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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

Kane County, Utah, *et al.*,	)	
	)	
Plaintiffs	)	**Civ. No. 2:05cv941 (TS)**
	)	
v.	)	
	)	
Dirk Kempthorne, *et al.*,	)	**DEFENDANT-INTERVENORS**
	)	**SOUTHERN UTAH WILDERNESS**
Defendants, and	)	**ALLIANCE, *ET AL.*'S**
	)	**REPLY IN SUPPORT OF THEIR**
Southern Utah Wilderness Alliance, *et al.*,	)	**MOTION FOR**
	)	**JUDGMENT ON THE PLEADINGS**
Defendant-Intervenors	)	
	)	

Attachment 3

INTRODUCTION

In November 2005, Plaintiffs Kane County *et al*. ("the Counties") filed this case challenging travel management and water provisions of the Bureau of Land Management's ("BLM's") February 2000 management plan ("Plan") for the nearly 2 million acre Grand Staircase-Escalante National Monument ("Monument") in southern Utah. First Amended Complaint for Mandamus, Declaratory, and Injunctive Relief, (Feb. 27, 2006), Docket #9 ("Complaint"). Defendants the Department of the Interior *et al*. ("DOI") and Defendant-Intervenors the Southern Utah Wilderness Alliance *et al*. ("SUWA") moved to dismiss the Counties' case this May. *See* Memorandum in Support of Federal Defendants' Motion to Dismiss, (May 5, 2006), Docket # 18; Memorandum in Support of Defendant-Intervenors Southern Utah Wilderness Alliance, *et al*.'s Motion for Judgment on the Pleadings, (May 26, 2006), Docket # 22 ("SUWA's Memo.").

Both DOI and SUWA argued, *inter alia*, that the Counties lacked standing and that their suit was not ripe; that because the Counties' claims implicated title, this court lacked jurisdiction to hear this case because the Counties failed to avail themselves of the Quiet Title Act's ("QTA's") narrow waiver of sovereign immunity; and that the Counties fail to state a claim upon which relief can be granted because no law requires, as the Counties allege, that DOI must identify all potential R.S. 2477 rights-of-way in land use plans.

In their responsive brief, the Counties argue that DOI does in fact have a legal duty to determine the existence of R.S. 2477 rights-of-way; that the Counties need not plead their case under the QTA; that the Plan unlawfully burdens the Counties' rights-of-way for a handful of identified routes; that the Plan improperly denied the Counties due process rights to claimed

rights-of-way; and that the Plan's limitations on water diversions interfere with the Counties' rights under state water law. *See* Combined Opposition To The Federal Defendants' Motion To Dismiss And To The Defendant-Intervenors' Motion For Judgment On The Pleadings, (June 16, 2006), Docket # 30 ("Counties Opp.").

None of the Counties' arguments is persuasive and thus SUWA's motion for judgment on the pleadings and DOI's motion to dismiss should be granted. First, the Counties point to no law or regulation – nor is there one – that requires that BLM first administratively determine whether a highway right-of-way exists before the agency makes decisions concerning the use of motorized vehicles on its lands. Thus, the Counties' claims that the court must order BLM to undertake such determinations should be dismissed.

Second, despite their statements to the contrary, the Counties' complaint clearly alleges that the Plan interferes with their exercise of never-adjudicated and unidentified rights-of-way. These claims plainly implicate title, and thus could only be brought under the Quiet Title Act, which the Counties have failed to do. The Counties further assert that the Plan interferes with their rights-of-way to a small handful of specifically-identified routes, based on the assumption that DOI has no power to regulate rights-of-way. That assumption contradicts settled law in this circuit.

Third, the Plan does not violate the Counties' due process rights because the Counties have no proven property rights at issue, and cannot show any deprivation of even alleged property rights for specifically identified rights-of-way.

Finally, federal courts have long held that federal land managers have discretion to approve or deny non-federal requests for the diversion of water on federal lands, even where the

non-federal party has a vested water right. The Counties' claim that a "right" to divert water accompanies a water right has no basis in law, and is not ripe besides, since the Counties do not allege that DOI has denied any application to divert water.

