

CHARLES W. NOLEN

IBLA 2003-356

Decided April 7, 2006

Appeal from decision of the Roswell, New Mexico, Field Office Manager, Bureau of Land Management, implementing the Fort Stanton Area of Critical Environmental Concern Route Designation Plan. EA NM 060-2002-119.

Affirmed as modified.

1. Rights-of-Way: Revised Statutes Sec. 2477

Although BLM lacks primary jurisdiction to make determinations on the validity of the rights-of-way granted under R. S. 2477, it may properly determine the validity of R. S. 2477 rights-of-way for its own purposes. The need to consider whether lands are within the purview of R. S. 2477 arises when BLM has an administrative concern that requires inquiry into the status of a claimed R. S. 2477 right-of-way. Such review is necessary when it is asserted that BLM has closed an R. S. 2477 right-of-way.

2. Rights-of-Way: Revised Statutes Sec. 2477

Where BLM has repeatedly notified State and County Governments of its intention to close specific roads in an area of critical environmental concern; where those Governments have not come forward to assert any interests in the closed roads under R. S. 2477; and where the record indicates that they have instead claimed the only roads they consider to fall under the purview of R. S. 2477, a strong presumption arises that the roads closed do not fall within the purview of R. S. 2477. Where a party asserting that some of the closed roads

have met the criteria and the recognition of the different agencies as R. S. 2477 roads fails to sustain its burden to show evidence of public use under State law, BLM's decision is properly affirmed on appeal.

3. Rights-of-Way: Generally

A BLM decision to close certain routes identified on U.S. Forest Service maps as "primitive roads" or "forest roads" in an area of critical environmental concern (ACEC) will be affirmed despite assertions that closing the roads will hamper access by fire control vehicles to residential areas bordering the ACEC where the record contains no evidence that such roads ever were or could be used by such vehicles or for health and safety purposes.

APPEARANCES: Charles W. Nolen, pro se; Dale Pontius, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Charles W. Nolen has appealed the July 7, 2003, decision of the Roswell (New Mexico) Field Office, Bureau of Land Management (BLM), implementing the Fort Stanton Area of Critical Environmental Concern (ACEC) Route Designation Plan (RDP). BLM's decision document consists of the RDP, supported by Environmental Assessment (EA) No. NM 060-2002-0119, a Decision Record (DR), and a Finding of No Significant Impact (FONSI)/Rationale.<sup>1/</sup>

The Fort Stanton ACEC was formally designated on October 10, 1997, with the approval of the Roswell Resource Management Plan (RMP). (Record of Decision

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<sup>1/</sup> BLM's administrative record (AR) consists of relevant documents (or portions) assembled and tabbed from 1 to 42. For convenience, we have numbered the pages of cited tabbed sections (which are not otherwise sequentially numbered) and shall refer to documents by their original document names and page numbers (where available) as well as to tab and page numbers within the AR.

BLM's decision document thus consists of four parts: The RDP, included as Chapter 1, pages 1 through 14 (AR 3-6 through -19); the EA, included as Chapter 2 I. through X., pages 15 through 46 (AR 3-20 through -51); the DR, included as Chapter 2 XI., page 47 (AR 3-52); and the FONSI/Rationale, included as Chapter 2 XII., pages 48 and 49 (AR 3-53 and -54).

for the Roswell RMP at ROD-1 (AR 42-1); and Roswell RMP at 67-70 (AR 42-9 through -12).) The ACEC comprises 24,630 surface acres and 27,622 acres of Federal mineral estate, covering the unsurveyed portion of the Fort Stanton Military Reservation near Carrizozo and Ruidoso in central New Mexico. (RMP at 49, 67, and AP12-8 (AR 42-8, -9, and -14).) <sup>2/</sup>

BLM announced in its October 1997 Roswell RMP the following management goal: “Protect the biological, archaeological and scenic qualities of Fort Stanton, while providing for quality recreation opportunity.” (Roswell RMP at 67 (AR 42-9).) To further that goal, BLM stated in the RMP that “[m]ajor rights-of-way will be excluded on about 24,630 acres of public land to protect important plant and animal habitat[;] significant riparian, wetland[,] and aquatic habitats[;] and visual quality.” Id. at 68 (AR 42-10). Further, the RMP stated that,

[i]n addition to the 40 miles of multi-use trails already in use, about 45 miles of existing roads or trails and about 20 miles of new trails will be developed and maintained as multi-use trails for hiking, horseback riding and mountain bikes. The trails, comprising about 51 acres, will be closed to the use of [off-highway vehicles (OHVs)].

