southern
utah
wilderness
alliance

December 20, 2005

Larry Jensen, Solicitor
United States Department of the Interior
Office of the Solicitor
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Salt Lake City, Utah 84138-1180

Via Fax No. 524-4506

Dear Larry:

As discussed in our conversation with you and Brian Waidman on December 5, 2005, I write on behalf of Kristen Brengel of The Wilderness Society and Ted Zukoski of Earthjustice to provide you our perspective on the discussions underway between the Department of Interior and Kane County regarding the county's R.S. 2477 claims. We appreciate the time you've taken to discuss this issue with us.

Based on our discussions with you, and your description of the process under consideration with Kane County, there are several issues which we believe require particular attention, and a number of concerns which must be resolved in a way that ensures protection for federal public land, and affirms the responsibility of claimants like Kane County to meet affirmatively their burden of proof as required by the 10th Circuit in *Southern Utah Wilderness Alliance v. Bureau of Land Management*.

The county's R.S. 2477 claims, which have as yet not been adjudicated, and to which Kane County has established no valid rights, have been the focus of intense interest by Congress, the public and Interior Department because of the significance of the land affected – the Grand Staircase – Escalante National Monument, and proposed wilderness areas – and because of the blatant, unilateral usurpation of federal authority by the county. Moreover, the Interior Department's failure to take swift remedial action, despite the recommendation of BLM staff, has exacerbated the situation. We urge the Department to make clear to the County that unless and until the validity of the claims is firmly established, BLM will exercise its full authority under federal law to manage and protect these lands.

Our specific, initial concerns largely fall into the following categories: 1) the standards which will govern the Department's review of Kane County's R.S. 2477 claims; and 2) public participation in the process that will lead to the Interior Department's review of those claims. Please note that this is a preliminary assessment. We will likely supplement this letter to raise additional concerns in the days to come.

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I. The Applicable Standard of Review and Evidentiary Requirements

As we discussed in our phone conversation, the County has the burden of establishing that each route claimed meets the criteria set down by R.S. 2477. Under the burden of proof set out by the courts, the County must show not by a preponderance of the evidence but beyond all doubt that the requirements of the statute were met.

Supreme Court and Tenth Circuit precedent requires that all doubt as to whether and R.S. 2477 right-of-way exists must be resolved in favor of the United States. "[T]he established rule [is] that land grants are construed favorably to the 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.**" *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 59 (1983) (emphasis added), quoting *United States v. Union Pacific R.R. Co.*, 353 U.S. 112, 116 (1957); *see also Northern Pacific Ry. v. Soderberg*, 188 U.S. 526, 534 (1903) ("Nothing passes by implication, and unless the language of the grant be clear and explicit as to the property conveyed, that construction will be adopted which favors the sovereign rather than the grantee"); *Caldwell v. United States*, 250 U.S. 14, 20 (1919) (land grants must be construed "favorably to the government. . . . [N]othing passes but what is conveyed in clear and explicit language – **inferences being resolved not against but for the government**" (emphasis added)); *Andrus v. Charlestone Stone Products*, 436 U.S. 604, 617 (1978) (quoting *United States v. Union Pacific R.R. Co.).*

This principle applies to the determination and scope of individual R.S. 2477 rights-of-way. For example, in *Fitzgerald v. United States*, 932 F.Supp. 1195, 1201 (D.Ariz.1996), the court stated:

> To establish an R.S. 2477 easement, plaintiffs must show that the road in question was built before the surrounding land was reserved for a National Forest. *Adams v. U.S.*, 3 F.3d 1254, 1257 (9th Cir.1993). Any doubt must be resolved in favor of the government. *U.S. v. Gates of the Mountains Lakeshore Homes, Inc.*, 732 F.2d 1411, 1413 (9th Cir.1984)

See also Humboldt County v. United States, 684 F.2d 1276, 1280 (9th Cir.1982) ("Any doubt as to the extent of the grant must be resolved in the government's favor"); *United States v. Balliet*, 113 F. Supp. 2d 1120, 1129 (W.D.Ark. 2001) ("Any doubt as to the scope of the grant under R.S. 2477 must be resolved in favor of the government").