ARGUMENT

I. BLM CAN MAKE ROUTE MANAGEMENT DECISIONS WITHOUT FIRST DETERMINING WHETHER R.S. 2477 RIGHTS-OF-WAY EXIST.

The Counties' third cause of action assumes that BLM has a legal duty "to determine the existence of R.S. 2477 rights-of-way or water rights prior to closing or otherwise restricting the use of those rights." Counties' Opp. at 21; *see also id.* at 23; Complaint ¶ 91 and Prayer for Relief ¶ 4. Because no statute or regulation imposes such a duty – and because a court may not impose an R.S. 2477-investigation duty of its own creation[1] – the Counties' claim must be dismissed.[2]

In addition to being non-existent, the R.S. 2477-investigation duty the Counties propose should be rejected because it would undermine BLM's ability to manage its lands. The Counties' position would require BLM to scour more than 140 years of records, photographs, maps and "historical archives for documentation of matters no one had reason to document at the time" whenever the agency sought to limit vehicle travel anywhere on its 100+ million acres.

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[1] *See Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 524 (1978) (courts may not impose duties upon agencies beyond those that Congress has established or that the agency has placed upon itself); *Phillips Petroleum Co. v. EPA*, 803 F.2d 545, 559 (10th Cir. 1986) ("the formulation of procedure is to be basically left within the discretion of the agencies to which Congress has confined the responsibility for substantive judgments").

[2] The Counties' failure to point to statute or regulation to defend against the pending dismissal motions could not be more telling. The best the Counties can do is to point to the Federal Land Policy and Management Act's (FLPMA's) provisions honoring valid existing rights, and requiring that BLM "consider" existing land "uses" in management plans. Counties' Opp. at 3; 43 U.S.C. §§ 1769(a), 1712(c)(5). But these provisions merely obligate BLM to "consider" (rather than "determine") "uses" (rather than "property rights").

S. Utah Wilderness Alliance v. BLM, 425 F.3d 735, 742 (10th Cir. 2005) ("*SUWA v. BLM*"). DOI's Interior Board of Land Appeals (IBLA) recognized as much when it recently rejected appellant's suggestion that "the Department must engage in a 10-year quest to inventory routes [off-highway vehicle] users may have carved out of the public lands by virtue of repetitive use" as part of land management planning. *Rainer Huck*, 168 IBLA 365, 399 n.17 (April 18, 2006) (rejecting challenge to BLM closing areas to vehicles in Utah's San Rafael Swell based on alleged R.S. 2477 rights).[3]

Further, the Counties' argument that BLM must determine whether any rights-of-way exist before closing areas to vehicle use flips on its head the well-settled burden of proof as to the validity of rights-of-way. *See* SUWA's Memo. at 10-11.[4]

II. THIS COURT LACKS JURISDICTION OVER THE COUNTIES' TITLE-RELATED CLAIMS.

A. This Court Must Dismiss the Counties' Claims that Assume the Validity of Unnamed and Unproven Rights-of-Way.

In addition to alleging that BLM failed to investigate the existence of R.S. 2477 claims, the Counties complain that the Plan "summarily deprive[s]" the Counties of their "valid existing rights." Complaint ¶¶ 79-80; SUWA's Memo at 7-9. In order to resolve this claim and grant the Counties' desired relief, this Court will necessarily have to determine whether the Counties in

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[3] While the IBLA has in a few situations concluded that the Board would make administrative determinations when doing so seemed "appropriate" (*see* Counties' Opp. at 19-20), it is clear that such determinations were an exercise of DOI's discretion, not required by any specific law or regulation. *Homer D. Meeds*, 26 IBLA 281, 298-99 (1976); *see also SUWA v. BLM*, 425 F.3d at 757-58 (recognizing BLM's "authority," but no ***duty***, to make administrative determinations); *Huck*, 168 IBLA at 398-99 ("***BLM did not need to decide the validity of the R.S. 2477 assertions*** in order to make its route designations, especially since it did not intend its analysis to affect any R.S. 2477 validity determinations and indicated that the Plan would be adjusted to reflect any R.S. 2477 decisions") (emphasis added).

[4] In addressing a motion that plaintiff failed to state a claim, courts need ***not*** accept plaintiffs legal conclusions. *Olpin v. Nat. Ins. Co.*, 419 F.2d 1250, 1255 (10th Cir. 1969).

fact have rights-of-way. Because the Quiet Title Act (QTA) provides the Counties with the only waiver of sovereign immunity to plead such claims, these claims must be dismissed. *See* SUWA's Memo. at 3-9.

