by the Secretary of the Interior in the exercise of his discretion.

446 U.S. at 511 (emphasis added.) The Supreme Court's reasoning in Andrus is fully applicable to all other similar claims for acquisition of rights in "all unappropriated federal lands." That

[63] E.O. 6910 is reprinted in full at Utah v. Andrus, 446 U.S. at 514 n.19.

reasoning is clearly applicable to any claims for rights-of-way arising under R.S. 2477 because that statute, by its terms, is expressly limited to lands "not reserved for public uses." All of such unreserved lands, under the 1936 Act, were withdrawn from such claims to assure their availability for administration in accordance with their classification.

The Humboldt County court noted that 43 U.S.C. § 315e does state that "nothing contained in this chapter shall restrict the acquisition, granting or use of ... rights -of-way within grazing districts under existing law …." However, the Ninth Circuit concluded that withdrawals and creation of a grazing district precluded establishment of a road across grazing district lands, unless the entity seeking to acquire a right of way sought the reopening of such lands under 43 U.S.C. §315f in order to establish the road. See Humboldt County, 684 F.2d at 1281.

The Humboldt case is instructive. The Ninth Circuit noted that "[i]n 1934 the President withdrew all of the unappropriated and unreserved public land in several states" – which including almost all of Utah's BLM lands across which the four routes run – "from 'settlement, location, sale or entry' pending a determination of the best use of the land," citing Executive Order 6910. Id. The court discussed Congress's subsequent decision to permit DOI to open such withdrawn land for homesteading, but concluded that given the language of the 1936 amendments, the County would be precluded from acquiring a right-of-way under R.S. 2477 unless "the requirements of 43 U.S.C. § 315f were met;" that is, unless the area over which the route crossed had been re-opened to entry by the Secretary of the Interior. Id. However, in the Humboldt County case, the applicant provided no evidence that the Secretary had classified the area traversed by the route claimed under 43 U.S.C. § 315f as open for entry. See id.

B. The Best Evidence Indicates that, to the Extent the Routes Were Constructed, They Were Constructed After the Lands Were 'Reserved' by the Taylor Grazing Act.

The Taylor Grazing Act of 1934, the amendments to it enacted on June 26, 1936, and E.O. 6910 (1934) withdrew Utah's public lands from entry for purposes of creating an R.S. 2477 right-of-way, unless, under 43 U.S.C. § 315f, the Secretary classified the lands over which the right-of-way ran as open for entry. The County has provided no credible, first-hand evidence that the Bald Knoll route became a County "highway" pursuant to R.S. 2477 before June 26, 1936. Thus, it appears likely that to the extent any of these routes were constructed, such construction took place after that date when the lands were reserved.

Kane County has certainly submitted no evidence – beyond mere unattributed hearsay – that any of the routes was "constructed" or had experienced ten years of continuous public use throughout the entirety of its lengths by 1936. Unless and until Kane County submits compelling evidence demonstrating that a non-federal entity constructed the routes at issue by June 26, 1936 – or that the Secretary of Interior classified the area traversed by the routes as open for entry – BLM cannot recognize an R.S. 2477 right-of-way for the alleged highways because the land was "reserved" after that time.

X. BLM FAILS TO DISCLOSE THE IMPACTS OF THE PROPOSED NBD.

A. BLM Does Not Disclose the Scope of Rights Recognized or Surrendered by Issuing an NBD, Nor Does It Clarify the Competing Rights of the Parties.

While the purpose of the Interior Department and BLM guidelines is to assist in the agency's "own land use planning and management purposes"(BLM IM 2006-159), and to help BLM "determine whether subsequent consultation with Kane County on certain improvements it has proposed to undertake on the Bald Knoll Road is appropriate" (Preliminary NBD), it is not clear how approval of Kane County's NBD application will assist the agency.

The press release announcing BLM's preliminary non-binding determination, Kane County's application, and DOI's and BLM's guidance all fail to make clear to what extent BLM will permit the County (or State) to exercise certain rights over what portion of public land to assist in BLM's "land use planning and management," and what rights BLM is effectively surrendering over what extent of the public's lands. What will be the exact impact of the NBD?

