

PUBLIC LANDS:

BLM approves Utah county's road claim (09/20/2007)

April Reese, Land Letter Western reporter

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Resolving a decade-long dispute over road claims across federal lands in rural southeast Utah, the Bureau of Land Management has decided for the first time to turn over a nine-mile road near the town of Kanab to Kane County.

The decision, announced Sept. 10, marks the first time the agency has formally recognized a county's claimed authority over a road crossing federal lands. Kane County officials have been at the forefront of a regional movement calling for counties to claim management authority over such roads. They base their claims on a 19th century statute known as R.S. 2477, which granted rights-of-way across public lands during the time of western expansion. Congress repealed the statute in 1976 but exempted existing rights-of-way.

The county has long argued that rights-of-way across large swaths of public land within its boundaries were in use when the statute was eliminated, and therefore should be under county jurisdiction. Utah law defines existing roads as rights-of-way that were frequented and maintained for 10 years before 1976.

While the Bald Knoll Road case involves road improvements, Kane County is also evoking R.S. 2477 rights-of-way claims to enhance off-roading opportunities. Kane County, along with Garfield County has claimed access to jeep tracks and canyon bottoms in Grand Staircase-Escalante National Monument where BLM has placed restrictions on off-roading -- restrictions that the counties oppose.

Litigation over the issue resulted in a federal district judge ruling in July that counties must resolve their R.S. 2477 claims in court first, before taking on off-roading issues. The burden is on the counties to prove their R.S. 2477 claims, not BLM, the judge said (Land Letter, July 12).

In this case, however, BLM's Utah state office said that after considering information supplied by the county and reviewing its own records, such as maps and historic aerial photos, it "has made the preliminary determination that the Bald Knoll Road is a valid R.S. 2477 right-of-way." The road does not go through any protected federal lands, such as national monuments, parks or potential wilderness, according to BLM.

New rules helped resolve issue

The decision to convey management of the road, about 20 miles north of the town of Kanab, Utah, was buffeted by new BLM administrative procedures designed to address such claims. An appeals court ruled in 2005 that R.S. 2477 claims are to be decided on a case-by-case basis in federal court, but it also concluded that BLM has the authority to make informal, "nonbinding determinations" on road claims that have not yet gone to court. The agency crafted procedures implementing the ruling last year.

Mike DeKeyrel, realty specialist, Utah State Office, emphasized that the determination simply amounts to an administrative acknowledgement of Kane County's R.S. 2477 claim for Bald Knoll Road and does not add any legal weight to the county's argument. Such a determination needed to be made before any improvements or projects could be done on the road, he said.

"In order for us to figure out if all this proposed work is reasonable and necessary, we first have to do this determination to figure out if we believe the right-of-way exists in the first place," DeKeyrel said.

Any improvements would need to go through a separate approval process after the final decision is made on the R.S. 2477 determination, he added.

DeKeyrel said BLM does not plan to use its authority to issue nonbinding determinations for R.S. 2477 claims liberally. "It's not as if BLM is going to go out and do a whole bunch of nonbinding determinations where there might be a question of the status," he said.

In the case of the Bald Knoll Road claim, there were no threatened or endangered species issues, and the road is not in a potential wilderness area, so the route was not controversial, he said.

Kane County officials welcomed the recognition of their R.S. 2477 claim for the road. "I think it's very positive decision," said Mark Habbeshaw, chair of the Kane County Commission. "I think when roads need to be improved, it's a very useful tool. It will be beneficial to the traveling public for their safety."

The commission nominated Bald Knoll Road for a "nonbinding determination" from BLM last year, after a local miner applied for a permit to remove shale from an area along the road. The improvements will involve widening the road and installing culverts to enhance water flow, Habbeshaw said.

But local environmental groups that have challenged the validity of such claims said that while improving Bald Knoll Road is not of concern in and of itself, the BLM decision sets a bad precedent that could open the door to claims on more sensitive lands.

"We're very concerned that this whole process opens the door to the validation of R.S. 2477 claims across areas that are proposed for wilderness or are otherwise sensitive," said Heidi McIntosh, conservation director for the Southern Utah Wilderness Alliance.

McIntosh said she would rather see the county's claim for Bald Knoll Road adjudicated in court, where the burden of proof is higher.

The public has until Oct. 15 to comment on BLM's decision and present evidence for why the road is not a valid right-of-way. Under the new BLM guidelines for R.S. 2477 claims, the agency will not conduct an environmental review of the decision.