BOZEMAN, MONTANA DENVER, COLORADO HONOLULU, HAWAII
INTERNATIONAL JUNEAU, ALASKA OAKLAND, CALIFORNIA
SEATTLE, WASHINGTON TALLAHASSEE, FLORIDA WASHINGTON, D.C.
ENVIRONMENTAL LAW CLINIC AT STANFORD UNIVERSITY

May 6, 2004

Sally Wisely, State Director
Bureau of Land Management, Utah St. Office
PO Box 45155
Salt Lake City, Utah 84145-0155

Chief, Branch of Lands and Realty
BLM, Utah State Office, UT-921
PO Box 45155
Salt Lake City, Utah 84145-0155

Re: BLM Cannot Approve Weiss Highway Disclaimer Application, UTU-81100

Dear Director Wisely and Lands and Realty Chief:

On behalf of The Wilderness Society (TWS), Earthjustice submits these comments on the State of Utah's and Juab County's application for a recordable disclaimer 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 (MOU). This recordable disclaimer of interest application, is identified by BLM Serial Number UTU-81100.

TWS, its 1,250 Utah members, and 200,000 members nationwide, and other members of the public are closely watching how the Bureau of Land Management (BLM) addresses the Weiss Highway application. Utah has stated its intent to claim 10,000 R.S. 2477 rights-of-way on federal public lands in the state. 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, and establish a fair, transparent, process that adheres to federal land management and environmental law, and that rigorously analyzes all available evidence that the agency solicits or seeks out itself.

For the reasons set forth below, TWS urges BLM to deny the application.

We wish to make clear, however, that while issuing a recordable disclaimer of interest for the Weiss Highway pursuant to R.S. 2477 is illegal and inappropriate, we believe that Utah and Juab County can pursue a lawful course of action that will ensure that environmental checks and balances are in place by applying for a right-of-way pursuant to Title V of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1761-1771.

SUMMARY.

BLM must deny Utah's application to for a recordable disclaimer of interest in the Weiss Highway. The application is submitted under an illegal process and, even under a process designed to improperly lower the standards for obtaining rights in federal lands, contains wholly inadequate information to state a claim.

First, the Disclaimer Rule and the 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, too, violates the Congressional ban on R.S. 2477 rulemaking, and because it does not incorporate or rely on the standards set by R.S. 2477.

Second, Utah has failed to submit evidence 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 the lands being reserved or the repeal of R.S. 2477 on October 21, 1976. Utah has failed to submit the basic information required by the Disclaimer Rule. It has submitted vague, unconvincing, and/or irrelevant data and mere hearsay concerning the critical standards set in law. Tellingly, Juab County has admitted that it has no official records at all concerning construction, road maintenance, or County funding of such activities. For this reason alone, BLM must reject Utah's application.

Third, although TWS does not have always have easy access to records maintained by Juab County, the State or DOI (especially since each of these entities has withheld information requested under open record laws concerning this application), TWS was able to locate during the short period available to it significant documentation and information about the construction, ownership and use of the Weiss Highway. The information TWS located, and attaches here, appears to show that the Weiss Highway was constructed by the Civilian Conservation Corps (CCC) in the late 1930s on behalf of the Division of Grazing, the predecessor agency to BLM. The evidence shows that to the extent the Weiss Highway (named after a CCC camp superintendent) was constructed, it was built by the Federal government, with federal funds, by federal employees, on the recommendation of a federal advisory board, to serve a federal purpose. As such, this route is a federal road, and no R.S. 2477 right-of-way can exist. In addition, TWS located Juab County records proving that DOI has a record interest in at least part of the route, because Juab County conveyed to DOI in 1936 all interests in the construction, operation, and maintenance of a road for that part of the route.

Utah's failure to locate this information (or to disclose the information to BLM if the State had previously located the data) is further indication of the patent inadequacy of the State's application, and raises troubling questions about the diligence of the State's search. Should BLM grant this application, it would demonstrate the unlawfully low bar that the agency intends to set for future claims, many of which traverse ecologically sensitive or significant areas. BLM cannot and must not grant R.S. 2477 rights-of-way or disclaimers based on such a record. The management of lands owned by all Americans is at stake, and BLM must not permit others to wrest significant management control from the American people without a rigorous review of all available information.

Therefore, we urge BLM to establish a rigorous, exacting process in addressing this and future applications, one that ensures meaningful opportunities for public comment, adherence to the plain standards of R.S. 2477, and through which BLM analyzes and discloses the environmental effects of recognizing a right-of-way.

I. THE DISCLAIMER RULE IS ILLEGAL.

The Department of the Interior (DOI) is barred from using the Bureau of Land Management's (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 the Federal Land Policy and Management Act of 1976 (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.

DOI has tried before to establish a mechanism 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.

There can be no question that the amendment to the Disclaimer Rule "pertains to" the recognition, management, or validity of R.S. 2477 rights-of-way, and that the moratorium statute applies. 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, as well, 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 remove the statute of limitations from states, except that the Department is preparing to give favorable reception to the R.S. 2477 claims of the states such as Utah and Alaska, which we understand will consist of thousands of claimed "highways" across federal lands. 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.

DOI clearly wished 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 by pertaining to recognition of an R.S. 2477 rights of way. The language of the relevant 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 this issue was provoked by a proposed rule that would have provided a similar 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]

B. Disclaiming an Interest in Rights-of-Way Exceeds FLPMA's Authority Concerning the Issuance of Disclaimers.

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

---

[1] At least one prominent legislator agrees. See letter of Sen. Jeff Bingaman to Secretary Gale Norton (April 21, 2003), attached as Exhibit 5.

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 a 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]

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 (Exhibit 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.

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.

---

[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.

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 the Interior Department 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" ("MOU") on April 9, 2003. Exhibit 6, attached. The stated purpose of the MOU is to "acknowledge the existence of certain R.S. 2477 rights-of-way on Bureau of Land Management 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 a right-of-way of 99 miles of the so-called "Weiss Highway." However, BLM cannot use the MOU to disclaim an interest in the Weiss highway 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 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 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 a right-of-way for the Weiss Highway for the same reason it utilize the Disclaimer Rule to achieve that end: the Disclaimer Rule amendments are illegal.

---

[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.

B. The 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.

GAO Report B-300912 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. A leading academic agrees 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").

Therefore, the MOU is illegal. Any attempt to implement the MOU through the approval of a disclaimer of interest for the Weiss Highway (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 the only law that would provide the basis for a claimant its claim. 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, then, to first 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 in 1976 by the Federal Land Policy and Management Act (FLPMA), but those rights-of-way that were created prior to repeal could still be valid. For an R.S. 2477 claim to be recognized, 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 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); Missouri, Kan. & Tex. Ry. Co. v. Kansas Pac. Ry. Co., 97 U.S. 491, 497 (1878).

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.

Id. at 281. 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).

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).

---

[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.

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 9. 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). Such roads were contemporaneously designated public highways. Id. § 2, 13 Stat. 183; see also Act of July 2, 1864, § 2, 13 Stat. 355.

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 emphatically agreed during this that "construction" requires actual physical work, and not mere use of a trail, in a briefs filed before the 10th Circuit Court of Appeals in 2002 and 2003. 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.
>
> 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 10). The Bush Administration repeated its position before the Tenth Circuit Court of Appeals in October 2003.[5] 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,

---

5 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 11; id. at 43 (R.S. 2477 "similarly requires actual, physical construction as a prerequisite to establishing an R.S. 2477 right-of-way")

at 684 (1863) ("A great road; a public road; a road over which the public at large have a right of passage"), attached as Exhibit 12; 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") (Exhibit 12); 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, Tenth Cir. No. 01-4173 (June 2002) at 51 (emphasis in original) (Exhibit 10). 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, (Exhibit 11) at 38-39 (reaching same conclusion as BLM did in SUWA v. BLM).[6]

---

[6] 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,

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" 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.

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 13; full text available at http://www.rs2477.com/documents/CRS_Report_RS2477%20_Disclaimers_of_Interest.pdf.

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.

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"[7] 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 is rife with slick rock, washes, sand dunes, and sparsely-vegetated plains all of which are "capable of accommodating" a four-wheeled vehicle without the construction of a highway or any other route. Yet construction of a highway is required by the plain language of R.S. 2477 before a right-of-way can be granted.

---

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

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 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.[8]

The GAO agrees. In its February 2004 analysis of the MOU, GAO stated:

> 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 (Exhibit 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.

---

[8] 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 14. 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.

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 (Exhibit 6) at 4; see also Memo. of Jim Hughes, Deputy Dir., BLM to Utah State Director (June 25, 2003), at 2, attached as Exhibit 15 ("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 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 16. 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 17). 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 (Exhibit 15) 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 18 (stating that BLM will process the Weiss Highway disclaimer application "based on criteria identified for R.S. 2477 roads [sic]," but providing no information on what those criteria might encompass). 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 "highway" – something required by the plain language of R.S.2477. See MOU (Exhibit 6) at 1

n.1. As discussed above, the term "road" and "highway" are not synonymous. Indeed, in a "Fact Sheet" released with the MOU, the DOI admitted as much when it distinguished the two terms, saying that R.S. 2477 permitted "local governments to acquire a property interest in roads and other public highways they constructed across unreserved federal land." DOI MOU Talking Points (Exhibit 14).

A recent Congressional Research Service report puts the point 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.
>
> ….
>
> 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 (Exhibit 13), 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 (Exhibit 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. 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. MOU (Exhibit 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. Thus, the MOU 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 use 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 reject 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 the court.

