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DISTRICT COURT

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

<p>SAN JUAN COUNTY, UTAH, a political subdivision, Plaintiff, STATE OF UTAH, Intervenor-Plaintiff, vs. UNITED STATES OF AMERICA, DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, Defendants,</p>	<p>INTERVENOR'S COMPLAINT TO QUIET TITLE</p> <p>Case No. 2:04CV00552 Judge Bruce S. Jenkins</p>
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Intervenor-Plaintiff State of Utah ("State"), for claims against Defendants, alleges as follows:

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INTRODUCTION

1. This is an action to quiet title to a certain described right-of-way for a highway, including the scope thereof, under the grant of Section 8 of the Mining Act of 1866, 14 Stat. 251, 253, later codified as Revised Statutes 2477 and as 43 U.S.C. §932 (repealed October 21, 1976 with savings provisions recognizing validity of rights-of-way already established) (hereinafter “R.S. 2477”).

JURISDICTION AND VENUE

2. The Court has subject matter jurisdiction under 28 U.S.C. §§ 1346(f) and 2409(a) (quiet title to real property in which the United States claims an interest).

3. Venue is proper under 28 U.S.C. § 1391(e) inasmuch as the lands in issue are located in Utah.

PARTIES

4. The State is one of the fifty sovereign states forming the United States of America, having been admitted to the Union on January 4, 1896 on an equal footing with the original states. The executive power of the State is vested in the Governor, who is responsible for seeing that the laws of the State are faithfully executed. Utah Const. art. VII, § 5; Utah Code Ann. § 67-1-1.

5. The State and the several Utah Counties are joint owners of the R.S. 2477 rights-of-way in Utah. Utah Code Ann. §§ 72-5-302(2) and 72-5-103(2)(b). An “R.S. 2477 right-of-way” is an interest in real property granted by R.S. 2477 consisting of the dominant estate in the land.

6. Defendant United States of America is the federal government and the owner of the servient estate adjacent to the highways relevant to this action, further described below.

7. Defendant United States Department of the Interior (“DOI”), through the National Park Service (“NPS”), manages the subject lands.

BACKGROUND AND ALLEGATIONS REGARDING
R.S. 2477 HIGHWAYS WITHIN THE STATE OF UTAH

8. R.S. 2477, originally enacted as Section 8 of the Mining Act of 1866, provides as follows:

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.

9. An R.S. 2477 right-of-way is a valid existing property right – an easement recognized by law as the dominant estate in the land.

10. Though R.S. 2477 was repealed in 1976, the repealing legislation specifically recognized the continuing validity of R.S. 2477 rights-of-way established as of 1976. FLPMA §§ 509(a), 701(a) and 701(h), codified respectively at 43 U.S.C. §§ 1769(a) and 1701, savings provisions (a) and (h).

11. R.S. 2477 was a congressional and self-executing grant; ratification or approval by the federal government was not required to perfect an R.S. 2477 right-of-way. Sierra Club v. Hodel, 848 F. 2d 1068, 1083-84 (10th Cir. 1988).

12. As a matter of federal law, state law controls perfection and scope of an R.S. 2477 right-of-way. Id. at 1081-84.

13. In Utah, an R.S. 2477 right-of-way could be established (“perfected”) by public use for a period of ten years without formal action by any public authority (Utah Code Ann. §72-5-104), or by affirmative non-federal governmental action indicating an intent to accept the grant, including but not limited to construction or maintenance of a road.

14. The scope of an R.S. 2477 right-of-way is a bundle of property rights, including that which is reasonable and necessary for uses to which the right-of-way has been put. Hodel, 846 F. 2d at 1083-84 (affirming the District Court’s “reasonable and necessary” definition); United States v. Garfield County, 122 F. Supp. 2d 1201, 1229-30 (D. Utah 2000) (recognizing the “reasonable and necessary” standard).

