Order Code RL32142

Highway Rights of Way on Public Lands: R.S. 2477 and Disclaimers of Interest

November 7, 2003

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Summary

A succinct provision in an 1866 statute known as "R.S. 2477" granted rights of way across unreserved federal lands for "the construction of highways." The provision was repealed in 1976 by the Federal Land Policy and Management Act (FLPMA), an act that also protected valid rights of way already established by that time. What definitions, criteria, and law should be applied to confirm or validate these R.S. 2477 rights of way has been controversial. The issues are important to states and communities whose highway systems are affected, and also because the rights of way may run either through undeveloped federal lands that might otherwise qualify for wilderness designation, or across lands that are now private or within federal reserves (such as parks or national forests) created after the highways might have been established.

Section 315 of FLPMA authorizes the Secretary of the Interior to issue a "disclaimer of interest" if an interest or interests of the United States in lands has "terminated by operation of law or is otherwise invalid." A disclaimer is a recordable document that can help remove a cloud from land title because it has the same effect as if the United States had conveyed the interest in question. The Department of the Interior has finalized amendments to existing regulations on disclaimers of interest that allow states, state political subdivisions, and others to apply for disclaimers that previously were time-barred. A recent Memorandum of Understanding (MOU) between Utah and the Department of the Interior establishes an "acknowledgment process" whereby R.S. 2477 rights of way on certain federal lands can be validated and a disclaimer to them issued by the United States. Several other states have requested negotiations to develop MOUs regarding R.S. 2477 rights of way.

The disclaimer regulation changes are controversial for many reasons; one of which is that Congress in § 108 of P.L. 104-208 prohibited regulations "pertaining to" R.S. 2477 from becoming effective without Congressional approval. The use of disclaimers to acknowledge R.S. 2477 rights of way is also controversial because the criteria that will be used to determine the validity of asserted R.S. 2477 claims are not set out, and without clearly stated criteria and standards, it is not clear whether the terms of § 315 have been met – whether a disclaimable interest of the United States has terminated or not. Most agree that a resolution of R.S. 2477 validity issues is desirable, but there is disagreement on standards and on whether and how the Congress and the courts should be involved. H.R. 1639 in the 108th Congress would authorize a process for determining the validity of R.S. 2477 claims and define crucial terms for those determinations. A House-passed amendment to FY 2004 Interior and Related Agencies Appropriations (H.R. 2691) would have prohibited implementation of the disclaimer regulation amendments in certain federal conservation areas, but was removed in conference. This report reviews the disclaimer provision of § 315 of FLPMA, the Utah MOU, the R.S. 2477 grant to construct highways and interpretation of it, the relationship of the new disclaimer regulations to that statute and to the statutory prohibition against rules that "pertain to" R.S. 2477, and H.R. 1639. It will be updated as events warrant; see CRS Report RS21402 for information on recent events.

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Introduction

A succinct provision in an 1866 statute known as "R.S. 2477" granted rights of way across unreserved federal public lands:

> *And be it further enacted*, That the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.[1]

This provision was repealed in 1976 by the Federal Land Policy and Management Act (FLPMA), an act that also protected valid rights of way established by that time. What definitions, criteria, and law should be applied to confirm or validate the existence of these pre-1976 R.S. 2477 rights of way has been controversial for over a decade. The issues are important to states and communities whose highway systems are affected, and also because the rights of way may run either through undeveloped federal lands that might otherwise qualify for wilderness designation, or across lands that are now private or within federal reserves (such as parks or national forests) created after the highways might have been established.

Many such rights of way have not been controversial because their construction and acceptance as highways was clear. Other asserted rights of way are controversial either because their timely completion is not clear, the standards by which their validity should be determined are debatable, or because of the location of the asserted rights of way. The potential impacts of claimed R.S. 2477 rights of way on the management of federal and non-federal lands and on state road systems could be significant.[2] Validated roads could continue across private lands as well, possibly to the surprise of current landowners.[3] Still other rights of way may threaten water

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[1] Act of July 26, 1866, ch. 262, 14 Stat. 251, R.S. 2477, later codified until repeal at 43 U.S.C. § 932.

[2] A Colorado committee of counties reportedly has indicated that thousands of miles of rights of way should be claimed across over a million acres of federal lands, including national parks, monuments, wilderness areas, and Indian reservations. DENVER POST, August 3, 2003, at B-08. This article also asserts that the roads on federal lands would continue across lands that are now private lands. Another article indicates that rights of way would be claimed in Dinosaur National Monument, Browns Park National Wildlife Refuge and the Vermillion Basin. FORT COLLINS COLORADOAN, July 24, 2003 at 1A.

[3] The director of the San Juan Citizens Alliance in Colorado is quoted as saying: "That right of way won't just stop at your ranch fence. The jeeps and motorcycles will be coming right through." Theo Stein, *County lobby to push road claims on federal land,* DENVER POST, August 3, 2003, at B-08. The potential for these old routes to be validated across private

(continued...)

quality if they pass through critical watersheds.[4] On the other hand, others assert that motorized access to the federal lands, which comprise about 44 percent of Utah, is important for ranching, recreation, mining, and other economic activities deemed vital to rural Utah and that the roadways will promote economic prosperity generally.[5] In commenting on a bill in the 104th Congress that would have legislated a validation process very different from that proposed in regulations, Sen. Hatch stated:

> [T]his matter is critical to communities and citizens in the rural West. In many cases, these roads are the only routes to farms and ranches; they provide necessary access for schoolbuses, emergency vehicles, and mail delivery. The Interior Department regulations would significantly confound transportation in the Western States, jeopardizing the livelihoods of many citizens and possibly their health and safety as well.[6]

On January 6, 2003 the Department of the Interior published new final regulations on "disclaimers of interest."[7] A disclaimer is a recordable document in which the United States declares that it does not have a property interest or interests in lands. The issuance of a disclaimer can help remove a cloud from land title because it has the same effect as though the United States had conveyed any interest it has. On April 9, 2003, the Department of the Interior and Utah entered into a Memorandum of Understanding (MOU) to establish a process to acknowledge as valid certain R.S. 2477 highway rights of way within that state and to disclaim the interest of the United States in valid rights of way. Apparently, this means that the United States would disclaim its interest in the highway easement, but not title to the underlying lands.

The new disclaimer regulations were issued under § 315 of the Federal Land Policy and Management Act of 1976 (FLPMA),[8] one part of which authorizes the issuance of disclaimers if an interest or interests of the United States in lands has "terminated by operation of law or is otherwise invalid." The amended disclaimer regulations at 43 C.F.R. Part 1860, Subpart 1864, allow states, state political subdivisions, and others to apply for disclaimers of interest by the United States,

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[3] (...continued)
lands has raised concerns of landowners of various political persuasions, both because they feel they may lose a property interest without compensation, or because they may be unable to exclude the public from property they thought was private. Theo Stein, *Old law pits landowners, 'road' users*, DENVER POST, August 19, 2003, at B-01.

[4] Molly Villamana, *Public Lands: Utah Prepares to Publish First RS 2477 Claims*, GREENWIRE, August 11, 2003.

[5] *See, e.g.*, Brent Israelsen, *Activists Seek Data on Roads Suit*, THE SALT LAKE TRIBUNE, October 26, 2001; and Mark Havnes, *Leavitt Asks for Moderation in Debate over Roads on Wild Lands*, THE SALT LAKE TRIBUNE, August 7, 2003, at B2.

[6] 141 CONG. REC. 34507 (November 27, 1995).

[7] 68 Fed. Reg. 494 (January 6, 2003). The regulations became effective on February 5, 2003.

[8] Pub. L. No. 94-579, 90 Stat. 2770, 43 U.S.C. §§ 1701, 1745.

regardless of whether they are the property owner of record, as was required by the previous regulations. The amended regulations provide exceptions to the 12-year statute of limitations that applied to all applications under the previous regulations and that would also apply to all plaintiffs, except states, if they were to pursue claims in court under the Quiet Title Act.

Some comments on the proposed changes to the disclaimer regulations expressed concern that disclaimers would be used to confirm many more R.S. 2477 rights of way through that means.[9] The explanatory materials accompanying the final regulations state that "[a] significant number of comments asked about the relationship between the proposed rule and R.S. 2477," and conclude that § 315 disclaimers are appropriate in the R.S. 2477 context if their issuance would help remove a cloud on the title to lands or interests in lands arising from unrecorded rights of way.[10]

The explanatory materials go on to discuss that the rule does not provide standards for recognizing, managing, or validating R.S. 2477 rights of way and therefore do not violate § 108 of Pub. L. No 104-208, which prohibited rules "pertaining" to recognition of R.S. 2477 rights of way.[11] By what process R.S. 2477 rights of way will be validated and by applying what criteria are controversial issues. For years, property disputes involving claims to federal lands were resolved by the Congress in individual legislation or by the courts under the Quiet Title Act. Disclaimers have been used when there is no dispute that the United States does not own a property. The issuance of disclaimers spares parties the time and expense of going to court under the Quiet Title Act. However, given the significant issues over what law applies to R.S. 2477 rights of way and what constitutes lawful R.S. 2477 validity criteria, use of disclaimers as part of a process for validating such rights of way without congressional or judicial guidance on how such claims should be evaluated and resolved may generate further controversy. The Administration asserts that disclaimers will only be used in reference to "obvious" R.S. 2477 claims[12] or claims that "satisfy the statutory requirement of 'construction' and 'highway' under almost any interpretation of those statutory terms."[13] However, as will be discussed, some of the terms of the Utah MOU may be controversial – *e.g.* it expressly equates "highway" with "road," possibly broadening the rights of way that may qualify by eliminating one debatable element of the 1866 grant from consideration.

The possible relationship between the new disclaimer regulations and R.S. 2477 determinations is important because Congress in § 108 of Pub. L. No. 104-208 stated

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[9] 68 Fed. Reg. 496.

[10] 68 Fed. Reg. 496.

[11] *Id.*

[12] Letter from Matthew J. McKeown, Associate Solicitor, Department of the Interior, to Susan D. Sawtelle, Associate General Counsel, U.S. General Accounting Office, July 15, 2003, available from the Department or the author's files.

[13] Memorandum to BLM State Director, Utah from Deputy Director of BLM, June 25, 2003, providing guidance for implementing the Utah MOU. Available from the Department of the Interior or the author's files.

that no rules "pertaining to" recognition or validity of R.S. 2477 rights of way could be effective unless authorized by Congress. Explanatory materials published with the amended disclaimer rules assert that the issuance of federal disclaimers is completely separate from determining the validity of claims of highway rights of way under R.S. 2477. But, apparently, disclaimers could be an essential part of a new process for finalizing claims found to be valid through application of a variety of administrative standards. The MOU with Utah establishes an "acknowledgment process" whereby R.S. 2477 rights of way claimed by that State can be validated and disclaimers to the rights of way issued by the United States. Some counties in Utah and one county in California, and the states of Alaska, Colorado, Idaho, Oregon, have indicated interest in developing separate MOUs regarding R.S. 2477 rights of way, and other states may follow.[14] Any additional MOUs may or may not be similar to that with Utah.[15] Whether this potential for disparate approaches to validating R.S. 2477 rights of way comports with the policies set out in FLPMA to retain the remaining public lands and to establish uniform procedures for the management and disposal of the public lands[16] raises other issues. Additional questions may arise even if all validation agreements prove to be uniform.

Neither the Utah MOU nor the supplemental BLM guidance for implementing it sets out the criteria that will be used by the United States to determine the validity of asserted R.S. 2477 claims. The articulation of criteria and the definitions of key terms are central issues that have generated controversy in the past. For many years as the West was being settled, there was little attention paid by the United States to R.S. 2477 grants. Meanwhile, state courts applying state laws established their own standards by which to judge whether a grant had been accepted by each state for public maintenance and liability. In some instances, state law or judicial interpretation went beyond determining when a right of way was accepted by a state or county for those purposes to also articulating what constituted "construction" or a "highway" for purposes of determining when the federal grant was completed However, these cases typically did not involve the federal government as a party, and after the repeal of the 1866 Act in 1976, attention was increasingly focused on the elements of the federal grant: the "construction" of "highways" over "public lands" "not reserved" – as matters of federal law.

Congress has addressed the R.S. 2477 controversy several times. In 1991 the House passed H.R. 1906, a bill that would have imposed a cutoff date for claims and specified how the Department of Interior was to process them, but no Senate action was taken. Then, in conference report language on Pub. L. No. 102-381, Congress

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[14] The Alaska context presents many special circumstances, both because of climatic and terrain conditions and because much of the state was subject to land withdrawals for many years. Possible solutions for the special needs of Alaska that may not be adequately met by the right of way provisions of Title XI of the Alaska National Interest Lands Conservation Act and Title V of FLPMA present issues beyond the scope of this paper.

[15] One press article reports that Alaska has sought an MOU that would recognize 14 of 650 trails in Alaska, use of which might have been by foot, horse, dog sled, snowmachine, off-road vehicle or other vehicular traffic. ANCHORAGE DAILY NEWS, September 2, 2003, at B3.

[16] 43 U.S.C. § 1701(a)(1) and (10).

deleted a prohibition on using funds to process R.S. 2477 rights of way in favor of directing the Department to prepare a report on R.S. 2477, and to develop validity criteria that are "consonant with the intent of Congress both in enacting R.S. 2477 and FLPMA, which mandated policies of retention and efficient management of the public lands."[17] The Department's report was completed in June, 1993. One of the recommendations in the report was that regulations be promulgated to establish a single uniform system for validating R.S. 2477 claims, and Secretary Babbitt proposed such regulations in 1994.[18] However, these proposed regulations were controversial[19] and elicited congressional prohibitions against new regulations.[20] These were followed by the prohibition in § 108 of Pub. L. No 104-208 (an appropriations act), against rules "pertaining to" R.S. 2477 becoming effective until approved by Congress.[21] Similar language had been proposed for the Interior

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[17] H.R. Rep. No. 102-901 at 71 (1992) states:

"Amendment No. 155: Deletes House proposed language that would have prohibited the use of funds to process rights of way claims under section 2477 of the Revised Statutes, as proposed by the Senate.

The managers agree that by May 1, 1993, the Department of the Interior shall submit to the appropriate committees of the Congress a report on the history of rights of way claimed under section 2477 of the Revised Statutes, the likely impacts of current and potential claims of such rights of way on the management of the Federal lands, on the access to Federal lands, private lands, State lands, Indian and Native lands, on multiple use activities, the current status of such claims, possible alternatives for assessing the validity of such claims and alternatives to obtaining rights of way, given the importance of this study to the Western public land States. In preparing the Report the Department shall consult with Western public lands States and other affected interests.

The managers expect sound recommendations for assessing the validity of claims to result from this study, consonant with the intent of Congress both in enacting R.S. 2477 and FLPMA, which mandated policies of retention and efficient management of the public lands.

Such validity criteria should be drawn from the intent of R.S. 2477 and FLPMA.

The managers further expect that any proposed changes in use of a valid right of way shall be processed in accordance with the requirements of applicable law."

[18] 59 Fed. Reg. 39,216 (August 1, 1994).

[19] Some felt that the regulations imposed too great a burden on the states claiming R.S. 2477 rights of way, or disagreed with the definitions of crucial terms. See Appendix I of this report.

[20] Section 349 of Pub. L. No. 104-59, 109 Stat. 568, 617-618 (November 28, 1995) stated: "Notwithstanding any other provision of law, no agency of the Federal Government may take any action to prepare, promulgate, or implement any rule or regulation addressing rights-of-way authorized pursuant to section 2477 of the Revised Statutes (43 U.S.C. 932), as such section was in effect before October 21, 1976." Section 110 of Pub. L. No. 104-134, 110 Stat. 1321-177 (April 26, 1996), extended the prohibition over Fiscal Year 1996 and stated that "None of the funds appropriated or otherwise made available by this Act may be obligated or expended by the Secretary of the Interior for developing, promulgating, and thereafter implementing a rule concerning rights-of-way under section 2477 of the Revised Statutes."

[21] Section 108 of Pub. L. No. 104-208, 110 Stat. 3009, 3009-200 (September 30, 1996).

Appropriations Act for FY 1998 (Pub. L. No 105-83), but was deleted in reliance on an Opinion of the Comptroller General that § 108 was permanent law.[22]

Several bills addressing R.S. 2477 were introduced in 1995 and 1996, including S. 1425, which would have put the burden of disproving validity of claims on the United States and directed that determinations be made by applying state law. Many opposed these provisions too, and no position garnered sufficient support to enact a bill. As part of the compromise in the 104th Congress, the Administration pledged to send a legislative proposal to the Hill, and a proposal was sent in August of 1997, but no legislation based on it was introduced.

On January 22, 1997, Secretary Babbitt revoked a 1988 Policy on R.S. 2477 and put in place an interim policy that directed that R.S. 2477 determinations be postponed unless necessitated by compelling circumstances, thereby giving Congress more time to resolve the issues. Language was added to the FY 1997 Supplemental Appropriation bill to nullify the 1997 policy and to again require that state law be used in evaluating R.S. 2477 claims; however, this language was eliminated after the bill was vetoed. Since that time very few administrative determinations have been completed, and disputed claims have been addressed in the courts under the Quiet Title Act. Now, with the Utah MOU as precedent, new administrative "acknowledgment processes" could use the amended disclaimer regulations to validate R.S. 2477 rights of way under as- yet-unstated criteria.

R.S. 2477 issues may be suitable for resolution by Congress because so many interests could be affected, and because the law and standards that should be applied are debatable. H.R. 1639 in the 108th Congress, again proposes a legislated system for evaluating and determining claims, and defines crucial terms. In addition, the House approved an amendment to the FY 2004 DOI Appropriations bill (H.R. 2691), that would have prohibited implementation of the amendments to the disclaimer regulations in National Monuments, Wilderness Study Areas, or units of the National Park System, National Wildlife Refuge System, or the National Wilderness Preservation System. This language was adopted instead of a more general prohibition on implementation. The Senate bill, as reported, did not contain a provision on disclaimers and the provision was eliminated in conference. If there is no legislated resolution of R.S. 2477 issues, the courts will continue to consider disputed claims as they arise, and use of the new acknowledgment/disclaimer process may also be challenged.

This report discusses the disclaimer provision of FLPMA, the recent amendments to the disclaimer regulations, and the Utah MOU. It also provides background on the R.S. 2477 grant to construct highways, administrative and judicial interpretation of it, and several questions involving its interpretation that are not settled. The relationship of the amended disclaimer regulations to that statute and to the prohibition against rules that "pertain to" R.S. 2477 is also discussed. Finally, H.R. 1639 and other actions in the current Congress also are discussed. This report will be updated as circumstances warrant; see CRS Report for Congress RS21402:

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[22] See H. R. Rep. 105-337 at 74 (1997), citing Opinion of the Comptroller General B-277719, August 20, 1997 concluding that § 108 of Pub. L. No. 104-208 was permanent law.

Federal Lands, "Disclaimers of Interest," and R.S. 2477, for a discussion of recent events.

Section 315 Disclaimers

Section 315 and regulations.

Section 315 of FLPMA authorizes the Secretary of the Interior to use disclaimers in certain circumstances, and reads in part:

> After consulting with any affected Federal agency, the Secretary is authorized to issue a document of disclaimer of interest or interests in any lands in any form suitable for recordation, where the disclaimer will help remove a cloud on the title of such lands and where he determines (1) a record interest of the United States in lands has terminated by operation of law or is otherwise invalid; or .... [23]

When a party formally disclaims an interest in real property, the result is to help clear title to the property interest that is the subject of the disclaimer. Section 315(c) states that a recordable federal disclaimer of interest has an *effect* equivalent to a quitclaim deed.[24] A part of the regulations that was not amended adds that although a disclaimer does not actually convey title[25] (presumably because the disclaimer indicates there is no title interest of the United States to be conveyed), a disclaimer may estop the United States from later asserting a claim to the lands. Unchanged regulations also state that the purpose of the procedure is to eliminate the necessity for court action or private legislation in certain circumstances, including when there is a cloud on the title to the lands that is *attributable to the United States*:

> The purpose of a disclaimer is to eliminate the necessity for court action or private legislation in those instances where the United States asserts no ownership or record interest, based upon a determination by the Secretary of the Interior that there is a cloud on the title to the lands, attributable to the United States, and that:
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> > (1) A record interest of the United States in lands has terminated by operation of law or is otherwise invalid; or ... [additional language reflecting the § 315 language on disclaimers involving submerged lands].[26]

These provisions of the disclaimer regulations were not changed. However, the former regulations limited those who could apply to use the procedure to "any

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[23] 43 U.S.C. § 1745(a). Although attention has focused on the use of disclaimers in connection with R.S. 2477 claims, disclaimers may also be used to disclaim title to lands beneath navigable waters, some of which might also be controversial.