The Counties' attempts to escape dismissal under the QTA are unpersuasive. First, the Counties argue that "[t]he relief requested does not seek substantive relief, rather, the Amended Complaint seeks to enjoin the procedurally defective action," namely the Plan. Counties' Opp. at 23. The plain language of the complaint – which seeks to halt the Plan's interference with and deprivation of "valid existence rights" – rebuts this argument. As the Supreme Court and Tenth Circuit have made clear, the plaintiff may not evade the QTA by artful pleading; if a claim implicates title it must be brought pursuant to the QTA.[5]

The Counties' claim that the QTA "does not apply to all disputes surrounding property claimed by the United States" is similarly unpersuasive and entirely unsupported by the two cases they cite. Counties' Opp. at 22-23. In *Kansas v. United States*, 249 F.3d 1213, 1225 (10th Cir. 2001), the Tenth Circuit held that a challenge to an agency decision regarding what lands constituted "Indian lands" under the Indian Gaming Regulatory Act need not be pursued as a QTA claim. Determining whether a parcel was "Indian lands" for purposes of a statute is "'conceptually quite distinct' from adjudicating title to that land," the Court concluded. *Id.* Here, though, the Counties have placed title squarely at issue by alleging that that DOI is interfering with rights derived from title to rights-of-way. In the other case the Counties cite,

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[5] *See Block v. North Dakota*, 461 U.S. 273, 284 (1983) (finding case should be brought under QTA, despite plaintiff's "artful pleading" of Administrative Procedure Act (APA) claims (citation omitted)); *Neighbors for Rational Development v. Norton*, 379 F.3d 956, 961 (10th Cir. 2004) (concluding "characterization of this suit as a challenge to the Secretary's actions under the [APA] is immaterial" and finding QTA is sole waiver of sovereign immunity even though plaintiff alleged it did not seek ownership interest, only to enjoin conversion of land). *See also* SUWA's Memo. at 6-7.

Dunbar Corp. v. Lindsey, 905 F.2d 754, 759 (4th Cir. 1990), the court concludes only that the QTA is not implicated when a dispute concerns not ***title*** but a different right: ***possession***. In contrast, the Counties' claims here concern the validity of easements, which are indisputably a title interest implicating the QTA. *See, e.g., Southwest Four Wheel Drive Ass'n v. BLM,* 363 F.3d 1069, 1071 (10th Cir. 2004). Neither of these cases undermine the bedrock principle that the QTA is the only waiver of sovereign immunity available to the Counties based on claims of validity of rights-of-way, and thus that this case must be dismissed.[6]

B. This Court Must Dismiss the Counties Claim that the Plan Conflicts with the Counties' Management Rights on a Handful of Named Routes.

Even where the Counties identify specific routes allegedly burdened by the Plan, they fail to state a claim upon which relief can be granted.[7] The Counties claim that the Plan illegally burdens three county routes on private lands. Counties' Opp. at 9-10, 17. These routes, however, are ***outside*** the Monument, and so are not impacted by the Plan. 16 U.S.C. § 431 (empowering President to create monuments only on "lands owned or controlled by the Government of the United States"); 61 Fed. Reg. 50221, 50225 (Sep. 24, 1996) (Monument Proclamation) (Monument proclamation announced that Monument includes only "Federal lands

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[6] The Counties also cite *Skranak v. Castenada*, 425 F.3d 1213, 1218 (9th Cir. 2005), in which the Ninth Circuit concluded that the QTA did not bar the court from addressing plaintiffs' APA claim that the Forest Service had failed to resolve whether plaintiffs had valid easements. *See* Counties Opp. at 22, 25. But in that case, the court found that the agency's regulations ***require*** the agency to specifically address whether a valid right exists in considering whether to issue a discretionary right-of-way permit. *Skranak*, 425 F.3d at 1218. No such BLM regulations are at issue here.

[7] The Counties' allege that the Plan conflicts with the Counties' "rights" related to four specific routes inside the Monument. They allege that courts have determined that valid existing highway rights-of-way exist for two routes, the Burr Trail and Skutumpah road. They further allege that BLM made administrative determinations for the Skutumpah route and the Hole in the Rock route; and that BLM issued a FLPMA Title V permit for one route (Johnson Canyon). The Counties also claim that BLM purports to regulate three routes that cross private land (Park Wash, Cottonwood Wash, and Willis Creek) not in the Monument. Counties' Opp. at 6-10, 17-18.

and interests in lands"); Plan at 2 (Exh. 1 to Counties' Opp.) (Monument includes only "federal land"); *id*. at 53 (private inholdings within Monument's boundaries are "not Monument lands").