In summarizing this case law recently, the Tenth Circuit stated:

> This allocation of the burden of proof to the R.S. 2477 claimant is consonant with federal law and federal interests. As the district court noted, "[T]he established rule [is] that land grants are construed favorably to the 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." 147 F.Supp.2d at 1136 (quoting *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 59 ... (1983) in turn quoting *United States v. Union Pac. R.R. Co.*, 353 U.S. 112, 116 ... (1957)) (brackets in district court opinion). Other courts have applied this rule to R.S. 2477 cases, *Adams v. United States*, 3 F.3d 1254, 1258 (9th Cir.1993); *United States v. Balliet*, 133 F.Supp.2d 1120, 1129 (W.D.Ark.2001); *Fitzgerald v. United States*, 932 F. Supp. 1195, 1201 (D.Ariz.1996), and we agree. On remand, therefore, the Counties, as the parties claiming R.S. 2477 rights, bear the burden of proof.

Southern Utah Wilderness Alliance v. Bureau of Land Management, 425 F.3d 735, (10th Cir. 2005).

The Department of Interior therefore cannot make an administrative determination that an R.S. 2477 right-of-way exists unless there are no doubts as to the evidentiary and legal basis that the State of Utah or Kane County has submitted to prove its claim. To do otherwise would be to defy decades of Supreme Court and other precedent.

These cases make clear that the burden of proof to establish a valid R.S. 2477 right of way remains firmly with the county. Accordingly, under the applicable standard, the county must show 10-years continuous use of the route at issue beginning at the very latest in 1966 (assuming no pre-1976 reservations apply) and continuing without interruption until 1976. This is a rigorous standard, and the evidence supplied by the county must be carefully reviewed by the BLM to determine whether it meets the threshold.

Specifically, evidence that would be relevant to BLM's review of an R.S. 2477 claim – and where appropriate that BLM must itself seek out and review in order to make a credible determination – would include, but not be limited to:

- Government Land Office surveys and re-surveys;
- U.S. Geologic Survey maps and notes;
- Affidavits which recount, without reliance on hearsay, continuous use of the route;
- Historical information relating to the use of the route and its surrounding area;
- Grazing files relating to the use of the area;
- Any activities in the area which are primarily conducted by federal authorities or under the auspices of federal law, including, for example, the construction of the route by the Civilian Conservation Corps or other federal entity — this may require an archival search for public lands records that could be located outside of the State of Utah;
- Records (or the lack thereof) relating to the expenditure of public funds for the use or construction of the route;

- The extent or frequency of the use of the route during the 10-year period of use supporting the right of way claim, which would define the permissible use of the route today;
- County road maps, and county construction and/or maintenance records;
- BLM records concerning the nature or presence of the routes, including records created during its review of the wilderness character of BLM lands in Kane County;
- Oil and gas leasing records which may have reserved public lands in Kane County where R.S. 2477 rights are claimed;
- BLM planning documents, concerning the existence and/or use of the claimed routes;
- Documentation of the termini or purpose for the claimed R.S. 2477 rights, which would be relevant to the claim that they are "highways;"
- Demonstration that the R.S. 2477 claims are continuous and uninterrupted. Gaps in the claimed "highway" result in isolated, unconnected strands of claims and would not meet the definition of highway. Such gaps may occur as a result of intervening oil and gas leases, parcels of private or state-owned lands, or lands reserved for other public purposes;
- Evidence related to whether the route had been abandoned;
- Evidence relating to changes in the use and character of the route;
- Evidence of acceptance by public authorities of the grant of the right of way, including the expenditure of public funding for the use or construction of the right of way;
- Use of the route for diverse purposes or by diverse interests; and
- The traditional uses to which the route had been put.

We emphasize the importance of BLM's independent, critical review of the evidence submitted by the county, in addition to a thorough review of BLM's own files, and those of other federal agencies, counties, and the State of Utah.

Our concern in this regard is grounded in our own recent experience relating to materials submitted by the State of Utah in support of applications for recordable disclaimers of interest. As you are no doubt aware, Utah was forced to withdraw its initial application – for a route known as the Weiss Highway in Juab County – when we discovered: (1) federal archival records showing that the U.S. Civilian Conservation Corps constructed the route to serve a federal purpose; and (2) records in the Juab County clerk's office showing that the County had sold part of the highway right-of-way to the BLM for $1. In short, County records the County failed to submit and Interior Department records that BLM had not previously reviewed demonstrated why BLM could not recognize a right-of-way for the Weiss Highway.This aptly demonstrates why BLM must perform its own skeptical review of County records submitted, why BLM must conduct an independent search of County records, and why BLM must thoroughly research its own files, archived records, and those of other federal agencies.