The MOU does not define key terms of this section, making it impossible to address important questions, e.g.: how will BLM (or the State or Kane County) determine what constitutes "routine maintenance" of the route – a maintenance activity that occurs once a year, once every five years, once a decade? Upon what evidence will BLM base a determination that an activity constitutes "routine" versus "non-routine" maintenance? If the definition of "routine maintenance" is something that "preserves the status quo," (BLM IM 2006-159), how will "status quo" be defined? If "status quo" means the current state of the route, does that mean the County may not fill in the currently eroded areas where gullies cut the route in half in places? Under what circumstances will BLM conclude that no permit or authorization is required for extraordinary maintenance that may substantially alter this route or any other routes? How will such understandings be memorialized so that all interested parties – BLM, the State, the Kane County, and the public – understand what can and what cannot occur within the right-of-way without prior BLM approval?

Key to the understanding of the relative rights of the parties where an R.S. 2477 right-of-way is at stake is the scope of the right-of-way at the time of reservation or repeal. That "scope," under Utah law and federal court precedent, is tied not to the width of the route at the time of reservation or repeal, but instead relates to the reasonable uses to which the route was being put at the time of reservation or repeal. See Hodel, 848 F.2d at 1083-84; Garfield County, 122 F. Supp. 2d at 1228-30. Yet, it is not clear that BLM intends to, or will, make any findings in this regard in issuing (or implementing) this or any other NBD. In short, a cloud of uncertainty will be placed over the exact scope of a right-of-way in which BLM determines the validity of R.S. 2477 NBDs.[64]

[64] We recognize, as does the Interior Department, that even if an activity falls within the scope of the right-of-way, that activity may be subject to federal regulation. See BLM IM 2006-159 Attachment 1 at 11.

Rather than leave the public, BLM, Kane County, and the State under such a cloud, BLM must attempt to resolve these issues and define the scope of the right-of-way and the relative rights of the parties before BLM issues an NBD. BLM should do so in an open way by issuing a new draft NBD decision that contains such information, and that seeks public input on BLM's proposal. The preliminary NBD contains no information at all identifying the scope of the right-of-way to be recognized in the NBD.

B. BLM Has Failed to Account for Environmental Impacts to Public Lands.

The vast majority of lands traversed by Bald Knoll are federal public lands administered by BLM. The management of uses on the routes, as well as maintenance activities on them, could have detrimental environmental impacts to BLM land, including that adjacent to, and burdened by, the alleged right-of-way.

For example, as numerous scientific and Federal agency research studies have shown, the use of motor vehicles on roads, as well as the maintenance of such routes, can, among other things:

- foster the spread of exotic, noxious weeds[65];
- fragment wildlife habitat[66];
- cause direct mortality of wildlife[67];
- introduce a variety of toxic pollutants to soils, vegetation, and water including nickel, copper, zinc, oils and greases, tire rubber, and cadmium
- cause air pollution (from, among other things, fugitive dust emissions);
- disrupt watersheds;
- cause sediment deposition in rivers and streams, where it can cover fish eggs and inhibit nest building[68];
- indirectly cause an increase in poaching and/or wildlife harassment[69];
- indirectly cause an increase in human-caused fires;
- indirectly cause an increase in damage to nearby archeological resources[70]; and

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[65] J.L. Gelbard and J. Belnap, Roads as conduits for exotic plant invasions in a semiarid landscape, Conservation Biology 17(2): 420-432 (2003).

[66] M.J. Wisdom, et al., Source habitats for terrestrial vertebrates of focus in the interior Columbia basin: broad-scale trends and management implications, Volume 1 – Overview. Gen. Tech. Rep. PNW-GTR-485, USDA Forest Service, Pacific Northwest Research Station (2000), available at http://www.fs.fed.us/pnw/pubs/gtr485/gtr485v1.pdf.

[67] Id.

[68] C.P. Newcombe, C.P., and D.D. MacDonald, Effects of suspended sediments on aquatic ecosystems, North American Journal of Fisheries Management, 11:72-82 (1991).