The Counties also claim that the Plan illegally burdens four specific routes on federal lands ***within*** the Monument by restricting the use of off-road vehicles, while at the same time allowing use by full-sized vehicles. *See* note 7, *supra*; Plan Map (attached as Exh. 2 to Counties' Opp.). In making this claim, the Counties assume that DOI's "authority to manage the public lands ends at the edge of [R.S. 2477] rights-of-way," and thus that BLM lacks ***any*** regulatory power to regulate the use of such routes. Counties' Opp. at 18. The Tenth Circuit, however, has stated repeatedly that the federal government does retain the authority to regulate R.S. 2477 rights-of-way. *See SUWA v. BLM*, 425 F.3d at 746-48; *San Juan County v. United States*, 420 F.3d 1197, 1210 n.7 (10th Cir. 2005) (collecting cases); *United States v. Jenks*, 22 F.3d 1513, 1518 (10th Cir. 1994); *Sierra Club v. Hodel*, 848 F.2d 1068, 1088, 1090-91 (10th Cir. 1988).[8]

BLM is obligated under FLPMA, the Monument proclamation, and other authorities to protect certain resources when it plans for uses of its lands. *See, e.g.,* 43 U.S.C. § 1732(b) (BLM must "prevent unnecessary or undue degradation of the [public] lands"); Plan at 46 (route management decisions based on "considerations including what is needed to protect Monument resources"); 43 C.F.R. Part 8340 (governing management of off-road vehicles). Therefore, even assuming that the Counties have vested property rights in the four routes they identify, there is nothing illegal about the Plan's decision to regulate these routes in a manner that limits particular type of vehicle use – off-road vehicles – while allowing full-sized vehicles continued access.

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[8] BLM also retains significant authority to manage lands burdened by Title V permits. *See* 43 U.S.C. §§ 1761, 1764. Further, the County alleges only that the Johnson Canyon route Title V permit permitted the County to "for realigning and paving" that route (Counties' Opp. at 8), not that the permit divested BLM of any authority to limit off-road vehicle on the route.

In any event, the Plan itself makes clear that where "[FLPMA] Title 5 rights-of-way are issued or in the event of legal decisions on R.S. 2477 assertions, routes will be governed under the terms of these actions." Plan at 46. Thus, the Plan specifically disclaims that BLM will regulate these routes in a way contrary to the terms of whatever rights the Counties have.[9]

III. THE MONUMENT PLAN DOES NOT VIOLATE ANY DUE PROCESS RIGHTS.

The Counties invocation or the Due Process Clause must be rejected, Counties' Opp. at 21-25, because a party may only press a due process claim if it has proved it has a protected property interest to begin with. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999) ("Only ***after*** finding the deprivation of a protected interest do we look to see if the [agency's] procedures comport with due process.") (emphasis added); *Camuglia v. City of Albuquerque*, 448 F.3d 1214, 1219 (10th Cir. 2006); *Watson v. Univ. of Utah Med. Ctr.*, 75 F.3d 569, 577-78 (10th Cir. 1996) (burden of proving existence of a protected property interest is on party claiming a procedural due process right). Here, the Counties have not carried their burden of demonstrating that they have such property rights and cannot do so in this litigation. *See supra* at 4-6 (Counties must file QTA action to prove valid rights-of-way against BLM).

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[9] Even if this court entertains a challenge to the Plan based on these four routes, it cannot grant the overbroad relief the Counties seek. Courts must narrowly tailor any injunctive relief to the plaintiff's harm. *See Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 436 (4th Cir. 2003); *Va. Soc'y for Human Life v. FEC*, 263 F.3d 379, 392-94 (4th Cir. 2001); *Conservation Law Found. v. Reilly*, 950 F.2d 38, 43 (1st Cir. 1991) (invalidating broad injunction, holding that "[b]cause plaintiffs have ties to only a few federal facilities, they have failed to carry their burden of showing injury-in-fact sufficient to grant them standing to obtain nationwide injunctive relief"). Despite identifying in their complaint only one route allegedly burdened by the Plan – and belatedly identifying only a handful more in their memo – the Counties seek an injunction preventing the Monument from implementing ***any*** restriction on travel management or route closure across the 1.8 million-acre Monument. *See* Complaint at 27-28 (Prayer for Relief ¶¶ 3-5). Such relief is obviously far more broad than necessary to redress the Counties' claimed injury.