It is well settled that federal land grants are construed narrowly in the United States's 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, and that BLM 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, as law requires, places the burden squarely on the State of Utah 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 must, as law requires, place the burden squarely on That process is one that provided an opportunity for all interested parties to participate, set transparent standards, and reached sound conclusions based on the evidence before it.

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.[9]

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 19.

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

---

[9] 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 State of 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 (Exhibit 15) 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.[10]

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 (Exhibit 19) 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

---

[10] 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, 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 (Exhibit 19) 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 at – based upon evidence as to these various factors at the time the federal reservation occurred.

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.

The review and determination concerning applications for disclaimers is likely to a matter of intense public interest. The submission of the initial disclaimer under the MOU – the one at issue here – was trumpeted at a press conference attended by the Governor and Lt. Governor of Utah as well as members of the media.[11] Millions of taxpayer dollars have been spent by the

---

[11] See, e.g., News Release, Governor Submits First Rural County Roads (R.S. 2477) Application to Bureau of Land Management, (Jan. 14, 2004), available at http://www.utah.gov/governor/newsrels/2004/newsrel_0114a04.html; J. Loftin, "Utah Claims Juab Road," Deseret News (Jan. 15, 2004), available at

State of Utah preparing information for submittal to BLM. See http://www.utah.gov/governorleavitt/County_Roads_Print_Version.pdf (stating "$8 million invested" in Utah's R.S. 2477 efforts). In submittals to DOI in 2000, Utah claimed 10,000 R.S. 2477 rights-of-way, many of which traversed some of America's most scenic and beloved public lands. The issue of issue of R.S. 2477 rights-of-way claims in Utah has generated attention at a national level.

Given the intensity 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 implementating the MOU states that the public has a maximum of 60 days to comment upon a submitted application. Memo of J. Hughes (Exhibit 15) 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 (Exhibit 15) 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 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 after submitting requests under the Freedom of Information Act (which the agency takes weeks to respond to) or 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

---

http://deseretnews.com/dn/view/0,1249,585037791,00.html, and attached as Exhibit 20; 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), available at http://www.nephitimesnews.com/0104/012104/3.htm, and attached as Exhibit 21.

closed. 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 it 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 22. 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.[12] In addition, BLM's final determination included within it responses to public comments. See Administrative Determinations on San Juan County Claims (Exhibit 19) 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.

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

In order to establish that there exists a right-of-way across federal (as well as private) 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.

Utah fails to present convincing evidence concerning at least two of these scores. First, the only evidence provided to support "construction" is vague declarations that are based in pertinent part on hearsay. Juab County has asserted that it has no additional evidence beyond that presented to BLM concerning construction of the highway. Second, Utah presents no evidence at all concerning whether or when the lands at issue were reserved. What evidence besides declarations Utah does provide is generally irrelevant to the determination of a right-of-

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

way's existence. 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.

A. Utah Fails to Submit an Application that Meets 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). The application nowhere alleges 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. 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 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.

Utah's application fails to meet the regulation's basic requirements. The application contains no legal description of the property right claimed, and no metes and bounds survey certified in accordance with state law by a certified civil engineer or surveyor. Instead, the application contains printouts of GIS data, and a six-sentence email from a Juab County official, Glenn Greenhalgh, describing very generally how (but not when or by whom) the data was generated. Mr. Greenhalgh does not aver that he is a surveyor or a civil engineer, nor does he state that he himself collected the GIS data. Email of Glenn Greenhalgh (Jan. 16, 2004). While GIS data can be very accurate, depending on the equipment used, it is not the same as a metes and bounds survey. In addition, Utah has failed to attach "[a] true copy of the field notes and plat of survey" to its application. Because Utah's application fails to meet the regulation's requirements, BLM must deny the application.[13]

---

[13] BLM guidance on implementing the MOU omits reference to the need for certification a licensed civil engineer or surveyor. See Memo of J. Hughes (Exhibit 15) at 2. In addition, Mr. Hughes's memo would permit the use of a "centerline or GPS description," but

Utah's application also fails 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." The application contains a few photos, and some general discussion of "improvements," but Utah admits that it only provides "[e]xamples" of the same, and not a comprehensive listing. See J. Boyden, Amended Application for Recordable Disclaimer of Interest (no date) at 2, available at http://www.ut.blm.gov/rs2477/weisshighway/applicationlinks.htm.

B. Utah's Declarations Are Tainted by Hearsay and Vague.

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

1. The Declarations Contain Hearsay.

A number of the declarations contain information that would surely not be admissible in any court as evidence because it is hearsay. The declarants provide absolutely no basis for the origin, or validity, of the information.

For example, a number of the declarations allege that it is the general "reputation" in the community of the road first being in use in the 1930s.[14] No basis is provided for the rumors of such construction, nor is there any other factual information presented by the county concerning how or when the route was originally constructed.[15]

The questionable value of these reputational statements is made clear by the fact that they are, on some issues at least, inconsistent. For example, the declarations are inconsistent as to whether "maintenance" was performed on the route prior to the 1930s. Two declaration state that: "Construction and maintenance of the road since before the 1930's by reputation was

---

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.

[14] Declaration of R. Roscoe Garrett ("It is the reputation in the community that this road was used by settlers, ranchers, sheepmen, and others of Juab County since at least the early 1930's"); Declaration of Ronald C. Jones (same); Declaration of Heber C. Taylor (same); Declaration of Howard J. Fields (same), all available at http://www.ut.blm.gov/rs2477/weisshighway/applicationlinks.htm.

[15] The application cites three types of evidence supporting "establishment" of the route prior to 1976: the declarations; water diversion and mining data; and aerial photos. We address the relevance of the latter two types of data below.

performed by moving rocks and vegetation from the roadway by hand labor and by horse scrapers and by passing hose or mule or ox-drawn wagons or livestock over the roadway, or some combination thereof" (emphasis added).[16] Others state that by reputation such construction and maintenance work was performed "since the 1930's."[17] Clearly, the "reputation" of the route even within Juab County is not clear.

Because the declarants provide no basis for these "reputational" statements, BLM must give them little weight in its evaluation of the right-of-way claim.

We note that BLM previously found similar declarations insufficient to establish construction of a right-of-way. In its administrative determination regarding a claim in San Juan County, BLM considered a declaration of an individual who alleged that the route in question there was bulldozed in the late 1950's or early 1960's. Administrative Determinations on San Juan County Claims (Exhibit 19) 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.

2. The Declarations Fail to Contain Specific Information about the Claim.

What first-hand information is contained in the nearly identically-worded declarations can best be described as vague. For example, the declarations do not specify where on, or upon what portion of, the Weiss Highway grading, maintenance or construction occurred. The declarations do not contain exact dates for when any such activities – or declarants use of the route – took place; they are generally described only by decade or year.[18] While the application itself notes that part of the route is paved, none of the declarations address how or when such paving took place, or who undertook it.[19]

---

16 See Declaration of Ronald C. Jones at ¶10; and Declaration of Heber C. Taylor at ¶9.

17 See Declaration of R. Roscoe Garrett at ¶9 ("since at least the 1930's"); Declaration of Howard J. Fields at ¶9 ("since the 1930's"); Declaration of Joseph L. Wahlberg at ¶9 ("since the early 1930's") available at http://www.ut.blm.gov/rs2477/weisshighway/applicationlinks.htm; and Declaration of Wesley Ray Lewis ("since the 1930's") at ¶9, available at http://www.ut.blm.gov/rs2477/weisshighway/affidavits/Weiss--Lewis.pdf.

18 See, e.g., Declaration of R. Roscoe Garrett at ¶5 ("I traveled the Weiss Highway several times … in the 1950's and … in the late 1960's")

19 In addition, none of the declarations establish by first-hand evidence the nature of the route prior to 1936 – the latest date that the area was reserved by the Taylor Grazing Act amendments. See Section V(C), below.

Some declarants provide no justification for statements that clearly could not be based on first-hand observation. For example, Ronald C. Jones declares that: "The Juab County Road Crew has graded the Weiss Highway at least twice a year since before I began working as County Road Supervisor in the 1940's." Declaration of Ronald C. Jones at 1 (emphasis added). Mr. Jones does not state how he could know this information, given that his observation of the Weiss Highway began in the "mid-1940's." Id. Other very general statements are provided with no basis for the information provided. For example, virtually all of the declarations state that "by my observation the road has been used for ranching, farming, hunting, fishing, prospecting, mining, homesteading, sightseeing, camping, recreation, search & rescue, law enforcement, land management, accessing state and institutional trust lands, joy riding and simply traveling from point A to point B."[20] It is not clear whether each of the declarants used the route for all of these purposes themselves, or how they could have known to what uses others were putting it. The remaining declarant, Robert L. Steele, alleges that uses of the road are illustrated by "Historical records (Government Land Office Surveys, official county records, local histories, newspapers, diaries, etc.)." Declaration of Robert L. Steele at ¶12. Neither Mr. Steele nor anyone else provides any of these purported records to support his claim.[21]

The relevance of much of the declarations is questionable as well. For example, Wesley Ray Lewis's experience with the Weiss Highway comes from living in the county for a maximum of two years in the early 1950s and since 1977. Declaration of Wesley Ray Lewis at ¶3. Mr. Lewis's statements concerning the nature of the Weiss Highway from 1977 to the present, as well as his current work on the Weiss Highway, is largely irrelevant to the existence and scope of an R.S. 2477 right-of-way, which must have been granted by October 21, 1976 at the absolute latest. Similarly, Mr. Wahlberg's statement that "we graded and graveled" the highway from 1976 to 1997 are largely irrelevant, given that Mr. Wahlberg does not allege that his employment with the road crew pre-dated FLPMA's repeal of R.S. 2477. Declaration of Joseph L. Wahlberg at ¶5. Howard J. Fields alleges that Juab County "put a lot of" bar ditches "during the time I worked for the County" – between 1966 and 1994 – but does not state how many, where, and whether any of them were put in before October 21, 1976. Declaration of Howard J. Fields at ¶5. Mr. Jones statement that Juab County "[i]mproved the Weiss a mile or two each year" starting in 1949 would indicate that improving the entire length of the route would take between 50-100 years, meaning that the route could not have been improved along its complete length prior to FLPMA's repeal. Declaration of Ronald C. Jones at ¶5. Mr. Jones does not state where any of this mile or two of improvement took place.