15. Such areas along the roadway beyond the actual beaten path as are reasonable and necessary to accommodate “sound engineering practice” and provide safe travel on the road, including lands on which attendant accouterments such as drainage ditches and culverts existed as of April 9, 1962, or reasonably and necessarily are added after that date to accommodate increased travel for pre-existing uses, are “part of the reasonable and necessary use” and are therefore within the scope of each highway right-of-way. Hodel, 846 F. 2d. at 1083-84.

16. The scope of the R.S. 2477 right-of-way includes the right to conduct reasonable and necessary maintenance within the right-of-way and make reasonable and necessary improvements within it. Id. at 1083, 1086 n.16.

17. Though R.S. 2477 was repealed on October 21, 1976 by the Federal Land Policy and Management Act (FLPMA), R.S. 2477 rights-of-way in existence on the date of FLPMA’s passage are protected under that act.

18. FLPMA section 701(a) provides:

Nothing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this act.

19. FLPMA section 701(h) provides:

All actions by the Secretary concerned under this Act shall be subject to valid existing rights.

20. FLPMA section 509(a) provides:

Nothing in this title [43 U.S.C. §§1701-1784] shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted or permitted.

21. In 1939, DOI regulations provided:

[R.S. 2477 (43 U.S.C. 932)] becomes effective upon the construction or establishing of highways, in accordance with the state laws, over public lands not reserved for public uses. No application should be filed under said R.S. 2477 as no action on the part of the Federal Government is necessary.

43 C.F.R. §244.55 (1939).

22. In 1963, DOI regulations provided:

Grants of [R.S. 2477 rights-of-way] become effective upon the construction or establishment of highways, in accordance with the State laws, over public lands, not reserved for public uses. No application should be filed under R.S. 2477, as no action on the part of the Government is necessary.

43 C.F.R. §244.58 (1963).

23. In 1974, DOI regulations provided:

No application should be filed under R.S. 2477, as no action on the part of the Government is necessary. . . . Grants of [R.S. 2477 rights-of-way] become effective upon the construction or establishment of highways, in accordance with the State laws, over public lands, not reserved for public uses.

43 C.F.R. §§2822.1-1 & 2822.2-1 (1974).

24. DOI's current regulations state that if an attempt to administer rights conferred under a right-of-way grant issued prior to October 12, 1976 "diminishes or reduces any rights conferred by the grant or the statute under which it was issued, . . . the provisions of the grant or the then existing statute shall apply." 43 C.F.R. §2801.4.

25. The language of DOI's current regulations was explained by DOI as follows:

[I]f questions should arise regarding the rights of a right-of-way grant holder under a grant or statute, the earlier editions of the Code of Federal Regulations on rights-of-way will remain available to assist in interpretation of the rights conferred by the grant or earlier statute In carrying out the Department's management responsibilities, the authorized officer will be careful to avoid any action that will diminish or reduce the rights conferred under a right-of-way grant issued prior to October 21, 1976.

51 Fed. Reg. 6542 (February 25, 1986).

26. In its 1993 Report to Congress and its 1994 Proposed Rules that were blocked by Congress, the Secretary of Interior recognized that BLM has no adjudicative or decision-making role to play in determining the existence or scope of an R.S. 2477 right-of-way and that any conclusions drawn by the agency are for internal administrative purposes only, thus not appealable to the IBLA and leaving actual decisions to the courts.

27. “Normal Maintenance Activities” as used in this complaint means routine maintenance involving use of road graders, trail cats and other appropriate equipment to conduct reasonable and necessary activities to maintain or improve the road (Hodel, 846 F.2d at 1083, 1086 n.16) including, but not limited to reasonable and necessary activities of the following types:

- a. Making minor deviations in the road for safety purposes;
- b. Grooming and grading of the road surface;
- c. Establishing and maintaining the crown with materials gathered along the road;
- d. Filling ruts;
- e. Spot filling with the same or improved materials;
- f. Leveling or smoothing washboards;
- g. Clearing the roadway of obstructing debris;
- h. Cleaning culverts, if any, including head basins and outlets;
- i. Resurfacing with the same or improved materials of the same general type;
- j. Maintaining, repairing, replacing and installing rip rap;
- k. Maintaining drainage;
- l. Maintaining and repairing washes and gullies;
- m. Maintaining, repairing, replacing and installing culverts as necessary to protect the existing surface from erosion; and,
- n. Repairing washouts.

