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ENVIRONMENTAL LAW CLINIC AT STANFORD UNIVERSITY

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Re: BLM Cannot Approve Recordable Disclaimers of Interest for Rights-of-Way as Requested in Disclaimer Applications UTU-82199 (Alexa Lane) and UTU-82200 (Snake Pass).

Dear Director Wisely and Mr. Incardine:

On behalf of The Wilderness Society, Wild Utah Project (WUP), and the Southern Utah Wilderness Alliance (SUWA) (collectively "TWS"), Earthjustice submits these comments on the State of Utah's and Millard County's applications for two recordable disclaimers 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 (State of Utah-DOI MOU). These recordable disclaimer of interest applications are identified by the Bureau of Land Management (BLM) as follows: Serial Number UTU-82199 (Alexa Lane) and UTU-82200 (Snake Pass route).

The Wilderness Society, its 1,250 Utah members, and 200,000 members nationwide, SUWA, its 15,000 members, WUP, and other members of the public are closely watching how the BLM addresses these applications. Utah has stated its intent to claim 10,000 or more R.S. 2477 rights-of-way on federal public lands. The State could submit dozens – if not thousands – of additional claims under the MOU. We therefore once again urge BLM to set a high standard for protecting the public's interest in the public's lands by establishing a fair, public-friendly, and transparent process that complies with federal land management and environmental laws, and that rigorously analyzes all available evidence, not just that submitted by the applicant.

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

We wish to make clear, however, that while issuing a recordable disclaimer of interest for these routes pursuant to R.S. 2477 is illegal and inappropriate, Utah and the counties could apply for rights-of-way pursuant to Title V of FLPMA, 43 U.S.C. §§ 1761-1771. This would enable the State and Millard County to pursue a lawful course of action to obtain a permit to maintain the routes while ensuring that federal environmental protections and public participation requirements remain in place.

SUMMARY.

BLM must deny both of Utah's applications. The applications are submitted under an illegal process and, even under a process designed to improperly lower the standards for obtaining rights to federal lands, each contains wholly inadequate information to prove a valid claim.

First, the Disclaimer Rule and the State of Utah-DOI 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 also violates the Congressional ban on R.S. 2477 rulemaking, and because it does not incorporate or rely on the legal standards set by R.S. 2477.

Second, Utah has failed to submit evidence for either of the routes 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 either the lands being reserved or the repeal of R.S. 2477 on October 21, 1976. Utah has failed to submit even the minimal information required by the Disclaimer Rule. It has submitted vague, unconvincing, contradictory, and irrelevant data and mere hearsay concerning the critical standards set by law.

Tellingly, Millard County has essentially admitted that it has no official records at all concerning highway construction or maintenance, or County funding of such activities. Utah presents no evidence concerning who first constructed the routes or why. For this reason alone, BLM must reject Utah's applications.

Third, while TWS does not always have easy access to records maintained by BLM, Utah's counties, or the State, TWS located documentation concerning both of the routes beyond that which the State submitted in its inadequate applications. The information TWS located raises significant legal and factual questions concerning the credibility of State's submissions and the validity of the State's claims. The evidence TWS located shows the following:

> Alexa Lane. The vast majority of the Alexa Lane claim does not appear in significant part on USGS – or County – maps before the late 1930s. However, after 1935, the Civilian Conservation Corps (CCC) undertook significant work in the area, constructing roads, reservoirs, and other waterholes. The US Geological Survey identifies the eastern-most portion of the claim – which runs to a CCC-built reservoir – as constructed by 1937, showing that CCC almost certainly built that portion of the route. Given that the CCC undertook significant work with heavy equipment on check dams and reservoirs directly adjacent to the current claimed route in Swasey Wash in the late 1930s, and that the County road grader had been hired in 1935 by the CCC to work on federal road projects in the area, and that the State of Utah alleges in its application that the road was graded by the late 1930s, it seems likely that to the extent the route was constructed prior to 1976, it was constructed by the CCC on behalf of the Division of Grazing, BLM's predecessor agency. The evidence thus tends to show that Alexa Lane, to the extent it

was constructed at all, was constructed by the Federal government, with federal funds, by federal employees, to serve a federal purpose. Thus, the route cannot be an R.S. 2477 right-of-way, and BLM cannot issue a disclaimer for the route.

Snake Pass. As with the Alexa Lane route, there are clues that this route, or portions of it, to the extent it was constructed at all, may have been constructed by the CCC. The "Ferguson Desert Reservoir" near the western terminus of the claim was built by the CCC in 1942, and the Snake Pass route now runs along the top of that reservoir's dam. No maps display the route as it is now claimed prior to 1937, although the State claims the route was built not long after that date. The CCC was clearly active in this area constructing road and reservoirs; it seems therefore likely that to the extent the route was built prior to 1976, the CCC built the route, and that the route therefore cannot be an R.S. 2477 right-of-way.

The information TWS presents here is the very type of documentation that Utah itself has admitted it should submit. Utah's failure to locate or disclose the information to BLM – particularly in light of similar failures concerning Utah's first application for the Weiss Highway – underlines the patent inadequacy of the State's applications, the poor quality of the State's research, and the State's failure to take seriously the requirement that it prove its claims.

Should BLM grant any of these applications, such approval would demonstrate the unlawfully low bar that the agency intends to set for future claims, many of which may damage ecologically sensitive or otherwise significant public lands. BLM cannot and must not grant R.S. 2477 rights-of-way or disclaimers based on such a scant record. The management of lands owned by all Americans is at stake. BLM must not permit others to wrest significant management control of public lands from the American people without a rigorous review of all available information and compelling evidence that the claims are valid.

Therefore, we urge the State and Millard County to abandon their application for recordable disclaimers of interest, and to instead to pursue FLPMA Title V permits.

I. THE DISCLAIMER RULE IS ILLEGAL.

The Department of the Interior (DOI) is barred from using 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 FLPMA be used to recognize rights-of-way.[1]

[1] An extended discussion of the disclaimer rule's illegality is contained in the letter of E. Zukoski to S. Wisely & J. Incardine (June 24, 2005) concerning the four disclaimer applications, attached on CD-ROM as Exhibit 1, at pp. 4-8 and associated attached exhibits (also attached on CD-ROM). We do not repeat those arguments in this letter, but request that they be included in the record for these two applications.

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" ("State of Utah-DOI MOU") on April 9, 2003. Exhibit 2, attached. The stated purpose of this MOU is to "acknowledge the existence of certain R.S. 2477 rights-of-way on BLM 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 two alleged rights-of-way. However, BLM cannot use the MOU to disclaim an interest in these or any other routes 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.[2]

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. In such a process, BLM must 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 places the burden squarely on the claimant 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 provided an opportunity for all interested parties to participate, utilized reasonable and transparent standards, and reached sound conclusions based on the evidence before the agency.[3]

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[2] Further discussion of the State of Utah-DOI MOU's illegality is contained in the letter of E. Zukoski (June 24, 2005) (Exhibit 1), at pp. 8-23 and associated attached exhibits. We do not repeat those arguments in this letter, but request that they be included in the record for these two applications.

[3] An extended discussion of the process that BLM must adopt to address future applications is contained in the letter of E. Zukoski (June 24, 2005) (Exhibit 2), at pp. 23 -29 and associated attached exhibits. We do not repeat those arguments in this letter, but request that they be included in the record for these two applications.

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

TWS believes that the disclaimer process is illegal and that BLM must abandon it. However, if BLM chooses nevertheless to proceed, it must adhere to certain minimal standards. Therefore, in order to establish that there exists a right-of-way across federal 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.

However, Utah fails to present convincing evidence to support either of the two applications. The only evidence provided to support "construction" of each route consists of a set of vague, duplicative affidavits that are based in part on hearsay. Further, Utah presents no evidence at all concerning whether or when the lands at issue were reserved. Aside from the flawed affidavits, the evidence Utah does provide is generally irrelevant to the determination of whether a right-of-way was granted. Indeed, these two applications are even thinner and contain less relevant information than any of Utah's prior applications. 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.

Additionally, as described below, the affidavits and other information submitted by the State of Utah for each route are so riddled with significant evidentiary problems that their credibility is gravely compromised. Thus, none of the applications can form the basis for the issuance of a recordable disclaimer of interest for a right-of-way pursuant to R.S. 2477. These numerous violations of basic evidentiary rules are not simply minor technical violations. The rules of evidence that Utah ignores ensure that information submitted in support of a claim is credible, and that there is some basis for having confidence that the statements made to support the existence of a right-of-way. Because the State has failed to submit credible evidence, BLM must reject these applications.

A. Utah Fails to Submit Applications that Meet 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). Neither of the applications allege 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.[4] Utah's application therefore violates the Disclaimer Rule and must be denied.

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[4] See letter of R. Fairbanks, Utah Attorney General's Office to S. Wisely, State Dir, Utah BLM re: Alexa Lane (Jan. 21, 2005) at 1 ("Fairbanks Alexa Lane letter") (Utah seeks recordable disclaimer of interest for "that right-of-way known as Alexa Lane (more commonly known as Swasey's Cutoff)"; letter of R. Fairbanks, Utah Attorney General's Office to S. Wisely, State Dir, Utah BLM re: Snake Pass Road (Jan. 21, 2005) at 1 ("Fairbanks Snake Pass letter") (Utah seeks recordable disclaimer of interest for "that right-of-way known as Snake Pass

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.

1. The Evidence Submitted by Utah Fails to Contain the Legal Description Required by Law.

Utah's applications do not contain a valid legal description of the property rights claimed as required by law. Rather, they offer two inadequate attempts at meeting the regulation's requirement.

First, Utah fails to use the Disclaimer Rule's provision for submission of a properly executed and certified metes and bounds survey when an "official United States public land survey" is absent or inappropriate, as is the case here. Each application includes lists of bearings and ranges (although no elevation or inclination component is provided) purporting to "closely" approximate the location of the centerline of each segment of the route.[5] These data are claimed to be derived from either GPS mapping grade data, data digitized from USGS Digital Orthophoto Quadrangles (DOQs) or topographic maps, and/or the transportation data model of the State of Utah Geographic Information Database (SGID).[6] Each application also states that "data are checked against the appropriate Digital Orthophoto Quadrangles published by the United States

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Road"). Since these letters and each part of the applications are on file with the BLM, we do not attach them here.

[5] See Alexa Lane Application, Appendix A and B at 1; Snake Pass Application, Appendix A at 1.

[6] Id.

Geological Survey (USGS) to verify a reasonable degree of accuracy."[7] The applications do not specify what the scale or currency date of the DOQs used for this process were or what a "reasonable degree of accuracy" is. Such lists of data points of unclear origin and accuracy are clearly not the same as the metes and bounds survey required by law. No evidence or certification is presented that the data were collected through a survey executed or supervised by a licensed civil engineer or surveyor. No evaluation of closure error is provided. Indeed, no permanent benchmark reference is provided for the start or end of end "survey" segment, making it impossible to replicate the survey and check for accuracy. As is clear from the evaluation of historical data elsewhere in these comments, the centerline of a purported road is not a monument which can be referenced in later investigations. The inappropriateness of these data is compounded by the fact that Utah has failed to attach "[a] true copy of the field notes and plat of survey" to any of the applications as required by the regulations. See 43 C.F.R. § 1864.1-2(c).[8]

Second, the applications include a "Legal description by aliquot parts" – a listing of the ¼-¼ sections in which the route may be located.[9] Such a listing of areas (each roughly a square 1,320 feet on a side) provides little certainty of the location of routes whose claimed width varies from 30 to 54 feet, and clearly fails as a legal description. While BLM's guidance implementing the MOU requires that applications "should contain a legal description of the claimed right-of-way by aliquot parts (e.g., a ¼ ¼ section)," that guidance cannot eliminate the requirements of the disclaimer regulations themselves. Memo of J. Hughes (Exh. 3) at 2.

In any event, Utah fails to meet even even the low bar set by BLM's guidance in its sloppy application for Alexa Lane. For while it is clear from data submitted by the State that the claimed route traverses Township 17 South, Range 10 West, Utah's application fails to contain even a description by ¼ ¼ section for any part of the claimed route in this township.[10] Thus Utah unlawfully – and incompletely – uses the "official United States public land survey" merely

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[7] Id.

[8] BLM guidance on implementing the MOU omits reference to the need for certification a licensed civil engineer or surveyor. See Memo. of Jim Hughes, Deputy Dir., BLM to Utah State Director (June 25, 2003), attached as Exhibit 3, at 2. In addition, Mr. Hughes's memo would permit the use of a "centerline or GPS description," but 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.

[9] See Alexa Lane Application at road segment attachment; Snake Pass Application at road segment attachment.

[10] Compare Declaration of Douglas C. Pflugh (July 29, 2004) (Pflugh Dec.), attached hereto as Exhibit 4, at ¶¶ 32-33 and 62-67 and Exhibit Y attached thereto (map based on Utah's data for claim, showing route traversing Township 17 South, Range 10 West) with Alexa Lane – Millard County location data, including section & subdivision (submitted with State of Utah's application, and showing no location information for Township 17 South, Range 10 West).

to establish the general location of the routes rather than the actual legal descriptions as required by the Disclaimer Rule. 43 C.F.R. § 1864.1-2(c).

Because Utah's application fails to meet the regulation's fundamental requirements for identifying what is being claimed and where it is located, BLM must deny the applications.

2. The Evidence Submitted by Utah Fails to Contain a Precise Description of Alleged Road Improvements.

All of Utah's applications also fail 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." Memo of J. Hughes (Exh. 3) at 2. Certainly, the applications contain no documentary evidence (aside from allegations in unreliable affidavits) that any of the routes was constructed.

a. The Alexa Lane Application Alleges the Existence of Improvements, But Provides Little Evidence as to Their Existence or When They Were Constructed.

While the requirement that an "application should also contain a description of the road's … improvements such as bridges or culverts and other ancillary features," the Alexa Lane application contains only a few photos, and asserts that it contains only "[e]xamples" of such improvements, and not a comprehensive listing. See R. Fairbanks, Alexa Lane Application for Recordable Disclaimer of Interest (no date) at 2. In addition, the application merely points to "map with photos, aerial photos, point data, and affidavits" for such examples. Id.

The ground-level photos submitted with the application show a dirt-surfaced route, two cattle-guards, a culvert, a sign, and several features identified as "drainage runouts." The State does not allege that these photos pre-date R.S. 2477's repeal. In fact, the State provides no evidence at all – such as a declaration or metadata – alleging when or where the ground-level photos were taken. In addition, none of the photos provide any evidence as to when any of the structures was constructed. It is unclear to what "point data" the application refers, and the application does not specify which such data might be relevant concerning the nature or existence of improvements.[11]

[11] Several maps provided with the application display "event points" along the route which apparently identify the location of various structures in photos. The State provides no evidence, affidavit, or other confirmation that the photos accurately represent what exists at each alleged event point, however. See discussion below at pp. 22-24.

In addition, the State enclosed a map of "points of [water] diversion" with its application showing one such diversion adjacent to, but not on, the route. However, the State does not claim that this feature is an improvement to the route.