[24] 43 U.S.C. § 1745(c).

[25] 43 C.F.R. § 1864.0-2(b).

[26] 43 C.F.R. § 1864.0-2(a). This language reflects similar statements in the legislative history of § 315. See, *e.g.* S. Rep. 94-583 at 50 (1975).

present owner of record,"[27] a limitation that does not appear in the statute or in the amended regulations. Further, the previous regulations required denial of an application for a disclaimer if more than 12 years had elapsed since the owner knew or should have known of the alleged claim attributed to the United States.[28] The amended regulations allow any entity to file an application for a disclaimer, and also provide that although most applicants must file within 12 years, this time limitation does not apply to states.[29] The explanatory materials indicate that this is to make the §315 regulations consistent with the Quiet Title Act (QTA). As will be discussed, the QTA is the exclusive vehicle for resolving title disputes with the United States. It contains a 12-year statute of limitations, but "states," as narrowly interpreted in the QTA context, are excepted from the limitation. The new regulations add a broader definition of "state" that includes states in the narrow sense, and also political subdivisions of a state, "any of its creations," and "other official local governmental entities."[30] This language is not elaborated on, but appears to include any independent commission or body a state (or even possibly a county) might create.[31] Because all those who fit within this definition of "state" are exempted from the 12-year statute of limitations under the new disclaimer regulations, these provisions may allow many governmental entities that would have been precluded previously from seeking an administrative disclaimer and who are also currently precluded from initiating a QTA action in court to now seek an administrative disclaimer.

Although there is no legal requirement that a § 315 administrative disclaimer process parallel the QTA, the amended regulations purport to reflect and be consistent with the QTA.[32] If the § 315 disclaimer process is viewed as completely separate from the QTA, expanding those who are not time-barred from requesting a disclaimer could be beneficial because disclaimers are to be used in situations where the United States has no interest in a property, and hence provides a means of clearing up unnecessary clouds on title without the time and expense of judicial suits under the QTA. However, neither Congress nor the courts have definitively clarified the criteria and law for determining whether and when an interest of the United States in a right of way might have "terminated or is otherwise invalid" within the meaning of § 315. Disclaiming R.S. 2477 claims, therefore, may be subject to challenge in some circumstances, unless criteria and standards are clarified.

Legislative History of §315 Disclaimers.

The legislative history of FLPMA sheds little light on the intended uses and scope of § 315. FLPMA is a complicated and detailed statute that developed over several years to consolidate and modernize the statutes governing the remaining

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[27] Former 43 C.F.R. § 1864.1-1(a).

[28] 43 C.F.R. 1864.1-3(a)(1)(2002).

[29] 43 C.F.R. § 1864.1-3(a).

[30] 43 C.F.R. § 1864.0-5(h).

[31] A computer search of the U.S. Code finds no instance where Congress has enacted a similar definition of "state."

[32] 68 Fed. Reg. 495, 501 (January 6, 2003).

public domain lands managed by the Bureau of Land Management, and to establish express policies for their management. One policy expressly urges the retention of the remaining public domain lands and another expressly requires "uniform procedures" for any disposal of public land.[33]

In the 94th Congress, which enacted FLPMA, §212 of the Senate bill, S. 501, and previous House bills[34] authorized disclaimers only if the title of the United States had terminated "by operation of law"– the section lacked the additional language "or is otherwise invalid." The Senate report indicates that the Secretary is to be given new authority to issue a document "showing that the United States has no interest in certain lands" that would have the legal effect of a quitclaim deed, and that this would "eliminate the necessity for court action or private relief legislation in those cases where the United States asserts no ownership or interest and would thus result in a saving of time and money for both the Government and private parties."[35] Section 208 of the House bill, H.R. 13777, contained the "or is otherwise invalid" language and also the express language on disclaimers having the effect of a quitclaim deed, but there was no elaboration in the report on the additions,[36] and no explanation as to why the broader House language ultimately passed.[37]

The amendments to the disclaimer regulations broaden the circumstances in which disclaimers may be used. Some expansion might be warranted by practicalities – *e.g.* some instances might involve parties who are not the title holder of record (for example, if there were a mistaken survey that erroneously showed the United States to hold title to a strip of land). But were there any implicit limits on how disclaimers could be used? In interpreting R.S. 2477, a court might look to the plain meaning of that statute, or, if ambiguities are perceived, and in the absence of clarification by Congress, a court might look to other provisions and to the history of title disputes.

Quiet Title Act.

Historically, it was difficult to correct title problems involving the United States. The United States, as the federal sovereign, is immune from suit, except to the extent it may waive its sovereign immunity, and one cannot "adversely possess" property against the United States and thereby obtain title. Typically, special acts of Congress were used to clear up title problems.[38] Some lawsuits attempted to avoid the sovereign immunity problem by suing an officer of the United States, rather than the

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[33] 43 U.S.C. § 1701(a)(1) and (10) respectively.

[34] *See, e.g.,* § 212 of H.R. 5622 (94th Cong.); § 212 of S. 1292 (94th Cong.).

[35] S. Rep. 94-583 at 50-51 (1975).

[36] H.R. Rep 94-1163 (1976).

[37] H.R. Rep. 94-1724 (1976).

[38] In addition, for years the General Land Office issued letters disclaiming title to lands, a practice without statutory authorization, but one that was "certainly acquiesced in by the Secretary of the Interior" and found to be binding on the government. Soda Flat Co. v. Hodel, 670 F. Supp. 879, 887-889 (E.D. Cal. 1987).

United States itself. These "officer suits" were eliminated by the enactment of the Quiet Title Act (QTA) in 1972,[39] which the Supreme Court has held to be the *exclusive means* by which adverse claimants can challenge the United States' title to real property in court and controverted title claims can be resolved.[40] There has always been a tension between the enabling of suits to clear up title problems on the one hand and the cabining of those suits in order to maintain parameters on the waiver of sovereign immunity on the other hand. As a result, the Supreme Court has said that waiver of sovereign immunity in the QTA is to be construed narrowly in favor of the United States.[41]

Except as to states, the QTA bars suits not filed within 12 years of the time an action accrues, and an action is deemed to have accrued on the date a plaintiff "knew or should have known of the claim of the United States."[42] The *Block* case held that states were subject to the statutory 12-year limitation on bringing suits under the QTA, but in 1986 Congress subsequently provided that states are not generally subject to that limitation (though in some circumstances they are).[43] Recent cases have held that the exception for states is to be interpreted narrowly, such that counties and other subdivisions of a state may not avail themselves of this exception to the QTA.[44] The new disclaimer regulations contrast with the QTA in this regard by including a broad new definition of "state" that includes many entities that would be time-barred from contesting title under the QTA and would have been time-barred from seeking disclaimers under the previous regulations. The administrative disclaimer process and its regulations are separate from judicial QTA actions, but, as will be discussed, the new disclaimer regulations purport to be consistent with the QTA, yet differ significantly in this crucial respect.

The Ninth Circuit has held that two conditions must exist before a district court can exercise jurisdiction over an action under the QTA: (1) the United States must claim an interest in the property at issue (and it need not necessarily be adverse to the interest asserted by the plaintiff); and (2) there must be a disputed title to real property. In the R.S. 2477 context, even if the United States conceded the validity of a right of way, the United States would retain an interest in the property – at least the servient estate over which the easement runs.[45] In the same litigation, the Ninth Circuit also held that a third party may claim a title interest on behalf of the United States so long as that claim results in a cloud on the title of the plaintiff.[46] However,

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[39] Pub. L. No. 92-562, 86 Stat. 1176, 28 U.S.C. § 2409a.

[40] Block v. North Dakota, 461 U.S. 273 (1983).

[41] *Id.* at 287.

[42] 28 U.S.C. § 2409a(g).

[43] Pub. L. No. 99-598, 100 Stat. 3351 (1986).

[44] *See, e.g.*, Calhoun County v. United States, 132 F.3d 1100, 1103 (5th Cir. 1998); Hat Ranch, Inc. v. Babbitt, 932 F. Supp. 1 (D. D.C. 1995).

[45] The United States could, of course, also have conveyed that servient estate in any particular instance.

[46] Leisnoi v. United States, 170 F.3d 1188 (9th Cir. 1999); 267 F.3d 1019 (9th Cir. 2001).

if the United States disclaims the contested interest, that is likely to end the suit under the QTA.

The QTA was enacted before FLPMA, but also refers to disclaimers. The statute provides that in a QTA lawsuit, the United States may disclaim all interest in the "real property or interest therein" at any time prior to the actual commencement of the trial regarding the property in question and if that disclaimer is confirmed by order of the court, further jurisdiction of the court over the title dispute ceases unless there is an independent ground for jurisdiction.[47] There are few cases involving QTA disclaimers, but they indicate that usually confirmation of a disclaimer by a court is a "formality."[48] However, some cases have indicated that a court might refuse to confirm a disclaimer of interest in some circumstances, *e.g.* if a disclaimer was not made in good faith.[49]

The relationship of the filing of a disclaimer by the United States in a QTA suit to other possible grounds for action against the United States is not clear, but a disclaimer may not be dispositive of other causes of action even if it may terminate the QTA suit.[50]

How courts might view the use of § 315 disclaimers as part of an administrative process for validating R.S. 2477 rights of way is difficult to predict, and whether and

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[47] 28 U.S.C. § 2409a(e).

[48] Lee v. United States, 629 F. Supp. 721 (D. Alaska 1985)(*amended opinion*), *aff'd* 809 F.2d 1406 (9th Cir 1987), *cert. denied* 484 U.S. 1041 (1988).

[49] LaFargue v. United State, 4 F. Supp. 2d 580 (E.D. La. 1998). In LaFargue, however, the United States had conveyed the property interest in question (a pipeline easement) after suit was filed, and the court seems to have concluded that § 2409a(e) did not remove the jurisdiction of the court either because in the 5th Circuit the time of any jurisdictional inquiry was the date a complaint was filed, or because although the United States characterized its action as a disclaimer, the court did not find a quitclaim conveyance to be a disclaimer contemplated by § 2409a. Other courts have indicated that the circumstances in which a disclaimer is issued may be considered: arguably, a disclaimer must be made in good faith and not with intent to "whipsaw" a plaintiff or avoid a resolution of the title dispute, or a court may refuse to confirm a disclaimer. See Lee v. United States, *supra*, and W.H. Pugh Coal Co. v. United States, 418 F. Supp. 538, 539 (E.D. Wis. 1976).

[50] See Leisnoi, Inc. v. United States, 313 F.3d 1181, (9th Cir. 2002) in which the court affirmed the decision of the district court that the filing of a disclaimer, which the court confirmed, deprived the district court of further jurisdiction and it dismissed as moot the motion of third party, Stratman, to intervene. Despite the fact that there arguably were grounds to question the propriety of the disclaimer, the appellate court stated that the decision whether to file a disclaimer was entirely the prerogative of the United States. However, the court also noted that the remaining challenges by Stratman to the merits of the district court's judgment were beyond the court's jurisdiction in the appeal from a denial of intervention. Another court characterized Donnelly v. United States, 850 F. 2d 1313 (9th Cir. 1988) as holding that "while the United States' disclaimer divested the court of jurisdiction over the Quiet Title Act claim, it did not divest the court of jurisdiction over APA-based claims." Camp v. Bureau of Land Management, 17 F. Supp. 2d 1167, n. 2 1171 (D. Or. 1998). The court noted at 1170 that there was no indication that the disclaimer in that case was "invalid or otherwise not in good faith."

on what grounds a court might scrutinize a disclaimer issued under §315 are issues beyond the scope of this report.

Discussion.

Many states enacted laws that required counties to determine which roads (including highways that were constructed on unreserved federal lands) were accepted for public use and maintenance (and liability).[51] Therefore, the status of many roads was clear well before the 1976 repeal of R.S. 2477. The status of others might not be as clear. "Roadless" reviews and other actions may have begun the 12-year statute of limitations period under the QTA and the previous disclaimer regulations, such that more than 12 years have now passed. (See the section of this report on statute of limitations issues.) If so, the amendments to the disclaimer regulations, by excepting states from the statute of limitations and broadly defining "state," could work a significant change with respect to the ability of counties and governmental entities to raise R.S. 2477 claims – enabling those claimants to now pursue claims administratively in instances where they would not have been able to do so before the amendments.

The original § 315 regulations reflect some of the elements of the QTA (see, *e.g.*, the references to security interests, water rights, or Indian lands that are not in FLPMA, but are in QTA[52]), and the materials accompanying the new regulatory changes refer to making the FLPMA disclaimers consistent with the QTA. As discussed, the original regulations barred all claims brought 12 years after the claims had accrued. The amended regulations broaden those who can apply for FLPMA disclaimers and avoid the 12-year limitation – significant departures from the QTA. The new § 315 regulations establish a new administrative forum for establishing R.S. 2477 rights – a forum that need not parallel the QTA, but which may be controversial, both because the standards that will or should govern the determination of the validity of such claims are unclear (and therefore whether the United States does or does not have an interest in a particular right of way is unclear), and because the consequences of recognition of R.S. 2477 claims can be so significant to the surrounding federal lands and communities.

Other issues may also be raised. Section 315 authorizes disclaimers of the "record title" of the United States in the property being disclaimed, and it can be asked what the "record title" of the United States is in the context of RS 2477 disclaimers. For most of the West, it appears that the record title of the United States would be the title to the public domain lands obtained by the United States through relevant treaties. That title would appear to consist of all the property rights encompassed in full fee title. Other questions are – given that the record title of the United States usually is full fee title – whether less than a full title interest may be disclaimed under § 315 at all, and whether the rights of way under R.S. 2477 are such an interest.

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[51] See, *e.g.* 1877 Laws of Wyo. p. 135 and 1886 Laws of Wyo., ch. 99; Ariz. Rev. Stat.s, §§ 2736, 2760 (1887); Idaho Code, §§ 40-501 (pre-1985), 31-805; Mt. Code Ann. § 7-14-2101 (2001); South Dakota Codified Laws, §§ 31-3-1 and 31-3-2 (1984 Rev.).

[52] 43 C.F.R. § 1864.1-3.

Section 315 authorizes the Secretary to issue a "document of disclaimer of interest or interests" in any "lands." As a general matter, "interest" could mean a general focus of human attention, or it could be used to refer to a right, title, or legal share in real property.[53] From the rest of the section, its purpose, and the references to recordation and to "record interest," it seems clear that property interests are the subject of the section. Furthermore, by referring to disclaiming "an interest or interests," it appears that less than a full fee title can be disclaimed under § 315 in appropriate circumstances. For example, given the complex history of mineral reservations, the United States in some circumstances may wish to disclaim the mineral estate.[54] In addition, many statutes have authorized the acquisition of, or grants or conveyances of various types of less-than-fee "interests" in lands, including rights of way or easements, and the reference in § 315 to "an interest or interests in lands" seems to contemplate that the United States might, in suitable circumstances, disclaim these interests as well.

R.S. 2477 appears to grant an easement across the federal lands, and easements are a recognized property interest.[55] Considering that § 315 states that "a record interest of the United States may be disclaimed if it has terminated by operation of law or is otherwise invalid," it may be argued that it is only easements to which the United States has a record interest that can be disclaimed. For example, if the United States had at some time acquired an access easement across private lands for a particular use or purpose, but never in fact used it for that purpose, thereby raising the question of whether the easement had terminated, this could be characterized as a situation where there was a cloud on the title of the underlying land "attributable to the United States that a disclaimer of its record interest could help remove."[56]

In the context of R.S. 2477 rights of way, however, the "record title" of the United States appears to be the full fee interest obtained by the United States when it acquired the western territories. Therefore, if the United States were to disclaim an R.S. 2477 easement interest, the United States might be said to be disclaiming only one *part* of its record title (i.e. an interest) – a part that would have to be validated and surveyed in order to be described legally in order to be able to disclaim a recordable interest. It could be argued on the one hand that this is not the kind of disclaimer situation contemplated by § 315 because the interest being disclaimed is not the "record interest" of the United States.

On the other hand, it could be argued that the traditional way of envisioning property rights is to say that fee title is like a bundle of sticks, each of which represents some aspect of ownership and enjoyment, some or all of which may be conveyed. In the context of R.S. 2477 rights of way, the United States granted away

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[53] Black's Law Dictionary 812 (6th ed. 1990).

[54] See the second example of a disclaimer submitted with the letter to Susan D. Sawtelle, *supra*.

[55] 25 AM. JUR. 2D *Easements and Licenses in Real Property* § 1; 2 George W. Thomson, *Thompson on Real Property* § 315 (1980); Sierra Club v. Hodel, 848 F.2d 1068, 1083 (10th Cir. 1988).

[56] 43 C.F.R. § 1864.0-2(a).

one of the sticks in the property bundle – a highway easement– a "dominant" interest to use the underlying federal lands for a highway right of way, and the United States retained the "servient" estate – the rest of the bundle of sticks – over which the right of way would run. Under this line of argument, the United States would be disclaiming the easement interest it previously granted.

No examples of either a disclaimer of an easement interest in general or of any disclaimers involving R.S. 2477 have been provided by the Department of the Interior.[57]

Section 315 states that disclaimers may be used when it will "help remove a cloud on the title" of lands where a record interest of the United States has terminated "by operation of law." In the R.S. 2477 context, the Congress enacted an offer of a grant, but in some instances whether *as a factual matter* (rather than by operation of law) the grant was adequately and lawfully accepted and completed is unclear. This may be viewed as a question of whether, based on actions taken by parties other than the United States (as opposed to those "attributable to the United States"), title ever left the United States – a question that depends on both the facts of each case and on the criteria chosen to answer the question. If facts remain in dispute and the legal criteria applied are not clarified by rule-making, Congress, or the courts, some would argue that the QTA may be the more appropriate vehicle.

Certain policies of FLPMA may also caution against the use of disclaimers in the R.S. 2477 context at the current time. Congress itself has called attention to some of the FLPMA policy concerns. When Congress directed DOI to submit a report to Congress on R.S. 2477 issues, the committee report directed that validity determinations were to be "consonant with the intent of Congress both in enacting R.S. 2477 and FLPMA, which mandated policies of retention and efficient management of the public lands."

One of the major policy changes of FLPMA was to put in place a policy of retention of the remaining federal lands, unless as a result of the planning processes it is determined that disposal of a particular parcel will serve the "national interest."[58] "Uniform procedures" for any disposal of public land also are required.[59] On the one hand, it could be argued that the issuance of a disclaimer is not a conveyance, that the R.S. 2477 rights of way were "disposed of" long ago, and therefore , these FLPMA policies are not implicated by disclaimers of any interest of the United States in the rights of way now. On the other hand, given the controversy surrounding the appropriate standards to be applied to validating such rights of way, some may

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[57] The Department of the Interior has produced some examples of disclaimers that involved less than a full fee interest, but none that disclaims a right of way. The Department has provided examples of disclaimers of the reversionary interest of the United States in conditional rights of way.

[58] 43 U.S.C. § 1701(a)(1).

[59] 43 U.S.C. § 1701(a)(10).

advocate that a conservative interpretation of the use of §315 is appropriate.[60] FLPMA requires that "in administering public land statutes and exercising discretionary authority granted by them," the Secretary is to "establish comprehensive rules and regulations after considering the views of the general public ...."[61] The Secretary has not established such rules with respect to reviewing R.S. 2477 claims.

Regulations "Pertaining To" R.S. 2477.

Congress has required that regulations "pertaining to" R.S. 2477 not be effective until Congress has approved them. Section 108 of the 1997 Omnibus Appropriations Act, Pub. L. No. 104-208 states:

> No final rule or regulation of any agency of the Federal Government pertaining to the recognition, management, or validity of a right-of-way pursuant to Revised Statute 2477 (43 U.S.C. 932) shall take effect unless expressly authorized by an Act of Congress subsequent to the date of enactment of this Act.[62]

Similar statutory language was deleted from the Interior Appropriations Act for FY 1998 in reliance on the assertion that the language in the 1997 Act was permanent law and hence an additional enactment was unnecessary.[63] There have been no further statutory prohibitions since, and no further attempts at direct R.S. 2477 regulations.