The State of Utah, however, appeared to learn little from the Weiss Highway application. It submitted a half-dozen additional claims, but for each supplied little more than a few affidavits of those claiming to have driven the routes, and aerial photos from 1976 and the 1990s. For all of the routes, both the State and the counties admitted that they had no official records at all concerning highway construction or maintenance, or county funding of such activities. Utah presented no first-hand evidence concerning who first constructed the routes and why. What information was provided was hardly compelling. The statements in the affidavits sometimes contradicted one other and were often at odds with hard data. For example, two men state that they remember trucks driving claimed Daggett County route D28 in 1941, although aerial photos from nine years later show no sign of any scar on the ground for the central portion of the route.[1] Information in BLM's files showed that this same route was so obscure that the county had repeatedly failed to display major stretches of the route on its highway maps, and BLM apparently closed part of it to off-road vehicles in the 1980s. While another route (the Horse Valley route) is located in Beaver and Iron County, Iron County general highway maps do not display all of the route until long after 1976. Affidavits Utah submitted to support that route's existence were so vague that they failed to demonstrate any vehicle use in Iron County at all. And evidence in Civilian Conservation Corps files showed that part of the claimed Snake Pass route was built by the CCC as an access road to a CCC-built reservoir. In sum, the scant evidence submitted by the State in favor of the six applications was often questioned - and sometimes refuted - by our research of federal agency, state, or county files. We will provide under separate cover a copy of each of our comment letters on the State's disclaimer applications so that you may get a sense for the nature and extent of our research efforts.

In addition, the State and County may submit evidence of dubious relevance to its claims, which BLM must scrutinize carefully. For example, in support of its applications for recordable disclaimers of interest, the State routinely submitted aerial photographs. Aerial photos are notoriously difficult to interpret, and require expert review. In addition, while such photos may identify disturbance on the ground, they rarely demonstrate how that disturbance was created or who created it and why.

These examples highlight the importance of thorough research and a skeptical review of evidence by BLM, as well as a meaningful public review and involvement in the process, as described below. As we have learned, the voluntary information provided by the State of Utah and counties has been notoriously scant. If the State and counties

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[1] This demonstrates why BLM cannot accept at face value and must thoroughly and skeptically evaluate and cross-check the information in affidavits submitted by the State. This is especially true given that the State created a "cheat sheet" template declaration which it apparently provided to assist attorneys in interviewing potential affiants, leading to the possibility that responses from affiants may have been coached and manipulated. See "R.S. 2477 Roads, Oral History Interview Questions and Affidavits," (no date), attached to June 24, 2005 comments of The Wilderness Society et al. on disclaimer applications (in Utah BLM state office files).

provide a similar paucity of data to support claims under this new process, the Department and BLM should push them to provide all of data in their files. If the State and counties continue to fail to provide needed information, BLM should be prepared to conduct its own research or to simply deny applications based on an inadequate supporting record.

II. Public Participation in the Department's Review Process

The presence of roads such as R.S. 2477 rights of way has profound, long-lasting implications for the future of the surrounding public lands. The threat to the affected public lands is heightened in a case such as this one where the lands have significant national importance due to the unique character of their scenic, wilderness, cultural, archeological, and rare fossil resources. The national interest in these landscapes is reflected in their designation as a national monument, as wilderness study areas, and as proposed wilderness areas.

Should the BLM suddenly determine that numerous claimed R.S. 2477 claims are valid and begin managing the underlying lands to take the status and presence of these claims into account, the agency's ability to exercise its full range of authority and management tools to protect these areas could be hampered, particularly from the threats of off-road vehicles like all-terrain vehicles and trail motorcycles which already present a management challenge to the BLM. Given the broad interest both locally and nationally in the future of these lands, and the potential repercussions of BLM's determinations, BLM must adopt a transparent process and a meaningful opportunity for early and continuing public involvement.