The Counties' complaint and opposition brief are not entirely clear as to what interests they claim are being deprived. To the extent they are complaining that they have been deprived of some right to a BLM determination regarding the presence of any R.S. 2477 right-of-way within the Monument, that claim must fail. *See supra* at 3-4 (nothing compels BLM to investigate R.S. 2477 claims); *Town of Castle Rock v. Gonzales*, - U.S. -, 125 S. Ct. 2796, 2803 (2005) ("Our cases recognize that a benefit is not a protected entitlement if government officials may grant or deny it in their discretion"); *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972) (statute may create a protected property interest for due process purposes); *Washington Legal Clinic for the Homeless v. Barry*, 107 F.3d 32, 36 (D.C. Cir. 1997) ("To determine whether a particular statute creates a constitutionally protected property interest, we ask whether the statute or implementing regulations place 'substantive limitations on official discretion.'" (quoting *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983))).

To the extent the Counties argue that the BLM violated their protected property interests in unproven, R.S. 2477 rights-of-way, this argument must also fail. As explained *supra*, absent a QTA claim, this Court lacks jurisdiction to hear any claim, like the Counties' due process argument, that would require court to determine whether the Counties actually hold rights-of-way across federal land. *See supra* at 4-6.[10]

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[10] The Counties argue that unproven claims of alleged, unidentified rights-of-way are protected property interests because courts have found protected property interests where plaintiffs alleged something less than title interests were at stake. Counties' Opp. at 23. However, in the cases the Counties cite, the courts found that plaintiffs did have an indisputable, protectable property interest (not an alleged one), namely ***possession***. *See, e.g., Fuentes v. Shevin*, 407 U.S. 67, 87 n.17 (1972) ("[i]t is enough that the right to continued *possession* of the goods was open to some dispute." (emphasis added)). Where, as here, plaintiffs prove neither a possessory interest nor any other interest in property, they have no due process rights.

The Counties' due process claims likewise fail as applied to the four named routes in which they arguably hold rights-of-way. *See* note 7, *supra.* Because BLM has some authority to regulate the use of the right-of-way, the agency's decision to prohibit off-highway vehicle use on these routes – while continuing to allow full-sized vehicles – does not deprive the Counties of any right they allegedly hold. *See supra* at 6-8.[11]

IV. BECAUSE THE COUNTIES HAVE NO RIGHT TO DIVERT WATER ON FEDERAL LANDS, THE COUNTIES FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

As part of "a sound strategy for assuring the continued availability of water for Monument resources," the Plan adopted a provision that permitted the diversion of water off of the Monument for culinary needs where the diverter could "demonstrate that the diversion of water will not damage water resources within the Monument or conflict with objectives of this Plan." Plan at 32. The Counties challenge this provision, on the grounds that it illegally burdens the Kane County Water Conservancy District's "water rights and rights to divert water." Complaint at 25 ¶¶ 85, 88. These claims must be dismissed.

The Counties allege for the first time in their opposition brief that the Plan's provisions concerning water conflict with Utah State law, governing how water rights are obtained. Counties' Opp. at 20. However, the Plan does not address the ***validity*** of privately-held water rights in any manner. *See, e.g.,* Plan at 2 (Plan does not make decisions concerning valid existing rights); *id.* at 54 (nothing will impair valid existing water rights owned by private parties on land transferred from state to BLM).

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[11] The Counties' due process argument as applied to allegedly vested water rights must also fail because the failure to consider such rights in a federal land management plan does not violate the alleged water rights holder's due process rights. *See Duval Ranching Co. v. Glickman,* 965 F. Supp. 1427, 1447 (D. Nev. 1997).

