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ENVIRONMENTAL LAW CLINIC AT STANFORD UNIVERSITY

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Ms. Sally Wisely, State Director
Bureau of Land Management, Utah St. Office
440 West 200 South, Suite 500
Salt Lake City, Utah 84101
Email: sally_wisely@blm.gov

Mr. Joe Incardine, Branch of Lands and Realty
BLM, Utah State Office, UT-921
440 West 200 South, Suite 500
Salt Lake City, Utah 84101
Email: joe_incardine@blm.gov

Re: BLM Cannot Approve Recordable Disclaimers of Interest for Rights-of-Way as Requested in Disclaimer Applications UTU-81879 (D28), UTU-81880 (D30), UTU-82193 (Hickory Peak), and UTU-82194 (Horse Valley)

Dear Director Wisely and Mr. Incardine:

On behalf of The Wilderness Society, Wild Utah Project (WUP), and the Southern Utah Wilderness Alliance (SUWA) (collectively "TWS"), Earthjustice submits these comments on the State of Utah's and Daggett, Beaver, and Iron counties' applications for four recordable disclaimers of interest from the United States pursuant to Section 315 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C § 1745, 43 C.F.R, Subpart 1864, and the April 9, 2003 Memorandum of Understanding Between the State of Utah and the Department of the Interior on State and County Road Acknowledgement (State of Utah-MOU). These recordable disclaimer of interest applications are identified by the Bureau of Land Management (BLM) as follows: Serial Number UTU-81879 (route D28 in Daggett County); UTU-81880 (route D30 in Daggett County); UTU-82193 (Hickory Peak route in Beaver County); and UTU-82194 (Horse Valley route in Beaver and Iron counties).

The Wilderness Society, its 1,250 Utah members, and 200,000 members nationwide, SUWA, its 15,000 members, 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 could submit dozens – if not thousands – of additional claims under the MOU. 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 available evidence, not just that submitted by the applicant.

For the reasons set forth below, TWS urges BLM to deny all four applications.

We wish to make clear, however, that while issuing a recordable disclaimer of interest for these routes pursuant to R.S. 2477 is illegal and inappropriate, Utah and the counties could apply for rights-of-way pursuant to Title V of FLPMA, 43 U.S.C. §§ 1761-1771. This would enable the State and the counties to pursue a lawful course of action to obtain a permit to maintain the routes while ensuring that federal environmental protections and public participation requirements remain in place.

SUMMARY.

BLM must deny Utah's applications for each of the four routes. The applications are submitted under an illegal process and, even under a process designed to improperly lower the standards for obtaining rights to federal lands, each contains wholly inadequate information to prove a valid claim.

First, the Disclaimer Rule and the State of Utah-DOI MOU that would be used to issue a recordable disclaimer of interest are both illegal. The Disclaimer Rule is illegal because it violates the Congressional ban on final rules related to R.S. 2477, and because disclaiming an interest in rights-of-way exceeds BLM's legal authority to issue disclaimers. The MOU is illegal because it relies on the unlawful Disclaimer Rule, because it also violates the Congressional ban on R.S. 2477 rulemaking, and because it does not incorporate or rely on the legal standards set by R.S. 2477.

Second, Utah has failed to submit evidence for any of the routes that meets the State'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. Utah has failed to submit even the minimal information required by the Disclaimer Rule. It has submitted vague, unconvincing, contradictory, and irrelevant data and mere hearsay concerning the critical standards set in law.

Tellingly, both the State and the Counties have admitted that they have no official records at all concerning highway construction or maintenance, or County funding of such activities. Utah presents no first-hand evidence concerning who first constructed the routes and why. For this reason alone, BLM must reject Utah's applications.

Third, while TWS does not always have easy access to records maintained by BLM, Utah's counties, or the State (especially since the State has refused to provide data requested under open record laws concerning the routes at issue here), TWS located documentation concerning each of the routes beyond that which the State submitted in its scant applications. The information TWS located raises significant legal and factual questions concerning the credibility of State's submissions and the validity of the State's claims. The evidence TWS located shows the following:

> Routes D28 and D30. The central portion of D28 does not appear on Daggett County highway maps either before or long after R.S. 2477's repeal. Aerial photos from 1950 do not show any sign of the central portion of the route, despite claims by Utah that the road was used by trucks nearly a decade before. The county did not claim that the central portion of D28 existed on its 1979 "Class D" road map. The county did not claim the central portion of D28 as a county route in a 1972 road maintenance agreement with BLM. A 1993 county attempt to claim "all county roads crossing public land administered by BLM" did not show the central portion of D28. BLM apparently proposed closing D28 to off-road vehicle traffic in the 1980s, clearly demonstrating federal management of the area. This evidence demonstrates that the route could not have risen to the level of a public "highway" and was not likely constructed by 1976.

Similarly, route D30 does not appear on Daggett County highway maps filed 14 years before and as long as 15 years after the repeal of R.S. 2477. The county did not claim D30 as a county route in its 1972 road maintenance agreement with BLM.

In any event, to the extent that any entity may have legal rights related to these routes, that entity is not the State. If these routes were constructed, such construction would have taken place while the federal land at issue was under lease for oil and gas. The leases specifically permitted the lease-holders to build roads for oil and gas development (but no other purpose). By specifically granting a temporary and limited right to the lease-holders to build roads to access petroleum on the leasehold, the United States clearly distinguished these rights-of-way from rights-of-way for a constructed public highway under R.S. 2477. Neither Congress nor BLM intended to grant public highway rights-of-way for the building of oil and gas roads across petroleum leases. BLM cannot use the disclaimer process to convert a limited right-of-way to access pipelines and drill pads into a right-of-way controlled by someone else – the county and State – for a different purpose.

Hickory Peak. The Hickory Peak route crosses BLM land and terminates at private land in the vicinity of the Harrington & Hickory mine. It is thus little more than an extended driveway across public land to the patented, private land. Even assuming that the State is correct that the route was used to facilitate mining at the Harrington & Hickory claim since the 1870s, under law the Hickory Peak claim cannot be an R.S. 2477 right-of-way. Rather, according to an Interior Department legal opinion, the route is in the nature of a 'private road' rather than a public highway. BLM cannot disclaim a right-of-way interest to the State of Utah because whatever right-of-way exists was granted to another party for another purpose.

Horse Valley. Iron County general highway maps fail to show the route at all in 1952, and fail to show significant portions of the route in 1975, 1976, and even in 1985, nine years after R.S. 2477's repeal. Even now, county maps characterize the route as a local road or "trail," hardly indicative that a constructed highway existed in October 1976. For many years (and still today), BLM has claimed the route as its own, as distinct from a county-maintained or constructed route.

The information TWS presents here is the very type of documentation that Utah itself has admitted it should submit. Utah's failure to locate or disclose the information to BLM – particularly in light of similar failures concerning Utah's first application for the Weiss Highway – is further indication of the patent inadequacy of the State's applications, and raises troubling questions concerning the quality and diligence of the State's research.

Should BLM grant any of these applications, such approval would demonstrate the unlawfully low bar that the agency intends to set for future claims, many of which may damage ecologically sensitive or otherwise significant public lands. BLM cannot and must not grant R.S. 2477 rights-of-way or disclaimers based on such a scant record. The management of lands owned by all Americans is at stake. BLM must not permit others to wrest significant management control of public lands from the American people without a rigorous review of all available information and compelling evidence that the claims are valid.

Therefore, we urge the State and counties to abandon their application for recordable disclaimers of interest, and to instead to pursue FLPMA Title V permits.

I. THE DISCLAIMER RULE IS ILLEGAL.

The Department of the Interior (DOI) is barred from using BLM's regulations on recordable disclaimers to grant or recognize R.S. 2477 rights-of-way because: (a) amendments to that rule which make the processing of rights-of-way possible were adopted in violation of a ban imposed by Congress on such rules; and (b) Congress never intended that the disclaimer process established by FLPMA could be used to recognized rights-of-way.

A. The Disclaimer Rule 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. 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 1. 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 2, attached.

DOI's 2003 amendment to BLM's disclaimer regulations clearly pertain to the recognition, management, or validity of R.S. 2477 rights-of-way, as forbidden by Congressional action. BLM has explicitly acknowledged the connection. BLM's press materials, issued concurrently with the proposed disclaimer rule on February 22, 2002, highlight the link between this proposed regulation and R.S. 2477, saying: "this proposed rule would provide an opportunity for States and other local governmental entities to secure a right to a highway which is purported to be an R.S. 2477 highway reservation…." See BLM, News, Proposed Rule on

Conveyances, Disclaimers and Correction Documents: Q's and A's (Feb. 22, 2002) at 2, attached as Exhibit 3.

A "significant number" of the tens of thousands of commenters also agreed that the rule would open a door to processing R.S. 2477 claims that was otherwise closed. See 68 Fed. Reg. 494, 496, (Jan. 6, 2003).

In operation, the rule "pertains to" R.S. 2477 whether it says so on its face, if it is used to process R.S. 2477 claims. BLM is required by 43 U.S.C. § 1745 to "determine" that the ownership of the United States "has terminated by operation of law or is otherwise invalid" before it can issue a disclaimer of interest. If BLM attempts to use this rule to process any R.S. 2477 claims, it would be required to determine that an R.S. 2477 claim was valid and had terminated or transferred an interest in a right-of-way to the claimant. (This is true notwithstanding the estoppel language in the 1984 rule, which says that a disclaimer does not "grant, convey, transfer, etc." any interest in lands. The recognition or validation must occur first in order to fulfill the statute's requirement for a determination.) This required determination would be "recognizing" the claim or determining the "validity" of the claim, and would be a clear violation of the Congressional moratorium. If BLM attempts to issue disclaimers without "determining" the validity of the claim, it would fail to meet the explicit requirement for a determination in 43 U.S.C. § 1745, and therefore be acting without authority altogether. Either way, pursuing this course would result in BLM violating the law.

The rule-change itself was clearly aimed at creating a mechanism to address R.S. 2477 claims. If the agency merely wished to continue using the recordable disclaimer regulation to provide an administrative mechanism for property owners to clear clouds on the title to their lands in uncontroversial circumstances, as FLPMA clearly intended, there would be no reason to authorize people other than record land owners to file these claims. In addition, there also was no reason to eliminate the statute of limitations for states, except that the Department is preparing to give favorable reception to the R.S. 2477 claims of the states such as Utah. In addition, the disclaimer process had never before been used to disclaim an interest in an R.S. 2477 right-of-way since FLPMA's adoption more than a quarter-century before. This reinforces the conclusion that DOI believed that a rule change was necessary to facilitate the approval of R.S. 2477 claims via amendments to the Disclaimer Rule.

Through rulemaking, DOI is clearly trying to expand the class protected by the statute, so it could include people and "entities" with different needs and different agendas than originally envisioned by the crafters of Section 1745. It was illegal for DOI to do so in the face of the statutory prohibition.

In its preamble to the final rule, BLM asserts that "[w]e do not believe that the Congressional moratorium on R.S. 2477 rulemaking precludes BLM from making effective this final rule." 68 Fed. Reg. 496 (Jan. 6, 2003). The agency goes on to make several specious arguments to support this position, none of which are convincing. For example, BLM argues that the moratorium does not apply because BLM is merely amending existing regulations that have nothing to do with R.S. 2477. This interpretation ignores the fact that the very purpose of the 2003 changes to the regulations was to ease the issuance of such claims.

BLM then argues that if the moratorium applied to the disclaimer rule, then it would impliedly repeal FLPMA's disclaimer provision. Again, this reading ignores the fact that the new, 2003 amendments to the regulations (which, as discussed below, exceed the authority granted in FLPMA) are at issue, not the statute itself.

In any event, legislative history suggests that this regulation is exactly the type of regulation 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 4. 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 BLM has attempted to do through the amended disclaimer regulation. BLM clearly intends to issue recordable disclaimers to R.S. 2477 claimants, relieving such claimants from having to file a quiet title action to gain recognition of their rights of way.

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 disclaimer regulation.

In sum, the amendments to the disclaimer rule which make the processing of rights-of-way possible were adopted in violation of the 1997 Congressional ban on the promulgation of such rules.[1]

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[1] At least one prominent legislator agrees. See letter of Sen. Jeff Bingaman (ranking member, Senate Energy & Natural Resources Committee) to Secretary Gale Norton (April 21, 2003), attached as Exhibit 5.

B. DOI Cannot Disclaim the United States' Interest in Rights-of-Way Because to Do So Would Exceed DOI's Authority under FLMPA.

The statutory authorization for BLM to issue recordable disclaimers of interest provides: "Issuance of a document of disclaimer by the Secretary pursuant to the provisions of this section and regulations promulgated hereunder shall have the same effect as a quit-claim deed from the United States." 43 U.S.C. § 1745(c) (emphasis added). Issuing a quitclaim deed to an R.S. 2477 claimant would be inconsistent with the nature of a right-of-way. As such, any attempt to use the amended disclaimer rule to process R.S. 2477 rights-of-way will go beyond the scope of that intended by Congress, and thus violate FLPMA.

A quitclaim deed renounces all interests in property. See, e.g., Black's Law Dictionary ("Quitclaim deed. A deed of conveyance operating by the way of release; that is, intended to pass any title, interest, or claim which the grantor may have in the premises . . . ."). Thus, issuing a quitclaim deed would be inconsistent with the nature of the respective rights of the United States and the holder of an R.S. 2477 right-of-way because R.S. 2477 grants nothing but an easement. The federal courts have held that Congress's grant of an R.S. 2477 right-of-way is merely an easement, which does not give the owner any other rights of ownership. See Sierra Club v. Hodel, 1068, 1083 (10th Cir. 1988) ("Hodel") (R.S. 2477 grants a right-of-way, a species of easement across U.S. public lands); United States v. Garfield County, 122 F. Supp. 2d 1201, 1242-43 (D. Utah 2000).[2] Nor has DOI ever disclaimed an interest that was less than the entire United States interest in a property.

The existence of an easement under R.S. 2477 does not invalidate the United States' interest in the land; the United States retains all other incidents of ownership. By recognizing a valid right of way, the United States does not give up its ownership of the land. Garfield County, 122 F. Supp. 2d at 1242-43. Thus, it would violate FLPMA's plain language for the United States to quitclaim its rights to an R.S. 2477 right of way. This is consistent with both the practice and interpretation of prior administrations. No prior administration has disclaimed an interest in a right-of-way over federal land nor interpreted FLPMA § 315 to provide DOI with the authority to disclaim an interest in an R.S. 2477 right-of-way. See letter of Sen. Bingaman (Exh. 5) at 2.

Both the regulation and the statute provide that a disclaimer can be issued when "a record interest of the United States in lands has terminated by operation of law or is otherwise invalid." 43 U.S.C. § 1745; 43 C.F.R. § 1864.1-2. The perfection of an R.S. 2477 right of way does not invalidate any record interest of the United States. As discussed above, as the owner of the servient estate, the United States retains all rights of ownership, as long as it allows the easement holder reasonable use of its easement.

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[2] In addition, the purpose of FLPMA § 315 is to remove "cloud[s] on … title." 43 U.S.C. § 1745(a). The effect of issuing a disclaimer for an R.S. 2477 claim would create, rather than remove, a cloud on public land title by recognizing a non-federal road easement.

Applying the disclaimer regulation to an R.S. 2477 claimant also violates the plain language of the regulation itself because an R.S. 2477 claimant does not have a claim to title. Black's Law Dictionary defines title as:

> The formal right of ownership of property. Title is the means whereby the owner of lands has the just possession of his property. The union of all the elements which constitute ownership. Full independent and fee ownership the right or ownership in land; also, the evidence of such ownership.

In contrast to "the union of all the elements" of ownership, or "full independent fee ownership," courts have clearly held that a right-of-way is merely an easement, which does not give the owner any other rights of ownership. See, e.g., Garfield County, 122 F. Supp. 2d at 1242-43; see also Hodel, 848 F.2d at 1083; Barker v. Board of County Comm'rs of County of La Plata, Colo., 49 F. Supp. 2d 1203, 1220 (D. Colo. 1999). [3]

For these reasons, it is clear that any attempt to use the disclaimer of interest regulations to recognize R.S. 2477 claims will exceed the authority Congress granted DOI through FLPMA.

II. THE UTAH-INTERIOR DEPARTMENT MEMORANDUM OF UNDERSTANDING IS ILLEGAL.

After months of secret negotiations, from which the undersigned and interested public were barred despite repeated requests to participate, the State of Utah and DOI signed a Memorandum of Understanding on "State and County Road Acknowledgement" ("Tate of Utah-DOI MOU") on April 9, 2003. Exhibit 6, attached. The stated purpose of this MOU is to "acknowledge the existence of certain R.S. 2477 rights-of-way on BLM land within the State of Utah." MOU at 2. It is pursuant to the process established in this MOU that the State of Utah seeks to have the United States disclaim an interest in four alleged rights-of-way. However, BLM cannot use the MOU to disclaim an interest in these or any other routes because: (a) the MOU utilizes the illegal Disclaimer Rule; (b) the MOU is itself a rule concerning R.S. 2477 promulgated in violation of the 1996 Congressional ban; and (c) because the MOU would permit the State to obtain rights-of-way using standards not related to R.S. 2477, the underlying law granting such rights-of-way.

A. The State of Utah-DOI MOU Uses an Illegal Vehicle, the Disclaimer Rule.

As noted in Section I, above, the Disclaimer Rule was unlawfully promulgated. Yet the MOU states:

> The Acknowledgement Process referenced in this MOU that the Department shall use to acknowledge eligible roads is FLPMA's recordable disclaimer of interest

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[3] Similarly, the disclaimer regulations require that the applicant for a disclaimer must be an entity "claiming title to lands." 43 C.F.R. § 1864.1-1(a). Those seeking an R.S. 2477 right-of-way seek an easement over, not title to, lands.

> process. *See* 43 U.S.C. 1745, 43 C.F.R. Subpart 1864. The recordable disclaimer of interest process provides a clear statutory basis for resolving claims ….

DOI cannot utilize the MOU for disclaiming an interest in rights-of-way for the four routes at issue here for the same reason it cannot utilize the Disclaimer Rule to achieve that end: the Disclaimer Rule amendments are illegal.

B. The State of Utah-DOI MOU Itself Violates the Congressional Ban on Rulemaking.

As noted above, Congress barred the Executive Branch from promulgating any rule or regulation "pertaining to the recognition, management, or validity of a right-of-way pursuant to Revised Statute 2477." Attorneys at the investigative arm of Congress, the General Accounting Office (GAO), have concluded that this Congressional ban applies to the MOU, which is, therefore, illegal. See General Accounting Office, Recognition of R.S. 2477 Rights-of-Way under the Department of the Interior's FLPMA Disclaimer Rules and Its Memorandum of Understanding with the State of Utah, Report B-300912 (Feb. 6, 2004), attached as Exhibit 7.

The GAO report notes that

> there can be little doubt that the Utah MOU "pertains" to the "recognition, management, or validity" of R.S. 2477 rights-of-way. The purpose of the MOU was to address years of "unresolved conflicts" over these precise issues, which DOI had "traditionally approached . . . by trying to define the precise legal limits of the original [R.S. 2477] statutory grant," see Utah MOU at 1, and as discussed below, the MOU includes substantive provisions pertaining to all three issues. The remaining question is whether the Utah MOU is a "final rule or regulation," meaning, as discussed above, that it is both an APA rule and a substantive rule. We conclude that it is both.

Id. at 10. The report concludes that the MOU is a rule of general applicability of the type barred by Congress, stating: "The subject of Congress' concern in Section 108 was DOI's establishment of the overall standards for recognizing, managing, and validating R.S. 2477 rights-of-way, not its decision in a particular case — in other words, it was concerned about the 'rules of the game,' not a particular game score." Id. at 11-12. GAO analyzed the MOU's standards for recognizing the existence of R.S. 2477 rights-of-way, and found that the MOU did in fact, attempt to change the rules of the game. Id. at 14-16. By changing the rules of the game, GAO held, the MOU was exactly the type of rule Congress intended to prohibit. Id. at 16. Leading academics agree with this interpretation. See Michael C. Blumm, The Bush Administration's Sweetheart Settlement Policy, 24 Environmental Law Review 10397, 10408 (May 2004), excerpts attached as Exhibit 8 (concluding that "the MOU meant to change the evaluation standards for R.S. 2477 claims"); S. Krakoff, Settling the Wilderness, 75 U. of Colorado L. Rev. 1159, 1185 (Fall 2004), excerpts attached as Exhibit 9 ("The R.S. 2477 MOU, when quilted together with the new disclaimer rules, amounts to the functional equivalent of an R.S. 2477 rule").

Therefore, the MOU is illegal. Any attempt to implement the MOU through the approval of disclaimers of interest for the four routes at issue here (or any other alleged R.S. 2477 right-of-way) will thus violate the law.

C. The MOU Does Not, as It Must, Utilize Standards Based Upon R.S. 2477.

While the MOU would essentially permit the U.S. government to surrender an interest in a right-of-way over federal public land based on a claim purportedly perfected pursuant to R.S. 2477, the MOU fails to recognize, utilize, or incorporate the standards of that law. Because the MOU exceeds DOI's authority by permitting the award of disclaimers in violation of R.S. 2477's plain requirements, the MOU is illegal, and BLM, thus, may not implement it.

1. R.S. 2477 and What It Means.

To understand the inadequacies of the MOU, it is necessary, first, to understand the requirements of R.S. 2477. Adopted in 1866, R.S. 2477 reads as follows:

> The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

The law was repealed on October 21, 1976 by FLPMA, but those rights-of-way that were created prior to repeal could still be valid. For an R.S. 2477 claim to be valid, then, those pressing the claim must show that a "highway" was "constructed" across U.S.-owned land either before the land was set aside for other uses or before October 21, 1976 (when the law was repealed), whichever is earlier.

a. For a Right-of-Way to Be Granted, Actual Physical Construction Must Have Taken Place.

For an R.S. 2477 right-of-way (ROW) to be valid, a highway must have been constructed. The Bureau of Land Management (BLM) has quite properly (and recently) interpreted the term "construction" in R.S. 2477 to require some form of purposeful, physical building or improving.

> Some form of mechanical construction must have occurred to construct or improve the highway. A highway right-of-way cannot be established by haphazard, unintentional, or incomplete actions. For example, the mere passage of vehicles across the land, in the absence of any other evidence, is not sufficient to meet the construction criteria of R.S. 2477 and to establish that a highway right-of-way was granted.

See Southern Utah Wilderness Alliance v. Bureau of Land Management, 147 F. Supp. 2nd 1130, 1138 (D. Utah 2001) (hereafter SUWA v. BLM) (on appeal) (supporting BLM's rejection of multiple counties' assertions that continued use amounted to construction).

Federal caselaw supports the inescapable conclusion that actual construction – not mere use – must occur before a grant under R.S. 2477 can have been granted. The first rule of statutory construction is to adhere to the statute's plain language. Finley v. United States, 123 F.3d 1342, 1347 (10th Cir. 1997) ("Absent a clearly expressed legislative intention to the contrary, that language must . . . be regarded as conclusive") (quotations omitted). Equally important is the principle that every word in a statute must be given operative effect, not rendered redundant or meaningless. Id. These "cardinal principle[s] of statutory construction" apply in "any setting" and are as fundamental today as they were in the 19th century. Duncan v. Walker, 533 U.S. 167, 174 (2001); *accord* Platt v. Union Pac. R.R. Co., 99 U.S. 48, 58 (1878) (refusing to interpret a federal land grant in a manner rendering words superfluous).

In addition to these principles, applicable to all statutes, federal land grants such as R.S. 2477 are subject to a clear-statement rule, under which they are construed "favorably to the [federal] government. . . . [N]othing passes but what is conveyed in clear and explicit language – inferences being resolved not against but for the [federal] government." Caldwell v. United States, 250 U.S. 14, 20 (1919) (emphasis added).

BLM and the federal courts have read R.S. 2477 in accordance with its plain language as requiring construction of a highway. The statutory term "construction" requires "[s]ome form of mechanical construction . . . . A highway . . . cannot be established by haphazard, unintentional, or incomplete actions [such as] the mere passage of vehicles across the land." SUWA v. BLM, 147 F. Supp.2d at 1138.

This reading is supported by the rule that neighboring words in a statute must be construed to have independent, not synonymous, meanings. See, e.g., Babbitt v. Sweet Home Chapters of Cmtys. for a Greater Oregon, 515 U.S. 687, 702-03 (1995). It is also bolstered by the clear statement rule, under which all ambiguities in a federal land grant must be resolved in favor of the United States. As the Tenth Circuit Court of Appeals noted in Hodel, 848 F.2d at 1080: "'[c]onstruction' indisputably does not include the beaten path; rather there must be some evidence of maintenance, e.g., grading, drainage, ditches, culverts."[4]

Congressional intent, as expressed in the plain language of a statute, "lies in the ordinary meaning attached to the word, which may be found by aid of commonly accepted dictionary definitions." In re Hamilton Creek Metro. Dist., 143 F.3d 1381, 1385 (10th Cir. 1998). Mid-19th-century dictionary definitions of "construction" and "construct" are entirely consistent with the conclusion that the term meant much more than mere use. For example, Noah Webster, American Dictionary of the English Language (1865) defined "construction" as

> 1. The act of construction; the act of building, or of devising and forming; fabrication; composition. 2. The manner of putting together the parts of anything so as to give the whole its peculiar form; structure; conformation.