We have attached for your reference an exhibit to the management plan for the Grand Staircase – Escalante National Monument which recounts the significant effort the BLM undertook to involve the public in decisions regarding the management and road plan for the monument. The mailing list for that effort included 10,000 interested parties, and 12 public hearings in Washington, D.C., Denver, San Francisco, Salt Lake City and other locations. The BLM consulted with Native American Indian Tribes, as well as other interested groups like conservation organizations. "These groups and individuals were kept informed through scoping workshops, a science symposium, planning update letters, Draft Plan open house sessions, an Internet homepage, Federal Register notices, news releases, various informational meetings, and distribution of the Draft and Proposed Plans." *Record of Decision at ix.* Over 6000 public comments were received from 49 of the 50 states during the 120-day comment period on the draft management plan.

All of this evidences the intense and high level of interest in the management of the Monument, and high value that Americans place on the future of this place. Changes to the Monument plan, and/or the BLM's ability to protect it due to the recognition of R.S. 2477 claims must recognize this interest, and provide for equivalent opportunities for the public to participate in the R.S. 2477 review process.

We appreciate your interest in involving the public in the BLM's review of the county's R.S. 2477 claims. We stress, however, that the public should be involved at every stage of the determination process. Documents presented to the BLM by the county in support of those claims should be made available immediately to the public. As discussed above, there have already been several instances in which we have uncovered incomplete or simply erroneous R.S. 2477 applications in the disclaimer/MOU process. As a result, we strongly believe that the review process in Kane County could only be enhanced as a result of early public involvement and review of the county's evidence.

Not only have we provided valuable information and documentation to the BLM in response to applications submitted by the State for recordable disclaimers of interest, but we have been productive partners in R.S. 2477 decision making in the past. For example, we participated in the process which led to an earlier settlement between Kane County, the BLM and SUWA and the Sierra Club; although that settlement was abandoned by the county, our early involvement in that process led to what could have been a ground-breaking settlement. Additionally, we and the public generally, were involved from the beginning in the R.S. 2477 determinations in *SUWA v. BLM,* and we were not limited to participation *after* the BLM made its preliminary determinations. Indeed, in that case we provided the bulk of the information relevant to the claims; the counties in that case provided virtually no evidence in support of their claims.

In short, we – like other members of the public – have resources to offer the BLM and should be involved *at the commencement of the process*, not after the BLM makes an initial, preliminary determination. These lands are public lands – and the right of way themselves would be public highways if validated. It is hard to imagine an issue more imbued with public interest and import than this one.

Additionally, this process should be utterly transparent. In this age of technology, posting documents on the internet does not require intense staff time or incur major costs. Documents created and exchanged by the BLM and Kane County should be immediately available for public review. Maps provided by the county of their R.S. 2477 claims – purported public highways since 1976 -- should be available to the public and meetings between the BLM and the County should be open to the public. We urge the Monument in conjunction with the State BLM office to create a page on its web site where these documents would be available, and where the public could follow the progress of this review. BLM created just such a webpage to assist the public in participating in the review of applications for recordable disclaimers of interest. See http://www.ut.blm.gov/RS2477/default.htm and links therefrom.

We understand that DOI and Kane County wish to ensure that BLM reaches a prompt decision on County applications for administrative determinations. This desire for a prompt determination should not – and need not – come at the expense of effective public input. Given our experience with the disclaimer process, we conclude that the

public should have at least 90 days to review applications, gather evidence and prepare comments on proposed agency decisions. We found that federal, state and local agencies – which in many cases may be the exclusive source for critical data relevant to the validity of R.S. 2477 applications – have often been unable to respond to requests for potentially critically relevant information in less than 30 days. Commercial vendors of materials such as aerial photos also may be unable to provide data in such a time-frame. Analyzing the data providing may take more weeks. Limiting the public comment period to less than 90 days will severely undermine the integrity and transparency of the process.