Whether the aerial photos show any signs of road improvements or not is irrelevant, since all of the aerial photos submitted by the state were taken well after October 21, 1976, the last possible date when the State and County could have acquired an R.S. 2477 right-of-way.[12] In any event, a significant number of the claimed "improvements" are not discernible from the 1978 aerial photos, making it impossible to confirm their existence at that time.[13]

And while the affidavits do allege the presence of "berms,"[14] "borrow ditches,"[15] "signs,"[16] cattle-guards,[17] and "a culvert,"[18] the affidavits themselves fail to provide any location data for any of these alleged "improvements," and none of the affidavits make any representations about when specific features were constructed. Indeed, several of the affiants preface their remarks about such improvements by stating: "as it [the road] now stands …."[19] Clearly, the present nature of improvements along the route is irrelevant to the question of whether the road was constructed prior to October 21, 1976, something that BLM itself apparently has acknowledged in recently-issued national guidance. That guidance requires claimants to provide evidence as to improvements "existing as of … October 21, 1976," something Utah's affiants largely fail to provide.[20]

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[12] See "Millard County Alexa Lane – 1978 Aerial Photography," attached to the State's application; "Millard County Alexa Lane Quad Index" (indicating aerial photos taken August 26, 1978 and September 8, 1978); and Alexa Lane, Application for Recordable Disclaimer of Interest (no date) at 1 ("Circa 1978 aerial photo").

[13] See Pflugh Dec. (Exh. 4) at ¶¶ 16-18 and Exhibit C attached thereto, and below at pp. 21-22.

[14] Bliss Aff. at ¶ 8 (alleging presence of "berms"); Henrie Alexa Lane Aff. at ¶ 8 (alleging presence of "occasional berms"); Smith Aff. at ¶ 8 (alleging presence of "berms"); and Young Alexa Lane Aff. at ¶ 8 (same).

[15] Young Alexa Lane Aff. at ¶ 8.

[16] Bliss Aff. at ¶ 8 (alleging presence of "signs"); Smith Aff. at ¶ 8 (alleging presence of "signs").

[17] Henrie Alexa Lane Aff. at ¶ 8

[18] Id.

[19] Id. (emphasis added); Young Alexa Lane Aff. at ¶ 8 (emphasis added).

[20] BLM's July 2005 guidance states that each "application should also contain a description of the road's … improvements such as bridges or culverts and other ancillary features existing as of the October 21, 1976." BLM, Guidance for Processing Applications for Either Disclaimers of Interest or Rights-of-Way for Valid R.S. 2477 Highways, at Attachment 1-4 (emphasis added), Attachment 1 to BLM Instruction Memorandum No. 2005-185 (July 14, 2005) (available at http://www.blm.gov/nhp/efoia/wo/fy05/im2005-185attach1.pdf) and attached hereto as Exhibit 5.

One of the affidavits alleges that "berms, shoulders, and borrow ditches can be found along the road wherever such features are feasible."[21] However, the State's submitted photos directly contradict the affiant's statements. Borrow ditches are not evident in several of the State's photos at locations where such improvements are apparently feasible, nor does the State identify the location of the same on any of its maps.[22]

Further, two of the State's affiants swear that there are "signs" (plural) along the route.[23] However, Utah provides evidence of the existence of only a single sign – and one erected by BLM at that.[24] It is unclear even from the State's unverified "event point" data that the sign is on the Alexa Lane route, or whether it is on the connecting route, old Highway 6. However, the sign appears to be on old Highway 6 from a close-up review of one of the photos.[25] The State's failure to provide evidence of any sign on the route calls into question the veracity and credibility of the affiants' sworn statements.

b. The Snake Pass Application Alleges the Existence of Improvements, But Provides Little Evidence as to Their Existence or When They Were Constructed.

The State's Snake Pass application is nearly identical to that of the Alexa Lane application, and it contains similar flaws.

The application similarly indicates that it provides only "[e]xamples" of improvements, and not a comprehensive listing. See R. Fairbanks, Snake Pass Application for Recordable Disclaimer of Interest (no date) at 2. The application also points to a "map with photos, aerial photos, point data, and affidavits" for such examples. Id.

The ground-level photos submitted with the application show a dirt-surfaced route, three cattle-guards, several drainage ditches, and a single sign – a BLM, not a State or County sign. Again, none of the ground-level photos provide any evidence as to when any of these "structures" was erected, and no evidence to verify when or where those photos were taken.

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[21] Young Alexa Lane Aff. at ¶ 8 (emphasis added).

[22] See, e.g., EP140366006; EP140366003; EP143010010; and EP143010012; Declaration of Jeff Kessler (Aug. 5, 2005) (Kessler Dec.) at ¶ 10, attached hereto as Exhibit 6.

[23] See note 16, above.

[24] Compare photo EP143010002 (showing BLM sign) with State's map of "Alexa Events / Road," both in Utah's application.

[25] See photo EP143010006, which depicts a drainage runout. When the photo is enlarged, a shape is visible behind the drainage runout on an adjacent route that appears to be the sign that is depicted in photo EP143010002. Other evidence verifies in fact that the sign is not on the Alexa Lane route. See Kessler Dec. at ¶ 9.

Again, a significant number of the claimed "improvements" are not discernible from the 1978 aerial photos, making it impossible to confirm their existence at that time.[26] And, in any event, the aerial photos post-date the R.S. 2477's repeal.[27] Here, too, the State fails to explain the relevance of "point data" in the application to the question of whether, where and when improvements to the route were made.[28]

Finally, the cookie-cutter affidavits allege the existence of "signs,"[29] cattle-guards,[30] drainage cut-outs,[31] and borrow ditches,[32] but provide no specific location data for any of these alleged "improvements" and no data that identifies when these improvements were erected. As with Alexa Lane application, several of the Snake Pass affidavits preface their remarks about such improvements by stating: "as it [the road] now stands," such improvements can be

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[26] See Pflugh Dec. (Exh. 4) at ¶¶ 16-19, and Exhibit D attached thereto, and below at pp. 21-22.

[27] See "Millard County Snake Pass – 1978 Aerial Photography," attached to the State's application; "Millard County Snake Pass Road Index" (indicating aerial photos taken August 26, 1978); and Snake Pass, Application for Recordable Disclaimer of Interest (no date) at 1 ("Circa 1978 aerial photo").

[28] As with the Alexa Lane application, the State provides several maps with the application displaying "event points" along the route which apparently identify the location of various structures in photos. The fact that there are structures (a ponds, claim markers, a corral, a pipeline, etc.) adjacent to the route is not necessarily relevant to whether or when the route itself was constructed, particularly given that the State provides no allegations as to the date of construction of any of these structures. Also, the State again provides no evidence, affidavit, or other confirmation that the photos accurately represent what exists at each alleged event point, however. See pp. 22-24, below.

In addition, the State enclosed a map of "Water / Minerals" with its application, which displays one icon related to "minerals" within a half mile of the route. Once again, the State does not claim that this feature is an improvement to the route (or explain its relevance in any manner).

[29] Henrie Snake Pass Aff. at ¶ 8 (noting existence of "occasional signs," although not noting their location or date of erection); Young Snake Pass Aff. at ¶¶ 2, 4 (alleging that "the County … posted signs along the road" but failing to identify where or when).

[30] Young Snake Pass Aff. at ¶ 9 (noting existence of "occasional ... cattle-guards").

[31] Henrie Snake Pass Aff. at ¶ 8 (noting existence of "occasional ... drainage cut-outs").

[32] Tolbert Snake Pass Aff. at ¶ 9 (noting existence of "occasional ... borrow ditches").

observed.[33] The affiants fail to provide that which the 2005 national guidance requires: a description of improvements on the day of FLPMA's repeal.[34]

Again, one of the State's three affiants swears that there are "signs" (plural) along the route.[35] However, Utah provides evidence of the existence of only a single sign erected by BLM.[36]

3. Utah Fails to Consistently Identify the Routes' Claimants.

Based on the descriptions of the claims, there is no doubt that the claims are located in Millard County. However, for each claim, the State's cover letter asserts as follows:

> Authority underlying the right-of-way ownership by the State of Utah and Beaver and Iron Counties is Revised Statute 2477 ….

Fairbanks Alexa Lane letter at 2 (emphasis added); Fairbanks Snake Pass letter at 2 (emphasis added). The State does not explain why Beaver and Iron Counties would have a property interest in an alleged right-of-way in Millard County.

B. Utah's Declarations Are Tainted by Hearsay, Fail to Provide the "Best Evidence," and Are Vague.

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

1. The Application's Supporting Documents Contain Unsubstantiated Statements.

The letters and affidavits supporting each application contain information that would not be admissible in any court as evidence because it is hearsay. BLM must reject this "evidence" as lacking credibility for the same, common-sense reasons as would a court.

In general, hearsay is "not admissible" as evidence in court. See, e.g., Fed. R. Evid. 802. Those presenting evidence (as the affiants do here) are required to testify only about that which they have first-hand knowledge. "[W]itnesses are qualified to testify to facts susceptible of

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[33] Id. (emphasis added); Henrie Snake Pass Aff. at ¶ 8 (emphasis added); Young Snake Pass Aff. at ¶ 9 (emphasis added).

[34] See note 20, above.

[35] See note 29, above.

[36] See photo EP140934030.

observation only if it appears that they had a reasonable opportunity to observe the facts." McCormick on Evidence (5th ed. 1999) at § 247. "[W]hen … the witness appears to be testifying on the basis of reports from others, … courts may simply apply the label 'hearsay.'" Id. The basis for this rule is the common-sense notion that people are most believable (and most likely to be accurate) when they speak about what they have observed first-hand, and less believable (and less likely to be accurate) when they speak of things they do not know based on their own experience.

Most of the affidavits presented by the State contain hearsay because they contain statements that are not based on the first-hand knowledge of the affiants. The affiants provide absolutely no basis for the origin, or validity, of the information. Such "evidence" cannot be relied upon by BLM as the basis for surrendering rights-of-way over public lands, since it would surely not be admissible in any court as evidence.

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 32 to E. Zukoski letter of June 24, 2005, attached as Exh. 1) 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.

a. Affidavits Supporting Applications for Alexa Lane Are Tainted by Hearsay.

Each of the affidavits about Alexa Lane discuss statements concerning uses of the route that are admittedly not based on first-hand knowledge. For example, all of the affiants allege that they used the route for a purpose or purposes, but allege additional use of the route by others without establishing any basis for that knowledge.[37]

[37] See Bliss Aff. at ¶ 6 (stating personal use of the route for "sightseeing," but alleging use of the route by others "for ranching, hunting, recreation, land management, sightseeing ...."); Henrie Alexa Lane Aff. at ¶ 7 (stating personal use of the route for "camping, recreation, and traveling through the area," but alleging use of the route by others "for hauling wood, hunting, ranching, camping, recreation, and traveling in and through the area"); Smith Aff. at ¶ 6 (stating personal use of the route for "sightseeing and search and rescue operations," but alleging use of the route by others "ranching, hunting, recreation, land management, sightseeing, search and rescue, and traveling in and through the area"); Tolbert Alexa Lane Aff. at ¶ 4 (stating personal use of the route for "sightseeing, camping, ranching, and traveling in and through the country" but alleging use of the route by others "ranching, hunting, recreation, sightseeing, camping, and traveling in and through the area"); Young Alexa Lane Aff. at ¶ 7 (stating personal use of the route for "hauling wood and traveling through the area" but alleging use of the route by others for "hauling wood, hunting, ranching, camping, and traveling in and through the area").

Similarly, one affiant (Mr. Young) states that while he was County road commissioner "during the 1950s and 1960s," "Alexa Lane was graded twice a year and supplemental maintenance was performed on an intermittent basis."[38] Mr. Young scrupulously avoids stating that he performed the maintenance, or that he was present when these actions took place, and he does not state how he can be sure that the work was actually performed by Millard County.

b. Affidavits Supporting Applications for the Snake Pass Route Are Tainted by Hearsay.

As with the Alexa Lane affidavits, the Snake Pass affidavits contain statements concerning uses of the route that are not based on first-hand knowledge. All of the affiants allege that they used the route for a purpose or purposes, but allege additional use of the route by others without establishing any basis for that knowledge.[39]

As he did for the Alexa Lane application, Mr. Young again states that while he was County road commissioner "during the 1950s and 1960s," "Alexa Lane was graded twice a year."[40] Mr. Young does not state that he performed the maintenance, or that he was present when such maintenance occurred, and he does not state how he knows that Millard County actually performed the work.

2. The Applications' Supporting Documents Contain Hearsay for Which Utah Fails to Provide the "Best Evidence."

In addition to submitting hearsay without basis or citation, the applications also include statements characterizing records that the State of Utah has failed to provide BLM. Because the State of Utah fails to provide the "best evidence" – namely the alluded-to records themselves – BLM cannot rely on the State's characterizations of those records.

"To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided …." Fed. R. Evid. 1002. This is known as the "best evidence" rule, and it "requires that a party seeking to prove the contents of

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[38] Young Alexa Lane Aff. at ¶¶ 2, 4.

[39] See Henrie Snake Pass Aff. at ¶ 7 (stating personal use of the route for "hauling wood and traveling in and through the area," but alleging use of the route by others "for hauling wood, hunting, ranching, camping, recreation, fossil hunting, and traveling in and through the area"); Tolbert Snake Pass Aff. at ¶ 6 ("hunting, sightseeing, picnicking with my family, and traveling in and through the area" but alleging use of the route by others for "ranching, hunting, recreation, sightseeing, camping, picnicking, and traveling in and through the area"); and Young Snake Pass Aff. at ¶ 4 (alleging that "the County graded [the route] twice a year" but not stating he did the work or basis for knowledge other than his position as supervisor).

[40] Young Snake Pass Aff. at ¶¶ 2, 4.

a document must introduce the original document." United States v. Boley, 720 F.2d 1326, 1332 (10th Cir. 1984). Commentators have explained that this rule is necessary due to "[t]he danger of mistransmitting critical facts which accompanies the use of written copies or recollection … which is largely avoided when an original writing is presented to prove its terms." McCormick on Evidence at § 231. Thus, the "best evidence" rule is based on the common-sense notion that a document itself is a better statement of its content than a person's potentially flawed recollection of what the document says.

a. The Alexa Lane Application Fails to Contain the "Best Evidence."

Two affiants allege that Alexa Lane "has been designated a Class B highway over which the County has been given jurisdiction by the State legislature." Bliss Aff. at ¶ 8; Smith Aff. at ¶ 8. However, the application presents no factual information – such as maintenance records, authorizing orders, legislative statements, county maps, or county records – showing that the route has been designated as any class of highway. Unless the State provides or BLM locates other data supporting these allegations, BLM must dismiss these claims as hearsay.[41]

In addition, as noted above, Mr. Young alleges that the County road crews graded Alexa Lane twice a year and intermittently at other times. However, the State fails to provide any County road records substantiating such activities.[42]

b. The Snake Pass Application Fails to Contain the "Best Evidence."

Affidavits supporting the Snake Pass application also allege that this route had been "designated a Class B highway over which the County had been given jurisdiction by the State legislature."[43] Again, however, the State has again provided no factual information – such as maintenance records, authorizing orders, legislative statements, county maps, or county records – showing that the route has been designated as such.

Further, while County records identifying which routes were graded would clearly be the best evidence of such activity, the State provides no such records – only bare allegations of such activities.[44] Finally, one affiant alleges that "the County also installed cattleguards and posted

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[41] Similarly, the affidavits fail to provide any assertion as to when the route was designated a Class B highway, or whether the route allegedly was designated a Class B highway before or after October 21, 1976.

[42] Young Alexa Lane Aff. at ¶¶ 2, 4.

[43] Henrie Snake Pass Aff. at ¶ 4; Young Snake Pass Aff. at ¶ 7.