[4] Thus, although Hodel rejected the argument that a "construction" standard applies to the *scope* of R.S. 2477 rights-of-way – a subject about which the statute is entirely silent – where "construction" does apply, it "indisputably" requires expenditure of labor, not just a path "beaten" through use.

Id. at 281 (Exhibit 10). Similarly, an 1863 dictionary defined construction as: "[t]he act of constructing; fabrication; [m]ode of constructing or building; structure; conformation." Joseph Worchester, Dictionary of the English Language 301 (1863) (Exhibit 11).

Historical sources also demonstrate that at the time Congress enacted R.S. 2477, "construction" of a highway entailed surveying, grading, draining, and leveling, i.e., the same mechanical construction definition upheld by the court in SUWA v. BLM. An 1837 treatise by a leading authority addressed drainage, materials, grading, and laying a foundation. Frederick W. Simms, A Treatise on the Principles and Practice of Levelling, Showing its Application to Purposes of Civil Engineering Particularly in the Construction of Roads 102-07 (1837).

Similar highway construction activities took place in Utah. Utah's highway department has documented that construction of roads during the mid-19th century involved detailed surveys and plans and, often, the building of bridges, aqueducts, culverts, turnpikes and other fixtures. Ezra C. Knowlton, History of Highway Development in Utah 11-12 (Utah State Department of Highways 1964), excerpts attached as Exhibit 12. An 1854 contract for construction of a highway in Utah specified "cleaning, grading, ditching, and bridging the entire road so as to render it practicable for general use and travel." Id. at 40.

Not surprisingly, the labor-intensive construction of these 19th-century highways was costly. For example, in 1852, the territorial legislature of Utah requested $500,000 in federal funding for a highway, observing that the contemplated construction required locating, grading, and macadamizing from Nebraska to Sacramento City. Knowlton, *supra*, at 731. Wagon road grants by Congress also required substantial mechanical construction. See, e.g., Act of June 25, 1864, § 4, 13 Stat. 183, 184 (requiring a "road-bed proper to be . . . constructed with ample ditches on both sides so as to afford sufficient drains, with good and substantial bridges and proper culverts and sluices where necessary . . . . [and] the hills to be levelled and the valleys raised so as to make as easy a grade as practicable") (emphasis added), attached as Exhibit 13. Such roads were contemporaneously designated public highways. Id. § 2, 13 Stat. 183; see also Act of July 2, 1864, § 2, 13 Stat. 355, attached as Exhibit 14.

Utah territorial laws from the 1850s to 1860s further demonstrate that highway construction was expensive and labor intensive. For example, the territorial legislature appropriated more than $20,000 in both 1866 and 1867 for spending "on" roads, or "to improve," "to open," "making," "to make," "to repair," or "for repairing and changing," roads or for "making a dugway," or for "labor" related to roads.[5] In 1860, the territory authorized payment of $18,997.61 to Brigham Young, President of the Church of Jesus Christ of Latter Day Saints,

[5] Territorial Appropriations Bill, approved January 19, 1866, from Acts, Resolutions and Memorials Passed at the Several Annual Sessions of the Legislative Assembly of the Territory of Utah (1866) at 224-226, attached as Exhibit 15; Territorial Appropriations Bill, approved January 18, 1867, from Acts, Resolutions and Memorials Passed and Adopted by the Legislative Assembly of the Territory of Utah, Sixteenth Annual Session (1867) at 23-25, attached as Exhibit 16.

and an associate "to reimburse [them] for the means expended by them in constructing [a] road" in Provo Canyon.[6]

Heavy equipment was needed for construction of these routes; the legislature appropriated $1,908.33 in 1867 for the Territorial Road Commissioner to purchase a "pile driver," presumably for highway and bridge construction.[7] The legislature further authorized a "poll tax" in 1862, "not to exceed two days labor, or [$1.50] per day in lieu thereof, of every able bodied male inhabitant … said labor to be performed upon any Territorial or County road ...."[8] Indeed, even before Utah was recognized as a territory, the General Assembly of the self-proclaimed "State of Deseret" passed an ordinance establishing the position of State Road Commissioner, whose duties it was to "to make all contracts for building bridges, acqueducts [sic], culverts, turnpikes, and all other fixtures necessary for the completion of any public road."[9]

The Utah territorial legislature recognized that "construction" of these routes meant more than merely using them repeatedly. For example, in 1867, less than six months after the passage of R.S. 2477, the legislature authorized the organization of the "Kaysville Wagon Road Company," whose duty it was to "locate and construct, on or near the present traveled road … a good road not less than twenty feet wide," and authorizing the company to collect tolls "upon the completion of one half of the distance of said road." Emphasis added.[10] Clearly, the "traveled road" was not constructed, since the legislature authorized the company to "construct" the route "on" the traveled route, and construction required work that had to be completed. Similarly, in its first session in 1862, the Utah territorial legislature requested that Congress appropriate $60,000 for "the location and construction of a Territorial road" to assist travel from northeast to southwest in Utah despite the fact that "[m]any companies [of emigrants] have already passed

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[6] An Act repealing the charters of certain Road Companies, and for other purposes, approved Jan. 20, 1860, from Acts, Resolutions and Memorials Passed at the Several Annual Sessions of the Legislative Assembly of the Territory of Utah (1860) at 30-31, attached as Exhibit 17.

[7] Utah Territorial Appropriations Bill, approved January 18, 1867 (Exh. 16) at 24.

[8] An Act Providing for a Poll Tax for Road Purposes, approved Jan. 16, 1862, from Acts, Resolutions and Memorials Passed by the Legislative Assembly of the Territory of Utah, Eleventh Annual Session (1862) at 8-10, attached as Exhibit 18.

[9] An Ordinance Providing for State and County Road Commissioners, approved Jan. 15, 1850, from Acts and Resolutions Passed at the Second Annual Session of the Legislative Assembly of the Territory of Utah (1853) at 90-92, attached as Exhibit 19.

[10] An Act incorporating the Kaysville Wagon Road Company, approved Jan. 16, 1867, from Acts, Resolutions and Memorials Passed and Adopted by the Legislative Assembly of the Territory of Utah, Sixteenth Annual Session (1867) at 19-21, attached as Exhibit 20.

over this route."[11] Thus, although "many" emigrant groups (and their wagons, horses, and other livestock) had passed over the route, the Utah territorial legislature nonetheless called for significant sums for the "construction" of the route.

Congress enacted R.S. 2477 against this long-established backdrop of funding expensive and labor-intensive construction of public highways. Like other land-grant statutes, the purpose of R.S. 2477 was to provide an incentive and reward for the expenditure required to construct a highway. To be sure, R.S. 2477, as a general statute, did not contain the detailed specifications concerning the mode of construction found in statutes funding specific roads. But while Congress did not specify particular methodologies, it unambiguously required "construction," a term that in the mid-19th century clearly demanded expenditure of significant labor and capital for road-building.

If further confirmation of the plain meaning of the statute were needed, it is found in the Supreme Court's interpretation of the word "construction" in another section of the same 1866 Act of which R.S. 2477 was a part. Section 9 of the 1866 Act provided that "the right-of-way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed." 14 Stat. 253. In Bear Lake, the Supreme Court held that no rights vest against the government under this statute's "construction" requirement without "the performance of any labor." 164 U.S. at 18. "Until the completion of this work, or, in other words, until the performance of the condition upon which the right . . . is based, the person taking possession has no title, legal or equitable, as against the government." Id. at 19 (emphasis added); see also Jennison v. Kirk, 98 U.S. 453, 458 (1878) (ditches covered by Section 9 of the 1866 Act were "constructed with vast labor and enormous expenditures of money"). A fundamental rule of statutory interpretation is that there should be a "single definition of a common term occurring in several places within a statute." Harline v. Gladwell, 950 F.2d 669, 674 (10th Cir. 1991) ("Generally, when the same words are used in different sections of the law, they will be given the same meaning") (quotations omitted).

BLM, through its legal representative the Department of Justice, has repeatedly agreed that "construction" requires actual physical work, and not mere use of a trail, in filings submitted to the 10th Circuit Court of Appeals in 2002, 2003 and 2004. In a brief filed in 2002, the Bush Administration Department of Justice stated:

> Contrary to the [Utah] Counties' argument, the statutory language selected by Congress did not provide for the establishment of a right-of-way based on the public's mere "use" or "passage" over the public lands with no particular destination. Rather, Congress selected the phrase "construction of highways" as the predicate for establishment of a right-of-way.

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[11] Memorial to Congress for an Appropriation for the Construction of a Territorial Road, approved Mar. 6, 1852 from Acts, Resolutions and Memorials Passed by the First Annual, and Special Session, of the Legislative Assembly of the Territory of Utah (1852) at 221-222, attached as Exhibit 21.

> Consistent with the commonly understood meaning of these terms at the time R.S. 2477 was enacted, Congress thereby required a purposeful, physical act to establish a defined route across the public lands.

Brief of Federal Appellees, SUWA v. BLM, Tenth Cir. No. 01-4173 (June 2002) at 50-51, excerpts attached as Exhibit 22. The Bush Administration repeated its position before the Tenth Circuit Court of Appeals in October 2003.[12] BLM's attorneys also repeated to the Tenth Circuit the very words quoted above in a brief filed last year. Brief of Federal Appellees, SUWA v. BLM, Tenth Cir. No. 04-4071 & 04-4073 (August 2004) at 48, excerpts attached as Exhibit 24. Given that the U.S. Department of Justice has taken an official position before the courts that R.S. 2477 right-of-way must be "constructed," BLM cannot now simply ignore the law's clear requirement for such construction.

b. For a Right-of-Way to Be Granted, the Route Constructed Must Be a "Highway."

R.S. 2477's clearly requires that a right-of-way can be granted only where a certain type of route – a "highway" – was constructed. BLM has previously concluded that:

> The claimed highway right-of-way must be public in nature and must have served as a highway when the underlying public lands were available for R.S. 2477 purposes. It is unlikely that a route used by a single entity or used only a few times would qualify as a highway, since the route [must have] open public nature and uses. Similarly, a highway connects the public with identifiable destinations or places.

See SUWA v. BLM, 147 F. Supp.2d at 1143 (quoting BLM R.S. 2477 determinations). BLM's definition accords with those from contemporaneous dictionaries, which, as noted above, federal courts turn to for interpretation. E.g., Joseph E. Worcester, Dictionary of the English Language, at 684 (1863) (Exh. 11) ("A great road; a public road; a road over which the public at large have a right of passage"); see also The Compact Oxford English Dictionary, 768 (2d ed. 1991) ("OED") ("A public road open to all passengers, a high road") (citing historical usage). In fact, as explained below, BLM's definition is less strict than one these dictionaries and other relevant authorities would support.

In the mid-19th century, as today, "highway" meant an artery connecting identifiable places, one the public at large would use. Worcester, supra, at 684 (a "public road") (Exh. 11);

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[12] See Brief of Federal Appellees, Southwest Four Wheel Drive Ass'n v. Bureau of Land Management, 10th Cir. No. 03-2138 (Oct. 15, 2003) at 39 ("the statutory language selected by Congress did not provide for the establishment of a right-of-way based on the public's mere 'use' or 'passage' over the public lands. Rather, Congress selected the phrase 'construction of highways' as the predicate for establishment of a right-of-way."), excerpts attached as Exhibit 23; id. at 43 (R.S. 2477 "similarly requires actual, physical construction as a prerequisite to establishing an R.S. 2477 right-of-way")

OED, supra, at 768 ("esp. a main or principal road forming the direct or ordinary route between one town or city and another, as distinguished from a local, branch or cross road") (emphasis added).

Indeed, in mid-19th-century America, the term "highway" had a meaning more strict than the definition BLM has previously adopted. First, mid-19-century Americans described transportation infrastructure that linked the Nation together for commercial purposes as "highways." Thus, in 1872, the Supreme Court used "highway" as a synonym for "an avenue to the markets of the country." Chicago Burlington & Quincy Railroad Co. v. Otoe County, 83 U.S. 667, 675 (1872). Second, "highway" in the mid-19th-century denoted not just any way useful for commerce, but a way of some importance. Worcester, *supra*, at 684 ("great road"); OED, at 768 ("a high road"). Thus, roads relatively insignificant to a transportation system would not qualify. See also Sierra Club v. Hodel, 675 F. Supp. 594, 606 (D. Utah 1987) (highway at issue was "vital link between the county's major centers of activity"), aff'd in part, rev'd in part by 848 F.2d 1068 (10th Cir. 1988).

The BLM, during this administration, has endorsed a narrow view of the definition of "highway." In its brief before the Tenth Circuit in the SUWA v. BLM case, the Department of Justice argued on BLM's behalf that:

> the ordinary meaning of the term "highway" in the 1860s was not merely any route or road across the landscape, but rather "a public road; a way open to all passengers; so called, either because it was a great or public road, or because the earth was raised to form a dry path. Highways open a communication from one City or town to another." [Webster's Dictionary of the English Language (1860)] at 552 (emphasis added). In fact, as noted by the Congressional Research Service in its 1993 Report, Congress' use of the term "highways" rather than "roads" indicates an intent to limit R.S. 2477 rights-of-way to "significant" or "principal" public roads rather than broadly apply to any class of road.

Brief of Federal Appellees, SUWA v. BLM, (June 2002) (Exh. 22) at 51 (emphasis in original). BLM continued to endorse this approach after the adoption of the Utah-DOI MOU on April 9, 2003. See Brief of Federal Appellees, Southwest Four Wheel Drive Ass'n v. Bureau of Land Management, (Exh. 23) at 38-39 (reaching same conclusion as BLM did in SUWA v. BLM); Brief of the Federal Appellee, SUWA v. BLM, (August 2004) (Exhibit 24) at 48-49 (same).[13]

Thus, any evaluation of requests for disclaimers of interests in rights-of-way under R.S. 2477 in Utah – or anywhere in the nation – must begin from the premise that a "highway"

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[13] The Congressional Research Service's 2003 report reaffirms its 1993 finding that the most convincing definition of "highway" is that of a significant route. See P. Baldwin, Congressional Research Service, CRS Report for Congress, Highway Rights of Way on Public Lands: R.S. 2477 and Disclaimers of Interest (2003) ("CRS 2003 Report"), at 23-26, excerpts attached as Exhibit 25; full text available at http://www.rs2477.com/documents/CRS_Report_RS2477%20_Disclaimers_of_Interest.pdf.

includes only a major avenue of transportation between significant public destinations (such as cities or towns) that was open to the public.

c. For a Right-of-Way to Be Granted, the Highway Must Be Constructed over Unreserved Public Lands.

R.S. 2477 permits the establishment of rights-of-way over "public lands" only if the land was "not reserved for public uses." An R.S. 2477 right of way may be created only while the "surrounding land [retains] its public character." Adams v. United States, 3 F.3d 1254, 1258 n. 1 (9th Cir.1993); SUWA v. BLM, 147 F. Supp. 2d at 1144; Humboldt County v. United States, 684 F.2d 1276, 1281 (9th Cir.1982).

Public lands that are not available for R.S. 2477 rights of way are those that are reserved or dedicated by Act of Congress, Executive Order, Secretarial Order, or, in some cases, classification actions authorized by statute, during the existence of that reservation or dedication, or lands pre-empted or entered by settlers under the public land laws or located under the mining laws which ceased to be public lands during the pendency of the entry or claim. See, e.g., SUWA v. BLM, 147 F. Supp. 2d at 1144 (finding that an R.S. 2477 right-of-way could not have been established during the pendency of a Coal Land Withdrawal promulgated as part of the Pickett Act, Act of June 25, 1910, ch. 421, § 1).

d. The Scope of the Right-of-Way Cannot Exceed Whatever Rights Were Granted by the Federal Government at the Time of the Reservation of Lands.

The scope of an R.S. 2477 right-of-way includes the highway's width, alignment, uses, surface character, and improvements. Under Federal caselaw and Utah law, an R.S. 2477 right-of-way today can extend no further than historic construction and historic uses had extended it at the time the lands were withdrawn or the date upon which FLPMA repealed R.S. 2477. See Garfield County, 122 F. Supp. 2d at 1228-29. FLPMA preserved only pre-existing rights-of-way as they existed on the date of passage, October 21, 1976. Hodel, 848 F.2d at 1083. The scope of a right-of-way "is limited ... to the width permitted by state law as of [the] date" of either reservation or October 21, 1976, whichever is later. Hodel, 848 F.2d at 1083. All uses established before that date not terminated or surrendered, "are part of an R.S. § 2477 right-of-way." Id. at 1084.

2. The MOU Fails to Address – or Contradicts – R.S. 2477's Standards.

The MOU identifies criteria for "roads" that will be considered "eligible" for "acknowledgment" as valid R.S. 2477 rights-of-way. Utah must show that:

1. the route "existed" prior to the enactment of FLPMA in 1976;
2. the route can be identified by centerline description or other appropriate legal description;

3. the existence of the route prior to FLPMA's enactment "is documented by information sufficient to support a conclusion that the [route] meets the legal requirements of a right-of-way granted under R.S. 2477;" and
4. the route "was and continues to be public and capable of accommodating automobiles or trucks with four wheels and has been the subject of some periodic maintenance."

MOU at 3. While the third requirement does concern the statute, the first, second and fourth do not, and in fact those three undermine the third requirement. Additional guidance further distances DOI from applying valid criteria for making findings concerning the validity of a right-of-way, demonstrating the MOU's illegality.

a. The MOU Does Not Address R.S. 2477's "Construction" Requirement.

The MOU fails utterly to address or follow the requirement that a route be created through "construction," as R.S. 2477 requires. The MOU neither endorses nor even acknowledges the construction requirement. Instead, the MOU permits the State of Utah to put forward as "eligible" routes for a right-of-way disclaimer a route that "existed" prior to FLPMA's repeal, where that route is and was "capable of accommodating" four-wheeled cars or trucks, and where that route has been "the subject of some periodic maintenance." None of these "standards" relate to R.S. 2477's plain requirement for "construction."

While the MOU requires that a route must have "existed" in some form or another prior to 1976, the MOU does not define what must have "existed" on the ground. Under this vague and undefined standard, DOI could award a right-of-way for a route that existed as a foot, horse, or un-constructed jeep trail prior to FLPMA's repeal, even if a "road"[14] did not come into being through construction until later. R.S. 2477 plainly forbids this result.

The fact that a vehicle route is "capable of accommodating" a four-wheeled vehicle is similarly irrelevant to a determination of whether a valid R.S. 2477 right-of-way was created through construction. Utah's public lands include slickrock, washes, sand dunes, and sparsely-vegetated plains all of which are "capable of accommodating" a four-wheeled vehicle without the construction any route at all. Yet construction of a highway is required by the plain language of R.S. 2477 before a right-of-way can be granted.

The MOU's requirement that routes have been "the subject of some periodic maintenance" is also not directly related to the plain-language requirements of R.S. 2477. Certainly, some types of actions that are arguably "maintenance" (grading, bridging, placement of culverts to replace washed-out route segments, addition of replacement gravel, etc.) could rise to the level of "construction," if undertaken over a sufficient period over a significant portion of a route that was not otherwise constructed. However, the term "maintenance" is nowhere defined in the MOU, and it is nowhere limited to those types of actions that would actually result

[14] As discussed further below at Section III(C)(2)(b), the MOU specifically declines to use the word "highway" in referring to R.S. 2477 claims.

in "construction." Indeed, the term is vague enough to arguably encompass activities such as driving over vegetation that has grown up in a user-created route. As noted above, in Section II(C)(1)(a), R.S. 2477's "construction" requirement forbids this outcome.[15]

> The GAO agrees. In its February 2004 analysis of the MOU, GAO stated:
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> Utah MOU criterion that a road have been in existence prior to FLPMA's enactment in 1976 and be in current use is equivalent to the "continuous use" standard for R.S. 2477 "construction" urged by Utah counties but rejected in Southern Utah Wilderness Alliance v. Bureau of Land Management, 147 F. Supp. 2d 1130 (D. Utah 2001), appeal dismissed, 2003 WL 21480689 (10th Cir. 2003) (SUWA). As BLM successfully argued in SUWA, the term "construction" in R.S. 2477 requires some form of purposeful, physical building or improvement, not simply continuous use. As the court explained, "[a] highway right-of-way cannot be established by haphazard, unintentional, or incomplete actions. . . . [T]he mere passage of vehicles across the land, in the absence of any other evidence, is not sufficient to meet the construction criteria of R.S. 2477 and to establish that a highway right-of-way was granted." Id. at 1138-39. See also United States v. Garfield County, 122 F. Supp. 2d 1201, 1227 n.5 (D. Utah 2000) (adopting Department's interpretation of "construction" as meaning actual building and more than mere use).

GAO Report B-300912 (Exh. 7) at 14. GAO concluded that the MOU eligibility requirements represented a "[c]hange[] in standards for recognition and validation of R.S. 2477 rights-of-way." Id.

That the MOU intends to abandon prior agency positions and ignore existing court precedent is reinforced by DOI's declaration that "the requirements for determinations" set out in a memo from former DOI Secretary Babbitt on January 22, 1997 "shall be inapplicable to acknowledgement requests submitted in accordance with this MOU." MOU (Exh. 6) at 4; see also Memo. of Jim Hughes, Deputy Dir., BLM to Utah State Director (June 25, 2003), at 2, attached as Exhibit 27 ("For purposes of implementing the MOU, the requirements for determinations under the 'Interim Departmental Policy on Revised Statute 2477 Grant of Right-of-Way for Public Highways; Revocation of December 7, 1988 Policy,' dated January 22, 1997, are inapplicable"). Secretary Babbitt's January 1997 memo, abandoned by DOI in favor of the

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[15] DOI materials announcing the MOU's signing also state that the MOU will permit DOI to disclaim an interest in "publicly traveled and regularly maintained roads in Utah." See DOI, Memorandum of Understanding: Department of the Interior and State of Utah, Resolution of R.S. 2477 Right-of-Way Claims, Fact Sheet (April 2003), available at http://www.doi.gov/news/moutalkingpoints.htm ("DOI MOU Talking Points"), attached as Exhibit 26. However, many routes – including old jeep trails to nowhere, wash bottoms, or off-road vehicle (ORV) tracks that were never constructed – may fit this definition because proponents will argue that such routes are used by ORVs and are "maintained" by the passage of such vehicles.

MOU, acknowledged R.S. 2477's clear construction requirement. See Memo. of Secretary of the Interior to Ass't Secretaries (Jan. 22, 1997) ("Babbitt Policy"), at 3, attached as Exhibit 28. In addition, the Babbitt Policy revoked a flawed, prior policy, known as the "Hodel Policy." Id. at 3 (revoking the "December 7, 1988 policy"); see also Hodel Policy, (Exhibit 29). While the Hodel Policy acknowledged the "construction" requirement, it defined "construction" in such a way as to run counter to the word's plain meaning by adopting, among other things, a standard that endorsed construction of foot and horse trails as highway "construction," and by stating that "[t]he passage of vehicles by users over time may equal action construction," an interpretation rejected by BLM in this Administration, the previous Administration, and the federal district court of Utah in SUWA v. BLM. The MOU's repeal of the Babbitt Policy for the purposes of the MOU may be interpreted by BLM to essentially reinstate the Hodel Policy for purposes of assessing the validity of applications for disclaimers under R.S. 2477. Again, this would result in DOI utilizing a standard that is flatly contradicted by the plain language of R.S. 2477, and is therefore illegal.

Guidance on implementing the MOU does not clarify whether DOI will apply a standard that requires actual construction. The MOU states: "Through the MOU, Interior and the State have agreed to focus their limited resources on acknowledging these R.S. 2477 rights-of-way, that satisfy the statutory requirements of 'construction' and 'highway' under almost any interpretation of those statutory terms." Memo. of J. Hughes (Exh. 27) at 1 (emphasis added). Neither the MOU, nor any guidance, define what 'under almost any interpretation' might encompass. Surely, one would assume that it would encompass the definitions of "construction" (as well as "highway") pressed by the BLM and Department of Justice in this Administration and endorsed by the federal court in Utah in SUWA v. BLM. However, as discussed above, the MOU itself undermines this assumption. Further statements by DOI do not illuminate the issue further. See letter of Rebecca Watson, DOI Ass't Secretary, to P. Eaton, TWS (Mar. 17, 2004), attached as Exhibit 30 (stating that BLM will process disclaimer applications "based on criteria identified for R.S. 2477 roads [sic]," but providing no information on what those criteria might encompass).[16] DOI should clarify immediately that it will apply a standard that requires actual, intentional, physical work to meet the "construction" requirement.

b. The MOU Does Not Address R.S. 2477's Requirement That the Route Constructed Be a "Highway."

