



Kane County Commission
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March 17, 2008

Selma Sierra
Bureau of Land Management
Utah State Office
Salt Lake City, UT 84145-0155

Re: BLM's intention to close the Paria Canyon to motorized travel

Dear Ms Sierra,

On Monday, March 10, 2008 Acting Monument Manager Rene Berkhoudt advised the Kane County Commission of Bureau of Land Management's (BLM) intention to close the Paria Canyon Road. The County Commission understands The Wilderness Society (TWS) wrote a letter to BLM demanding the closure. The Commission also understands TWS was successful in generating a letter from Congressman Norm Dicks (D-CA) threatening Department of Interior/BLM funding if BLM does not close the Paria Canyon Road.

The County believes Congressman Dicks may have written his letter without personal knowledge and without consulting with BLM, Kane County, the State of Utah, or the Utah congressional delegation. Congressman Dicks may have been misled by TWS's representation of the facts. Kane County believes the matter is factually and legally more complex than currently understood by Congressman Dicks and suggests the matter requires deliberate consideration by BLM, the County, and the State of Utah.

The County understands there may be a misunderstanding as to whether the County asserts an R.S. 2477 right-of-way within the Paria Canyon. The County does claim an R.S 2477 public highway right-of-way for the Paria Canyon Road, which travels from the Skutumpah Road, through Sheep Creek Canyon, and through the Paria Canyon to its terminus at the Cottonwood Road. Preliminary documentation supporting the establishment of a public highway right-of-way along the Sheep Creek and Paria Canyons prior to October 21, 1976 is attached to this letter.

The County formally requests BLM carry out a timely and expeditious administrative determination to consider whether it agrees that a right-of-way vested for the Paria Canyon Road prior to October 21, 1976. The County requests the administrative determination take place prior to BLM taking any action that could impair the rights of the County through improper use of BLM's authority, by unreasonable disapproval, or by delay.

The County's request is consistent with existing DOI policy. Instruction Memorandum Number 2006-159 titled "Non-Binding Determinations of R.S. 2477 Rights-Of-Way Claims" states:

***Summary of Guidance:** As the Secretary's Memorandum and *SUWA v. BLM* make clear, the BLM does not have the authority to make binding determinations on the validity of R.S. 2477 right-of-way claims. The BLM may, however, make **informal, non-binding determinations** for its own land use planning and management purposes. An NBD is required before completing consultation with states or counties on any proposed improvements to a claimed R.S. 2477 right-of-way. It may also be appropriate to complete an NBD before taking action to close or otherwise restrict the use of a claimed R.S. 2477 right-of-way. (emphasis added).*

In addition, the Monument Plan is consistent with the County's request in stating:

It is unknown whether any R.S. 2477 claims would be asserted in the Monument which are inconsistent with the transportation decisions made in the Approved Plan or whether any of those R.S. 2477 claims would be determined to be valid. To the extent claims are made, the validity of those claims would have to be determined. If claims are determined to be valid R.S. 2477 highways, the Approved Plan will respect those as existing rights. (emphasis added). (see footnote 1, page 46, GSENM Management Plan).

Further, FLPMA requires an administrative decision in section 701(h) which states:

All actions by the Secretary concerned under this Act shall be subject to valid existing rights.

FLPMA Section 701(h) creates a congressionally mandated duty upon BLM to protect valid existing rights.

The County requests BLM consider recent case law that applies directly to BLM's intention to close the Paria Canyon Road. The 10th Circuit Court of Appeals in deciding *Southern Utah Wilderness Alliance v. Bureau of Land Management (SUWA v. BLM)* recognized that "[b]oth levels of government have responsibility for, and a deep commitment to, the common good, which is better served by communication and cooperation than by unilateral action."

SUWA v BLM changed the landscape regarding BLM's handling of R.S. 2477 rights-of-way. That change was clearly delineated in the Tenth Circuit's binding interpretation of BLM's duties and obligations regarding BLM's handling of established rights-of-way. The court wrote:

*We therefore hold that when the holder of an R.S. 2477 right of way across federal land proposes to undertake any improvements in the road along its right of way, beyond mere maintenance, it must advise the federal land management agency of that work in advance, affording the agency a fair opportunity to carry out its own **duties** to determine whether the proposed improvement is reasonable and necessary in light of the traditional uses of the rights of way as of October 21, 2006, to study potential effects, and if appropriate, to formulate alternatives that serve to protect the lands. The initial*

*determination of whether the construction work falls within the scope of an established right of way is to be made by the federal land management agency, which has an **obligation** to render its decision in a timely and expeditious manner. **The agency may not use its authority, either by delay or by unreasonable disapproval, to impair the rights of the holder of the R.S. 2477 right of way.** (emphasis added)*

The Tenth Circuit's statement of BLM's duties and obligations equally applies to instances where BLM desires to take administrative actions potentially impairing valid existing rights held by the County, *i.e.*, closing the Paria Canyon Road.