[44] Young Snake Pass Aff. at ¶ 4.

signs along the road," but provides no funding reports or agreements with BLM that might verify that such structures were actually erected on public lands.[45]

3. The Affidavits Fail to Contain Specific Information about the Claims, and Contain Irrelevant or Questionable Information.

Much of the first-hand information contained in the nearly identically-worded affidavits can best be described as vague or imprecise. Much of it is irrelevant as it relates only to the period after R.S. 2477 was repealed. The affidavits submitted to demonstrate construction thus have little to no evidentiary value.

a. The Affidavits Supporting the Alexa Lane Application Fail to Contain Specific Information about the Claims, and Contain Irrelevant or Questionable Information.

The supporting affidavits do not specify where on, or upon what portion of, the routes alleged grading, maintenance, construction or placement of signs and other structures took place. The affidavits contain no exact dates for when any such activities – or affiants' use of the route – took place; the activities are generally described only by decade or year.[46] Some of the allegedly observed activities on the route are so vaguely described that they all could have occurred after R.S. 2477 was repealed in 1976.[47] Affiants also allege that they have observed "County

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[45] Id. A review of BLM's records concerning cattleguards along the route did not identify any cattleguards constructed by or for the County, which calls into question the veracity of this particular allegation.

[46] See, e.g., Henrie Alexa Lane Aff. at ¶ 6 (alleging that "gravel has been added to the northern section of the road" but failing to identify where that section might be – or when such activities took place); Bliss Aff. at ¶ 8 (alleging presence of "signs" but failing to identify where or when erected); id. at ¶ 2 (stating that he has observed the route "since the early 1940s" but not stating a date in that decade or any other when he used the route); Smith Aff. at ¶ 2 (alleging use of the route "since the early 1960s" but failing to identify the date or frequency of his use); id. at ¶ 8 (alleging presence of "signs" but failing to identify where or when erected); Tolbert Alexa Lane Aff. at ¶ 2 (alleging he observed the route since "the 1920s" but failing to identify the date or frequency of his use).

[47] See, e.g., Tolbert Alexa Lane Aff. at ¶ 4 (stating that "we used the road for driving cattle for many years" but failing to specify which years, or whether the use occurred before 1976); id. at ¶ 7 (stating personal travel on the road "on horseback, horse-drawn wagon, car ... and truck" but not stating when any of these uses of the route took place); at ¶ 8 ("I have frequently observed County graders maintaining Alexa Lane" but failing to state when, or whether such use was prior to or after 1976); Bliss Aff. at ¶ 8 ("I have personally observed Millard County employees grading the road many times in the intervening years" but failing to specify when or where along the route he observed this activity).

employees" or "County graders" maintaining the route, but fail to state how affiants knew that the drivers or equipment were associated with the County.[48]

The State also proffers entirely irrelevant information concerning activities that occurred long after R.S. 2477's repeal. For example, one affidavit discusses maintenance of the route only since 1991.[49]

A number of allegations in the affidavits are so vague as to be useless. For example, one affiant alleges that the route "has received moderate use from the 1960s to the present," without providing any context or definition for what "moderate" use might be, or the basis for the affiant's statement.[50] Similarly, another affiant alleges that "trucks use the road on a fairly regular basis."[51] "Fairly regular" use could be twenty times a day or once a decade – and the State's application provides no guidance as to which is the case.

In addition, some of the statements are of questionable credibility. Two of the affiants state that they have been observing the routes in the late 1920s or early 1930s – between 70 and nearly 80 years ago.[52] A third states that his initial use dated from "the early 1940s" – or 60 years ago, although he cannot recall whether the route was open for all to use until two decades later.[53] One of the affiants admits that he was 14 years old at the time of his initial observations; two others decline to state their age, although it is likely that they, too, were fairly young, since one allegedly used the route 79 years ago, the other at least 60 years ago.[54] Despite the passage of nearly eight decades, one affiant recalls that the route runs "the same route as it does now;"[55] another affiant recalls that 74 years ago the route was open for all to use and a number of uses to which the route was allegedly put at that time.[56] Is it credible for young men to specifically

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[48] Bliss Aff. at ¶ 8 ("I have personally observed Millard County employees grading the road many times in the intervening years"); Smith Aff. at ¶ 8 (same); Tolbert Alexa Lane Aff. at ¶ 8 ("I have frequently observed County graders maintaining Alexa Lane").

[49] Henrie Aff. at ¶ 5.

[50] Bliss Aff. at ¶ 7.

[51] Young Alexa Lane Aff. at ¶ 6.

[52] Tolbert Alexa Lane Aff. at ¶ 4 ("I first traveled the road in 1926" or 79 years ago); Young Alexa Lane Aff. at ¶ 4 (stating he was "born in 1917" and that he "first remember[ed] traveling Alexa Lane when [he] was 14 years old").

[53] Bliss Aff. at ¶¶ 2, 4, 5, and 6 (alleging use of the route "since the early 1940s" but discussing other observed uses only since the 1960s).

[54] See notes 52 and 53, above.

[55] Tolbert Alexa Lane Aff. at ¶ 9.

[56] Young Alexa Lane Aff. at ¶¶ 6, 7.

recall the exact path of the route or the uses to which the route was then being put 70-80 years ago? It is possible, although it seems very unlikely.

Finally, three affiants make statements that cast doubt as to whether the route meets the definition of a highway, since, they allege, the route is only open for public travel "[w]eather permitting."[57] What sort of weather would close the route to use is not described.

b. The Affidavits Supporting the Snake Pass Application Fail to Contain Specific Information about the Claims, and Contain Irrelevant or Questionable Information.

The information supporting the Snake Pass application is hobbled by similar deficiencies. For example, supporting affidavits do not specify where on, or upon what portion of, the routes alleged grading, maintenance, construction or placement of signs and other structures took place.[58] The affidavits contain no exact dates for when any such activities – or affiants' or others' use of the route – took place; the activities are generally described only by decade or year, if that.[59] Personal recollections of the use seem hazy; while two affiants recall using the route long before 1976, neither can recall even approximately when the route appears to have been graded, and one does not recall it being graded before 1976. Further, some of the allegedly observed activities on or related to the route are so vaguely described that they all could have occurred after R.S. 2477 was repealed in 1976.[60]

As with the Alexa Lane application, the Snake Pass submission contains allegations of actions that occurred only long after R.S. 2477's repeal, and thus that are irrelevant. For instance, one affidavit alleges that Snake Pass has been designated a Class B route since at least 1991 – 15 years after the last date when the route could have become an R.S. 2477 right-of-

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[57] Bliss Aff. at ¶ 5; Smith Aff. at ¶ 5; Tolbert Alexa Lane Aff. at ¶ 5.

[58] See, e.g., Henrie Snake Pass Aff. at ¶ 8 (alleging "gravel has been added to certain sections of the road" but not stating which sections).

[59] See, e.g., Tolbert Snake Pass Aff. at ¶ 4 (alleging use of the route "frequently" since 1918, but providing no dates identifying when); id. at ¶ 7 (since 1918, use of the route was by "horse and wagon" and "later" (but not stating when) "by car and truck"); id. (stating that "[c]onstruction and maintenance of the road occurred before 1976" but not stating even approximately when); Thayne Snake Pass Aff. at ¶ 5 ("The road had been graded before I assumed my position in 1991" though alleging he initially used the route in 1968); Young Snake Pass Aff. at ¶¶ 2, 4 (alleging that "the County also installed cattle guards and posted signs along the road" but not stating when – or where).

[60] See note 59 above; Tolbert Snake Pass Aff. at ¶ 7; Thayne Snake Pass Aff. at ¶ 5; see also Young Snake Pass Aff. at at ¶ 5 (alleging that the route "has been designated a Class B highway" but failing to state when such designation occurred, despite the fact that the affiant states he was the County road supervisor both before and after 1976).

way.[61] Similarly, that same affidavit asserts that County maintenance since 1991 has taken place annually.[62] All of the affidavits discuss the condition of the route "as it now stands," although few details are provided of the route's condition prior to 1976.[63]

Some allegations are also vague, failing to provide BLM or the public with useful information. For example, one affiant states that he used the Snake Pass route "frequently" since 1918, but failing to identify whether the affiant considers use once a month or once a decade as "frequent."[64] The same affiant recalls observing initially that the route was used by "horse and wagon and, at a later time, by car and truck," but fails to even hazard a guess as to when he might have first observed motorized traffic, or whether such use occurred before 1976 or after.[65] Use of the route by "cattle trucks and sheep trucks" is alleged to have been "regular," although how "regular" is not described, nor does the affiant disclose when that "regular" traffic was observed.[66] The same affiant alleges that the route "has been designated a Class B highway," but fails to allege when this designation may have taken place, and presents no evidence as to when this designation occurred.[67]

Some allegations presented in one affidavit are based on decades-old memories or memories of a young man, which, by their nature, are less likely to be reliable. One affiant states that he first observed the route nearly 87 years ago, so it is likely that this affiant was young when his initially observations occurred.[68] At that age and since, the affiant swears, he can recall the uses to which others put the use, the types of vehicles on the route, and the fact that the route now runs "the same route as it does now," although he cannot recall even to the decade when the he observed the route as graded or maintained and does not allege with any specificity when he used the route.[69] BLM cannot rely on these long-ago memories to dispose of land belonging to all Americans.

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[61] Thayne Snake Pass Aff. at ¶ 5.

[62] Id.

[63] Henrie Snake Pass Aff. at ¶ 8; Tolbert Snake Pass Aff. at ¶ 9; Young Snake Pass Aff. at ¶ 9.

[64] Tolbert Snake Pass Aff. at ¶ 4.

[65] Id. at ¶ 7.

[66] Young Snake Pass Aff. at ¶ 6.

[67] Id. at ¶ 7.

[68] Tolbert Snake Pass Aff. at ¶¶ 2, 4 (alleging first use of the route in 1918 or 87 years ago). Mr. Tolbert scrupulously avoids stating his age in each of his affidavits.

[69] Id. at ¶¶ 6-8, 10.

Further, one affiant alleges that at some unspecified time during his tenure as road supervisor (from 1950s to 1960s and from 1976 to 1983) "the County also installed … signs along the road."[70] The affiant provides absolutely no information as to what kind of signs were erected, or where, or when, they might have been placed along the route. And in fact the State's allegations are contradicted by recent observation. A recent observer found no county signs along any of the route, only what appeared to be a severely damaged BLM sign.[71] Certainly, the State's application fails to show County signs along the route. If the County did actually erect any such signs, no sign of them remains.

Finally, one affiant alleges that Snake Pass, like Alexa Lane, is not and has not been an all-weather road, since, the route is only open for travel "[w]eather permitting," casting doubt on its status as a highway.[72]

c. The Affidavits Supporting the Both Applications Contain Contradictory Information about the Nature of the Route.

One would think that it would not be difficult for all involved to agree as to the nature of the route as it stands presently – particularly given that this is a fact capable of ready determination by observing the route now. However, regarding both applications, the affiants are in disagreement. Concerning Alexa Lane, the State's cover letter and one affiant allege that the road's surface is composed of "native dirt;" yet three other affiants disagree, alleging that the route is graveled. Even the latter three affiants are not clear as to whether gravel has been added to the entire route or only a portion thereof.[73]

Similarly, with respect to Snake Pass, the State's cover letter and a single affiant again allege the route's surface is "native dirt," with two affiants alleging the road is also graveled. Again, the extent of the graveling is not made clear in the declarations.[74]

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[70] Young Snake Pass Aff. at ¶ 4.

[71] Kessler Dec. (Exh. 6) at ¶¶ 18, 26.

[72] Tolbert Snake Pass Aff. at ¶ 5.

[73] Compare Young Snake Pass Aff. at ¶ 8 (alleging surface of the road "is native dirt"); Fairbanks cover letter at 2 ("The surface of the road is native dirt") with Bliss Aff. at ¶ 8 (alleging surface of road is "composed of native dirt and gravel"), Henrie Alexa Lane Aff. at ¶ 6 (alleging that "gravel has been added to the northern section of the road"), and Smith Aff. at ¶ 8 (alleging surface of road is "composed of native dirt and gravel").

[74] Compare Tolbert Snake Pass Aff. at ¶ 9 (alleging surface of road "is native dirt"); Fairbanks cover letter at 2 ("The surface of the road is native dirt") with Young Snake Pass Aff. at ¶ 9 (alleging surface of road "is composed of gravel and native dirt") and Henrie Snake Pass Aff. at ¶ 8 ("gravel has been added to certain sections" of the route).

This type of contradiction about a matter of clear fact renders all of the declarations suspect.

C. Aerial Photos Submitted by Utah Are Irrelevant and 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 for the two routes amounted to a "constructed highway" as required by R.S. 2477 prior to October 21, 1976.

In fact, the greatest problem with the aerial photos supplied for both routes is that they were all taken nearly two years after the repeal of R.S. 2477, rendering them irrelevant to the question of whether a route in the area was constructed prior to October 1976.[75]

Even assuming that the presence of a constructed highway on the ground in mid-1978 might indicate that a constructed highway was likely there two years earlier – a dubious assumption at best – the aerial photos do not definitively demonstrate that either route was constructed even by 1978. For example, for both the Alexa Lane and Snake Pass routes, the alleged 1978 aerial photos show each route as indistinct or barely visible for much of the claimed route.[76] The condition of each route in locations where evidence of construction would be likely, such as wash crossings, is indiscernible in the 1978 aerial photos due either to photographic quality issues or the indistinctiveness of the route itself.[77] In addition, portions of each route appear more distinct on the 1990s aerial photo than they do on the 1978 photo, perhaps indicating that significant improvements to the route took place long after R.S. 2477 was

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[75] See "Millard County Alexa Lane – 1978 Aerial Photography," attached to the State's application; "Millard County Alexa Lane Quad Index" (indicating aerial photos taken August 26, 1978 and September 8, 1978); and Alexa Lane, Application for Recordable Disclaimer of Interest (no date) at 1 ("Circa 1978 aerial photo"); "Millard County Snake Pass – 1978 Aerial Photography," attached to the State's application; "Millard County Snake Pass Quad Index" (indicating aerial photos taken August 26, 1978); and Snake Pass, Application for Recordable Disclaimer of Interest (no date) at 1 ("Circa 1978 aerial photo").

Utah's failure to provide pre-October 21, 1976 aerial photos is a particularly egregious omission, given the ready availability of such photos from federal agencies and private vendors. See Pflugh Dec. (Exh. 4) at ¶¶ 59-61 and Exhibit X attached thereto (detailing availability of numerous other aerial photography datasets for area traversed by both claims).

[76] Pflugh Dec. at ¶¶ 9-15, and aerial photo comparisons attached thereto as Exhibits A and B.

[77] Pflugh Dec. at ¶¶ 11, 13 and 14 and photo comparisons attached thereto as Exhibits A and B.

repealed.[78] 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 Exh. 32 to E. Zukoski letter of June 24, 2005, attached as Exh. 1 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"). 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 1978 aerial photos of both the Alexa Lane and Snake Pass are accompanied by a map indicating the date on which the photos were supposedly taken, but no declaration or any supporting evidence or statement substantiates the alleged dates. Another set of aerial photos is identified as being taken in the 1990s. The photos taken in the 1990s, however, are even more irrelevant to the determination of whether a highway right-of-way was constructed before October 21, 1976. The State of Utah fails to provide evidence as to who took any of the photos. As such, this "evidence" cannot be accepted by BLM as proof of anything.[79]

D. Images and Maps Created After October 21, 1976 Do Not Establish that Valid Existing Rights Existed Prior to That Date.