The MOU defines the terms "road" and "highway" to be "synonomous" [sic] for purposes of the MOU, and thereby eliminates the need for the State to show that a route is a

[16] At least one academic agrees that the terms of the MOU provide little direction concerning the key terms of R.S. 2477. Professor Krakoff states that the MOU "provides very little guidance concerning how the key statutory terms 'construction' and 'highway' will be interpreted," and writes that the MOU lacks "clear definitions of highway or construction," contains "circular" statements and sets "a low (and nebulous) bar" for determining what constitutes a valid R.S. 2477 right-of-way. Krakoff, 75 U. of Colorado L. Rev. at 1178-79 (Exh. 9); see also R. Hubbard, R.S. 2477 Rights-of-Way: The Controversy Continues, Rocky Mountain Mineral Law Fdn. (Feb. 2005) at 10-16 – 10-17, excerpts attached as Exhibit 31 (noting the lack of precise standards in the MOU).

"highway" – something required by the plain language of R.S.2477. See State of Utah-DOI MOU (Exh. 6) at 1 n.1. As discussed above, the term "road" and "highway" are not synonymous. A recent Congressional Research Service describes the distinction succinctly:

> Although the terms at times have been used interchangeably in discussing R.S. 2477, "highways" is the term used by Congress and it is used in conjunction with a requirement for construction. "Roads" appears to be the more general term and "highways" the more specific term. In other words, while all highways are roads, not all roads are highways, since, arguably, highways are public, and are more significant, built up roads.
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> ….
>
> This distinction is still evident in modern usage: the 1997 WEBSTER'S NEW COLLEGIATE DICTIONARY defines "highway" as "a public road, esp. a main direct road." (Emphasis added.)

CRS 2003 Report (Exh. 25), at 25 & n.96.

The GAO agrees that labeling "roads" and "highways" as "synonomous" [sic] has significance.

> The Utah MOU also changes the meaning of the basic R.S. 2477 term "highway," by equating it with the term "road." Utah MOU at 1. Courts have not always equated the two terms. In SUWA [v. BLM], for example, the court disagreed that highways could be established by the mere passage of wagons, horses, or pedestrians and accepted the Department's definition of "highway" as "a road freely open to everyone; a public road." 147 F. Supp. 2d at 1143. The court also agreed with the Department that a road must be a significant one to be an R.S. 2477 highway: "It is unlikely that a route used by a single entity or used only a few times would qualify as a highway . . . a highway connects the public with identifiable destinations or places." Id.

GAO Report (Exh. 7) at 14 (emphasis added).

By equating "roads" with "highways," the MOU seeks to eliminate a key prerequisite for establishing the existence of an R.S. 2477 right-of-way. The MOU cannot do this.

In addition, the MOU repeals the Babbitt Policy, and by implication reinstates the Hodel Policy which defines a "highway" to include "pedestrian or pack animal trail[s]." This definition contradicts the plain meaning of the term "highway."

c. The MOU Does Not Address R.S. 2477's Requirement That the Route Constructed Traverse Unreserved Public Lands.

The MOU does not prohibit Utah from submitting applications for acknowledgement of R.S. 2477 claims for routes constructed over reserved lands. The MOU does bar Utah from submitting applications for areas now protected as National Parks, National Wildlife Refuges, wilderness areas, and wilderness study areas. State of Utah-DOI MOU (Exhibit 6) at 2-3. However, the MOU does not address the numerous other types of withdrawals or reservations (such as coal withdrawals, Taylor Grazing Act withdrawals, etc.) that could terminate the granting of R.S. 2477 claims. The MOU thus fails to address another of the key elements of R.S. 2477.

d. The MOU Ignores Federal or State Law Relevant to the Scope of the Right-of-Way.

Despite the fact that federal caselaw is clear that an R.S. 2477 right-of-way today can extend no further than historic construction and historic uses had extended it at the time the lands were withdrawn or the date of the law's repeal, the MOU would grant the State a right-of-way for the width of the route as it is today. State of Utah-DOI MOU (Exh. 6) at 3. The MOU states:

> the scope of a road that the Department disclaims should include a sufficient width to allow the State or county to maintain the character, usage and travel safety of the road existing at the date of this MOU.

Id., emphasis added. The MOU therefore fixes the scope of the right of way based on the route's character as it existed in April 2003, more than a quarter-century after R.S. 2477's repeal, and possibly even more years after the land was reserved. Thus, where the State has lawfully (or unlawfully) expanded the character of a route far beyond that established at the time of reservation or repeal, the MOU will permit the United States to disclaim an interest far beyond that permitted by R.S. 2477 itself.

In addition, the MOU states:

> the scope of a road that the Department disclaims should include a sufficient width to allow the State or county to maintain the character, usage, and travel safety of the road existing at the date of this MOU. For purposes of the Acknowledgement Process only, the width of the road asserted and the width of the road disclaimed shall not exceed the width of ground disturbance that currently exists for the road at the date of this MOU.

Id. at 3. Not only does this unlawfully set today as the critical date for determining the width of the right-of-way, as discussed above, it endorses a standard that sets the width at the existing level of disturbance, something that has been explicitly and roundly rejected by the Federal District Court for Utah at the urging of the Department of the Interior. In a case involving Utah's Burr Trail, the District Court concluded:

> The County's "disturbed area" theory proves to be the most singularly unhelpful, uncertain and ungovernable approach to answering the question of scope. What is "disturbed" at a particular location may or may not correspond at all to what is "reasonable and necessary" to ensure the safe travel of two vehicles passing each other--which Garfield County itself insists is the proper standard under Utah law for measuring the scope of its right-of-way. The "disturbed area" approach depends upon an inescapably subjective perception of what land has been "disturbed" and what land has not. Reasonable people may differ as to what has been "disturbed," when, by what, and what has not been disturbed. Nor is the approach limited to land "disturbed" by identifiable road work done by the County in the past. Any disturbance will do.

Garfield County, 122 F. Supp. 2d at 1230 (emphasis added) (footnote and citation omitted). Thus, the MOU would adopt a standard concerning a critical aspect of scope – width of the right-of-way – that was found entirely lacking by at least one Federal court at DOI's insistence.

It is well settled that federal land grants are construed narrowly in the United States' favor. Caldwell v. United States, 250 U.S. 14, 20 (1919) (offers of grants by the United States government are subject to a clear-statement rule, under which they are construed "favorably to the [federal] government. … [N]othing passes but what is conveyed in clear and explicit language – inferences being resolved not against but for the [federal] government")(emphasis added); Missouri, Kan. & Tex. Ry. Co. v. Kansas Pac. Ry. Co., 97 U.S. 491, 497 (1878). Because the MOU could allow BLM to disclaim a greater interest than that permitted by R.S. 2477 and well-established caselaw, it is unlawful.

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

If BLM wishes 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.

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.

A. BLM Must Rigorously and Skeptically Evaluate All Submitted Data, Resolving Doubts in Favor of the United States.

Under federal caselaw, Utah and others 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). This principle applies to the determination of R.S. 2477 rights-of-way. See Garfield County, 122 F. Supp. 2d at 1225; Fitzgerald v. United States, 932 F. Supp. 1195, 1201 (D. Ariz. 1996) (doubt as to whether land was reserved for public use resolved in favor of government); Shultz v. Department of Army, 96 F.3d 1222 (9th Cir. 1996) (per curiam) (plaintiff had burden of establishing a continuous R.S. 2477 route or right-of-way), cert. denied, 118 S. Ct. 1511 (1998). R.S. 2477 claimants, as "parties seeking to enforce rights-of-way against the federal government, therefore bear the burden of proving that their claimed rights-of-way are valid under R.S. 2477." SUWA v. BLM, 147 F. Supp. 2d at 1136 &1146.[17]

In addition, federal caselaw clearly establishes that any doubt as to the scope of a grant under R.S. 2477 must be resolved in favor of the government. Adams v. United States, 3 F.3d 1254, 1257 (9th Cir. 1993) (doubt as to the scope of R.S. 2477 right-of-way resolved in favor of government); U.S. v. Gates of the Mountains Lakeshore Homes, 732 F.2d 1411, 1413 (9th Cir. 1984) (same); Humboldt County v. United States, 684 F.2d 1276, 1280 (9th Cir. 1982) (same); United States v. Balliet, 133 F. Supp. 2d 1100, 1129 (W.D. Ark. 2001) (same).

BLM itself acknowledged this standard in its administrative determinations for the asserted R.S. 2477 claims at issue in SUWA v. BLM. In its administrative determinations, BLM stated: "The proponent of an R.S. 2477 right-of-way bears the burden of proof to demonstrate that a highway right-of-way was constructed. It is the proponent's burden to demonstrate this by a preponderance of the evidence. …. [i]t is the county's burden to show that 'construction' of a 'highway' over 'unreserved public lands' was more likely than not to have occurred." See BLM, R.S. 2477 Administrative Determination(s), San Juan County Claims (July 7, 1999) at 4 ("Administrative Determinations on San Juan County Claims"), excerpts attached as Exhibit 32.

While BLM's Disclaimer Regulations do not establish a standard of review as such, the regulations place the burden on the applicant to provide "[a]ny available documents or title evidence, such as historical and current maps, photographs, and water movement data, that

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[17] Similarly, under the Quiet Title Act, those seeking to obtain a judgment that they hold an R.S. 2477 right-of-way against the United States bear the burden of showing "with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States." 28 U.S.C. § 2409a(d); see also North Dakota v. United States, 972 F.2d 235, 238 (8th Cir. 1992) (fixing burden of proof on State asserting property interest adverse to United States).

support the application." 43 C.F.R. § 1864.1-2(c)(5). Similarly, guidance implementing the MOU requires that

> The application should contain all the information the applicant wants BLM to consider in processing the application. .... Each application should contain information demonstrating that the claimed right-of-way existed prior to October 21, 1976.

Memo of J. Hughes (Exh. 27) at 2.

Therefore, in reviewing the State of Utah's applications, the BLM must review the information provided skeptically, resolving all doubts in favor of the United States, and place the burden squarely on the State to demonstrate, by a preponderance of the evidence, that a right-of-way under R.S. 2477 was granted.

B. BLM Must Rely upon the Clear Standards Set by Law, Not the MOU.

In evaluating any applications submitted by the State of Utah, the BLM must hew to the standards set by R.S. 2477 itself concerning the construction of a highway over unreserved public lands as well as caselaw concerning the scope of the grant.[18]

1. Applicants Must Establish That "Construction" Has Occurred.

As demonstrated above, a plain reading of the law, adhering to accepted principles of statutory interpretation, requires that applicants must establish that actual mechanical construction throughout the length of the claimed right-of-way occurred. Mere passage of vehicles or haphazard or unintentional actions are not sufficient to meet the requirements of the grant.

Evidence of actual construction may include: road construction or maintenance records, physical evidence of construction, first-hand testimony or declarations affirming when, where, and how construction occurred, and official United States government maps depicted an improved highway at the location of the asserted route. See Administrative Determinations on San Juan County Claims (Exh. 32) at 5. If the applicant does not provide convincing evidence of this type, the application must be rejected.

2. Applicants Must Establish That a "Highway" Was Constructed.

Applicants must demonstrate that the route constructed was a "highway." As discussed above, applicants must thus demonstrate that the route is not just any road, but a significant public route carrying people and goods from one identifiable public place – such as a city or

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[18] As noted above, the standards of law differ from those in the MOU because the MOU ignores settled law.

town – to another. The route must have served as a highway at the time when the route was available to be claimed pursuant to R.S. 2477.

Evidence of the existence of a highway may include: cadastral survey notes and plats, official United States public land records, BLM or other federal agency resource management plans, other agency files, records demonstrating use of the route, and state maps.

3. Applicants Must Establish That the Land Was Not Reserved.

Applicants must demonstrate that any alleged "highway" was "constructed" over unreserved public lands. As stated above, public lands that are not available for R.S. 2477 rights of way are those that are reserved or dedicated by Act of Congress, Executive Order, Secretarial Order, or, in some cases, classification actions authorized by statute, or lands pre-empted or entered by settlers under the public land laws or located under the mining laws which ceased to be public lands.

Public land records, records of laws, executive orders, and classifications and information made available through title searches may be the most persuasive evidence concerning the date underlying land was "reserved."

4. Applicants Must Establish the Scope of the Right-of-Way at the Time of Reservation.

BLM need not establish the scope of a right-of-way if it concludes that the application does not establish the right-of-way's existence by convincing evidence. See Administrative Determinations on San Juan County Claims (Exh. 32) at 5-6 (BLM declines to determine scope where no R.S. 2477 right-of-way found). However, where BLM determines a valid right-of-way exists, BLM must also make a determination as to the scope of the right-of-way – including the highway's width, alignment, uses, surface character, and improvements – based upon evidence as to these various factors at the earlier of the time the federal reservation occurred or of R.S. 2477's repeal.

The kinds of evidence that might be useful to a BLM determination of scope include declarations of first-hand experience on the route, construction and maintenance records, historical accounts, newspaper records, and agency records.

C. BLM Must Ensure Robust and Meaningful Public Comment.

BLM's review and determination of validity of disclaimer applications is a matter of intense public interest, in part because of the great public values (including public funds) that are at stake. The submission of the initial disclaimer under the State if Utah-DOI MOU (for the Weiss Highway) reflected this public interest; the submission was trumpeted at a press conference attended by the Governor and Lt. Governor of Utah as well as members of the

media.[19] The facts surrounding the first disclaimer – which led to the eventual withdrawal of the application – were also highly publicized.[20] The State of Utah has spent millions of taxpayer dollars preparing information for submittal to BLM.[21] In submittals to DOI in 2000, Utah claimed more than 10,000 R.S. 2477 rights-of-way, many of which traversed some of America's most scenic and beloved public lands.

Given the high level of public interest, and the critical public land values at stake, BLM must ensure robust and meaningful public notice and comment. The current process does not do this. We therefore urge BLM to adopt a process that more closely resembles that implemented by BLM in reviewing R.S. 2477 claims at issue in the case of SUWA v. BLM.

The current process provides the interested public with one opportunity to comment on a partial application. Guidance on implementing the MOU states that the public has a maximum of 60 days to comment upon a submitted application. Memo of J. Hughes (Exh. 27) at 4. However, those who take the time to comment will not receive a final notice of BLM's action to either approve or deny the MOU, nor will they receive a document analyzing or responding to their comments. Indeed, BLM need only "address ... relevant, substantive comments" through a memo it files away without public notice ("[i]n documentation to be placed in the case file"). Id. Unless the public actively seeks out such information, it will never know how BLM responds or BLM's final determination on the application. The only entities receiving notice of BLM's decision on the disclaimer application are the applicant and any competing "claimants" to the right-of-way. Id. at 5 ("BLM will provide written notice of its decision on an application to any adverse claimant.")

In addition, BLM guidance grossly undermines the meaningfulness of public comment. First, the applicant may continue to provide evidence after the application has been filed and the public comment period has started. See Memo of J. Hughes (Exh. 27) at 2 ("The application may be supplemented by the applicant at any time during BLM's consideration of the application"). Thus, the public will literally be shooting at a moving target. While further

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[19] See, e.g., Press Release, "Governor Submits First Rural County Roads (R.S. 2477) Application to Bureau of Land Management," (Jan. 14, 2004), attached as Exhibit 33; J. Loftin, "Utah Claims Juab Road," Deseret News (Jan. 15, 2004), attached as Exhibit 34; M. Trauntvein, "Weiss Highway in West Juab County first road to be claimed by state officials for right of way through federal lands," Nephi Times (Jan. 21, 2004), attached as Exhibit 35.

[20] See Chris Smith, "Road ownership test case hits a bump," Salt Lake Tribune (May 10, 2004), attached as Exhibit 35; T. Westby, "The Road to Nowhere," High Country News (Dec. 20, 2004), attached as Exhibit 36.

[21] See State of Utah, "Resolving Environmental Disputes, County Roads," (April 2003) at 11, available at http://www.utah.gov/governorleavitt/County_Roads_Print_Version.pdf (stating "$8 million invested" in Utah's R.S. 2477 efforts); see also Legislative Auditor General, State of Utah, Report No. 2004-08 (Oct. 2004), attached as Exhibit 38.

applicant-submitted information "will be subject to public review in accordance with applicable law," id., this apparently only guarantees that the public may be able to see the additional information only after submitting requests under the Freedom of Information Act (to which the agency may take weeks to respond) or repeatedly contacting BLM's Salt Lake Office. Given that BLM is not required to notify the public of the receipt of supplemental information from the applicant, this puts a significant burden on the public to continually contact BLM to determine whether additional information has been submitted.

Second, since BLM "consideration" of the application continues after the comment period is closed, and the applicant many submit information "at any time during BLM's consideration," the applicant thus may submit information after the public comment period is closed. Id. This means that the applicant can pack the record without (or to avoid) public scrutiny. While the public has the right to review such information, that right is largely meaningless since information will reach the public after the public may effectively participate in decisionmaking. That the applicant will get the last word is further made clear by the fact that BLM is required to review all public comments "in consultation with the applicant," but not with the public. Id. at 4.

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 39. 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.[22] In addition, BLM's final determination included within it responses to public comments. See Administrative Determinations on San Juan County Claims (Exh. 32) 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 and meaningful public participation.

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

D. 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 disclaimer of interest pursuant to the illegally-promulgated and deeply flawed regulation and MOU, BLM, the State, and counties have a valid, tested procedure to address key issues concerning route maintenance 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 disclaimer 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."[23] Further, Daggett County previously sought and received a right-of-way under Title V to at least a portion of the Browns Park Road, a significant route to which both routes D28 and D30 connect, and the County is apparently seeking a Title V permit for work contemplated on the Browns Park Road elsewhere.[24]

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

IV. THE EVIDENCE SUBMITTED BY UTAH DOES NOT DEMONSTRATE THAT THE STATE MERITS A DISCLAIMER FOR AN R.S. 2477 RIGHT-OF-WAY FOR ANY OF THE FOUR ROUTES.

TWS believes that the disclaimer process is illegal and that BLM must abandon it. However, if BLM chooses nevertheless to proceed, it must adhere to certain minimal standards. Therefore, in order to establish that there exists a right-of-way across federal land established by operation of R.S. 2477, the State of Utah 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 information submitted by Utah thus far fails to establish these elements for each of the four routes.

In general, Utah fails to present convincing evidence to support any of the four applications. The only evidence provided to support "construction" of each route consists of a

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[23] Garfield County Title V permit application (Dec. 2, 2004) at 2 (emphasis added), excerpts attached as Exhibit 40; 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").

[24] See BLM Right-of-Way Grant Serial Number UTU-69134 (Apr. 9, 1993), attached as Exhibit 41; Federal Highway Administration, Draft EIS, Browns Park Road from Red Creek to Colorado State Line (Oct. 2004) at 14, 21-22, excerpts attached as Exhibit 42.

set of vague, duplicative affidavits that are based in part on hearsay. Further, Utah presents no evidence at all concerning whether or when the lands at issue were reserved. Aside from these flawed affidavits, the evidence Utah does provide is generally irrelevant to the determination of whether a right-of-way was granted. For these reasons, Utah has simply not met the burden that it must 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 the State of Utah for each route are so riddled with significant evidentiary problems that their credibility is gravely compromised. Thus, none of the applications can form the basis for the issuance of a recordable disclaimer of interest for a right-of-way pursuant to R.S. 2477. These numerous violations of basic evidentiary rules are not simply minor technical violations. The rules of evidence that Utah ignores 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 State has failed to submit such credible evidence, BLM must reject these applications.

A. Utah Fails to Submit Applications that Meet the Requirements of the Disclaimer Rule and BLM Guidance.

The Disclaimer Rule requires that the applicant for a disclaimer must be an entity "claiming title to lands." 43 C.F.R. § 1864.1-1(a). None of the four applications anywhere allege that the State of Utah claims title to the land at issue. Instead, Utah seeks an R.S. 2477 right-of-way easement over, not title to, lands.[25] Utah's application therefore violates the Disclaimer Rule and must be denied.

In addition, the Disclaimer Rule requires that the applicant adequately and accurately identify the property claimed. The rule states:

> Each application shall include … (1) A legal description of the lands for which a disclaimer is sought. The legal description shall be based on either an official United States public land survey or, in the absence of or inappropriateness (irregularly shaped tracts) of an official public land survey, a metes and bounds survey (whenever practicable, tied to the nearest corner of an official public land survey), duly certified in accordance with State law, by the licensed civil engineer

[25] See letter of R. Fairbanks, Utah Attorney General's Office to S. Wisely, State Dir, Utah BLM re: D28 (Sep. 15, 2004) at 1 ("Fairbanks D28 letter") (Utah seeks recordable disclaimer of interest for "that right-of-way known as Daggett County Road D28"); letter of R. Fairbanks, Utah Attorney General's Office to S. Wisely, State Dir, Utah BLM re: D30 (Sep. 15, 2004) at 1 ("Fairbanks D30 letter") (same for D30); letter of R. Fairbanks, Utah Attorney General's Office to S. Wisely, State Dir, Utah BLM re: Hickory Peak Road (Dec. 8, 2004) at 1 ("Fairbanks Hickory Peak letter") (same for Hickory Peak route); letter of R. Fairbanks, Utah Attorney General's Office to S. Wisely, State Dir, Utah BLM re: Horse Valley Road (Dec. 8, 2004) at 1 ("Fairbanks Horse Valley letter") (same for Horse Valley route). Since all letters and each part of the application are on file with the BLM, we do not attach them here.

> or surveyor who executed or supervised the execution of the metes and bounds survey. A true copy of the field notes and plat of survey shall be attached to and made a part of the application. If reliance is placed in whole or in part on an official United States public land survey, such survey shall be adequately identified for record retrieval purposes.

43 C.F.R. § 1864.1-2(c). Precision in defining the boundary of the property rights at issue is critical to ensure that United States adequately protects its property interests on behalf of all Americans and so that the rights of the applicants and the United States are clearly defined.

1. The Evidence Submitted by Utah Fails to Contain the Legal Description Required by Law.

Utah's applications do not contain a valid legal description of the property rights claimed as required by law. Rather, they all offer two inadequate attempts at meeting the regulation's requirement.

First, the applications include a "Legal description by aliquot parts" – a listing of the ¼-¼ sections in which the route may be located.[26] Such a listing of areas (each roughly a square 1,320 feet on a side) provides little certainty of the location of routes whose claimed width varies from 10 to 45 feet, and clearly fails as a legal description. Utah uses the required "official United States public land survey" to establish the general location of the route rather than its actual legal description as required by the Disclaimer Rule. 43 C.F.R. § 1864.1-2(c).

Second, Utah attempts, but fails, to use the Disclaimer Rule's provision for submission of a properly executed and certified metes and bounds survey when an "official United States public land survey" is absent or inappropriate, as is the case here. Each application includes lists of bearings and ranges purporting to "closely" approximate the location of the centerline of each segment of the route.[27] These data are claimed to be derived from either GPS mapping grade data, data digitized from USGS Digital Orthophoto Quadrangles (DOQs) or topographic maps, and/or the transportation data model of the State of Utah Geographic Information Database

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[26] See Route D28 Application at Road Segment attachment; Route D30 Application at Road Segment attachment; Hickory Peak Application at Road Segment attachment (http://www.ut.blm.gov/rs2477/Hickory_Peak/HickoryPeakAlliquotParts.pdf); Horse Valley Application at Road Segment attachment; Road Segment attachment (http://www.ut.blm.gov/rs2477/Horse_Valley/HorseValleyRoad2AlliquotParts.pdf). Note that citations to the Utah BLM website were made before that website was taken down by the agency in April 2005. We provide the identifying web addresses in the hopes that they may assist BLM (and eventually the public) in locating the items discussed.

[27] See Route D28 Application, Appendix A at 1; Route D30 Application, Appendix A at 1; Hickory Peak Application, Appendix A & B at 1; Horse Valley Application, Appendix A, B & C at 1.

(SGID).[28] Each application also states that "data are checked against the appropriate Digital Orthophoto Quadrangles published by the United States Geological Survey (USGS) to verify a reasonable degree of accuracy."[29] The applications do not specify what the scale or currency date of the DOQs used for this process were or what a "reasonable degree of accuracy" is. Such lists of data points of unclear origin and accuracy are clearly not the same as the metes and bounds survey required by law. No evidence or certification is presented that the data were collected through a survey executed or supervised by a licensed civil engineer or surveyor. The inappropriateness of these data is compounded by the fact that Utah has failed to attach "[a] true copy of the field notes and plat of survey" to any of the applications as required by the regulations. See 43 C.F.R. § 1864.1-2(c).

