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For people who care about the West

The road more traveled

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Trevor Leach remembers riding horses on Bald Knoll Road as a child in the 1920s. During the '60s, Arlene Goulding and her kids used the route for hunting trips. The testimony of these Kane County residents helped the Bureau of Land Management piece together the history of Bald Knoll Road, which laces across public lands in southern Utah. Now, the BLM is poised to acknowledge Kane County's claim to the route, and environmental groups fear that decision will open the door to a web of county-controlled roads on federal lands.

On Sept. 12, after reviewing affidavits from locals, aerial photographs and historical maps, the agency's Utah office made a preliminary decision that Kane County does hold the right of way to the route – a determination that will allow the county to maintain the primitive dirt road northeast of Kanab. When the final decision is issued later this year, it will be the first time the BLM has recognized a county's right of way claim under a process established in 2006 by then-Secretary of the Interior Gale Norton.

In Utah and other Western states, thousands of such old roadways crisscross public lands. Many of them are mired in controversy over who has the right to maintain and use the routes. The question dates back to a provision known as R.S. 2477, which was tucked into a mining law passed in 1866 and allowed states and counties to construct highways across public lands.

When Congress repealed R.S. 2477 in 1976, existing roads were grandfathered in. But the definition of "existing road" was broad, and many Western counties asserted claims to all types of routes on public lands, including cow paths, faint vehicle tracks, and streambeds that had once served as trails.

Bald Knoll Road, which appears in photographs dating back to the 1960s and has been used by locals for wood-gathering, camping and mining for decades, probably deserves the title. But many so-called "roads" are not nearly so clear-cut.

For years, conservation groups and some private property owners whose land is also crossed by R.S. 2477 routes have vigorously fought more ambiguous road claims, and Utah has been at the center of the storm. In 2003, Norton and then-Utah Gov. Mike Leavitt signed a controversial memorandum of understanding designed to make it easier for Utah counties to assert right of way claims. Two years later, the 10th Circuit Court of Appeals ruled that the BLM cannot officially decide R.S. 2477 claims, but the agency can make “non-binding determinations” for its own use.

Shortly before leaving the Interior Department in 2006, Norton issued orders outlining how the BLM should implement the appeal court’s rulings, including the process for issuing non-binding determinations. This June, U.S. District Court Judge Bruce Jenkins ruled that petitioners must prove a road claim’s validity in federal court – using their state’s definition of a road – before the BLM can legally validate a right of way. But that ruling does not stop the agency from making unofficial decisions.

The BLM emphasizes that the Bald Knoll Road decision is non-binding and intended to be used for the agency’s “management purposes only.” Even when the decision is finalized after a 30-day public comment period, it won’t be the last legal word, according to Mike DeKeyrel, realty specialist for the BLM’s Utah State Office. “It’s basically just an acknowledgement that we believe a right of way exists under R.S. 2477,” he says.

But it’s difficult to tell how this “acknowledgement” differs from an official decision. Once the agency’s determination is final, the county can perform routine maintenance, such as grading and culvert repair, to preserve the current condition of the road. If the county wants to make improvements – and Kane County does – it must consult with the BLM to determine whether the work is necessary to allow historical uses of the road to continue. In the Bald Knoll Road case, if Kane County needs to add new culverts or widen the road for hunting or sightseeing, the BLM can approve those upgrades.

Despite its preliminary status, the Bald Knoll deal is as good as done, says Heidi McIntosh, conservation director for the Southern Utah Wilderness Alliance. She sees the decision as a transfer of ownership over public land. “I’d be willing to bet my next paycheck that the final decision they make will be the same as the non-binding decision,” she says. “As a practical matter, the county and the BLM will start treating this as the county’s road.”

While McIntosh admits that Bald Knoll Road itself is not controversial, she believes the

decision will have much larger ramifications. “We see this as a sort of Trojan horse,” she explains. “They’re using Bald Knoll Road as a model to do dozens more of these transfers.”

And, McIntosh says, those future decisions could affect roads running through fragile riparian areas or over land proposed for wilderness designation.

DeKeyrel confirms that Utah counties have several pending requests for R.S. 2477 recognition, but says that the agency plans to consider only a few of them under this new procedure.

The number of requests the BLM considers is not as important as how the agency handles those claims, according to Robert Keiter, a law professor and the director of the Wallace Stegner Center for Land, Resources, and the Environment at the University of Utah. “If the agency appears to be applying as stringent of standards as the law requires, then there’s no reason this won’t be a legitimate process,” he says. “The public comment should be helpful in guiding the agency.”

But Keiter also notes that it’s unclear how, or even if, the BLM’s decisions about Bald Knoll Road and future R.S. 2477 claims could be protested: “If a party is dissatisfied or thinks the agency has erred in its determination, is there further recourse available?” At this point, the policy is ambiguous, according to Keiter, because of a lawsuit pending in the 10th Circuit, which will clarify when individuals and groups can protest agency management decisions.

One thing everyone agrees on is that Bald Knoll Road is a test case. “Other counties in southern Utah and across the West may well be watching this,” Keiter says, “to see if it’s a procedure they want to invoke.”

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