1. Ground and Aerial Photos Taken After 1976 Submitted by the State to Support Both Claims Do Not Support those Applications.

Photos of the current condition of the claimed routes from the ground may be relevant to the existing scope of disturbance of each route. Aerial photos taken "circa 1995," which were submitted in support of both applications, may be relevant to showing some natural, or man-

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[78] Pflugh Dec. at ¶¶ 11-15 and photo comparisons attached thereto as Exhibits A and B.

[79] Finally, Utah uses the aerial photos from "circa 1995" as background for a number of its maps. See, e.g., Millard County Alexa Lane map with event points and points of diversion submitted with its application. This is a deceptive practice which we urge Utah to terminate. While the 1995 aerial photos may better display the current status of the routes, they do not accurately reflect the status of the route on the relevant date (October 21, 1976 or earlier).

made feature at that time. Such photos are, however, not dispositive of or even convincing concerning 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. Such photos 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 whenever the land was otherwise reserved.[80] None of the photos of improvements to the routes provided by Utah for either the Alexa Lane or Snake Pass claims contain such evidence, except those related to survey markers.[81] BLM has previously concluded that evidence concerning the "present and near present conditions of [] claims" was "not persuasive" in addressing whether a right-of-way was granted because it "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 32 to E. Zukoski letter of June 24, 2005, attached as Exh. 1) at 6-7.

In addition, photos of the existing nature of the route, or of the scope of the route in the last ten 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, the recent photos are not helpful to the discussion of the scope of the route at the time any alleged right-of-way was created.

Finally, Utah has provided neither BLM nor the public with any evidence or information to support that the photos asserted to reflect the condition of each route at a certain point on the map were in fact taken at those locations. Utah has failed to supply any declarations or affidavits with the photos; the State fails to provide an assertion by any individual that the photos represent the routes at a particular point, which direction the photos face; etc. If these photos are linked to some GIS data, the State has not attempted to demonstrate such a connection.[82]

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[80] 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.

[81] The only photographed items that display a date are USGS survey markers. See, e.g., Snake Pass photos EP140932003, EP140934008, EP140934021, and Alexa Lane photo EP14301001. These markers are, of course, not improvements to either route; their mere existence at certain locations is not evidence of highway construction.

[82] With its application, Utah provided BLM with no metadata to verify the location of the photos or points on the map. E. Zukoski, Earthjustice, pers. comm. with M. DeKeyrel, Realty Specialist, Utah BLM (July 29, 2005). This despite the fact that the State almost certainly has such data. In addition, Appendices submitted with Utah's application state 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, e.g., Alexa Lane Application, Appendix A at 1. Again, Utah failed to provide this data to BLM with the application.

2. The Ground Photos Submitted, By Themselves, Lack Information to Render Them Useful as Supporting Evidence.

Many photos taken from the ground and submitted by Utah do not support the applications with which they are submitted because they are not, on their face, self-explanatory, and they lack any supporting documentation to explain what they are. For example, none of the photos displayed contain any information about the direction the photos were taken.

In addition, it is unclear what the State is attempting to demonstrate with a number of the photos. For example:

- Photo EP143010023 displays some disturbed earth on a hillside. It is impossible to tell from the photo where it was taken in relation to Alexa Lane (or any route, for that matter) or why it would be relevant to whether the route is a constructed highway.

- Similarly, the State has submitted photos of a number of other human-made items (related to corrals (EP14093401 and EP140934038), a man-made pond (EP140934033), and an abandoned pipe or fallen-over post (EP140934037)) for which it is impossible to discern the relationship between the items and the road. Again, the State provides no explanatory information, nor does it state why these items are relevant to whether the routes were constructed highways before 1976.

- Snake Pass photos EP140932003, EP140934008, EP140934021, and Alexa Lane photo EP14301001 all display USGS survey markers. Again, from the photos, it is impossible to tell the relation of the location of these items to any existing route.

Given Utah's failure to provide any explanation for these (and other) photographs submitted in support of the disclaimer applications, the photos should be given little or no weight in considering whether Utah has carried its burden of demonstrating that a disclaimer is warranted.

In addition, a number of Utah's photos are placed deceptively on its maps. While several of the features depicted in photos are 90 feet or more from the edge of the claimed rout's surface, the State displays these features as "event points" as if they were on or directly adjacent to the route.[83] Utah's misleading practice only underscores its failure to provide any useful or accurate information verifying the location of depicted features.

BLM should insist that this and future applications include such metadata in such a way that the public will be able to obtain it, review it, and comment on it. If BLM has not or will not require that Utah submit such information, BLM should explain to the public its failure to do so.

[83] See Kessler Dec. (Exh. 6) at ¶ 13 (survey monument depicted in EP143010014 is 90 feet from edge of Alexa Lane claim); ¶ 24 (survey monument depicted in EP140934008 is more than 90 feet from edge of Snake Pass claim); and ¶ 25 (pond depicted in EP140935014 is more than 90 feet from edge of Snake Pass claim).

E. Utah's "Point Data" Concerning Water Sources and Minerals, Standing Alone, Is Irrelevant.

Both of Utah's applications contain, among other things, a map displaying water "points of diversion" and "minerals" near each route. 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 necessarily related to when and where water rights were claimed, or where minerals are located, in the general vicinity of the current path of the alleged rights-of-way. While this information is interesting, it is, without more, 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 germane.[84]

F. Millard County Apparently Has No Construction, Maintenance, or Funding Records Concerning the Alleged Rights-of-Way.

No evidence concerning construction, budgeting, funding, or road maintenance was submitted with either of the two applications to BLM beyond the statements of a few individuals that allegedly observed such activities. 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 (Exh. 32 to E. Zukoski letter of June 24, 2005, attached as Exh. 1) at 8.[85]

Yet when The Wilderness Society sought from Millard County "all records (including … road maintenance records, construction records, records concerning funding of construction, maintenance or improvement …)" related to Alexa Lane and Snake Pass route, Millard County provided no documentation in response.[86] Instead, the County responded that "*everything* generated, modified or acquired by Millard County concerning these … claimed rights-of-ways [sic], is on file with the Utah State Attorney General's Office."[87] Given that the Utah State Attorney General failed to supply any County records in the Alexa Lane or Snake Pass

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[84] To the extent data concerning water diversions near the route is germane, it supports the conclusions that either (a) the route was constructed by and to benefit BLM, not the State; and (b) that the a portion of the route lies on lands reserved long before Utah's application alleges that County maintenance took place. See discussion below at Sec. VI(E).

[85] The State of Utah has also admitted the relevance and importance of such data. See Sec. IV(H) below.

[86] Letter of K. Brengel, The Wilderness Society to L. Jackson, Millard County Attorney (July 29, 2004) at 1, attached as Exhibit 7.

[87] L. Jackson, Millard County Attorney to K. Brengel, The Wilderness Society (Sep. 21, 2004) (emphasis added), attached as Exhibit 8.

applications, BLM must assume that the County and State have no "road maintenance records, construction records, records concerning funding of construction, maintenance or improvement" regarding either route.

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

The scope of an R.S. 2477 right-of-way includes the highway's width, alignment, uses, surface character, and improvements. The State has provided only vague and subjective information concerning the uses of the routes prior to 1976, as noted above. See above at Section III(B)(3).

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. Guidance implementing the MOU requires the applicant to describe the routes' width.[88] Apparently, the State's poorly-crafted application initially failed to comply with this requirement, forcing Utah to remedy its omission by filing additional information later.[89] When Utah did finally include width measurements, the State simply provided some numbers on a sheet of paper.[90] Utah made no attempt to establish the bona fides of the data with affidavits or the like. The State does not identify who, or how, or when, or with what equipment the measurements for width were made. Nor does the State anywhere allege what standards it used to establish width; that is, what types of disturbance, or what types of features are encompassed within the width of the route.

In addition, the tables submitted by the State addressing width do not explain where any of the measurements of width took place along a particular route segment. For example, the State identifies three times a "unique" segment as Segment A of the Snake Pass route. The State alleges that 5.1 miles of this segment are 54 feet in width, another 0.4 miles is 35 feet in width, and another 6.9 miles is 45 feet in width[91]. However, these allegations of width are unclear on their face – are the identifications of width meant to identify 5.1 continuous miles of 54-feet-wide road? If so, which 5.1 miles of the 12.4 mile segment are that wide – starting from the east or the west of the segment? Or are the 5.1 miles of 54-feet-wide road scattered throughout that segment of the route? Just where are the wider and slimmer sections located within this "unique" segment? Utah's cursory – and cryptic – submission fails to clarify any of these issues.

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88 Memo of J. Hughes (Exh. 3) at 2.

89 E. Zukoski, pers. comm. with M. DeKeyrel, Realty Specialist, Utah BLM (July 6, 2005); see also M. DeKeyrel, fax cover sheet, attached as Exhibit 9 (noting that initial Utah applications "did not identify a claimed ROW [right-of-way] width").

90 See road segment data at Exhibit 9.

91 See road segment data for Snake Pass Road at Exhibit 9.

In addition, the State provides no explanation as to why the routes width might grow or shrink along the route.

While recordable disclaimer regulations mandate a survey to determine the property's metes and bounds, Utah fails to explain how its width "data" was derived. The State may have based its conclusions on windshield observations by individuals. Identifying disturbance by visual signs of the disturbed areas – as the State may have done here – is not an exact exercise. The U.S. District Court for the District of Utah concluded that any statement regarding the disturbance associated with a route "depends upon an inescapably subjective perception" that is simply not helpful and not reliable in determining scope. United States v. Garfield County, 122 F. Supp. 2d 1201, 1230 (D. Utah 2000). Given federal case law, any BLM decision that sets scope based in part on width allegations not supported by any explanation or evidence will be arbitrary and capricious.

H. BLM Must Require Utah to Gather Essential Factual Information that Utah Admits Is Relevant.

The sparse, contradictory, and/or irrelevant information submitted by Utah does not demonstrate that a right-of-way was granted under R.S. 2477 for any of the claimed routes. 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 the counties admit that they do 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 (Exh. 32 to E. Zukoski letter of June 24, 2005, attached as Exh. 1) at 8-10.

Indeed, the State of Utah itself has admitted that this type of information is relevant and important to establishing an R.S. 2477 claim. In response to a Freedom of Information Act request and litigation, DOI provided to The Wilderness Society and SUWA records provided to the agency by the State of Utah as part of settlement negotiations over R.S. 2477 claims in the State. See The Wilderness Society v. Bureau of Land Management, 2003 WL 255971 (D.D.C. 2003). Among the documents released were template declarations apparently prepared by the State for presentation to BLM. See "R.S. 2477 Roads, Oral History Interview Questions and Affidavits," (no date) (hereafter "Utah R.S. 2477 Affidavit Template"), attached to Declaration of Keith Bauerle (Apr. 15, 2005), attached hereto as Exhibit 10 (identifying source of document). That document, clearly prepared by the State, contains "Questions (To ask of present or former

public officials or employees)." Utah R.S. 2477 Affidavit Template at un-numbered page 8. The State recommends that it be determined from such employees: "What documentation is available for the period before 1976?" and recommends that the following type of documents be located:

- Photographs ...
- County resolutions
- County planning documents
- Commission meeting minutes
- Budget documents
- Contracts/Memoranda of understanding
- Correspondence
- Diaries
- Class B road maps
- Class D road maps
- BLM maps ...
- USGS maps ....

Id. at un-numbered page 9. Despite the fact that the State has admitted that the type of evidence listed above is important to establishing the validity of an R.S. 2477 right-of-way, and the fact that much of this type of evidence is the type that would be in the State's or county's possession, or could easily be obtained from BLM or other federal agencies, the State provided BLM with virtually none of this type of information to support either of its applications. Therefore, it can be assumed that none of this type of admittedly relevant information could be located by State or County employees in support of the applications.[92]

While BLM's website previously stated that the agency intended to "review[] existing and historic records," it is unclear whether BLM staff will do more than review the application and comments, undertake a site visit, and review some maps. See http://www.ut.blm.gov/rs2477/process.htm (viewed April 2004). TWS believes that review of historic and agency records above is essential, and that BLM must either require that Utah submit such information in the future or commit itself to gathering the information and making it available to the public before the commencement of the public comment period.

[92] At least one of the sources the State identified might yield important information concerning whether or not the County participated in the construction of either route. While TWS did not have time to review all minutes of the Millard County Commission from the relevant period, one reviewer who sampled minutes from 1918-1920 found numerous mentions of specific routes programmed for maintenance or construction by the County. See Kessler Dec. (Exh. 6) at ¶ 7. We urge BLM to undertake a complete review of these voluminous records prior to making any decision on either disclaimer application.

V. BLM CANNOT RELY ON UTAH'S SUBMISSIONS TO ISSUE A DISCLAIMER OF INTEREST FOR EITHER OF THE ROUTES, BECAUSE TO DO SO WOULD VIOLATE THE INFORMATION QUALITY ACT.

A. Legal Background.

The Information Quality Act (IQA), adopted by Congress in late 2000, requires that the Office of Management and Budget (OMB) issue "policy and procedural guidance to federal agencies" requiring that the other agencies in turn issue their own guidelines with the goal of "ensuring and maximizing the quality, objectivity, utility, and integrity of information ... disseminated." P.L. 106-554; Sec. 515 of H.R. 5658. OMB issued its guidelines on February 22, 2002, and DOI and BLM issued their own guidelines as required shortly thereafter. See 67 Fed. Reg. 8452 (Feb. 22, 2002) (OMB guidelines); 67 Fed. Reg. 36,642 (May 24, 2002) (announcing DOI guidelines); www.doi.gov/ocio/guidelines/515Guides.pdf (last viewed June 9. 2005) (hereafter "DOI guidelines"); BLM website at www.blm.gov/nhp/efoia/data_quality/guidelines.pdf (last viewed June 9, 2005) (hereafter "BLM guidelines").

The IQA (sometimes referred to as the "Data Quality Act") was meant to ensure that agencies, including the BLM, did not disseminate to the public or rely on information of dubious quality in the agency's public pronouncements or decision-making. The DOI and BLM guidelines make clear that when the agency makes a decision, the IQA's guidelines would apply to that decision and dissemination of information allegedly supporting that decision. DOI guidelines at 3; BLM guidelines at 4. DOI guidelines state that to ensure the "quality" of information the agency relies upon or disseminates, the agency must ensure that the information is "accurate, reliable, and unbiased," and is "presented in an accurate, clear, complete, and unbiased manner." DOI guidelines at 8; see also BLM guidelines at 6. Where the information at stake is "influential," the agency must more rigorously evaluate the information to ensure its integrity. DOI guidelines at 10; BLM guidelines at 4-5. DOI defines "influential information" to include that data that will have a "clear and substantial impact on important public policies." DOI guidelines at 10; see also BLM guidelines at 4 (influential information is that which is "expected to have a genuinely clear and substantial impact at the national level").

B. A BLM Decision to Rely upon Information Provided by the State of Utah – as Well as BLM's Dissemination of the Information Itself – Is Subject to the IQA.

IQA guidelines make clear that BLM must ensure the objectivity of information provided to the agency by third parties that may form the basis for the agency's decision. DOI's guidelines state that if DOI "relies upon technical [or other] information submitted or developed by a third party, that information is subject to the appropriate standards of objectivity and utility" under the IQA. DOI guidelines at 7; see also BLM guidelines at 2 (IQA applies to information submitted by a third party where BLM's use of the data "suggests that BLM endorses or adopts the information, or indicates in its distribution that it is using or proposing to use the information to formulate or support a ... DOI decision ....").