Because Utah's application fails to meet the regulation's fundamental requirements for identifying what is being claimed and where it is located, BLM must deny the application.[30]

2. The Evidence Submitted by Utah Fails to Contain a Precise Description of Alleged Road Improvements.

All of Utah's applications also fail to meet additional requirements set by BLM in agency guidance on the MOU. That guidance states that an "application should also contain a description of the road's … improvements such as bridges or culverts and other ancillary features existing as of April 9, 2003." Memo of J. Hughes (Exh. 27) at 2. Certainly, the applications contain no documentary evidence (aside from allegations in unreliable affidavits) that any of the routes was constructed.

a. The D28 Application Alleges the Existence of Improvements, But Provides Little Evidence as to Their Existence or When They Were Constructed.

While the requirement that an "application should also contain a description of the road's … improvements such as bridges or culverts and other ancillary features," the initial D28 application contained only a few photos, and asserted that it contained only "[e]xamples" of such improvements, and not a comprehensive listing. See R. Fairbanks, D28 Application for Recordable Disclaimer of Interest (no date) at 2. In addition, the initial application merely pointed to "map with photos, point data, and affidavits" for such examples. Id. None of the

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[28] Id.

[29] Id.

[30] BLM guidance on implementing the MOU omits reference to the need for certification a licensed civil engineer or surveyor. See Memo. of Jim Hughes, Deputy Dir., BLM to Utah State Director (June 25, 2003), attached as Exhibit 27, at 2. In addition, Mr. Hughes's memo would permit the use of a "centerline or GPS description," but ignores and omits reference to the "metes and bounds" requirement of the Disclaimer Rule. Id. These omissions, of course, cannot eviscerate a plain legal requirement contained in duly promulgated regulations.

initial photos show anything other than a dirt-surfaced route. It is unclear to what "point data" the application refers. And while the affidavits do discuss "culverts"[31], signage[32], and bridges that have been replaced[33], no location data for any of these alleged "improvements" was originally provided.

After TWS and SUWA pointed out the lack of such data to BLM, Utah attempted to remedy this lack of location data by taking additional photos of signs and other facilities.[34] However, the State failed to provide any data that identifies when these other improvements were erected, other than the vague statements in the affidavits. In addition, it appears that the State was unable to locate any culverts at all associated with route D28, since it provided no photographs of such facilities associated with that route (and only three photos of culverts associated with route D30).[35]

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[31] Affidavit of Elmer Widic concerning route D28 (Widic D28 Aff.) at ¶¶ 6-7 (mentioning culverts, failing to provide location information); Affidavit of Troy Gale (Sep. 7, 2004) concerning route D28 (Gale D28 Aff.) at ¶¶ 7-8 (same); Affidavit of A. Dickinson concerning route D28 (Dickinson D28 Aff.) at ¶ 6 (same); Affidavit of Alexander Radosevich concerning route D28 (Radosevich D28 Aff.) at ¶ 6 (same); Widic D28 Aff. at ¶ 11 (noting existence of "occasional culverts for drainage" "[a]long the road"); Gale D28 Aff. at ¶ 12 (same); Dickinson D28 Aff. at ¶ 11 (same); Radosevich D28 Aff. at ¶ 11 (same).

[32] Widic D28 Aff. at ¶ 11 ("there was a 15 MPH speed limit sign near the north end of the road") (emphasis added); Gale D28 Aff. at ¶ 12 ("there is a 5 MPH speed limit sign near the north end of the road" and "In the same vicinity there is also a caution sign warning motorists that children may be playing.") (emphasis added); Dickinson D28 Aff. at ¶ 11 (same); Radosevich D28 Aff. at ¶ 11 (same).

[33] Gale D28 Aff. at ¶ 8 ("[a]s culverts have been maintained and repaired on this and other roads in the Clay Basin, I have observed evidence of the construction of wooden bridges from years past").

[34] See letter of E. Zukoski, Earthjustice to S. Wisely, State Dir., BLM Utah (Sep. 29, 2004) (on file with BLM State Office); letter of R. Fairbanks, Utah Att'y General's Office to S. Wisely, State Dir., BLM Utah (Dec. 8, 2004) at 1-2 and Exhibit B (on file with BLM State Office). We note that while the supplemental maps and photos were available to BLM in December, 2004, they were never made generally available to the public through BLM's website containing other application materials. BLM apparently failed to post the materials in part because the State of Utah declined to submit them in electronic format. To address this issue in the future, we urge BLM to require Utah to submit all information concerning recordable disclaimers of interest electronically so that it may be made available to the public on BLM's website.

[35] The map accompanying Mr. Fairbanks letter of Dec. 8, 2004 concerning routes D28 and D30 identifies two culverts, one at the north end and the other at the south end of route D30, which are displayed in photos 0173 and 0201. A culvert is also displayed in photo 0192, though the map does not identify a culvert at that location. Photo 0192 is presented together with

Given that all four of the State's affiants swore that there were indeed culverts along route D28,[36] Utah's failure to identify such structures seriously calls into question the veracity and credibility of the affiants' other statements.

b. The D30 Application Alleges the Existence of Improvements, But Provides Little Evidence as to When They Were Constructed.

The State's D30 application is nearly a carbon-copy of the D28 application, and it is riddled with similar flaws. The D30 application similarly contains a few photos, but provides only "[e]xamples" of the type of improvements, and not a comprehensive listing. See R. Fairbanks, D30 Application for Recordable Disclaimer of Interest (no date) at 2. In addition, this application again points to the "map with photos, point data, and affidavits" for such examples. Id. Again, none of the photos show anything other than a dirt-surfaced route, and again it is unclear to what "point data" the application refers. Finally, the cookie-cutter affidavits discuss "culverts"[37], signage[38], and bridges that have been replaced[39], but provide no specific location data for any of these alleged "improvements." Once again, months after the application was submitted, the State attempted to remedy this lack of location data by taking additional photos of culverts and signs.[40] But once again, the State has failed to provide any data that identifies when these improvements were erected, other than vague statements in the affidavits.

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other photos of route D28. However, since photo 0192 is identified as at the junction of routes D28 and D30, it is impossible to tell whether the culvert is associated with route D28 or D30. No declaration of any kind explaining the photos or map accompanied those submissions.

[36] See note 32, above.

[37] Affidavit of Elmer Widic concerning route D30 (Widic D30 Aff.) at ¶¶ 6-7 (mentioning culverts, failing to provide location information); Affidavit of Troy Gale (Sep. 7, 2004) concerning route D30 (Gale D30 Aff.) at ¶¶ 7-8 (same); Affidavit of A. Dickinson concerning route D30 (Dickinson D30 Aff.) at ¶ 6 (same); Affidavit of Alexander Radosevich concerning route D30 (Radosevich D30 Aff.) at ¶ 6 (same); Widic D30 Aff. at ¶ 11 (noting existence of "occasional culverts for drainage" "[a]long the road"); Gale D30 Aff. at ¶ 12 (same); Dickinson D30 Aff. at ¶ 11 (same); Radosevich D30 Aff. at ¶ 11 (same).

[38] Gale D30 Aff. at ¶ 12 ("there is a 5 MPH speed limit sign near the north end of the road" and "In the same vicinity there is also a caution sign warning motorists that children may be playing.").

[39] Gale D30 Aff. at ¶ 8 ("[a]s culverts have been maintained and repaired on this and other roads in the Clay Basin, I have observed evidence of the construction of wooden bridges from years past").

[40] Letter of R. Fairbanks, Utah Att'y General's Office to S. Wisely, State, Dir., BLM re: D28 & D30 (Dec. 8, 2004) at 1-2 and Exhibit B (on file with BLM State Office).

Interestingly, the only culverts the State identified with photos are at the northern and southern termini of route D30.[41] The photos, taken within the last few months, provide no hint as to when they may have been placed there.

c. The Hickory Peak Application Alleges the Existence of Improvements, But Fails to Provide Any Evidence of Their Existence.

The Hickory Peak application also purports to describe only "[e]xamples" of improvements, and not a comprehensive listing. Undated "Application for Recordable Disclaimer of Interest," at 2 (submitted with Fairbanks Hickory Peak letter). In addition, the application merely directs the reader to "map with photos, point data, and affidavits" for such examples. Id.

None of the three photos submitted with the application show anything other than a dirt-surfaced route with a disturbed area on either side of the route. Maps submitted by the State in support of the application do not identify any bridges, culverts, or other facilities associated with the route. One photo shows the route as little more than a two-track with vegetation growing down the middle, indicating a lack of recent maintenance.[42]

The "point data" discussed in the application may reference the map of "Points of Diversion," but none of points on that map are directly adjacent to the claimed route. See www.ut.blm.gov/rs2477/hickory_peak/PDF/HickoryPeak_POD.pdf. Such point data therefore has little bearing on the status of improvements to the route.

The affidavits allege the existence of several kinds of improvements, including: a "yield" sign at an intersection, and "a fence equipped with a cattle-guard crosses the road at one point." Lister Hickory Peak Aff. at ¶ 8; Merryweather Hickory Peak Aff. at ¶ 10; McCully Aff. at ¶ 11; Jefferson Aff. at ¶ 15. The affidavits contain no location data for the alleged cattle guard, and none of the other photos or maps display or identify this feature. While the location of the "yield" sign is identified, again no photo or map verifies its existence. Even if all of these features exist, the affidavits do not assert when these features were first constructed. There is therefore no way of knowing whether they were erected prior to October 21, 1976.

d. The Horse Valley Application Alleges the Existence of Improvements, But Fails to Provide Any Evidence of Their Existence.

The Horse Valley application contains several photos, but the application purports to describe only "[e]xamples" of such improvements, and not a comprehensive listing. Undated "Application for Recordable Disclaimer of Interest," at 2 (submitted with Fairbanks Horse

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[41] See aerial photo/map entitled "Event Points," attached to Letter of R. Fairbanks, Utah Att'y General's Office to S. Wisely, State, Dir., BLM re: D28 & D30 (Dec. 8, 2004)

[42] See www.ut.blm.gov/rs2477/Hickory_Peak/Photos/ep010010002a01.jpg.

Valley letter). In addition, the application merely directs the reader to a "map with photos, point data, and affidavits" for such examples. Id.

None of the photos show anything other than a dirt-surfaced route.[43] In fact, one photo, indicated as a "Gully Crossing" on the map, shows no culverts, bridges, or other improvements that would maintain a road constructed in a wash. Rather, here the route appears to be the wash.[44] Several of the photos show a two-track trail, only wide enough to accommodate a single vehicle, with extensive vegetation and broken surfaces that in no way suggest that grading has ever occurred.[45] Where photos do show a graded surface, the sharp edges of the disturbed area and fresh tracks suggest that the grading occurred immediately prior to the photograph being taken; there is no evidence of prior work dating back to 1976 or earlier.[46]

It is unclear to what "point data" the application refers. It is possible that this is a reference to the map of "Points of Diversion," the majority of which are more than a mile from the claimed route and none of which lie directly on the route (and are therefore unlikely to be improvements to the route). See www.ut.blm.gov/rs2477/Horse_Valley/PDF/HorseValley_POD.pdf.

While the affidavits do allege that "occasional berms, shoulders and barrow [borrow?] ditches can be found along the road wherever such features are feasible"[47] and assert that the route is characterized by "disturbed areas … and large rocks at the edge of the road,"[48] no location data or dates of construction for any of these alleged "improvements" is provided.

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[43] One photo, previously available at www.ut.blm.gov/rs2477/Horse_Valley/Photos/ep110061002a01.jpg , does show a fence oriented perpendicular to the route. However, there is no evidence of any improvements to the route – no gate (only a break in the fence), cattle guard, or other constructed feature on the route itself. Indeed, the route at this point is a two-track trail where vegetation, grade, and exposed roots challenge the assertion that grading has occurred.

[44] See www.ut.blm.gov/rs2477/Horse_Valley/Photos/ep010031003a1.jpg (photo) and www.ut.blm.gov/rs2477/Horse_Valley/PDF/HorseValley_Events.pdf (map).

[45] See, e.g., www.ut.blm.gov/rs2477/Horse_Valley/Photos/ep11061c001a01.jpg, www.ut.blm.gov/rs2477/Horse_Valley/Photos/ep110060025a01.jpg, www.ut.blm.gov/rs2477/Horse_Valley/Photos/ep110061002a01.jpg, and http://www.ut.blm.gov/rs2477/Horse_Valley/Photos/ep110061007a01.jpg.

[46] See, e.g., www.ut.blm.gov/rs2477/Horse_Valley/Photos/ep010031001a01.jpg, and http://www.ut.blm.gov/rs2477/Horse_Valley/Photos/ep010031002a01.jpg.

[47] Dalton Affidavit at ¶ 8, Lister Horse Valley Affidavit at ¶ 8, and Merryweather Horse Valley Affidavit at ¶ 10, in exactly matching statements.

[48] Craw Affidavit at ¶ 9 ("Evidence of construction along the road includes berms, disturbed areas, barrow ditches where feasible, and large rocks at the edge of the road").

Indeed, the submitted photos do not support – and in fact directly contradict – the affiants' statements. No engineered berms or shoulders are apparent; any elevated soil on the edge of the disturbed area may be a function of use of the route in recent years.[49] No ditches or large rocks likely to have been removed from the disturbed area are visible in any of the photos. The photos do show numerous locations where such improvements are feasible – directly contradicting three of the affiants' statements that berms, shoulders, and ditches would be constructed "wherever such features are feasible."[50]

The general credibility of the affidavits is called into question by the unsupported, incorrect, and identical use of broad generalities where specific examples, should they exist, are required.

B. Utah's Declarations Are Tainted by Hearsay, Fail to Provide the "Best Evidence," and Are Vague.

The State of Utah submitted several declarations in support of each application. However, these documents do not meet the evidentiary standards that must be met before a property interest of the United States can be surrendered to another entity.

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

The letters and affidavits supporting each application contain information that would not be admissible in any court as 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 only 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.

The vast majority of the affidavits presented by the State contain hearsay because they contain statements that are not based on the first-hand knowledge of the affiants. The affiants

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[49] See, e.g., www.ut.blm.gov/rs2477/Horse_Valley/Photos/ep110061003a01.jpg, www.ut.blm.gov/rs2477/Horse_Valley/Photos/ep010031004a01.jpg.

[50] Other evidence further contradicts statements made in support of Utah's applications. See Section IV(G) below.

provide absolutely no basis for the origin, or validity, of the information. Such "evidence" cannot be relied upon by BLM as the basis for surrendering rights-of-way over public lands, since it would surely 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 (Exh. 32) 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.

a. Affidavits Supporting Applications for Routes D28 and D30 Are Tainted by Hearsay.

First, each affidavit supporting the applications for routes D28 and D30 contains statements the truth of which the affiants cannot vouch for personally. The affiants provide absolutely no basis for the origin, or validity, of the information. For example, each of the affidavits contains statements that describe the uses to which the routes have been put since before the affiant observed the route.[51] Because the affiants provide no basis for these statements, BLM must give them little – if any – weight in its evaluation of the right-of-way claim.

Second, at least one affidavit contains a statement for which the affiant provides no support at all. Mr. Elmer Widic asserts of route D30 that: "The northern portion of the road provides access to Clay Basin Well No. 1, which was originally drilled in the late 1920s, and it is my understanding from my years with Mountain Fuel Supply Company that the northern portion of the road was originally constructed at that time." Widic D30 Aff. at ¶ 9. How did Mr. Widic arrive at this "understanding?" Mr. Widic provides no evidence of any kind to support his statement. He does not assert that his first-hand experience with the route came from anything other than his living at the Clay Basin Camp from 1965-1982. Id. at ¶ 3. How he could have first-hand knowledge of activities that took place 40 years before is nowhere explained.

Third, the cover letter submitting materials to BLM similarly contains statements about the "reputation" of routes D28 and D30, and similarly provides no basis for such statements. For

[51] Widic D28 Aff. at ¶¶ 2, 9 (stating affiant observed route first in 1965; describing uses to which route has been put "[s]ince before 1965"); Widic D30 Aff. at ¶¶ 2, 9 (same); Gale D28 Aff. at ¶¶ 2, 10 (stating affiant observed route first in 1974; describing uses to which route has been put "[s]ince before I first observed it in 1974"); Gale D30 Aff. at ¶¶ 2, 10 (same); Dickinson D28 Aff. at ¶¶ 2, 9 (stating affiant observed route first in 1941; describing uses to which route has been put "[s]ince before I first observed it in 1941"); Dickinson D30 Aff. at ¶¶ 2, 9 (same); Radosevich D28 Aff. at ¶¶ 2, 9 (stating affiant observed route first in 1941; describing uses to which route has been put "[s]ince before 1941"); Radosevich D30 Aff. at ¶¶ 2, 9 (same)

example, the cover letters state for both routes that: "The road has been used by persons who went by horseback, automobile, and truck and has been used for ranching, hunting, natural gas exploration and development, recreation, land management, and travel in and through the area since the late 1920s by reputation in the community …." Letter of R. Fairbanks, Utah Attorney General's Office to S. Wisely, State Dir, Utah BLM re: D28 (Sep. 15, 2004) at 2 ("Fairbanks D28 letter") (emphasis added); Letter of R. Fairbanks, Utah Attorney General's Office to S. Wisely, State Dir, Utah BLM re: D30 (Sep. 15, 2004) at 1-2 ("Fairbanks D30 letter"). No basis is provided for the rumors of such use, nor is there any other factual information presented by the State of Utah to support these allegations.

b. Affidavits Supporting the Hickory Peak Application Are Tainted by Hearsay.

As with the affidavits supporting other routes, several of the affidavits supporting the Hickory Peak route contain information that is not based on personal knowledge. See Jefferson Aff. at ¶ 6 (asserting personal knowledge of route began in 1940s, identifying uses of the route "[s]ince before 1940"); McCully Aff. at ¶¶ 7, 9 (asserting personal knowledge of the route began in 1932, identifying uses of the route "[s]ince before 1932" and discussing "[c]onstruction and maintenance of the since before 1932").[52]

Further, Mr. McCully avers that it is the "reputation in the community" as opposed to his first-hand knowledge that the route was used "at least as early as 1871." McCully Aff. at ¶ 5. He provides no basis for such a statement and no factual information is presented in the application to support his allegation.

In addition, Mr. McCully's affidavit contains what appears to be a misrepresentation. Mr. McCully states that a 1913 and a 1973 publication: "indicate that the road was used for mining operations in the 1870s." McCully Aff. at ¶ 5. The 1913 publication contains no statement at all about the route; it merely describes a variety of mining operations in the area in the 1870s. No mention of a constructed highway to or from the mine in the location of the claim is made in the report. See McCully Aff. at Appendix A (B.S. Butler, Geology of Ore Deposits of the San Francisco and Adjacent Areas, USGS Professional Paper 80 (1913) (excerpts). Similarly, while the 1973 publication mentions the route, it does not assert that the route was used in relation to mining operations in the 1870s. While it may be fair to infer some horse, wagon, or foot-path between Milford and the mining district during that period, nothing provided by the State points to the location of such a route at the location sought in the application.

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[52] It is difficult to discern whether the basis for a number of other of Mr. McCully's statement is first- or second-hand information. For example, Mr. McCully alleges that: "During that time period [in the 1940s] Jim Williams used the Hickory Peak Road to access a mining claim located near the westernmost end of the road." McCully Aff. at ¶ 4. He also states that the route was "first graded in the early 1940s." Id.; see also id. at ¶ 9 (route was first graded "in the 1940s"). Mr. McCully provides no statement as to the basis of his knowledge on these subjects.

Mr. Merryweather alleges uses of the road for which he apparently lacks first-hand knowledge. See Merryweather Hickory Peak Aff. at ¶ 9 (describing personal use of the road for "bird hunting and hiking," but claiming that uses of the road included "rock hounding, access to mining claims, prospecting, ... camping, and establishing 'guzzlers'.").

c. Affidavits Supporting the Horse Valley Application Are Tainted by Hearsay.

With respect to the Horse Valley claim, Mr. Lister's affidavit contains statements that the route had "already been constructed and maintained" since before the affiant observed the route in 1980.[53] Mr. Dalton presents the same claim that the route had "already been constructed and maintained" in 1999, before his recent experience with the route, but he adds his an unsubstantiated claim that his grandfather used the route in "the 1940s." He presents no evidence of knowledge of the route in the intervening decades, which includes the crucial year of 1976.[54] Mr. Merryweather similarly fails to account for the period between his early experiences with the route and the time at which he claims that it had "already been constructed and maintained."[55] Messrs. Merryweather and Craw both assert uses for the road of which they do not have first-hand experience.[56] Because the affiants provide no basis for these statements, BLM must give them little – if any – weight in its evaluation of the right-of-way claim.

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[53] Lister Horse Valley Aff. at ¶¶ 2, 4 (implying that affiant only familiarity with the route is through his position as equipment operator and stating that route had "already been constructed and maintained when I assumed my position in 1980.")

[54] Dalton Aff. at ¶¶ 2, 4 (the affiant states "I know my grandfather herded sheep along the road in the 1940s" and that route had "already been constructed and maintained when I assumed my position in 1999.")

[55] Merryweather Horse Valley Aff. at ¶¶ 4, 6 (stating that route had "already been constructed and maintained when I assumed my position in 1970" and that the County maintained the route when affiant used the route to access hunting with his father in the 1950s, but not establishing his pattern of use during the intervening time.)

[56] Merryweather Horse Valley Aff. at ¶ 9 (stating that uses of the road have included "wood gathering, trapping horses, hunting, ranching, access for range improvement projects, prospecting, rock hounding, and camping" and that affiant has "personally used the road for hunting since the 1950s."); Craw Aff. at ¶ 7 (stating that uses of the road have been "ranching, wood gathering, hunting, camping, recreation, land management, and traveling in and through the area" and that affiant has personally "used the road for ranching purposes and to gather firewood.")

Further, Mr. Craw uses a statement of the "reputation in the community" rather than first-hand knowledge to support his claim that the route was established in "the 1920s."[57] He provides no basis for such a statement and no factual information is presented in the application to support this allegation. Mr. Craw also claims that his father received a grazing permit "along the road" in 1937. Craw Aff. at ¶ 7. No copy of the permit, or reference to identifying information, is provided to support this claim.[58] Similarly, Mr. Craw asserts that he has "personally observed Beaver County employees grading the road many times over the past 56 years." Craw Aff. at ¶ 9. He neglects, however, to provide any explanation of how he knew those performing the alleged work were County employees, where along the route the alleged work was performed, or even approximately when during the 56-year span it occurred. His broad statements provide no meaningful support for the State's claim.

Because the affiants provide no basis for their "reputational" and other statements noted above, BLM must give them little weight in its evaluation of the right-of-way claim.

2. The Applications' Supporting Documents Contain Hearsay for Which Utah Fails to Provide the "Best Evidence."

In addition to submitting hearsay without basis or citation, the applications also include statements characterizing records that the State of Utah has failed to provide BLM. Because the State of Utah fails to provide the "best evidence" – namely the alluded-to records themselves – BLM cannot rely on the State's characterizations of those records.

"To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided …." Fed. R. Evid. 1002. This is known as the "best evidence" rule, and it "requires that a party seeking to prove the contents of a document must introduce the original document." United States v. Boley, 720 F.2d 1326, 1332 (10th Cir. 1984). Commentators have explained that this rule is necessary due to "[t]he danger of mistransmitting critical facts which accompanies the use of written copies or recollection … which is largely avoided when an original writing is presented to prove its terms." McCormick on Evidence at § 231. Thus, the "best evidence" rule is based on the common-sense notion that a document itself is a better statement of its content than a person's potentially flawed recollection of what the document says.

[57] Craw Aff. at ¶ 5 (stating that it is "reputation in the community" that the route was "established by use by my grandfather, Charles Nelson Craw, in the 1920s and has been continuously used since that time.")

[58] In addition, simply because one has received a permit to graze livestock in the vicinity of a route does not mean that a route alleged to access the allotment was a constructed highway prior to October 21, 1976.

a. The Applications for Routes D28 and D30 Fail to Contain the "Best Evidence."

In its initial applications, the State of Utah originally alleged that "the recordable disclaimer of interest sought [for both routes D28 and D30] will not adversely affect any other right-of-way. In fact, we understand that [each] road is used to provide access to Questar's pipeline rights-of-way." Fairbanks D28 letter at 2; Fairbanks D30 letter at 2. Both of these statements were in part "[b]ased upon … review conducted by the Daggett County Recorder." Id. The State provided no original documents from the Daggett County Recorder's office, nor did the State provide any other records from the Daggett County Recorder's office characterizing whatever "review" that office might have undertaken.

