

FACT SHEET:
The Tenth Circuit’s Decision in
Southern Utah Wilderness Alliance v. Bureau of Land Management (2005)

Background

On September 8, 2005, the Tenth Circuit issued a decision in the case *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735 (10th Cir. 2005) (“*SUWA v. BLM*”). This decision contains a number of important holdings concerning the showing that right-of-way claimants must make in order to prove the existence of a right-of-way under R.S. 2477. R.S. 2477, a 19th Century law, stated that: “the right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted.” It was repealed in 1976, but rights-of-way existing at that time remained valid.

Summary of Core Requirements to Prove an R.S. 2477 Claim

- Issue:** Who has the burden of proof?
- Court Holding:** A person or governmental entity claiming the existence of a right-of-way.
- Discussion:** The Court clearly established that a person (or county) claiming the existence of an R.S. 2477 right-of-way has the burden of proving to a court that all the requirements of a right-of-way have been satisfied. Decision at 769. The Tenth Circuit further noted that the burden of proof may be a tough hurdle for right-of-way claimants to overcome. Because “evidence in these cases is over a quarter of a century old, the burden of proof could be decisive in some cases.” Decision at 769.
- Issue:** How will courts resolve R.S. 2477 disputes if there are doubts as to whether the requirements for a right-of-way have been met?
- Court Holding:** All doubts must be resolved *against* a party claiming a right-of-way.
- Discussion:** Even before the *SUWA v. BLM* case was decided, Supreme Court and Tenth Circuit cases required that *all doubt* as to whether an R.S. 2477 right-of-way exists must be resolved against the claimant. The Tenth Circuit emphatically embraced this approach in *SUWA v. BLM*. Decision at 768-69.

Issue: Is the proper interpretation of R.S. 2477 a matter of federal or state law?

Court Holding: R.S. 2477 is a federal law and therefore must be interpreted based on federal law. Courts may look to common law to help interpret terminology in the statute, but R.S. 2477 establishes threshold requirements which state law *cannot* override.

Discussion: The Court was careful to specify that the interpretation of R.S. 2477 “is a federal not a state question,” and that while state law can be used to help “flesh out” ambiguous terminology, federal law “alone control[s] the disposition of title to [federal] lands.” *States are “powerless to place any limitation or restriction on that control.”* Decision at 762, 766.

Issue: Can a state *add* to the minimum requirements in R.S. 2477?

Court Holding: Yes.

Discussion: Because acceptance of a right-of-way can entail public responsibilities for upkeep, states can impose a higher standard for acceptance, such as requiring that highways be recorded in county records (as they have, for example, in Arizona and Wyoming). Decision at 763 n.15.

Issue: What is the requirement for a highway under Utah law?

Court Holding: One of the minimum requirements for a “highway” under Utah law is continuous public use for a ten-year period. The court established that occasional use is clearly insufficient. Decision at 771.

Discussion: The court accepted the BLM’s conclusion that “haphazard, unintentional, or incomplete actions,” such as “the mere passage of vehicles” would *not* be sufficient to establish an R.S. 2477 right-of-way. The court went a step further and concluded that to find an R.S. 2477 right-of-way based on mere evidence of vehicles passing over land would be a “caricature” of the requirements. Decision at 781.

- Issue:** What other factors did the court find significant in determining whether an R.S. 2477 right-of-way was established?
- Court Holding:** There must have been “continual public use over a lengthy period of time,” as opposed to routes that served limited purposes for limited periods of time. Decision at 781-782.
- Discussion:** Mining and logging roads were cited as examples of routes used for limited purposes which would be insufficient to establish a public highway, as were routes used for activities such as trailing of sheep and travel to sawmills. Decision at 773, 781-782.
- Issue:** Are there requirements other than “continual public use over a lengthy period of time”?
- Court Holding:** Yes. The court emphasized that it was not attempting to catalogue all the requirements for an R.S. 2477 right-of-way.
- Discussion:** The court noted that there may be other important factors such as whether a road was abandoned, whether a road was built by the federal government, and whether a road leads to identifiable destinations. Decision at 758 n.13, 772 n.27, 783.
- Issue:** Are the standards established by the Tenth Circuit easier to meet than an “actual construction” standard?
- Court Holding:** No. The court emphasized several times that its standard is no less demanding than an “actual construction” standard, and may well be more demanding.
- Discussion:** The court noted that there could well be “actual construction” on a road but not continuous public use. Decision at 781. The court also expressed great skepticism that there could be the requisite “sustained substantial use” by the general public over the necessary period of time without some maintenance or other actual construction. Decision at 781.

For more information, contact:

Jerry Epstein, Jenner & Block, attorney for Southern Utah Wilderness Alliance (202-639-6062, jepstein@jenner.com)
 Kristen Brengel, The Wilderness Society (202-429-2694, kristen_brengel@tw.s.org)
 Heidi McIntosh, Southern Utah Wilderness Alliance (801-486-3161, heidi@suwa.org)
 Ted Zukoski, Earthjustice (303-623-9466, tzukoski@earthjustice.org)

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