Id. at 69 (AR 42-11). The RMP also announced the intention to designate approximately 24,000 more acres where OHV use would be limited to designated roads and trails and to bar OHV use on 100-foot riparian corridors on either side of Rio Bonito and Salado Creek. Id. While setting out BLM’s goals regarding OHV management throughout the Roswell area, BLM provided in the Roswell RMP that “[p]lans for implementing OHV use restrictions (activity plans) will be developed with public participation,” and that the “plans will describe how OHV use restrictions would be applied, will clarify permitted, licensed, emergency and official use activities, and will describe the conditions under which waivers of OHV use restrictions would be considered.” Id. at 47 (AR 42-6).

BLM developed the activity plan for the Fort Stanton ACEC from March 1999 until its completion on August 28, 2001, under serial number NM 060-2000-141. See, generally, AR 15 through AR 38. BLM involved the public throughout the development of the plan, notifying it of activity plan issues, and holding open house

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<sup>2/</sup> Approximately 24,000 acres are administered by BLM; approximately 2,000 acres are managed by the State of New Mexico as historic Fort Stanton; a portion is managed by the New Mexico State Penitentiary; and the Sierra Blanca Regional Airport is also within the boundaries of the ACEC. (EA at 19 (AR 3-24).) The prison and airport, as well as a State-owned hospital, are not included in the acreage of the ACEC. (Roswell RMP at 67 (AR 42-9).)

discussions and formal meetings. BLM distributed and accepted public comment recommendations on its September 2, 1999, draft Fort Stanton ACEC activity plan. The record reveals that the subject of road closures and closing/authorizing OHV use on other roads was addressed throughout the public consideration of the activity plan. See, e.g., Draft Fort Stanton ACEC Activity Plan Issues at 2 and 3 (AR 38-4 and -5.).

The final Fort Stanton ACEC activity plan addresses several aspects of vehicle use management. It generally repeats the provisions concerning OHV use (Fort Stanton ACEC Activity Plan at 9 and 10 (AR 15-9 and -10)), camping (AR 15-9), and rights-of-way (AR 15-10) previously set out in the RMP. As to OHV management, the activity plan noted that an RDP/EA “will be written to designate routes of travel within Fort Stanton”; that from this RDP/EA, “routes of travel will be designated open or closed”; and that “[c]ertain routes of travel such as mountain bike/horse/hiking trails would be closed to motor vehicles.” Id. at 31 (AR 15-31). As to recreation trails, BLM noted that roads in the area were then being used as hiking trails, and vice versa. See id. at 32 (AR 15-32). BLM noted that it “will begin a route designation planning process that will guide trail development and possible road closures within the ACEC. The goal of the plan will be to eliminate as much of the current road/trail dual designation as possible.” Id. BLM attached maps showing proposed road closures and proposed trails in the Fort Stanton ACEC. Id. at 20 (AR 15-20). BLM noted that the RDP planning process would “be a public process and include environmental analysis.” Id. at 32 (AR 15-32).

In January 2003, BLM initiated the public process by circulating a draft RDP and EA to the public for comment and holding open house meetings. The draft RDP largely reiterates the discussion of trails set out in the activity plan. It states that a route designation network was being implemented that would reduce the 54 miles of traveled roads and two-track roads within the ACEC to 35 miles of active maintained roads. (Draft RDP at 8 (AR 8-13).) It explains that the

existing roads proposed for abandonment are redundant, or cause resource problems, have no function, no legal access, or are not needed within the ACEC. The proposed road and trail network would provide visitor access to the majority of the ACEC, while providing protection of threatened and endangered species, riparian areas, cultural resources, special use trails, and other special areas.