BLM has already published and disseminated information contained in Utah's applications to the public, and by proposing to issue recordable disclaimers of interest based upon the applications, has effectively endorsed the information contained therein. See 70 Fed. Reg. 19500 (April 13, 2005) (relying upon and stating as fact information contained in Utah's applications). Thus, BLM's April decision to publish that information was subject to the IQA. Further, a final BLM decision to issue recordable disclaimers of interest based on Utah's submissions would, under DOI's and BLM's guidelines, also require that BLM review that data and vouch for its objectivity before disseminating such a decision. Finally, because a decision to issue a recordable disclaimer for any of the applications will set a national precedent as to how BLM will effectively recognize R.S. 2477 rights-of-way under the Disclaimer Rule – an issue of great national import considering its potential impact on BLM land across the country – the information relied upon must be considered "influential" and subject to the higher standards for such information in BLM and DOI guidelines.

C. Utah's Affidavits – and Other Submissions – Fail to Meet the Standards of the IQA.

BLM cannot rely upon – or disseminate in support of a final decision based upon – the affidavits and other information submitted by the State because such information does not meet the standards for "accurate, reliable" information that is "presented in an accurate, clear, [and] complete" manner in the IQA and implementing guidelines. As discussed in detail in Section IV above, for each of the alleged right-of-ways:

- Utah has submitted affidavits that contain hearsay, fail to provide the best evidence, are vague, fail to provide any basis for numerous statements made, and contradict each other;
- Utah has submitted maps and photos that are of marginal – if any – relevance, and for which the State provides no evidence or verification as to their authenticity;
- Utah has submitted almost no reliable information to actually support a conclusion that a public highway was constructed during the relevant time period; and
- Utah has admitted that there are other types of persuasive evidence that it either does not possess or that the State has failed to submit.

As such, BLM cannot rely upon – or disseminate in support of a final decision based upon – the State's submissions. To do so would plainly violate BLM's duty to rely on "accurate, reliable" information as required by the IQA. This is especially true given that the information could be considered "influential," and thus merits a higher level of scrutiny from BLM.

This section of TWS's comments should be considered by BLM to be a "request for correction" of data disseminated by the BLM pursuant to the IQA. See BLM guidelines at 7-8. This letter meets all the requirements for such a valid request pursuant to the agency's

guidelines.[93] We look forward to BLM's explanation of its response to this request for correction within 60 day, as the agency requires. Id. at 8. Since BLM's guidance on the State of Utah-DOI MOU requires BLM to respond to comments on disclaimer applications merely in a memo to the agency's case file and not directly to the commenter, BLM should provide TWS with a "separate response" to this request for correction, as the agency's IQA guidance suggests. BLM guidelines at 8.[94]

VI. OTHER EVIDENCE DOES NOT SUPPORT THE VALIDITY OF THE ALLEGED RIGHT-OF-WAY FOR ALEXA LANE.

The application submitted by Utah contains little to no credible evidence to support the contention that Alexa Lane was a "constructed highway" before October 21, 1976 except for a few affidavits that often include hearsay, contradict one another, fail to include the best evidence, and contain vague or irrelevant data. However, to the extent that the evidence may show that Alexa Lane was constructed, it shows that the highway was likely constructed by the Federal government, with federal funds, by federal employees, to serve a federal purpose. As such, to the extent that Alexa Lane is a constructed highway, it is a federal highway, and therefore no

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[93] First, TWS provides contact information at bottom of the first page of this letter, and at the end of this letter.

Second, TWS explains in this section that the State's submissions generally – and its declarations specifically – do not comply with agency IQA guidelines, and thus cannot be relied upon by BLM to support a decision to issue disclaimers of interest, and why the State's submissions cannot be republished by BLM.

Third, the remedy, or "correction," that TWS seeks is that BLM cannot rely upon (or use as the basis for any published decision) information submitted by the State to issue any disclaimers of interest, and thus that BLM cease dissemination Utah's submissions.

Finally, TWS is and will be an "affected person" for purposes of these guidelines, since BLM's dissemination of or reliance upon non-credible information from the State of Utah in reaching a decision on the State's applications for disclaimer may harm TWS's and its members' long-standing and well-recognized interests in protecting the environment of the public lands directly abutting and affected by the claimed routes.

[94] BLM guidelines state that a separate response is unnecessary in cases such as rulemakings because "BLM rulemaking includes a comprehensive public comment process and impose a legal obligation on BLM to respond to comments on all aspects of the action." BLM guidelines at 8. Unlike BLM rulemakings, however, guidance on the State of Utah-DOI MOU for responding to comments on applications for recordable disclaimers hardly establishes a "comprehensive" process. Guidance on the State of Utah-DOI MOU requires no publication of the agency's response to comments to the public – which is required by both rulemaking regulations and the National Environmental Policy Act – nor any response to the commenter, requiring instead only a memo to the file.

right-of-way to another entity (either the State or Millard County) was created by such construction. Later alleged upkeep of the route by Millard County cannot turn a federal highway into a County right-of-way.

A. Neither the State's Application, Nor Other Evidence, Support a Conclusion that the Route Was "Constructed" before the 1930s.

The State's application does not allege that construction took place on the route before the late 1930s. Rather, one affiant (Mr. Tolbert) asserts that he observed wagon and horse traffic on the route starting in 1926. He does not assert that the route was constructed at that point, indicating that the route was simply a traveled route with no grading or other evidence of construction. Another affiant's recollection agrees; Mr. Young alleges traveling on Alexa Lane in about 1931, and recalls that "Alexa Lane was not graded at that time," although by the 1950s it had been graded already.[95] Mr. Tolbert asserts that an activity likely to meet the definition of construction if undertaken across the entire route – grading – had occurred by "the late 1930s."[96] Utah submits no evidence that suggest that "construction" of any kind took place at any earlier data.

Other evidence gathered by TWS tends to support the conclusion that some travel was occurring in the general area of the Alexa Lane claim before 1935. However, the evidence does not support that the routes were identical to the current Alexa Lane claim, and does not indicate that any of the routes was constructed.

A "reconnaissance" map from 1885 that includes the eastern portion of the Alexa Lane routes does not display any route in the general location claimed by Utah.[97] The 1885 "Sevier Desert Sheet" illustrates only a single route heading west from the town of Deseret and nothing in the vicinity of the Alexa Lane claimed route.[98]

The 1910 "Fish Springs Quadrangle" map prepared by the U.S. Geological Survey (USGS) illustrates the area over which the western two thirds of the Alexa Lane route now runs. The map shows a route roughly following Swasey Wash in the vicinity of the Alexa Lane claimed route. However, the illustrated route does not appear to follow the exact alignment of the Alexa Lane claimed route. In addition, the map itself does not identify whether the routes on

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[95] Young Alexa Lane Aff. at ¶ 4 (emphasis added).

[96] Tolbert Alexa Lane Aff. at ¶¶ 7-8 (alleging use of route since 1926; alleging that initial observed use was for "horseback and wagon;" and that "the road has been graded and maintained since at least the late 1930s").

[97] USGS, Utah, Sevier Desert Sheet, Reconnaissance Map (1885, reprinted 1911) – triangulation and topography by the Wheeler and Powell Surveys, attached to Pflugh Dec. (Exh. 4) at Exh. O; see also Pflugh Dec. at ¶ 34.

[98] Pflugh Dec. at ¶ 35.

the map are constructed or merely traveled; every route on the map is drawn with the same symbol. The map simply does not distinguish between more-significant routes and less-significant routes.[99]

In December of 1933 through February of 1934, the USGS completed subdivision surveys of Township 17 South Range 10 West, and Township 17 South Range 11 West, which includes the majority of the area traversed by the State's claim for Alexa Lane. The results of these surveys were printed as official survey plats filed with the General Land Office.[100] These maps do not display a single route that corresponds to the route claimed as the Alexa Lane route. In fact, while the maps display a number of trails criss-crossing in the general area of the Alexa Lane route, significant portions of the current route are not displayed on these maps. Although there are routes indicated on the survey plats in the vicinity of the Alexa Lane claimed route, some of which share the same general location and alignment as the claimed route, there is no indication that the Alexa Lane route as claimed existed in its entirety at the time of the surveys.

For example, for Township 17 South, Range 10 West (Sections surveyed December 1933 through January 1934), the following significant contrasts were noted between traveled routes indicated on the survey plats and the Alexa Lane claim.[101]

- In Section 29, the USGS found no route that corresponds to the claimed route. The claimed route goes from old Highway 6 and then virtually due north through the section, exiting Section 20's northern boundary into Section 29. The only path the USGS identified in Section 29 leaves old Highway 6, and bears northwest, exiting Section 20 at its border with Section 30. The route on the USGS map is therefore not the same as the Alexa Lane claim.

- In Section 20, the USGS found no route that corresponds to the claimed route. The claimed route enters Section 20 near the center of the section's southern boundary and exits in the northern portion of the section's western boundary. The only path identified on the USGS plat runs roughly east-west through the center of the section.

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[99] USGS, Utah, Fish Springs Quadrangle, Topography (1910) (surveyed in 1908); attached to Pflugh Dec. at Exh. P; see also Pflugh Dec. at ¶ 36.

[100] See Dep't of the Interior, General Land Office, Map of Township No. 17 South, Range No. 10 West, of the Salt Lake Meridian, Utah (April 1, 1935); and Dep't of the Interior, General Land Office, Map of Township No. 17 South, Range No. 11 West, of the Salt Lake Meridian, Utah (May 28, 1935), attached as Exh. S to Pflugh Dec. (Exh. 4). Copies of these Public Land Survey System (PLSS) maps were obtained from the National Archives in Denver. Pflugh Dec (Exh. 4) at ¶ 38.

[101] Compare Wild Utah Project, Alexa Lane map, attached to Declaration of Carrie Norton Richmond (Aug. 3, 2005) (Richmond Dec.), attached as Exhibit 11 with plat maps identified in note 100 above. See also Pflugh Dec. (Exh. 4) at ¶ 40.

- In Sections 18 and 19, the USGS did not clearly identify a single route that corresponds to the claimed route. The claimed route runs roughly southeast-northwest through the two sections, crossing the southern boundary of Section 19 slightly to the west of center. While the USGS identified several criss-crossing paths in this general area, none appears to correspond exactly to that claimed as the Alexa Lane route.

- On the western border of Section 18 of this township – which forms the eastern border of Sections 12 and 13 of Township 17 South Range 11 West – the USGS identifies no route at all. Yet Utah claims the Alexa Lane route runs south-north near or on this section boundary for more than half a mile.

- None of the routes in the general vicinity of the Alexa Lane claim in this township are identified by USGS as major routes. All of the routes are identified with double dashed lines. The only route identified as a major route – two solid lines – is the route to which the Alexa Lane claim connects (old Highway 6 between Delta, UT and Ely, NV).

For Township 17 South, Range 11 West (Sections surveyed February 1934), the following significant contrasts were noted between traveled routes indicated on the survey plats and the Alexa Lane claim.[102]

- Again, on the eastern boundary of Sections 12 and 13 of this Township – which forms the western border of Section 18 of Township 17 South Range 11 West – the USGS identifies no route at all. Yet Utah claims the Alexa Lane route runs south-north near or on this section boundary for more than half a mile.

  Instead of the claimed south-north route on the eastern boundary of Sections 12 and 13 that Utah asserts, the USGS identified a route that follows Swasey Wash from northwest to southeast through the Sections 13 and 24 and that the USGS marked with the notation "To State Highway." This is not on the route the State claims as Alexa Lane.

- In Section 11, the USGS did not identify a route that corresponds directly to the claimed route. The claimed route runs roughly east-west near the center of the section. The USGS identifies a path crossing the eastern boundary of Section 11 and trending southwest, where it connects with another route near the southern boundary of the section. That connecting route then trends northwest until it hits the western boundary of the section. The routes the USGS identified are thus not the same as the claimed Alexa Lane route.

- None of the routes in the general vicinity of the Alexa Lane claim in this township are identified by USGS as major routes. All of the routes are identified with double dashed lines. The only route identified as a major route – two solid lines – is the

[102] Compare Wild Utah Project, Alexa Lane map, attached to Richmond Dec. (Exh. 11) with plat maps identified in note 100 above. See also Pflugh Dec. (Exh. 4) at ¶ 41.

route to which the Alexa Lane claim connects (old Highway 6 between Delta, UT and Ely, NV).

In sum, although there are some routes indicated on the 1934 survey plats in the vicinity of the Alexa Lane claimed route, some of which share the same general location and alignment as the claimed route, there is no indication that the Alexa Lane route as claimed by Utah today existed in its entirety at the time of the surveys. There is no indication from any of the maps that any of the routes that may correspond to the Alexa Lane route were constructed in any way.

A review of the notes taken by the US surveyors in Township 17 South Range 11 West for those sections where a route does roughly correspond to that claimed by Utah as Alexa Lane (in Sections 10, 3, 4, and 5) do not indicate construction, merely the presence of a traveled route – described as an "old road" – running in or directly alongside Swasey Wash. The survey notes sometimes identify the route as connecting "Swasey Springs" and the "State highway" (presumably old Highway 6), but nowhere describe the condition of the route.[103] As noted above, the path of this "old road" apparently diverges from that of the currently claimed route in a number of locations in Township 17 South Range 11 West and in Township 17 South Range 10 West.[104]

These 1934 surveys not only confirm that there was no highway corresponding to the route alleged by Utah in 1934, they also directly contradict the statement of one affiant who alleges that when he "first used and observed Alexa Lane" in 1926, the route "ran the same route as it does now." Tolbert Alexa Lane Aff. at ¶ 9. Given the contemporary nature of the 1934 USGS notations, as opposed to an individual's memory of a route from nearly 80 years ago, the USGS's impressions are likely to be the more accurate.

Further supporting the USGS surveys is a 1935 map prepared by the State Road Commission, which shows no route at all in the vicinity of the Alexa Lane route.[105]

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[103] Pflugh Dec. (Exh. 4) at ¶¶ 68, 70. Excerpts of the survey notes are attached as Exh. C to Kessler Dec. (Exh. 6).

[104] Further evidence that the Alexa Lane route was not constructed before the late 1930s can be found on the ground today. The route surveyors described as the "old road" in Swasey Wash in Township 17 South Range 11 West is identified by parallel dashed lines within the sections where it does follow the current Alexa Lane route and where it does not (for example in sections 11, 13 and 24), indicating that the route was in a similar condition along both parts of the route. A review within the last few weeks of this "old road" where it diverged the current Alexa Lane route found evidence of the route itself but absolutely no evidence of any kind of construction. See Kessler Dec. (Exh. 6) at ¶ 20 and photos attached thereto as Exh. D. Although it may be difficult to discern a route's condition 70 years ago from its current condition, scars on the land in the desert are slow to disappear.

[105] Pflugh Dec. (Exh. 4) at ¶ 53, and State Road Commission, Road Map (1935), attached thereto as Exhibit V. Though this map includes the classification of "Dirt" as a lower class of roads than graded and drained, the Snake Pass route does not appear.

B. Evidence from the 1930s Indicates that to the Extent Alexa Lane Was Constructed, It Was Constructed by the Civilian Conservation Corps.

To the extent that there is evidence that the Alexa Lane route was constructed, as Utah's application alleges, in the "late 1930s," documentary and circumstantial evidence strongly suggests that the route, if constructed at all, was constructed by the Civilian Conservation Corps (CCC) on behalf of BLM's predecessor, the Division of Grazing.