28. Performance of Normal Maintenance Activities on County roads minimizes degradation of the servient estate by decreasing erosion, fugitive dust and other impacts on adjacent lands.

29. With the State’s consent, Utah counties have performed Normal Maintenance Activities on thousands of miles of roads for decades. These activities are generally conducted on an “as needed” basis, taking into account the County’s financial resources available for that purpose.

LOCATION, CONSTRUCTION AND USE OF SALT CREEK ROAD

30. The Salt Creek Road crosses lands entirely within San Juan County, Utah.
31. The lands underlying the Salt Creek Road lie within Townships 30, 30½ and 31 South, Ranges 19 and 20 East, S.L.M.
32. The road is located on public lands, not reserved for public uses, as more particularly shown on the accompanying exhibits 1 and 2 and incorporated herein by this reference. Exhibit 1 is a map reflecting the location of the road as identified and plotted using GPS or digital technology, and Exhibit 2 is a description based on the geographic coordinate system using NAD27 Data, and employing G.P.S. mapping grade data or digital data from United States Geological Survey or the State of Utah Geographic Information Database, or both. The Salt Creek Road links up with other roads in the State and County's road system.
33. The Salt Creek Road lies within the exterior boundaries of Canyonlands National Park (hereinafter, "Canyonlands"), which is administered by NPS.
34. As referred to herein and shown on the attached exhibits, the Salt Creek Road commences at the end of the pavement near Squaw Butte in the NW ¼ NE ¼ of Section 30, Township 30 South, Range 20 East, S.L.M., and travels easterly for roughly one mile, and then turns south near Cave Spring in Section 29 and travels roughly three and one-half miles in a southerly direction to Peekaboo Spring. The distances set forth in this pleading are for reference and are subject to the precise measurements in the GPS data.

35. NPS has restricted the public's vehicle use of the Salt Creek road with a use-permit gate placed across the Salt Creek Road near Cave Spring. NPS additionally caused a gate to be erected across the Salt Creek road at Peekaboo Spring, which lies near the northern township line of Township 31 South, in Range 20 East, S.L.M., and has entirely prohibited vehicular travel beyond the gate at Peekaboo Spring.

36. From the gate at Peekaboo Spring, the Salt Creek road travels south a distance of more or less seven and one-half miles to the junction of Salt Creek Canyon and Angel Arch Canyon.

37. From this junction, the Salt Creek Road travels more or less one and one-half miles southeasterly through Angel Arch Canyon to a parking area near Angel Arch.

38. The Salt Creek Road that is the subject of this action begins near Squaw Butte at the end of the pavement, proceeds to Cave Spring, to Peekaboo Spring, and to Angel Arch as specifically mapped and plotted in Exhibits 1 and 2 (hereinafter, the "Salt Creek Road").

FACTS PERTAINING TO THE VALIDITY AND SCOPE OF
SALT CREEK ROAD AS AN R.S. 2477 RIGHT-OF-WAY

39. On April 4, 1962 the Department of Interior, General Land Office filed a notice of withdrawal of the subject lands on its public records pertaining to the subject lands in anticipation of the creation of Canyonlands.

40. Congress thereafter created Canyonlands on September 12, 1964, by Pub. L. 88-590, 78 Stat. 934 (1964), codified at 16 U.S.C. § 271.

