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State lauds ruling on access to old roads

By Geoffrey Fattah
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State officials are calling a ruling from the 10th Circuit Court of Appeals a victory for the rights of the public to access old road rights of way that cut through federal land in three counties. But one environmental group says the ruling will only throw things into confusion and lead to yet more lawsuits.

In a ruling issued Thursday evening, the Denver-based Court of Appeals rejected the U.S. Bureau of Land Management's criteria for defining a road that a lower federal district judge used in her decision. Instead, three appellate judges, including former University of Utah law professor Michael McConnell, chose the state's criteria, which makes it easier to designate road rights of way and could open up areas of federal land to public access.

Among the BLM's criteria, a qualifying road must be established by "mechanical" construction. The state's criteria allows a right of way for roads that have been in continuous use for 10 years prior to 1976.

"This case has been in litigation since 1996, when Kane, Garfield and San Juan counties were accused of trespass for performing maintenance on roads they asserted as their rights of way," said Assistant Utah Attorney General Ralph Finlayson.

Calling the appellate ruling a major victory for counties and the state, Finlayson said many people who live in the Salt Lake area take easy access to places for granted. Finlayson said people who live near federal land rely on roads to access their cattle, their farms and each other. "These people absolutely need these roads for their livelihood and for their recreation," he said.

But the Southern Utah Wilderness Alliance, which brought the suit against BLM, called the ruling disappointing.

SUWA spokeswoman Heidi McIntosh said that while the BLM criteria set a clear definition of what roads are acceptable, the court's ruling sends a confusing message that may lead to yet more lawsuits.

"It's sort of like Santa Claus left a present under the tree for everybody and leaves it open to litigation," McIntosh said.

The controversy over the roads stems from a Civil War-era mining law, Revised Statute 2477, that gave states and counties rights of way across federal lands, encouraging development and settlement. Although the law was repealed by Congress in 1976, then-existing roads could still be used. The three counties in Utah laid historic claim to 16 disputed rights-of-way —

including routes in areas under review for wilderness protection.

Bottom line, McIntosh said, the issue is not about roads but about wilderness. She accused Utah officials of fighting for roads that have "vanished" into the desert to undermine attempts to preserve wilderness areas.

"Some of these roads you can barely see," she said. "They're not focusing on real roads."

"That's flatly not true" Finlayson said. "I am not interested in blocking wilderness. . . . Our interest is in preserving public access on these roads that were created before 1976."

McIntosh said her group feels there is a danger in opening up roads into wilderness areas, some which are deemed areas for wilderness study, to the public.

SUWA officials say they need time to study the large ruling before deciding what action they may take next, but they did assure they will be back in court to fight the state on the issue.

The appellate court has ruled the issue is to be heard "de novo," which means the court proceedings must start over from the beginning, taking in mind the appeals court's selected definitions.

"I think we need time to digest this, but this is not the end of the road, so to speak," McIntosh said.

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