

From Blazing Trails to Building Highways: *SUWA v. BLM* & Ancient Easements over Federal Public Lands

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*Potentially thousands of miles of federal public land are burdened with outstanding right-of-way claims¹ under a single sentence taken from a Civil War era mining statute, Revised Statute 2477 (R.S. 2477). R.S. 2477 seemed simple, in that it provided self-executing grants of easements over unreserved public lands.² Nearly a century and a half later, though, resolution of these claims has become a complex issue, rife with uncertainty about which access routes are valid and which areas of land are affected. This is an especially salient issue in Utah, a public land state; Utah is comprised primarily of federal land, and it is riddled with an estimated 10,000 local R.S. 2477 roads.³ The Tenth Circuit Court of Appeals' extensive opinion in *Southern Utah Wilderness Alliance v. Bureau of Land Management (SUWA)*⁴ culminated a legal battle among several rural Utah counties and the Bureau of Land Management (BLM) over the "improvement" of rights-of-way through federal land in southern Utah. While the court upheld the agency's ability to regulate changes to existing rights-of-way,⁵ it rejected BLM authority to determine*

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1. See 149 CONG. REC. E671 (daily ed. Apr. 3, 2003) ("Introduction of Bill Dealing with Claims for Rights-of-Way under R.S. 2477" by Rep. Udall).

2. Lode Mining Act of 1866, ch. 262, § 8, 14 Stat. 251, 253 (subsequently codified at 43 U.S.C. § 932) (repealed 1976) ("the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted").

3. James R. Rasband, *Questioning the Rule of Capture Metaphor for Nineteenth Century Public Land Law: A Look at R.S. 2477*, 35 ENVTL. L. 1005, 1010 (2005).

4. 425 F.3d 735 (10th Cir. 2005), *as amended on denial of rehearing* (2006).

5. *Id.* at 748.

the initial validity of R.S. 2477 claims.⁶ This Note contends that case-by-case adjudication of claims, pursuant to SUWA, is insufficient. It advocates for a proactive national plan to settle outstanding R.S. 2477 claims. To date, Congress has not only failed to devise such a plan, but it has also hindered resolution by placing a moratorium on agency rulemaking. Legislators need to reach a compromise between “states’ rights” and “federal rights” and develop a rational solution that balances the protection of federal public lands against the transportation needs of rural residents in public land states.

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6. *Id.* at 757.

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INTRODUCTION

Battles for rights-of-way under Revised Statute 2477 (R.S. 2477) are being waged over the last unreserved portions of this nation's land. State and federal authorities are engaged in the same struggle between federal supremacy and state sovereignty that has persisted since the country's founding.⁷ Conservationists are deeply concerned about how R.S. 2477 right-of-way claims (and resulting road development) will impact wilderness designation in the last remaining portions of unspoiled public land in the United States.⁸ In contrast, those who make a livelihood on these lands assert that rights-of-way were vital to the development of the West, and that unimpeded access is essential to maintaining rural transportation infrastructures.⁹

Revised Statute 2477 was enacted as part of the 1866 Mining Act¹⁰ to encourage frontier settlement and bolster development of the sparsely populated West.¹¹ The statute was a cornerstone of Congress's pro-development land policy, granting open-ended rights-of-way to state and local governments to establish easements over public lands. States, counties, and cities were given wide leeway to develop public access roads over whichever unreserved public lands they deemed necessary, resulting in thousands of miles of roads and providing access to mining claims, homesteads, and towns.¹²

Throughout this era of disposition, availability of public lands appeared limitless and roads were viewed as a good thing—they were “internal improvements” leading to human settlement.¹³ Economically productive disposition of the land toward commodity uses was favored.¹⁴ As Judge Hall of the Nevada district court aptly explained:

7. See, e.g., Harry R. Bader, *Potential Legal Standards for Resolving the R.S. 2477 Right of Way Crisis*, 11 PACE ENVTL. L. REV. 485, 486 (1994).

8. Rasband, *supra* note 3, at 1033.

9. Michael J. Wolter, Comment, *Revised Statutes 2477 Rights-of-Way Settlement Act: Exorcism or Exercise for the Ghost of Land Use Past?*, 5 DICK. J. ENVTL. L. & POL'Y 315, 325 (1996).

10. Lode Mining Act of 1866, ch. 262, 14 Stat. 251 (subsequently codified at 43 U.S.C. § 932) (repealed 1976). It was entitled, “An Act granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for other Purposes.” *Id.*

11. Bader, *supra* note 7, at 493–94.

12. Mitchell R. Olson, *The R.S. 2477 Right of Way Dispute: Constructing a Solution*, 27 ENVTL. L. 289, 293 (1997).

13. Rasband, *supra* note 3, at 1016.

14. Kevin Hayes, *History and Future of the Conflict Over Wilderness Designations of BLM Land in Utah*, 16 J. ENVTL. L. & LITIG. 203, 206 (2001).

