

The road to nowhere

Utah's backcountry road takeover comes apart at the seams

The ambitiously named Weiss Highway is a lonely dirt road that cuts through the heart of Juab County and the hardscrabble landscape of Utah's West Desert. It's the only east-west route through the sparsely populated county, and since the 1930s, locals have relied on the 99-mile-long road for access to an otherwise isolated region. Officials in Juab County — and many rural counties across the West — say roads like this are crucial to their economic survival.

For over two decades, Utah counties have claimed ownership of similar roads and thousands more rights-of-way under a Civil War-era law known as R.S. 2477. But environmentalists say those claims are a barely veiled attempt to thwart wilderness designation for millions of acres of public land, because roads are not allowed in wilderness areas. After years of bulldozer skirmishes and court battles, the two sides have

fought to a standstill.

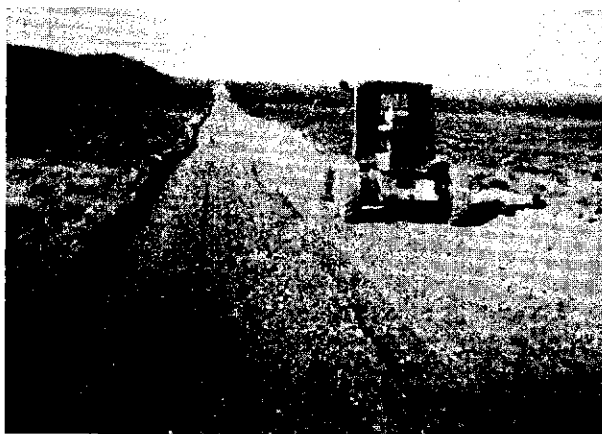
But in April 2003, then-Gov. Mike Leavitt and Interior Secretary Gale Norton signed a controversial "memorandum of understanding." The agreement was supposed to provide a framework for resolving the issue without having to battle it out in the courts (*HCN*, 5/12/03). Other Western states viewed the deal as a possible precedent-setter for solving their own R.S. 2477 claims. Environmentalists, however, slammed it as a giveaway.

In January 2004, the Weiss Highway became the first road Utah submitted to the Bureau of Land Management under the agreement. There's little dispute that the Weiss Highway is a real road — it's 40 to 60 feet wide and covered with gravel — and it doesn't cross any environmentally sensitive lands. It seemed like the perfect, uncontroversial poster child. Gov. Olene Walker, who succeeded Leavitt as governor last November, said the Weiss Highway claim "would have national significance."

Instead, it turned into an embarrassment. In May, The Wilderness Society and Earthjustice dug up evidence — much of it from a common

Utah history book series — that the Interior Department had built the road with federal money and that the county had signed away any claim of ownership in 1936. Red-faced state officials asked the BLM to put the claim on hold, and in September, they pulled the Weiss Highway from consideration altogether, and instead asked the agency to consider two short roads in eastern Utah that, combined, cover a little more than four miles.

The dubiousness of the Weiss claim is just one of the problems undercutting the Norton-Leavitt agreement's potential to do anything other than create more controversy. In February, the General Accounting Office, the research arm of Congress, issued a report that the agreement was illegal. In May, the Utah attorney general's office said it would no longer pursue claims under the deal, but then later backed away from that stance. These setbacks slowed the process to a crawl and rattled the confidence of county commissioners, many of whom had only tepid support for the deal in the first place. Environmentalists and state officials agree that the divisiveness of the issue has only increased.



The Weiss Highway in Juab County, during its construction by Depression-era Civilian Conservation Corps workers. PHOTO COURTESY UTAH HISTORICAL SOCIETY

"It's sort of the ultimate irony," says Heidi McIntosh, conservation director for the Southern Utah Wilderness Alliance (SUWA). "The (agreement) was supposed to reduce the threat of litigation, but what it has done instead is increase it severalfold."

A rocky start

When Leavitt and Norton signed the memorandum of understanding in April 2003, Utah had already spent three years and \$4.2 million on a statewide database in preparation for a massive lawsuit against the federal government, claiming more than 100,000 miles of R.S. 2477 roads. Leavitt agreed to drop the lawsuit threat and any claims to roads in national parks, wildlife refuges and wilderness areas. In return, Norton promised that the Interior Department would begin considering the state's claims to roads on other federal lands, including land proposed for wilderness designation by citizens' groups.

Under the agreement, counties and the state must prove that a road existed before 1976 — the year Congress repealed R.S. 2477 — and is used regularly by automobiles. Doing this involves a long, expensive multi-agency process. Counties select roads using global positioning system data, current and historical maps, and affidavits from longtime locals. Once a county has gathered the initial information, state officials do digital mapping and collect aerial photos from before and after 1976, before tapping into the state's database to gather more evidence of the road's historical and current use.

The information then goes before a statewide executive committee, made up mostly of county commissioners, that decides if the road passes muster. If the committee gives the nod, the claim goes to the BLM. The agency then reviews the information and opens a 90-day public comment period before making a final decision. So far this year, the state, which is picking up most of the tab for counties to collect the data, has

The Wilderness Society discovered that Juab County had signed away ownership of the Weiss Highway in 1936.

STATE OF UTAH PHOTO



spent \$5.5 million on the process.

Although state officials eventually expect to claim well over 10,000 roads, only 20 have made it to the state level so far — and the Weiss is the only one that has made it all the way to the BLM.