In 1866, Congress passed an open-ended grant of "the right of way for the construction of highways over public lands, not reserved for public uses." Act of July 26, 1866, ch. 262, S 8, 14 Stat. 251, 253, *codified at* 43 U.S.C. S 932 (R.S. 2477), *repealed by* Federal Land Policy Management Act of 1976 (FLPMA), Pub.L. No. 94-579 S 706(a), 90 Stat. 2743. Although repealed by FLPMA, Congress preserved R.S. 2477 rights-of-way in sections 509(a) and 701(a)(h). FLPMA Section 701(a) states, "[n]othing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid...right-of-way...existing on the date of approval of this Act." FLPMA Section 701(h) states, "[a]ll actions by the Secretary concerned under this Act shall be subject to valid existing rights.

The public and the County accepted the Paria Canyon Road public highway right-of-way, and no entry, no application, no license, no patent, no deed and no administrative formality was required. The grant was accepted by the construction or establishment of a public highway prior to October 21, 1976 in accordance with Utah law. Upon acceptance, Kane County became the vested owner of this public highway right-of-way. (*See* preliminary documentation, attached).

State Law and the County's General Plan

Kane County owns interests in, and has legal jurisdiction regarding, class "B" and "D" public highways and the R.S. 2477 rights-of-way for such roads that lie within its borders. *See* Utah Code Ann. §§ 72-3-103-105, 72-5-103-105, and 72-5-302. In Utah a highway is "dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years." Utah Code Ann. § 72-5-104(1).

FLPMA, NEPA and the CEQs require BLM planning to be consistent with local planning to the maximum extent possible when local planning is consistent with federal law, regulations and policy.

The Kane County General Plan states:

Much of the transportation system developed in Kane County traverses public lands. Until 1976, the development of roads across public lands was authorized by a blanket right of way defined in Revised Statute (RS) 2477. Most such roads were never formally platted or surveyed. The adoption of the Federal Lands Policy and Management Act in 1976 did away with RS 2477, and instituted a right of way authorization system. Kane

County has filed maps showing all roads asserted under the provisions of Revised Statute 2477.

Kane County will take the lead in providing a safe, efficient and functional transportation system which emphasizes the circulation of residents and visitors between communities, as well as to the scenic wonders found in the county. The system will stress a wide range of transportation methods, and will be founded upon the ability of the county to utilize rights of way on public lands asserted under authority of Revised Statute 2477. (p.28).

Status Quo

The Tenth Circuit recognized a “status quo” that protects both the public’s existing uses of a road and BLM’s public land management and protection mandates in stating:

*Drawing the line between maintenance and construction based on “preserving the status quo” promotes the congressional policy of “freezing” R.S. 2477 rights of way as of the uses established as of October 21, 1996**. Hodel, 848 F.2d at 1081. It protects existing uses without interfering unduly with federal land management and protection. (emphasis added).*

The Tenth Circuit recognized BLM’s earliest R.S. 2477 regulation in its entirety:

The grant [under R.S. 2477] becomes effective upon the construction or establishing of highways, in accordance with the State laws, over public lands not reserved for public uses. No application should be filed under said R.S. 2477 as no action on the part of the Federal Government is necessary.

The Tenth Circuit reasoned, “[i]n sum, nothing in the terms of R.S. 2477 gives the BLM authority to make binding determinations on the validity of the rights-of-way granted thereunder....” (emphasis added).

The Tenth Circuit clarified BLM’s authority as follows:

This does not mean that the BLM is forbidden from determining the validity of R.S. 2477 rights-of-way for its own purposes. The BLM has always had this authority. It exercises this authority in what it calls “administrative determinations.” ...These procedures “are not intended to be binding, or final agency action.” Rather, “they are recognitions of ‘claims’ and are useful only for limited purposes,” namely, for the agency’s internal “land-use planning purposes.”

The Tenth Circuit further recognized the role of State law in stating:

Acceptance of an R.S. 2477 right of way in Utah thus requires continuous public use for a period of ten years.

Regarding “continuous public use”, the Tenth Circuit acknowledged the Utah Supreme Court’s reasoning:

...the road was used by many and different persons for a variety of purposes; that it was open to all who desired to use it; that the use of it was as general and extensive as the situation and surroundings would permit, had the road been formally laid out as a public highway by public authority.

Regarding the definition of “highway” the Tenth Circuit noted:

At common law the term “highway” was a broad term encompassing all sorts of rights of way for public travel.” The Court considered an 1868 legal definition, “[a] highway is a way over which the public at large have a right of passage, whether it be a carriage way, a horse way, a foot way, or a navigable river.

Regarding “mechanical construction,” the Tenth Circuit reasoned:

Thus, we cannot agree with the Appellees’ argument that a “mechanical construction” standard is necessary... [t]he common law standard of user, which takes evidence of construction into consideration along with other evidence of use by the general public, seems better calculated to distinguish between rights of way genuinely accepted through continual public use over a lengthy period of time, and routes which, though mechanically constructed (at least in part), served limited purposes for limited periods of time, and never formed part of the public transportation system.

We therefore see no persuasive reason not to follow the established common law and state law interpretation of the establishment of R.S. 2477 rights of way.