In its supplemental submission to BLM, provoked by TWS's letter of September 29, 2004 (see note 34, above), the State did provide a declaration from the Daggett County recorder together with a number of documents from that office.[59] However, none of these documents depict the locations of rights-of-way, nor do they demonstrate that the routes for which Utah seeks a disclaimer provide access to such rights-of-way. Similarly, while a supplemental affidavit avers that the routes provide access to a number of gas wells, that declaration contains no statement concerning the location or existence of pipeline rights-of-way.[60] In any event, a route that merely accesses a pipeline is hardly, of necessity, a "public highway." In sum, unless and until the State provides documentation to support its statements concerning the interaction between the pipeline rights-of-way and the routes, its allegations are hearsay to which BLM should give no weight.

In addition, the only "evidence" provided by the State concerning when and why these routes were initially constructed is hearsay, for which the State fails to supply the best evidence. For example, Troy Gale's affidavit states that: "From my review of Questar Pipeline Company's records, I am aware that the road designated as Daggett County Road D28 was first constructed to provide access to the first wells drilled in the Clay Basin Field in the late 1920s." Gale D28 Aff. at ¶ 13. Mr. Gale's affidavit for route D30 makes similar allegations concerning that route.[61] Mr. Gale evidently provided no Questar Company records and publications with his affidavit, nor did the State of Utah provide such records to BLM. Mr. Gale's vague allusion to

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[59] Affidavit of RaNae Wilde (Nov. 30, 2004), submitted to BLM with letter of R. Fairbanks, Utah Att'y General's Office to S. Wisely, State Dir., BLM Utah re: D28 & D30 (Dec. 8, 2004) (on file with BLM State Office).

[60] See Affidavit of Troy Gale (Dec. 3, 2004) concerning routes D28 and D30 (Gale Supplemental Aff.) at ¶¶ 4-6 and attached map.

[61] "From my review of Questar Pipeline Company's records and publications, I am aware that the northernmost part of the road designated as Daggett County Road D30 was first constructed to provide access to the first well drilled in the Clay Basin Field in the late 1920s." Gale D30 Aff. at ¶ 13.

certain unnamed and unidentified "records," without the records themselves, is mere hearsay upon which BLM cannot rely, particularly when the ownership of public property is at stake.[62]

b. The Hickory Peak Application Fails to Contain the "Best Evidence."

Three affidavits supporting the Hickory Peak application allege that the route has been "included in the state highway system or infrastructure and has been designated as a Class B highway over which the County has been given jurisdiction by the state legislature for construction, operation, and maintenance." Lister Hickory Peak Aff. at ¶ 6; Merryweather Hickory Peak Aff. at ¶ 7; Jefferson Aff. at ¶ 12. However, the application presents no factual information – such as maintenance records, authorizing orders, legislative statements, county maps, or county records – showing that the route has been designated as any class of highway. Unless the State provides or BLM locates other data supporting these allegations, BLM must dismiss these claims as hearsay.

c. The Horse Valley Application Fails to Contain the "Best Evidence."

Three affidavits supporting the Horse Valley claim state – in words identical to those used for the Hickory Peak route – that the route has been "included in the state highway system or infrastructure and has been designated as a Class B highway over which the County has been given jurisdiction by the state legislature for construction, operation, and maintenance."[63] Despite these identical assertions, the application presents no factual information, such as maintenance records, authorizing orders, legislative statements, county maps, or county records purporting to adopt the road to support their claims. Again, these statements must be dismissed as hearsay unless and until actual evidence is located.

3. The Affidavits Fail to Contain Specific Information about the Claims, and Contain Irrelevant or Questionable Information.

Much of the first-hand information contained in the nearly identically-worded affidavits can best be described as vague or imprecise. Much of it is irrelevant as it relates only to the

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[62] The State's cover letter for route D28 contains the flat assertion that "[t]he road was first constructed and maintained at least as early as the late 1920s," but the State provides to BLM no evidence beyond hearsay to support that allegation. Fairbanks D28 letter at 1. The State's cover letter for route D30 contains a similar, unsubstantiated assertion. See Fairbanks D30 letter at 1 ("At least as early as the late 1920s and early 1960s, construction was performed by means of heavy road equipment, in addition to the passing of motor vehicles over the roadways."). Apparently, these flat assertions are based on the unsupported hearsay of Mr. Gale.

[63] Dalton Aff. at ¶ 6; Lister Horse Valley Aff. at ¶ 6; and Merryweather Horse Valley Aff. at ¶ 7.

period after R.S. 2477 was repealed. The affidavits submitted to demonstrate construction thus have little to no evidentiary value.

a. The Affidavits Supporting the D28 and D30 Applications Fail to Contain Specific Information about the Claims, and Contain Irrelevant or Questionable Information.

With respect to routes D28 and D30, the supporting affidavits do not specify where on, or upon what portion of, the routes alleged grading, maintenance, construction or placement of culverts 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.[64] 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.[65]

The relevance of much information in the affidavits is of questionable value to a determination of a right-of-way as well. For example, Mr. Gale's affidavit states that in his job as Crew Foreman of the Kastler Station he is "personally familiar with the construction and maintenance activities" on routes D28 and D30 "for the past twenty years." Gale D28 Aff. at ¶ 6; Gale D30 Aff. at ¶ 6. However, the latest possible date for establishing whether the route was "constructed" to serve as a highway was October 21, 1976, nearly a decade before Mr. Gale began work for Questar. His statements concerning maintenance of the route since 1984 are thus totally irrelevant to the question of the existence of rights-of-way.

In addition, some of the statements are of dubious credibility. Three of the affiants state that they have been observing the routes since they were fairly young – between the ages of six and ten.[66] At that age and since, the affiants swear, they recall observing with respect to both routes "evidence of construction, including grading, addition of gravel, berms, ditches, culverts, shoulders and disturbed areas at the sides of the road" as well as "construction and maintenance activities on the road," which have included "grading, addition of gravel, dragging of the road surface with pipes pulled behind well service vehicles and snow removal."[67] Is it credible for a

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[64] See, e.g., Gale D28 Aff. at ¶ 3 ("I have observed and traveled the road many times in the last twenty years"); Gale D30 Aff. at ¶ 3 (same).

[65] Dickinson D28 Aff. at ¶ 7 ("Over the years since 1941, I have observed construction and maintenance activities …."); Dickinson D30 Aff. at ¶ 7; Radosevich D28 Aff. at ¶ 7 ("Over the years, I have observed construction and maintenance activities …."); Radosevich D30 Aff. at ¶ 7 (same).

[66] See, e.g., Gale D28 Aff. at ¶¶ 2-3 (born 1965, observed route since 1974); Gale D30 Aff. at ¶¶ 2-3 (same); Dickinson D28 Aff. at ¶¶ 2-3 (born 1931, observed route since 1941); Dickinson D30 Aff. at ¶¶ 2-3 (same); Radosevich D28 Aff. at ¶¶ 2-3 (born 1935, observed route since 1941); Radosevich D30 Aff. at ¶¶ 2-3 (same).

[67] Dickinson D28 Aff. at ¶¶ 6, 7; Radosevich D28 Aff. at ¶¶ 6, 7; Dickinson D30 Aff. at ¶¶ 6, 7; Radosevich D30 Aff. at ¶¶ 6, 7see also Gale D28 Aff. at ¶ 7 ("evidence of

six-year-old on a short trip over a short stretch of route to specifically recall the technical specifications of that route, or for anyone to remember whether they saw "evidence of construction" including berms and culverts on a one- or two-mile road 60 years ago? It is possible, although it seems very unlikely.

Statements in several affidavits also raise questions about the date of route D30's alleged "construction" as a public "highway." The affidavits allege that in the 1920s the route was only constructed for several hundred yards from its northern terminus (at route D28) to a turnoff to an oil well pad.[68] In other words, the allegedly "constructed" part of the route was one that dead-ended at an oil well. It is unclear how such a short, dead-end route would constitute a "public highway." In addition, the affidavits are vague as to whether or not the entire route was in use before the 1960s (when the affidavits allege the southern part of the route was finally "constructed").[69]

b. The Affidavits Supporting the Hickory Peak Application Contain Vague, Irrelevant, and Contradictory Data.

The affidavits submitted to support the Hickory Peak application do not specify where on, or upon what portion of, the routes alleged grading, maintenance, and/or construction took place. The affidavits contain no exact dates for when any such activities – or affiants' use of the route – took place; they are described only by decade or year.[70]

The reliability of some allegations in the affidavits may be called into question as well, given how long ago the events related are alleged to have occurred. Three of the affiants rely on

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construction, including grading, the addition of gravel, berms, ditches culverts and disturbed areas at the sides of the road"); Gale D30 Aff. at ¶ 7 (same).

[68] Dickinson D30 Aff. at ¶ 6; Radosevich D30 Aff. at ¶ 6.

[69] Compare Dickinson D30 Aff. at ¶ 6 and Radosevich D30 Aff. at ¶ 6 (southern portion not constructed until the 1960s) with Dickinson D30 Aff. at ¶ 9 and Radosevich D30 Aff. at ¶ 9 (describing numerous uses of the "road" since 1941).

[70] Merryweather Hickory Peak Aff. at ¶ 9 (affiant used the road for hiking and bird hunting in "in the 1950s"); McCully Aff. at ¶ 9 (affiant observed grading "on numerous occasions" without specifying when); Jefferson Aff. at ¶ 4 (affiant traveled the route "frequently" since the 1950s.); id. (affiant has held an interest in area mines "for many years"); id. at ¶ 8 (observed evidence of grading "in the 1950s."); id. (recalls route graders "before 1976" because "I frequently observed recent evidence of grading activity on" the route).

memories of observations from 55 to 73 years ago.[71] Not surprisingly, the memories of the affiants sometimes vary dramatically.[72]

The relevance of certain information in the affidavits is questionable. One of the affidavits – Mr. Lister's – offers statements only for the period after R.S. 2477 was repealed. Mr. Lister's affidavit is entirely irrelevant as the affiant's knowledge of the route derives from his experience as a County road equipment operator– a position that he did not begin until 1980, well after the repeal of R.S. 2477. Lister Hickory Peak Aff. at ¶ 7.

The affidavits also contain evidence that cast doubt on the validity of the claim. One affiant also makes clear that at least as of the 1930s – apparently after most significant mining in the area had ceased – the route was not mechanically constructed, and that it was not always open for public use. Mr. McCully states that the route was "construct[ed] and maint[ained]" by the "passing of horses, wagons, or livestock over the roadway." McCully Aff. at ¶ 9. "I know this because, as early as 1932, I personally observed the tracks" from such uses. Id. Thus, if Mr. McCully can be believed, no mechanical construction had taken place by the 1930s. Mr. McCully also says that the road was used regularly "weather permitting." Id. at ¶ 4. This statement apparently means that poor weather regularly forced closure of this alleged constructed public highway.

c. The Affidavits Supporting the Horse Valley Application Contain Vague, Irrelevant Data, and No Data at All to Support the Validity of Utah's Claim to the Iron County Portion of the Route.

The affidavits submitted to support the Horse Valley application do not specify where on, or upon what portion of, the routes alleged grading, maintenance, and/or construction took place. The affidavits contain no exact dates for when any such activities – or affiants' use of the route – took place; they are described only by decade or year.[73] Some of the allegedly observed

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[71] Merryweather Horse Valley Aff. at ¶ 9 (recalling state of road from hunting and hiking trips more than a half-century ago); McCully Aff. at ¶¶ 4, 9 (recalling from trip 73 years ago that the claimed route "consisted of two tracks leading up the mountain" and from that same period recalling "personally observ[ing] the tracks created" by the passage of horses and livestock over the route); McCully Aff. at ¶¶ 2, 6 (alleging observation of route "since the early 1940s" and recalling uses to which travelers put the road 60+ years ago).

[72] For example, Mr. McCully states that the route was first graded "in the early 1940s." McCully Aff. at ¶ 1. Mr. Jefferson, who claims to have observed the route "since the early 1940s" alleges that the route was not graded until "the 1950s." Jefferson Aff. at ¶¶ 2, 8.

[73] See, e.g., Dalton Aff. at ¶ 2 ("I know my grandfather herded sheep along the road in the 1940s"); Merryweather Horse Valley Aff. at ¶ 6 (the route has been maintained by the County "since at least as early as the 1950s"); Id. at ¶ 7 ("Since at least as early as 1970 the road has been included in the state highway system or infrastructure"); Id. at ¶ 9 ("Uses of the road since the 1950s included"); Craw Aff. at ¶ 5 ("this road was established by use by my

activities on the route are so vaguely described that they all could have occurred after R.S. 2477 was repealed in 1976.[74]

In addition, the relevance of much information in the affidavits is of questionable value to a determination of a right-of-way. Two of the affidavits offer supported evidence only for the period after R.S. 2477 was repealed. Mr. Lister's affidavit is entirely irrelevant as the affiant's knowledge of the route derives from his experience as a road equipment operator for the County – a position that he did not begin until 1980, well after the repeal of R.S. 2477. Similarly, Mr. Dalton's only supported personal experience derives from his time as a Beaver County Commissioner – a period that began in 1999.[75] All of his first-hand accounts of the route date from long after 1976.

Some of the statements are of dubious credibility as well. Two of the affiants rely on long-ago memories, with no supporting evidence, of observations from as long as fifty years ago.[76] Although no evidence concerning the age of the affiants has been submitted, it is likely that they were both quite young at the time of observation. Is it truly credible for a boy or young man to remember the details of the management, use, and construction of a stretch of road that undoubtedly constituted only a portion of the route used during a family trip a half century previously? It is possible, although it seems unlikely.

Further, none of the affiants provide information that specifically and identifiably concerns the Iron County portion of the route. Three of the affiants, Messrs. Dalton, Lister, and Merryweather, base much of their credibility on the fact that each is (or was recently) an official or employee of Beaver County. Dalton Aff. at ¶ 2, Lister Horse Valley Aff. at ¶ 2, Merryweather

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grandfather, Charles Nelson Craw, in the 1920s"); Id. at ¶ 9 ("I have personally observed Beaver County employees grading the road many times over the past 56 years.")

[74] Dalton Aff. at ¶ 2 ("I have personally traveled the Horse Valley Road while hunting deer"); Craw Aff. at ¶ 4 ("I am familiar with the indicated road because my father and I used the road to access high pasture land for livestock grazing. We often lived in a camp wagon"); id. at ¶ 9 (stating "Evidence of construction along the road includes …" without stating when his observations of the route took place); Merryweather Horse Valley Aff. at ¶ 6 ("vehicles such as trucks use the road on a fairly regular basis.")

[75] Dalton Aff. at ¶ 2 ("I have been a County Commissioner for Beaver County from 1999 until the present time."). Mr. Dalton states that he has "personally traveled the Horse Valley Road while hunting deer," id., but he fails to state when that hunting trip may have occurred.

[76] Merryweather Horse Valley Aff. at ¶ 6 ("The road has been maintained by the County as a public highway, freely open for all to use, to come and go as they please, since at least as early as the 1950s"); Craw Aff. at ¶ 9 ("In 1948 I first observed evidence that the road had been graded"); id. at ¶ 10 ("When I first used and observed Horse Valley Road it ran the same route as it does now ….").

Horse Valley Aff. at ¶ 2. Messrs. Lister and Merryweather claim to have both been involved with road maintenance for Beaver County. However, only a short portion of the route is found within Beaver County – 1.91 miles out of a total of 8.83 miles. No support is provided by the official status of these affiants for their general statements on the majority of the route, which is found in neighboring Iron County. Further, given the general vagueness of all of the affiants' statements, it is unclear if any of the affiants have personal experience with, or even are making claims related to, the Iron County portion of the claimed route.

Finally, one affiant provides statements that appear to contradict the application's assertion that the route was constructed and regularly maintained. Mr. Craw states that the route today follows the same course as it did in 1948, except where "buildup of debris and sand may have resulted in minor deviations." Craw Aff. at ¶ 10. The statement that the route has deviated due to the accumulation of debris seems to directly contradict the claims that this route has been regularly maintained and specifically graded twice a year. See, e.g., Dalton Aff. at ¶ 4, Lister Horse Valley Aff. at ¶ 4.

d. Conclusion.

The affidavits submitted to demonstrate construction have little evidentiary value, at best. 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 herein.

C. Aerial Photos Submitted by Utah Do Not Establish Construction.

Aerial photos are taken from thousands of feet up in the air. While they thus can show something on the ground, what they show is subject to interpretation. The aerial photos submitted by Utah fail to demonstrate that the disturbance depicted on the ground for the four routes amounts to a "constructed highway" as required by R.S. 2477.

Indeed, for the Horse Valley route, the 1976 aerial photo shows the route as indistinct or barely visible in numerous places.[77] Numerous other features – apparently gullies or fence lines – intersecting the claimed route on the circa 1976 aerial photos appear at least distinct than the route itself.[78] In addition, the Horse Valley route appears more distinct on the 1990s aerial photo than it does on the 1976 photo, perhaps indicating that improvements to the route took place after R.S. 2477 was repealed.[79] Utah points to no evidence in the aerial photos that would demonstrate that construction took place, or to demonstrate any other evidence relevant to its claim.

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[77] Declaration of Douglas C. Pflugh (June 22, 2005) at ¶¶ 23-26, attached as Exhibit 58, and aerial photo comparisons attached thereto as Exhibit I.

[78] See id. at Exhibit I.

[79] Id. at ¶ 24-25.

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 Exh. 32 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"). BLM's determination that the evidence provided by counties – including aerial photos – was not sufficient to establish the existence of an R.S. 2477 right-of-way was upheld by a federal court in SUWA v. BLM.

In addition, Utah provides in the public record nothing to verify the authenticity of the aerial photographs with respect to the date taken. The 1976 aerial photos of the four routes are accompanied with a map indicating on what date they were supposedly taken, but no declaration or any supporting evidence or statement substantiates the alleged dates. Another set of aerial photos is identified as being taken in the 1990s. The photos taken in the 1990s, however, are irrelevant to the determination of whether a highway right-of-way was constructed before October 21, 1976. The State of Utah 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.

D. Images and Maps Created After October 21, 1976 Do Not Establish that Valid Existing Rights Existed Prior to That Date.

1. Ground and Aerial Photos Taken After 1976 Submitted by the State for All Claims Do Not Support those Applications.

Photos of the current condition of the claimed routes from the ground may be relevant to the existing scope of disturbance of each route. Aerial photos taken "circa 1995," which were submitted in support of each application, may be relevant to showing some natural, or manmade feature at that time. 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, for example, 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.[80] None of the photos provided by Utah for the Hickory Peak or Horse Valley claim contain such

[80] 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.

evidence.[81] 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 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 32) at 6-7.

In addition, photos of the existing nature of the route, or of the scope of the route in the last ten years, 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. Utah provides no ground photos from 1976 or earlier; as such, they are not helpful to the discussion of the scope of the route at the time any alleged right-of-way was created.

Finally, Utah has provided neither BLM nor the public with any evidence or information to support that the photos asserted to be on the route at a certain point on the map were in fact taken at those locations. No declarations or affidavits accompany the photos; there is no assertion by any individual that the photos represent the routes at a particular point, which direction the photos face; etc. If these photos are linked to some GIS data, the State has apparently failed to make that metadata available to BLM.[82]

2. The Ground Photos Submitted, By Themselves, Lack Information to Render Them Useful as Supporting Evidence.

Many photos taken from the ground and submitted by Utah do not support the applications with which they are submitted because they are not, on their face, self-explanatory, and they lack any supporting documentation to explain what they are. None of the photos displayed contain any information about the direction the photos were taken. Utah's attorney did

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[81] As noted above at Sec. IV(A)(2), the photos supplied for the Hickory Peak and Horse Valley claims show no bridges, signs, or culverts. After the initial applications were submitted for routes D28 and D30, Utah did supply some additional photos of signs along those routes and culverts on D30. However, none of the photos demonstrate that these signs or structures were built prior to 1976, nor does Utah provide any additional evidence to verify when the signs or structures were put in place.

[82] With its application, Utah provided BLM with no metadata to verify the location of the photos or points on the map. E. Zukoski, Earthjustice, pers. comm. with M. DeKeyrel, Realty Specialist, Utah BLM (June 3, 2005). This despite the fact that the State almost certainly has such data. In addition, Appendices submitted with Utah's application state that the origin of certain mapping data is "indicated in the metadata and/or transportation data model of the State of Utah Geographic Information Database." See, e.g., Horse Valley Application, Appendix A at 1. Again, Utah failed to provide this data to BLM with the application.

BLM should insist that this and future applications include such metadata in such a way that the public will be able to obtain it, review it, and comment on it. If BLM has not or will not require that Utah submit such information, BLM should explain to the public its failure to do so.

provide a hearsay statement as to when the photos for route D28 and D30 were taken, but no other such representations were provided concerning the Horse Valley or Hickory Peak routes.[83]

In addition, it is unclear what the State is attempting to demonstrate with a number of the photos. For example:

- A photo submitted with the Horse Valley application (previously available at http://www.ut.blm.gov/rs2477/Horse_Valley/Photos/ep11061b001a01.jpg) appears to show a junction of two or three dirt paths. It is unclear which (if any) of the routes is the route claimed.
- Another photo submitted in support of the same route (previously available at www.ut.blm.gov/rs2477/Horse_Valley/Photos/ep110060025a01.jpg) shows another, similar junction, with no indication given as to which route is the route for which the State seeks a disclaimer of interest.
- A photo submitted in support of route D28 shows a long view of a gas well with several roads in the distance. See www.ut.blm.gov/rs2477/Daggett_D28/RoadPhotos/ep050043001a01.jpg. Whether this is a photo from the claimed route, or a distant shot of the claimed route (and which route that might be) is not clear.
- Numerous photos submitted in support of route D28 purport to show junctions between that route and others; however, it is difficult to tell which route is the claimed route from the photos and which the route intersecting with D28. See photo ## 0179, 0181, 0184, 0185, 0187, 0191, and 0193 attached to letter of R. Fairbanks, Utah Att'y General's Office to S. Wisely, State, Dir., BLM (Dec. 8, 2004).
- Several photos submitted in support of route D30 purport to show junctions between that route and others; however, it is similarly difficult to tell which route is the claimed route from the photos. See photo ## 0176, 0177, 0196, and 0198, attached to letter of R. Fairbanks, Utah Att'y General's Office to S. Wisely, State, Dir., BLM (Dec. 8, 2004).

Given Utah's failure to provide any explanation for these (and other) photographs submitted in support of the disclaimer applications, the photos should be given little or no weight in considering whether Utah has carried its burden of demonstrating that a disclaimer is warranted.

3. Maps Created after 1976 or at an Uncertain Date Cannot Support Claims Concerning Routes D28 and D30.

For the same reason, maps created by Daggett County long after the repeal of R.S. 2477 cannot establish the existence of highway before October 21, 1976. Thus, a topographic map dated April 14, 2004 submitted in December 2004 by Utah that depicts routes D28 and D30 is

[83] See Letter of R. Fairbanks, Utah Att'y General's Office to S. Wisely, State, Dir., BLM (Dec. 8, 2004) at 1-2 (alleging a Mr. Kelson took photos in 2002, and a Mr. Cox took photos in 2004).

not relevant evidence for a determination of the existence of an R.S. 2477 right-of-way.[84] Similarly, a map submitted by an affiant purporting to have been prepared by the Questar Pipeline Company, but which is undated, and for which no date is suggested by the affiant, is similarly irrelevant and unpersuasive.[85]

E. Utah's "Point Data" Concerning Water Sources and Minerals Is Irrelevant.

Each of Utah's four applications contains, among other things, a map displaying "water points of diversion [prior to] 1976" and "minerals" near each route. Utah, however, does not explain why this information is relevant. Whether a highway was constructed over unreserved federal land prior to the earlier of reservation or October 21, 1976 is not necessarily related to when and where water rights were claimed, or where minerals are located, in the general vicinity of the current path of the alleged rights-of-way. In short, while this information is interesting, it is, by itself, irrelevant to the claim of existence of an R.S. 2477 right-of-way. Utah's application certainly fails to explain why or how the submitted information might be germane.

In addition, no dates concerning mineral or water information are provided with the maps, making it impossible to determine whether the information relates to minerals and water rights located before or after reservation or repeal. Finally, it is unclear whether Utah provided BLM with any "metadata" to support the location of purported mineral or water rights data.[86] In short, there is no way to verify whether the points on the map are supported by any evidence that a water or mineral claim actually occurred at that location. If Utah has such evidence and believes it is relevant, it should supply that information with the application.

F. Beaver, Daggett, and Iron Counties Admit That They Have No Construction, Maintenance, or Funding Records Concerning the Alleged Rights-of-Way.

As is described in detail below, no evidence concerning construction, budgeting, funding, or road maintenance was submitted with any of the four applications to BLM beyond the statements of a few individuals that 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

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[84] See Letter of R. Fairbanks, Utah Att'y General's Office to S. Wisely, State, Dir., BLM (Dec. 8, 2004) at 1 and attached map.