Assuming that § 108 is permanent law, a basic issue is whether the disclaimer regulations are covered by § 108 – i.e. whether they "pertain to" R.S. 2477. The Department looks to the legislative history of § 108 to conclude that the Congress intended the Department to acknowledge rights of way:

> Congress enacted section 108 to prevent the Department from promulgating final rules and regulations setting out specific standards for R.S. 2477 rights-of-way. *See* H.R. Rep. No. 104-625, at 58 (1996). Instead, it appears that Congress itself wanted to enact legislation defining the key terms and scope of grants for R.S. 2477 rights-of-way. The House Committee on Appropriations stated:
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> > [T]he public interest will be better served if these grants [for highway rights-of-way across Federal land] to States and their political subdivisions are not put in jeopardy by the Department pending Congressional clarification of these issues. [Then] Section 109 does not limit the ability of the Department to acknowledge or deny the

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[60] It is also the policy of the government that there must be some authority for the disposal of federal property. *See* 18 U.S.C. § 641, which contains criminal penalties for the unauthorized disposal of federal property. Clearly R.S. 2477 granted the highway rights of way interest. The standards for ascertaining when such rights of way are valid and the grants legally completed, however, are not clear. Where the legal standards are unclear and the policy interests polarized, some may question the appropriateness of using the disclaimer process.

[61] 43 U.S.C. § 1701(a)(5).

[62] Pub. L. No. 104-208, § 108, 110 Stat. 3009-200 (1996).

[63] See H.R. Rep. 105-337 at 73-74 (1997). The Report indicates that Congress was relying on the Opinion B-277719 of the Comptroller General dated August 20, 1997.

> validity of claims under RS 2477 or limit the right of grantees to litigate their claims in any court. *Id.*.[64]

The § 108 statutory language sets up a situation where the Secretary is not to finalize regulations establishing standards by which to validate R.S. 2477 claims, yet the report refers to the Department nonetheless being able to acknowledge or deny such claims,[65] an ambiguity that might lead to challenges to any such validations or rejections.

In order to minimize R.S. 2477 determinations until Congress acted to clarify how such rights of way were to be validated, the January 22, 1997 policy on R.S. 2477 instructed the BLM to defer processing R.S. 2477 claims except in cases where there is a "demonstrated, compelling, and immediate need to make such determinations," and the Forest Service followed suit. This meant that few determinations would be made, pending congressional clarification, and disputes involving R.S. 2477 rights of way were primarily to be determined by the courts.

The current Administration is taking a new approach that does not involve rulemaking to set out validity standards – such rules could trigger the prohibition of § 108 – but is an approach that also could greatly expand the number of claims that may be validated. This approach will be implemented through changes to the procedures for issuing disclaimers. As discussed, the Department seems to view § 108 as aimed only at preventing rules that set out specific standards for R.S. 2477 rights of way,[66] and therefore as unrelated to disclaimer rule changes which may or may not impact R.S. 2477 rights of way. However, the actual wording of § 108 appears to prohibit all regulations that "pertain" to R.S. 2477. The materials explaining the proposed changes to the disclaimer regulations indicated that the disclaimers might be a part of a new agency adjudication process to clear up R.S. 2477 claims,[67] and the Forest Service stated that the disclaimers could be used for R.S. 2477 rights of way determinations and that "[c]urrently there is no administrative process available for states or land management agencies like the Forest Service to resolve such title claims; the process is time consuming and requires expensive litigation in Federal Courts...."[68]

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[64] Letter to Susan Sawtelle, *supra*, at 3.

[65] Later committee report language indicates that § 108 sought to reserve to Congress approval of alternatives to processing R.S. 2477 claims under the QTA. See discussion of S. Rep. No. 105-160 (1998) in United States v. Garfield County, 122 F. Supp. 2d 1201, 1236 (C.D. Ut. 2000). However, H.R. Rep. No. 104-625 at 57-58 (1996) states that the language "does not limit the ability of the Department to acknowledge or deny the validity of claims under R.S. 2477 ...."

[66] H.R. Rep. 104-625, at 58 (1996).

[67] 68 Fed. Reg. 497.

[68] 68 Fed. Reg. 499.

The Department reports there have been only 62 disclaimers issued under § 315 since its enactment in 1976,[69] and none involved a disclaimer of an easement or involved rights of way claims under R.S. 2477.[70] However, as a result of the broad definition of "state" in the new disclaimer regulations, more claimants may now be able to avoid the 12-year limitation that appeared in the previous disclaimer regulations, which could result in many more applications for § 315 disclaimers related to R.S. 2477 rights of way. The expansion of the meaning of "state" in the amended disclaimer regulations now allows counties and other entities to apply for disclaimers, even if they could not do so under the previous disclaimer regulations or the QTA. In commenting on the proposal, some counties indicated an awareness of the opportunity, objecting to the costs that might result from their expected "hundreds" of filings that could be involved in some counties.[71]

More recently, the Utah MOU expressly recognizes that additional agreements will be completed with counties.[72] It is not clear whether the 1997 R.S. 2477 policy will be eliminated with respect to these counties, or what validation criteria will be used in implementing any future agreements. Other states have indicated that they will seek agreements, and whether the terms of those agreements and the criteria to be applied will differ from previous agreements is not known. The policies of FLPMA contemplate uniformity and consistency with respect to the management of the federal public lands in general and with respect to disposal in particular and some may argue that these policies weigh against having varied criteria for validating R.S. 2477 rights of way.

In as much as the disclaimer regulations have been amended in a manner that appears to expand the opportunity for those entities most likely to claim R.S. 2477 rights of way to do so, that the Utah MOU indicates that agreements will be negotiated with counties directly, and that there are indications that at least hundreds of claims are now likely to be filed,[73] it could be argued that the new disclaimer

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[69] 68 Fed. Reg. 498.

[70] The Department has provided examples of disclaimers involving less than fee interests and examples of disclaimers of the reversionary interest of the United States in conditional rights of way.

[71] 68 Fed. Reg. 499-500, referring to comments of Gilpin County, Colorado, Valley County, Idaho, and San Bernadino County, California. In response, BLM noted that it may waive the fees.

[72] Paragraph 3 of the MOU states that: "The State of Utah, or any Utah county, shall submit a request to initiate the Acknowledgment Process ...." Paragraph 7 states: " ... the Department recognizes that other interested states and counties may wish to submit proposed MOU's for consideration by the Department that are generally consistent with the principles set out in this agreement."

[73] As to potential R.S. 2477 claims in Utah alone: "[e]stimates of claims range from 2,000 to more than 10,000, but 5,000 seems to represent the generally agreed figure." Amicus Brief of Natural Resources Defense Council in Southern Utah Wilderness Alliance v. Bureau of Land Management, No. 01-4009 (10th Cir.) n.11, at 20. (Appeal dismissed as premature.). In 1993, Alaska undertook to identify R.S. 2477 rights of way in that state (Alaska Stat. § 19.30.400(b)), identified 1,899 trails and concluded that about 560 qualified.

(continued...)

regulations are intended to provide a means for claimants to assert R.S. 2477 claims, that they "pertain" to R.S. 2477, and therefore must be approved by Congress before becoming effective.

The Department has asserted that interpreting Pub. L. No. 104-208 so as to prohibit the use of disclaimer regulations would partially repeal § 310 of FLPMA (the rulemaking authority) and § 315, and that repeals by implication are not favored by the courts.[74] However, it could be argued that a requirement by Congress that regulations on a particular subject must be approved by an act of Congress does not repeal the general rulemaking authority. And, assuming that certain amendments to § 315 disclaimer regulations were found to be so tailored as to pertain primarily to the R.S. 2477 context and therefore not effective without congressional approval, this would not necessarily repeal the general authority to utilize disclaimers.

In sum, the new disclaimer regulations present at least two questions: 1) whether the rule amendments, by significantly expanding the use of disclaimers to process R.S. 2477 rights of way are a proper use of the § 315 authority; and 2) assuming that the no-R.S. 2477-regulations language in Pub. L. No 104-208 is still in effect, whether the new changes to the disclaimer regulations "pertain to" recognition and validity of R.S. 2477 rights of way within the meaning of Pub. L. No. 104-208, and, therefore, must be approved by Congress.

The Utah Memorandum of Understanding

The connection between the recent amendments to the disclaimer of interest regulations and R.S. 2477 rights of way has recently been clarified by the execution of a Memorandum of Understanding (MOU) on April 9, 2003, between the Secretary of the Interior and the state of Utah to establish an "acknowledgment process" for recognizing some R.S. 2477 rights of way in that state. It is expressly stated in paragraph 4 of the MOU that the acknowledgment process that the Department "shall use" to acknowledge eligible roads is "FLPMA's recordable disclaimer of interest process." "The Utah State Director of the Bureau of Land Management will issue a recordable disclaimer of interest if the requirements of the applicable statutes and regulations, and the terms of this MOU, have been satisfied."

The current MOU is to apply to only some of the many claims Utah may have. For example, the MOU precludes consideration of rights of way within congressionally designated Wilderness Areas or Wilderness Study Areas designated on or before October 21, 1993, under Section 603 of FLPMA (thereby facially eliminating any that might result from the wilderness reevaluation conducted by Secretary Babbitt); roads that lie within the boundaries of any unit of the National Park System (although most national monuments are within the National Park System, the Grand Staircase-Escalante National Monument is not – because it is

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[73] (...continued)
In 1998 the Legislature declared these "available for use by the public." (Alaska Stat. § 19.30.400(a)(c)(d).) *Id.* at 21.

[74] 68 Fed. Reg. 497 (January 6, 2003).

managed by BLM, and hence it is not protected from claims under the MOU); roads within a unit of the National Wildlife Refuge System; or roads administered by another agency unless that agency consents to the use of the Acknowledgment Process.

The MOU does not set out the criteria by which the validity of claimed rights of way will be determined. As discussed in connection with the analysis of § 108 of Pub. L. No. 104-208, *supra*, this may be to comport with the desire of Congress to itself legislate regarding standards for validating R.S. 2477 claims. However, the subtitle of the MOU refers to State and County "Road" Acknowledgment. The word "road" is footnoted as follows: "[F]or purposes of this MOU, the terms "A road" and "A highway" shall be deemed synonomous." (sic) The R.S. 2477 grant was for the "construction of highways across public lands not reserved." Arguably, the equating of highway and road in the title of the Utah MOU eliminates one major issue – that the 1866 grant was for "highways" and not all "roads." There is no elaboration in the MOU on how "construction" or "not reserved" will be interpreted. It is stated that eligible roads are those: (1) that existed prior to enactment of FLPMA and which "are in use at the present time;" (2) identifiable by centerline description or other appropriate legal description; (3) documented by information sufficient to support a conclusion that the road meets "the legal requirements of a right-of-way granted under R.S. 2477;" and requires that (4) "the road was and continues to be public and capable of accommodating automobiles or trucks with four wheels and has been the subject of some type of periodic maintenance."

Paragraph 7 states that the 1997 [Babbitt] policy is inapplicable to acknowledgment requests submitted in accordance with the MOU. This is presumably because that policy directed that R.S. 2477 rights of way only be validated in compelling circumstances. The 1997 policy repealed an earlier 1988 (Hodel) policy. There is no clarification in the MOU as to whether the Department is presuming that the 1988 policy will now guide these determinations in Utah, and therefore whether the 1988 definitions of construction and other elements will apply. Paragraph 7 states that other states *and counties* may wish to propose MOU's for consideration by the Department that are "generally consistent with the principles set out in this agreement." This raise the issue of whether certain R.S. 2477 validity policies and criteria will apply in some states or counties as to some claims, but not in others as additional states and counties negotiate various MOUs. Alaska reportedly has sought negotiations for an agreement[75] and other states may follow. It has been noted that the Utah MOU was negotiated and finalized without public participation, but it is unclear whether those that may follow will also be completed in this manner. If a closed and varied approach is taken with respect to the new disclaimer process for R.S. 2477 claims, resulting agreements may be challenged as not comporting with the policies of FLPMA that establish uniform management for the public lands and direct that the Secretary "in administering public land statutes

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[75] Sam Bishop, *State seeks federal agreement on historic trails*, FAIRBANKS DAILY NEWS-MINER, July 25, 2003.

and exercising discretionary authority granted by them ... establish comprehensive rules and regulations after considering the views of the general public."[76]

In a recent letter responding to a question posed by the General Accounting Office as to what additional guidance for processing applications for R.S. 2477 disclaimers might be available, the Department responded that the June 25, 2003 memorandum from the Deputy Director of BLM to the State Director of BLM in Utah was the only additional information expected to be issued.[77] The letter further states that the guidance implements BLM's authority under the disclaimer regulations and the MOU, was not subject to notice and comment rulemaking, and was not published in the Federal Register or elsewhere. The June 25, 2003 guidance summarizes some of the terms of the MOU and states that: "[t]hrough the MOU, Interior and the State have agreed to focus their limited resources on acknowledging these R.S. 2477 rights-of-way, that satisfy the statutory requirements of "construction" and "highway" under almost any interpretation of those statutory terms." However, as indicated above, there may be differences of opinion regarding essential elements.

The guidance sets out what should be in an application, including information demonstrating that the claimed right of way existed prior to October 21, 1976, and that it was in use as of April 9, 2003; and details as to appropriate description and location information. The application also should describe any "improvements such as bridges or culverts and other ancillary features existing *as of April 9, 2003*." (Emphasis added.) Why this is the relevant date to demonstrate whether improvements existed that might demonstrate "construction" of a highway, rather than October 21, 1976 – the date of statutory repeal of the grant – is not explained. Examples of helpful information mentioned in the guidance include: a narrative as to when the claimed right of way was constructed and supporting evidence; affidavits and/or other legally cognizable documents evidencing how the claimed right of way was established, its history and usage; and historic maps and photographs of the claimed right of way (pre-October 21, 1976). There is no information as to what criteria BLM will apply in evaluating this supporting evidence regarding adequacy of "construction."

Paragraph 5 of the MOU states that a disclaimed right of way will be of "a sufficient width to allow the State or county to maintain the character, usage, and travel safety of the road existing *at the date of this MOU*." The guidance indicates that a draft decision on an application will be prepared that will describe the right of way, including its width. "The width of the road asserted and the width of the road disclaimed shall not exceed the width of ground disturbance that existed for the road *as of April 9, 2003*, the date of the MOU." In this context too, no explanation is given as to why the date of the MOU is used to determine the baseline width of the road, rather than October 21, 1976.

Paragraph 6 of the MOU also states that "where the State or a county wishes to substantially alter a road that is subject to the Acknowledgment Process in a way that

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[76] 43 U.S.C. § 1701.

[77] Letter to Susan D. Sawtelle, *supra*.

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 other authorization is required under federal law ...."

The June 25th guidance discusses the public notice of an application that will be required (notice is required under both the statute and the regulations), and states that only the applicant or claimant has the right to appeal a decision to the Interior Board of Land Appeals, and that no other form of appeal is available to other persons. This reflects the disclaimer regulations which require publication of notice when an application is filed for a disclaimer,[78] but include no requirement for a comment period and allow only an applicant to appeal.[79] The June 25th guidance with respect to the implementation of the Utah MOU clarifies that the BLM, in consultation with the applicant, will review all timely comments received on a disclaimer application under that MOU and documentation will be placed in the case file responding to all "relevant, substantive issues" raised by commenters.

The Utah MOU may raise many questions as to the interpretation of the R.S. 2477 grant. An analysis of the history of the R.S. 2477 grants, the elements of the grant, and their administrative and judicial interpretation is essential to evaluating the Utah MOU and future actions of the Department regarding R.S. 2477.

R.S. 2477 Rights of Way

Background.

R.S. 2477 rights of way are those obtained under an 1866 statute reenacted as § 2477 of the Revised Statutes, an act that was later codified at 43 U.S.C. § 932 until it was repealed by uncodified § 706 of FLPMA. The 1866 statutory language was succinct, stating simply:

> *And be it further enacted,* That the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.[80]

Section 701 of FLPMA provided that valid rights of way in existence at the time of repeal in 1976 were to be recognized.[81] Similarly, section 509 of FLPMA states that nothing in Title V on rights of way "shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted, or permitted." Therefore, R.S. 2477 rights of way that were valid on October 22, 1976, the effective date of FLPMA and not abandoned thereafter, are protected. In most states it was clear

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[78] 43 C.F.R. § 1864.2.

[79] 43 C.F.R. § 1864.4.

[80] Act of July 26, 1866, ch. 262, 14 Stat. 251.

[81] Whether a right of way might have been abandoned before 1976 is another issue that might be involved in determining the validity of a particular right of way, but will not be discussed in this report.

which highway beds were valid because there had been some form of acceptance process under state law (typically a system of county maintenance) that made the roadways identifiable. In a few states, however (notably Utah and Alaska), there was no clear system of acceptance or recordation, and the existence and maintenance of some highways as a factual matter also was not clear and, as a result, which roadbeds might still qualify under the 1866 law has been controversial. The question is important because areas traversed by asserted R.S. 2477 highways may be disqualified from consideration for possible inclusion in the National Wilderness Preservation System, or might now be private lands, or lands in federal reserves (such as parks or national forests) created after the establishment of the rights of way. The proper interpretation of "construction," "highway," and "not reserved" in the federal grant, and the appropriate scope of the role of state law also have been controversial.

The historical context of the R.S. 2477 highway grant sheds light on the purpose and importance of the act in the settlement of the West. After the United States acquired the vast territories west of the Mississippi, Congress debated how best to encourage settlement of the lands. Rapid settlement was considered desirable both to secure the new lands from foreign encroachment and to speed the conveyance of lands from federal to state and private ownership in order to build the new nation. Although Congress enacted many piecemeal laws in furtherance of these goals, the westward movement outpaced Congressional efforts at comprehensive legislation. As a result, many explorers, developers, and settlers were already on the western lands by the time the first national homesteading and land laws were enacted. Comprehensive authority to manage the lands that remained in federal ownership was not enacted until the 20th century.

Mineral development is an example of an area in which federal law was playing "catch up" with events. Private individuals and companies entered upon the federal public domain lands in search of mineral wealth before there was legislated authorization to do so. Sometimes the influx of miners was quite significant, as when thousands of miners flocked to California after the discovery of gold in 1849. Because in many areas even territorial governments had not yet been established, claimants developed local rules and customs to govern the location (establishment) of mining claims and priorities among themselves.

In the 1860's, Congress enacted several pieces of legislation that both legitimized existing occupations of the federal lands and addressed their use prospectively. One of these was the Homestead Act of 1862,[82] which provided a system by which citizens could obtain title to public lands for agricultural settlement purposes. The Mining Act of 1866[83] provided an initial system for the recognition of mining claims and for obtaining title to the lands on which mining claims were established. Section 8 of the Act provided for the granting of rights of way, later became section 2477 of the Revised Statutes (R.S. 2477), and still later was codified as 43 U.S.C. §932 until its repeal in 1976 by § 706 of FLPMA.

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[82] Act of May 20, 1862, ch. 75, 12 Stat. 392, as amended.

[83] Act of July 26, 1866, ch. 262, 14 Stat 251.

R.S. 2477 highway grants played an important role in the development of the West. Many state and county roads in the West today originated as R.S. 2477 roads, and the validity of most of these roads was clearly established by 1976. However, it is essential to note that R.S. 2477 rights of way are not now, nor were they ever, the only type of road or access allowed across federal lands.[84] In any particular instance, a denial of a R.S. 2477 right of way is not dispositive of whether and how a road or other access was or may be recognized or permitted.

The next section of this report will examine the statute itself, the historical context in which it was enacted, and proffer a possible interpretation.

1866 Act.

It is a fundamental rule of statutory construction that every issue of statutory interpretation should begin with a close textual examination,[85] and that the "plain meaning" of a provision must guide its interpretation.[86] The provision reads:

> *And be it further enacted,* That the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

Succinct though the section is, it is clear that R.S. 2477 is a grant of a right of way for the "construction" of "highways" across public lands "not reserved." Several approaches to possible meanings of these terms will be discussed. Because the basic purpose of the grant -- for highways -- sheds light on what Congress might have meant by "construction," the term "highways" will be examined first.

In many discussions of R.S. 2477 (and in the Utah MOU), there is a tendency for speakers to use "highway" and "road" interchangeably, or to substitute other words such as "ways" or even "trails" and cease to refer to "highways" at all. Arguably, this can produce a significant shift in emphasis. There appear to be distinctions between "highway" and "road," and between "road" and still lesser terms, such that only "highways," the term chosen by Congress, should properly be used.