[69] Wisdom et al., supra note 116.

[70] Bureau of Land Management, Strategic paper on cultural resources at risk (2000), available at http://www.blm.gov/heritage/docum/00atriskpaper3.pdf.

- indirectly cause an increase in recreational uses in adjacent areas.[71]

BLM has a duty to manage and protect public lands, and a transfer of management responsibility for these four routes could have potentially significant implications on the agency's ability to discharge those duties.

Of course, the rights of a right-of-way holder are not absolute when it comes to such easements over public lands. R.S. 2477 right-of-way holders do not have absolute power to expand, maintain, or use such routes without regulation by the owner of the public lands (also known as the "servient estate") on which the right-of-way lies. For example, the Forest Service's manual states that the agency must:

> Ensure that the Government's servient estate does not suffer unnecessary degradation as a result of any actions by the holder of the [R.S. 2477] right-of-way. Activities on a right-of-way, which potentially may affect the servient estate, are subject to the National Environmental Policy Act (Tenth Circuit Court of Appeals ruling in Sierra Club v. Hodel, 848 F.2d 1068).

Forest Service Manual 2734.51 (emphasis added). The Forest Service's guidance that the National Environmental Policy Act applies to the agency's management actions as they relate to R.S. 2477 rights-of-way is consistent with Federal caselaw concerning BLM and other federal land. See Sierra Club v Hodel, 848 F.2d at 1083 (general rule is that holder of the right-of-way and the owner of the servient estate – here, BLM – must exercise rights so as not to unreasonably interfere with one another); Garfield County, 122 F. Supp. 2d 1201, 1242-43 (D. Utah 2000) (holder of the right-of-way and owner the servient estate – here, NPS – must exercise rights so as not to unreasonably interfere with one another); id. at 1253 (analyzing the difference between maintenance and construction, and concluding that where activity occurs within the scope an existing ROW, the County "will likely be able to proceed") (emphasis added); Barker v. Board of County Com'rs of County of La Plata, Colo., 49 F. Supp. 2d 1203, 1220 (D. Colo. 1999) (noting the Forest Service's "right to reasonably regulate" portions of easement that traverses the agency's lands). Nevertheless, if BLM issues an NBD for a right-of-way, it intends to surrender some authority to manage the route, and thus it will surrender some authority to protect public values implicated by management of the route. The fact that BLM intends to notify the public that it has issued an NBD by noting its decision on the official master title plats signifies the importance and binding nature of the decision on third parties and the world.[72]

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[71] For more background on the ecosystem impacts of roads, see, e.g., R.T.T. Forman and L. Alexander, Roads and their major ecological effects. Annual Review of Ecology and Systematics 29:207-231 (1998); H. Gucinski et al., Forest roads: a synthesis of scientific information, General Technical Report PNW-GTR-509, USDA Forest Service, Pacific Northwest Research Station (2001), available at: http://www.fs.fed.us/eng/road_mgt/science.pdf; S.C. Trombulak and C.A. Frissell, Review of ecological effects of roads on terrestrial and aquatic communities, Conservation Biology 14: 18-30 (2000).

[72] BLM's recognition of an NBD on the master title plats is significant because it connotes a recognition of a right held by a party other than the United States. See BLM website

Despite the fact that BLM is proposing to adopt an NBD for the route, the agency apparently is refusing to consider the environmental effects of its actions, as the National Environmental Policy Act (NEPA) requires the agency to do for discretionary actions. It is unclear why BLM is declining to comply with NEPA. NEPA clearly applies to all discretionary agency actions. There is no doubt that BLM's decision to issue any NBD is an exercise of agency discretion. It is not a decision required by law. See BLM IM 2006-159 ("The State or Field Offices may make NBDs for claimed R.S. 2477 rights-of-way for its own land use planning and management purposes"). The Tenth Circuit's SUWA v. BLM decision recognized that BLM had the authority, but not the duty, to make NBDs. NEPA would appear to apply to BLM's action in approving an NBD. BLM may also assume that an NBD makes no decision that has any impact on the ground and therefore can have no environmental impacts. This would be a false assumption. Changing the nature of public highways – even restoring a route to some "status quo" of years ago – will have impacts. Further, we are unaware of any categorical exclusion under which this NBD could be made, nor does BLM invoke one.