The Counties also appear to allege that the Plan's provisions concerning the ***diversion*** of water unlawfully interfere with the State's jurisdiction over the ***ownership*** of water rights. Complaint ¶¶ 55-57; Counties Opp. at 20 (attacking Plan's "restriction on diversion"). This is incorrect. Federal courts have long recognized that the right to ***use*** water is distinct from the right to ***divert*** water, and that no right to divert water on federal land follows a water ***ownership*** right.[12]

Further, federal law grants BLM the right to regulate the use of its land, including rights-of-way for water diversion. The Counties admit that "FLPMA governs the terms and conditions for obtaining rights-of-way and installing diversions and facilities that may be needed to divert … water across public lands, including lands within the Monument." Complaint ¶ 33. FLPMA "authorizes" but ***does not require*** BLM to grant rights-of-way for water diversions on public lands. 43 U.S.C. § 1761(a)(1). BLM's regulations expressly permit BLM to deny rights-of-way, such as water diversions, when "[t]he proposed use is inconsistent with the purposes for which BLM manages the public lands." 43 C.F.R. § 2804.26(a)(1). Courts recognize that FLPMA allows land management agencies to restrict diversion rights-of-way to even vested water rights. *See Okanogan County v. Nat'l Marine Fisheries Serv*., 347 F.3d 1081, 1086 (9th Cir. 2003), *cert denied* 541 U.S. 1029 (2004); *Trout Unlimited v. U.S. Dep't of Agric.,* 320 F. Supp. 2d 1090, 1104-05 (D. Colo. 2004). Thus even if the District could obtain a vested water right "by

[12] *See Utah Power & Light Co. v. United States*, 243 U.S. 389, 410-11 (1917) (distinguishing between regulation of water rights and that of water diversions across federal lands; finding federal government had right to regulate use of its lands under federal, not state, law); *Snyder v. Colo. Gold Dredging Co*., 181 F. 62, 69 (8th Cir. 1910) ("[t]he right to appropriate the waters of a stream does not carry with it the right to burden the lands of another with a ditch for the purpose of diverting … waters"). *See also Dalton Wilson and Dan Bowman*, 156 IBLA 89, 94 (2001) ("Water rights acquired under State laws do not carry with them, as necessary incidents, rights-of-way over public lands").

application," no law or regulation prohibits DOI from regulating water diversions on the Monument.[13]

The Counties suggestion that DOI cannot regulate diversions on the Monument because the proclamation reserved no federal water rights is similarly off-base. Counties' Opp. at 11, 20. The Monument proclamation clearly anticipated federal regulation of water diversions when it ***required*** that the Plan address the "extent to which water is necessary for the proper care and management of the objects of this monument …[and] to assure the availability of water." 61 Fed. Reg. at 50225. By directing how and under what circumstances the Monument would approve or deny applications for water diversions, the Plan does exactly what the President's proclamation required, and conforms with federal law.[14]

In any case, any claim that the Plan improperly burdens the District's water rights is unripe. Here, the Counties do not identify any right-of-way diversion that has been denied due to the Plan's provisions; they merely allege that ***after*** they filed this case, the District filed an application with the Monument for such a right-of-way. Declaration of Michael Noel at ¶ 10, Docket # 33, attached to Counties' Opp. Until BLM actually denies an application for a right-of-way to divert water – an event the Counties do not yet allege has occurred – any claim concerning a denial of permission to divert water is unripe. *See Sierra Club v. Yeutter*, 911 F.2d

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[13] Filing an application for water rights does not, as the Counties apparently believe, give an applicant the right to use water. *See* Counties' Opp. at 20 (alleging certain water "was appropriated (by application)"). Until a certificate of appropriation is issued by the state engineer, no one owns vested water rights. *See Tanner v. Provo Reservoir Co.*, 2 P.2d 107 (Utah 1931); *Loose v. First Federal Sav. & Loan Ass'n of Logan*, 858 P.2d 999, 1002 (Utah 1993); Utah Code Ann. § 73-3-17 (only a state engineer's certificate is "prima facie evidence of the owner's right to the use of water").

[14] Federal agencies also have no duty to consider vested water rights when planning land management. *Nev. Land Action Ass'n v. U.S. Forest Serv.,* 8 F.3d 713, 719-20 (9th Cir. 1993) (rejecting claim that management plan must be set aside because it allegedly failed to address valid existing water rights).

1405, 1419 (10th Cir. 1990) (case is unripe if harm from agency's action is speculative and contingent).

CONCLUSION

For the reasons set forth above, and in SUWA's and DOI's opening memoranda, the Counties' complaint must be dismissed.

Respectfully submitted July 7, 2006.

___/s/ Edward B. Zukoski_________________

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of July, 2006, I filed a true and exact copy of the DEFENDANT-INTERVENORS SOUTHERN UTAH WILDERNESS ALLIANCE, *ET AL.*'S MOTION FOR JUDGMENT ON THE PLEADINGS with the Court's CM/ECF system, which will generate a Notice of Filing and Service on the following:

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