Id. The draft RDP contains a base map depicting the proposed road closures to be used as a basis for the proposed route designation within the ACEC. Id. at 1 (AR 8-6) and 6 (AR 8-11). The record shows that BLM held public meetings on the draft RDP. See AR 7.

On February 25, 2003, Nolen filed a letter with BLM objecting to the road closures:

A good number of the roads you are suggesting to be closed have met the criteria and the recognition of the different agencies as public [R. S. 2477] road easements. They have met required time. They have had uninterrupted use for many years. There has been construction by several different public agencies. Access for recreation, service of water lines, and waterers, allotment fences, and fire control is a constant and necessary requirement for access on both north and south sides of Little Creek to Eagle Creek. There are major subdivisions adjoining the western [boundary] of this forest area that these accesses have repeatedly been used to save private property and lives [sic].

(AR 5-2.)

On July 7, 2003, BLM issued the final RDP and supporting DR, EA, and FONSI that are under appeal herein. The final RDP is largely the same as the draft. It again explains that the “existing roads proposed for abandonment are redundant, or cause resource problems, have no function, no legal access, or are not needed within the ACEC,” and that the “proposed road and trail network would provide visitor access to the majority of the ACEC, while providing protection of threatened and endangered species, riparian areas, cultural resources, special use trails, and other special areas.” (RDP at 7 (AR 3-12).) The DR specifies that implementation of the route designation network would “reduce the 54 miles of traveled roads and two track roads within the ACEC to 35 miles of active maintained roads within the ACEC.” (DR at 1 (AR 3-53).) It contains the same base map as the draft, depicting, as nearly as we can tell, the same road closures and designated routes of travel. (RDP at 6 (AR 3-11).) <sup>3/</sup>

The final EA contains the following response to Nolen’s comments. Concerning his assertion that the roads being closed “met the criteria and the recognition of the different agencies as public [R. S. 2477] road easements,” BLM stated:

Enacted in 1866, RS 2477 states in its entirety, “The right-of-way for construction of highways over public lands, not reserved for public uses, is hereby granted.”

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<sup>3/</sup> The maps differ in one respect, in that an apparently existing road (shown on some maps as “581”) running from Ruidoso through Fort Stanton to Lincoln is not depicted on the draft RDP map, but is shown on the final RDP map.

Labeling the roads and trails within the Fort Stanton ACEC as RS 2477 rights-of-way is a misapplication of RS 2477 authority for the following reasons:

1. Fort Stanton and its Military Reservation (the ACEC) were established in 1855, predating the enactment of RS 2477 by 11 years.
2. As a military reservation, the Fort Stanton Military Reservation does not meet the definition of unreserved public lands and has been continually under control of the Federal government.
3. The boundaries of the Fort Stanton ACEC and the Fort Stanton Military Reservation are synonymous.
4. The roads and trails within the ACEC do not meet any of the use conditions to be labeled as RS 2477 rights-of-way found in case law applying to this issue.

Since the lands that make up the ACEC were originally a military reservation, have been under continuous federal jurisdiction since 1855, and case law does not apply to the uses of the roads within the ACEC, RS 2477 does not apply. Therefore, [BLM] is free to propose roads within the ACEC as open for public use or closed to public use.

(EA at 44 and 45 (AR 3-49 and -50).) Concerning Nolen's assertion that the road closures would block critical access, BLM responded as follows:

The [RDP/EA] provides adequate access to all areas within the ACEC. Authorization can be obtained to maintain boundary areas of the ACEC from the Roswell Field Office. Health and Safety of the surrounding areas will take precedence over proposed and existing plans for the ACEC.

Id. at 45 (AR at 3-50).