41. Congress expressly provided that Canyonlands was “subject to valid existing rights.” 16 U.S.C. § 271.

42. Between 1866 and April 4, 1962, the State and San Juan County, on behalf of the public, acquired an R.S. 2477 right-of-way interest in and to the Salt Creek Road across the subject lands by acts evidencing the acceptance of the grant of an R.S. 2477 right-of-way, including, but not limited to:

a. use and construction of the Salt Creek Road by Rensselaer Lee Kirk, a.k.a. Lee Kirk, who constructed and used the Salt Creek Road during the 1890s and continued thereafter to use the same on a regular and non-exclusive basis for access and to haul goods and things, including by a wagon which remains at Kirk’s Cabin;

b. use and construction of the Salt Creek Road by the Scorup & Somerville Cattle Company (hereinafter, the “S & S Company”) on a continuous and non-exclusive basis from the 1920s through 1965 to trail cattle and haul supplies to established cowboy camps;

c. use by hikers and archeological explorers on a regular and continuous basis from at least 1949 and continuing through the present;

d. use and construction by persons driving the entire Salt Creek Road in jeeps on a regular and continuing basis beginning at least as early as 1954, including members of the S & S Company who hauled equipment and supplies in jeeps during the 1950s along the Salt Creek Road;

e. use, construction and maintenance by explorers and sightseers in jeeps and other vehicles on a regular, continuing and non-exclusive basis from at least 1954 and continuing until NPS placed a gate blocking the road at Peekaboo Spring in 1998, including the use of shovels and axes to clear the road of debris and make it ready for vehicular travel;

f. use, construction and maintenance by persons involved with commercially operated jeep tours on a regular, continuing and non-exclusive basis from at least as early as 1958 and continuing until NPS placed a gate across the road in 1998;

g. use, construction and maintenance by bulldozer before 1956, and other incidents of maintenance and construction before 1962 by blasting, bulldozer, heavy machinery, and uranium core-drillers operated by persons using the Salt Creek Road for exploration purposes;

h. regular and continuous use, construction and maintenance from the mid-1950s through the creation of the park in 1964 by uranium prospectors whose mining claim locations have been filed in the San Juan County Recorder's office, and whose drift tunnels still exist in the Salt Creek Canyon;

i. use by the Honest John Uranium Corporation, which established a mining camp by 1957 at a location it accessed in part by the Salt Creek Road and which used the Salt Creek Road beginning at least as early as 1957 to haul goods, materials and equipment along the Salt Creek Road to the camp;

j. use by oil and gas companies to access leases and drilling locations along the Salt Creek Road, including the drilling of one or more oil wells within the Salt Creek canyon prior to 1962.

43. The foregoing uses of the Salt Creek Road prior to April 9, 1962 were accomplished by means including horseback, horse-drawn wagon, motor vehicle including jeep, truck, core driller and bulldozer and foot traffic.

44. The foregoing uses, construction and maintenance occurred along essentially the same route of the Salt Creek Road as it lies today.

GENERAL ALLEGATIONS REGARDING THIS QUIET TITLE ACTION

45. This is an action under 28 U.S.C. § 1346(f) and 28 U.S.C. §2409a to quiet title in and to the Salt Creek Road in San Juan County, Utah. The rights-of-way are described herein and in Exhibit 1, Exhibit 2, and Exhibit 3 exclusive of attachments, incorporated herein by this reference.

46. The State filed with the Department of the Interior a notification of intention to file suit under 28 U.S.C. § 2409a(m). A copy thereof is attached to this complaint as Exhibit 3 and by this reference.

47. The notification of intention to file suit was dated July 14, 2004 and sent to the Secretary of the Department of the Interior by U.S. mail, and the requirement of 28 U.S.C. § 2409 a(m) that 180 days pass between the notification and the bringing of an action is satisfied.

48. R.S. 2477, first enacted by Congress as Section 8 of the Mining Act of 1866, provides in pertinent part as follows:

§8. 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.

Some detail regarding R.S. 2477 is supplied above in paragraphs 8 through 26.

49. The description of the Salt Creek Road in the exhibits hereto are the result of field verification and precise location by mapping-grade Global Positioning Satellite (GPS) technology or in some instances digitalization from digital ortho-photo quadrangles published by the United States along the entire length of the roads. Data obtained by GPS has been electronically downloaded to computers where they were checked for accuracy.

50. The road was open to the public without reservation as early as the 1890s and continuing to April 4, 1962 when a reservation for Canyonlands was initiated.

51. At the time of the Salt Creek Road's first use and construction it had been located on open public lands for decades.