In October 1935, the CCC established a camp (Division of Grazing or "DG-29") located at Antelope Springs, Utah, approximately eight miles west of the western end of the Alexa Lane claimed route. In the words of camp superintendent Paul Arentz, the camp was established by the Interior Department to "develop springs, reservoirs, dams, and build stock driveways, and truck trails, … so water would be available every 5 or 6 miles for the herds …."[106] In his first report, dated May 15, 1936, he states that in the previous six months, "52 miles of truck trails have been built, this means roads similar or as good as county road. Turn piked, bladed, graveled in sections across sandy count[r]y …. All truck trails had to be cleared 30 ft. wide of brush and rocks before being graded …"[107]

Of one route, the Swazey Truck Trail, Mr. Arentz stated:

> In order to ensure accesability [sic] to the 100,000 or more sheep that drift into Swazey each season a good truck trail was necessary, also to allow the camp trucks and men to get to the work projects.
>
> Dec. 30, 1935, work was started from the Main Camp Road and 5 miles below the camp, using trucks, one caterpillar, and road grader.
>
> The road to-date is graded and turnpiked 20 miles. All washes are dips instead of culverts. Eventually this road will form a junction with all main desert roads from the north and east. 10 miles more will be necessary to complete the job, but due to lack of equipment, as the caterpillar and grader was [sic] needed elsewhere, the main objective was reached, the construction of 2 large reservoirs, of 1500,000 [sic] gal. capacity, four check dams in the main Swazey wash to stop erosion and serve as stock watering when flood waters are backed up, and a good serviceable road to Swazey Spring on Swazey Mountain.[108]

This report makes clear that a CCC camp was in the area, and that it was at work constructing roads and reservoirs. The report does not clearly identify what route to "Swazey Spring" was

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[106] P. Arentz, Narrative Report for DG-29 (May 15, 1936) at 2, excerpts attached as Exh. E to Pflugh Dec. (Exh. 4).

[107] Id. at 3-4.

[108] Id. at unnumbered page entitled "Swazey Truck Trail."

constructed, but recall that at the time, a portion of the Alexa Lane claim was identified as a route to Swasey Springs by US surveyors.

In an October 1936 narrative report, Mr. Arentz documents the construction of reservoirs and check dams along the "sheep driveway out of DG-29." These projects are shown to include "Swazey Reservoir #4," described as "on main sheep driveway, Swazey Wash," and four check dams "in Swazey Wash" located "1 ½ miles apart."[109] A CCC form in BLM files further verifies that a reservoir project, identified as "R-4" and "Swazey Reserv[oir] #4" was completed in Township 16 South Range 11 West, Section 30 in April 1936.[110]

The camp's March 1937 narrative report documents twenty miles of construction on "Swazey Spring Road" that "makes the Swazey Spring and Swazey reservoirs accessible to stockmen."[111] The report states that it is "contemplated to eventually complete this road to Joy making a route thru [sic] from Juab County to the grazing area about Antelope Springs and Painter Springs." An accompanying photo shows workers clearing substantial rocks and brush from the "right of way" and "building the grade" with heavy machinery. A project listing in the report includes "reconditioning" work on "Swazey Reservoir 4."[112]

A map displaying a number of the projects is attached to the 1937 report, showing the approximate location of constructed projects.[113] The map displays the following:

- a check dam (#1) and reservoir (identified as "Swazey Reservoir #4") apparently located in Township 16 South Range 11 West, Section 30. These features are apparently located at the northern-most extent of the Alexa Lane claimed route.
- Check dam #2, located in the southern portion of Township 16 South Range 11 West, Section 32, apparently within the Swasey Wash directly adjacent to the claimed path of the Alexa Lane claimed route (on State land).
- Check dam #3, located approximately in the center of Township 17 South Range 11 West, Section 4, apparently within the Swasey Wash directly adjacent to the claimed path of the Alexa Lane claimed route.

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[109] P. Arentz, Narrative Report for DG-29 (October 1936), excerpts attached as Exh. F to Pflugh Dec. (Exh. 4).

[110] Form WP-7a Completed Work Project (April 13, 1936), attached as Exhibit 12.

[111] Dep't of the Interior, Division of Grazing, Eighth Period Illustrative Narrative Report, March 31, 1937, Camp DG-29, Antelope Springs Utah, excerpts attached as Exh. G to Pflugh Dec. (Exh. 4).

[112] Id.

[113] Id.

- Check dam #4, located in the northeast quarter-section of Township 17 South Range 11 West, Section 10, apparently within the Swasey Wash directly adjacent to the claimed path of the Alexa Lane claimed route.

The "Swazey Reservoir #4" in the March 1937 report is almost certainly the same as that described as "on main sheep driveway, Swazey Wash" in the October 1936 report, and it is in the same location as the project of the same name on the 1936 CCC form in BLM files. The four check dams identified on the map in the March 1937 report appear to be the check dams (or a subset of them) identified in the October 1936 narrative report, as four check dams "in Swazey Wash" located "1 ½ miles apart." (On the 1937 CCC map, the check dams are spaced roughly 1 and ½ miles apart.)

The 1937 CCC map also displays a highlighted route stretching from the "Swazey Road" to the "Swazey Reservoir #4," the latter located in Township 16 South Range 11 West, Section 30. Highlighted routes appear to be those constructed by the CCC.[114] The highlighted route from the "Swazey Road" to "Swazey Reservoir #4" appears to conform closely to the westernmost 1-2 miles of the alleged Alexa Lane route.

Other evidence confirms construction of part of the Alexa Lane claim itself – as well as check dams and reservoirs along the Alexa Lane route – at the time indicated the CCC documents indicate that those features were constructed by the CCC on behalf of the Division of Grazing.

First, USGS surveyor notes from September 1936 indicate that the portion of the Alexa Lane route that runs from its western terminus (in Township 16 South Range 12 West) to its northernmost point (1-2 miles to the northeast in Township 16 South Range 11 West, Section 30) where it accesses a reservoir was apparently constructed by that time. The survey notes identify a "Graded road" bearing "S.70ºW., to Swasey Springs, and N.70ºE" toward the reservoir; surveyors identified the road as about one-quarter of a mile north from the southern end of the boundary between Township 16 South Range 12 West Section 25 and Township 16 South Range 11 West Section 30.[115] The plat map of the route (dated 1939, based on the 1936 survey) also indicates this route toward the reservoir as a solid double line to distinguish it from other less

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[114] The only non-highlighted route on the 1937 CCC map is old Highway 6, whose construction apparently pre-dated the arrival of the CCC. As noted above, old Highway 6 was listed on the 1934 USGS survey plats as a major road. In addition, at least one individual asserted that he graded old Highway 6 was graded before the CCC arrived. See Interview with W. Legrand Law, quoted in M. Kelsey, Hiking, Climbing & Exploring Western Utah's Jack Watson's Ibex Country (Kelsey Publishing, 1997) at 189, 192, excerpts attach as Exhibit 13.

[115] See Pflugh Dec. (Exh. 4) at ¶ 69(a); and Kessler Dec. (Exh. 6), and Exh. C attached thereto (survey notes at Book A-510, page 382) (emphasis added).

significant routes on the map (displayed with a dashed double line).[116] Recall that no other part of the alleged Alexa Lane route was identified as "graded" in the 1934 surveys of Township 17 South Range 11 West and Township 17 South Range 10 West, indicating that the surveyors clearly understood the difference between a path created by use and a constructed route.

Second, contemporary maps and other government evidence indicate that the reservoir in Township 16 South Range 11 West Section 30 (which the graded section of road identified above appears to have been built to access) was built at the time the CCC indicates that it built the reservoir. The Historical Index lists a Range Improvement Reservoir "R-4" in Section 30 of Township 16 South Range 11 West, and places the date that this reservoir was entered in the index as April 13, 1936.[117] The plat map based on the September 1936 surveys also displays a "dyke" and reservoir at the same approximate location of the check dam and reservoir that the CCC indicates it had built by April 1936.[118]

Third, contemporary and other government records fix the construction of check dams and a reservoir in the Swasey Wash in Township 17 South Range 11 West – directly adjacent to the Alexa Lane claim – at approximately the same locations as the 1937 CCC map does, furthering verifying that the CCC constructed these features. The Historical Index for Township 17 South Range 11 West has two entries for "check dam[s]" as range improvements ("RI") on March 31, 1936.[119] Both are located in Section 10, which is consistent with at least one of the check dams identified on the CCC map.[120]

The Index also entered a reservoir as a range improvement in the Township (on March 31, 1937), although the index does not identify the exact location.[121] Other government records, however, indicate that a reservoir – possibly the one entered on the Index in 1937 – was constructed in Swasey Wash along the Alexa Lane route at about the same time as the check dams. As noted above, the State in its application identifies a water "point of diversion" adjacent

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[116] See Dep't of the Interior, General Land Office, Map of Township No. 16 South, Range No. 11 West, of the Salt Lake Meridian, Utah (plat officially filed for entry July 6, 1939), attached to Pflugh Dec. (Exh. 4) as Exh. S.

[117] Pflugh Dec. (Exh. 4) at ¶ 71, and Historical Index entry for Township 16 South Range 11 West, excerpts attached to Pflugh Dec. as Exh. Z.

[118] The Swasey Reservoir in Township 16 South Range 11 West, Section 30 is displayed on current USGS quad topo maps, although it is identified as "Swasey Res. No. 3." Pflugh Dec. (Exh. 4) at ¶ 73. While the numbering of the Swasey Reservoirs is not consistent over time, their location is consistent. See id. at ¶¶ 71-73.

[119] Pflugh Dec. (Exh. 4) at ¶ 72, and Historical Index entry for Township 17 South Range 11 West, attached to Pflugh Dec. as Exh. Z.

[120] Id.

[121] Id.

to the Alexa Lane claim in Swasey Wash in Township 17 South Range 11 West. A reservoir is present on current aerial photography at the location identified by the State in that Township and Range in Section 3.[122] In correspondence with the Utah State Engineers Office in 1967 concerning BLM's seeking recognition of a water right related to the reservoir at the point of diversion, BLM's district manager stated that the reservoir "was constructed in 1936," or at the time the CCC was constructing check dams and reservoirs in Swasey Wash.[123] The fact that BLM obtained the water rights for the reservoir directly adjacent to the route also underscores the federal interest in construction projects in the area – including the Alexa Lane route.

Other evidence also supports the contention that the northwest terminus of the Alexa Lane claim was graded by 1937, during the CCC construction period. A General Highway Map of Millard County, dated 1937, and approved by the Utah State Road Commission, displays that part of the Alexa Lane route from its western terminus in Township 16 South Range 11 West to the access point to the reservoir Township 16 South Range 11 West in Section 30, a distance of over a mile. According to the map's legend, the route was, at that time a "graded and drained road."[124]

The fact that two 1937 maps – from USGS and the State – both display the graded road traveling northeast from Alexa Lane's western terminus to the reservoir in Township 16 South Range 11 West provides a further inference that CCC constructed the route. Why would anyone construct a 1-2 mile road segment that would dead-end at a wash, that was only later to be the site of a reservoir? Given that the route that was graded by 1937 terminates at the reservoir, it is more than likely that the route was built by the CCC to access the reservoir – a reservoir that the CCC clearly built.

Finally, there is powerful circumstantial evidence that the CCC constructed the majority of the Alexa Lane claim. If Utah's affidavits are to be believed, the majority of the Alexa Lane route was not constructed – graded and maintained – by 1932, but was by "the late 1930s" and at

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[122] Pflugh Dec. (Exh. 4) at ¶¶ 24-25 and Exh. H attached thereto.

[123] Letter of W.D. Brough, BLM, District Manager, Fillmore UT to S.B. Montgomery, Area Engineer, Utah State Engineers Office (Jan. 3, 1967), attached to Pflugh Dec. as Exh. M. Consistent with the assertion that the reservoir was constructed in 1936, BLM later stated that the reservoir was constructed "before 1950." See State of Utah, Proof of Appropriation form (signed Feb. 20, 1968) attached to letter of R.D. Nielson, State Dir., BLM to H.C. Lambert, Utah State Engineer (July 17, 1968), attached to Pflugh Dec. (Exh. 4) as Exhibit N.

[124] See Millard County, General Highway Map, 1937, excerpts attached as Exhibits A and B to Kessler Dec. (Exh. 6). The Millard County 1937 map also shows no routes at all in Township 17 South Range 11 West, where a significant portion of the claimed Alexa Lane route lies, and none at locations that correspond to the alleged claim in Township 17 South Range 11 West. Id. This would cast doubt on any allegation that the route was constructed before the CCC arrived.

least before the "1950s."[125] Thus, Utah alleges that the entire route was constructed at precisely the time the CCC was in the area (1936-41); and at the time the CCC had apparently constructed at least the northwest terminus of the route; and at precisely the time the CCC was working in Swasey Wash, directly adjacent to the Alexa Lane claim, constructing check dams and a reservoir, tasks that presumably involved the use of trucks and heavy equipment.

The statements of CCC officials that the camp's men constructed dozens of miles of roads and "truck trails" in this area of Millard County further bolster the case. Of particular interest is a statement from Mr. W. Legrand Law, quoted in a 1997 book that addresses some of the history of CCC camp DG-29 at Antelope Springs. Mr. Law states that he was a "grader operator" who used to grade "Highway 6" when he was approached by the CCC camp superintendent in 1935 as the Antelope Springs camp was being set up.[126] Mr. Law and Mr. Owen George, described as a "caterpillar operator," apparently also from the Millard County area, were recruited to construct roads for the camp.[127] Mr. Law spent the next 6 years (from about 1935-1941) working for the CCC and went on to become a foreman and later the camp superintendent.[128] This indicates that two of the likely very few – if not the only – individuals formerly involved in road maintenance and construction for the local government was, during the period Utah says the Alexa Lane was built, working for the CCC. Not only were Mr. Law and Mr. George working for the CCC, but their equipment was too. Mr. Law further states of the CCC that "we had saturated the country building roads and reservoirs while we were at Antelope Spring" and that "[o]ur main work out there was roads and reservoirs for the livestock men."[129] The interview with Mr. Law thus supports the argument that to the extent any construction was occurring in the area of the Alexa Lane claim in the late 1930s, it was almost certainly construction undertaken by the CCC – a federal entity building roads with federal funds and federal crews over federal lands to serve federal grazing permit holders. We located no evidence – and Utah certainly provides none – that any other entity was engaged in road construction or maintenance in the period between 1935 and 1940 – the period when Utah alleges the route was first graded.

C. Other Evidence Establishes BLM's Interest in the Route.

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[125] Tolbert Alexa Lane Aff. at ¶¶ 7-8; Young Alexa Lane Aff. at ¶ 4 (in 1931, "Alexa Lane was not graded at that time, however, the road had already been graded when I assumed my position as road supervisor in the 1950s.")

[126] Interview with W. Legrand Law, quoted in M. Kelsey, Hiking, Climbing & Exploring (Exh. 13) at 189-192.

[127] Id.

[128] Id. at 192.

[129] Id.

BLM's interest in this route is also established by its interest in constructed improvements situated directly adjacent to or to the route itself. First, in 1954, BLM constructed a cattleguard on the Alexa Lane route in Township 17 South Range 10 West, Section 19 in cooperation with grazing permit holders.[130] This cattleguard is one apparently identified (and photographed) by the State in its application.[131] BLM documents indicate that BLM paid for the cattleguard, and that title to the cattleguard was to remain with BLM.[132] This shows BLM interest in the route itself through its title to improvements it made to (and in) the route.