Nolen (appellant) filed a timely appeal of BLM's RDP.<sup>4/</sup> He states that his concern is that BLM "is trying to close all public roads to the south to connect to adjacent Forest Service roads," adding that "[t]here are no roads still existing west out of Devils Canyon into this area" and suggesting that the absence of roads would hamper fire access to homes there. (Statement of Reasons (SOR) at 1.) He notes that the "Homestead and Kokopelli fires consumed about 30 homes and thousands of acres of public and private land." He argues that existing road "access has been crucial in saving lives and property." Id.

Appellant also claims to have identified "Public Roads" that "were established at least 86 years ago and have met the criteria of 10 years of open, uninterupted use by the public" and that "are still in full use today." His evidence consists largely of three maps.<sup>5/</sup> He alleges that "these roads were constructed as vehicular roads to be used by all people of the United States." (SOR at 1.) He asserts that "RS 2477 easements were created at least 86 years prior and continue to date." He argues that, "[a]ccording to the mandate of the" Federal Land Policy and Management Act of 1976, "Federal agencies have no authority on RS 2477 easements," which were "granted automatically to the public when the criteria" were met. He contends

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<sup>4/</sup> We note that BLM's DR incorrectly describes the appeal procedures applicable to its decision, citing 43 CFR 4.470 (providing for an appeal to an administrative law judge and applying to appeals of grazing decisions) instead of 43 CFR 4.410 (providing for appeal to the Board of Land Appeals and applying to land management decisions such as the current matter). (DR at 47 (AR 3-52).) Despite that error, BLM properly processed Dolen's appeal under 43 CFR 4.410, duly forwarding it to this Board.

<sup>5/</sup> "Map one (1) depicts road closure stated in ACEC. Map two (2) depicts recognized public roads of Lincoln County in 1917 filed in the Lincoln County courthouse December 16, 1964. Copy of the decision of the court cause #CV-139-81 Division two in the Twelfth Judicial District of the State of New Mexico between the O-Bar-O Ranch vs. Lincoln County Commissioners and the New Mexico Department of Game and Fish recognizes this map as public roads [sic]. County Road #13 on this map shows County Road from Fort Stanton [through] Little Creek, Eagle Creek, to existing FS Road 120. Exhibit three (3) 1967 map denotes areas of fire and shows FS Road #593, 592, being maintained by Forest Service as public roads [through] present BLM land. Also notice that all outside [boundaries] of the Military Reservation were abandoned and only parts of the Bonito River were reserved for state facilities. Exhibits four (4) and five (5) uses of Lincoln County National Travel Map and BLM Addition of the Surface Management Status Map. These two maps indicate acceptance and continued use as public roads to date." (SOR at 1.)

further that “all Federal agencies are charged to maintain public access to adjoining public lands.” (SOR at 2.)

BLM filed its Answer, arguing that “a significant portion of the public land within the current boundaries of the Fort Stanton ACEC was reserved public land” not subject to R. S. 2477, which, it maintains, applies only to “unreserved” public land. (Answer at 2.) BLM notes that only three roads (New Mexico State Highways 380 and 220 and Lincoln County Road E0007) within the ACEC are considered “public highways,” and that neither the State of New Mexico nor Lincoln County has claimed any additional R. S. 2477 roads within the ACEC. *Id.* at 2-3.

[1] R. S. 2477 is formally known as the Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253, Revised Statutes 2477, formerly codified at 43 U.S.C. § 932 (1970) (repealed by FLPMA, 90 Stat. 2793 (1976)). It provided as follows, in its entirety: “The right of way for the construction of highways over the public lands, not reserved for public uses, is granted.” The Court of Appeals for the Tenth Circuit has recently set out in detail the history of the provision in a seminal decision styled Southern Utah Wilderness Alliance v. Bureau of Land Management, 425 F.3d 735 (10th Cir. 2005) (SUWA v. BLM).<sup>6/</sup> In that decision, the Court ruled that, although BLM lacks primary jurisdiction to make determinations on the validity of the rights-of-way granted under R. S. 2477, it may properly determine the validity of R. S. 2477 rights-of-way for its own purposes, as an aid to rendering administrative decisions regarding the public lands. 425 F.3d at 757; see also Sierra Club v. Hodel, 848 F.2d 1068, 1084 (10th Cir. 1988).