Regarding a destination requirement, the Tenth Circuit concluded:

It is hard to imagine a road satisfying the “continuous public use” requirement that did not “lead anywhere.” Moreover, given the BLM’s concession that “a highway can allow public access to a scenic area, a trail head, a business, or other place used by and open to the public,” it is hard to imagine much of a road that would not satisfy the standard.”

We therefore hold that, on remand, the district court should consider evidence regarding identifiable destinations as part of its overall determination of whether a contested route satisfies the requirements under state law for recognition as a valid R.S. 2477 claim.

In *Sierra Club v. Hodel*, the Tenth Circuit offered additional guidance as follows:

Tenth Circuit precedent requires “that the initial determination of whether activity falls within an established right-of-way is to be made by the BLM and not the court.

The Tenth Circuit further reasoned, “Because the grantor, the federal government, was never required to ratify a use on an R.S. 2477 right-of-way, each new use of the [road] automatically

vested as an incident of the easement. Thus, all uses before October 21, 1976, not terminated or surrendered, are part of an R.S. 2477 right-of-way.” 848 F2d at 1084.

Statutory provisions, case law, and DOI/BLM regulations clearly provide BLM the authority to conduct “administrative determinations” considering R.S. 2477 rights-of-way. BLM has certain duties and obligations related to such a determination. Those duties and obligations clearly extend to circumstances where BLM intends to take agency action that could impair the rights of a holder of an R.S. 2477 right-of-way. Therefore, Kane County respectfully requests BLM to conduct an administrative determination as to the existence of the public highway right-of-way for the Paria Canyon Road prior to taking any action adverse to Kane County’s and the State of Utah’s property interests.

Improved Working Relationships

During the tenure of Monument Manager Brad Exton, the County and Monument Management developed a good working relationship. Monument Management and the County, in fact, have successfully embraced the Court’s suggestion that “[b]oth levels of government have responsibility for, and a deep commitment to, the common good, which is better served by communication and cooperation than by unilateral action.” Examples include the County using county road equipment to finish a Monument seeding project, and County consultation with Monument Management regarding the Whitehouse campground environmental assessment in order to avoid controversy over a county road. In fact, the County has initiated the process to abandon a portion of the Whitehouse Road as part of the cooperative effort to relocate the campground. The County was also instrumental in coordinating with NRCS to utilize flooding related FEMA funding to stabilize the Paria Canyon riverbank.

The proposed action to close the Paria Canyon Road threatens the trust and good working relationship we have worked hard to develop between the County and Monument Management. It is also unfortunate when the public is caught between controversial unilateral actions by either the County or BLM. Unilateral action, without mutual consultation and coordination, may even compromise the public’s safety and enjoyment of public lands.

Monument Management and the County have discussed the need to work cooperatively to prevent impairment and degradation within the Paria-Hackberry WSA, which includes the Paria Canyon Road. Monument Management and the County recently participated in a field trip, by horseback, to examine “on the ground conditions” within the Paria Canyon. The result of that trip was the consensus of Monument Management and the County that impairment and degradation were not occurring along the Paria Canyon Road, but that the County and BLM should coordinate through visitor outreach and other efforts to protect the lands adjacent to the main route. The County offered several specific suggestions to collaborate with Monument Management in that effort. The County understands that this information was shared with the State BLM Office several months ago. The County/BLM cooperative law enforcement contract is on the verge of final approval and could be beneficial in assuring appropriate use of the Paria Canyon Road, while promoting our common interest in preventing degradation or impairment of public lands adjacent to the road.

Special Interest Groups and the Supreme Court

The County provided Monument Management a copy of the Supreme Court decision in *SUWA v. Norton*. In non-technical language, the decision rejects the ability of special interest organizations to micro-manage BLM, or interfere with planning implementation. Plans are adopted for general planning purposes and the manner of their implementation is left to the broad agency discretion - not special interest groups. The Monument Plan specifically recognizes the need to determine the existence of existing rights and to recognize and protect those rights in implementing the Monument Plan.

Congressional Influence

With all due respect, the County submits that it is improper for a single member of Congress to use congressional committee authority to threaten DOI/BLM funding if the agency fails to take specific action on a particular Kane County road at the urging of a special interest group. Congress generally acts as a body rather than by single member action. In addition, the Utah congressional delegation should certainly have input regarding action affecting congressionally granted rights-of-way in the State of Utah. The County believes the Supreme Court's decision in *SUWA v. Norton* applies to the influence of a single member of Congress in the same manner it applies to members of special interest groups.

Conclusion

The County requests the opportunity to discuss the issues involved with the Paria Canyon prior to adverse federal action that may unilaterally impair a valid existing right held by Kane County and the State of Utah.

Respectfully submitted,

(signed 3-17-08)

Daniel W. Hulet

Chairman, Kane County Commission

Attachments: R.S. 2477 documentation

cc: Monument Manager Rene Berkhoudt

Governor Jon Huntsman

State Representative Mike Noel

Utah Public Lands Policy Coordinator John Harja

Senator Bob Bennett

Senator Orin Hatch

Congressman Rob Bishop

Congressman Chris Cannon

Congressman Jim Matheson