[W]hen the government granted mining rights on the vast mountainous, and often impassable, areas of the West. . . it granted, as a necessary corollary . . . the right not only to pass over the public domain but also a property right to the continued use of such roadway or trail To realize the force of the proposition just stated, one need but to raise their eyes, when traveling through the West to see the innumerable roads and trails that lead off, and on, through public domain, into the wilderness where some prospector has found a stake (or broke his heart) or a homesteader has found the valley of his dreams and laboriously and sometimes at very great expense built a road to conform to the terrain, and which in many instances is the only possible surface access to the property¹⁵

Many R.S. 2477 roads were duplicative and many others were abandoned, due to fulfilled mining ventures or aborted homesteading attempts, but those that remained served as transportation and communication arteries across the West.¹⁶

In 1976, Congress ended the wholesale disposition of federally owned lands with the passage of the Federal Land Policy and Management Act (FLPMA).¹⁷ The Act formally recognized the value of preserving and protecting remaining public lands for future generations. It prospectively repealed R.S. 2477; however, it also included a savings clause providing that rights to any valid “highway,” established in the 110 years prior to FLPMA’s enactment, would be upheld.¹⁸ What Congress did not include was a formal administrative process for determining the validity of pre-FLPMA claims. As a result, the existence of previously uncontroversial roads through public lands became a hotly contested topic.¹⁹

*Southern Utah Wilderness Alliance v. Bureau of Land Management (SUWA)*²⁰ is the only federal appellate decision²¹ to provide criteria for determining the validity²² of R.S. 2477 rights-of-way. The Tenth Circuit

15. *United States v. 9,947.71 Acres of Land*, 220 F. Supp. 328, 331 (D. Nev. 1963).

16. *See* Olson, *supra* note 12, at 293.

17. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 (1976). The federal government retained approximately 657 million acres—roughly one-third of the U.S. land base. Hayes, *supra* note 14, at 208. FLPMA also requires BLM to retain public lands in federal ownership, under a multiple-use, sustained yield mandate. 43 U.S.C. §§ 1731, 1732 (2006).

18. Federal Land Policy and Management Act of 1976 § 510(b).

19. *See infra* Part I.

20. 425 F.3d 735 (10th Cir. 2005), *as amended on denial of rehearing* (2006).

21. *See* Bret C. Birdsong, *Road Rage and R.S. 2477: Judicial and Administrative Responsibility for Resolving Road Claims on Public Lands*, 56 HASTINGS L.J. 523, 537 (2005).

22. The terms “validity” and “scope” will be used throughout this Note to refer to R.S. 2477 right-of-way claims. “Validity” refers to the existence of a right-of-way—a determination of whether the claimant has an established right to use the easement in some manner. “Scope” refers to what can be done with an existing right-of-way—meaning the extent to which a claimant can alter a “valid” easement.

Court of Appeals determined that the Department of the Interior (DOI), through its Bureau of Land Management (BLM), does not have the authority to determine the initial *validity* of R.S. 2477 claims.²³ However, it may determine the *scope* of existing valid right-of-way claims.²⁴ The court directed federal agencies to review R.S. 2477 road “improvements” using a state law standard—which, according to Utah law, requires BLM to evaluate the scope of the claim based on the established use of the road.²⁵ More importantly, the court clearly prohibited DOI from assessing whether unresolved R.S. 2477 claims are valid—holding that each and every contest of validity must be resolved in the courts.

Case-by-case adjudication of these claims will only exacerbate the uncertainty and animosity that pervade R.S. 2477 disputes—inevitably pitting western states and municipalities against the federal government. Outstanding R.S. 2477 claims encumber local economic development activities, and federal land managers are stymied in developing and implementing congressionally mandated land management plans.²⁶ States and counties that do not hold clear title to R.S. 2477 rights-of-way across federal land may be unable to guarantee maintenance of local access routes and improvements that meet the needs of increased travel and tourism.²⁷ Finally, private land buyers must be wary of hidden claims that might suddenly emerge.²⁸

I begin this Note with an overview of the interests at stake²⁹ and a brief history of R.S. 2477.³⁰ Next, I analyze the holding in *SUWA*³¹ and outline options for resolving other right-of-way claims.³² Lastly, I argue that Congress should enact legislation, either outlining a rational plan for settling outstanding claims or allowing DOI to promulgate rules through notice and comment rulemaking.³³ Though past attempts have failed, the 2006 federal elections—which favored western representatives and created a Democratic majority—present an opportunity for new proposals.