In short, the declarations submitted to demonstrate construction have little evidentiary value, at best.

---

[20] Declaration of Ronald C, Jones at ¶8; Declaration of R. Roscoe Garrett at ¶7; Declaration of Heber C. Taylor at ¶7; Declaration of Joseph L. Walberg at ¶7; Declaration of Howard J. Fields at ¶7; Declaration of Wesley Ray Lewis at ¶7.

[21] In fact, as addressed below, Juab County denies the existence of any county records on the route.

C. Aerial Photos 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 amounts to a "constructed highway" as required by R.S. 2477. 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.

BLM has reviewed similar aerial photographs before and found them to not provide sufficient evidence to demonstrate the existence of a valid R.S. 2477 claim. In reviewing the validity of a R.S. 2477 claims in San Juan County near the Hart's Point Road, BLM concluded: "While aerial photographs reveal the existence of the disturbance claimed by the county, analysis of those photographs fails to reveal how the disturbance was created or whether it serves to access a specific destination or place." See Exhibit 19 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"); id. at 27 ("Aerial photographs prior to the repeal of R.S. 2477 reveal the claim. However, none of these photographs indicate signs of mechanical construction or maintenance."). 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 photos simply state that they were taken "circa" 1976 or 1995. It is unclear, thus, whether the "circa 1976" aerial photos were taken prior to the repeal of R.S. 2477; the "circa 1995" photos definitely were not. The State of Utah fails to provide evidence as to who took the photos. As such, this "evidence" cannot be accepted by BLM as proof of anything.

D. Photos Taken After October 21, 1976 Do Not Establish that Valid Existing Rights Existed Prior to That Date.

Photos of the Weiss Highway's current condition from the ground may be relevant to the existing scope of disturbance of the route. Aerial photos taken in 1995 may be relevant to showing some natural, or manmade feature at that time. Such photos are, however, not dispositive of or very 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. They 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 prior to 1936, when the lands were reserved (see discussion at Section V(C) below). None of the

photos provided by Utah contain such evidence.[22] 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 19) at 6-7.

A document submitted with 10 photos along the route argues: "Characteristics all these photos show include substantiality of the road, maintenance, that the road is in use at the present time, that the road is capable of accommodating cars or trucks with four wheels, and that the road surface in these locations includes a mix of gravel." See Application, CD-ROM #I, juab-map_photos.pdf. However, this statement merely parrots some of the MOU's language, and fails to demonstrate that the route met the conditions of R.S. 2477 when the land was unreserved.

In addition, photos of the existing nature of the route, or the of the scope of the route in the last 10 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. See discussion above at Section II(C)(1)(d).[23]

Finally, Utah has provided neither BLM nor the public with any evidence or information to support that the photos asserted to be on the Weiss Highway at a certain point on the map were in fact taken at those locations. No declarations accompany the photos; there is no assertion by any individual that the photos represent the Weiss Highway at a particular point, which direction the photos face; etc. If these photos are linked to some GIS data, none of that meta-data was made available to BLM or the public in response to requests to BLM for the complete application.[24]

---

[22] 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.

[23] We note that Utah and Juab County have apparently withheld from BLM a number of photos concerning the nature and extent of the route. See Letter of P. Davis, Deputy Juab Co. Att'y to K. Brengel, TWS (Mar. 16, 2004) at 5 (noting that the County was withholding "[d]igital photographs beyond those on the [BLM's] website"), attached as Exhibit 23. However, since these photos were "taken after the filing of the Notice of Intent to Sue," or since mid-2000, the relevance of these photos to demonstrating the nature of the route at the time of reservation or repeal is questionable. Id.

[24] Utah provided BLM with no meta-data to verify the location of the photos or points on the map. E. Zukoski, Earthjustice, pers. comm. with M. DeKeyrel, Realty Specialist, Utah BLM (May 3, 2004). This despite the fact that Juab County suggests that it has such data, which it is withholding from the public in the face of open records act requests. See letter of P. Davis (Exhibit 23) at 5 (County admits it is withholding "Preliminary Arc/Info computer data (including GIS information)"). In addition, Appendices submitted with Utah's application

E. Utah Fails to Explain How "Point Data" Concerning Water Sources and Minerals Is Relevant.

Utah's application contains, among other things, a map displaying "water points of diversion [prior to] 1976" and "minerals." 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 related to when and where water rights were claimed, or where minerals are located, in the general vicinity of the current path of the Weiss Highway. 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 relevant.

In addition, no dates concerning mineral information are provided, making it impossible to determine whether the information relates to minerals located before or after reservation or repeal. Finally, Utah provided BLM with no "meta-data" to support the location of purported mineral or water rights data.[25] 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. Juab County Admits That It Has No Construction, Maintenance, or Funding Records Concerning the Weiss Highway.

On February 25, 2004, The Wilderness Society submitted to Juab County a request pursuant to Utah's Government Records Access and Management Act (GRAMA), seeking

> **all records** (including but not limited to photographs, geographic information system (GIS) Arc/Info coverages or shape files, road maintenance records, funding records, construction records, memoranda of understanding with BLM or other parties, declarations, affidavits, notes, emails or any other records) generated, modified or acquired by Juab County **concerning or relating to the** … Weiss Highway.

---

indicate 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 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 meta-data in such a way that the public will be able to obtain it, review it, and comment on it.

[25] E. Zukoski, Earthjustice, pers. comm. with M. DeKeyrel, Realty Specialist, Utah BLM (May 3, 2004). Again, BLM should insist that applicants provide such meta-data and make it available for public review prior for the public comment period.

Letter of K. Brengel, TWS to Juab County Comm'rs (Feb. 25, 2004) at 1 (emphasis in original), attached as Exhibit 24. Juab County responded by stating that:

> We have no records, or no further records beyond those on the BLM website, of the following types [of information] you request as to the Weiss Highway …: road maintenance records, funding records, constructions records, declarations, affidavits notes or emails.

Letter of P. Davis (Exhibit 23) at 2 (emphasis added). In other words, concerning the Weiss Highway, Juab County has admitted that it has:

- no construction records;
- no funding records; and
- no road maintenance records.

No evidence concerning construction, funding, or road maintenance was submitted to BLM beyond the statements of a few individuals that they were on the road crew. BLM has previously concluded that: "Records of road construction and maintenance generated by a county can often be excellent evidence for determining whether right-of-way claims were mechanically constructed or improved." Administrative Determinations on San Juan County Claims (Exhibit 19) at 8. The fact that Juab County has no official records of any kind that the County ever funded work on, constructed, or maintained the Weiss Highway strongly implies that such work never took place. It is also strong evidence that the Weiss Highway is of such little importance to the County that it might not be a significant route or a "highway."

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

Declarations submitted by Utah concur that the "traveled portion of the road" is now, as it has been since at least the 1940s, "approximately twenty-two feet." See, e.g., Declaration of Ronald C. Jones at ¶11. The declarations also state, however, that traveled portion of the route ranges from twenty to twenty five feet in width." Id. at ¶12. The declarations do not state by what means any of the declarants used to reach this conclusion.

In comparison to the declarations, appendices to the application assert that the "disturbed width" of the route is either 40 feet or 60 feet, depending on the particular route segment. See Appendices A-Q at 1. An email message submitted with the application states that:

> disturbance was paced off and rechecked based on width changes that lasted for 500 feet or more. Minor changes such as substantially wider areas of culverts etc. were not listed. Disturbance was established using visual signs of the disturbed areas such as berms, cuts, fills, and other evidence of grader work or road work by other equipment.

Email of Glenn Greenhalgh (Jan. 16, 2004). Mr. Greenhalgh's email is not notarized, is not a declaration, and does not state who gathered the information concerning disturbance or when,

etc. 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 addition, 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 here asserts that making a rough guestimate by "pacing" out a distance and ignoring variations in width up to nearly a tenth of a mile (500 feet) is close enough to carefully determine what rights the American people will surrender. Identifying disturbance by "visual signs of the disturbed areas" too hardly seems an exact exercise, and is clearly subject to interpretation. As noted above, the Federal District Court of Utah concluded that a determination regarding disturbance "depends upon an inescapably subjective perception" that is simply not helpful and not reliable in determining scope. Garfield County, 122 F. Supp. 2d at 1230. Given federal caselaw, any BLM decision that sets scope based on "disturbance" will be arbitrary and capricious. In addition, the appendices state that all of the route segments are neatly divided into those where the width of disturbance is either 40 or 60 feet, although a number of the 60-foot-wide segments appear to abut 40-foot-wide segments. What happens at the junction of these segments with differing widths is nowhere explained, and only underlines the subjectivity and unreliability of the data provided.

In addition, there appears to be duplication or error in at least two of the appendices. Appendices B and C assert that they concern different "road segments," involving different townships and ranges, and that they differ in length. See Appendix B at 1 (Segment 06, 6.80 miles in length); Appendix C at 1 (Segment 08, 10.10 miles in length). However, both apparently begin at 39 degrees 45 minutes 21.82 seconds north latitude and -112 degrees 18 minutes 50.71 seconds west longitude, and terminate at 39 degrees 46 minutes 11.67 seconds north longitude and -112 degrees 25 minutes 2.96 seconds west longitude. Appendix B at 1, 6; Appendix C at 1, 6. This hardly seems possible for unique road segments of differing length. Utah should correct this error, and BLM should make this document available to the public, and open a new public comment period.