[85] Affidavit of Troy Gale (Dec. 3, 2004) concerning routes D28 and D30 (Gale Supplemental Aff.) at ¶ 4 (identifying map as "from the records of Questar Pipeline Company" but providing no other identifying data); id. at Exhibit B (map, undated).

[86] E. Zukoski, Earthjustice, pers. comm. with M. DeKeyrel, Realty Specialist, Utah BLM (June 3, 2005). Again, BLM should insist that applicants provide such metadata and make it available for public review prior for the public comment period.

constructed or improved." Administrative Determinations on San Juan County Claims (Exh. 32) at 8.[87]

The fact that none of the counties has any official records of any kind demonstrating that the counties ever funded work on, constructed, or maintained any of the four routes at issue strongly implies that the County never performed such work. It is also strong evidence that the routes are of such little importance to the County that they do not constitute significant routes or a "highways."

1. Daggett County Admits That It Has No Relevant Records Concerning Routes D28 and D30.

On September 7, 2004, The Wilderness Society submitted to Daggett County a request pursuant to Utah's Government Records Access and Management Act (GRAMA), seeking all records generated, modified or acquired by Daggett County concerning or relating to the alleged R.S. 2477 rights-of-way in the County, including routes D28 and D30. Daggett County responded by stating that:

The county has no record of construction or maintenance of these roads.

Letter of Craig W. Collett, Comm'r, Daggett County to Kristen Brengel, The Wilderness Society (Sep. 16, 2004) attached as Exhibit 43 (emphasis added).

2. Beaver County Admits That It Has No Relevant Records Concerning the Hickory Peak and Horse Valley Routes.

On July 29, 2004, TWS submitted to Beaver County a GRAMA request for all records concerning, among other things, "road maintenance records, construction records, [and] records concerning funding of construction, maintenance, or improvement" of a number of alleged R.S. 2477 rights-of-way, including the Hickory Peak and Horse Flat (AKA Horse Valley) routes. Letter of K. Brengel to V. Christiansen (July 29, 2004) at 1, attached as Exhibit 44. Other than two documents concerning another route – the Vance Springs route – Beaver County stated that it had no other information beyond that provided to BLM. Letter of B. Harris to K. Brengal [sic] (Sep. 3, 2004), attached as Exhibit 45.

3. Iron County Admits That It Has No Relevant Records Concerning the Horse Valley Route.

On February 11, 2005, TWS submitted a GRAMA request to Iron County for all records concerning, among other things, "road maintenance records, funding records [and] construction records" concerning three routes in Iron County, including the Horse Valley route. The County responded:

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[87] The State of Utah has also admitted the relevance and importance of such data. See Sec. IV(H) below.

> Other than records available on the [State of Utah's] website and records provided to the BLM in connection with the application on Horse Valley Road, Iron County is not aware of having generated, modified or acquired any records responsive to your request ….

Letter to B. Steed, Iron County to K. Brengel, TWS (Mar. 23, 2005), attached as Exhibit 46 (emphasis added).

4. The Utah Attorney General's Office Alleges that Beaver County Recorder Has No Relevant Records Concerning the Horse Valley or Hickory Peak Routes.

On January 26, 2005, Earthjustice filed a GRAMA request with the State of Utah Office of the Attorney General seeking all records concerning the Hickory Peak and Horse Valley routes. Letter of E. Zukoski to R. Fairbanks (Jan. 26, 2005), attached as Exhibit 47. The Attorney General's office refused to provide any records responsive to the request. However, among the documents the Attorney General's office chose to withhold were the following:

> Correspondence dated July 19, 2004, from Beaver County to this office [i.e., the Utah Attorney General's office] indicating a complete absence of records relating to the Hickory Peak Road and Horse Valley Road at the Beaver County Recorder's Office.

Letter of R. Fairbanks to E. Zukoski (Feb. 23, 2005) at 4, attached as Exhibit 48.[88]

G. Utah Has Submitted Contradictory and Ill-Substantiated Evidence Concerning the Scope of the Right-of-Way.

While rules governing recordable disclaimers of interest require that the property interest subject to disclaimer be surveyed by certified civil engineers or surveyors to determine the property's metes and bounds (see 43 C.F.R. § 1864.1-2(c)) – a rigorous and technically demanding process – Utah seemingly bases its conclusions concerning the width of each of the routes claimed on observations by individuals, though it fails to explain how such observations were made or why the claims often fail to correspond with these observations. Identifying disturbance by visual signs of the disturbed areas – as affiants evidently did here – hardly seems an exact exercise, and is clearly subject to interpretation. The U.S. District Court for the District of Utah concluded that any statement regarding the disturbance associated with a route "depends upon an inescapably subjective perception" that is simply not helpful and not reliable in determining scope. United States v. Garfield County, 122 F. Supp. 2d 1201, 1230 (D. Utah

[88] Interestingly, the response of the Utah Attorney General's office contains no indication that the State corresponded at all with Iron County prior to submitting the Horse Valley claim. See id. at 4-5. This further supports the contention that Utah has failed to supply any information (beyond a few photos) concerning the Iron County portion of the route. See Sec. IV(B)(3)(c) above and Sec. IV(G) below.

2000). Given federal case law, any BLM decision that sets scope based on such imprecise and vague definitions of "disturbance" will be arbitrary and capricious.

In addition, for many of the claims, Utah's application seeks a disclaimer of the United States' interest in rights-of-way for a width that is greater (or in one case, less than) that identified by the affiants. Utah never explains these disparities. Nor does it present photos with visual aids (such as yardsticks or tape measures) or any other evidence that the State (or affiants) used standard measurement tools in the evaluation of a claim's width. In short, the State of Utah fails to provide any useful evidence concerning the nature and extent of any of the rights-of-way claimed.

Utah's failure to submit substantiated evidence concerning the scope of each alleged right-of-way is described in detail below.

1. Utah Has Submitted Contradictory and Ill-Substantiated Evidence Concerning the Scope of the Route D28.

Affidavits submitted by Utah all aver that the "traveled portion" of route D28 is now, as it has been since at least the 1940s, "approximately twenty-two feet for most of its length, but ranges from twenty to twenty-five feet." See Widic D28 Aff. at ¶ 11; Gale D28 Aff. at ¶ 12; Dickinson D28 Aff. at ¶ 11; Radosevich D28 Aff. at ¶ 11. One affiant, Mr. Gale, further states that "there are typically berms, ditches and disturbed areas approximately ten feet wide on each side of the traveled road surface to facilitate maintenance and drainage." Gale D28 Aff. at ¶ 12. The affidavits do not state when or by what means any of the affiants used to reach their conclusions. In addition, although the scope of the right-of-way is set from the date of the reservation or repeal, the application contains no evidence or assertions at all concerning the width (or the required width for uses established) at those critical dates. Further, while the affiants allege that the width of the traveled route "ranges" between 20 and 25 feet, the affiants do not say where the route is more narrow or more wide. Similarly, while one affiant claims that the disturbed area beyond the traveled route is "typically" ten feet on either side, where it is less and where it is more than ten feet is nowhere explained.

In comparison to the affidavits, appendices to the application assert that the "disturbed width" of the route is an even 40 feet for the entirety of the route. See D28 Appendix A at 1; see also 70 Fed. Reg. 9095 ("claimed right-of-way (disturbed) width for Road D28 is 40 feet"). This assertion does not square with the assertions in the affidavits. The affiants alleged that the width of the traveled route is "approximately 22 feet" although it varies (from 20 to 25 feet), and an additional disturbed area is "typically" 10 feet on each side. Thus, on average, the disturbed area of the route (if the affidavits can be believed) would average about 42 feet. However, the Appendix picks a single width for the right-of-way for its entire two-mile length at 40 feet. The State of Utah nowhere explains this discrepancy.

In addition, first hand review of the width of the route by another recent observer concluded that the total disturbed area was closer to 30-35 feet in width, and that the travel surface of the route was no more than 14 feet wide. See Declaration of Jim Catlin (Apr. 19, 2005), at ¶¶ 7-8 ("Catlin Dec."), attached as Exhibit 49.

In sum, Utah has failed to submit accurate, consistent information concerning the width and location of the alleged right-of-way for route D28.

2. Utah Has Submitted Contradictory and Ill-Substantiated Evidence Concerning the Scope of the Route D30.

The State of Utah's submissions concerning the width of route D30 are hobbled by the same inconsistencies and inaccuracies as those for route D28. Again, information concerning the width of D30 comes almost exclusively from affidavits. The affidavits assert that the "traveled portion" of the route D30 is now, as it has been, "approximately seventeen feet for most of its length, but ranges from fifteen to twenty feet." See, Widic D30 Aff. at ¶ 11; Gale D30 Aff. at ¶ 12; Dickinson D30 Aff. at ¶ 11; Radosevich D30 Aff. at ¶ 11. Mr. Gale again alleges that "there are typically berms, ditches and disturbed areas approximately ten feet wide on each side of the traveled road surface to facilitate maintenance and drainage." Gale D30 Aff. at ¶ 12. Again, the affidavits fail to state when or by what means any of the affiants reached their conclusions, and again the application contains no evidence or assertions concerning the width (or the required width for uses established) at the date of reservation or repeal.

In comparison to the affidavits, appendices to the application assert that the "disturbed width" of the route is an even 45 feet for the route's one-mile length. See D30 Appendix A at 1; see also 70 Fed. Reg. 9095 ("claimed right-of-way (disturbed) width for Road D30 is 45 feet"). Again, there appears to be a discrepancy between the claimed width of the route over its entire length – here 45 feet – as described in the application and the allegations made in the affidavits. The affidavits allege that the width of the traveled route is "approximately 17 feet" although it varies (from 15 to 20 feet), and an additional disturbed area is "typically" 10 feet on each side. Thus, on average, the disturbed area of the route (if the affidavits can be believed) would average about 37 feet, and at its maximum be 40 feet. However, the Appendix picks a single width for the right-of-way for its entire two-mile length at 45 feet – a significantly wider distance than the existing disturbance according to individual observation. The State of Utah nowhere explains why it is claiming a far wider width than its affiants have observed on the ground.

Again, recent first-hand observation of the route conflicts with that of statements by the affiants. A recent observer concluded that the total disturbed area was closer to 32 feet in width, and that the travel surface of the route was no more than 12 feet wide. See Catlin Dec. at ¶¶ 4-6 (Exh. 49)

Thus as with Route D28, Utah failed to submit accurate, consistent information concerning the width and location of the alleged right-of-way for route D30.[89]

[89] Note also that when Daggett County submitted a claim for this route under Title V of FLPMA in 1993, it asserted that the width of the route was 40 feet, again less than the State's claim of 45 feet today. See note 106 below.

3. Utah Has Submitted Contradictory and Ill-Substantiated Evidence Concerning the Scope of the Hickory Peak Route.

The application for the Hickory Peak route similarly contains contradictory assertions concerning the scope and nature of the alleged right-of-way. The affidavits appear to agree with each other that the "traveled portion" of the route "is approximately twenty feet (two grader blade widths) wide for most of its length." Lister Hickory Peak Aff. at ¶ 8; Merryweather Hickory Peak Aff. at ¶ 10 (same); McCully Dec. at ¶ 11 (route "is approximately twenty feet wide for most of its length"). As with affidavits supporting the other claims, the affidavits fail to state by what means any of the affiants reached their conclusions, and again the application contains no evidence or assertions concerning the width (or the required width for uses established) at the date of the underlying land's reservation or R.S. 2477's repeal.

However, while the affidavits agree with each other, the application itself does not agree with the affidavits. The application itself seeks to claim a route that is 24 feet wide for a little under 1.87 miles and balloons to 30 feet wide for another 1.22 miles. The application describes this width as the "disturbed width." See Hickory Peak Road Application, road segment table; see also 70 Fed. Reg. 9095 ("claimed right-of-way (disturbed) width for Hickory Peak Road ranges from 24 to 30 feet"). None of the affidavits describe a discontinuity in the route's width; the photos provided with the application provide little in the way of reference points by which to measure the route's width at any point. Nowhere does the State explain: how it reached its conclusions regarding the route's width; or why the route's width varies; where the width discontinuity occurs; or why the application seeks to claim a width for the route that is 50% greater than that the affiants say exists.

4. Utah Has Submitted Contradictory and Ill-Substantiated Evidence Concerning the Scope of the Horse Valley Route.

Three of the four affidavits submitted by Utah for the Horse Valley route allege that the "present actual traveled portion" of the route is now "approximately twenty … wide feet for most of its length." Dalton Aff. at ¶ 8; Lister Horse Valley Aff. at ¶ 8; Merryweather Horse Valley Aff. at ¶ 10.[90] The affidavits do not state when or by what means any of the affiants used to reach their conclusions, although Mr. Lister and Mr. Merryweather opine that this width is equal to "two grader blade widths." Lister Horse Valley Aff. at ¶ 8; Merryweather Horse Valley Aff. at ¶ 10. Nor do the affidavits explain what "most of its length" means (60% of its length? 99% of its length?), or where the route might be more (or less) than twenty feet wide. In addition, although the scope of the right-of-way is set from the date of the reservation or repeal, the application contains no evidence or assertions at all concerning the width (or the required width for uses established) at those critical dates.

In comparison to the affidavits, appendices to the application assert that the "disturbed width" of the route ranges from 10 to 12 feet in Iron County and is 24 feet in Beaver County.

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[90] The remaining affiant, Mr. Craw, presents no statement concerning the road width or surface.

See Horse Valley Application, Road Segment Summaries, see also 70 Fed. Reg. 9095 ("claimed right-of-way (disturbed) width for Horse Valley Road is 24 feet in Beaver County and ranges from 10 to 12 feet wide in Iron County"). The segment described as 24 feet of "disturbed width" by the first attachment entitled "Horse Valley Road [in] Beaver County"[91] represents less than one-quarter of the entire claimed route. This segment is the entire Beaver County portion of the route. The appendices to the application also allege that nearly three-quarters of the route is only ten or twelve feet in "disturbed width," barely a single "grader blade width" by Mr. Lister's and Mr. Merryweather's calculus. The discrepancies between the appendix and the declarations call into question the familiarity of Messrs. Dalton, Lister, and Merryweather with the route as a whole, and particularly with Iron County portion of the route. The veracity of any statements they make concerning the Iron County portion of the route in particular, and entire route in general, are thus highly suspect.

Further casting doubt on the veracity of the affidavits and the appendix as to the route's width in Beaver County are the photos submitted by the State. One of the photos taken on the border of Beaver and Iron Counties – ep110061007a01.jpg (previously available at www.ut.blm.gov/rs2477/Horse_Valley/Photos/ep110061007a01.jpg) – shows a two-track trail, only wide enough to accommodate a single vehicle, with extensive vegetation in the middle of and at the margins of the route, something that in no way suggest that grading (or any construction) has ever occurred. This route does not appear to be anywhere near 24 feet (or two grader blade widths) wide. Similarly, another photo taken in Beaver County – ep010031003a01 (previously available at www.ut.blm.gov/rs2477/Horse_Valley/Photos/ep010031003a01.jpg) – shows a route which would not appear to accommodate two vehicles abreast. The pickup truck in the photo appears to be wider than half the width of the route, and thick vegetation with no sign of disturbance fringes the margin of the route. It is unlikely that the route is more than 10-15 feet wide at that point, despite the affidavits' and the application appendix's allegations to the contrary.[92] In fact, a recent observer confirmed exactly that –the disturbed area on and adjacent to the route in Beaver County did not appear to be more than 10-16 feet, and that the route, at one point, did not appear wide enough for two cars to pass each other. Declaration of Jeff Kessler (June 15, 2005), at ¶ 21, attached as Exhibit 51 (Kessler Dec.).

The allegation in the application's appendix that the route is 10 or 12 feet wide in Iron County – which contradicts the State's affiants' statements that the route is 20 feet wide "for

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[91] This attachment and the following one entitled "Horse Valley Road Iron County" contain each contain a table listing characteristics of the claimed route including "County Unique ID" and "Disturbed Width." The second set of attachments with the same titles contain quarter-quarter section legal land descriptions of the areas through which the claimed routes pass. The third set of attachments with the same titles contain the listing of the alleged centerlines of the claimed routes.

[92] BLM has even further clouded certainty by recording the width of the Beaver County portion of the claim as 10 feet in its "LR 2000" database. See LR2000 printout for UTU-82194 (January 13, 2005), attached as Exhibit 50. It is unclear whether the database description is a typo or whether it is based on data or interpretation by BLM.

most of its length" – seems closer to the factual situation on the ground, if the photos submitted by the State are to be believed. The photos submitted by the State of Utah show, for much of the route's length in Iron County, only a two-track route, just wide enough to accommodate a single vehicle.[93] Photos and observations made by a recent observer similarly document a narrow route through Iron County. Kessler Dec. at ¶¶ 20, 22 and photos attached there to as Exhibit K.

Utah's application also contains contradictory, inconsistent information concerning the nature of the route's surface. Three affiants assert that the surface of the route is "native dirt." Dalton Aff. at ¶ 8; Lister Horse Valley Aff. at ¶ 8; Merryweather Horse Valley Aff. at ¶ 10. None of the photos show anything other than a dirt-surfaced route.[94] However, the application contains a statement alleging that the route, in the Iron County portion, contains a 0.68-mile segment whose surface type is "Improved." See Horse Valley Road (Iron Co.) Road Segment Summary (filed with application). What "improvement" might have been made to the route is nowhere explained. Such "improvement" not evident in the State's photos. Nor was it evident to a recent observer. Kessler Dec. at ¶¶ 18, 20 (Exh. 51) (noting lack of paving, culverts, bridges, and evidence of regular maintenance on the route). Therefore, Utah's allegation that a portion of the route is improved casts further doubt on the veracity, consistency, and reliability of the State's submissions.[95]

Thus, Utah has failed to submit accurate, consistent information concerning the width, location, and condition of the alleged right-of-way for route.

H. BLM Must Require Utah to Gather Essential Factual Information that Utah Admits Is Relevant.

The sparse, contradictory, and/or irrelevant information submitted by Utah does not demonstrate that a right-of-way was granted under R.S. 2477 for any of the claimed routes.

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[93] See, e.g., photos formerly at BLM's website of the Horse Valley route in Iron County: www.ut.blm.gov/rs2477/Horse_Valley/Photos/ep11061c001a01.jpg (showing route in wash, continuing as vegetated two-track), www.ut.blm.gov/rs2477/Horse_Valley/Photos/ep110061002a01.jpg (showing route as vegetated two-track), and www.ut.blm.gov/rs2477/Horse_Valley/Photos/ep110061003a01.jpg (showing route as narrow two-track, vegetated in distance).

[94] One photo, previously available at www.ut.blm.gov/rs2477/Horse_Valley/Photos/ep110061002a01.jpg, does show a fence oriented perpendicular to the route. However, there is no evidence of any improvements to the route – no gate (only a break in the fence), cattle guard, or other constructed feature on the route itself. Indeed, the route at this point is a two-track trail where vegetation, grade, and exposed roots challenge the assertion that grading has occurred.

[95] In addition, the distinction between a "dirt" route and an "improved" one is hardly academic. Should BLM accept the State's allegation that part of the route is "improved," and should BLM approve the disclaimer of interest for this route, the State may obtain greater leeway to "improve" the route to a higher standard than currently exists.

What Utah 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), Utah 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 (Exh. 32) at 8-10.

Indeed, the State of Utah 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 52 (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 has admitted that the type of evidence listed above is important to establishing the validity of an R.S. 2477 right-of-way, the State

provided BLM with virtually none of this type of information to support any of its applications. Therefore, it can be assumed that none of this type of admittedly relevant information could be located by State or County employees in support of the applications.

While BLM's website previously stated that the agency intended to "review[] existing and historic records," it is unclear whether BLM staff will do more than review the application and comments, undertake a site visit, and review some maps. See http://www.ut.blm.gov/rs2477/process.htm (viewed April 2004). TWS believes that review of historic and agency records above is essential, and that BLM must either require that Utah submit such information in the future or commit itself to gathering the information and making it available to the public before the commencement of the public comment period.

V. BLM CANNOT RELY ON UTAH'S SUBMISSIONS TO ISSUE A DISCLAIMER OF INTEREST FOR ANY OF THE FOUR ROUTES, 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 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 the State of Utah – 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 information contained in Utah's applications to the public, and by proposing to issue recordable disclaimers of interest based upon the applications, 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 February decision to publish that information was subject to the IQA. Further, a final BLM decision to issue recordable disclaimers of interest based on Utah'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 a recordable disclaimer for any of the applications will set a national precedent as to how BLM will effectively recognize R.S. 2477 rights-of-way under the Disclaimer Rule – 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. Utah'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 the State 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 above, for each of the alleged right-of-ways:

- Utah has submitted affidavits that contain hearsay, fail to provide the best evidence, are vague, fail to provide any basis for statements made, and contradict other information submitted by the State;
- Utah has submitted maps and photos that are of marginal – if any – relevance, and for which the State provides no evidence or verification as to their authenticity;
- Utah has submitted almost no information to actually support a conclusion that a public highway was constructed during the relevant time period; and
- Utah has admitted that there are other types of persuasive evidence that it either does not possess or which the State has failed to submit.

As such, BLM cannot rely upon – or disseminate in support of a final decision based upon – the State'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.[96] 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. Since BLM's guidance on the State of Utah-DOI MOU requires BLM to respond to comments on disclaimer applications merely in a memo to the agency's case file and not directly to the commenter, BLM should provide TWS with a "separate response" to this request for correction, as the agency's IQA guidance suggests. BLM guidelines at 8.[97]

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[96] 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 State'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 State'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 State to issue any disclaimers of interest, and thus that BLM cease dissemination Utah'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 State of Utah in reaching a decision on the State's applications for disclaimer 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 routes.

[97] 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 the State of Utah-DOI MOU for responding to comments on applications for recordable disclaimers hardly establishes a "comprehensive" process. Guidance on the State of Utah-DOI MOU requires no publication of the agency's response to comments to the public – which is required by both rulemaking regulations and the National Environmental Policy Act – nor any response to the commenter, requiring instead only a memo to the file.

VI. OTHER EVIDENCE DOES NOT SUPPORT THE VALIDITY OF THE ALLEGED RIGHT-OF-WAY FOR ROUTE D28 OR D30.

A. Maps and Other Data Do Not Support a Finding that Route D28 Was a "Constructed Highway" before 1976.

The application submitted by Utah (which is based upon hearsay, fails to include the best evidence, and contains vague or irrelevant data) contains little to no credible evidence to support the contention that route D28 was a "constructed highway" before October 21, 1976. As noted above, the County admits it has no such evidence.

Other evidence available in State, County, and BLM files further undermines Utah's application. First and foremost is the absence of some or all of the route on numerous maps before October 21, 1976 and even long after. As claimed by the State of Utah, route D28 cuts through the center of section 22 in a generally west-northwest to east-southeast direction for a little over a mile, and then takes a sharp turn to the southwest near the eastern boundary of section 22. The road proceeds about 0.5 miles to its intersection with a larger east-west road (192). On numerous maps prepared by the State or by the federal government, some or all of route D28 did not appear.

State and 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 June 21, 2005)). Where counties claimed that they intended to maintain a route to certain minimum standards, routes were marked in blue, and usually identified by number.[98] A review of maps entitled "General Highway Map, Daggett County, Utah," prepared in cooperation with the "Utah State Department of Highways" on file at UDOT showed the following[99]:

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[98] Kessler Dec. (Exh. 51) at ¶ 3 and Exhibit A attached thereto (including statement of UDOT staff concerning the maps).

[99] Relevant excerpts of all identified maps are attached as Exhibits B-G to the Declaration of Jeff Kessler (Exh. 51). Virtually identical Daggett County highway maps for 1962, 1966, and 1979 were obtained from the Daggett County Recorder's Office, and display the same information with respect to route D28. See Declaration of Kristen Brengel (June 23, 2005), attached as Exhibit 53 (Brengel Dec.), and maps attached thereto as Exhibits A-C. In addition, a 1991 map from the Daggett County Recorder's Office, like the 1979 map, displayed none of route D28. Exhibit D to Brengel Dec.

Year of Daggett County map	Route on Daggett County General Highway Map?	Route listed as intended for County maintenance?
1962	East-west portion of route through center of section 22 is not on map; north-south segment at eastern edge of section 22 is on map	Only north-south segment on map listed for maintenance
1966	East-west portion of route through center of section 22 is not on map; north-south segment at eastern edge of section 22 is on map	Only north-south segment on map listed for maintenance
1971	East-west portion of route through center of section 22 is not on map; north-south segment at eastern edge of section 22 is on map	Only north-south segment on map listed for maintenance
1975	East-west portion of route through center of section 22 is not on map; north-south segment at eastern edge of section 22 is on map	Only north-south segment on map listed for maintenance
1975 (edited)	East-west portion of route through center of section 22 is not on map; north-south segment at eastern edge of section 22 is on map	NONE of route on map listed for maintenance
1979	NONE of route on map	NONE of route listed for maintenance

In short, for the 14 years prior to the repeal of R.S. 2477, and even thereafter, the middle section of the route did not appear on County maps.

