



southern  
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wilderness  
alliance

UTAH STATE OFFICE  
STATE DIRECTOR'S OFFICE

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May 7, 2004

Sally Wisely, State Director  
Bureau of Land Management, Utah State Office  
Attn: RS 2477  
PO Box 45155  
Salt Lake City, Utah 84145-0155

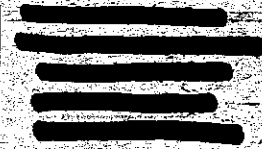
VIA U.S. Mail, FAX and Email

Re: Weiss Highway -- Application for Recognition of R.S. 2477  
Claim pursuant to April 9, 2003 Memorandum of Understanding  
Between the State of Utah and the Department of the Interior on  
State and County Road Acknowledgement / BLM Serial Number  
UTU-81100

Dear Ms. Wisely and the BLM R.S. 2477 Review Office:

The Southern Utah Wilderness Alliance has been deeply involved in the R.S. 2477 controversy since this issue began to emerge as a significant threat to public lands management and preservation nearly 20 years ago. SUWA staff and volunteers have spent countless hours reviewing RS 2477 claims, and have documented hundreds of claims throughout the state. We appreciate the need for certainty regarding the transportation system which provides access to our public lands, and have pursued various opportunities for bringing closure to this ongoing issue. Our comments regarding the Weiss Highway application are informed by this long-standing experience with R.S. 2477.

In short, while the Weiss Highway in itself may not pose a direct threat to areas proposed for wilderness designation in America's Redrock Wilderness Act, our primary focus of concern, the application is widely acknowledged as setting a precedent by which subsequent claims will be evaluated. As a result, we believe that a thorough review of the application according to the principles set forth in Southern Utah Wilderness Alliance v. Bureau of Land Management, 147 F. Supp. 2d 1130 (D. Utah 2001) and other cases, regulations and statutes, shows it to be inadequate in several key respects. These standards set forth the only relevant, governing criteria the BLM can apply for this application.



As a result, the BLM should reject the application until and unless Juab County and the State of Utah submit information adequate to prove their claim that the Weiss Highway was constructed by a non-federal entity prior to 1976. We join the specific comments and concerns expressed by The Wilderness Society dated May 6, 2004, and incorporate their comments herein.

The Application Does Not Demonstrate that the Highway was Actually Constructed by a Non-Federal Entity

Before the BLM can approve the Weiss Highway application, the State and Juab County must provide convincing evidence that the Weiss Highway was:

- Actually constructed by a non-federal entity, and not created by the passage of vehicles;
- A significant transportation route connecting identifiable destinations; and
- That the lands traversed by the claimed highway were public lands not reserved for other uses.

We emphasize that it is the claimants' burden to prove that they have clearly satisfied each of the RS 2477 elements.

Our review of the application and its supporting materials, together with other information not contained in the application, indicates that the road was actually constructed by the Civilian Conservation Corps' – a federal entity funded by federal dollars to facilitate a federal purpose. As a result, the State and County cannot legitimately claim that it has met the requirement that it constructed the Weiss Highway.

Additionally, none of the various affidavits submitted with the application contradict this – in fact, several actually support the conclusion that the highway was constructed in the 1930s by the CCC. See Declaration of Ronald L. Steele (CCC worked on the road as early as 1930s); Declaration of Ronald C. Jones (same). Moreover, while the declarations show that Juab County road crews did some work on the highway, they do not establish that County workers actually *constructed* the route. Instead the declarations simply show that there may have been some level of county maintenance of a federal highway that was actually constructed by the CCC. Those facts are inconsistent with R.S. 2477's application to non-federal entities which have constructed highways across unreserved federal public lands.

The Disclaimer Rule and the MOU Do Not Provide a Lawful Foundation for Evaluation of the Application.

Together with other national, regional and local environmental organizations, we have submitted lengthy comments in connection with the promulgation of the Department of Interior's Disclaimer Rule, demonstrating that

the processing of this -- and countless other R.S. 2477 applications certain to follow -- stretches FLPMA Section 315 far beyond Congress's intent. (These comments are summarized and recounted in The Wilderness Society comments submitted for the Weiss Highway application.)

Nor does the April 9, 2003 Memorandum between the State of Utah and the Department of Interior provide an adequate basis for the evaluation of these claims. As you know, on February 6, 2004, the General Accounting Office issued an opinion that the MOU violated a Congressional ban on the Department's issuance of rules and regulations pertaining to R.S. 2477.<sup>1</sup> Importantly, one of the bases for the GAO's conclusion is that the MOU attempts to establish R.S. 2477 criteria that the court in *Southern Utah Wilderness Alliance v. BLM* rejected, notably the two erroneous assertions that an R.S. 2477 claim could be established by "use" alone without actual construction, and second, that the term "highway" is the equivalent of a lesser "road" -- the term used by the MOU.<sup>2</sup>

As a result, the BLM lacks authority to process this and any subsequent claim under the Disclaimer Rule and the MOU.

### Conclusion

We appreciate the opportunity to comment on the Weiss Highway R.S. 2477 application. However, like many -- including, no doubt, the State and County claimants themselves -- we are mindful that this process implicates much more than the relatively narrow issue of whether this particular route satisfies the R.S. 2477 criteria. There can be little doubt that that the criteria and the process set in motion by this application will influence future applications under the MOU (and/or the Interior Department's revised, broader Disclaimer Rule).

Unless the BLM undertakes a careful review of R.S. 2477 claims like this, and requires strict adherence to the letter of the law as it evaluates them, public lands will suffer from countless R.S. 2477 claims based on inadequate information. With respect to the Weiss Highway, the degree to which this application misses the mark by failing to provide key information, readily available through an inexpensive title search, is alarming. (For example, information about the CCC's role in constructing the highway, as well as a recorded easement by which Juab County conveyed whatever property interest it may have once held, should have been in either or both BLM and County files. The fact that information like this was not part of the application raises serious doubts about the thoroughness of the claimants' research.)

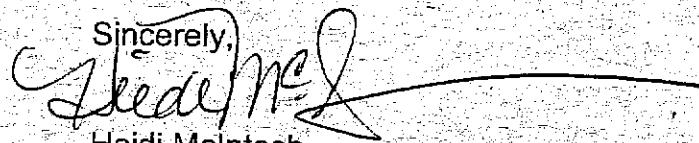
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<sup>1</sup> General Accounting Office, Recognition of R.S. 2477 Rights-of-Way under the Department of the Interior's FLPMA Disclaimer Rules and Its Memorandum of Understanding with the State of Utah, Report B-300912 (February 6, 2004).

<sup>2</sup> In a similar vein, we have been frustrated by the Department's refusal to explain exactly what standards the BLM will use in evaluating the application. For example, it has specifically refused to confirm that it will evaluate every claim to ensure that "actual construction" is demonstrated.

Approval of R.S. 2477 claims based on inadequate information and the failure to conduct even basic research tasks (such as a title search) undercut BLM's management of the public lands and needlessly extends controversy over this issue. The BLM can move towards resolution of this issue by requiring claimants to hew to the letter of the law as described above.

Sincerely,

A handwritten signature in black ink, appearing to read "Heidi McIntosh", with a long horizontal flourish extending to the right.

Heidi McIntosh  
Conservation Director