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

H. BLM Apparently Will Not Require Utah to Gather Essential Factual Information.

The sparse, contradictory, and/or irrelevant information submitted by Utah does not demonstrate that a right-of-way was granted under R.S. 2477. 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 Juab County states that it does 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 (Exhibit 19) at 8-10.

While BLM's website concerning the Weiss Highway application states that the agency will "review[] existing and historic records," Utah BLM staff have stated that BLM will only review the application, comments, and results of a site visit. See http://www.ut.blm.gov/rs2477/process.htm; Declaration of Kristen Brengel, attached as Exhibit 25. TWS believes that review of the historic and agency records above is essential, and that BLM should either require that Utah submit such information in the future or that BLM itself commit to gathering the information and making it available to the public before the commencement of the public comment period.

V. EVIDENCE STRONGLY SUGGESTS THAT TO THE EXTENT THE WEISS HIGHWAY WAS CONSTRUCTED, IT WAS CONSTRUCTED AS A FEDERAL HIGHWAY, AND THERFORE NO RIGHT-OF-WAY WAS GRANTED TO THE STATE.

While Utah provides no compelling evidence of the timing or purpose of highway construction, such evidence apparently does exist. In fact, TWS found significant evidence concerning the validity of the claim by researching public records, while operating under serious time constraints and without the knowledge of local records that both Utah and BLM should have. To the extent that the evidence may show that the Weiss Highway was constructed, it shows that the highway was constructed by the Federal government, with federal funds, by federal employees, on the recommendation of a federal advisory board, to serve a federal purpose. As such, the Weiss Highway is a federal highway, and therefore no right-of-way to another entity (either the State or Juab County) was created by its construction. Later upkeep of the route by Juab County cannot turn a federal highway into a County right-of-way. In addition, further evidence shows that to the extent Juab County had a right-of-way to construct highways, it conveyed at least a portion of that right-of-way to the Division of Grazing.

A. The Weiss Highway Was Evidently Constructed by the Civilian Conservation Corps (CCC) Working on Behalf of the Federal Division of Grazing.

1. Records of Division of Grazing Projects Performed by the CCC Strongly Suggest that the CCC Constructed the Weiss Highway.

Records on file at that National Archives indicate that on July 18, 1935, Civilian Conservation Corps personnel, working under the supervision of the Division of Grazing – now

the BLM – began construction of a CCC camp, numbered DG-26, in the eastern part of Juab County, two miles from Jericho and sixteen miles south of the Town of Eureka. The camp was completed on November 29, 1935.[26] Eighteen stockmen, all Division of Grazing permit holders, equally divided between cattle and sheep interests, formed an "advisory board" constituted by the Division of Grazing. Such advisory boards were mandated by Section 9 of the Taylor Grazing Act of 1934. 43 U.S.C. § 315h. None of the board members were identified as representatives of state, county, or local government. The board's function was to "list[] projects and determine[] the order in which they are to be constructed" by the camp.[27]

One of Camp DG-26's first project was work on the "Cherry Creek Road – Project No. 6-1A." As the camp's first report describes the project:

> The Cherry Creek Road is the first section of a ninety mile road extending from State Highway No. 26 to the Nevada line. This is a sheep trail and is traversed by perhaps 250,000 head of sheep each year on their way to and from the desert winter range.
>
> The road begins at State Highway No. 26 about one mile east of Jericho and extends to Cherry Creek, sixteen and one[-]fourth miles west.
>
> The construction is comprised largely of heavy blade work with a limited amount of rock work and about thirty drainage structures comprised chiefly or rock and cedar culverts. Considerable sand is encountered. Clearing of sage and cedar involves an appreciable percentage of the project.[28]

From this description, several important pieces of information are clear. First, the route involved is almost certainly a portion of the currently claimed Weiss Highway. The 'Cherry Creek Road' travels approximately 16 miles from Jericho to Cherry Creek; so does the Weiss Highway. The sand encountered is likely that area now designated as the Little Sahara Recreation Area, the northeastern boundary of which the Weiss Highway traverses.

Second, to the extent this route was constructed, it was <u>first constructed</u> by the CCC. While a rough trail was in use previously for moving sheep, it is described as nothing more than a "trail." No pre-existing constructed features are mentioned. To construct a route capable of supporting vehicle travel, the CCC had to remove vegetation ("clear sage and cedar") and rocks, something that had not been done on the trail. Photos show an apparently untouched landscape

---

[26] US Dep't of Interior, Division of Grazing, DG-26, Narrative Report Nov. 29, 1935 to April 1, 1936, National Archives and Records Administration (Denver, CO), Record Group 049, Records of the Bureau of Land Management, Grazing Service (Hereafter "RG-049"), Entry 19, Box 61, excerpts attached as Exhibit 26.

[27] <u>Id</u>.

[28] <u>Id</u>.

before CCC construction efforts and a bladed road after CCC efforts. The photos are captioned "before construction" and "after construction." Photos also show heavy equipment at work and the results of their labor, as well as laboriously-constructed rock walls for culverts. During a 5-month period, work on the route cost $1,223.32 in federal expenditures and required 1,750 man days of the labor of federal (CCC) employees.[29]

From April through September 1936, Camp DG-26's work on the Cherry Creek Road continued, requiring through the end of that period the expenditure of $3,281.22 in federal funds and 4,213 man days performed by federal laborers. No narrative exists for this period, but photos show the results of the work as well as photo of a stack of 50 large diameter culvert pipes, apparently supplied by Juab County (the caption of the photo reads "Juab County cooperation").[30]

In addition, work on another road project – "Sand Pass Road – Project #7-R2" – apparently began during this period, requiring the expenditure of $354.48 and 475 man-days.[31] Given that the only route on current maps that traverses "Sand Pass" in Juab County is the Weiss Highway, the Sand Pass Road project is almost certainly a continuation of the Cherry Creek Road to and through Sand Pass.

By March 1937, Camp DG-26 reported that the Cherry Creek Road project was "nearly completed. All the grading is finished and several miles of gravel are placed. This road is the first section of a proposed truck trail to the Nevada line, a distance of ninety miles. Cherry Creek Road is sixteen miles long." Photos in the March 1937 narrative report show bulldozing and gravelling along the new road bed, as well as small, sturdy, bridges and culverts. Up to March 1937, this project cost $5,156.15 and required 6,414 man-days in federal funds and labor.[32]

The March 1937 report again contains no narrative on the Sand Pass Road, but does contain photos showing men working on "road clearing" with picks in a trackless scrub desert. Photos also show "culvert construction" and heavy equipment at work on "rolling," "blading," and "grading." Through March 1937, this project cost $2,129.21 and required 2,770 man-days.[33]

---

[29] Id.

[30] US Dep't of Interior, Division of Grazing, DG-26, Narrative Report April 1, 1936 to Sept. 30, 1936, RG-049, Entry 19, Box 61, excerpts attached as Exhibit 27.

[31] Id.

[32] US Dep't of the Interior, Division of Grazing, Eighth Period Illustrated Narrative Report, Camp DG-26, March 31, 1937, RG-049, Entry 19, Box 61, excerpts attached as Exhibit 28.

[33] Id.

The Camp DG-26 report for the sixth months ending October 1, 1937 states that the Cherry Creek Road project was completed during this period. The report states: "Before its completion the road was impassable for weeks in the spring and fall. It is a very good piece of road construction …." The statement "[b]efore its completion" is ambiguous; it may refer to use of the route prior to – or during – CCC construction. There is also no indication in this statement – or any statement made by the CCC reports – that a constructed route at the location of the CCC work pre-existed the CCC-constructed route. Photos again show the use of heavy equipment on the route. The report indicates that the entire project cost $6,369.86 and required 7,676 man days, 32 culverts, the excavation of 25,710 cubic yards of earth, and the placement of 6,036 yards of gravel.[34]

For the first time, the October 1937 report indicates that the Sand Pass Road "is a continuation of the Cherry Creek Road a distance of 19.6 miles. The [Sand Pass] Road is very nearly complete and is of a high type of construction. Gravel is being placed on parts that will not stand up under severe weather. Stockmen think this project and Cherry Creek Road justify the presence of the camp."[35] Photos show a well-constructed route with cars traveling on it. Another project, entitled "River Bed Excavation Reservoir Project #12," involved excavation of a reservoir and use of the removed fill on the "last section of Sand Pass Road." Cost-to-date of the Sand Pass Road at the time was $5,265.13 and the use of 6,366 man-days, as well as "clearing" on the entirety of the route's 19.6-mile length. The River Bed Excavation project cost another $605.62 and 651 man-days.[36]

The March 31, 1938 report for Camp DG-26 indicates that the 19.6 miles of the Sand Pass Road was completed in the preceding six months. The report states that the route "has <u>opened</u> the range to the west for stockmen. Before this road was built, the desert was not accessible for many months [winter?] each year. It is now completed and will be a boon to this county for many years to come." Photos show filled-in "dips," cars using the route, and tractors on a "finished grade." Total actual cost of the project is listed as $7,027.10, involving 7,417 man-days, requiring 24,700 cubic yards of earth excavation and the placement of 5,430 cubic yards of gravel.[37]

There is also reference to Camp DG-26 undertaking emergency work to repair "existing desert <u>trails</u>," including use of a bulldozer and grader repairing a trail "completely around Keg

---

[34] US Dep't of the Interior, Division of Grazing, Ninth Period Illustrated Narrative Report, Camp DG-26, Sept. 30, 1937, RG-049, Entry 19, Box 61; excerpts attached as Exhibit 29.