Like many words in the English language, the term "highway" has more than one meaning; unfortunately, two of its meanings have somewhat opposite

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[84] *See* Title V of FLPMA, which authorizes rights of way across federal lands, and Title XI and especially § 1110 on access to inholdings in the Alaska National Interest Lands Conservation Act of 1980 (ANILCA) (Pub. L. 96-487, 94 Stat. 2464), and other access statutes.

[85] Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197 (1976), quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975).

[86] *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 432 n.12 (1987); TVA v. Hill, 437 U.S. 153 (1978); W.Va. Div. Izaak Walton League, Inc. v. Butz, 367 F. Supp. 422, 429 (1973), *affirmed* 522 F.2d 945 (4th Cir. 1975).

connotations, as can be demonstrated from numerous treatises and other sources.[87] One of the principal definitions of the term is a generic one meaning *any* avenue of travel open to the public, including rivers and bridges.[88] Congress has used the term in this sense when it has referred to rivers being free highways.[89] With respect to ground transportation, the term "highway" similarly can mean any way open to the public, even including footpaths. The term especially has this meaning in English law when used in the context of prescriptive rights obtained by the public across private lands, and this meaning carried over into some American state law.[90]

Under English law, too, better roads -- those that were built up so as to be literally "high" ways, typically connected towns or market places, etc. and enjoyed better protection for travelers – were known as "King's (or Queen's) highways". This usage gave rise to the second meaning of highway as "a main or principal road forming the direct or ordinary route between one town or city and another, as distinguished from a local, branch, or cross road, leading to smaller places off the main road, or connecting two main roads."[91]

American dictionaries of common usage published near the time of enactment of R.S. 2477 indicate that this second meaning, that of principal public roads, was evidently the common American meaning at the time of enactment: highway was not defined in the generic sense as a travel corridor of any kind. Rather, the contemporaneous common usage dictionaries use "road" as the more generic term, and "highway" (at least in the context of ground transportation) to mean a more significant road. According to the 1865 Webster's Dictionary, a "road" is

> a riding, a riding on horseback, that on which one rides or travels, a trackway, a road, from *ridan*, to ride .... a place where one may ride; an *open way* or public

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[87] *See, e.g.*, the nearly contemporaneous BENJAMIN V. ABBOTT, DICTIONARY OF TERMS AND PHRASES (1879) which points out "[t]here is a difference in the shade of meaning conveyed by two uses of the word. Sometimes it signifies right of free passage, in the abstract, not importing anything about the character or construction of the way. Thus, a river is called a highway; and it has been not unusual for congress (sic), in granting a privilege of building a bridge, to declare that it shall be a public highway. [On the other hand], it has reference to some system of law authorizing the taking of a strip of land, and preparing and devoting it to the use of travelers. In this use it imports a roadway upon the soil, constructed under the authority of these laws."

[88] ABBOTT, *supra;* BYRON K. AND WILLIAM F. ELLIOTT, THE LAW OF ROADS AND STREETS 1 (1890).

[89] *See* Act of March 3, 1811, ch. 46, 2 Stat. 606, R.S. 5251, 33 U.S.C. §10, which states that "All the navigable rivers and waters in the former Territories of Orleans and Louisiana shall be and forever remain public highways."

[90] *See, e.g.*, JAMES KENT, III COMMENTARIES 548 *et seq.*

[91] JAMES A.H. MURRAY, A NEW ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 285 (1888). *See also* the definition of "highway" contained in ALEXANDER M. BURRILL, LAW DICTIONARY AND GLOSSARY 23 (2d Ed. 1867), which includes both the generic meaning of highway and the distinction of a King's highway as a "great road" that goes from town to town.

> passage; *a track for travel*, forming a communication between one city, town, or *place*, and another.[92]

According to the same 1865 dictionary, a "highway" is a public road, a way open to all passengers.[93] The 1860 Webster's Dictionary also indicates that "road" is the general term for any ground appropriated for travel, while "highway" is a significant type of road:

> Road: an *open way* or public passage; *ground appropriated for travel*, forming a communication between one city, town, *or place*, and another. The word is generally applied to highways, and as a generic term it *includes* highway, street and lane .... [94]

> Highway: a public road; a way *open to all* passengers; so called, either because it is a *great or public* road, or because the *earth was raised* to form a dry path. Highways open a communication from one *City or town* to another.[95]

Although the terms at times have been used interchangeably in discussing R.S. 2477, "highways" is the term used by Congress and it is used in conjunction with a requirement for construction. "Roads" appears to be the more general term and "highways" the more specific term. In other words, while all highways are roads, not all roads are highways, since, arguably, highways are public, and are more significant, built up roads.[96]

In which sense Congress used the term highway is obviously of great significance in interpreting R.S. 2477. Whatever the meaning of highway might be in other contexts, such as the determination of prescriptive rights, the question arising from its use in legislation is one of congressional intent. One writer noted the difficulties entailed by the use of the term highway in legislation:

> ...It is to be regretted that the term 'highways' has not been more accurately employed by the courts and text writers, for it is undeniably true that confusion, and sometimes injustice, has resulted from the use of this vague and ill defined term. Whether streets, ferries, railroads, rivers, or rural roads, are all meant to be included in a particular statute can not, in many instances, be asserted without a careful study of the entire statute and a full consideration of all the matters which the courts usually call to their assistance in ascertaining the meaning and effect of legislative enactments. A word capable of so many different meanings

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[92] WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 1143 (1865) (emphasis added).

[93] *Id.* at 627.

[94] WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 959 (1860) (emphasis added).

[95] *Id.* at 552 (emphasis added).

[96] This distinction is still evident in modern usage: the 1997 WEBSTER'S NEW COLLEGIATE DICTIONARY defines "highway" as "a public road, *esp. a main direct road*." (Emphasis added.)

> can seldom, of its own force and vigor, influence the judicial mind engaged in the work of ascertaining and enforcing the legislative intention.[97]

For reasons that will be developed, it appears likely that Congress in the 1866 Act used the term highway in the sense of a significant or principal road; namely, one that was open for public passage, received a significant amount of public use, was constructed or improved, and that connected cities, towns, or other places of interest to the public. It is interesting to note that some degree of constructed improvement inheres in this concept of a highway in order to support the greater public use that characterizes such roads. This comports with Congress' reference to granting rights of way for the "construction of highways". Of course, it must be kept in mind that highways in times past were not 6-lane paved roads, and that the historical amount and type of travel in an area and era must be taken into account in evaluating what qualifies as a principal, public, improved road.

There is no legislative history that sheds light on why Congress included the highway grant as section 8 in the Mining Act of 1866 (Act), or on exactly what Congress intended by the language of the section. The Mining Act of 1866 established a system for the recognition of several practices that had been taking place on public domain lands. Some of the provisions directly addressed mining, other provisions related to the use of water and to rights of way. These latter provisions addressed practices that were related to mining, but had implications beyond the mining context. The Act legitimized mining claims in accordance with federal laws or regulations, state and local law, and even the local customs of miners, and provided that claimants could obtain full title to the lands on which mining claims were located. Because water was necessary for some types of mining, the Act acknowledged rights to use water, if such rights were recognized by local customs, laws, and the decisions of courts, and § 9 of the 1866 act also addressed construction of rights of way for ditches for the transport of water.

The principal focus of the floor debates on the Act was on alternatives for disposing of the mineral lands of the United States, and section 8 was not discussed.[98]

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[97] Elliott, *supra*, at 6.

[98] Rep. Julian, Chairman of the House Committee on Public Lands had introduced H.R. 322, a bill to sell the mineral lands of the United States in 40 acre parcels. This bill as introduced and as reported did not contain a right of way provision. *See* H.R. Rep. 39-66, (1866). S. 257 also proposed a system that regulated the occupation of mineral lands, extended preemption rights to claimants, and allowed the acquisition of full fee title to lode claims. Section 8 was not in S. 257 as introduced, but was section 10 of the bill as reported from the Senate Committee on Mines and Mining. No committee report is available on this measure. Note that when section 5 of the final Act was proposed as an amendment on the floor of the Senate it was defeated by a vote of 21-10. Section 5 recognizes the operation of state law in defining certain aspects of miners' rights, including "easements". This provision was included in the final version. It is not known what was intended by state law allowing "easements", or whether any states enacted laws allowing access easements to mines on federal lands. The title of the Senate bill was amended to read: "A bill to legalize the occupation of mineral lands and to extend the right of preemption thereto."

When S. 257 reached the House, Rep. Higby attempted to have it sent to the

(continued...)

Therefore, in seeking clarification of the intent of Congress in enacting R.S. 2477, we must look primarily to the words Congress actually used and to the historical context in which they were enacted. While the issue is not free from doubt, a court -- faced squarely with the issue -- is likely to find that the understanding of Congress in 1866 was probably of highways in the sense of significant public roads, an interpretation supported by the historical context in which the 1866 Act was passed,[99] including other congressional enactments, as discussed below

Historical context.

The creation of roads and access were fundamental problems implicit in the surveying system the federal government used to divide and dispose of public lands. The federal government applied the same system of surveying since the Continental Congress passed the Land Ordinance of 1785, an act that was later re-enacted by the new federal government.[100] Under this system, a principal meridian, base, standard and guides were first measured and marked, and "townships" – squares six miles on a side – were surveyed. The townships were then divided into "sections" one mile on a side, each of which contained 640 acres (the amount of land allowed under the Stock-Raising Homestead Act of 1916). These sections were divided into halves (the 320 acres allowed under the Desert Land Entry Act of 1877), or further divided into quarters (the 160 acres allowed under the Homesteading Act of 1862), or smaller subdivisions allowed under certain other acts.

These sections and blocks available for settlement and disposal were absolute, that is each surveyed subdivision abutted the next one without access corridors intervening. This practice, combined with the fact that many sections of lands were granted to the states and other entities for school and other public purposes to spur development, resulted in "checkerboard" land patterns and meant that access needs were a pressing exigency. Congress did not resolve the issue, choosing instead to acquiesce in whatever access solutions developed on unreserved federal lands. Access problems typically were resolved among settlers as the local topography and circumstances indicated; usually, settlers simply created roads and ways across lands

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[98] (...continued)
Committee on Mines and Mining, but Rep. Julian succeeded in having it sent to his Committee on Public Lands, where it languished.

The Senate then amended H.R. 365, a bill to grant rights of way to ditch and canal owners in California, Oregon and Nevada, to substitute the text of S. 257. H.R. 365 did not originally contain a provision like section 8. That measure was sent to the House on a Saturday afternoon and was brought up under a rule precluding debate. Rep. Julian protested this "plot to obtain legislation under false pretenses" as a "reproach to public decency and common fair play". CONG. GLOBE, 39th Cong., 1st Sess. 4049 (1866). Rep. Julian attempted to amend the bill to substitute a system such as that in his bill, H.R. 322, again without a right of way section. This amendment was defeated and the Senate version was passed 73 to 37.

See also, the discussion of the enactment of the 1866 act in: PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 715-721.

[99] Ute Indian Tribe v. Utah, 521 F. Supp. 1072, 1080, 1087 (C.D. Utah 1981).

[100] Act of May 18, 1796, ch. 29, 1 Stat. 464.

as needed. Subsequent settlers took title subject to established roads and ways.[101] Later, as areas became more developed, access needs were resolved by negotiation and purchase of the necessary rights. Given the intermingled patterns of land ownership, establishment of roads was typically of mutual benefit, which apparently facilitated resolution of this difficulty that was inherent in the survey system. Territorial and state laws also played a role in the resolution of access and roads issues, as will be discussed.

A court has discussed the problem caused by the surveying system as follows:

> [The sections] touch at their corners and their points of contact, like a point in mathematics, are without length or width. If the position of the company were sustained, a barrier embracing many thousand acres of public lands would be raised, unsurmountable except upon terms prescribed by it. Not even a solitary horseman could pick his way across without trespassing. In such a situation the law fixes the relative rights and responsibilities of the parties. It does not leave them to the determination of either party. As long as the present policy of the government continues, all persons as its licensees have an equal right of use of the public domain, which cannot be denied by interlocking lands held in private ownership.[102]

In an 1890 case the Supreme Court declined to enjoin sheepherders from driving sheep across sections owned by plaintiffs in order to reach open public lands, stating:

> We are of the opinion that there is an implied license growing out of the custom of nearly a hundred years, that the public lands of the United States ... shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids this use ....
>
> The whole system of the control of the public lands of the United States as it had been conducted by the Government, under acts of Congress, shows a liberality in regard to their use which has been uniform and remarkable.[103]

The Court, in the course of distinguishing between access rights the federal government might have retained and those of settlers in the context of a federal land grant for the construction of a railroad, also stated:

> Congress obviously believed that when development came, it would occur in a parallel fashion on adjoining public and private lands and that the process of subdivision, organization of a polity, and the ordinary pressures of commercial and social intercourse would work itself into a pattern of access roads .... It is some testament to common sense that the present case is virtually unprecedented,

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[101] Surveyors were to note all existing roads and trails on their field notes and final surveys. *See* the 1889 instructions of the Commissioner of the General Land Office, in C. ALBERT WHITE, A HISTORY OF THE RECTANGULAR SURVEY SYSTEM 574 (1982).

[102] Mackay v. Uinta Development Co., 219 F. 116, 118 (8th Cir. 1914).

[103] Buford v. Houtz, 133 U.S. 320, 326-327 (1890).

> and that in the 117 years since the [railroad] grants were made, litigation over access questions generally has been rare.[104]

It is interesting to note that an 1895 Solicitor's opinion found that the government had always allowed miners to build access roads without either a permit or the payment of a fee:

> Since it has traditionally been customary for mining locators, homestead and other public land entrymen to build and/or use such roads across public lands other than granted rights-of-way as were necessary to provide ingress and egress to and from their entries or claims without charge, the question whether a fee may be charged for such use is not only of broad, general interest but to make such a charge now would change a long practice.
>
> ... Congress knew, when it enacted the mining laws, that miners necessarily would have to use public lands outside of the boundaries of their claims for the running of tunnels and for roads.
>
> The Department has recognized that roads were necessary and complementary to mining activities....[105]

The opinion did not mention section 8 of the 1866 Mining Act (R.S. 2477) as relevant to the discussion of mining road access. Furthermore, if the 1866 Act is read as granting individual access, this interpretation would controvert the universally recognized requirement that a way be public to be a highway.[106] It is arguable that the better interpretation is that creation of individual access was tolerated as a matter of course and that R.S. 2477 addressed public roads. If the 1866 Act is read to mean highways in the generic sense of all kinds and types of ways, including minor individual access ways, one could argue that the act was superfluous since the federal government at that time was allowing such use without requiring a grant or permit and did not attach any management significance to doing so. And if the 1866 provision was intended to legitimize all transit and access across the public domain, this would include individual access roads and trails that were not public.

However, the other meaning of "highways" -- as significant public roads -- arguably is more consistent with other measures Congress enacted that both addressed continued easy individual access on the one hand and the development of significant transportation corridors on the other.

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[104] Leo Sheep Co. v. United States, 440 U.S. 668, 686-687 (1979).

[105] Opinion of Edmund T. Fritz, Acting Solicitor, M-36584, 66 I.D. 361, 362, 364 (1959). The granted rights of way referred to are those for tram roads and other purposes under the act of January 21, 1895, 28 Stat. 635.

[106] See the definitions cited above and the section of this report on Administrative Interpretation.

In the Unlawful Inclosures of Public Lands Act of 1885, Congress regulated the fencing off of public lands (even when the fences were on private lands[107]) and prohibited the obstruction of "free passage or transit over or through the public lands".[108] This Act prohibits obstruction of *any* passage over the federal lands -- whether on established ways or not -- and is reflective of Congress' tolerance of such passage during the time of western settlement, an indication that a special statute on minor access ways was not required. If R.S. 2477 granted rights of way only for highways in the sense of significant public roads, the 1885 Act serves more of a function because there would be a need for federal protection of all other free passage and transit across the public lands.

During the time of settlement of the new national lands to the West, Congress also provided land grants for the “construction” of many transportation routes by canals, railroads, or "wagon roads". These grants, including those made for wagon roads, typically were for the construction of particular routes between named destinations, often with some legislated detail as to the type and timing of construction. Such grants typically included grants of lands sufficient both for the bed of the transportation route itself, and extra lands to be sold so that the proceeds could be put toward completing the work. If construction did not occur, there typically was language providing for the reversion of the lands to the United States.

Several statutes enacted before 1866 provided for “construction” of "wagon roads," which were to be well constructed roads adequate for the movement of troops and the mail. Clearly construction of these roads entailed definite physical acts to improve the roadbeds, and Congress at times required them to be built to very substantial standards, involving considerable earth-moving activities, even to the extent of leveling hills.[109]

Some of these statutes provided simply that the roads were to be "public highways"; others stated that the road must remain a public highway "for the use of the government of the United States, free from tolls or other charge upon the transportation of any property, troops, or mails of the United States."[110] An 1866 statute established a process for the dedication of military roads in the District of Columbia as public highways. As noted above, roads suitable for the movement of

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[107] Camfield v. United States, 167 U.S. 518 (1897).

[108] Act of February 25, 1885, ch. 149, 23 Stat. 321, codified at 43 U.S.C. §§1061, 1063.

[109] For example, several acts specified an overall right of way 6 rods wide with the “road-bed proper to be not less than thirty-two feet wide, and constructed with ample ditches on both sides, so as to afford sufficient drains, with good and substantial bridges and proper culverts and sluices where necessary. All stumps and roots to be thoroughly grubbed out between the ditches the entire length of said road, the central portion of which to be sufficiently raised to afford a dry road-bed by means of drainage from the centre to the side ditches; the hills to be levelled and valleys raised so as to make as easy a grade as practicable.” Act of June 25, 1864, ch. 153, 13 Stat. 183.

[110] Act of July 2, 1864, ch. 213, 13 Stat. 355.

troops typically were well constructed; this statute simply provided a process for allowing use of the military roads by the public. [111]

It is important to reiterate that the problem of securing routine access and constructing minor roads throughout the federal public lands surveying system existed and had been resolved for almost a century before Congress enacted R.S. 2477. Before and after R.S. 2477, the federal government tolerated the creation of access ways and roads across open federal lands; settlement was the principal interest of the federal government in the eighteenth and nineteenth centuries, and allowing individual access was such a given that it was seldom discussed. Even after enactment of R.S. 2477, the principal work that reviews federal land grants does not discuss access issues, nor mention the 1866 provision.[112]

After enactment of R.S. 2477, Congress adopted many other rights of way provisions for various types of rights of way, especially with respect to crossing federal reservations. This potpourri of other rights of way acts argues again for an interpretation of the 1866 Act as *not* meaning generic ways of all types, but rather as referring to significant roads.

Before enactment of R.S. 2477, in addition to acquiescing in the creation of individual access, Congress had authorized and made land grants for the construction of transportation arteries, including large, well constructed roads in some instances. We have found only one land grant for a wagon road enacted after the enactment of the 1866 Act. It is arguable that, since the federal government continued to acquiesce in the creation of access ways to individual properties as settlers spread westward, perhaps R.S. 2477 was an express grant of rights of way for all more significant roads -- those "highways" that were to be open to the public, to serve as important connectors, and that were to involve some degree of construction to support such use.

In 1872, Congress revisited the mining issues and modified many of the provisions of the 1866 Act.[113] The 1872 Act did not change section 8 of the 1866 Act on rights of way, and there is no discussion of the section or its retention in the legislative history of the 1872 Act. In 1899, Congress enacted a provision of permanent law as part of an appropriations act:

> That in the form provided by existing law the Secretary of the Interior may file and approve surveys and plats of any right of way for a wagon road, railroad, *or other highway* over and across any forest reservation or reservoir site when in his judgment the public interests will not be injuriously affected thereby.[114] (Emphasis added.)

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[111] Act of May 9, 1866, ch. 76, 14 Stat. 45.

[112] THOMAS DONALDSON, THE PUBLIC DOMAIN: ITS HISTORY, WITH STATISTICS (1884). This work of 1,343 pages discusses only land grant wagon roads and railroads, but does not mention other roads.

[113] Act of May 10, 1872, ch. 152, 17 Stat. 91.

[114] Act of March 3, 1899, ch. 427, 30 Stat. 1214, 1233, codified before repeal at 16 U.S.C. §525 (national forests) and 43 U.S.C. §958 (reservoirs).