52. The Salt Creek Road has been included in the state highway system and infrastructure and the State legislature has given San Juan County jurisdiction over it, as not solely a State or city road, for construction, operation, and maintenance.

53. The scope of Salt Creek Road, as an R.S. 2477 right-of-way, is governed by Utah law as a matter of federal law. That scope is that which is reasonable and necessary for the type of use to which the road had been put as of April 4, 1962; it includes the beaten path plus reasonable and necessary accouterments such as drainage ditches, culverts, realignments that have been made in response to natural impacts on the road such as flooding and rock slides, slight deviations from the common way to avoid encroachments, obstacles or obstructions upon

the road, and the right to enhance the road even after 1976 to meet the exigencies of increased travel.

54. Reasonable and necessary management activities on the road are also part of the scope of the Salt Creek Road as an R.S. 2477 right-of-way. As long as the R.S. 2477 owner stays within the right-of-way, as defined in the previous paragraph, that owner may make reasonable and necessary improvements in the road. Sierra Club v. Hodel, 848 F. 2d at 1086 n.16 (10th Cir. 1988).

55. The Salt Creek Road was used and constructed as a public thoroughfare for decades prior to the reservation of the adjacent lands for Canyonlands.

56. The Salt Creek Road consists of a valid and perfected R.S. 2477 right-of-way with a reasonable and necessary scope encompassing vehicular travel and the uses to which the right-of-way was put prior to April 9, 1962.

FIRST CAUSE OF ACTION

(TO QUIET TITLE IN THE SALT CREEK ROAD IN SAN JUAN COUNTY)

57. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1 through 56.

58. The Salt Creek Road at the time of its perfection as an R.S. 2477 right-of-way was located on public lands, not reserved for public uses, and is more particularly shown on the accompanying Exhibits 1 and 2, incorporated herein by this reference. The exhibits reflect the location of the road as identified and plotted using GPS or digital technology. The Salt Creek Road links up with other roads in the County's road system.

59. Construction and maintenance of the road before April 9, 1962 was performed by San Juan County.

60. The Salt Creek Road was also established before April 9, 1962 by continuous public use for at least ten years prior thereto, as described above in paragraphs 42 through 44.

61. The uses to which the road was put before 1962 include those identified above in paragraphs 42 through 44.

62. In 1995, NPS published a Backcountry Management Plan (hereinafter, the "BMP") that allowed continued vehicle use of the Salt Creek Road, but imposed a permit system and placed a gate across the road to reduce the number of vehicles traveling the Salt Creek Road.

63. NPS has since changed the BMP and determined to permanently close the Salt Creek Road to vehicular travel and has actually closed the road by placing a permanent gate across the road at Peekaboo Spring, precluding any vehicular travel beyond the gate and thereby creating a case or controversy herein.

64. NPS' acts have wrongfully denied the State, San Juan County and the public the use of Salt Creek Road and disturbed the State's, County's and public's quiet enjoyment of their R.S. 2477 right-of-way.

65. The State is entitled to an order of this Court quieting title to the R.S. 2477 right-of-way for the Salt Creek Road in the State and San Juan County.

REQUEST FOR RELIEF

WHEREFORE, Intervenor-Plaintiff requests relief and judgment against Defendants as follows:

1. Quiet title in and to each highway described above;
2. Include within the scope of the highway: a) that which is reasonable and necessary for the types of use to which the right-of-way had been put as of April 9, 1962, b) the right to conduct ordinary maintenance activities within the right-of-way, without any federal authorization, c) areas along the roadway beyond the actual beaten path that are reasonable and necessary to accommodate reasonable and necessary accouterments such as drainage ditches and culverts that accord with sound engineering practices to accommodate safe travel on the road, including the requirements of AASHTO, and to provide reasonable and necessary servicing of such accouterments as are put in place pursuant to that sound engineering practice;
3. Award the Intervenor-Plaintiff attorneys' fees and costs to the extent permitted by law; and
4. Grant Intervenor-Plaintiff such further relief as may be appropriate.

DATED this 22 day of April, 2005.

Respectfully submitted,

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Exhibits/
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