[35] <u>Id</u>.

[36] <u>Id</u>.

[37] US Dep't of the Interior, Division of Grazing, Tenth Period Illustrated Narrative Report, Camp DG-26, March 31, 1938, RG-049, Entry 19, Box 60, (emphasis added), excerpts attached as Exhibit 30.

Mountain."[38] Portions of the 'Weiss Highway' pass within a few miles of Keg Mountain. Again, there is no mention of any prior work by heavy equipment to such existing "trails."

The National Archives' Grazing Service-CCC files contained no further narrative reports concerning Camp DG-26 beyond the March 1938 report. Camp DG-26 in Jericho was "discontinued" on April 30, 1941.[39]

In July 1938, however, the Jericho Camp sent a truck and 40 men to the town of Callao.[40] Those pressing for the location of a new camp at Callao – later dubbed DG-116 –specifically listed the need to develop roads and trails in the area to assist livestock grazing.[41] Callao is about four miles northeast of the termination of the route claimed as the 'Weiss Highway.'

Inspection reports detailing a review of operations at Camp DG-116 in Callao in July 1939 indicate that this camp was, like Camp DG-26, working on the "Sand Pass Road," apparently continuing to the west the work begun by Camp DG-26 in Jericho. The report states: "Very satisfactory progress has been made on the Sand Pass Road …. There remains but approximately six miles of turnpiking to reach Sand Pass[,] the terminal of the project. The work done is also a very satisfactory job and after a few soft spots are graveled and a storm comes and settles other sections, this will be a very fast road. There are still several dips to be constructed but the tractor work should be completed before the end of the month …."[42] Inspection reports from October 1939 for Camp DG-116 label the work on the Sand Pass Road as "construction."[43]

---

[38] Id. (emphasis added).

[39] Letter of Chesley P. Seely, Regional Grazier, to Director of Grazing (May 29, 1941), RG-049, Entry 5, Box 16, attached as Exhibit 31.

[40] Letter of Chesley P. Seely, Regional Grazier, to Director, Division of Grazing (Aug. 4, 1938), RG-049, Entry 5, Box 15, excerpts attached as Exhibit 32.

[41] Letter of E. H. Frenzell, Acting Regional Grazier, Division of Grazing, to K. Wolfe, Liaison Officer, CCC (July 13, 1938), RG-049, Entry 5, Box 17, attached as Exhibit 33. The letter states: "This is in further reference to the proposed camp site at Calleo [sic]. Attention is directed to the fact that a large number of livestock are dependent upon the range accessible for improvement from this camp site. The range has been divided up into [federal grazing] allotments and it is necessary that water be provided and trails and roads be developed so that the range can be made available for those who are paying [the Grazing Service] for its use." This indicates that the roads were to be "developed" by federal workers at federal expense, and at the direction of the federal Grazing Service, to aid in the use of federal forage by federal permit holders.

[42] Letter of C.C. Taylor, Inspector to C. P. Seely, Regional Grazier (July 21, 1931) [sic, should be 1939] at 3; RG-049, Entry 20, Box 83, excerpts attached as Exhibit 34.

[43] Letter of E.R. Alcott, Engineer Inspector to Chesley P. Seely, Regional Grazier (Oct. 10, 1939) at 1; RG-049, Entry 20, Box 83, excerpts attached as Exhibit 35.

Inspection the following June revealed the following:

> Work on this project consists of the construction of many dips; grading on this project was completed prior to this camp moving to Black Rock last November. This is a good road and will soon be completed and will reduce the travel distance between this camp and the Jericho Camp to a distance of approximately 100 miles and will give ingress and egress to a vast amount of public domain that here-to-fore was difficult to get into.[44]

In November 1940, inspection showed of the Sand Pass Road that: "Work at the present time consists of cementing dips where rocks were only placed loose and repairing other places that were damaged by recent storms. This is a very satisfactory route and is used extensively by many; alignment very good and curves the result of good engineering. Via this route lessened some 45 miles to Delta and makes easy ingress to this camp via way of Jericho a distance of 103 miles."[45]

Camp DG-116 in Callao was officially abandoned on August 1, 1941.[46]

2. Other Evidence Supports the Fact that the "Weiss Highway" Was Constructed at the Time of the CCC's Work.

Evidence in addition to that produced by the Division of Grazing for CCC camps indicates that no highway existed at the site of the existing route prior to 1938. First, a AAA roadmap from Spring 1938 shows no highway from Jericho to Callao, or indeed, any east-west route traversing the county. [47] Yet two years later, after the bulk of the CCC work in the area was complete, a 1940 Standard Oil road map shows a route from Jericho through Sand Pass to Callao, in the approximate location of the claimed 'Weiss Highway.'[48]

---

[44] Memorandum of C.C. Taylor, Inspector to C. P. Seely, Regional Grazier (June 25, 1940) at 3; RG-049, Entry 20, Box 83, excerpts attached as Exhibit 36.

[45] Memorandum of C.C. Taylor, Inspector to C. P. Seely, Regional Grazier (Nov. 10, 1940) at 3; RG-049, Entry 20, Box 83, attached as Exhibit 37.

[46] Letter of Chesley P. Seely, Regional Grazier, to Director of Grazing (November 28, 1941), RG-049, Entry 5, Box 17, excerpts attached as Exhibit 38.

[47] American Automobile Ass'n, Official Road Map of Colorado-Utah and Wyoming ["Issued Annually – Next Edition Spring 1939"], RG-049, Entry 38, Box 136, excerpts attached as Exhibit 39.

[48] The H.M. Gousha Co., Road Map of Utah, Prepared Exclusively for Standard Oil Company of California, copyright 1940, RG-049, Entry 38, Box 136, excerpts attached as Exhibit 40.

Second, Division of Grazing correspondence indicates that those driving in the area had no highways to use before the CCC's construction efforts. Initially, the Army resisted establishing a year-round camp at Callao fearing winter weather would make the area uninhabitable for months. But supporters of a year-round camp wrote: "The snow does not fall to any depth to hinder transportation and the stockmen travel cross-country all winter on unimproved and no roads at all in their trucks."[49] This indicates the lack of constructed highways in the area.

Third, that the CCC constructed the route at issue in the disclaimer application is further reinforced by its name: the "Weiss Highway." There are no geographic features named "Weiss" in Juab County.[50] Historical research did not identify any prominent family or individual from Juab County named Weiss.[51] However, Henry R. Weiss was the Technical Foreman, Camp Engineer for Camp DG-26 – the camp that constructed the Cherry Creek Road and the route to Sand Pass from the east – when the camp was constructed in 1935.[52] By September 30, 1938, Mr. Weiss had been named Camp Project Superintendent of DG-26.[53] He later went on to become Acting Assistant Engineer-CCC for the Grazing Service.[54]

Fourth, Grazing Service correspondence in the early 1940s, in discussing a dispute concerning where the Division should place boundaries for grazing districts, states that the "Weiss road was <u>completed</u> by the CCC,"[55] and labels the "Weiss Highway" as the "Jericho-

---

[49] Letter of Conrad L. Wirth, Rep., Dep't of the Interior, to Robert Fechner, Director, CCC (Oct. 21, 1938), RG-049, Entry 5, Box 17, attached as Exhibit 41. Conrad's letter quotes the letter of Chesley P. Seely, Regional Grazier, to Director of Grazing (Oct. 4, 1938), RG-049, Entry 5, Box 17, attached as Exhibit 42.

[50] Search of www.topozone.com for "Weiss" in Utah renders no items found.

[51] Declaration of Kristen Brengel (May 6, 2004), attached as Exhibit 25.

[52] <u>See</u> Exhibit 26 [US Dep't of Interior, Division of Grazing, DG-26, Narrative Report Nov. 29, 1935 to April 1, 1936, RG-049, Entry 19, Box 61.]

[53] <u>See</u> Exhibit 29 [US Dep't of the Interior, Division of Grazing, Ninth Period Illustrated Narrative Report, Camp DG-26, Sept. 30, 1937, RG-049, Entry 19, Box 61.]

[54] Letter of Hugh C. Lewis, Chief Engineer-CCC to Henry R. Weiss, Acting Assistant Engineer-CCC (Mar. 4, 1940), RG-049, Entry 3, Box 12, attached as Exhibit 43. Henry R. Weiss was buried in the Weber County Cemetery, near Ogden, UT. http://www.usgennet.org/usa/ut/county/weber/cemetery/aultorest/w.htm.

[55] Memo. of Chas. F. Moore, Regional Grazier, DOI Grazing Service (Jan. 5, 1943), in National Archives Denver Regional Office, Accession 8NN-049-91-133, file 4114 M-17, Consolidation of Districts (Boundaries, etc.), (emphasis added) attached as Exhibit 44.

Sand Pass Road."[56] This, again, demonstrates the understanding by those who had first-hand knowledge that the CCC played a significant role in constructing the route, and that the route constructed by the CCC was known as the Weiss Highway.