Randy Johnson, a planner in the governor's office who is heading up the effort, insists that the state has no intention of dropping the Weiss as an R.S. 2477 claim, but admits it's more complicated than first thought: "We would rather wait until we have some experience under our belt."

Nor is Johnson concerned that the Weiss debacle will hurt the overall agreement process. "That's exactly what the process is for — to find problems like this," he says.

Johnson expects dozens of roads to be in the pipeline by the end of the year and "several times that many" by the end of next year. And he expects environmentalists to take the process to court at some point. "We get sued on everything we try to do on public lands," he says. "You're always looking over your shoulder."

In fact, when the state refused to turn over the documents it had to support the first 20 roads to make it to the state, SUWA threatened to sue. Eventually, the state relented and turned over what it had. It was a thin file, says McIntosh, and shows that the state and counties will have a tough time finding documentation for R.S. 2477 claims, even with the reduced requirements of the Norton-Leavitt agreement. "There wasn't a whole lot there," she says.

Skeptical counties

Johnson is facing a mountain of such skepticism from all sides, for a variety of reasons. The GAO's report said the memorandum of understanding violated a 1997 law that prohibited the Interior Department from recognizing any R.S. 2477 roads without the approval of Congress. That law was pushed by Republicans to stop Clinton-era Interior Secretary Bruce Babbitt from issuing rules that might void many county claims. But ironically, it may prove to be a hurdle for the counties — and a trump card for environmentalists.

County commissioners have concerns about the agreement, too. "It's not a perfect document. We have a couple of issues with it, but we're working through those," says Maloy Dodds, a county commissioner in south-central Utah's Garfield County. Made up of nearly 97 percent public land, Garfield County has been at the epicenter of the R.S. 2477 debate for 20 years.

Dodds, like many county commissioners, points to a provision in the



Utah Gov. Olene Walker delivers a road claim to the BLM as part of a settlement involving the state's claim to historic roadways across federal lands. AP WIDE WORLD PHOTO

agreement that says a road must stay "as is, where is." He worries that the provision is too vague and could hamper the county's efforts to do simple maintenance.

Like Garfield County, neighboring Kane County is made up almost entirely of public land. Kane County Commissioner Mark Habbeshaw takes Dodds' concern one step further. "We don't want to submit roads and then forevermore just do maintenance. We would like the opportunity to improve them."

That's "improve," as in blade, widen, gravel or pave them. Since the agreement doesn't allow for that, Habbeshaw says his county won't be submitting any claims under the agreement. And he doubts the agreement will ever do what it was meant to. "The (agreement) is faltering," he adds. "The Weiss road has so many problems and sets the perception that all county roads have those problems."

Back to court?

Even the Utah attorney general's office has sent conflicting messages. In court documents following the GAO report, the state announced it would no longer pursue claims under the agreement, and notified the federal government of its intent to sue once again. But, "There is an intention to move forward now," says Assistant Attorney General J. Mark Ward. "Things have come up," he says, but he won't say what has changed.

Ward says that even if the agreement holds, the state will still sue to win ownership of some roads. The attorney general's office made good on that threat in September, when the state joined a lawsuit leveled by

Garfield County against the National Park Service over ownership of Salt Creek Canyon Road, which cuts several miles into Canyonlands National Park.

Environmentalists and county commissioners agree that one lawsuit making its way through the courts could do more to resolve R.S. 2477 than the Leavitt-Norton deal.

The case, which stretches back to the mid-1990s, involves Kane, Garfield and San Juan counties. Environmentalists, led by the Southern Utah Wilderness Alliance, accused the counties of blading faint trails that would not normally fall under R.S. 2477 into full-fledged roads. Most of the roads were in areas under consideration for wilderness designation. SUWA took the counties to court and in 2001, a federal district judge ruled in the group's favor in 15 of 16 disputed roads. Judge Tena Campbell ruled that the roads, which had seen little use before the counties improved them, were invalid claims because they had not been constructed before 1976 and had no particular destination.

The case is significant because it will likely lay out for the first time the parameters under which a road could be claimed as R.S. 2477. Environmentalists believe it will rule out many claims.

Earlier this year, the same judge turned back an appeal by the counties. The case is now on appeal in the 10th Circuit Court of Appeals in Denver. "I think this decision could go a long ways to resolving the

issue," says McIntosh.

Or not. John Leshy, the Interior Department's solicitor during the Clinton administration, agrees that the case has that potential, but says it might only be the start, particularly if different courts hand out conflicting decisions. "This may not be settled in the courts simply," he says.

If the state and the BLM stick with the agreement, the GAO's differing opinion could provide opponents with ammunition, he adds. "Congress could resolve the whole issue once and for all, but so far, they haven't shown any interest."

That's why the state wants to make the agreement work, says Johnson. Although the memorandum of understanding has already proved to be costly and complicated, it's still cheaper than suing the federal government in a single lawsuit. But that remains the state's fallback position should the agreement fail. Litigation, says Johnson, "is not a public process and, let's face it, it's not the best way to manage public lands."

But instead of reducing the amount of litigation, the Norton-Leavitt may have simply added another layer. Says Leshy, "It opened a can of worms, and I think both sides know it."

BY TIM WESTBY

The author writes from Salt Lake City, Utah.

This story was made possible with support from the following individuals: Grant Heilman, Farwell Smith, Nelle Tobias and Andy Wiessner.

BLM R.S. 2477 Web site www.ut.blm.gov/rs2477/

The Wilderness Society www.wilderness.org/Library/Documents/WeissHighwayDocs.cfm