This holding is consonant with previous holdings of this Board, wherein we held that the need to consider whether lands are within the purview of R. S. 2477 arises when BLM has an “administrative concern” that requires inquiry into the status of a claimed R. S. 2477 right-of-way. Southern Utah Wilderness Alliance, 111 IBLA 207, 213-214 (1989). Review is appropriate “in cases where a determination would be helpful in the administration of the public lands.” Leo Titus, Sr., 89 IBLA 323, 338, 92 I.D. 578, 587 (1985). Such review is necessary, we have expressly held, when (as in the instant case) it is asserted that BLM has closed an R. S. 2477 right-of-way. See Homer D. Meeds, 26 IBLA 281, 83 I.D. 315 (1976); accord, Bear River Development Corp., 157 IBLA 37, 59 (2002) (AJ Burski, concurring). Appellant protested that BLM was closing roads that “have met the criteria and the recognition of the different agencies as public [R. S. 2477] road easements.” (AR 5-2.) BLM accordingly undertook to review whether the roads closed by its RDP were within the

<sup>6/</sup> Memorandum dated Mar. 22, 2006, Secretary Norton provided that the Department “should apply [the] principles [of SUWA v. BLM] nationwide.” Secretarial Memorandum dated Mar. 22, 2006, at 4.

purview of R. S. 2477, concluding in its EA that they were not. As appellant was a party to the case who is assertedly adversely affected by BLM's road closure decision, we consider his appeal from that administrative determination. See 43 CFR 4.410.

[2] We would note that the failure of the State or County to take appropriate action to have the roads that BLM closed recognized as falling within the purview of R. S. 2477, despite a full and detailed public process, creates a strong presumption that the roads do not. In this regard, BLM has repeatedly notified those entities of its intention to close specific roads in the ACEC (see, e.g., AR 8-46 through -48), and they have not come forward to assert any interests in the closed roads under R. S. 2477. BLM's Answer states that the County and State have already claimed the only roads they consider to fall under the purview of R. S. 2477, to-wit, State Highways 220 and 380 and County Road E007. (Answer at 2-3.)

This is not to say that we can fully embrace BLM's explanation in its response to appellant's protest, quoted above, regarding why it believes none of the roads closed by the RDP fall under R. S. 2477. As noted above, three roads in the reservation have admittedly been established under R. S. 2477, thus belying BLM's assertion that none of the lands in the ACEC are subject to R. S. 2477 because they "have been under continuous federal jurisdiction since 1855." (EA at 45 (AR 3-50).) If some lands in the former Fort Stanton Military Reservation became subject to cognizable R. S. 2477 rights, others may have, too.

We also find no basis in the material provided by BLM to find that the lands covered by the routes closed by the RDP have been continuously "reserved for public uses" within the meaning of R. S. 2477, such that no R. S. 2477 right could arise on those lands. That material represents that all of the lands at issue were part of the original 1859 Fort Stanton Military Reservation (Answer Ex. 5). Even agreeing with BLM that the creation that reservation might have amounted to a reservation "for public uses," exempting the lands from the operation of R. S. 2477 (see SUWA v. BLM, 425 F.3d at 784), according to BLM's chronology, most of the land (including the lands at issue) <sup>7/</sup> was opened to entry in 1872 by an act of Congress and all of the remaining lands were opened for disposal in 1895. The lands remained open to entry/disposal until 1899, when an Executive Order reserved the abandoned Fort Stanton Military Reservation for use by the Marine Hospital Service (Merchant Marine). Lands that are open to entry and disposition, we believe, cannot properly

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<sup>7/</sup> According to BLM, all lands in the reservation except a 16 square-mile tract (8 miles by 2 miles) were opened to entry. (Answer Ex. 5.) That rectangular tract is still depicted on relevant maps. Significantly, the roads that BLM closed plainly lie outside that tract, in the portion of the original reservation that was opened to entry in 1872.

be regarded as “reserved for public uses.” Accordingly, in the absence of evidence that the lands were reserved in some manner, we reject BLM’s assertions that the lands have been “continuously reserved for public uses” within the meaning of R. S. 2477, as the record shows that this was not so from 1872 to 1899. BLM’s decision is modified accordingly.