Finally, we understand that Kane County and the State of Utah have expressed dissatisfaction with BLM's process for considering applications for recordable disclaimer of interest under the Utah-Interior Department Memorandum of Understanding (MOU), and have urged BLM to adopt a more truncated, "streamlined" process in addressing applications for administrative determinations. Many of the State's and county's concerns may be related to factors entirely within their control, since the State submitted insufficient applications and failed to timely provide funds required to defray the costs of BLM processing the requests, as required by law. We have many concerns ourselves about the disclaimer application process, as indicated by our comment letters. However, the process also had some features related to public comment that we support. For example, BLM made the State's application materials promptly available in hard-copy or CD, even before it published notice of the comment period. Evidence submitted by the State supporting each application was made available on-line as well. BLM provided a public comment period of 60 days (as its regulations required), and granted extensions where appropriate and requested by the public.[2] We believe that BLM itself should have undertaken a more rigorous review of application materials, particularly of the initial application for the Weiss Highway. And, as discussed above, we support a process that will provide for a comment period on draft determinations, which the disclaimer process did not. However, BLM's public review process for recordable disclaimers did have the positive features identified above. While DOI may wish to adopt an administrative determination process that differs from that used to evaluate applications for recordable disclaimers of interest, DOI should not limit public comment to less than that offered by BLM in the latter process.

[2] The 60-day period for public comment on disclaimer applications was generally adequate, but in that case the State BLM office reviewed a total of 7 applications over a 2-year period. Kane County has posted over 100 signs within the Monument and over 150 on other public lands, signing scores of routes. DOI apparently intends to process all of Kane County's claims on BLM lands in 2-3 years. This will result in the public facing comment periods on dozens of routes simultaneously. In that circumstance, the public will clearly need much more than 60 days to comment on each route, especially if the comment periods are running simultaneously.

III. DOI Must Evaluate the Impact of a Determination that a Right-of-Way Likely Exists.

In our discussions with you, we have learned little about how DOI intends to manage (or allow Kane County to manage) alleged rights-of-way for which BLM makes an administrative determination that a right-of-way likely exists. If BLM intends to manage a route differently as a result of a positive determination, BLM must evaluate the scope of the alleged right-of-way.

The scope of an R.S. 2477 right-of-way may include 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 United States v. 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. *Sierra Club v. Hodel*, 848 F.2d 1068, 1083 (10th Cir. 1988). 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. Id. All uses established before that date not terminated or surrendered, "are part of an R.S. § 2477 right-of-way." Id. at 1084.

BLM must either: (1) include in any draft determination concluding that a right-of-way likely exists an analysis of the likely scope of the right-of-way; or (2) explain why it will not do so.

In addition, BLM must build into its administrative determination process a mechanism for protecting critical lands by denying claims for rights-of-way. A key area that Kane County has targeted with its claims and signs is the Grand Staircase-Escalante National Monument. The Monument was set aside by presidential proclamation and is now being managed by BLM to protect its numerous wildlife, archeological, paleontological, biological, historical, and wilderness treasures. Other areas of public land in Kane County (such as WSAs) also have outstanding public values and have been determined by the BLM to be roadless. Kane County's R.S. 2477 claims may result in damage or destruction to numerous resources. Indeed, the County is explicitly seeking to end restrictions on off-road vehicles in the Monument plan, restrictions that BLM deemed necessary to protect the objects which the Monument was created to protect. BLM retains the option of simply telling the County that the resources threatened by claims either individually or cumulatively are too great, and prohibiting vehicle travel on any such routes. Under the Quiet Title Act, BLM retains the authority to purchase any proven rights-of-way to protect the resources at stake. 28 U.S.C. 2409a(b). BLM must therefore build into the process a mechanism through which BLM can simply deny the County the use of rights of way to arguably valid claims in order to protect those resources. In order to ensure that such values are accounted for, BLM should include in its evaluation of each claim an evaluation of the environmental consequences of a decision validating the claim.

IV. Conclusion

Our interests are in the preservation of the federal public lands in Kane County, particularly the Grand Staircase – Escalante National Monument, and lands with wilderness character. We are also intensely invested in the resolution of the R.S. 2477 issue in a way that conforms to the applicable legal standards, and which respects the public's interest in this process and invites their participation.

Please let us know if you have any questions about these preliminary comments or concerns. We will likely supplement these comments in the near future. We appreciate your availability and willingness to answer questions about this process, and look forward to speaking with you again as this process continues.

Sincerely,

Heidi McIntosh

Cc: Senator Richard Durbin
Senator Jeff Bingaman
Representative Scott Matheson
Representative Mark Udall
Brian Waidmann, Chief of Staff to the Secretary, Dep't of the Interior
Gene Terland, Acting Director, Utah BLM
Kent Hoffman, Deputy Director for Lands & Minerals, Utah BLM
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