Finally, the preliminary NBD states: "BLM will use this NBD to determine whether subsequent consultation with Kane County on certain improvements it has proposed to undertake on the Bald Knoll Road is appropriate." Thus, NEPA regulations require that the NBD be analyzed together with any action that may result in improvements to the Bald Knoll route because such actions may be connected to the NBD or may have cumulative impacts when taken together with the NBD. See 40 C.F.R. § 1508.25 (requiring agencies to examine in one document all connected, cumulative, and similar actions). Not only may improvement activities be consider connected or cumulative when analyzed together with the NBD, they may directly or indirectly result from issuance of the NBD, since BLM takes the position that BLM should make an NBD determination prior to approving any improvement to the route. 40 C.F.R. § 1508.8 (requiring agency to disclose the direct and indirect effects of an agency action).

Whether BLM is required by NEPA to undertake an analysis of environmental impacts or not, BLM certainly could, if it chose to, disclose such potential impacts. That BLM is choosing not to inform the public of such potential impacts demonstrates its lack of concern for important public resources, which we decry. BLM's failure to acknowledge potential environmental impacts reinforces our belief that BLM should address assertions of rights-of-way through the issuance of Title V permits. BLM is required to analyze and disclose environmental impacts of issuing a permit under Title V, as it did for its analysis of re-routing and improving part of the Bald Knoll route just a few months ago. See EA UT-110-06-001 (BLM, Kanab Field Office, EA on Burnt Shale Material Sale, Serial No. UTU-080877, Sep. 1. 2006).[73]

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on master title plats (http://www.blm.gov/or/landrecords/mastitleplats.php) ("Master Title Plats are large-scale graphic representations of current Federal ownership, agency jurisdiction, and rights reserved to the federal government on private land. Federal ownership of the subsurface mineral estate and acquisitions, exchanges, and sales involving federal lands are also identified. Rights granted or permitted to private parties for such commercial activities as road rights-of-way, power lines, pipelines, and communication sites are symbolized on the Master Title Plats.")

[73] We take no position on the sufficiency of that EA, upon which we did not comment.

Environmental damage may occur from a decision to issue an NBD for the Bald Knoll route, given the nature of the environment that the routes traverses. For example, the area traversed by the route is prone to erosion. See Exhibit 12 (Catlin field report); see also BLM, EA UT-110-06-001 at 5 (noting "moderate soil erosion" occurs in area). Given that the County claims it already "regularly maintains" this route, it is not clear how such maintenance (which, if an NBD is issue, BLM will allow to occur without notification to BLM) will "improve" these conditions. In addition, the 1980 Zion MFP may indicate the need for special case in an area traversed by the route, namely Thompson Creek. The MFP states that 10 acres of the Thompson Creek riparian area are sensitive enough that livestock should be excluded from the area. See BLM, Zion MFP, Activity and Recommendation RM-1.2, attached as Exhibit 49. Major "maintenance" activities where the route crosses Thompson Creek may impact these sensitive riparian values.

XI. BLM FAILS TO FOLLOW ITS GUIDANCE IN ISSUING ITS PRELIMINARY NBD.

BLM IM 2006-159, attachment 1, states that BLM "should determine whether the road, or any part of it, was abandoned." BLM must explain what steps it has taken to determine whether the route was abandoned. Since it appears under Utah law that an act of the County would be required to abandon the route, BLM must inform TWS and the public what efforts it undertook to review Kane County's records concerning the route. Did BLM review minutes of Kane County meetings from the 1960s to the present? It would appear that this would the only way for BLM to answer this question. Failure to do such research would appear to violate the IM. Furthermore, BLM should not and cannot rely upon self-serving statements by Kane County concerning whether the route was abandoned; it must check the records independently.

Further, BLM lacks the authority to issue NBDs, given that BLM IM 2006-159 expired on September 30, 2007, several weeks ago.