Fifth, contemporary news accounts also conclude that the CCC constructed the route. For example, the Eureka Reporter, in a 1938 article on the CCC camp at Jericho stated: "The most important unfinished piece of work [for the camp] is the construction of a direct road into western Juab County by way of Sand Pass. It will take another year to complete this job ...."[57] Two years later, the Nephi Times wrote:

> This work is being done by young men of the Civilian Conservation Corps working under the direction of employers of the Grazing Service of the United States Department of the Interior. They are fed, clothed and otherwise taken care of by men trained for that purpose by the United States Army.
>
> All work is done in the interest of the public good and to improve public land. ....
>
> One project of great value ... is the road built by the Jericho CCC camp from Jericho towards Callao on the state line between Utah and Nevada. Seventy miles of this road have been built by this camp and the remaining 26 by the Callao camp. Both of these camps work under the supervision of the Grazing Service.
>
> This road .... is an all weather road in constant use by stockmen with sheep and cattle on the west desert. Before this road was constructed wet weather frequently made it impossible to reach the herds with supplies for the herders and stock when necessary.[58]

Thus, contemporary news accounts repeatedly identified the CCC's work on the Weiss Highway as "construction" and emphasized that it was the construction of this route by the CCC, under the control of the Grazing Service, that permitted year-round travel into the West Desert.

---

[56] Memo. of R. D. Nielson, District Grazier, DOI Grazing Service (Sep. 3, 1942) at 2, in National Archives Denver Regional Office, Accession 8NN-049-91-133, file 4114 M-17, Consolidation of Districts (Boundaries, etc.), attached as Exhibit 45. This is the earliest located reference in a public document identifying a route as the "Weiss Highway."

[57] Eureka Reporter, "Jericho Camp May Be Moved," (April 7, 1938) (emphasis added), attached as Exhibit 46.

[58] Nephi Times, "Reviews Work Of Jericho CCC Camp," (April 4, 1940) (emphasis added), attached as Exhibit 47.

More recent evidence reinforces the CCC's likely role on behalf of the Grazing Service in construction. Recent news accounts state that the claimed route "has existed for decades, at one time leading to a Civilian Conservation Corps camp."[59]

3. To the Extent Juab County Had a Right-of-Way to Construct Highways, It Conveyed at Least a Portion of That Right-of-Way to the Division of Grazing.

A title search concerning private property near Cherry Creek that is traversed by the route of the Weiss Highway (Sec. 21, Township 12 south, Range 5 west) disclosed the existence of an easement held by the Division of Grazing, DOI, to "construct and maintain roads and trails" recorded in Juab County's records. Juab Title & Abstract Company, Commitment for Title Insurance (April 30, 2004), Schedule B – Section 2, ¶12, attached as Exhibit 48. The actual recorded easement reads, in pertinent part, as follows:

> Juab County, does by these presents, hereby grants, bargains, releases, sells and conveys the right to construct and maintain roads and trails ... together with all rights which are incidental and necessary in the construction, operation, maintenance and convenient to a peaceful passageway to, from and over the hereinafter described lands; to the United States Department of the Interior, Division of Grazing, Grantee ... for the sum of ... $1.00 ... the following described land, described, as follows, to-wit:
>
> Right-of-way for the construction of road. The Right-of-Way, Thirty feet wide, described as follows ….

Easement, No. 58289, Book 120, Page 187 of the records of Juab County, executed Feb. 7, 1936, recorded Feb. 1, 1937, attached as Exhibit 49. The lands over which the right-of-way traverses are then described by township and range as well as with some specific reference points. The right-of-way tracks with the route of the Weiss Highway roughly from Jericho to Cherry Creek (a distance of about 15 miles). Declaration of Douglas C. Pflugh (May 5, 2004), attached as Exhibit 50. The description of the right-of-way's route includes passage over federal public lands, state lands, and private lands. The right-of-way purports, at least for part of its route, to follow a "county road." The easement dates from 1936, when the CCC and Division of Grazing were beginning construction on the easternmost part of the Weiss Highway.

---

[59] See Deseret News (Jan. 15, 2004) (Exhibit 20); Nephi Times (Jan. 21, 2004) (Exhibit 21). Declarations submitted in support of the application, while of dubious value (as described above) do not contradict the timeframe of construction as the 1930s. Declaration of R. Roscoe Garrett at ¶6 ("It is the reputation in the community that this road was used by settlers, ranchers, sheepmen, and others of Juab County since at least the early 1930's"); Declaration of Ronald C. Jones at ¶4 (same); Declaration of Heber C. Taylor at ¶4 (same); Declaration of Howard J. Fields at ¶4 (same). Two declarations submitted to BLM mention the CCC specifically. See Declaration of Ronald L. Steele ("It is the reputation in the community that in the 1930's the Civilian Conservation Corps worked on the Weiss Highway widening it, improving it, adding gravel, and installing culverts") and Declaration of Ronald C. Jones.

A plain reading of the easement leads to several conclusions relevant to Utah's application. First, and most importantly, to the extent – if any – that Juab County could have had a right-of-way for the construction of a highway at the location of the Weiss Highway, Juab County granted, released, sold conveyed that right-of-way to DOI, "together with all rights which are incidental and necessary in the construction, operation, maintenance and convenient to a peaceful passageway to, from and over" the route of the first 15 or so miles of the Weiss Highway.[60]

Second, at least part of the path of the Weiss Highway from Jericho to Cherry Creek apparently coincided with that of a claimed (but unnamed, unnumbered and otherwise unidentified) county road.

Third, the unidentified "county road" was, at the time, almost certainly <u>not constructed</u> since the right-of-way granted to the DOI the right to "construct" and not simply "maintain" a road.

Since DOI holds an easement for the construction of a highway from Juab County across state and private land (as well as federal public land), the agency cannot issue a disclaimer for the route. DOI cannot "confirm that it has no property interest in the identified public highway" through a recordable disclaimer of interest (see Notice of Application, 69 Fed. Reg. 6000), since, according to the records of Juab County, the DOI has just such an interest in at least a portion of the route, an easement granted by the County.[61]

4. Conclusion.

Evidence from the Grazing Service-CCC files, contemporary newspapers, and Juab County title records, as well as other evidence thus supports the following conclusions:

-- at least part of the Weiss Highway was used as a stock driveway for sheep prior to 1935, and may have been claimed as a "county road";

- no "construction" of the route that is now claimed as the Weiss Highway took place on the route until late 1935;

---

[60] The easement's identification of the right-of-way over federal public lands is somewhat puzzling, since that land would have been administered by DOI. DOI may have sought the easement to supercede any hypothetical claim to the route by other parties (including Juab County).

[61] TWS only sought a review of title records for a single square-mile section traversed by the Weiss Highway. BLM should require Utah to complete title searches for all land which the route traverses to determine whether other easements exist for the remainder of the route.

-- significant parts of the Weiss Highway appear to have been constructed between 1935 and 1941 by federal laborers employed by a federal agency (the Grazing Service) acting at the request of a federally-constituted advisory board to further the federal purposes of assisting federal livestock permit holders over largely federal land, although the exact location and extent of that work is not completely established;

-- to the extent Juab County had a right-of-way to construct highways, it conveyed that right to the Division of Grazing over at least part of the route in early 1936; and

-- after 1938, at least part of the route was available for public motor vehicle travel between Callao and Jericho, although CCC construction continued through at least 1940.

B. Because the Weiss Highway Was Apparently Constructed by and for the Federal Government, No R.S. 2477 Right-of-Way Was Created by Its Construction.

R.S. 2477 granted to non-federal entities a right-of-way for the construction of highways. Because a federal entity – the Grazing Division – constructed the Weiss Highway across federal lands using federal employees and federal funds, to serve a federal purpose (namely, to assist federal permit holders in the exercise of privileges extended by federal permits), no right-of-way could be created under R.S. 2477 to Utah or Juab County.

There is no reason to believe that the purpose of R.S. 2477 was needed to encourage or recognize the construction of federal routes across federal lands. Under Article IV of the U.S. Constitution, Congress clearly had the power to authorize such highways, and title to such routes would clearly remain in the United States. Simply put, there would be no need for Congress to recognize federal rights-of-way across federal lands.

Indeed, it would make no sense for Congress to grant a right-of-way to a federal agency over its own land, given that the general law of easements (which includes rights-of-way) forbids such an outcome. In general, an easement is a right held by someone other than the property owner. As a leading treatise has put it:

> an easement is a privilege without profit which the owner of one tenement [or "estate"] has a right to enjoy in respect of that tenement, in or over the tenement of another person, by reason whereof the latter is obliged to suffer or refrain from doing something on his own tenement for the advantage of the former. It is a charge or burden on one estate, the servient, for the benefit of another, the dominant.

25 Am.Jur. 2d Easements and Licenses in Real Property § 1 (May 2003 Ed.). For this reason, "[a] person cannot have an easement in his own land," because:

> all the uses of an easement are fully comprehended in his general right of ownership. In other words, 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. It follows that no easement exists so long as there is a unity of ownership of the properties involved.

25 Am. Jur. 2d Easements and Licenses in Real Property § 2 (May 2003 Ed.), citing, inter alia, Hidalgo County Water Control and Improvement District No. 16 v. Hippchen, 233 F.2d 712 (5th Cir. 1956) (other citations omitted).

It therefore follows that the Division of Grazing, in constructing a highway over its own land, to serve its own purposes, using federal funds and federal workers, cannot have created a right-of-way on behalf of itself – or anyone else – under R.S. 2477.

Maintenance that Utah asserts occurred on the route since the 1940s does not render the route "constructed" by another entity. The CCC clearly used heavy equipment and expended a huge amount of man hours and (for that era) money in initially constructing significant portions of the Weiss Highway, in turning a seldom used trail overgrown with vegetation, blocked by rocks, and threatened with frequent washouts into a highway capable of supporting motor vehicles. The CCC's work included bulldozing, grading, graveling, and the construction of culverts, small bridges, and other improvements. Juab County has stated that it has no records indicating that it spent any money or time maintaining, improving, or constructing the route before or since the CCC constructed the route. See letter of P. Davis (Exhibit 23) at 2. TWS did not locate any records in which the Division of Grazing or its successor (BLM) surrendered title to the Weiss Highway to any other agency, nor has Utah submitted any such evidence.