Further, BLM retained an interest in water rights to projects it built adjacent to the route.[133] As noted above, BLM obtained the water rights for Swasey Reservoir No. 4 in Swasey Wash at Township 17 South Range 11 West, Section 3, directly adjacent to the claimed route.[134] BLM also asserted that title to the reservoir project itself was in the United States.[135] At a minimum, this demonstrates that construction activities in the area were being undertaken by the federal government to facilitate the use of federal forage for federal grazing permit-holders.

D. Because Alexa Lane 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 evidence suggests that a federal entity – the CCC working on behalf of the Grazing Division – constructed Alexa Lane 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 Millard County.

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130 See Dep't of Interior, BLM, Cooperative Agreement, Project No. 4-C-210 (April 1, 1954), attached hereto as Exhibit 14 (from BLM files); and Dep't of the Interior, BLM, Final Project Report, Project N. 4-C-210 (April 2, 1954) and attached maps, attached hereto as Exhibit 15.

131 See EP143010011, and icon identifying that event point on Millard County Alexa Lane "Alexa Events / Road" map, both submitted with the State of Utah's application.

132 See BLM Cooperative Agreement, Project No. 4-C-210 at 2 (Exh. 14) ("title to the improvement … shall be in the United States") (from BLM files).

133 Letter of W.D. Brough, BLM, District Manager, Fillmore, Utah to S.B. Montgomery, Area Engineer, Utah State Engineers Office (Jan. 3, 1967), attached to Pflugh Dec. (Exh. 4) as Exh. M.

134 See note 123 above and related text.

135 BLM, Answer to Protest of Deseret Cattle Growers Association, In the Matter of Application No. 21377 (Nov. 22, 1950) ("this water development [was] made with Federal funds on Federal lands and which is owned by the United States") attached as Exh. J. to Pflugh Dec. (Exh. 4).

There is no reason to believe that the purpose of R.S. 2477 was 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 routes, 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).

If, therefore, as seems more likely than not given all the evidence, the Division of Grazing (through the CCC) constructed a highway over its own land, to serve its own purposes, using federal funds and federal workers, the Division 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 beginning in the 1950s does not render the route "constructed" by an entity other than the CCC.[136] The CCC clearly used heavy equipment in initially constructing the northwest end of Alexa Lane, and circumstantial evidence

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[136] Bliss Aff. at ¶ 8 (stating personal observation of County employees "grading the road" in the "intervening years," presumably between 1960s and today); Smith Alexa Aff. at ¶ 8 (same); Young Alexa Lane Aff. at ¶ 4 (stating that regular grading and "supplemental maintenance" was regularly performed by the county during the 1950s).

strongly suggests that it further used heavy equipment to turn a path for driving sheep through Swasey Wash into a graded route. Millard County has provided no official records indicating that it spent any money or time maintaining, improving, or constructing the route before or since the CCC appears to have constructed the route. TWS did not locate any records in which the Division of Grazing or its successor (BLM) surrendered title to Alexa Lane to any other agency, nor has Utah submitted any such evidence.

While some of Utah's affidavits state that county road crews graded prior to 1976, all of this work is consistent with maintaining an existing graded road. In addition, the affidavits 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. This further indicates that the CCC, on behalf of the Division of Grazing, likely completed the job of "construction" by the late 1930s or early 1940s, and that the work affiants 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 was likely constructed by the CCC. Indeed, Utah never states who it alleges constructed the route or why.

Some of activities more commonly associates with maintenance – such as the use of graders – could, 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 State's affidavits are to be believed (the lack of official County records notwithstanding), all that the Millard County road crew did in the 1950s and beyond was to keep in service a previously-constructed highway, one that appears very likely to have been built by the CCC. That is not enough to satisfy the "construction" requirement of R.S. 2477.

That BLM may have permitted Millard County to undertake maintenance work, if any, does not undercut the fact that BLM's predecessor – the Division of Grazing – almost certainly constructed Alexa Lane. Records obtained pursuant to the Freedom of Information Act indicate that BLM and Millard County signed an agreement concerning "Road Construction & Maintenance Responsibilities" in 1970.[137] Despite its title, this 1970 MOU appears to largely concern 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 "Millard County will be primarily responsible for the maintenance of roads … 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]."[138] The MOU then sets out "maintenance responsibilities" for a number of named routes, including a "Swazey" route (further identified, with a hand-written notation,

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[137] Memorandum of Understanding, To Clarify Road Construction & Maintenance Responsibilities in Millard County, Between the Bureau of Land Management and the Millard County Commission (Aug. 19, 1970), attached as Exhibit 16.

[138] Id. at 2.

perhaps added long after the MOU, as "Alexa Lane) which was assigned to county maintenance.[139] Whether this route is the same as the claimed Alexa Lane is difficult to tell, since we could not locate the map accompanying the MOU. In any event, the fact that BLM may have permitted the County to maintain a portion of Alexa Lane which had apparently 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. As you know, the BLM enters into countless agreements with local governments concerning public lands; these agreements do not mean that the BLM has agreed to surrender an interest in land.

E. The Existence of Waterholes and Reservoirs Reserved Portions of the Alexa Lane Route.

Where the Alexa Lane route occurs within ¼ mile of waterholes used by livestock on public lands, that part of the route was reserved at the time the waterholes came into existence. Therefore, should Utah argue that the route was not constructed by the CCC in the late 1930s, but was constructed at some later time, it will still not be able to prove that it merits a recordable disclaimer for the route. Public land that several parts of the route traverse were reserved by the CCC's reservoir and check dam construction activities (if not before).

In 1926 President Calvin Coolidge signed an Executive Order entitled "Public Water Reserve No. 107" (PWR 107). PWR 107 provides:

> It is hereby ordered that every smallest legal subdivision of public land surveys which is vacant, unappropriated, unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land, be and the same is hereby withdrawn from settlement, location, sale or entry, and reserved for public use in accordance with the provisions of Section 10 of the Act of December 29, 1916.

Exec. Or. Pub. Water Reserve No. 107 (April 17, 1926).[140] The Executive Order was authorized under the Stock Raising Homestead Act (SHRA).[141] This Act authorized the President to reserve lands containing waterholes or other bodies of water needed or used by the public for watering purposes. The Secretary of the Interior's recommendation to the president encouraging the promulgation of the executive order stated:

> The control of water in the semi arid regions of the west means the control of the surrounding grazing areas, possibly in some regions millions of acres, and in view

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[139] Id. at Attachment B, page 5.

[140] See also J Muhn, Public Water Reserves: The Metamorphosis of a Public Land Policy, 21 J. of Land Resources & Envtl L. 67 (2001) at nn. 4, 272, attached as Exhibit 17.

[141] 43 U.S.C. §§ 218-219, 222, 291-302 (1916) (repealed by Section 702 of Pub.L. 94-579 (FLPMA) in 1976).

> of the pending bill to authorize the leasing of grazing lands upon unreserved public domain, it is believed important to retain the title to and supervision of such spring and water holes on the unreserved public domain as have not already been appropriated.[142]

BLM has previously and explicitly concluded that PWR 107 effected withdrawals related to stock watering developments such as reservoirs – and including a reservoir directly adjacent to Alexa Lane.[143]

There are a number of water holes for livestock near or directly adjacent to the Alexa Lane claim. First, two reservoirs in close proximity to the route – Swazey #3 in Township 16 South Range 11 West, Section 30, and Swazey #4 in Township 17 South Range 11 West, Section 3 – were apparently built by the CCC in the 1930s. Swazey #3 is arguably within one-quarter mile of the northernmost extent of Alexa Lane; Swazey #4 is directly adjacent to the route. Second, the CCC built four check dams in Swasey Wash adjacent to the route: one directly adjacent to Swazey Reservoir #3, on a state section, one in Township 17 South Range 11 West, Section 4, and one in Section 10 of that township, the latter two directly adjacent to the route.[144] Officials asserted that CCC constructed the "four check dams in the main Swazey wash to stop erosion and serve as stock watering ...."[145] At each of these facilities, a reservation of public land within ¼ mile (or within the same ¼ ¼ section) took place upon construction. Thus, any claim that the route was constructed after the CCC built reservoirs and check dams along the way would be limited by the fact the PWR 107 affected a reservation of public lands of and near these facilities.

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[142] Muhn (Exh. 17) at n. 273 and accompanying text.

[143] BLM, Answer to Protest of Deseret Cattle Growers Association, In the Matter of Application No. 21377 (Nov. 22, 1950) ("This stock watering development which is located on withdrawn Federal lands is within the purview of the Executive Order of April 17, 1926, establishing [PWR] 107 ….") (emphasis added), attached as Exh. J. to Pflugh Dec. (Exh. 4).

[144] The CCC map identifying the location of the check dams places them in the directly adjacent to the location of the route. See map attached to Dep't of the Interior, Division of Grazing, Eighth Period Illustrative Narrative Report, March 31, 1937, Camp DG-29, Antelope Springs Utah, excerpts attached as Exh. G to Pflugh Dec. (Exh. 4). One recent observer identified a check dam 15 yards the current claimed route. See, e.g., Kessler Dec. (Exh. 6) at ¶ 16.

[145] P. Arentz, Narrative Report for DG-29 (May 15, 1936) at unnumbered page entitled "Swazey Truck Trail" (emphasis added), attached as Exh. E to Pflugh Dec. (Exh. 4); see also photo caption on following page of Arentz report (displaying check dam and stating one purpose of such features is to "back[] water up in wash for stock watering").

VII. OTHER EVIDENCE DOES NOT SUPPORT THE VALIDITY OF THE ALLEGED RIGHT-OF-WAY FOR SNAKE PASS.

As with the Alexa Lane claim, the State's application for Snake Pass contains virtually no credible evidence proving that Snake Pass was a "constructed highway" before October 21, 1976 except for a few affidavits that often include hearsay, contradict one another, fail to include the best evidence, and contain vague or irrelevant data. Additional evidence only casts further doubt on the veracity of the State's affidavits.

And while TWS located little evidence about the route's construction, there are clues that this route, or portions of it, to the extent it was constructed at all, may also have been constructed by the CCC.

A. Neither the State's Application, Nor Other Evidence, Support a Conclusion that the Route Was "Constructed" before 1937.

The State's application does not allege that construction took place on the route before the late 1930s. In fact, the State's three meager declarations contain no allegations as to who constructed the route, when, or why. And while several affiants claim to have used the route for years, the date at which the route went from a path to a graded route is not something that registered with the travelers. Mr. Tolbert alleges using the road since 1918, but can only recall that the route was allegedly constructed "before 1976."[146] Mr. Henrie also allegedly traveled the route for many years (since 1968) but does not remember that the route was constructed at that time, or even before 1976. Instead, he merely alleges that the route was graded by 1991.[147] Mr. Young alleges that the route was "already ... graded" when he worked for the county road crew "in the 1950s," although he cannot identify what exact year he began work for the county (and thus by what year grading had taken place).[148]

Other evidence gathered by TWS tends to support the conclusion that some travel was occurring in the general area of the Snake Pass claim by the mid-1920s, however, the evidence does not support that the routes were identical to the current Snake Pass claim, and does not indicate that any of the routes was constructed. Indeed, there is no indication that the Snake Pass route itself existed as such by the mid-1930s.

For three of seven townships traversed by the Snake Pass route, the USGS completed subdivision surveys in 1909. It completed the other four townships traversed by the route in 1924. The results of these surveys were printed as official survey plats filed with the General

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146 Tolbert Snake Pass Aff. ¶¶ 7-8.

147 Henrie Snake Pass Aff. at ¶¶ 4-5.

148 Young Snake Pass Aff. at ¶ 4.

Land Office.[149] These maps do not display a single route that corresponds to the route claimed as the Snake Pass route. In fact, although there are routes indicated on the survey plats in the vicinity of the Snake Pass Road claimed route, some of which share the same general location and alignment as the claimed route, there is no indication that the Snake Pass Road route as claimed existed in its entirety at the time of the surveys. Indeed, there are no routes indicated on the survey plat for large portions of the area through which the claimed route passes.

A review of the USGS survey plat maps shows the following:

-- For Township 21 South, Range 16 West (Sections surveyed June 1909), no routes are indicated that correspond to the Snake Pass Road claim. There are several other routes indicated on the survey plat, including one that appears to intersect the claim at the western edge of the Township.

-- For Township 21 South, Range 17 West (Sections surveyed October 1924), no routes are indicated that correspond to the Snake Pass Road claim. There are several other routes indicated on the survey plat, including ones that appear to cross the claim.

-- For Township 22 South, Range 16 West (Sections surveyed June 1909), no routes are indicated that correspond to the Snake Pass Road claim except for approximately one mile of route entering Section 24 from the east and continuing a short distance into Section 13. There are several other routes indicated on the survey plat, including the continuation of the above described major east-west route entering from the east.

-- For Township 22 South, Range 17 West (Sections surveyed September 1924), no routes are indicated that correspond to the Snake Pass Road claim. There are several other routes indicated on the survey plat.

-- For Township 23 South, Range 14 West (Sections surveyed May through June 1909), no routes are indicated that correspond to the Snake Pass Road claim except for in the southwest quarter of Section 7. There are several other routes indicated on the survey plat.

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[149] See U.S. Surveyor General, Map of Township 21 South, Range 16 West, of the Salt Lake Base Meridian, Utah (Sep. 22, 1909); U.S. Surveyor General, Map of Township 21 South, Range 17 West, of the Salt Lake Base Meridian, Utah (June 30, 1925); U.S. Surveyor General, Map of Township 22 South, Range 15 West, of the Salt Lake Base Meridian, Utah (May 14, 1925); U.S. Surveyor General, Map of Township 22 South, Range 16 West, of the Salt Lake Base Meridian, Utah (Sep. 22, 1909); U.S. Surveyor General, Map of Township 22 South, Range 17 West, of the Salt Lake Base Meridian, Utah (June 30, 1925); U.S. Surveyor General, Map of Township 23 South, Range 14 West, of the Salt Lake Base Meridian, Utah (Sep. 22, 1909); Map of Township 23 South, Range 15 West, of the Salt Lake Base Meridian, Utah (Sep. 1, 1926); all attached as Exh. T to Pflugh Dec. (Exh. 4). Copies of these Public Land Survey System (PLSS) maps were obtained from the National Archives in Denver. Pflugh Dec at ¶ 43.

-- For Township 23 South, Range 15 West (Sections surveyed August 1924), in Section 12, a short section of route entering the Section from the east that corresponds with the Snake Pass Road claim does not connect with the route that corresponds with the claim in the remainder of the township.[150]

Again, this review demonstrates that the Snake Pass route as claimed today did not exist as such in 1909 or 1924, according to contemporaneous surveys. This evidence severely undermines the credibility of one of the affiants, Mr. Tolbert, who alleges that the Snake Pass route today "was well established by 1918," and that it "ran the same route" in 1918 "as it does now."[151] Impressions written down at the time by surveyors are more credible than memory of use of a route 87 years ago.

Further undermining any allegation that a "constructed highway" existed as of the mid-1930s is the State's General Highway Map of Millard County data 1937. That map shows absolutely none of the Snake Pass route although the map legend indicates that even "primitive roads" – those routes that are not as developed as mere "graded" routes – would be displayed.[152] Further, a 1935 "Road Map" identified as "issued by the State Road Commission" displays no highways at all west of the southern portion of Sevier Lake, where the Snake Pass claim is located.[153] Other road maps of the era similar fail to display the route.[154]

B. Evidence Indicates that the CCC May Have Constructed at Least Part of the Route,

The western terminus of the route runs across the top of a dam to a reservoir now known as Probst Pond, located in Section 35 of Township 21 South Range 17 West.[155] The reservoir, however, appears to have been previously identified as the "Ferguson Desert Reservoir," and located at that same location. This reservoir – the dam over which the Snake Pass route runs –

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[150] See Pflugh Dec. (Exh. 4) at ¶¶ 43-50.