Previous County Road and Right-of-Way Claims. Daggett County failed to identify the center portion of route D28 when is identified all roads in existence in the county in about 1978, and similarly failed to display on a map, identify, or claim as an R.S. 2477 right-of-way the center portion of route D28 when it submitted to BLM a permit application for "all" county roads as R.S. 2477 rights-of-way in 1993.

Shortly after 1978, Daggett County submitted to UDOT what has become known as a "Class D" road map as required by Utah state law. That law at that time required that:

> 1. Each county shall prepare maps showing to the best of its ability the roads within its boundaries which were in existence as of October 21, 1976.
> ….
> 2. Any road which is established or constructed after October 21, 1976, shall similarly be reflected on maps prepared as provided in Subsection (1).

Utah Code. Ann. § 27-15-3 (1978) (later recodifed and amended as § 72-3-105). The map submitted by Daggett County does not show the center portion of route D28 that cuts across section 22 in an east-west direction as a road in any way. See Map, Class "D" Road System,

circa 1978, Daggett County (obtained from UDOT), attached as Exhibit 54.[100] While the inclusion of a line on the map indicating a Class D route is not enough to establish that a constructed highway existed there, the failure – as here – to locate a significant portion of the route on the Class D map certainly indicates that the route was so insignificant that the County did not considered it to be an "existing" road.

In addition, in February 1993, Daggett County submitted to the BLM an application for road rights-of-way. See Application for Transportation and Utility Systems and Facilities on Federal Land (signed Feb. 11, 1993), in BLM Right-of-Way file UTU-071204, and attached as Exhibit 55. The application states that the County seeks rights-of-way for "Existing County Roads." Id. at 1. The application claims routes highlighted in yellow (for those claimed as 40' wide), green (66' wide), or purple (80' wide) on a 1991 Daggett County "General Highway Map." Id. at attached maps. The maps do NOT display the east-west section of D28 through the center of section 22. This part of the route does not appear on the map, and it is not claimed as an "Existing County Road" in Daggett County's 1993 application. In addition, the County later submitted a letter in support of its application, clarifying that its request for rights-of-way covered "all county roads crossing public land administered by BLM." Letter of E. Steinaker, Daggett Co. to T. Stephenson, BLM, Utah St. Office (Apr. 28, 1993) (emphasis added) (in BLM Right-of-Way file UTU-071204), attached as Exhibit 56. Thus, in submissions presented to the BLM in 1993, Daggett County made clear that it had no interest in the central portion of route D28 as a County road, and its maps did not show the route as in existence.

Maps and Aerial Photos Prepared by or Filed with the Federal Government. Numerous maps prepared by or for the U.S. government before October 1976 – and later – also fail to show the entirety of route D28.

The U.S. Geological Survey (USGS) prepared a "Geologic and Structure Contour Map of the Clay Basin Gas Field and Vicinity" in 1949. See Exhibit 57 (excerpts), attached (obtained from BLM, Utah State Office, File: Clay Basin Known Geologic Structure). While the map displays a number of roads in the area, it does not display route D28 at all.

A 1:24,000 scale topographical map prepared by the U.S. Geological Survey in 1952 – the only such scale USGS map that we could locate prepared before October 21, 1976 – fails to display the east-west portion of the route through center of section 22. See Declaration of Douglas C. Pflugh (map excerpts attached thereto as Exhibit A), attached as Exhibit 58 ("Pflugh Dec."). The omission from the USGS map appears to have been intentional, for although USGS personnel had access to aerial photos showing a portion of this route, no landscape scar at all is visible for that portion of the route from the center of section 22 to the eastern edge of the

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[100] On this map, the class D road claims, in red, are superimposed over a 1975 General Highway Map of Daggett County, apparently the same one excerpts for which are attached as to Mr. Kessler's Dec. (Exh. 51) at Exhibits E and F. While the class D map appears to show a feature of some kind in the center of section 22, it appears to be the same feature that is on the general highway map – a watercourse. In addition, neither that marking – nor any other part of route D28 – is claimed in red as a class D road.

section. In short, the middle part of the route is invisible and does not appear to exist on the ground from the May 1950 aerial photo the USGS apparently used in creating its map. Pflugh Dec. at ¶¶ 15-22, and Exhibits D-H attached thereto. A route which USGS did not consider "mapworthy" – even as a jeep trail – is extremely unlikely to meet any definition of the term "highway."

The fact that the 1950 aerial photos show no scar at all for a significant portion of this route also casts serious doubt on the veracity and reliability of statements of those State affiants who allege that they traveled on the route in 1941; that the route was then "well established;" and that trucks traveled the route in 1941. See Dickinson D28 Aff. at ¶¶ 5, 10-11; Radosevich D28 Aff. at ¶¶ 5, 10-11.

Like the 1952 USGS 1:24000 map, a 1981 USGS map, at a scale of 1:100,000 fails to show the same portion of the route. USGS Map, Dutch John (1981), excerpts attached as Exhibit 59.

A 1955 Ashley National Forest map which displays BLM land in the vicinity of the Forest (including section 22) does not show any portion of the route. USDA Forest Service, Ashley National Forest, Utah (1955), excerpts attached as Exhibit H to Brengel Dec. (Exh. 53).

In 1972, BLM and Daggett County signed an agreement concerning maintenance of routes on BLM land in the County. "Memorandum of Understanding to Clarify Road Construction and Maintenance Responsibilities in Daggett County," (May 15, 1972) (hereafter "BLM-Daggett County MOU"), attached as Exhibit 60. The BLM-Daggett County MOU specifies two types of roads on public lands: those "roads constructed or acquired by the County and which serve generally public access purposes" which were to be maintained by the County (displayed in dark blue), and those "constructed or acquired by the Bureau which are needed primarily for the administration and management of the public lands," which BLM agreed to maintain (displayed in orange). Id. at 2 and attached maps. The attached maps do not display at all the east-west portion of the route through center of section 22, although it does claim for County maintenance the north-south portion of the route. Id. The failure of Daggett County to claim the majority of the route for "generally public access purposes" is an indication that the County did not believe that the route was a "highway" for R.S. 2477 purposes.[101]

A number of BLM maps – even after 1976 – similarly fail to identify the route. Most importantly, the BLM prepared a management framework plan (MFP) for the area in the 1980s. As part of that MFP, BLM prepared a decision concerning off-road vehicle use in a number of areas, including the Clay Basin. The decision was to allow "use of present roads and trails" only for off-road vehicles (ORVs) from April 1 to June 15. See BLM File Browns Park MFP, Vol. 2 of 2, Recreation Activity R-8.2 at un-numbered 2-3 (emphasis added), attached as Exhibit 61 (reviewed and copied at Vernal BLM office, Nov. 2004). The MFP also contains an "Off-Road Vehicle Plan and Implementation Procedures," dated 1983, that states that "ORV use is limited

[101] When Daggett County and BLM modified the MOU in 1985 to transfer the maintenance of some routes, they used the same map, and the County again did not seek agreement to maintain the majority of D28. See MOU, Attachment C (at Exh. 60).

to designated roads and trails" within the Red Creek Watershed (which includes the Clay Basin and the area in which route D28 lies) and that a "brochure indicating the location of public lands and their applicable ORV limitations will be prepared for free distribution." BLM File: Browns Park MFP, Vol. 2 of 2, Off-Road Vehicle and Implementation Procedures (1983) at un-numbered 1, 2 (emphasis in original) (reviewed and copied at Vernal BLM office, Nov. 2004), attached as Exhibit 62. Accompanying this plan is the referenced brochure, which states that "Off-road vehicle use, except snowmobiles[,] is limited to designated routes and trails indicated by" a dark line. BLM File: Browns Park MFP, Vol. 2 of 2, Off Road Vehicle Designations [pamphlet], (Jan. 1983), attached as Exhibit 63. The map in the pamphlet does not show the east-west portion of route D28 through the center of section 22. Given that the original decision limited ORV use to "present roads and trails," and that BLM failed to designate a significant portion of D28 as a route open for ORV use, it appears that BLM did not recognize D28 as an existing road (or even as a trail) in 1983. In fact, it apparently closed the center portion of the route to vehicle travel.

At about the same time as BLM adopted ORV restrictions for the area, the agency created the 22,867-acre Red Creek Watershed Area of Critical Environmental Concern (ACEC). See 49 Fed. Reg. 8499-50 (Mar. 7, 1984), attached as Exhibit 64. BLM's decision was analyzed in an environmental assessment (EA). BLM, EA UT-080-3-14, Proposed Green River Scenic Corridor ACEC and Proposed Red Creek Watershed ACEC (Oct. 1982) (in Browns Park MFP, Vol. 2 of 2, viewed in BLM Vernal Office, Nov. 2004), attached as Exhibit 65. The map accompanying the EA does not show that portion of route D28 through the center of section 22 (although it does show the north-south section of the route along the eastern edge of section 22). Id., at attached map.

Later BLM documents reinforce those of the mid-1980s. In 1994, BLM published a resource management plan (RMP) for the Diamond Mountain resource area, and included in that plan a decision to continue to protect the Red Creek ACEC. A map of the ACEC in the RMP shows some routes in the Clay Basin area; it does not show any of route D28. See BLM, Diamond Mountain resource area RMP (1994), excerpts attached as Exhibit 66 (map at page following 3-28).

The off-highway vehicle management map in map packet #6 attached to the Diamond Mountain resource area RMP also fails to show the east-west portion of the route through center of section 22. Id. at Map #6 (on file at Vernal BLM).[102] Further, this map shows that in the area where the claimed route is located, off-road vehicle travel is "limited to designated roads and trails – seasonally." Id. In other words, since the center of the route does not appear on the map, BLM has decided that this route is closed to certain types of vehicle travel at least part of the year.

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[102] The author has this map on file on disc, but does not provide a copy of this map with this letter. While a viewer can zoom in on the map to identify the routes in question on the computer, printing a version of the map from the disc does not yield a high-quality product. We assume that BLM can review a copy of this map in its own files.

A 1995 map filed by the Questar Pipeline Company – the manager of gas injection wells in the area – attached to a filing with BLM also fails to show the center section of route D28, despite the fact that the map focuses only on section 22. See Sundry Notices and Reports on Wells (submitted Jan. 30, 1995) at attached map (dated 11/28/94) (from Vernal BLM Files, Clay Basin Unit, General Correspondence), attached as Exhibit 67.

For purposes of the existence of the alleged right-of-way, the period before October 21, 1976 is clearly the most relevant period. However, the fact that maps before and after the relevant period fail to show some or all of the route further reinforces the fact that this route was not a "constructed highway," and was not considered a "constructed highway" either before or long after R.S. 2477's repeal.

The fact that BLM limited ORV travel to existing roads and trails in 1983 and did not recognize route D28 – and in published a pamphlet showing the area of the route closed to off-road vehicle travel – put on notice any party who claimed a state or county "highway" existed there that BLM was asserting an interest contrary to such a claim, and that BLM was investing significant resources in limiting use of the area. This notice would trigger the running of the 12-year statute of limitations clock under the Quiet Title Act (QTA). See 28 U.S.C. §§ 2409a(g); Southwest Four Wheel Drive Ass'n v. BLM, 271 F. Supp. 2d 1308 (D. N.M. 2003) (BLM notice that an area lacked roads started 12-year QTA clock against those claiming existence of a constructed highway pursuant to R.S. 2477). Thus, if BLM grants a disclaimer application for this route, it will effectively grant to Daggett County something that the County could not achieve through litigation under the QTA. BLM cannot undertake this kind of give-away because to do so would be to surrender rights-of-way that Daggett County could not obtain through a court of law.

B. Maps and Other Data Do Not Support a Finding that Route D30 Was a "Constructed Highway" before 1976.

Like the application for route D28, the application for route D30 submitted by Utah contains little to no credible evidence to support the contention that that route was a "constructed highway" before October 21, 1976, particularly given that the County itself admits that it has no supporting evidence.

Other evidence available in State, County and BLM files fails to support Utah's application. As with route D28, the absence of the entirety of the route on a number of maps before October 21, 1976 and even long after undermines Utah's claim. When route D30 does appear on maps it appears as a dashed line, indicating an unimproved dirt road – and hence not a constructed highway. And while the entirety of route D30 appears on maps more often than route D28 after October 1976, the appearance of the route on maps after R.S. 2477 was repealed cannot support Utah's claim.

State and County Maps. "General Highway Maps" of Daggett County on file at UDOT for the 14 years prior to R.S. 2477's repeal detail where the County claimed that it intended to

maintain a route to certain minimum standards apparently. These maps do not display route D30.[103]

Year of Daggett County map	Route on Daggett County General Highway Map?	Route listed as intended for County maintenance?
1962	Route DOES NOT appear on map	NO
1966	Route DOES NOT appear on map	NO
1971	Route DOES NOT appear on map	NO
1975	Route DOES NOT appear on map	NO
1975 (edited)	Route DOES NOT appear on map	NO
1979	Route DOES NOT appear on map	NO

In short, for the 14 years prior to the repeal of R.S. 2477, and even thereafter, the route did not appear on County maps.

Maps Prepared by or Filed with the Federal Government. While some maps prepared by or for the U.S. government before October 1976 display route D30, where it is displayed it is almost always identified as an unimproved route. Nothing in these maps indicates that the route was constructed by October 1976.

The 1949 USGS map of "Geologic and Structure Contour Map of the Clay Basin Gas Field and Vicinity" fails to display route D30. See Exhibit 57. The 1952 1:24,000 USGS topographical map displays the route, but displays it only as an unimproved road. Pflugh Dec. (Exh. 58) at Exhibit A. This is hardly surprising, since even the suspect affidavits submitted by the State do not allege that the entirety of the route was constructed at that time. See Dickinson D30 Aff. at ¶ 6; Radosevich D30 Aff. at ¶ 6

The 1955 Ashley National Forest map which displays BLM land in the vicinity of the Forest (including section 22) does not show the route. See Exhibit H attached to Brengel Dec. (Exh. 53).

As noted above regarding route D28, the 1972 BLM-Daggett County MOU, attached as Exhibit 60, specifies two types of roads on public lands: those "roads constructed or acquired by the County and which serve generally public access purposes" which were to be maintained by the Count), and those "constructed or acquired by the Bureau which are needed primarily for the administration and management of the public lands," which BLM agreed to maintain. Id. at 2 and attached maps. The attached maps do not appear to display any route at all on the west side

[103] Relevant excerpts of all identified maps are attached as Exhibits B-G to the Declaration of Jeff Kessler (Exh. 51). Virtually identical Daggett County highway maps for 1962, 1966, and 1979 were obtained from the Daggett County Recorder's Office, and also fail to display route D30. See Brengel Dec. (Exh. 53) and maps attached thereto as Exhibits A-C. In addition, a 1991 map obtained from the Daggett County Recorder's Office displays none of route D30. Brengel Dec. at Exhibit D.

of section 22 – the location of route D30. Id. The failure of Daggett County to claim the route for "generally public access purposes" is an indication that the County did not believe that the route was a "highway" for R.S. 2477 purposes in 1972.[104]

Some BLM maps after 1976 display the route, but do not make clear whether it is a "constructed highway" or merely an unconstructed route open to ORV travel. The Browns Park MFP, prepared in the mid-1980s, permitted off-road vehicle use in the Clay Basin on "present roads and trails" for off-road vehicle only from April 1 to June 15. See BLM File Browns Park MFP, Vol. 2 of 2, Recreation Activity R-8.2 at un-numbered 2-3 (emphasis added) (Exh. 61). The MFP also contains an "Off-Road Vehicle Plan and Implementation Procedures," dated 1983, that states that "ORV use is limited to designated roads and trails" within the Red Creek Watershed (which includes the Clay Basin and the area in which route D30 lies) and that a "brochure indicating the location of public lands and their applicable ORV limitations will be prepared for free distribution." BLM File Browns Park MFP, Vol. 2 of 2, Off-Road Vehicle and Implementation Procedures (1983) at un-numbered 1, 2 (first two emphases in original, third emphasis added) (Exh. 62). Accompanying this plan is the referenced brochure, which states that "Off-road vehicle use, except snowmobiles[,] is limited to designated routes and trails indicated by" a dark line. Off Road Vehicle Designations [pamphlet], (Jan. 1983) (Exh. 63) (emphasis added). The map in the pamphlet does show route D30, but there is certainly no indication as to whether BLM considered the route to be a road, an unimproved, un-constructed vehicle route, or a "trail."

Maps accompanying the decision to create the Red Creek Watershed ACEC fail to demonstrate that the route was a "constructed highway." The map accompanying BLM's 1983 EA on the ACEC displays the route, but shows it, again, as an unimproved route. See Exh. 65.

A decade later, BLM's maps included in the Diamond Mountain resource area RMP fail to include any information demonstrating that the route was a "constructed highway." A map of the ACEC in the RMP shows some routes in the Clay Basin area, but it does not show any of route D30. See Exh. 66 (map at page following 3-28).

The off-highway vehicle management map attached to the Diamond Mountain resource area RMP, published in 1994, displays route D30, but does so as a "Designated BLM Road[] or Trail[]." Id. at Map #6 (on file at Vernal BLM) (emphasis added).[105] BLM chose to label the route as a BLM road or trail, and not as a "Federal, State, or County road[]."

In sum, maps prepared by and for the federal government before and after 1976 sometimes fail to display the route, and when the maps do display the route, there is no

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[104] When Daggett County and BLM modified the MOU in 1985 to transfer the maintenance of some routes, they used the same map (which does not display D30), and the County again did not seek agreement to maintain D30. See Exhibit 60.

[105] The author has this map on file on disc, but does not provide a copy of this map with this letter. See note 102, above.

indication that it was a constructed highway. Thus, nothing in these records requires or permits BLM to find that route D30 meets the standard necessary to establish an R.S. 2477 right-of-way.

Previous County Maps and Right-of-Way Claims, 1978 and 1993. While Daggett County did claim route D30 as a "Class D road" in 1978 and submitted an application for a right-of-way that included at least a portion of route D30 in 1993, nothing in these applications demonstrates that in October 1976 the route met R.S. 2477's requirement for a "constructed highway." See Exh. 54.

The 1978 "Class D" road map contains no indication as to whether the routes identified are "constructed highways." A notation stamped on the map by UDOT states: "Accuracy and Validity Not Checked by UDOT," so clearly UDOT has no wish to be bound by the information submitted by Daggett County. Further, the definition of class D road indicates that counties could submit claims for routes that were not constructed highways, and thus clearly did not meet the definition of an R.S. 2477 right-of-way:

> As used in this section, "class D road" means any road, way, or other land surface route that has been or is established by use or constructed and has been maintained to provide for usage by the public for vehicles with four or more wheels that is not a class A, class B, or class C road under this title.

Utah Code § 72-3-105(1) (emphasis added). Thus, the mere fact that a route appears on a class D road map does not mean that the road actually meets the "construction" requirement of R.S. 2477, since it could include any path established and maintained by use of four-wheeled vehicles, a standard that BLM firmly rejected (and continues to reject) in litigation in SUWA v. BLM, 147 F. Supp. 2d 1130 (D. Utah 2001) (on appeal). In addition, because Daggett County has admitted that it has no information concerning the construction or maintenance of the route, its decision to place the route on its class D map – which is an allegation that the route was established or constructed and maintained – is utterly unsupported. In addition, attorneys for the applicant – the State of Utah – have gone to great lengths to question the relevance of the class D maps to R.S. 2477 claims. See letter or R. Finlayson, Office of the Utah Att'y Gen'l to P. Fisher, Tenth Cir. Court of Appeals (Apr. 22, 2005), attached as Exhibit 68 (stating that the Utah law "does not purport to address what is required for R.S. 2477 rights-of-way" and that Counties also placed on class D road maps "roads established or constructed after October 21, 1976" (emphasis in original)).

Daggett County did include at least part of route D30 in the County's application for rights-of-way for "Existing County Roads" submitted to the Bureau of Land Management in 1993. See Application for Transportation and Utility Systems and Facilities on Federal Land (signed Feb. 11, 1993), at Exh. 55.[106] Daggett County, however, failed to provide any

[106] In its 1993 application to BLM, Daggett County claimed route D30 for a width of 40 feet. See maps attached to Exh. 55. With this disclaimer application, the State and Daggett County seek recognition of a right-of-way 45 feet in width. While in neither case did Daggett County provide any information supporting the right-of-way's claimed width or how it was

documentation at all with its application to support the proposition that route D30 was a "constructed highway." In addition, it is unclear from the maps whether Daggett County was claiming the route to a junction with the east-west route which it meets on the route's southern end – the maps are not clear. In any event, a claim in 1993 that a route is a county highway is hardly convincing evidence that a constructed highway existed 17 years previously, before R.S. 2477 was repealed, particularly when the County issued a highway map in 1991 that did not show the route. See Brengel Dec. (Exh. 53), map attached thereto as Exhibit D.

C. Even if Routes D28 and D30 Were Constructed before October 21, 1976, They Were Likely Constructed by an Energy Company Pursuant to a Lease Agreement, Not as Public Highways Pursuant to R.S. 2477.

As the current survey plats for the Clay Basin show, routes D28 and D30 are both located within an area that is developed for natural gas storage, and which, prior to 1976, was also developed for petroleum extraction. Sections 21, 22, and 23 – in which all but the most southern parts of routes D28 and D30 are located – were leased for petroleum development in 1929 or 1930. See Lease of Oil and Gas, SL-045051(a) (Oct. 10, 1929), attached as Exhibit 69; Lease of Oil and Gas, SL-045051(b) (Sep. 29, 1930), attached as Exhibit 70. Notations of the survey plats for township 3 north, range 24 east (on file at BLM's Utah Office in Salt Lake City) indicate that the northern half of section 27 was leased on April 27, 1937.

Given that the County has admitted that it has no evidence that it constructed the routes, it seems likely that the routes – whenever and to whatever extent they were constructed – were built to facilitate access to petroleum development facilities.[107] If the routes were constructed between 1929 and 1976, however, they were built when most of the lands were under lease to various energy companies.

Under the Mineral Leasing Act of 1920, the federal government granted leases for the exploitation of federal lands for a variety of purposes, including (relevant here) the development of oil and gas deposits. 41 Stat. 437, P.L. No. 66-146 (1920). In issuing leases under the Act, including both of the leases at issue here, the federal government has consistently granted to the lessee the right to "construct and maintain thereupon all ... roads ... necessary to the full enjoyment" of the lease property. See Exh. 69 (SL-045051(a)) at 1; Exh. 70 (SL-045051(b)) at 1. The fact that the lease expressly grants the lessee the right to construct roads indicates that oil and gas 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 expressly grant this authority.

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determined, the County's inability to identify the route's width with any consistency casts even more doubt on the application's validity.

[107] This is not inconsistent with hearsay statements passed on by the State. For example, the cover letter from the State's disclaimer applications asserts (without supporting first-hand documentation) that the routes were constructed to provide access to gas wells in the area. Fairbanks D28 letter at 1; Fairbanks D30 letter at 1.

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 closed to the public unless the Secretary took affirmative action to open them to third parties or the public. 41 Stat. at 449 § 29; see also Exh. 69 at 4 (Section 3 of lease agreement reserving these rights explicitly to the Secretary in the lease in question); Exh. 70 at 4 (same). 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 oil and gas companies made to access their leasehold.

Leaseholders would reasonably desire some measure of control over their ability to access their oil and gas 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 neither D28 nor D30 qualify as R.S. 2477 rights-of-way.[108]

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 71. This Solicitor's Opinion is consistent with long-standing principles of property law. The rights that the oil and gas leaseholder has 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 oil and gas leases like the one at issue in this case only granted the right to construct roads and other improvements on the lease to the extent "necessary to the full enjoyment" of the lease. Exh. 69 at 1; Exh. 70 at 1 (leases). Thus, the easement for road construction on oil and gas leases must

[108] 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.

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.[109] Therefore, a road constructed over a federal oil and gas lease by the leaseholder cannot be a "public" highway that qualifies for R.S. 2477.

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 (Exh. 71) at 4. Thus, by permitting the lessor a temporary right to build roads to access the leasehold for the purposes of removing petroleum products, 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 1929 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.

D. Even if Routes D28 and D30 Were Constructed before October 21, 1976, They Were Likely Constructed after the Lands Were "Reserved" by Oil and Gas Leases.

The grant of lands for rights-of-way under R.S. 2477 is limited to lands "not reserved for public uses." However, in granting the leases for oil and gas development that cover the routes at issue here, the United States "reserved for public use" the lands covered by those leases. Accordingly, from the date of the issuance of those leases – as early as 1929 – the lands in question were not covered by R.S. 2477 and no grant of land by the federal government was made.