On the face of this provision, Congress arguably again used "highway" to indicate significant types of transportation corridors. The legislative history of the provision is inconclusive, but indicates that it was felt necessary to specify that the new rights of way were for railroads, because the Department did not construe the term highways as including railroads.[115] This is noteworthy because if 'highway' was generally understood to mean *all* public avenues of travel, rather than just significant land roads, it would include railroads. However, it would also have included wagon roads as well, so why Congress mentioned both highways and wagon roads is not clear.

In 1875 Congress granted a general right of way through the public lands to any railroad company for tracks, stations, etc.[116] Later statutes provided for the disposition of the lands underlying the railroad rights of way upon abandonment; both of these later statutes excepted "public highways" established within the railroad corridors from the disposal provisions that would otherwise apply.[117]

Section 603 of FLPMA in 1976 directed the BLM to conduct a wilderness suitability review of the large roadless areas under its management. Although "roadless" was not defined in the statute, the section by section discussion in the House report clarifies that:

> The word 'roadless' refers to the absence of roads which have been improved and maintained by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road ....[118]

The explanation set out in the Committee report was reflected in the regulations implementing the wilderness review, which defined roadless areas in part as areas within which there is no improved road that is suitable for public travel by means of

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[115] The discussion focused on a railroad issue, and its sponsor, Sen. Carter, indicated that the 1897 Organic Act for the national forests already authorized "highways" across national forests, but that the Secretary of the Interior had interpreted that as not including railroads. In fact, the act in question had authorized ingress and egress and "wagon roads" necessary to reach settlers' homes, but did not use the term highway. 32 CONG. REC. 2800 (1899).

[116] Act of March 3, 1875, ch. 152, 18 Stat. 482, codified at 43 U.S.C. § 934.

[117] Act of May 25, 1920, ch. 197, 41 Stat. 621, codified at 43 U.S.C. § 913; and Act of March 8, 1922, ch. 94, 42 Stat. 414, codified at 43 U.S.C. § 912. The former statute authorizes the railroads to convey "to any State, county, or municipality" any portion of the railroad right of way to be used as a public highway or street.

[118] H.R.Rep. 94-1163 at 17 (1976). A 1980 opinion by Deputy Solicitor Ferguson to Assistant Attorney General Moorman states that the transcript of the House Committee markup session reveals that Congressman Steiger of Arizona suggested the definition of "road" that appears in the House Report. Arizona is an arid state where "ways" can be created and used as roads merely by the passage of vehicles, and Congressman Steiger took some pains to draw the distinction between such a "way" and a "road" for wilderness purposes. The latter, he insisted, was any access route improved or maintained in any way, such as by grading, placing of culverts, or making of bar ditches. Transcript of Proceedings, Subcommittee on Public Lands of House Committee on Interior and Insular Affairs, Sept. 22, 1975, at 329-333.

four-wheeled, motorized vehicles intended primarily for highway use.[119] The Wilderness Inventory Handbook, prepared to assist personnel with completing the wilderness suitability inventory, adopted the Committee report language as the definition of "road," and also defined several other relevant terms in connection with evaluating roads.[120] Because other sections of FLPMA repealed R.S. 2477, Congress can be said to have been aware of R.S. 2477 when it used and commented on the term "roadless." If the more general term "road" in 1976 connoted to Congress a way that had been "improved and maintained by mechanical means to insure relatively regular and continuous use," this usage is consistent with the use in 1866 of the more specific term “highway” as a constructed and improved road that served as a significant public connector.[121]

Administrative and Judicial Interpretation of 1866 Act

Administrative interpretation.

The federal government historically seems to have adopted a position of benign neglect of R.S. 2477 that probably reflects the acquiescence of the United States on access issues during the settlement of the West and the pre-FLPMA absence of coherent policies and authority for the management of the public lands. No

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[119] 43 C.F.R. §19.2.

[120] USDI, Bureau of Land Management, *Wilderness Inventory Handbook* 5 (September 27, 1978) defined "Improved and maintained" as “Actions taken physically by man to keep the road open to vehicular traffic.” "Improved" does not necessarily mean formal construction. "Maintained" does not necessarily mean annual maintenance. "Mechanical means" -- Use of hand or power machinery or tools. "Relatively regular and continuous use" -- Vehicular use which has occurred and will continue to occur on a relatively regular basis. Examples are: access roads for equipment to maintain a stock water tank or other established water sources; access roads to maintained recreation sites or facilities; or access roads to mining claims. Additional explanatory material also stated that: “A route is not a road if no tools -- either hand or machine -- have been used to improve or maintain it. The intent of the definition of the phrase ‘mechanical means’ in the inventory handbook is that it refers to hand machinery, power machinery, hand tools, or power tools. Sole use of hands or feet to move rocks or dirt without the use of tools or machinery does not meet the definition of ‘mechanical means.’” Organic Act Directive No. 78-61, Change 2, at 4 (June 28, 1979).

[121] The court in Sierra Club v. Hodel, 848 F.2d 1068, 1082 (10th Cir. 1988), overruled on other grounds, Village of Los Ranchos de Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992) stated that "[i]t is incongruous to determine the source of interpretative law for one statute based on the goals and policies of a separate statute conceived 110 years later." In this instance, the court was considering an argument for current uniform federal rules as to scope of all federal rights of way; a goal of the Federal Land Policy and Management Act of 1976 (FLPMA). The court was saying that this goal does not guide interpretation of the intent of the 1866 grant of highway rights of way. This is a different issue from whether a plausible interpretation that harmonizes and gives full meaning to both the 1866 Act on "highways" and to FLPMA, which both repealed the 1866 Act and dealt with "roadless areas", should be preferred over an interpretation that does not encompass both statutes.

application or approval from the government was considered necessary to perfect an R.S. 2477 grant, and the grant did not need to be recorded.

Although we know of no contemporaneous agency interpretation of the Act,[122] an 1898 decision of the Secretary determined that dedication of highways along section lines, without construction, did not complete a grant.[123] A 1938 regulation that was repeated over time simply stated that a highway grant became effective "upon the construction or establishing of highways in accordance with the State laws."[124] We note, however, that this position retains the crucial statutory elements of "construction" and "highways," and does not necessarily mean that state interpretations that vitiate or eliminate these elements are valid. This issue will be more fully discussed later.

Too much can be read into this silence of the federal government. In reviewing the cases, it is important to distinguish those decided before FLPMA, when the federal government had much less interest in the validity or existence of rights of way of *any type* across its lands,[125] and the statutory management authority over the remaining public domain lands was piecemeal. For much of the time before the enactment of FLPMA it may well simply not have mattered whether a particular right of way was a highway that qualified under R.S. 2477, or was some other type of road for which some other federal permission could readily be demonstrated or obtained, since all forms of access and settlement were being encouraged.

Over the years, federal policies increasingly stressed retention of the public lands in national ownership and the affirmative management of the remaining public domain lands to conserve and protect the lands and resources. In 1976, FLPMA expressly recognized a policy of retention of the remaining public lands,[126] repealed many of the piecemeal right of way statutes, including the 1866 Act, and replaced them with a new comprehensive process for the permitting and conditioning of rights of way.

Because R.S. 2477 was a federally enacted grant, its interpretation raises questions of federal law.[127] However, federal law may incorporate state law as part of the law to apply, and the extent to which this may be true in the R.S. 2477 context has caused much controversy. State law also clearly plays a role, especially in evaluating whether and when a state accepted a right of way grant.

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[122] For the Department's overview of the history of administrative interpretation of R.S. 2477, see the United States Department of the Interior *Report to Congress on R.S. 2477; The History and Management of R.S. 2477 Rights-of-Way Claims on Federal and Other Lands*, June, 1993.

[123] 26 L.D. 446 (1898).

[124] Par. 55, Circ. 1237a, May 23, 1938; 43 C.F.R. §244.55.

[125] *See* Wilkenson v. Dept. of Interior of United States, 634 F. Supp. 1265, 1274-1275 (D. Colo. 1986).

[126] 43 U.S.C. §§1701(a)(1); 1732(b).

[127] Hughes v. Washington, 389 U.S. 290 (1967); United States v. Oregon, 295 U.S. 1, 27-28 (1935).

After the repeal of R.S. 2477, the Bureau of Land Management issued a regulation permitting persons, or State or local governments who had constructed public highways under the authority of R.S. 2477 to file maps with BLM showing the locations of highways claimed to be valid existing rights. The regulation states that the filings were not conclusive as to the existence or non-existence of the highways (leaving that final determination to the courts), but were to facilitate management of and planning for the public lands. As originally proposed, the regulation set out a 3-year period for such filings, but this time limit was eliminated in the final regulations in 1982.[128]

In 1980, a letter written by a Deputy Solicitor of Interior opined on the standards to be applied in determining whether R.S. 2477 highways were established.[129] This analysis noted the inconsistent judicial decisions on the subject and the fact that they did not "come to grips" with the central issues of what was offered by Congress and to whom, and how such rights of way were to be perfected. The opinion asserts that whether a particular highway has been legally established remains a question of federal law, and that use of the term "construction" means that some actual building of a highway was necessary to comply with the terms of the grant. In this regard, the opinion noted that not requiring actual construction would be potentially unmanageable because otherwise innumerable jeep trails, etc. might qualify as public highways.[130] R.S. 2477 claimants, however, have argued that what might be desirable for post-1976 federal land management purposes is not relevant to determining what constituted valid pre-1976 acceptance of the 1866 grant, and that Interior cannot retroactively set standards for establishing highways long since vested.[131]

The Ferguson opinion, in addressing the 1866 granting language, concluded that "construction" must be construed as an essential element of the grant offered by Congress or else Congress' use of the term is meaningless and superfluous. "The

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[128] The initial proposed regulations for 43 C.F.R. §2802.3-6 at 44 Fed. Reg. 58106, 58118 (October 9, 1979) required the filing of maps within three years, noting that this filing would protect holders against other claims or changes in land ownership. The final regulations merely provided an opportunity to file within three years. 45 Fed. Reg. 44518, 44521, 44531 (July 1, 1980). More streamlined regulations were proposed that eliminated §2802.3-6 and the map filings. 46 Fed. Reg. 39968-69 (August 5, 1981). The new final regulations for 43 C.F.R. §2803.5 at 47 Fed. Reg. 12568, 12570 (March 23, 1982) provided an opportunity for filing maps as a means of resolving road status, and no time limit was imposed.

[129] Letter from Frederick Ferguson to Assistant Attorney General James Moorman, April 28, 1980 addressing R.S. 2477 issues (Ferguson opinion), reprinted in U.S. Department of the Interior, REPORT TO CONGRESS ON R.S. 2477: THE HISTORY AND MANAGEMENT OF R.S. 2477 RIGHTS-OF-WAY CLAIMS ON FEDERAL AND OTHER LANDS, Appendix II, Exhibit J, June 1993.

[130] Ferguson opinion, at 7.

[131] Appellant counties opening brief in Southern Utah Wilderness Alliance v. BLM, Appeal No. 01-4009 (10th Cir.) at 43; *appeal dismissed as premature*, 69 Fed. Appx 927, 2003 U.S. App. LEXIS 13208 (10th Cir. June 27, 2003).

states could accept only that which was offered by Congress and not more."[132] The Ferguson opinion further stated that construction ordinarily means more than mere use, and entails actual building such as grading, paving, placing culverts, etc. to prepare the highway for actual use.[133] Given the statutory requirement of construction, the phrase in the BLM R.S. 2477 regulations referring to construction of highways 'in accordance with the State laws' "must mean that a state could lawfully require more than mere construction of the highway in order to perfect the R.S. 2477 grant; *i.e.*, 'construction' is the minimum requirement of federal law but the State could impose on itself additional requirements in order to perfect a grant under R.S. 2477."[134]

In the initial regulations of the Department implementing the new FLPMA Title V rights of way, the Department called upon persons "who had constructed public highways" to submit maps locating such highways for notation on the records of the Department in order to facilitate the new federal planning and management mandated by FLPMA. Here again, the Department continued to use the same phrasing – that which is required by the relevant statute. In addition, the Department incorporated the concept of road improvement *by mechanical means* set out in a FLPMA committee report as the analysis of what could constitute a 'road' under §603 of FLPMA, pertaining to roadless areas and wilderness reviews. Again, to require less for a right of way to qualify as a highway than is required to be a road arguably is inconsistent.

A Departmental Policy was issued in 1988 that differed significantly from the Ferguson Opinion.[135] According to the June 1993 Task Force Report, circumstances in Alaska drove the new policy on R.S. 2477: "The 1988 DOI policy, attempting to account for the perceived uniqueness of the Alaska situation, put forward loose criteria for R.S. 2477 claims and applied these criteria to all federal lands under DOI jurisdiction in all 30 public land states."[136] Among the 1988 criteria was one that set out minimal construction requirements and stated that removal of rocks and vegetation by hand, or the mere passage of vehicles might be sufficient.

> Construction is a physical act of readying the highway for use by the public according to the available or intended mode of transportation -- foot, horse, vehicle, etc. Removing high vegetation, moving large rocks out of the way, or filling low spots, etc., may be sufficient as construction for a particular case.[137]

To the extent this statement means that the mere moving of rocks and vegetation by hand qualifies as construction, it could be argued that this does not comport with

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[132] Ferguson opinion, *supra*, at 9.

[133] Ferguson opinion, *supra*, at 5-7.

[134] *Id.* at 11.

[135] *Departmental Policy Statement on Section 8 of the Act of July 26, 1866, Revised Statute 2477 (Repealed), Grant of Right-of-Way for Public Highways (R.S. 2477)*, December 7, 1988 ("1988 Policy Statement" or "Hodel Policy").

[136] Task Force Report, at 23.

[137] 1988 Policy Statement at 2.

Congress's intent in granting rights of way for the construction of principal or significant roads. However, some argue that it does because, depending on the terrain and the time the right of way was established, the mere repeated passage of traffic with only slight modifications of the roadbed could suffice.

The 1988 Policy also stated that a qualifying highway could be a trail or a footpath, but did not include any analysis to support that position.

The 1994 proposed R.S. 2477 regulations defined "construction" as

> An intentional physical act or series of intentional physical acts that were intended to, and that accomplished, preparation of a durable, observable, physical modification of land for use by highway traffic. Where State law, in effect on the latest available date, further limits the definition of construction, these limits also apply.

"Highway" was defined as:

> A thoroughfare that is currently and was prior to the latest available date used by the public, without discrimination against any individual or group, for the passage of vehicles carrying people or goods from place to place. Where State law, in effect on the latest available date, further limits the definition of highway, these limits also apply.

"Public lands not reserved for public uses" and "unreserved public lands" were also defined at length, and in most pertinent part were stated to not include:

> (I) lands that were set aside, dedicated for specific purposes, withdrawn, or otherwise reserved from disposition under the public land laws by an Act of Congress, Presidential Proclamation or Executive Order, Secretarial Order, or classification actions authorized by statute that specified that the land would be used for a specific purpose or that prevented certain uses.

On January 22, 1997, then Secretary of the Interior Bruce Babbitt revoked the 1988 Policy and established a new, interim policy. Noting the congressional prohibition against final regulations going into effect without congressional approval, the Secretary instructed BLM to "defer any processing of R.S. 2477 assertions except in cases where there is a demonstrated, compelling, and immediate need to make such determinations." BLM could, however, accept claims and make recommendations to the Secretary and in doing so was to "examine all available documents and maps and perform an on-site examination to determine whether construction on the alleged right-of-way had occurred prior to the repeal of R.S. 2477 on October 21, 1976." No definition of construction was set out. In addition, the agency was to evaluate whether the alleged right of way constitutes a highway, which was stated to be "a thoroughfare used prior to October 21, 1976 by the public for the passage of vehicles carrying people or goods from place to place." "In making its recommendations, the agency shall apply state law in effect on October 21, 1976, to the extent that it is consistent with federal law." The agency was not to recommend approval of claims that did not comply with the requirements of applicable state law.

A proposal for legislation was also sent to Congress in August of 1997 that established a procedure for determining the validity of claimed R.S. 2477 rights of way and contained definitions. "Construction" was defined as:

> An intentional physical act or series of intentional physical acts that were intended to, and that accomplished, preparation of a highway by a durable, observable, physical modification of land for use by highway traffic.

"Highway" means:

> A thoroughfare that was prior to the latest available date used by the public, without discrimination against any individual or group, for the passage of vehicles carrying people or goods from place to place.

"Public lands not reserved for public uses" or "unreserved public lands" were defined in somewhat awkward syntax as meaning:

> lands owned by the United States that were available and open to the public under various public land laws that provided for disposition to the public, but lands that had not yet been set aside, dedicated, withdrawn, reserved, settled, preempted, entered, appropriated, or disposed of, or on which claims had not been located.

As part of the current litigation in *Southern Utah Wilderness Alliance v. Bureau of Land Management (SUWA v. BLM)*,[138] the court allowed BLM to make initial determinations as to the validity of the rights of way claimed by several counties in Utah.[139] For purposes of making those determinations, BLM applied the following with respect to construction:

> Some form of mechanical construction must have occurred to construct or improve the highway. A highway right-of-way cannot be established by haphazard, unintentional, or incomplete actions. For example, the mere passage of vehicles across the land, in the absence of any other evidence, is not sufficient to meet the construction criteria of R.S. 2477 and to establish that a highway right-of-way was granted.[140]
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> Evidence of actual construction may include such things as road construction or maintenance records, aerial photography depicting characteristics of physical construction, physical evidence of construction, testimony or affidavits affirming that construction occurred, official United States Government maps with legends showing types of road, as well as other kinds of information.

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[138] 147 F. Supp. 2d 1130 (C.D. Utah, 2001), *appeal dismissed as premature* 69 Fed. Appx 927, 2003 U.S. App. LEXIS 13208 (10th Cir. June 27, 2003).

[139] Interestingly, the counties in this litigation, who are among the counties who are expected to apply for disclaimers for R.S. 2477 rights of way, argue that BLM has "no authority to conduct determinations on R.S. 2477 roads at all" because there are no rules or regulations or formal procedures in place for doing so and none have been authorized by an Act of Congress. Brief of Defendant/Appellants in Appeal No. 01-4009 (10th Cir.) at 16.

[140] *Id.* at 1138-1139.

The court also indicated that as part of the validity determinations performed for the court, BLM built upon the definition of "highway" contained in the 1980 Ferguson Letter at 8 which states" [a] highway [for purposes of R.S. 2477] is a road freely open to everyone; a public road:"

> The claimed highway right-of-way must be public in nature and must have served as a highway when the underlying public lands were available for R.S. 2477 purposes. It is unlikely that a route used by a single entity or used only a few times would qualify as a highway, since the route [must have] open public nature and uses. Similarly, a highway connects the public with identifiable destinations or places. The route should lead vehicles somewhere, but it is not required that the route connect to cities. For example, a highway can allow public access to a scenic area, a trail head, a business, or other place used by and open to the public. Routes that do not lead to an identifiable destination are unlikely to qualify.[141]

The position of the Department consistently has been that the elements set out in the statute must be complied with: namely that there must be construction of a highway across unreserved public lands.[142] However, the details of the Agency's articulation of these elements have changed over the years, especially in the 1988 Policy, which interpreted construction very broadly.

The contemporaneous and reasonable interpretation of the agency entrusted with implementing a law, when arrived at through formal rulemaking or adjudication, is entitled to deference.[143] However, as noted, there does not appear to have been any contemporaneous interpretation adopted by the Department. Rather, it appears that except for the 1898 decision that mere declarations of highways along section lines without actual construction did not constitute completion of the grant, the 1938 regulation, the 1959 Solicitor's Opinion on mining access, and a few other pre-FLPMA documents, the Department's analysis has been almost entirely post-FLPMA. The Department seems to have consistently taken the position that a prospective grantee must comply with the elements of the granting law, but the arguably minimal standards of the 1988 policy call into question the meaning of the construction requirement.[144]

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[141] *Id.* at 1143.

[142] *See* 26 L.D. 446 (1898); Bureau of Land Management Manual, Part 2801.48 (evolving through Release 2-152, 2-229, 2-263, and 2-266); Letter and Memorandum from Deputy Solicitor Ferguson to Ass't Attorney General Moorman, April 28, 1980; 1988 Policy Statement; 1997 Policy Statement; and guidance provided for determinations that are the subject of litigation in the Southern Utah Wilderness Alliance v. Bureau of Land Management, cases.