[151] Tolbert Snake Pass Aff. at ¶ 10, ¶ 4 (alleging first traveling road in 1918).

[152] See Millard County, General Highway Map, 1937, excerpts attached as Exhibit A (on CD-ROM) to Kessler Dec. (Exh. 6 hereto); and Kessler Dec. at ¶ 22.

[153] Pflugh Dec. (Exh. 4) at ¶ 57, and State Road Commission, Road Map (1935), attached thereto as Exhibit V. Though this map includes the classification of "Dirt" as a lower class of roads than graded and drained, the Snake Pass route does not appear.

[154] See Pflugh Dec. at ¶¶ 55-58 and exhibits attached thereto.

[155] See excerpts of Wild Utah Project, Snake Pass Claim, Millard County (July 11, 2005), available of the web at http://www.earthjustice.org/TWS-EJ/assets/maps_pdf/snake_pass_1200final_11jul05.pdf and attached as Exhibit 18.

was initially constructed in 1941-42 by the CCC working on behalf of the Division of Grazing.[156] Project completion required a significant outlay of labor (1,315 "man-days") from camp DG-117, and presumably the assistance of heavy equipment as well.[157]

This information is significant for several of the same reasons as explained above relating to Alexa Lane. First, this tends to show that the CCC constructed at least part of the route (the nearly two-tenths of a mile stretch over the dam), and likely constructed more of it. And to the extent evidence shows that CCC construction is likely, no R.S. 2477 claim on behalf of the county or State can be recognized.

If Utah's declarations are to be believed, the likelihood that the CCC constructed the route is also large because of the timing of the route's alleged construction. Maps from 1935 and 1937 show no route in the area, approximately the time when the CCC became active in Millard County. By "the 1950s," according to Utah, the road had "already been graded."[158] Between 1937 and 1950 is the window within which, if Utah's maps and statements are to be believed, the route was constructed. During a significant portion of that period – 1937-1942 – the CCC was very active in the area building roads and reservoirs. Utah has submitted no evidence that any other entity was constructing roads in the area during the critical period.

Second, the Ferguson Desert Reservoir was built to benefit livestock on public lands.[159] Therefore, PWR 107 withdrew from entry the public lands within ¼ mile of the reservoir, thereby effecting a reservation that would prevent the recognition of an R.S. 2477 right-of-way claim for any route built in that area after 1942, when the reservoir was erected.

IX. IF THE ROUTES WERE CONSTRUCTED, NO EVIDENCE SUPPORTS THEIR CONSTRUCTION PRIOR TO THE LANDS BEING RESERVED BY THE TAYLOR GRAZING ACT.

A. The 1934 Taylor Grazing Act, Executive Order 6910, 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.

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156 CCC Form 7, Fergerson [sic] Desert Reservoir (finished Feb. 11, 1942), (from BLM files), attached as Exhibit 19.

157 Id.

158 Young Dec. at ¶ 4 (alleging route "had already been graded" in the 1950s).

159 See id. (indicating that the project would benefit 10 "stockmen" and 12,500 sheep).

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 or 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.[160] 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:

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[160] E.O. 6910 is reprinted in full at Utah v. Andrus, 446 U.S. at 514 n.19, and attached hereto as Exhibit 20.

> 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 BLM lands across which the two routes run – "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.

B. The Best Evidence Indicates that, to the Extent the Routes Were Constructed, They Were Constructed After the Lands Were 'Reserved' by the Taylor Grazing Act.

The Taylor Grazing Act of 1934, the amendments to it enacted on June 26, 1936, and E.O. 6910 (1934) withdrew Utah's public lands 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. The State has provided no credible, first-hand evidence that construction on any of the routes occurred before June 26, 1936. Thus, it appears likely that to the extent either of these routes were constructed, such construction took place after that date when the lands were reserved.

The State of Utah has certainly submitted no evidence – beyond mere unattributed hearsay – that any of the routes was "constructed" throughout the entirety of their lengths by June 26, 1936. The best evidence is that construction was not complete on either route by that date. Certainly the routes do not appear on the 1937 Millard County General Highway Map. Unless and until Utah submits compelling evidence demonstrating that a non-federal entity constructed the routes at issue by June 26, 1936 – or that the Secretary of Interior classified the area traversed by the routes as open for entry – BLM cannot recognize an R.S. 2477 right-of-way for the alleged highways because the land was "reserved" after that time.

X. BLM FAILS TO DISCLOSE THE IMPACTS OF THE PROPOSED DISCLAIMERS.

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

The Federal Register notice announcing BLM's intent to issue disclaimers of interest, Utah's applications, and the DOI-Utah MOU itself all fail to make clear what rights the State of Utah and the respective counties will have to exercise over what portion of public land, and what rights BLM is giving up over what extent of the public's lands. What will be the exact impact of a statement "confirm[ing]" that "the United States has no property interest in the identified public highway rights-of-way?" See 70 Fed Reg. 19500 (Apr. 13, 2005). When a standard disclaimer is issued (that is, a statement that the United States has no interest at all in a certain parcel of land), the outcome is clear. Not so here.

Although the State of Utah-DOI MOU refers to the relative rights of the parties, it does not do address those rights clearly. 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 FLPMA and [NEPA].

State of Utah-DOI MOU (Exh. 2) at 4. The MOU does not define key terms of this section, making it impossible to address important questions, e.g.: what does it mean to "substantially alter" a highway in general, and these two routes in particular? What characteristics of these two routes or any other route (or characteristics of their use) will BLM consider subject to the "substantial[] alter[ation]" test? What can the counties or State do to alter these routes or any other route that does not rise to the level of a "substantial" alteration? How will BLM (or the

State or counties) determine what constitutes "ordinary maintenance" of the routes – 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 these two routes or any other route? How will such understandings be memorialized so that all interested parties – BLM, the State, the counties, and the public – understand what can and what cannot occur within the right-of-way without prior BLM approval?

While the contours of the rights that BLM intends to surrender are not clear, the rights that Utah seeks to gain through recognition of an R.S. 2477 right-of-way are more evident. In a complaint filed in federal court last year, the State and six counties seek to establish the scope of alleged R.S. 2477 rights-of-way such that the routes may be "widen[ed] … at least to the extent of a two lane road," if not wider, and such that the plaintiffs may construct other facilities, including "reasonable and necessary accouterments such as drainage ditches, shoulders, [and] culverts" an unspecified distance "beyond the actual beaten path" of the currently disturbed area. State of Utah v. United States of America, Docket No. 05-cv-108 (D. Utah), State of Utah Amended Complaint (March 4, 2005) at 20, Request for Relief ¶ 2 (emphasis added), attached as Exhibit 21. The State and counties also ask the Court to determine the scope of the alleged rights-of-way such that the State may undertake "reasonable and necessary deviations from the common way without any federal authorization." Id. (emphasis added). Again, it is unclear to what extent some or all of these activities might be undertaken as "ordinary maintenance" and which would be considered to "substantially alter" the route in question.

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 tied not 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) recordable disclaimer(s) 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 area," an approach previously rejected by the courts, at DOI's urging, as the "most singularly unhelpful, uncertain and ungovernable approach to answering the question of scope." Garfield County, 122 F. Supp. 2d at 1230; see above at Sec. II(C)(2)(d). In short, a cloud of uncertainty will be placed over the exact scope of a right-of-way in which BLM disclaims an interest.

Rather than leave the public, BLM, the State, and the respective counties 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 two routes are federal public lands administered by BLM. The management of uses on the routes, as well as maintenance activities on them, could have detrimental environmental impacts to BLM land, including that adjacent to, and burdened by, the alleged right-of-way.

For example, as numerous scientific and Federal agency research studies have shown, the use of motor vehicles on roads, as well as the maintenance of such routes, can, among other things:

- foster the spread of exotic, noxious weeds[161];
- fragment wildlife habitat[162];
- cause direct mortality of wildlife[163];
- introduce a variety of toxic pollutants to soils, vegetation, and water including nickel, copper, zinc, oils and greases, tire rubber, and cadmium
- cause air pollution (from, among other things, fugitive dust emissions);
- disrupt watersheds;
- cause sediment deposition in rivers and streams, where it can cover fish eggs and inhibit nest building[164];
- indirectly cause an increase in poaching and/or wildlife harassment[165];
- indirectly cause an increase in human-caused fires;
- indirectly cause an increase in damage to nearby archeological resources[166]; and
- indirectly cause an increase in recreational uses in adjacent areas.[167]

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[161] J.L. Gelbard and J. Belnap, Roads as conduits for exotic plant invasions in a semiarid landscape, Conservation Biology 17(2): 420-432 (2003).

[162] M.J. Wisdom, et al., Source habitats for terrestrial vertebrates of focus in the interior Columbia basin: broad-scale trends and management implications, Volume 1 – Overview. Gen. Tech. Rep. PNW-GTR-485, USDA Forest Service, Pacific Northwest Research Station (2000), available at http://www.fs.fed.us/pnw/pubs/gtr485/gtr485v1.pdf.

[163] Id.

[164] C.P. Newcombe, C.P., and D.D. MacDonald, Effects of suspended sediments on aquatic ecosystems, North American Journal of Fisheries Management, 11:72-82 (1991).

[165] Wisdom et al., supra note 116.

[166] Bureau of Land Management, Strategic paper on cultural resources at risk (2000), available at http://www.blm.gov/heritage/docum/00atriskpaper3.pdf.

[167] For more background on the ecosystem impacts of roads, see, e.g., R.T.T. Forman and L. Alexander, Roads and their major ecological effects. Annual Review of Ecology and Systematics 29:207-231 (1998); H. Gucinski et al., Forest roads: a synthesis of scientific information, General Technical Report PNW-GTR-509, USDA Forest Service, Pacific

BLM has a duty to manage and protect public lands, and a transfer of management responsibility for these two routes 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 any actions by the holder of the [R.S. 2477] right-of-way. Activities on a right-of-way, which potentially may affect the servient estate, are subject to the National Environmental Policy Act (Tenth Circuit Court of Appeals ruling in Sierra Club v. Hodel, 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 concerning BLM and other federal land. See Sierra Club v Hodel, 848 F.2d at 1083 (general rule is that holder of the right-of-way and the owner of the servient estate – here, BLM – must exercise rights so as not to unreasonably interfere with one another); Garfield County, 122 F. Supp. 2d 1201, 1242-43 (D. Utah 2000) (holder of the right-of-way and owner the servient estate – here, NPS – must exercise rights so as not to unreasonably interfere with one another); id. at 1253 (analyzing the difference between maintenance and construction, and concluding that where activity occurs within the scope an existing ROW, the County "will likely be able to proceed") (emphasis added); Barker v. Board of County Com'rs of County of La Plata, Colo., 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 is considering approving these disclaimer applications, the agency apparently is refusing to consider the environmental impacts of its actions, 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. See Memo. of J. Hughes (Exh. 3) 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

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Northwest Research Station (2001), available at: http://www.fs.fed.us/eng/road_mgt/science.pdf; S.C. Trombulak and C.A. Frissell, Review of ecological effects of roads on terrestrial and aquatic communities, Conservation Biology 14: 18-30 (2000).

its lack of concern for important public resources, which we decry. BLM's failure to acknowledge potential environmental impacts reinforces the need for BLM to 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.

Environmental damage may occur from a decision to issue recordable disclaimers of interest for these routes, given the fragile environment that some of the routes traverse or abut. For example, the Snake Pass route directly abuts the King Top Wilderness Study Area (WSA), as well as areas proposed for addition to the WSA by conservationists.[168] The route also abuts proposed wilderness areas known as the Red Tops (at the eastern terminus of the route), and Painted Rock (on the southern edge of the route across from proposed additions to the King Top WSA).[169] The Alexa Lane claim's western terminus abuts the boundary of Utah Wilderness Coalition-proposed additions to the Swasey Mountain WSA.[170] Any decision that limits BLM's authority to control the use and expansion of these routes may harm these proposed wilderness areas, and their considerable environmental values.[171]

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[168] See Wild Utah Project, Snake Pass Claim, Millard County (July 11, 2005), available of the web at http://www.earthjustice.org/TWS-EJ/assets/maps_pdf/snake_pass_1200final_11jul05.pdf (last viewed Aug. 5, 2005) and attached as Exhibit 22.

[169] Id.

[170] See Wild Utah Project, Alexa Lane Claim, Millard County, attached to Richmond Dec. (Exh. 11).

[171] See, e.g., Utah Wilderness Coalition, Wilderness at the Edge (1990) at 72-75 (noting Swasey Mountain WSA provides habitat for antelope, mule deer, bald and golden eagle, and peregrine falcon); id. at 80-82 (describing King Top WSA and proposed wilderness as providing habitat for antelope, mule deer, chukar, bald and golden eagle, and peregrine falcon, and noting opportunities for fossil hunting), excerpts attached as Exhibit 23. The Painted Rocks area contains unique geologic features and unique vegetation. E. Zukoski, pers. comm. S. Bloch (Aug. 5, 2005).

CONCLUSION.

BLM must deny Utah's applications for a recordable disclaimer of interest for rights-of-way for Alexa Lane and the Snake Pass route because: (1) both the Disclaimer Rule and the State of Utah-DOI MOU that would be used to approve the disclaimer applications are illegal; (2) Utah has failed to provide any evidence beyond unsubstantiated allegations or hearsay that the alleged "highways" were constructed before October 21, 1976; and (3) evidence we submit casts considerable doubt as to whether either of the routes meets the standards of an R.S. 2477 right-of-way.

Should the State or counties attempt to remedy the gross inadequacies of these applications by providing additional information to BLM, or should BLM conduct additional research of its own, we request that BLM make available to the public any additional information discovered or received by the agency, and provide the public with an additional comment period to address any such additional information before BLM issues a final decision."

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 and to use a standard of review that protects the interests of the American people in their public lands.

In addition, if the State continues to submit applications for recordable disclaimers of interest for R.S. 2477 rights-of-way which contain similarly meager and unreliable supporting documentation, BLM must reject the applications unless and until the State provides the bare minimum of accurate, verifiable information necessary to support its claims, and demonstrates diligence in reviewing and providing all relevant State, county, and federal records. Beginning the process for awarding a disclaimer based on the type of inadequate, unsupported, and unreliable evidence the State has provided to date simply burdens BLM and forces the interested public to locate that evidence which Utah has failed or refuses to provide.

Finally, we again urge the State and Millard County to abandon their applications for recordable disclaimers of interest, and to instead to pursue FLPMA Title V permits. Such permits would allow BLM to more effectively balance environmental protections while ensuring that the State and counties could take certain actions to maintain the routes.

Thank you for this opportunity to comment. We look forward to receiving a response to these comments within 60 days, as required by BLM's guidelines implementing the Information Quality Act. 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
Wild Utah Project
Southern Utah Wilderness Alliance

cc: Jon M. Huntsman, Jr., Governor, State of Utah
Senator Joseph Lieberman
Senator Jeff Bingaman
Senator Dick Durbin
Rep. Mark Udall
Gale Norton, Secretary, Department of the Interior
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