XII. BLM MUST PROVIDE A TRANSPARENT, REASONED DECISION IN EVALUATING THIS NBD APPLICATION.

BLM has stated that it can determine that a right-of-way exists only if a preponderance of the evidence supports continuous public use of the route for ten years. See Norton Policy. BLM therefore must review, analyze and weigh the evidence to determine which facts tend toward a conclusion that the route existed at its current location and was used continuously for ten years, and which weigh against such a conclusion. BLM must weigh which evidence seems to be valid and reliable and which is not. See, e.g., BLM IM 2006-159 Attachment 2 at 1 (BLM "should review its public land records for any evidence supporting or contradicting the claim." (emphasis added). And BLM must explain its decision so that when it makes a determination either in favor or against the existence of a right of BLM staff, the NBD applicant, and the public can understand why BLM came to its conclusion.

The preliminary NBD fails to meet this standard or to reflect the necessary consideration. In the preliminary NBD's key passage, BLM concludes that the route was used continuously for

ten years prior to October 21, 1976 "based on the BLM's review of the USGS quadrangles and the other above-referenced information" without stating what that "other above-referenced information" might be. It may be that BLM is referring to the deeply-flawed affidavits (referenced a few sentences previously in the NBD) or it may be any other piece of data BLM lists as "Documents and Information Reviewed" previously in the document. In any event, the preliminary NBD nowhere evaluates each piece of information and states whether it supports (or not) the application and upon what such an evaluation is based. Without providing such analysis and clarity, BLM undermines the integrity of its determination and the letter and spirit of its own guidance. We urge BLM to correct these shortcomings before issuing a final evaluation of Kane County's application.

Further, BLM must ensure that it provides the public and those with evidence with a meaningful opportunity to participate in the NBD process. BLM's determination will impact public lands and allegedly public highways. The public deserves a say in BLM's decisions. BLM's guidance purports to recognize this by providing for a 30 day period in which the public may "provide the BLM with information, comments, or additional evidence relevant to the determination." BLM IM 2006-159 Attachment 2 at 2. However, the agency permits the decisionmaker to utterly ignore the public, stating that BLM's final determination "need not respond directly to any comments." Id. In other words, the agency is saying to the public: feel free to comment, just don't expect us to pay any attention. We urge the Utah State Office not to take this approach but instead to make the public process meaningful by responding to those members of the public who invest the time and energy attempting to assist the agency as it makes its determination.

XIII. BLM FAILS TO TAKE APPROPRIATE ACTION TO SAFEQUARD PRIVATE PROPERTY RIGHTS

The Bald Knoll route as described by the BLM in its preliminary NBD crosses over private property. It states, "Less than ¼ mile of the Bald Knoll Road crosses privately owned property within the SE¼SE¼, Section 15, T. 40 S., R. 5 W., SLBM." See http://www.blm.gov/ut/st/en/prog/more/lands_and_realty/rs2477_rights-of-way/bald_knoll_road_non/preliminary_nnbd.html. Regardless of the length traversing private property, the fact is that the alleged R.S. 2477 claim does. The Norton policy and BLM IM 2006-159 direct the agency to safeguard private property rights and not make NBDs over private land, respectively.

The Norton policy provides some "principles" when assessing the legitimacy of R.S.2477 claims. Those principles include:

> Directs all Interior Bureaus to develop safeguards to ensure that their implementation of these principles does not infringe on the rights of private landowners or Indian tribes whose land may be crossed or abutted by claimed rights of way.

See Norton policy at page 4. DOI's guidance thus seeks to ensure that BLM and other agencies do not give the impression to a State or county that it can allow use or management over land

that it does not own. The BLM, under the direction of the Norton policy, developed the following guidelines:

> Please note that BLM does not have authority over private lands and should not make any determination for any portion of a road that is on private land or land managed by another government unit… BLM should also ensure that owners and managers of such lands are given individual notice and opportunity to comment before taking any action on claims for rights-of-way that would abut or the extension of which would cross their property.