[143] Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). Other agencies that manage reserves of various types that were created after the establishment of such rights of way also are faced with these issues, but BLM, or its predecessor the General Land Office, usually was the managing agency at the time the rights of way were created.

[144] *See* 1988 Policy Statement at 2.

Until the 1993 study, the Department of the Interior does not seem to have extensively analyzed the meaning of "highway" in the 1866 Act,[145] or to have correlated that definition either with the statutory "construction" requirement, or with the previous congressional enactments on highways, the Department's own analyses of mining access rights discussed previously, or with the use of "road" for purposes of wilderness review. Agency interpretations that are promulgated long after the act in question, that are not contained in rulemaking, or that are inconsistent are not entitled to the same deference as is contemporaneous rulemaking,[146] an approach that may apply to agency interpretation of R.S. 2477. If so, then arguably agency R.S. 2477 interpretations, while entitled to respect, must rest on their power to persuade.[147]

The Appendix to this report summarizes the various iterations interpreting the key terms of the 1866 grant.

Judicial interpretation.

Judicial interpretation does not provide conclusive precedent on some important R.S. 2477 issues for several reasons. R.S. 2477 is a federal statute and must be interpreted as a matter of federal law.[148] However, federal law may at times apply state law, and many argue that this is the case in the R.S. 2477 context. In particular, many claimants who feel that state law controls point to the early Department of the Interior regulation that stated that a highway grant became effective "upon the construction or establishing of highways in accordance with State laws," and to numerous cases holding that state law controls. Others assert that while state law controls as to state concerns, it cannot controvert the basic elements of the federal grant. Many of the cases predate the enactment of FLPMA, which both repealed R.S. 2477 and put in place new federal public land policies, and therefore date to a time when the federal government was not concerned about the rights of way grants. In addition, the cases were typically in state courts and the federal government was not a party.

There appear to be two levels of inquiry that at times become merged: 1) what actions are necessary to create a public highway under state law for purposes of

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[145] *See* Ferguson opinion, *supra*, at 8.

[146] Secretary of the Interior v. California, 464 U.S. 312, 320 n. 6 (1984); Christensen v. Harris County, 529 U.S. 576 (2000).

[147] Christensen v. Harris County, 529 U.S. 576, 586 (2000), *quoting* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[148] The Department of Justice in an amicus brief submitted in 1986 in *Alaska Greenhouses, Inc. v. Anchorage*, (Civ. A85-630, D. Alaska) stated: "In any event, it is not at all unusual for federal courts to have to interpret federal statutes in a manner inconsistent with prior state law which remained unchallenged for a long period of time by federal authorities." *See also* Federal Power Commission v. Oregon, 349 U.S. 435 (1955) in which the Supreme Court held that Congressional language on severance of water rights on federal public lands (including a section of the 1866 Act at issue here), which cases in state courts had concluded meant that all use of water in the West would be governed by state law, did not apply to federal reservations and hence did not bind the United States as to its own use of water; and United States v. California, 332 U.S. 19, 39-40 (1947).

determining relative property rights, and whether a state or political subdivision of a state has incurred obligations to maintain and be liable for the highway; and 2) whether a public highway established under state law is also always a highway under R.S. 2477.

Legitimate issues remain as to the proper interpretation and weight to be given state court holdings on the establishment of R.S. 2477 rights of way. The following section discusses some of the more important issues and the most frequently cited cases involving R.S. 2477.

Role of State law. The most fundamental and controversial issue is the proper role of state law in validating the establishment of R.S. 2477 rights of way. Clearly there is a role for state law to play, but the proper extent of that role is not clear. The grant of highway rights of way under the 1866 Act and the interpretation of that Act raise questions of federal law.[149] A federal grant usually is construed in favor of the government. However, this strict interpretation has been held to be rebutted with respect to many grants made to assist in the settlement of our country, because of the great public interests intended by those grants. Courts have applied both approaches with respect to rights of way.[150]

Clearly, federal law may incorporate or apply state law in some instances, and the 1866 Act, at least to some degree, is such an instance. It does not specify how the highway grant is to be accepted by a state or locality, or the scope of the rights granted, and state law can play a significant role in defining these and certain other aspects. State law is controlling as to state concerns, such as relative rights among parties within the state, and certainly, state law may validly supply details or additional requirements unique to a particular state – for example with respect to procedures for accepting the highways as public for purposes of maintenance and liability. But the extent to which R.S. 2477 may fairly be interpreted as adopting state law as to the elements of the grant itself is the principal controversy – whether, for example, state law can eliminate or otherwise controvert one or more of the terms of the federal grant.

The same group of cases is frequently cited for the proposition that state law controls – especially with respect to the fact that mere passage without construction can suffice to satisfy the grant. However, as will be discussed, it appears from an examination of the principal state cases, that the state courts sometimes indulged in dicta (non-binding judicial discussion) and the pronouncement of broadly worded rules not warranted by the facts before the court. A close examination of the facts of these cases often indicates that the roads in question clearly were constructed highways and, therefore, the broad generalizations or rules for which the cases are cited were not in fact the necessary holdings of the court, and hence their value as precedent arguably is sometimes overstated. In addition, the cases sometimes are

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[149] Hughes v. Washington, 389 U.S. 290 (1967); United States, v. Oregon, 295 U.S. 1, 27-28 (1935).

[150] *See, e.g.,* cases on railroad grants, such as Denver & R.G.R. Co., 150 U.S. 1 (1893); Oregon & C. R. Co. v. United States, 238 U.S. 393 (1915); but *see also, e.g.*, Burlington, K. & S.W.R. Co. v. Johnson, 38 Kan. 142, 16 P. 125 (1887).

cited for rules broader than those actually formulated by the courts. Later cases then typically cite the earlier cases as precedent without further analysis. For these reasons, the law surrounding many of R.S. 2477 issues continues to be debated.

The principal issue is whether state law controls such that it may contradict or even eliminate the express federal statutory elements of the grant offered. Other statutory provisions may shed light on this question. For example, the portions of the 1866 Act that pertain to mining and mineral rights expressly recognize and permit state and local law and even local customs to apply if they are "not inconsistent with the laws of the United States," language missing from § 8 of the 1866 Act. Section 8 of the Reclamation Act of 1902 expressly states that the Secretary of the Interior shall comply with state laws in carrying out that Act, but is also silent as to consistency. Nonetheless, the Supreme Court held that state law cannot contravene that federal law or frustrate its federal purposes.[151] Arguably, state law may apply to elaborate on R.S. 2477 and to indicate when a state has accepted the federal grant, but cannot contravene its terms. The highway grant is succinct, but does contain discernible elements: the grant is for the purpose of 1) the construction of 2) highways 3) across public lands that 4) are not reserved at the time of acceptance.

One of the principal cases cited for the proposition that state law determines when the offer of a grant has been accepted by the construction of highways is an Arizona case.[152] This "rule" is correct with reference to that state's law, since Arizona law required both construction and designation of public highways by official action.[153] Indeed, the rule would always be correct -- that state law determines when the offer of a grant has been accepted *by the construction of highways* so long as state law does not contravene the two elements of construction and highways,[154] and so long as the lands across which a highway runs were public lands not reserved at the time the highway was constructed.

The majority of cases interpreting R.S. 2477 have been state cases not involving the federal government. An important case that did involve the United States that is cited for the proposition that state law controls is the "Burr Trail" or *Hodel* case,[155]

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[151] California v. United States, 438 U.S. 645 (1978).

[152] County of Cochise v. Pioneer National Title Ins. Co., 115 Ariz. 381, 384, 565 P.2d 887, 890 (Ariz. Ct. App. 1977). The court actually was addressing whether an R.S. 2477 highway could be established *contrary* to state law, a question it decided in the negative.

[153] Ariz. Rev. Stat. §§2736, 2760 (1887).

[154] *See* Warren v. Chouteau County, 265 P. 676 (Mt. 1928), in which the Supreme Court of Montana stated that a R.S. 2477 grant of a right of way for highway purposes over the public domain does not become operative until accepted by the public by the construction of a highway according to the provisions of the laws of the state. In Moulton v. Irish, 67 Mont. 504, 218 P. 1053 (1923), the court found that the road in question in that case "was never actually opened to travel, and was never traveled by the general public, nor was there a formal order made by the board declaring it a public highway, as required in this state...." *Id.*, at 680.

[155] Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988), *overruled on other grounds in* (continued...)

but the holding in this case may not be as broad as is sometimes asserted. On appeal, the case involved only the *scope* of an R.S. 2477 right of way, since the valid *establishment* of the road was not before the court, this point having been conceded. Issues as to establishment could involve whether the road was constructed adequately, was on lands unreserved at the time of establishment, or was a highway within the meaning of the statute; issues as to scope could involve the width and range of permissible uses and improvements that can be said to have been included within the rights of way granted. The specific issue before the court was whether a proposed subsequent widening of the road was reasonable and necessary under Utah law, and within the right that was granted. Although the holding of the court in *Hodel* does not apply to establishment, it is sometimes cited as precedent on that issue.

The appellate court in *Hodel* considered the 1980 Ferguson opinion letter and rejected a reading of that letter that would result in no role for state law. The court then correctly noted that the second possible reading of the letter -- that it speaks only to what is necessary to *perfect* an R.S. 2477 right -- did not help appellant because only the question of scope was before the court.[156] The court then stated:

> The third possible reading of this letter would return us to BLM's regulations: as a matter of federal law, state law has been designated as controlling. This third reading, we think, is most consonant with reason and precedent.[157]

Arguably, this assertion is further support for the conclusion that state law controls. On the other hand, given the language that immediately precedes this quote, it could be argued that the court held that state law is controlling as to the *scope* of an R.S. 2477 right of way. To the extent that the opinion might be read as holding that state law is controlling as to establishment, one can argue that that is a strained reading of the Ferguson letter[158] and the 1866 Act, and is dicta because it is an interpretation not necessary to the decision of the court.

The court also stated that the federal regulations "heavily support a state law definition."[159] Yet, as noted above, the federal regulations retain the three essential elements of the statute: namely *construction* of *highways* on *unreserved* lands in accordance with state laws. It is not clear from the face of the regulation that state

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[155] (...continued)
Village of Los Ranchos de Albuquerque v. Marsh, 956 F.2d 970, 973 (10th Cir. 1992).

[156] Hodel, at 1081.

[157] *Id.*

[158] *See* Ferguson letter, *supra*, at 9-11, wherein the author makes it clear that it is his opinion that state law cannot validly conflict with the statutory elements, and that the 1938 regulations should not be interpreted as meaning that state law contrary to the statutory elements may prevail.

[159] Hodel, at 1080.

law inconsistent with these requirements could result in a valid acceptance of the grant offer.[160]

The valid existence of an R.S. 2477 road was in controversy in the lower court in *Hodel*. The district court had held that under R.S. 2477, a right of way could be established by public use under terms provided by state law.[161] The court cited two other federal cases as authority for this proposition. In one of them, *United States v. 9,947.71 Acres of Land*, the court concluded that a mine access road was a qualifying R.S. 2477 public highway that resulted in a private property interest in the user that was compensable under the 5th Amendment, even though the road definitely was *not* a public highway under state law.[162] This case seems anomalous as to this point and the case did not probe what construction was necessary to establish an R.S. 2477 right of way, but did note facts that indicated actual construction had occurred.

The *Wilkenson* case was also cited by the district court for the rule that state law governs establishment of R.S. 2477 highways notes that at the time of that decision (1986), there was no direct and controlling precedent for the legal conclusions reached.[163] It is important to note that the parties in *Wilkenson* "were in agreement" that the right of way statute was to be applied by reference to state law to determine when the offer of the grant has been accepted by the "construction of highways."[164] The court then pointed out that under Colorado law, the term highways could include footpaths, that the use of a road by a single person could suffice, and that mere use of a highway without construction was "sufficient."[165] By implication, the court seems to have meant that this state law was sufficient under R.S. 2477, even if state law eliminated one or more of the federal requirements, such as actual construction, or a highway being public. However, the court also probed the road segments in question and concluded that *construction* on the "Serpent's Trail," part of the highway connecting the two towns in question that was used by people and livestock, was completed before inclusion of the lands in a federal national monument. The court also noted that the roads in question were described as surveyed and actually built; visited by approximately one thousand people a year at the turn of the century; traveled by wagons; built in part under a county contract; completed with volunteer labor, financial contributions from Glade Park residents, and payments from the County; and served as connectors between towns and the next state.[166] These facts

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[160] See the earlier decision of the Secretary that dedication of highways along section lines, without construction, did not complete the grant (26 L.D. 446 (1898)) and the discussion of this point in the Ferguson Opinion.

[161] Sierra Club v. Hodel, 675 F. Supp. 594, 604 (D. Utah 1987), *citing* Wilkenson v. U.S. Department of Interior, 634 F. Supp. 1265, (D. Colo 1986); and United States v. 9,947.71 Acres of Land, 220 F. Supp. 328 (D.Nev. 1963).

[162] 220 F. Supp. 328 (D.Nev. 1963).

[163] Wilkenson v. Dept. of Interior, 634 F. Supp. 1265, 1280 (D. Colo. 1986).

[164] *Id.* at 1272.

[165] *Id.*

[166] *Id.* at 1268-1269, 1272.

appear to satisfy the elements of the federal statute,[167] and therefore, the expansive comments of the court could be characterized as dicta.

While the district court opinions in *Wilkenson* and *Hodel* enunciated the rule that state law governs even as to establishment, neither case had before it an instance where *both* the relevant state law purported to eliminate the R.S. 2477 statutory elements *and* the road in question actually failed to qualify under the R.S. 2477 requirements.

The state law applied by the courts varied widely. Some of the western territories and new states expressly addressed the issue of roads, especially after the enactment of the 1866 grant. Some state statutes clearly articulated how highways were to be established and hence how the R.S. 2477 grant was to be accepted. Where state law was clear, there are few disputes today as to which roads qualify under R.S. 2477. See, for example, the early Arizona law that provided that all roads and highways in the territory of Arizona which were located as public highways by order of the board of supervisors, or recorded as public highways, were declared to be public highways.[168] Many of these laws provided that the counties had the authority to take actions that made rights of way public highways.

The law of other states is not as clear, and hence controversies now exist as to whether a valid R.S. 2477 right of way exists. In Utah, for example, evidently there was no formal procedure for accepting the highway grant and the status of roads in that state consequently is unclear. Some states addressed roads in several ways, speaking both to establishment of highways, and to roads serving individual properties.[169]

The available federal case law is relatively sparse and, although general rules as to the applicability of state law are repeated, the precedent on the issue arguably is not definitive and clear for the reasons discussed. While the 1866 Act permits the

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[167] One segment was disqualified because the construction was after the establishment of the Monument. *Id.* at 1273. This fact raises the interesting question of why state law might be seen as validly eliminating the construction requirement of R.S. 2477, but not the requirement that a right of way be across unreserved lands.

[168] Ariz. Rev. Stat. §§2736, 2760 (1887). Ariz. Rev.Stat. §§2740 and 2741 (1887) required public highways to be kept clear from obstructions and in good repair, with graded banks, bridges and causeways as necessary, and authorized the use of gravel, dirt, timber, and rock for improving the roads.

[169] States might also separately address the issue of other roads. In South Dakota roads that developed simply by dint of public use could be public highways if the local government accepted them as such, worked on them and kept them in repair as such for a period of 20 years. Mere usage of a way by the public did not suffice. §§ 31-3-1 and 31-3-2, S.D. Codified Laws (1984 Rev.). Other (non-public highway) roads could be established in other ways: a 1909 law provided relief for owners of isolated tracts of land, enabling them to obtain a right of way across adjacent lands to reach a public highway, and providing for the payment of compensation to the landowners yielding up the easement. Ch. 108, Laws of 1909, Compiled Laws of S.D.(1910). In many states, private property interests also could be obtained by adverse possession against the property of another. § 47-0603, N. D. Rev. Code of 1943.

application of state law as a general matter,[170] and state law at times has been articulated as including generous standards for when an R.S. 2477 grant was accepted, whether state law can contravene the federal statutory requirements remains an issue.

If the governing rule is articulated as being that a valid R.S. 2477 highway is one that is both accepted under the laws of the state in which it is located and also meets the federal requirements, the disparate body of state cases can be seen as essentially harmonious, and actual areas of conflict with the federal requirements appear to be few. This interpretation is also consistent with the Department's earliest, and most of its subsequent interpretations.

Is construction necessary to comply with the grant? The necessity for actual "construction" is the principal focus of the issue of the proper role of state law in articulating acceptance of the 1866 grant offer, and has already been addressed in part in the preceding general discussion of the role of state law. As was also discussed, the 'plain meaning' of § 8 of the 1866 Act (R.S. 2477) would seem to require actual construction. While there is no available legislative history of § 8, § 9 of the same Act (R.S. 2339) addressed "construction" of ditches. As to the use of the term construction in § 9 of the 1866 Act, the Supreme Court has explained that "[i]t is the doing of the work, the completion of the well, or the digging of the ditch" that complied with the statute.[171] The United States in the *SUWA v. BLM* appeal asserted that it is a basic canon of statutory construction that identical terms within an act have the same meaning.[172] However, the counties argue that the two instances are not analogous because you cannot have a well or ditch without construction, but in some areas you can have a road without construction and that "where the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different... the meaning well may vary to meet the purposes of the law."[173]

An important situation in which the construction issue arises is in the context of section line rights of way. The American surveying system did not provide for road corridors along section lines. In contrast to the American system, the Canadian system expressly did provide for road corridors along all section and township

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[170] Because R.S. 2477 was repealed in its entirety in 1976, it is state law in effect on that date that is applicable.

[171] Bear Lake & River Waterworks & Irrigation Co. v. Garland, 164 U.S. 1, 18-19 (1896), quoted in Brief of the Federal Appellee, No. 01-4173 at 54, who also cited Reno v. Koray, 515 U.S. 50, 58 (1995) that it is a "basic canon of statutory construction that identical terms within an Act bear the same meaning."

[172] Brief of the Federal Appellees in No. 01-4173 (10th Cir.) at 54; *appeal dismissed as premature*, 69 Fed. Appx 927, 2003 U.S. App. LEXIS 13208 (10th Cir. June 27, 2003)..

[173] Opening Brief of Defendants-Appellants in Appeal No. 01-4009 at 41, quoting Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 433 (1932).

lines.[174] Some states adopted the Canadian approach and specified that rights of way existed along section lines. South Dakota law states:

> There is along every section line in this state a public highway located by operation of law, except where some portion of the highway along such section line has been heretofore vacated or relocated by the lawful action of some authorized public officer, board, or tribunal.[175]

If a territorial or state government enacted such a law, the strips along section lines were considered as dedicated for highway purposes and subsequent patentees took title subject to these dedicated rights of way. Eventually, most of these roads were actually constructed, relocated, or vacated in accordance with state law. If section line highways, or other public highways dedicated by operation of law, were not constructed by the time the federal R.S. 2477 grant was repealed, what is the status of such paper highways? Are they valid existing rights within the intent of FLPMA simply because they were segregated and dedicated "for highway purposes", or did they need to have been actually constructed by the time of the rescinding of the federal grant? The issue is an important one, because some states may press such claims now.[176]

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[174] "The Dominion lands shall be laid off in quadrilateral townships, containing thirty-six sections of one mile square in each (except in the case of those sections rendered irregular by the convergence or divergence of meridians as hereinafter mentioned), together with road allowances of one chain and fifty links in width, between all townships and sections." (Act of May 15, 1879, 42 Victoria, Chap. 31.)

[175] §31-18-1, S.D. Codified Laws (1984 Rev.). The width of these highways is stated as being 66 feet. *Id* §31-18-2.

[176] Alaska evidently may claim section line rights of way even if they were not constructed by 1976, because so much of the state was not even surveyed at that time, and the state has extensive infrastructure needs as yet unmet that were served by R.S. 2477 in other states. *See* the Alaskan state report: Senate Transportation Committee R.S. 2477 Task Force, Phase II Report 67 (1986) citing AS 19.10.010 (1975). The Senate Committee Task Force Report also gives "highways" a generic definition that includes paths, trails, walks, etc. *Id.* at 86. In enacting the Alaska National Interest Lands Conservation Act (Pub. L. No. 96-487, 94 Stat. 2374)(ANILCA), Congress took note of the undeveloped status of Alaska's transportation system and provided special rights of way provisions for crossing federal conservation areas in that state. The Committee reports do not indicate that Congress considered R.S. 2477 as providing any prospective help on the issue.(*See*, S. Rep. No. 95-1300 at 53, 249 (1978) and H.R. Rep. No. 95-1045, Part 1, at 207, 243 (1978).)