While a number of Utah's declarations state that county road crews used heavy equipment on the route, maintained the route by grading it, gravelling it or installing culverts or bar ditches, all of this work is consistent with maintaining an existing dirt and gravel road, and all of this work the CCC had previously performed in making the road usuable for motor vehicles. In addition, the declarations do not allege that the route had to be recreated from whole cloth, or that parts of the federally-constructed route were abandoned and had to be restored. In fact, all of the declarations state that the location and width of the route has remained essentially unchanged for decades, going back to at least the 1940s, shortly after the CCC-Division of Grazing completed its construction work. See, e.g., Declaration of Ronald C. Jones at ¶ 11 ("When I first used the road it ran the same route it does now, the width of the traveled portion of the road as of the 1940's was essentially the same as it is now, or approximately twenty-two feet"). This further indicates that the CCC, on behalf of the Division of Grazing, completed the job of "construction" about 1940, and that the work declarants allege occurred was more in the manner of "maintenance" or upkeep of a federally-constructed route over federal land than in "constructing" a new route along the same footprint as that constructed by the CCC.

This is not to say that the activities discussed above – the use of graders, placement of culverts, etc. – cannot, in some cases, be considered to constitute "construction." For example, where a mere trail created by use of several vehicles is bladed and graveled, such activity could be considered "construction." However, that is not the case here. If the declarations are to be

believed (the lack of official County records notwithstanding), all that the Juab County road crew did in the 1940s and beyond was to keep in service a federally-constructed highway. That is not enough to satisfy the "construction" requirement of R.S. 2477.

That BLM apparently permitted Juab County to undertake maintenance work, if any, does not undercut the fact that BLM's predecessor – the Division of Grazing – constructed the Weiss Highway. Records obtained pursuant to the Freedom of Information Act indicate that BLM and Juab County signed an agreement concerning "Road Construction & Maintenance Responsibilities" in 1970. Memorandum of Understanding, To Clarify Road Construction & Maintenance Responsibilities in Juab County, Between the Bureau of Land Management and Juab County (Feb. 19, 1970), attached as Exhibit 51. Despite its title, this 1970 MOU clearly concerns the maintenance of already constructed routes. It indicates that BLM "will be primarily responsible for the maintenance of roads constructed or acquired by the Bureau which are needed and used primarily for the administration and management of the public lands" and that "Juab County will be primarily responsible for the maintenance of rods constructed or acquired by the County and which serve principally general public access purposes, and which are not considered as falling in category 1 [concerning those roads for which BLM was to be primarily responsible]." Id. at 1-2. The MOU then sets out "maintenance responsibilities" for a number of named routes, including an unidentified 15-mile segment of the "Weiss Highway" which was assigned to county maintenance, as were several segments of routes named "Cherry Creek." Id. at 5-6. Whether these routes are the same as the claimed 99-mile "Weiss Highway" is difficult to tell, since BLM could not locate the map accompanying the MOU. E. Zukoski, pers. comm.. with Rod Lee, Utah BLM, Fillmore Office (Apr. 28, 2004).[62] In any event, the fact that BLM permitted the County to maintain a portion of the Weiss Highway which had been constructed by and for BLM's predecessor federal agency could not, by itself, result in the creation of a right-of-way under R.S. 2477.

Even if Juab County's alleged maintenance activities did rise to the level of actual "construction" of the Weiss Highway (which they did not), the County must demonstrate that the "construction" occurred prior to the time at which the lands were reserved. Utah's declarations fail to make this case, since the lands were reserved, at the latest, by under the Taylor Grazing Act amendments of 1936, as discussed immediately below.

C. Because the Weiss Highway Was Apparently "Constructed" after the Lands Were "Reserved" under the Taylor Grazing Act, R.S. 2477 Does Not Apply.

1. The 1934 Taylor Grazing Act, Executive Order 6920, 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.

---

[62] This MOU was the only document concerning the Weiss Highway BLM could locate in its Richfield/Fillmore office.

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 of 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.[63] The withdrawal affected the land covered by the Taylor Grazing Act as well as land not covered by the statute. The President's authority to issue Executive Order No. 6910 was expressly conferred by the Pickett Act. Ch. 421, 36 Stat. 847; see also Utah v. Andrus, 446 U.S. at 513-15.

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

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

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

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

---

[63] E.O. 6910 is reprinted in full at Utah v. Andrus, 446 U.S. at 514 n.19, and attached hereto as Exhibit 52.

> 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 West Desert across which the Weiss Highway runs – "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.

2. The Best Evidence Indicates that the Weiss Highway Was at Least in Part Constructed After the Lands Were 'Reserved.'

The Taylor Grazing Act of 1934, the amendments to it enacted on June 26, 1936, and E.O. 6920 (1934) withdrew Utah's public lands of 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. Correspondence in the Division of Grazing archives indicates that the land underlying the route at issue was within one or more grazing districts established under the 1934 Act. As discussed above, the best available evidence indicates that construction did not begin on what became known Weiss Highway until late 1935 or early 1936, and was not completed until about 1940. Thus, it appears likely that substantial

parts of the Weiss Highway were constructed after the latest date when the lands were reserved (June 26, 1936).

The State of Utah has certainly submitted no evidence – beyond mere unattributed hearsay – that the route was "constructed" throughout the entirety of its length 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 99-miles of route at issue by June 26, 1936, BLM cannot recognize an R.S. 2477 right-of-way for the Weiss Highway because the land was clearly "reserved" after that time.

VI. BLM FAILS TO DISCLOSE THE IMPACTS OF THE PROPOSED DISCLAIMER.

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 Utah's application for a recordable disclaimer of interest will only create more clouds of uncertainty.

The Federal Register notice announcing BLM's intent to issue a disclaimer, Utah's application, and the MOU itself all fail to make clear what rights Juab County will have to exercise over what amount of land that it does not have now, and what rights BLM is giving up over what extent of the public's lands. What will the exact impact be of a statement "confirm[ing]" that "the United States has no property interest in the identified public highway right-of-way?" 69 Fed Reg. 6000 (Feb. 9, 2004). When a standard disclaimer is issued (that is, a statement that the United States has no interest in a certain parcel of land), the outcome is clear. Not so here.

The MOU, while addressing the relative rights of the parties, fails to clarify the issue. 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 FLLPMA and [NEPA].

MOU (Exhibit 6) at 4. The MOU does not define key terms of this section, making it impossible to address key questions: what does it mean to "substantially alter" a highway in general, and the Weiss Highway in particular? What characteristics of the Weiss Highway or any other route (or characteristics of their use) will BLM consider subject to the 'substantial alteration' test? What can the County or State do to alter the Weiss Highway or any other route that does not rise

to the level of a "substantial" alteration? How will BLM (or the County) determine what constitutes "ordinary maintenance" of the Weiss Highway – 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 the Weiss Highway or other route? How will such understandings be memorialized so that all interested parties – BLM, the State, the County, and the public – understand what can and what cannot occur within the right-of-way without prior BLM approval? Utah does not provide any evidence to specifically answer the question of what might constitute "ordinary maintenance" of the Weiss Highway.

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 not strictly tied 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) its recordable disclaimer 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 are," an approach previously rejected by both the Courts and DOI. In short, a cloud of uncertainty will be placed over the exact scope of a right-of-way in which the BLM disclaims an interest.

Rather than leave the public, BLM, the State, and Juab County 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 Weiss Highway are federal public lands administered by BLM. The management of uses on the route, as well as maintenance activities on the route, could have detrimental environmental impacts to BLM land, including that adjacent to, and burdened by, the alleged right-of-way.

For example, the use of motor vehicles on roads, as well as the maintenance of such routes, can, among other things:

- act as vectors for exotic, noxious weeds;
- fragment wildlife habitat;
- cause direct mortality of wildlife;
- cause air pollution (from, among other things, fugitive dust emissions);
- disrupt watersheds;
- cause sediment deposition in rivers and streams;

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

BLM has a duty to manage and protect public lands, and a transfer of management responsibility for the Weiss Highway 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 <u>any actions</u> by the holder of the [R.S. 2477] right-of-way. Activities on a right-of-way, which <u>potentially may affect</u> the servient estate, are subject to the National Environmental Policy Act (Tenth Circuit Court of Appeals ruling in <u>Sierra Club v. Hodel</u>, 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. <u>See</u> <u>Sierra Club v Hodel</u>, 848 F.2d at 1083 (general rule is that holder of the right-of-way and the owner of the servient estate must exercise rights so as not to unreasonably interfere with one another); <u>Garfield County</u>, 122 F. Supp. 2d 1201, 1242-43 (D. Utah 2000) (holder of the right-of-way and owner the servient estate must exercise rights so as not to unreasonably interfere with one another); <u>id</u>. at 1253 (analyzing the difference between maintenance and construction, and concluding that where activity occurs within the scope an existing ROW, the County "will <u>likely</u> be able to proceed") (emphasis added); <u>Barker v. Board of County Com'rs of County of La Plata, Colo.</u>, 49 F. Supp. 2d 1203, 1220 (D. Colo. 1999) (noting the Forest Service's "right to reasonably regulate" portions of easement that traverses the agency's lands). Nevertheless, if BLM issues 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 apparently plans to approve this disclaimer application, the agency apparently is refusing to consider the environmental impacts, 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. <u>See</u> Memo. of J. Hughes (Exhibit 15) 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.

CONCLUSION.