Nonetheless, the material presented by appellant fails to establish any error in BLM’s administrative determination that the roads in the ACEC closed by the RDP “do not meet any of the use conditions to be labeled as RS 2477 rights-of-way found in case law applying to this issue.” (EA at 45 (AR 3-50).) As the 10th Circuit has noted, the burden of proof is on the parties seeking to enforce R. S. 2477 rights-of-way against the Federal Government to establish “public use”<sup>8/</sup> of the route for the period required under governing State law, and the presumption is in favor of the land owner, in this case the United States. SUWA v. BLM, 425 F.3d at 768, 770-71 and n.22 and n.23. We find nothing in the materials presented by appellant that meets his burden to show evidence of public use of the closed roads under State law. Rather, his case is solely supported by maps, including maps prepared by the United States Forest Service (USFS) for its own use.

One map (SOR Ex. 2A) is submitted as showing “recognized public roads in Lincoln County in 1917,” particularly a road designated on the map as “13,” but its scale is so small that it is impossible to state with any precision that it refers to any road existing in the modern day. We find no reference even on the 1967 Lincoln National Forest map to any road that corresponds to road “13,” which was shown on the 1917 map as running north from the road now used as U.S. 70 (which does appear on the 1917 map) in the western portion of T. 14 E., R. 11 S. (in the vicinity of Ruidoso Downs).<sup>9/</sup> Road “13” is depicted as running mainly north to south and

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<sup>8/</sup> We note the distinction in the meaning of the word “public” in the two terms “reserved for public uses” (key in determining whether lands fall under the purview of R. S. 2477) and “public use” (key in determining whether a right has been established on lands that are within its purview). “Public uses” in the former context relates to lands being reserved for uses that benefit the public, customarily by transferring authority over the lands to Governmental entities; thus, the word “public” is used in the sense of “Governmental.” In the latter context, “public use” seemingly means use of the lands as a road by the general public; the word “public” refers to the community at large.

<sup>9/</sup> The 1967 map shows a spur road (“5619”) running approximately 2-½ miles north from Ruidoso Downs through Johnson Canyon, but it does not connect with any road continuing north across Eagle Creek and Little Creek to Fort Stanton, as the road designated as “13” is depicted as doing on the 1917 map.

does not correspond to the roads BLM is closing, which run east to west. We are left to conclude that, if a road corresponding to “13” ever existed, it was either abandoned long ago or does not relate to the roads BLM is closing.

Appellant also cites the 1967 Lincoln National Forest map, which depicts what are described as “primitive roads” in the southern part of the Township, three of which bear numeric designations (“577,” “592,” and “593”), parts of which were closed by BLM’s RDP. As BLM states, two of those numeric designations (“577” and “592”) do not appear on the 1995 Lincoln National Forest Map, strongly suggesting that these were roads administered by USFS at one time, but are no longer recognized by it. (Answer at 3.) That USFS may have established a route for its own purposes is not tantamount to evidence, let alone proof, of public use under State law.

Although a road identified as a “Forest Road” appears on the 1995 map that seems to correspond to “592” on the 1967 map, this road leads to a dead-end in the neighboring National Forest. Further, since the 1995 USFS map reflects that the roads closed in the vicinity by the RDP were also “primitive roads” leading to dead-ends in the forest, we cannot sustain appellant’s unsupported presumption that any such road was or could have been used to serve a residential community to the west with emergency vehicles. Instead, such community would clearly have been served by roads from Ruidoso to its south. Indeed, the only “facility” to the east of the community that might provide emergency vehicles is the airport, which, the RDP provides, is still served by a well-defined public road running directly between the airport and the residential community in question. Although designations “593” and “593A” still appear on the 1995 map, those roads are depicted as not connecting with any road in the ACEC and do not correspond to any road marked by BLM as closed in its RDP. We are not persuaded that the application of numeric designations to “primitive roads” or “forest roads” by the USFS has any controlling significance in determining whether such roads fall under the purview of R. S. 2477.