During the FLPMA debates there was a discussion between Senators Stevens of Alaska and Haskell of Colorado about whether Alaska could continue to claim roads created from trails that "have been graded and then graveled and then are suddenly maintained by the state" or which *in fact had been built*, (emphasis added) but which might not have been formally declared to be public highways. Sen. Haskell responded that formal perfection was not necessary if the existing use was recognized as a public highway under state law. 120 Cong. Rec. 22283-22284 (July 8, 1974). The roads being discussed appear to be constructed and hence were not unconstructed section line roads.

Possible solutions for the special needs of Alaska that may not be adequately met by Title XI of ANILCA and Title V of FLPMA present issues beyond the scope of this paper.

The cases usually cited as authority for the conclusion that section line right of way dedications suffice as acceptance of the R.S. 2477 grant are pre-FLPMA cases between a state or state subdivision and a citizen, not between the federal government and a state. In this context, it is reasonable that the state dedication of the lands is effective against a subsequent titleholder of the lands crossed by a right of way, even if the highway was not yet constructed when that person took title. Under state law, the dedication is the lawful first step of a highway construction process that could be completed over time, and that dedication is enough to impose a state interest on the property that is good against subsequent titleholders.[177] However, this is not to say that the paper dedication is effective against the federal government if the offer of the federal highway grant is rescinded before construction has been completed. A better argument appears to be that the roads must have been constructed to comply fully with the terms of the federal highway grant, and if they were not at least partially constructed by the time the grant offer is repealed, then the opportunity to comply with the grant offer was extinguished upon repeal. That section line dedications alone, without construction, do not complete grants has long been the consistent position of the Department,[178] especially if construction was not even begun before repeal of the granting statute.[179]

Another difficult question is whether mere use by the public can ever suffice to establish a highway under R.S. 2477. Again, some of the cases cited for the proposition that public use alone can result in a public highway appear to be overstated. For example, *Central Pacific Railway v. Alameda County* is frequently cited for the proposition that valid R.S. 2477 highways could be established by the mere passage of wagons. The court in that case noted: "The original road was formed by the passage of wagons, etc., over the natural soil...."[180] However, the Court also had noted that "A public highway ... was *laid out and declared* by the county in 1859, and *ever since has been maintained*. During that time it has served as one of the *main arteries of travel* between the bay regions of southern Alameda County and the Livermore Valley."[181] Therefore, regardless of how the road originated, it apparently did qualify under R.S. 2477, and the “rule” for which this case is often cited appears to be either overstated or dicta.

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[177] Tholl v. Koles, 70 P. 881 (Kan. 1902); Girves v. Kenai Peninsula Borough, 536 P. 2d 1221 (Al. 1975); Bird Bear v. McLean County, 513 F. 2d 190 (8th Cir. 1975). However, even states with section line statutes view the effect of such acts differently depending on the reason for inquiry. In Pederson v. Canton Township, 34 N.W. 2d 172 (S.D. 1948), the South Dakota Supreme Court held that although the section line statute constituted a dedication of section line highways, if a part of a section line highway was not actually constructed, there was no duty for the County government to warn motorists under an abandoned highway statute because in fact there never had been a highway.

[178] 26 L.D. 446 (1898); Ferguson Opinion, *supra*; 1988 Policy Statement, *supra,* at 2.

[179] Even the more lenient 1988 Policy Statement required that construction had to have been initiated prior to repeal and actual construction had to have followed within a reasonable time.

[180] 284 U.S. 463, 467 (1932).

[181] *Id*. at 465-466. (Emphasis added.) This case also reinforces the argument that the roads intended as qualifying under R.S. 2477 are significant roads considered public highways.

There are actually two issues involved in some of the cases that may be confused: 1) whether public use without some formal acceptance by a governmental entity may nonetheless result in a "public highway" within a particular state; and 2) whether a highway established merely by public use without further improvement or construction of the roadway may qualify under R.S. 2477.

The first point may be answered wholly by the statutory and case law of the state involved. Some of the cases may not word the issue correctly – as for example, by discussing "adverse possession" against the United States, which does not lie.[182] Under the laws of some states, public use of sufficient type over sufficient time may result in the creation of a public highway in the first sense – recognition under state law and/or acceptance by a state or local governmental entity for maintenance and liability. State law might also conclude that a valid R.S. 2477 highway resulted, not because citizens are adversely possessing title against the United States, but because if public use of a certain type and duration results in acceptance of a "public highway" under state law, this is equated with adequate acceptance of the federal grant offer.[183]

However, this latter approach presents the second issue– if public use may result in the creation of a public highway under state law, does the resulting highway qualify under federal law even if the road was not "constructed?" In some of the more arid parts of the country, repeated passage may compact a roadbed capable of sustaining regular use. If a road that was never improved or maintained nonetheless served as a well-traveled transportation corridor between towns, and was recognized as a public highway under state law, could such a road qualify under R.S. 2477?

Here too, in the leading cases usually cited, the roads in question in fact appear to have satisfied all of the elements of the 1866 Act. In the first *Hatch* case, for example, the road served several towns and several purposes, and citizens had spent considerable private funds installing ditches, bridges, and dugways.[184] *Hatch II* held that public use alone (as public use was described in (*Hatch I*), without any official action by a governmental entity could constitute valid acceptance of an R.S. 2477 right of way, because Wyoming recognized a common-law doctrine of establishment of highways by user. In this case, the court was focusing on whether any official acceptance was necessary under Wyoming law *at that time* to constitute acceptance of the federal grant offer, and concluded that it was not. A recent decision of the Wyoming Supreme Court quoted from *Hatch II* with approval for the principles that state law controls the establishment of R.S. 2477 rights of way, and that use alone suffices – though the court held that a highway right of way in that case did not exist because later Wyoming statutes did require official acceptance.[185]

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[182] United States v. California, 332 U.S. 19, 39-40 (1947); Texas v. Louisiana, 410 U.S. 702, 714 (1973), *rehearing denied*, 411 U.S. 988 (1973).

[183] Hatch Brothers Co. v. Black, 165 P. 518 (Wyo. 1917), *affirmed on rehearing*, 171 P. 267 (1918); Lindsay Land & Live Stock Co. v. Churnos, 285 P. 646 (Ut. 1930).

[184] Hatch, *supra*.

[185] Yeager v. Forbes, 2003 WY 134; 2003 Wyo.LEXIS 164 (Wyo. October 24, 2003).

In *Lindsay Land & Live Stock* case too, a Utah case that has also been cited for the proposition that public use *without construction* is sufficient under R.S. 2477, the road in question appears actually to have qualified under R.S. 2477. The court in that case actually worded the rule as stated in *Hatch*, and noted that improvements had been made even without public funds, that the road connected points between which there was considerable public travel, and that the use made of the road was as general and extensive as the situation and surroundings would permit had the road been formally laid out as a public highway by public authority.[186] Therefore, *Lindsay* does not appear to stand for the proposition that no construction or improvement of a road is necessary to construct a public highway under the terms of R.S. 2477. This was not the rule stated in the case and was not the situation before the court.[187]

It seems unlikely as a factual matter that a road could be both totally unimproved and still have supported until 1976 the kind of regular and continuous use as a significant connector that qualifies as a highway.[188] Even in arid areas, ditches and grading may be necessary at certain places to cope with seasonal rains. It also seems unlikely that a road would remain totally unimproved once it eventually became formally accepted as a public highway and maintained by the local government, circumstances that typically occurred well before 1976.

This is significant because in considering what alternatives may now exist for processing R.S. 2477 claims, it has been said that any attempt to adhere to the language and requirements of the 1866 Act would be disruptive of long established expectations. Yet, it may well be that an analytic approach of asking both whether a right of way is a public highway under state law, and whether the road is a qualifying highway under federal law, in fact will prove to be consistent with most of the case law to date.

As discussed above, the Department of the Interior has consistently maintained that some construction must have taken place, although at times the Department has construed "construction" broadly, as in the 1988 Policy.

SUWA v. BLM recently focused again on the proper interpretation of R.S. 2477 and the earlier cases. After reviewing the plain meaning of the statute's words as evidenced in various dictionaries, the federal district court for the central district of Utah upheld BLM's interpretation of "construction" and "highway" as consistent with these definitions and Congress's objective for federal land use policy.[189] (See above and Appendix I for the text of the definitions.) The counties, who also are defendant/appellants on appeal, asserted that under Utah law, "construction" could be accomplished by "continued use" and nothing more, and that this law should control. In response, the court probed the use of state cases, noted the disparity

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[186] Lindsay, n. 183 *supra*, at 648.

[187] Most of the Utah cases following *Lindsay* also specifically indicate that the road in question was constructed or improved.

[188] *See* n.118 and accompanying text, *supra*, for a discussion in a committee report on FLPMA to the effect that unimproved ways in arid areas were not roads under FLPMA.

[189] SUWA v. BLM, *supra* at 1139.

between some of the broad pronouncements and the actual facts involved in the cases, and summarized many recent opinions that cited them. This summary shows why the applicability of state law cases continues to be controversial, with arguments to be made on both sides:

> ... While past interpretations by state courts are not binding on a federal court interpreting a federal statute, several federal courts have looked to this state interpretation for guidance. In *Sierra Club v. Hodel*, 675 F. Supp. 594 (D. Utah 1987), the court ruled that under R.S. 2477, a right of way could be established by public use under terms provided by State law." *Id. at 604*. Since the Hodel decision in 1987, several federal district courts have adopted this state law "continued use" standard in the determination of R.S. 2477 claims. *See Barker v. Board of County Comm'rs of the County of La Plata, Colo.*, 49 F. Supp. 2d 1203, 1214 (D. Colo. 1999) (citing Hodel); *United States v. Jenks*, 804 F. Supp. 232,235 (D. N.M. 1992) (citing Hodel), aff'd in part, rev'd in part on other grounds, 22 F. 3d 1513 (10th Cir. 1994); *Adams v. United States*, 687 F. Supp. 1479, 1490 (D. Nev. 1988) (citing Hodel); *see also Shultz v. United States Dept. of Army*, 10 F. 3d 649, 655 (9th Cir. 1993) (citing Hodel), withdrawn and superseded on rehearing, 96 F. 3d 1222 (9th Cir. 1996).
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> The cases adopting the "continued use" standard, however, are distinguishable from the present matter. The more recent cases to adopt this standard reached that interpretation simply by citing back to Hodel, rather than through independent analysis of the competing interpretations of the word "construction." The Hodel case itself also seems to have reached its decision by citing to previous cases, rather than by analyzing the statutory meaning of the term "construction." In ruling that state law would govern the establishment of R.S. 2477 rights-of-way, Hodel cited to two cases: *Wilkenson v. United States Dept. of Interior*, 634 F. Supp. 1265, 1272 (D. Colo. 1986), and *United States v. 9,947.71 Acres of Land*, 220 F. Supp. 328, 335 (D. Nev. 1963). The Wilkenson case looked to state law for the establishment of R.S. 2477 rights-of-way only because the parties to that case agreed to do so. *See Wilkenson*, 634 F. Supp. At 1272. And the 9,947.71 Acres case appears to have been miscited .... The issue of whether "physical work" or "continued use" was required to perfect an R.S. 2477 right-of-way was not before and was never discussed by the court. Nevertheless, the language used by the court clearly indicates its view that physical work was required to perfect an R.S. 2477 right-of-way. In referring to the road at issue in that case, the court mentioned that the road had been "built" and "laid out" through a meandering mountain pass and that "acts of the actual construction" had been necessary to create the road ....[190]
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> ... Further, Plaintiffs are correct that the Tenth Circuit's decision in Hodel did not resolve the issue of what interpretation should be given to the word "construction" in R.S. 2477. The Tenth Circuit's decision in Hodel addressed only the scope of R.S. 2477 rights-of-way already found to have been established – it did not address the issue in this case, how R.S. 2477 rights-of-way are established in the first place ....[191]

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[190] *Id.* at 1141-1142.

[191] *Id.*

The appeal of this case was dismissed by the 10th Circuit for lack of jurisdiction since the lower court had not yet ruled on requests for injunctive relief and damages,[192] so additional clarification on the issue of the role of state law in establishing R.S. 2477 rights of way is not yet available.

Scope of rights of way. A complete analysis of the scope of R.S. 2477 rights of way is beyond the scope of this report, but some background on this issue may be helpful. The 1866 Act is silent as to the extent and features of a right of way, and the regulations of the Department did not elaborate on the scope of R.S. 2477 grants. Although there have been few federal cases to date, in the *Hodel* case involving the Burr Trail, the 10th Circuit held that the scope of a valid R.S. 2477 right of way generally is to be determined by the laws of the state in which the right of way is located, as they existed in 1976.[193] Under this rule, analysis of the scope of a particular right of way will vary depending both on the facts of each case and the laws of the state in which the right of way is located. The *Hodel* case addressed only the part of the road in question that was adjacent to Wilderness Study Areas (WSAs). The court discussed the relationship of the permissible scope of the right of way under Utah law to the management duties of BLM in that context.

Applying Utah law, the district court in *Hodel* found that a valid R.S. 2477 right of way includes the potential to expand the right of way to a width that is "reasonable and necessary" for the type of use to which the road had been put.[194] The 10th Circuit affirmed on this point, adding that reasonable and necessary must be read in light of traditional uses to which the right of way was put. Furthermore, the court felt that the basic principles of law governing easements would control abuses, in that owners of the dominant and servient estates must exercise their rights so as not unreasonably to interfere with each other.[195]

Although the appeals court stated that state law controlled and that state law held an easement was limited to the original use for which it was acquired, the court next stated that the county's right of way was not limited to the use to which it was first put, because R.S. 2477 was an open-ended and self-executing grant under which new uses automatically vested. The court apparently meant that all the particular highway uses that developed over the years before repeal in 1976 would assist in determining the reasonable and necessary scope of valid expansion.[196] The court noted that the district court had found expanding the road to promote economic development was within the historic uses of the road as a "vital link between the

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[192] 69 Fed. Appx 927, 2003 U.S. App. LEXIS 13208 (10th Cir. June 27, 2003).

[193] Sierra Club v. Hodel, 848 F.2d 1068, 1080-1081 (10th Cir. 1988), *overruled on other grounds*, Village of Los Ranchos de Albuquerque v. Marsh, 956 F.2d 970, 973 (10th Cir. 1992).

[194] Sierra Club v. Hodel, 675 F. Supp. 594, 607 (C.D. Utah 1987).

[195] Sierra Club v. Hodel, 848 F.2d at 1083, citing Utah cases.

[196] *Id.* 1083-1084.

country's major centers of activity".[197] The district court had directed the county to apply to BLM for a right of way permit for a part of the road segment that needed to be relocated from its historic location. The appeals court agreed, but added that the BLM could not deny the permit or impose all the conditions it usually could impose on rights of way granted under Title V of FLPMA, but that BLM could specify where the road should be relocated in order to have the least degrading impact on the WSA.[198]

The court had perceived a conflict between the saving provisions of FLPMA that preserved the valid R.S. 2477 right of way, and the duty imposed on BLM in §603(c) to manage WSAs to avoid impairing their wilderness values and to avoid unnecessary and undue degradation. Congress had specified in §603 that certain other uses were to be allowed to continue in WSAs, but did not speak to valid existing roadways. BLM had analogized valid existing highways to other grandfathered uses and afforded them the same protections, an interpretation the court found reasonable.

It is interesting to note that the courts in the *Hodel* cases derived the authority of the federal government to have any control over the scope and exercise of the R.S. 2477 right from the duty of BLM to prevent unnecessary and undue degradation of the WSAs under their management. Under the general management section of FLPMA, 43 U.S.C. 1732(b), BLM has a similar duty to prevent undue degradation of *all* the lands under its management. In other words, the federal government is no longer in the pre-FLPMA position of having no interest in or responsibilities for the underlying lands impacted by R.S. 2477 highways.

Another Utah case further elaborated on the relative interests of the United States and those with the R.S. 2477 easement interest. In *United States v. Garfield County*,[199] Garfield County had bulldozed part of the Burr Trail that traverses Capitol Reef National Park, for which actions the United States sought damages in trespass. The court, relying on the *Hodel* cases, determined that the scope of the R.S. 2477 right of way is that which is reasonable and necessary to ensure safe travel for the uses made of the right of way at the time of repeal of R.S. 2477, including improving the road to two lanes so travelers could pass each other.[200] The court rejected the County's assertion that the width of the right of way included all "disturbed area," finding that standard to be "the most singularly unhelpful, uncertain and ungovernable approach to answering the question of scope."[201] The issue of the extent to which the County could "improve" the road led to an exploration of the respective authorities of the two parties. The County asserted that it could improve the road without permission from the National Park Service, but the National Park Service pointed to its statutory authorities to protect the federal lands underlying and

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[197] 675 F. Supp. at 606.

[198] 848 F.2d at 1088.

[199] 122 F. Supp.2d 1201 (D.C.D. Utah 2000)

[200] *Id.* at 1217.

[201] *Id.* at 1230.

surrounding the right of way and to "conserve the scenery and the natural and historic objects and wildlife therein."[202] The court responded that: "[a]t the intersection of power, right, and duty, then, the law comprehends that one entity may not act upon its rights without regard for the other. Each must acknowledge the need for reasonable accommodation of the other's duties, powers and purposes."[203] "Hodel instructs that 'the initial determination of whether the activity falls within an established right of way is to be made by' the federal land management agency having authority over the lands in question."[204] The court held that Garfield County could conduct maintenance work without prior authorization from the National Park Service, but could not perform work constituting "construction" within the meaning of the NPS regulations without first obtaining a permit, approval or agreement from the National Park Service, which could regulate that construction work to the extent provided by regulation and statute.[205]

Undoubtedly there will be other disputes as to the scope of R.S. 2477 rights of way and the respective authorities to regulate their improvement and use, and it remains for future agency and judicial exposition to flesh out these issues further.

Is R.S. 2477 retrospective or prospective? The court in *United States v. Dunn* held that the 1866 Act was meant only to sanction trespasses that had occurred on the public domain before its enactment. The court said that the Act was "not intended to grant rights, but instead to give legitimacy to an existing status otherwise indefinable."[206] The court reached this result by relying on two previous cases, both of which addressed those aspects of the 1866 Act that cured past trespasses, because those were the facts before the court. A better reading of both cases is that the 1866 Act served to legitimize past trespasses and to establish priorities of occupancy rights that related back to the establishment of the uses rather than only to the 1866 date of enactment.[207] Neither case held that the 1866 Act *only*

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[202] *Id.* at 1240.

[203] *Id.* at 1243.

[204] *Id.* at 1243, quoting 848 F.2d at 1085.

[205] *Id.* at 1265. As to the authority of federal agencies to regulate R.S. 2477 rights of way, *see* United States v. Jenks, 22 F.3d 1513 (10th Cir. 1994), and 129 F.3d 1348 (10th Cir. 1997), and United States v. Vogler, 859 F.2d 638 (9th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989); accord, Clouser v. Espy, 42 F.3d 1522, 1538 (9th Cir. 1994); Adams v. United States, 3 F.3d 1254, 1258 n.1 (9th Cir. 1993).

[206] 478 F. 2d 443, 445 n.2 (9th Cir. 1973)

[207] Jennison v. Kirk, 98 U.S. 453, 459 (1878), quoted approvingly the statement of the author of the act that "[i]t merely recognized the obligation of the government to respect private rights which had grown up under its tacit consent and approval. It proposed no new system, but sanctioned, regulated, and confirmed a system already established, to which the people were attached." However, the Court in that case addressed a factual situation where two miners disagreed as to whose rights had priority with respect to a mining claim and a water ditch -- two uses in effect when the 1866 Act was passed. The Court's comments were therefore dicta to the extent they should be construed as indicating the Act had no prospective effects. The better reading, however, seems to be that the author meant that the

(continued...)

addressed past trespasses, and the best reading of these two cases and of the majority of judicial interpretation indicates that the act also was prospective in its application.