BLM must deny Utah's application for a recordable disclaimer of interest in the Weiss Highway because: (1) the Disclaimer Rule and the MOU that would be used to approve the disclaimer are both illegal; (2) Utah has failed to provide any evidence that the highway was constructed before October 21, 1976; (3) evidence we submit shows that the route was apparently constructed as a federal project to serve federal ends, and therefore no right-of-way could be granted pursuant to R.S. 2477; (4) evidence we submit shows that to the extent the route was constructed, a substantial portion of the route was not constructed before the lands were reserved; and (5) evidence we submit shows that Juab County granted an easement to the Interior Department to construct the route in question.

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 utilizing a standard of review that protects the interests of the American people in their public lands.

Finally, we again urge Utah and Juab County to abandon their application for a recordable disclaimer of interest, and to instead pursue to a FLPMA Title V permit. Such a permit would allow BLM to more effectively balance environmental protections while allowing Juab County authority to maintain the route.

Thank you for this opportunity to comment. 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

Cc: Olene Walker, Governor, State of Utah
Senator Joseph Lieberman
Senator Jeff Bingaman
Rep. Mark Udall
Gale Norton, Secretary, Dep't of the Interior
J. Steven Griles, Deputy Secretary, Lands & Minerals Management, Dep't of the Interior
Rebecca Watson, Ass't Secretary, Dep't of the Interior
Kathleen Clarke, Director, Bureau of Land Management
Joe Incardine, Realty Office Dir., Utah State Office, BLM
William Boyd Howarth, Chair, Juab County Commission

Cc: Neil V. Cook, Juab County Comm'r
Robert L. Steele, Juab County Comm'r
Jared Eldridge, County Attorney, Juab County
Mark Ward, 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

TABLE OF EXHIBITS

Exhibit 1.	Section 108 of the Omnibus Interior Appropriations Bill for Fiscal Year 1997, 110 Stat. 3009-200
Exhibit 2.	Letter of the Comptroller General (Aug. 20, 1997), # B-277719
Exhibit 3.	BLM, News, Proposed Rule on Conveyances, Disclaimers and Correction Documents: Q's and A's (Feb. 22, 2002)
Exhibit 4.	S. Rep. No. 160, 105th Cong., 2nd Sess. (1998) (excerpts)
Exhibit 5.	Letter of Sen. Jeff Bingaman to Secretary Gale Norton (April 21, 2003)
Exhibit 6.	Memorandum of Understanding on "State and County Road Acknowledgement" (April 9, 2003).
Exhibit 7.	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)
Exhibit 8.	Michael C. Blumm, The Bush Administration's Sweetheart Settlement Policy, 24 Environmental Law Review 10397, 10408 (May 2004) (excerpts)
Exhibit 9.	Ezra C. Knowlton, History of Highway Development in Utah (Utah State Department of Highways 1964) (excerpts)
Exhibit 10.	Brief of Federal Appellees, SUWA v. BLM, Tenth Cir. No. 01-4173 (June 2002) (excerpts)
Exhibit 11.	Brief of Federal Appellees, Southwest Four Wheel Drive Ass'n v. Bureau of Land Management, 10th Cir. No. 03-2138 (Oct. 15, 2003) (excerpts)
Exhibit 12.	Joseph E. Worcester, Dictionary of the English Language (1863) (excerpts)
Exhibit 13.	P. Baldwin, Congressional Research Service, CRS Report for Congress, Highway Rights of Way on Public Lands: R.S. 2477 and Disclaimers of Interest (2003) (excerpts)

Exhibit 14.	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)
Exhibit 15.	Memo. of Jim Hughes, Deputy Dir., BLM to Utah State Director (June 25, 2003)
Exhibit 16.	Memo. of Secretary of the Interior to Ass't Secretaries (Jan. 22, 1997) ("Babbitt Policy")
Exhibit 17.	Memo. of Secretary of the Interior to Ass't Secretaries (Dec. 7, 1988) ("Hodel Policy")
Exhibit 18.	Letter of Rebecca Watson, DOI Ass't Secretary, to P. Eaton, TWS (Mar. 17, 2004)
Exhibit 19.	BLM, R.S. 2477 Administrative Determination(s), San Juan County Claims (July 7, 1999) (excerpts)
Exhibit 20.	J. Loftin, "Utah Claims Juab Road," Deseret News (Jan. 15, 2004)
Exhibit 21.	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)
Exhibit 22.	BLM, Instruction Memorandum No. UT 98-56 (June 19, 1998)
Exhibit 23.	Letter of P. Davis, Deputy Juab Co. Att'y to K. Brengel, TWS (Mar. 16, 2004)
Exhibit 24.	Letter of K. Brengel, TWS to Juab County Comm'rs (Feb. 25, 2004)
Exhibit 25.	Declaration of Kristen Brengel (May 6, 2004)
Exhibit 26.	US Dep't of Interior, Division of Grazing, DG-26, Narrative Report Nov. 29, 1935 to April 1, 1936, National Archives and Records Administration (Denver, CO), Record Group 049, Records of the Bureau of Land Management, Grazing Service, Entry 19, Box 61 (excerpts)
Exhibit 27.	US Dep't of Interior, Division of Grazing, DG-26, Narrative Report April 1, 1936 to Sept. 30, 1936, RG-049, Entry 19, Box 61 (excerpts)

Exhibit 28. US Dep't of the Interior, Division of Grazing, Eighth Period Illustrated Narrative Report, Camp DG-26, March 31, 1937, RG-049, Entry 19, Box 61 (excerpts)

Exhibit 29. US Dep't of the Interior, Division of Grazing, Ninth Period Illustrated Narrative Report, Camp DG-26, Sept. 30, 1937, RG-049, Entry 19, Box 61 (excerpts)

Exhibit 30. US Dep't of the Interior, Division of Grazing, Tenth Period Illustrated Narrative Report, Camp DG-26, March 31, 1938, RG-049, Entry 19, Box 60 (excerpts)

Exhibit 31. Letter of Chesley P. Seely, Regional Grazier, to Director of Grazing (May 29, 1941), RG-049, Entry 5, Box 16

Exhibit 32. Letter of Chesley P. Seely, Regional Grazier, to Director, Division of Grazing (Aug. 4, 1938), RG-049, Entry 5, Box 15

Exhibit 33. Letter of E. H. Frenzell, Acting Regional Grazier, Division of Grazing, to K. Wolfe, Liaison Officer, CCC (July 13, 1938), RG-049, Entry 5, Box 17

Exhibit 34. Letter of C.C. Taylor, Inspector to C. P. Seely, Regional Grazier (July 21, 1931) [sic, should be 1939]; RG-049, Entry 20, Box 83

Exhibit 35. Letter of E.R. Alcott, Engineer Inspector to Chesley P. Seely, Regional Grazier (Oct. 10, 1939); RG-049, Entry 20, Box 83

Exhibit 36. Memorandum of C.C. Taylor, Inspector to C. P. Seely, Regional Grazier (June 25, 1940); RG-049, Entry 20, Box 83 (excerpts)

Exhibit 37. Memorandum of C.C. Taylor, Inspector to C. P. Seely, Regional Grazier (Nov. 10, 1940); RG-049, Entry 20, Box 83

Exhibit 38. Letter of Chesley P. Seely, Regional Grazier, to Director of Grazing (November 28, 1941), RG-049, Entry 5, Box 17

Exhibit 39. American Automobile Ass'n, Official Road Map of Colorado-Utah and Wyoming ["Issued Annually – Next Edition Spring 1939"], RG-049, Entry 38, Box 136 (excerpts)

Exhibit 40. The H.M. Gousha Co., Road Map of Utah, Prepared Exclusively for Standard Oil Company of California, copyright 1940, RG-049, Entry 38, Box 136 (excerpts)

Exhibit 41.	Letter of Conrad L. Wirth, Rep., Dep't of the Interior, to Robert Fechner, Director, CCC (Oct. 21, 1938), RG-049, Entry 5, Box 17, (excerpts)
Exhibit 42.	Letter of Chesley P. Seely, Regional Grazier, to Director of Grazing (Oct. 4, 1938), RG-049, Entry 5, Box 17 (excerpts)
Exhibit 43.	Letter of Hugh C. Lewis, Chief Engineer-CCC to Henry R. Weiss, Acting Assistant Engineer-CCC (Mar. 4, 1940), RG-049, Entry 3, Box 12
Exhibit 44.	Memo. of Chas. F. Moore, Regional Grazier, DOI Grazing Service (Jan. 5, 1943), in National Archives Denver Regional Office, Accession 8NN-049-91-133, file 4114 M-17, Consolidation of Districts (Boundaries, etc.)
Exhibit 45.	Memo. of R. D. Nielson, District Grazier, DOI Grazing Service (Sep. 3, 1942) at 2, in National Archives Denver Regional Office, Accession 8NN-049-91-133, file 4114 M-17, Consolidation of Districts (Boundaries, etc.)
Exhibit 46.	Eureka Reporter, "Jericho Camp May Be Moved," (April 7, 1938)
Exhibit 47.	Nephi Times, "Reviews Work Of Jericho CCC Camp," (April 4, 1940)
Exhibit 48.	Juab Title & Abstract Company, Commitment for Title Insurance (April 30, 2004)
Exhibit 49.	Easement, No. 58289, Book 120, Page 187 of the records of Juab County, executed Feb. 7, 1936, recorded Feb. 1, 1937
Exhibit 50.	Declaration of Douglas C. Pflugh (May 5, 2004)
Exhibit 51.	Memorandum of Understanding, To Clarify Road Construction & Maintenance Responsibilities in Juab County, Between the Bureau of Land Management and Juab County (Feb. 19, 1970)
Exhibit 52.	Executive Order No. 6910 (Nov. 26, 1934)