See IM 2006-159. Here, the Bald Knoll route goes directly through private property. A BLM determination that a right-of-way exists on one side of the property and on the other could make it more difficult for the property owner to protect his or her land from claims of a prescriptive or other easement. In its attempt to effectively surrender control of public property to Kane County, BLM appears prepared to undermine the protection of private property rights. This runs counter to the letter and intent of DOI's and BLM's guidance.

CONCLUSION.

BLM must deny Kane County's application for an NBD for the Bald Knoll route because: (1) to do so would reward Kane County, which has for years shown absolutely no respect for federal land management when it comes to roads; (2) the Norton policy upon which BLM's decision would be based is illegal; (3) Kane County has failed to provide any evidence beyond unsubstantiated allegations or hearsay that the alleged "highways" were constructed before October 21, 1976; and (4) evidence we submit casts considerable doubt as to whether any of the routes meets the standards of an R.S. 2477 right-of-way. (5) Kane County has failed to submit the length, surface, and width of the right-of-way it is seeking to obtain.

Should the County attempt to remedy the gross inadequacies of its application by providing additional information to BLM, or should BLM conduct additional research of its own, we request that BLM make available to the public any additional information discovered or received by the agency, and provide the public with an additional comment period to address any such additional information before BLM issues a final decision.

Further, if BLM is to continue processing NBDs pursuant to the Norton policy and BLM IM 2006-159, we urge BLM to establish standards based on the plain meaning of R.S. 2477 and to use a standard of review that protects the interests of the American people in their public lands.

In addition, if counties continue to submit applications for NBDs for R.S. 2477 rights-of-way which contain similarly meager and unreliable supporting documentation, BLM must reject the applications unless and until the counties provides the bare minimum of accurate, verifiable information necessary to support its claims, and demonstrates diligence in reviewing and providing all relevant State, county, and federal records. Setting a precedent nationwide for awarding a non-binding determination based on the type of inadequate, unsupported, and

unreliable evidence Kane County has provided to date simply burdens BLM and forces the interested public to locate that evidence which the County has failed or refuses to provide.

Finally, we again urge the Kane County to abandon its application for an NBD, and to instead to pursue a FLPMA Title V permit for the entire route. Such a permit would allow BLM to more effectively balance environmental protections while ensuring that the county could take certain actions to maintain the route.

Thank you for this opportunity to comment. We continue to request that BLM grant an extension of the comment period to enable us to supplement our letter as we await additional relevant information from Kane County and other sources. We respectfully request the BLM provide a response to these comments in any final NBD that it prepares. We look forward to receiving a response to these comments within 60 days, as required by BLM's guidelines implementing the Information Quality Act. If you have any questions in this matter, please contact me at 303-623-9466.

Sincerely,

Edward B. Zukoski, Staff Attorney
Douglas C. Pflugh, Research Associate

for The Wilderness Society
Wild Utah Project
Center for Biological Diversity
Southern Utah Wilderness Alliance

Cc: Jon M. Huntsman, Jr., Governor, State of Utah
Senator Joseph Lieberman
Senator Jeff Bingaman
Senator Dick Durbin
Rep. Norm Dicks, Chairman, House Interior Appropriations Subcommittee
Rep. Mark Udall
Dick Kempthorne, Secretary, Department of the Interior
Lynn Scarlett, Deputy Secretary, Department of the Interior
Chad Calvert, Deputy Ass't Sect'y, Lands and Minerals Management, Dep't of Interior
Jim Caswell, Director, Bureau of Land Management
Brian Waidmann, Chief of Staff, Department of the Interior
Larry Jensen, Esq., Office of the Solicitor, U.S. Department of the Interior
Mike DeKeyrel, Realty Specialist, BLM, Utah State Office
Kane County Commission
Roger Fairbanks, Esq., State of Utah, Office of the Attorney General
Kristen Brengel, The Wilderness Society
Heidi McIntosh, Southern Utah Wilderness Alliance
Lawson LeGate, Sierra Club
Jim Catlin, Wild Utah Project
Chris Kassar, Center for Biological Diversity

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- Exhibit 36(E). General Highway Map, Kane County, Utah, 1977, Revised Feb. 1980 (excerpts) (routes named)
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