Leases issued under the Mineral Leasing Act of 1920 for oil and gas development provide an exclusive right to the lessee to develop those leases for oil and gas. Section 29 of the Act reserved to the federal government the right to "lease, sell, or otherwise dispose of the surface" of the lands within leases, so long as the government did not interfere with the lessees

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[109] Additionally, the lessee's opening of a road on its oil and gas lease to the public would allow the use of the easement by third parties to benefit other pieces of property besides the oil and gas lease. 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 oil and gas lease would violate this principle.

ability to extract and remove oil and gas resources from the lease. Thus, the Act set up a careful balance by which the federal government retained the ability to make other uses of lands leased for oil and gas under the 1920 Act, so long as it did not interfere with the valid existing rights of the leaseholder under that lease.

Accordingly, the ability of the government to dispose of leased oil and gas lands was significantly restricted. This restriction meant that lands leased for oil and gas uses were, for purposes of R.S. 2477, "reserved for public uses," and the grant of lands under R.S. 2477 is superseded by the existence of an oil and gas lease. Otherwise, any party could construct a public highway across an oil and gas lease and obtain a right-of-way valid against both the federal government and the leaseholder -- even if the route covered by that right-of-way interfered with the leaseholders development of the lease for oil and gas development. (Interference might occur either by physically preventing development or by eliminating the leaseholders' legal right to explore and develop the oil and gas resources beneath the right-of-way.)

VII. OTHER EVIDENCE DOES NOT SUPPORT THE VALIDITY OF THE ALLEGED RIGHT-OF-WAY FOR THE HICKORY PEAK ROUTE.

A. Legal Background: Mining Access Roads Are Distinct from R.S. 2477 Rights-of-Way.

Prior to 1976, access to mining claims across adjacent federal lands has been granted pursuant to an "implied right of access" under which mining claimants had the right to use or make roads over lands retained by the government to the extent "reasonably necessary to the full enjoyment of the mineral rights" of their claims. See Mary Jane C. Due, Access Over Public Lands, 17 Rocky Mt. Min. L. Inst. 171, 175 (1972), excerpts attached as Exhibit 72; Department of the Interior, Rights of Mining Claimants to Access Over Public Lands to Their Claims (M-36584), 66 I.D. 361, 363-64 (1959), attached as Exhibit 73. This access is different from the explicit grant of authority under the 1866 mining act that created R.S. 2477. See Due at 174, 176 (distinguishing between the two); Leonard J. Lewis, Access Problems and Remedies for Oil and Gas Operators, 26 Rocky Mt. Min. L. Institute 811, 835-37 (1980) ("As a general rule, mining roads constitute a separate class of roads from the public highways referred to in [R.S. 2477]"), excerpts attached as Exhibit 74.

According to attorneys for the Interior Department, access under the "implied right of access" is more limited than under R.S. 2477. Any road created is "in the nature of a 'private road' across another's land which is primarily used by one or more persons but which may be used by anyone," including the United States and its permittees or licensees. 66 I.D. at 365; see also Due (Exh. 72) at 176. However, use by third parties is permissible only so long as "it does not unduly interfere with its use for the legitimate purpose for which it was built." 66 I.D. at 365. If the mining claim that it serves is abandoned, the road becomes "the sole property of the United States." Id.; see also Due (Exh. 72) at 176. The concept of a "private road" is one long recognized by the State of Utah. See Utah Code Ann. § 41-6-1 (2005) (defining private road).

Given that the general mining laws of the United States implied a right of access across its lands for those seeking to exploit mineral claims, it would make little sense for the use or construction of such roads to create an R.S. 2477 right-of-way for a public highway. As noted above, an R.S. 2477 right-of-way is controlled by the local government and could be abandoned or closed at the choice of that government. The mining laws have not be read to provide that the mine claimant or patent holder immediately loses control over a road that the claimant had constructed to access a claim or patented land by virtue of the route, upon construction, ceasing to be in the nature of a 'private road' and becoming an R.S. 2477 public highway.

B. To the Extent that the Hickory Peak Route Was Constructed, It Was Likely Constructed as a Private Mining Road to Patented Mine Land.

The Hickory Peak route crosses BLM land and terminates at private land in the vicinity of the Harrington & Hickory mine. Based upon a review of USGS maps, it appears that the claimed route ends where it enters private (patented) land at the site of that mine. The most likely patented claim at the western terminus of the route is the Harrington & Hickory Consolidated (Mineral Survey 41, North Star District) claim, which has a patent date of January 24, 1874, as listed in the Historical Index. Affidavits submitted to support the application further allege that the claimed route is otherwise known as the "Harrington-Hickory Road," and that the claimed route "reach[es]" the mine. See, e.g., Lister Hickory Peak Aff. at ¶¶ 2-3; Merryweather Hickory Peak Aff. at ¶¶ 2-3. The route is thus little more than an extended driveway across public land to the patented, private land.[110]

Assuming that the State is correct that the route was used to facilitate mining at the Harrington Hickory claim since the 1870s,[111] then the Hickory Peak claim cannot be an R.S. 2477 right-of-way. Rather, pursuant to the Interior Department Solicitor's opinion, the route is in the nature of a private road – rather than a public highway – meant to facilitate access to and from the patented land at what once was the Harrington & Hickory mine. Simply because the County takes it upon itself to grade or maintain a private road does not, by that act, convert the route into a public highway pursuant to R.S. 2477. Whatever access rights against BLM that come with the implied right of access to the mine land is limited to the access needs of the landowner, not the general public (as would be true for a public highway R.S. 2477 right-of-way). BLM cannot disclaim a right-of-way interest to the State of Utah because whatever right-of-way was granted was granted to another party for another purpose.

Thus, even assuming that all of the hearsay and unsubstantiated comments submitted by the State are true, the Hickory Peak route is not an R.S. 2477 right-of-way.

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[110] In any event, the nature of the route's end-point – apparently unoccupied private land – also means that the route does not constitute a "highway" pursuant to R.S. 2477.

[111] See McCully Aff. at ¶ 5.

VIII. OTHER EVIDENCE DOES NOT SUPPORT THE VALIDITY OF THE ALLEGED RIGHT-OF-WAY FOR THE HORSE VALLEY ROUTE.

A review of maps and other data from the USGS, UDOT, and BLM, as well as other evidence, fails to demonstrate when the Horse Valley route was constructed, and if so, by whom and for what purpose. BLM, however, has asserted for years that Horse Valley is a BLM route, maintained – and perhaps initially constructed – by BLM.

A. Federal Agency Records and Maps Indicate that the Route Is a BLM, Not County, Route.

Information from the initial U.S. public survey of the area does not identify a constructed highway in the area where the claimed Horse Valley route is now. 1911 field notes of the General Land Office Survey indicate a "road" in Township 31 South, Range 11 West at the approximate location of the Horse Valley claim in Iron County at the border between sections 4 and 9, sections 20 and 29, and sections 17 to 20. See Field Notes of the Survey of the Subdivision of Township No. 31, Range No. 11 West (filed Feb. 17, 1913) (in BLM State Office Public Reading Room). However, the survey notes do not define the term "road," fail to indicate whether the route was "constructed," and fail to note even a "road" at all of the section lines that the claimed route now crosses.

Consistent with the surveyor's notes, some route fragments are depicted on the 1914 survey plat of the area near the path of the current claimed route. Surveyor General's Office, Map of Township 31 South, Range 11 West (approved Jan. 7, 1914) (on file at National Archives and Records Administration, Denver) attached as Exhibit 75. However, the survey plat does not identify a road, trail or any similar feature between sections 9 and 16 and between sections 16 and 17; it simply shows a route petering out in the northeast quarter of section 9. Id. On the plat, a route is shown at the boundary of sections 17 and 20 in the approximate location of the claimed route, but the plat does not show the route continuing beyond a few hundred yards. Id. The plat map also fails to show a route crossing the boundary between section 29 and 28 near the location of the claimed route, nor does it show any route traversing section 28 in the location of the claimed route, although it shows another route traversing the section. Id. In short, survey reports and early plat maps do not indicate a "constructed highway" along the entirety of the presently claimed route, instead showing a number of fragments of routes with significant gaps.

USGS 1:24,000 topographic quadrangle (quad) maps from the 1950s and the 1980s display the route, but identify it as an "unimproved road" or "unimproved dirt." See USGS Quad Map, Baboon Peak (provisional edition 1989) (obtained from BLM through Freedom of Information Act) excerpts attached as Exhibit 76 (identifying route as "unimproved dirt"); and USGS Quad Map, Ninemile Knoll (1953, photorevised 1978) (obtained from BLM through Freedom of Information Act), excerpts attached as Exhibit 77 (identifying route as "unimproved road"). Thus, USGS did not identify the route as "improved" or "constructed."

A number of documents in BLM files indicate that the agency has considered – and still considers – the Horse Valley route to be a BLM route, not a County route. USGS maps in BLM's files highlight the route in brown ink in both Beaver and Iron counties, indicating, as the

legend shows, that the route was a "BLM road." See Exhs. 76 and 77 (USGS Quads). BLM confirmed via letter that "the color brown means BLM has maintenance responsibility" for roads so highlighted. Letter of T. Christensen, BLM Cedar City Field Off. to E. Zukoski, Earthjustice (Apr. 19, 2005) at 2, attached as Exhibit 78. According to BLM, these "maps were used as an orientation map of the roads for which BLM was taking maintenance responsibility. Notations may have been written between 1975 and the early 1990s." Id.

The BLM maps further identify at least part of the route by number and name as route 4406, the Government Well South route. See Ninemile Knoll Quad (Exh. 77) and Baboon Peak Quad (Exh. 76). A printout from BLM's Facility Inventory Maintenance Management System (FIMMS) database this year (last updated in 2001) states that for 7 miles from its northern terminus, the Government Well South route is under the "jurisdiction" of – and that "maintenance responsibility" belongs to – the BLM. See BLM, FIMMS printout, Government Well South (Mar. 9, 2005), attached as Exhibit 79. In explaining the FIMMS print-out, BLM indicated that it considers the route to be under its jurisdiction, and that a route so identified "is usually a BLM maintained road [because] the road accesses BLM lands to BLM sites." Exh. 78 (Christensen letter) at 1. BLM further indicated that the agency would not have identified the route as it did "if the county or state provide funds to improve the road." Id. That's because if the counties do provide such funding, "then they may do the maintenance." Id.

The USGS and BLM maps and FIMMS database printout indicate that BLM understood that the Horse Valley route was a route that BLM must maintain because the respective counties did not. This casts doubt on assertions in the State's affidavits that the route is and has been maintained by the County for years. It also casts doubt as to whether the route was a highway constructed by someone other than BLM or its predecessors, and thus that it qualifies as an R.S. 2477 right-of-way.[112]

B. Iron County Maps Do Not Demonstrate that the Entirety of the Route Was a Constructed Highway.

While General Highway Maps of Beaver County on file at UDOT before 1976 appear to display that portion of the route in Beaver County, such general highway maps for Iron County show none of the route or only that part of the route that extends from Iron County's northern boundary into section 17 (of Township 31 South, Range 11 West) is claimed as maintained. A General Highway Map of Iron County dated 1952 does not show any portion of the route in the County; in fact it shows no routes at all in the relevant sections of Township 31 South, Range 11 West. See Iron County, General Highway Map (1952), excerpts attached as Exhibit F to Brengel Dec. (Exh. 53).

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[112] If BLM constructed the route, the route cannot be an R.S. 2477 right-of-way. Under the standard principles of easement law, a landowner cannot create an easement by its own actions against itself. See 25 Am. Jur. 2d Easements and Licenses in Real Property § 2 (May 2003 Ed.) ("one may not have an easement in his own land because an easement merges with the title, and while both are under the same ownership the easement does not constitute a separate estate.")

While part of the route does appear on later Iron County highway maps, the entirety of the route does not. The part of the route that the State claims traverses sections 20, 29 and 28 does not exist on Iron County General Highway Maps prepared in 1975, 1976 and even after 1976. See Iron County, General Highway Map (1972, hand-dated "approved Mar. 4, 1975"), attached to Brengel Dec. as Exhibit G; Iron County, General Highway Map (1976), attached to Kessler Dec. as Exhibit H; Iron County, General Highway Map (1980, updated 1985), attached to Kessler Dec. as Exhibit I. In fact on the 1976 Iron County map (as well as the 1980 map, updated 1985), the route simply terminates abruptly in the southern half of section 17 at no discernable destination.

The fact that Iron County did not identify a road or trail of any kind in the County in 1952 at the location of the Horse Valley route, and did not identify a road or trail of any kind in the County through 1976 from section 17 to section 28 casts doubt on the veracity and reliability of the State's declarations submitted alleging use of the route before 1976. Iron County's maps also undermine any determination that the route in Iron County could be considered a "highway" for its claimed length.

An Iron County map of 2001 – a quarter-century after the repeal of R.S. 2477 – identifies the route from the County's northern border south to section 17 as a "dirt road," and the remainder of the route as a "Local Road/Trail." See Iron County Road Map (2001) (emphasis added) attached to Brengel Dec. (Exh. 53) as Exhibit E. Thus, long after the repeal of R.S. 2477, even Iron County was identifying the route as little more than a "trail," which is clearly less than a constructed public highway.[113]

C. Independent Review of the Route Does Not Establish that the Route Is a Constructed Highway.

A review of the route in April 2005 did not locate any constructed improvement – culverts, bridges, or paved sections – on the route. Kessler Dec. (Exh. 51) at ¶¶ 18, 20. The individual who drove the route also "did not observe any obvious evidence of sites adjacent to the route from which material had been removed to provide a surface of the route." Id. at ¶ 18. The observer further noted "a number of features that would appear to be inconsistent with regular maintenance of a route," including deep ruts, and vegetation growing in the center of the route, especially along the Iron County portion of the route. Id. at ¶ 20, and photos identified therein and attached thereto as Exhibit K. These observations cast doubt on the reliability of declarations submitted by the State implying that the route includes improvements and is regularly maintained in Iron County. See Sec. IV(B)(3)(c), above.

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[113] Iron County failed to file any maps with UDOT to identify "roads within its boundaries which were in existence as of October 21, 1976" (the date of FLPMA's repeal of R.S. 2477) as required by State law in 1978. Utah Code. Ann. § 27-15-3 (1978).

IX. IF THE ROUTES WERE CONSTRUCTED, NO EVIDENCE SUPPORTS THEIR 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 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.[114] 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,

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[114] E.O. 6910 is reprinted in full at Utah v. Andrus, 446 U.S. at 514 n.19, and attached hereto as Exhibit 80.

> "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 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 State has provided no credible, first-hand evidence that construction on any of the routes occurred 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.

The State of Utah has certainly submitted no evidence – beyond mere unattributed hearsay – that any of the routes was "constructed" throughout the entirety of their lengths by June 26, 1936. The best evidence is that construction was not complete by that date. Unless and until Utah 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 DISCLAIMERS.

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

While the purpose of the disclaimer regulations is to remove clouds on title, see 43 U.S.C. § 1745(a), approval of any of Utah's applications for a recordable disclaimer of interest will only create more clouds of uncertainty.

The Federal Register notice announcing BLM's intent to issue disclaimers of interest, Utah's applications, and the DOI-Utah MOU itself all fail to make clear what rights the State of Utah and the respective counties will have to exercise over what portion of public land, and what rights BLM is giving up over what extent of the public's lands. What will be the exact impact of a statement "confirm[ing]" that "the United States has no property interest in the identified public highway rights-of-way?" See 70 Fed Reg. 9095 (Feb. 24, 2005). When a standard disclaimer is issued (that is, a statement that the United States has no interest at all in a certain parcel of land), the outcome is clear. Not so here.

Although the State of Utah-DOI MOU refers to the relative rights of the parties, it does not do address those rights clearly. The MOU states:

> In cases where the State or a county wishes to substantially alter a road that is subject to the Acknowledgement Process in a way that is outside the scope of ordinary maintenance, it will do so only after notifying BLM of its intentions and

> giving BLM an opportunity to determine that no permit or authorization is required under federal law; or, if a permit or other authorization is required, securing such a permit or other authorization, issued in compliance with any applicable law, including requirements of Title V of FLPMA and [NEPA].

State of Utah-DOI MOU (Exh. 6) at 4. The MOU does not define key terms of this section, making it impossible to address important questions, e.g.: what does it mean to "substantially alter" a highway in general, and these four routes in particular? What characteristics of these four routes or any other route (or characteristics of their use) will BLM consider subject to the "substantial[] alter[ation]" test? What can the counties or State do to alter these routes or any other route that does not rise to the level of a "substantial" alteration? How will BLM (or the State or counties) determine what constitutes "ordinary maintenance" of the routes – 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 "ordinary" or "extraordinary" maintenance? Under what circumstances will BLM conclude that no permit or authorization is required for extraordinary maintenance that may substantially alter these four routes or any other route? How will such understandings be memorialized so that all interested parties – BLM, the State, the counties, and the public – understand what can and what cannot occur within the right-of-way without prior BLM approval?

While the contours of the rights that BLM intends to surrender are not clear, the rights that Utah seeks to gain through recognition of an R.S. 2477 right-of-way are more evident. In a complaint filed in federal court last year, the State and six counties (including Beaver County) seek to establish the scope of alleged R.S. 2477 rights-of-way such that the routes may be "widen[ed] … at least to the extent of a two lane road," if not wider, and such that the plaintiffs may construct other facilities, including "reasonable and necessary accouterments such as drainage ditches, shoulders, [and] culverts" an unspecified distance "beyond the actual beaten path" of the currently disturbed area. State of Utah v. United States of America, Docket No. 05-cv-108 (D. Utah), State of Utah Amended Complaint (March 4, 2005) at 20, Request for Relief ¶ 2 (emphasis added), attached as Exhibit 81. The State and counties also ask the Court to determine the scope of the alleged rights-of-way such that the State may undertake "reasonable and necessary deviations from the common way without any federal authorization." Id. (emphasis added). Again, it is unclear to what extent some or all of these activities might be undertaken as "ordinary maintenance" and which would be considered to "substantially alter" the route in question.

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) recordable disclaimer(s) of interest. As noted above, the MOU's standards unlawfully require BLM to set scope based on data at the time of the MOU (as opposed to the date of reservation or repeal) and permit BLM to set the width of right-of-way up to the level of the "disturbed area," an approach previously rejected by the courts, at DOI's

urging, as the "most singularly unhelpful, uncertain and ungovernable approach to answering the question of scope." Garfield County, 122 F. Supp. 2d at 1230; see above at Sec. II(C)(2)(d). In short, a cloud of uncertainty will be placed over the exact scope of a right-of-way in which BLM disclaims an interest.

Rather than leave the public, BLM, the State, and the respective counties under such a cloud, BLM must attempt to resolve these issues and define the scope of the right-of-way disclaimed and the relative rights of the parties before a disclaimer is issued. BLM should do so in an open way by issuing a draft disclaimer decision that contains such information, and that seeks public input on BLM's proposal.

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

The vast majority of lands traversed by the four routes 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[115];
- fragment wildlife habitat[116];
- cause direct mortality of wildlife[117];
- 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[118];

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

[116] 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.

[117] Id.

[118] 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).

- indirectly cause an increase in poaching and/or wildlife harassment[119];
- indirectly cause an increase in human-caused fires;
- indirectly cause an increase in damage to nearby archeological resources[120]; and
- indirectly cause an increase in recreational uses in adjacent areas.[121]

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)

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

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

[121] 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).

(noting the Forest Service's "right to reasonably regulate" portions of easement that traverses the agency's lands). Nevertheless, if BLM issues a disclaimer for a right-of-way, it will surrender some authority to manage the route, and thus it will surrender some authority to protect public values implicated by management of the route.

Despite the fact that BLM is considering approving these disclaimer applications, the agency apparently is refusing to consider the environmental impacts of its actions, as the agency is required to do for discretionary actions under National Environmental Policy Act (NEPA). It is apparently the agency's position that its action in approving the disclaimer would be non-discretionary, and hence that considering a disclaimer application is not subject to NEPA. See Memo. of J. Hughes (Exh. 27) at 5. 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.

Environmental damage may occur from a decision to issue recordable disclaimers of interest for these routes, given the fragile environment that some of the routes traverse or abut. For example, the Daggett County routes – D28 and D 30 – lie within the Red Creek Watershed Area of Critical Environmental Concern (ACEC). See BLM, EA UT-080-3-14 (Exh. 65) at unnumbered attached map. The ACEC was designated to "give primary emphasis to watershed protection and the reduction of sediment contributed to the Green River by Red Creek" because such sediment "has a significant adverse effect on the Class I cold water fisheries below Flaming Gorge Dam." Id. at unnumbered signature page. BLM concluded that "[f]uture construction or other surface disturbing activities without adequate safeguards, could result in watershed erosion and an increase in the flow of sediments into the Green River." Id. at 2. Under the ACEC designation: "A plan to provide for the protection of the environment would have to be approved by this [BLM] office prior to each construction or surface disturbing activity in the ACEC." Id. at 3. In fact, BLM records suggest that the agency closed part of route D28 to off-road vehicles in the 1980s to protect the Red Creek watershed. See above Sec. VI(A); BLM, Off-Road Vehicle and Implementation Procedures (Exh. 62) at un-numbered 1, 2; BLM, Off Road Vehicle Designations [pamphlet], (Exh. 63).

More recent Federal agency environmental reviews underscore the importance of the area to wildlife. In its environmental review of a proposal to pave the Browns Park road, with which both D28 and D30 intersect, the Federal Highway Administration identifies the two routes as: adjacent to "high value" elk winter range; within "crucial" deer winter range; within "crucial yearlong" antelope areas; and within "crucial" summer sage grouse areas. Federal Highway Administration, Draft EIS, Browns Park Road at Figures 3-6 – 3-9 (pages 83-86) (Exh. 42). The Draft EIS admits that the paving project for the Browns Park road "would increase the risk of mortality" for antelope and elk, would increase poaching mortality and road kills of sage grouse, and would spread noxious weeds. Id. at 146-48.

Given the value of the area to wildlife, the sensitivity of the area's soils to disturbance, and the Federal government's admission that improving another road in the area will likely harm wildlife and habitat, a decision to cede management of highway rights-of-way for routes D28 and D30 to the State and County will likely have harmful environmental impacts. This is especially true since the BLM will likely lose its authority to prohibit certain forms of access on the routes, a power BLM has exercised with respect to at least one of the two routes in recent years.

CONCLUSION.

BLM must deny Utah's applications for a recordable disclaimer of interest for rights-of-way for route D28, route D30, the Hickory Peak route, and the Horse Valley route because: (1) both the Disclaimer Rule and the State of Utah-DOI MOU that would be used to approve the disclaimer applications are illegal; (2) Utah has failed to provide any evidence beyond unsubstantiated allegations or hearsay that the alleged "highways" were constructed before October 21, 1976; and (3) evidence we submit casts considerable doubt as to whether any of the routes meets the standards of an R.S. 2477 right-of-way.

Should the State or counties attempt to remedy the gross inadequacies of these four applications 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 disclaimers from the State of Utah pursuant to the illegal Disclaimer Rule and MOU, 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 the State continues to submit applications for recordable disclaimers of interest for R.S. 2477 rights-of-way which contain similarly meager and unreliable supporting documentation, BLM must reject the applications unless and until the State 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. Beginning the process for awarding a disclaimer based on the type of inadequate, unsupported, and unreliable evidence the State has provided to date simply burdens BLM and forces the interested public to locate that evidence which Utah has failed or refuses to provide.

Finally, we again urge the State and Beaver, Daggett, and Iron counties to abandon their application for recordable disclaimers of interest, and to instead to pursue FLPMA Title V permits. Such permits would allow BLM to more effectively balance environmental protections while ensuring that the State and counties could take certain actions to maintain the routes.

Thank you for this opportunity to comment. 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

Attorney for The Wilderness Society
Wild Utah Project
Southern Utah Wilderness Alliance

Cc: Jon M. Huntsman, Jr., Governor, State of Utah
Senator Joseph Lieberman
Senator Jeff Bingaman
Senator Dick Durbin
Rep. Mark Udall
Gale Norton, Secretary, Department of the Interior
Rebecca Watson, Deputy Secretary, Lands & Minerals Management, Dep't of the Interior
Kathleen Clarke, Director, Bureau of Land Management
Matt McKeown, Esq., Deputy Solicitor, U.S. Department of the Interior
Mike DeKeyrel, Realty Specialist, BLM, Utah State Office
Beaver County Commission
Daggett County Commission
Iron County Commission
Roger Fairbanks, Esq., State of Utah, Office of the Attorney General
Kristen Brengel, The Wilderness Society
Pam Eaton, The Wilderness Society
Suzanne Jones, The Wilderness Society
Leslie Jones, The Wilderness Society
Heidi McIntosh, Southern Utah Wilderness Society
Lawson LeGate, Sierra Club
Jim Catlin, Wild Utah Project