The 9th Circuit noted the issue as an open question in a 1982 opinion in *Humboldt County v. United States*.[208] However, two years later, the same Circuit noted that the parties to new litigation agreed that R.S. 2477 operated prospectively to grant rights of way for highways constructed after its enactment. The court then stated: "*Dunn* is questionable authority because it is contrary to the cases cited in *Humboldt County*, 684 F.2d at 1282 n. 6, and appears to misread *Central Pacific Railway Co. v. Alameda County*, 284 U.S. 463, 52 S. Ct. 225, 76 L. Ed. 402 (1932)."[209]

Therefore, the better interpretation would seem to be that while the 1866 Act confirmed preexisting rights of way, it also applied prospectively.

Does R.S. 2477 apply only to roads for mining or homesteading purposes? The Ninth Circuit also has held that an alternative ground for finding that Humboldt County did not acquire a right of way under R.S. 2477, is that a right of way could not be acquired under that Act for a road for purposes other than mining or homesteading, which purposes did not include the desired purpose of reaching a recreation area. The court found that although the language of the grant is without limitation as to purpose, the statute of which it was a part addressed solely mining and homesteading claims. The court noted that the holding in *Wilderness Society v. Morton*[210] was consistent with this interpretation in that the road in that case would

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[207] (...continued)
1866 Act more closely followed current practices than did the other proposal of Rep. Julian. See discussion above. Central Pacific Railway Co. v. Alameda County, 284 U.S. 463 (1931), presented the issue of whether a R.S. 2477 road should be considered established in 1866 when it was validated by the Act, or whether it should be considered as having been established in 1859 when it was layed out and approved by the county. (If the former, it predated the rights of the railroad.) The Court held that the 1866 Act sanctioned existing rights of way rather than creating new ones *as of 1866*. The Court reviewed the *Jennison* case and stated: "The section of the Act of 1866 granting rights of way for the construction of highways, no less than that which grants the right of way for ditches and canals, was *so far as then existing roads are concerned*, a voluntary recognition and confirmation of preexisting rights, brought into being with the acquiescence and encouragement of the general government." (*Id*. at 473. Emphasis added.) Quite arguably, the Court in *Central Pacific* corrected the possible reading of the Jennison case that it denied possible prospective rights, and made clear that both cases spoke only to then existing rights, finding that they were ratified as of the time the uses were established, rather than being "new" rights as of 1866.

[208] 684 F.2d 1276, 1282 n. 6 (9th Cir. 1982).

[209] United States v. Gates of the Mountains Lakeshore Homes, 732 F.2d 1411, 1413 n.3 (9th Cir. 1984).

[210] 479 F.2d 842 (D.C. Cir. 1973)(*en banc*), *cert. denied*, 411 U.S. 917 (1973).

facilitate oil drilling, which was completely consonant with Congress' intent in 1866 to facilitate private mineral development.[211]

Although the argument can be made that section 8 is limited to the context of the act of which it is a part, the language is not so limited on its face, and the provision seems consistently to have been interpreted as being of general import. The meaning of "highway" as a significant road set forth earlier in this report also refutes the narrow interpretation. Furthermore, when the provision was codified, it was not placed with the remainder of the sections pertaining to mineral claims, but rather was codified as part of the general rights of way provisions as 43 U.S.C. §932. Although unenacted titles of the United States Code are only evidence of the law and cannot change the law,[212] this Code placement is further evidence that the provision should be interpreted as of general import.

The Department of the Interior also has interpreted the provision as applicable to other than mining access. A 1959 Solicitor's Opinion on access to mining claims states that Congress understood when it enacted the mining laws that miners would have to use the public lands for roads, and that roads were necessary and complementary to mining activities. The opinion does not mention section 8 of the 1866 Mining Act (R.S. 2477) as relevant to the discussion of mining roads, a fact that argues for the interpretation that the highway grant in section 8 was speaking of roads other than mere mining access roads.[213] It also appears that the vast majority of cases have implicitly found the highway right of way is not limited to the mining and homesteading context.[214] *United States v. 9,947.71 Acres of Land*[215] held that private entities were entitled to compensation from the United States for the taking of their mine access right of way. Although the court had discussed R.S. 2477 as one authority for the mine road, the court also concluded that the right of way was not a public highway, and the case does not stand for any clear characterization of R.S. 2477.

What are unreserved lands? The 1866 grant was for rights of way across public lands that were not then reserved. Public lands are those lands in the public domain -- basically the western lands the United States obtained from another sovereign rather than from a state or individual -- that were open to the operation of the various public land laws enacted by Congress, such as the homesteading acts. Reserved lands are those public lands that are withdrawn and dedicated to a particular federal purpose or purposes, such as military reservations or national parks.

The position of the Department in the 1988 policy statement was that public lands that are not available for R.S. 2477 rights of way are those that are reserved or

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[211] Humboldt Co. v. United States, 684 F.2d 1276, 1282 (9th Cir. 1982).

[212] 1 U.S.C. §204; Preston v. Heckler, 734 F.2d 1359, 1367 (9th Cir. 1984); Stephan v. United States, 319 U.S. 423, 426 (1943)(*per curiam*).

[213] *See* 66 I.D. 361, 362, 364 (1959).

[214] *See, e.g.,* Sierra Club v. Hodel, 675 F. Supp. 594, 601 (D. Utah 1987), which indicates that the road in that case originated as a livestock driveway and a wagon road.

[215] 220 F. Supp. 328 (D. Nev. 1963).

dedicated by Act of Congress, Executive Order, Secretarial Order, or, in some cases, classification actions authorized by statute, during the existence of that reservation or dedication, or lands pre-empted or entered by settlers under the public land laws or located under the mining laws which ceased to be public lands during the pendency of the entry or claim.[216] Usually, it is clear whether a full-fledged reservation has occurred. The situation may not be as clear, however, when classifications and withdrawals are involved.

For example, the withdrawals and classifications associated with the creation of grazing districts under the 1934 Taylor Grazing Act[217] may reserve lands sufficiently to preclude establishment of an R.S. 2477 right of way. The Taylor Grazing Act at 43 U.S.C. §315f provides that affected lands "shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry." Yet 43 U.S.C. §315e states that "nothing contained in this chapter shall restrict the acquisition, granting or use of ... rights -of-way within grazing districts under existing law ...." The 9th Circuit has held that the two sections should be read together, such 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.[218] If this reasoning is repeated in other cases, it obviously would have a great impact on the remaining R.S. 2477 validity determinations since the Taylor Grazing Act withdrawals were extensive.

Estoppel. An issue that underlies much of the controversy surrounding R.S. 2477, especially with reference to construction issues, is that of federal "acquiescence" in whatever interpretations the states devised. The argument can be made that because the agency administering the Act allegedly did not assert any federal requirements or dispute state claims for a period of over a hundred years, and because Congress also acquiesced in state articulation of all aspects of these grants, the federal government may not now assert statutory requirements that contradict state claims or interpretations. Therefore, the argument continues, the valid existing rights that were preserved by FLPMA are those and only those that are recognized as valid under state law.

This issue of estoppel by acquiescence was discussed in *United States v. California*, a case involving disputed ownership and jurisdiction over the three-mile belt of submerged lands off the coast of California. The Court ruled for the United States (a position Congress later changed by statute), despite a long history of acquiescence by federal officials in the assertion of jurisdiction by the State, even to the point of making federal purchases of rights in the belt. The Court said:

> As a matter of fact, the record plainly demonstrates that until the California oil issue began to be pressed in the thirties, neither the states nor the Government

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[216] 1988 Policy Statement at 1.

[217] Act of June 28, 1934, ch. 865, 48 Stat. 1269, codified at 43 U.S.C. §§315 *et seq.*

[218] Humboldt County v. United States, 684 F.2d 1276, 1281 (9th Cir. 1982). *See also* the Burr Trail/*Hodel* cases, which found that, in that case, a road had already been established by the time of the withdrawals in question. 675 F. Supp. at 604; 848 F. 2d at 1079 n.10.

> had reason to focus attention on the question of which of them owned or had paramount rights in or power over the three-mile belt. And even assuming that Government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the government in this ocean area are not to be forfeited as a result. The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property: and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.[219]

The analogy with the current situation appears clear. The federal government had no reason to focus on validity of R.S. 2477 rights of way until after the repeal of the measure, and possibly not until the issuance of the 1988 Policy Statement, which perhaps encouraged claims that had previously not been considered to be valid. Quite arguably, the actions of the federal agents were not as compromising in the R.S. 2477 context as they were in the *California* context because the regulation of the Department did incorporate the elements of the relevant statute, and because of the historical context surrounding rights of way before FLPMA.

In *Utah Power & Light Co. v. United States*, involving another right of way statute and a combination of acquiescence and overt actions on the part of federal agents, the Supreme Court also held:

> This ground also must fail. As a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest .... A suit by the United States to enforce and maintain its policy respecting lands which it holds in trust for all the people stands upon a different plane in this and some other respects from the ordinary private suit to regain the title to real property or to remove a cloud from it.[220]

An "estoppel" argument also was raised in *City and County of Denver v. Bergland*, involving another right of way statute. The court quoted from *U.S. v. California, supra.*, with approval, and stated that estoppel, if applicable at all, can lie only against an agency to which Congress has delegated the authority to dispose of lands held in trust for the public.[221] The court did not decide whether some version of estoppel could apply to the agencies regarding the right of way involved in that case, because it concluded that plaintiff had failed to make a traditional case of estoppel against the United States for reasons that may well also pertain in the current R.S. 2477 context.[222] Even if the elements of estoppel are present, when title to

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[219] 332 U.S. at 39-40. *See also* Utah Power and Light Co. v. United States, 243 U.S. 389, 409 (1917).

[220] 243 U.S. 389, 409 (1917).

[221] 695 F.2d 465, 482.

[222] *Id. See also* Oregon v. BLM, 676 F. Supp. 1047, 1059 (D.Or. 1987); United States v. Wharton, 514 F.2d 406 (9th Cir. 1975); and U.S. v. 31.43 Acres of Land, more or less, 547 F.2d 479, 482 (9th Cir. 1976.).

public lands is involved, policy considerations demand that estoppel not be applied without compelling reasons.[223]

An argument can be made that estoppel is not appropriate in the R.S. 2477 situation, because the elements required by the 1866 Act are evident on the face of the Act and have consistently been required by the Department since its earliest regulation.

Clearly, there is a legitimate and significant role for state law to play in implementing the statute, but it can hardly be assumed that Congress agreed with diverse state interpretations of which it was not aware and regarding which it had no reason to inquire. Furthermore, Congress has acted to address rights of way in legislation since 1866 in enactments that are consistent with an intent in the 1866 Act to grant rights of way for the construction of significant roads, and therefore it could be argued that Congress did not necessarily acquiesce in apparently contrary state interpretations.

A reconsideration of the 1988 Policy and the criteria set out in it, the argument might continue, that resulted in a new articulation closer to the requirements of the Act would not actually be disruptive of the current status quo because most of the qualifying roads clearly qualified by 1976. Furthermore, an examination of some of the leading state cases indicates that an interpretation that required qualifying roads to be public highways under state law and also to meet the elements of the federal grant would not be at odds with most of the actual rules and facts of those cases.

Statute of Limitations. Except for certain suits by states, the Quiet Title Act bars suits that are brought more than 12 years after the plaintiff knew or should have known that the United States asserted title in a particular property contrary to their own.[224] The previous disclaimer regulations had a blanket statute of limitations of 12 years. The amended regulations parallel the QTA by providing a new exception for state claims, but also put in place a new definition of "state" that, in contrast to the interpretation of that term under the QTA and to the absence of any exception to the 12-year statute of limitations in the previous disclaimer regulations, includes counties and other political subdivisions of states, and other governmental entities, thereby broadening those not time-barred from seeking a disclaimer. Court cases have analyzed whether the statute of limitations in the QTA context may have run with respect to R.S. 2477 claims, and may shed light on statute of limitations issues in the disclaimer context.

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[223] *See, e.g.,* Oregon v. Bureau of Land Management, 676 F. Supp. 1047, 1059 (D. Or. 1987), a case in which the General Land Office had made certain determinations involving lands, which the BLM invalidated 40 years later. The court cited with approval United States v. Ruby, 588 F. 2d 697, 704 (9th Cir. 1978).

[224] Under 28 U.S.C. §2409a(k), the notice for the purpose of the accrual of an action brought by a state must be "(1) by public communications with respect to the claimed lands which are sufficiently specific as to be reasonably calculated to put the claimant on notice of the Federal claim to the lands, or (2) by the use, occupancy, or improvement of the claimed lands which, in the circumstances, is open and notorious."

After Congress repealed R.S. 2477 in its entirety in 1976, no new R.S. 2477 rights of way could be established, and several administrative actions taken after the repeal of the grant in 1976 may have begun the 12-year period. After repeal, BLM notified the states that R.S. 2477 was no longer effective and that all new claims would be under Title V of FLPMA.[225] In 1980, BLM proposed regulations for Title V rights of way, and included a request for all persons, state or local governments that had "constructed public highways" under the authority of R.S. 2477 to file maps showing the locations of the highways. However, doing so was optional.[226]

As part of its implementation of section 603 of FLPMA, BLM also developed proposed criteria for determining which lands were "roadless". These criteria were finalized after public review and numerous public meetings. The Wilderness Policy and Review Procedures were issued in draft form on February 27, 1978. More than 60 meetings were held and over 5,000 letters and written comments were received, most of which focused on the proposed definition of "road" that would be used in the inventory.[227] A wilderness inventory handbook was issued on September 27, 1978.[228] BLM then completed two levels of inventories that were completed by December, 1980.

By the end of 1980, lists of areas determined to be roadless that were classified as "Wilderness Study Areas" (to be studied further for suitability for inclusion in the National Wilderness Preservation System) were published in the Federal Register and the BLM directors in each state issued press releases on the classifications and designated areas. The names and addresses of each BLM State Director were given in the Notices, which also stated that inventory maps and detailed information were available to the public.[229]

Arguably, this sequence of actions, especially the opportunity for public comment on the proposed wilderness inventory procedures and in particular the definition of "road" that generated such response, the public notice of the final Wilderness Handbook, the BLM inventories of roadless areas, and the subsequent published determinations of which areas were deemed to be *without roads* may have constituted notice of a position of the United States adverse to possible claimed R.S. 2477 rights in those areas so classified.

If these actions of BLM are found to have put possible claimants on notice that they should assert R.S. 2477 claims, the statute of limitations may have run such that some claimants may not be able to contest an adverse determination now under the QTA. However, courts may require additional acts in order to find that a plaintiff

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[225] Organic Act Directive No. 76-15 at 5, December 14, 1976.

[226] *See* n. 127, *supra.*

[227] *See* the Preface to the *Wilderness Inventory Handbook* (1978).

[228] 43 Fed. Reg. 43772 (September 27, 1978).

[229] Many of the state-by-state final inventories were published in the Federal Register on November 14, 1980. *See, e.g.*, lists beginning on 45 Fed. Reg. 75577 (November 14, 1980).

"knew or should have known" that the United States claimed title in conflict with a non-federal right of way.[230]

The argument can also be made that if R.S. 2477 "highways" are interpreted as including minor ways that were not even roads for purposes of section 603 of FLPMA, then the classification of areas as roadless still did not suffice as notice of a position of the United States hostile to the interest of possible R.S. 2477 claimants, such that the clock on the statute of limitations began to run. Absent Congressional action, this, like many other R.S. 2477 issues appears likely to be settled by the courts.

Current Congressional Actions

H.R. 1639 in the 108th Congress would establish a window of time to present R.S. 2477 claims, beyond which time such claims would be deemed to have been abandoned,[231] and would establish uniform definitions and a procedure for validating such claims.

The bill would define "construction" and "highway" as:

> [A]n intentional physical act or series of intentional physical acts that were intended to prepare, and that accomplished preparation of a highway by a durable, observable, physical modification of the land along the entire claimed route to facilitate the safe and efficient passage of four-wheeled highway vehicles.
>
> A thoroughfare along a specific identified route that, prior to the latest available date, was used by the public, without discrimination against any individual or group, for the passage of four-wheeled highway vehicles carrying people or goods from one inhabited place to another inhabited place.

The House approved an amendment to FY 2004 Interior and Related Agencies Appropriations (H.R. 2691) that would have prohibited implementation of the disclaimer regulation amendments in national monuments, wilderness and wilderness study areas, National Parks, and National Wildlife Refuges. The Senate bill did not contain a similar provision and it was eliminated in conference.

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[230] See discussions of notice in Spirit Lake Tribe v. North Dakota 262 F.3d 732 (8th Cir. 2001), *reh. denied, reh. en banc denied* US App LEXIS 24546, and *cert. denied* US LEXIS 2390; Elk Mountain Safari, Inc. v. United States, 645 F. Supp. 151 (D. Wyo 1986); Park County v. United States, 626 F.2d 718 (9th Cir. 1980), *cert. denied* 449 U.S. 1112.

[231] *See* section 314 of FLPMA, 43 U.S.C. 1744, in which Congress imposed a three year time limit on recording mining claims, beyond which time the claims would be deemed conclusively to constitute an abandonment of the claims. This approach was upheld in United States v. Locke, 471 U.S. 84 (1985).

Appendix 1

Comparison of Various Definitions Relating to R.S. 2477

	Construction	Highway
1988 "Hodel" Policy	"Construction must have occurred while the lands were public lands, not reserved for public uses. Construction is a physical act of readying the highway for use by the public according to the available or intended mode of transportation -foot, horse, vehicle, etc. Removing high vegetation, moving large rocks out of the way, or filling low spots, etc., may be sufficient as construction for a particular case. Survey planning, or pronouncement by public authorities may initiate construction but does not, by itself, constitute construction. Construction must have been initiated prior to the repeal of R.S. 2477 and actual construction must have followed within a reasonable time. Road maintenance over several years may equal actual construction. The passage of vehicles by users over time may equal actual construction."	"A public highway is a definitive route or way that is freely open for all to use. It need not necessarily be open to vehicular traffic for a pedestrian or pack animal trail may qualify. A toll road or trail is still a public highway if the only limitation is the payment of the toll by all users. Multiple ways through a general area may not qualify as a definite route, however, evidence may show that one or another of the ways may qualify. The inclusion of a highway in a State, county, or municipal road system constitutes being a public highway. Expenditure of construction or maintenance money by an appropriate public body is evidence of the highway being a public highway. Absent evidence to the contrary, a statement by an appropriate public body that the highway was and still is considered a public highway will be accepted."
1994 Proposed Regulations	"[A]n intentional physical act or series of intentional physical acts that were intended to , and that accomplished, preparation of a durable, observable, physical modification of land for use by highway traffic. Where State law, in effect on the latest available date, further limits the definition of construction, these limits also apply."	"[A] thoroughfare that is currently and was prior to the latest available date used by the public, without discrimination against any individual or group, for the passage of vehicles carrying people or goods from place to place. Where State law, in effect on the latest available date, further limits the definition of highway, these limits also apply."
1997 Proposed Legislation	An intentional physical act or series of intentional physical acts that were intended to, and that accomplished, preparation of a highway by a durable, observable, physical modification of land for use by highway traffic.	A thoroughfare that was prior to the latest available date used by the public, without discrimination against any individual or group, for the passage of vehicles carrying people or goods from place to place.

Standards applied in SUWA v. BLM	Some form of mechanical construction must have occurred to construct or improve the highway. A highway right-of-way cannot be established by haphazard, unintentional, or incomplete actions. For example, the mere passage of vehicles across the land, in the absence of any other evidence, is not sufficient to meet the construction criteria of R.S. 2477 and to establish that a highway right-of-way was granted. Evidence of actual construction may include such things as road construction or maintenance records, aerial photography depicting characteristics of physical construction, physical evidence of construction, testimony or affidavits affirming that construction occurred, official United States Government maps with legends showing types of road, as well as other kinds of information.[232]	
H.R. 1639	"[A]n intentional physical act or series of intentional physical acts that were intended to prepare, and that accomplished preparation of, a highway by a durable, observable, physical modification of the land along the entire claimed route to facilitate the safe and efficient passage of four-wheeled highway vehicles."	"[A] thoroughfare along a specific identified route that, prior to the latest available date, was used by the public, without discrimination against any individual or group, for the passage of four-wheeled highway vehicles carrying people or goods from one inhabited place to another inhabited place."
Current DOI	No published definitions; definitions will evidently vary from agreement to agreement.	

[232] Southern Utah Wilderness Alliance v. Bureau of Land Management, 147 F. Supp. 2d 1130, 1138-1139 (C.D. Utah, 2001), *appeal dismissed as premature*, 69 Fed. Appx 927, 2003 U.S. App. LEXIS 13208 (10th Cir. June 27, 2003).