Appellant has provided a copy of a decision ostensibly issued by the District Court of Lincoln County, Twelfth Judicial District, State of New Mexico, in O-Bar-O Ranch, Inc. v. Lincoln County Commissioners, No. CV-139-81 (June 8, 1984).<sup>10/</sup>

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<sup>10/</sup> The document is styled “Decision of the Court” and bears the date stamp of the Clerk of the District Court of Lincoln County, New Mexico. However, it is not signed by a Judge, but instead by a “District Attorney Representing Lincoln County,” the commissioners of which are defendants in the matter. Further, the document contains a certification of service indicating that it is a “pleading” rather than a decision by the Court. It is unnecessary to resolve whether the document is a decision of the Court in the context of the present appeal.

That decision finds that U.S. Forest Service Road Number 441 is a “public road.” However, that road is not at issue in the instant appeal, being located many miles from the Fort Stanton ACEC, and appellant so acknowledges. He argues that the decision holds that roads were designated as “public roads” simply by virtue of being depicted on the 1917 map.<sup>11/</sup> However, the decision contains numerous findings of fact based on evidence other than the 1917 map to the effect that Road Number 441 “has been in general and continuous use by Lincoln County and the general public for a period of time predating 1955, and since that date to the present.” *Id.* at 4-6. Plainly, there was ample evidence in addition to the 1917 map to support the ostensible finding that Road Number 441 was a “public road,” and the fact that the route might have been depicted on the 1917 map is not legally determinative. Accordingly, even if we could find that any of the roads closed by BLM’s RDP appear on the 1917 map, that fact alone would not justify a conclusion that they were “public roads” under R. S. 2477. Some evidence of public use would be necessary. By comparison, the putative finding by the New Mexico District Court of “public use” based on evidence of how the road at issue therein was actually used serves to highlight the absence of any comparable evidence that any of the roads closed by BLM in its RDP were in “public use” and, as a result, fell under the purview of R. S. 2477. In the absence of such evidence, we can find no basis to upset the RDP.

[3] Finally, we reject as baseless appellant’s argument that BLM’s decision to close certain roads puts the public at risk by limiting the access of fire control equipment to the areas surrounding ACEC. (SOR at 1.) BLM’s RDP states that “[a]uthorization can be obtained to maintain boundary areas of the ACEC from the Roswell Field Office,” and that “Health and Safety of the surrounding areas will take precedence over proposed and existing plans for the ACEC.” *Id.* at 45 (AR at 3-50). Clearly, the decision provided appellant (and Governmental officials charged with maintaining surrounding lands and protecting the public health and safety) the opportunity to demonstrate to BLM which roads should be retained for maintenance and health and safety reasons. Appellant made no such presentation to BLM, or to

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<sup>11/</sup> Again, the 1917 map is very unclear, and it is difficult to conclude with any certainty that Road Number 441 is accurately depicted on it. The road that corresponds to Road Number 441 appears to be numbered “10” on that map.

<sup>12/</sup> We note that had appellant (or the State or Counties) come forward with some evidence of public use under State law, we would remand the matter to BLM to make the administrative determination consistent with SUWA v. BLM and the Secretarial Memorandum. However, unsupported assertions of rights under R. S. 2477, particularly by non-Governmental persons or entities, are not a talisman preventing BLM from taking steps to manage the public lands.

us. His assertion that the RDP compromises fire safety is supported by no single evidentiary point. To the contrary, it is refuted by the fact that any road closed by the RDP is a USFS “primitive road” or “forest road” that dead-ends in the forest.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the BLM’s decision is affirmed as modified.

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David L. Hughes  
Administrative Judge

I concur:

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Lisa Hemmer  
Administrative Judge