I. THE INTERESTS AT STAKE

From a local perspective, R.S. 2477 “dirt roads” are often the only way to reach ranches and farms, and they provide access routes for

23. *S. Utah Wilderness Alliance*, 425 F.3d at 757.

24. *Id.* at 748.

25. *Id.* at 746.

26. Bader, *supra* note 7, at 488.

27. *See id.*

28. Wolter, *supra* note 9, at 323.

29. *See infra* Part I.

30. *See infra* Part II.

31. *See infra* Part III.

32. *See infra* Part IV.A.

33. *See infra* Part IV.B.

necessary services, such as mail, school buses, medical emergency vehicles, and law enforcement.³⁴ Many rural residents and policy makers view the restrictions on R.S. 2477 roads as sanctioned harassment, designed to rob them of their vested rights in “meaningful access” to transportation routes across federal lands.³⁵ Each BLM denial of a road expansion plan is another reason to resent the federal government. Those most affected by these restrictions are the rural residents who actually live and work on these lands—for instance, Garfield County, Utah is comprised of 93 percent public land and may only collect property taxes from 2 percent of the land in the County.³⁶ Indeed, for rural residents “surrounded by a sea of public lands,” these roads are an “economic lifeline,” providing access to markets, mining, grazing, and other local industry.³⁷

On the other hand, disputed R.S. 2477 claims are rarely the “economic lifelines” described above, and even valid roads can be an environmental threat. Roads increase erosion and opportunity for amplified human impact on the land; they help spread invasive and non-native species of flora and fauna; they can disturb the migration patterns and movement of native animals; and most importantly, they might serve to defeat the standards required for wilderness designation.³⁸ Environmental groups view assertions of R.S. 2477 rights as a means of usurping increased protection under the Wilderness Act, which states:

An area of wilderness is . . . an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, *with the imprint of man's work substantially unnoticeable*; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) *has at least five thousand acres of land* or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.³⁹

34. *Second Session on S. 1425, To Recognize the Validity of Rights of Way Granted Under Section 2477 of the Revised Statutes, and for Other Purposes: Hearing Before the S. Comm. on Energy and Natural Resources*, 104th Cong. 6 (1996) (statement of Utah Sen. Orrin G. Hatch).

35. Wolter, *supra* note 9, at 325–26.

36. *Second Session on S. 1425, supra* note 34, at 43 (statement of Barbara Hjelle).

37. Rasband, *supra* note 3, at 1023.

38. *Id.* at 1019; Tom Kenworthy, *Blazing Utah Trails to Block a Washington Monument*, WASH. POST, Nov. 30, 1996, at A1.

39. Wilderness Act of 1964 § 2(c), 16 U.S.C. § 1131(c) (2006) (emphasis added). FLPMA uses the same definition of “wilderness” as the Wilderness Act. *See* 43 U.S.C. § 1702(i) (2006) (“The term ‘wilderness’ as used [here] shall have the same meaning as it does in section 1131(c) of Title 16.”).

Preservationists' primary concern pertains to wilderness designation, which requires at least five thousand acres of land upon which the human imprint is minimal—a requirement that many have construed to mean an absence of mechanically maintained roads.⁴⁰ The presence of R.S. 2477 roads in Wilderness Study Areas⁴¹ (WSAs) would thus disqualify otherwise worthy public land under Wilderness Act requirements and prohibit permanent protection.⁴²

Lastly, it is difficult to view many assertions of R.S. 2477 claims as anything but wanton destruction in an effort to assert state rights.⁴³ For instance, Kane County, Utah bulldozed a “road to nowhere,” through the middle of the desert near Canyonlands National Park, in response to the area’s potential designation as “wilderness.”⁴⁴ Though rural counties claim that their primary concern is loss of access routes through federal land, losing widely used rural transportation arteries may not constitute a truly pressing danger. The issue is more likely whether foot trails and cow paths can be classified as “highways,” and the extent to which existing roads can be widened and “improved,” despite potential detriment to sensitive habitats.⁴⁵ Alternatively, a less insidious motive may be that states and counties are asserting these easement rights as a back door means of developing infrastructure to enable economic gain, such as oil and gas development—alleging R.S. 2477 claims rather than seeking permission for more restricted access across federal lands.⁴⁶ For a municipality, establishing a preexisting vested R.S. 2477 right to an easement is much more desirable than seeking a new right through FLPMA, under which DOI can attach numerous restrictions.

40. Rasband, *supra* note 3, at 1010.

41. On BLM and U.S. Forest Service lands, Wilderness Study Areas (WSAs) are lands that have been inventoried by the agency and found to have suitable wilderness characteristics pursuant to the Wilderness Act, see *supra* note 39 and accompanying text, but have not yet been designated by Congress as “wilderness.” See 43 U.S.C. § 1782(a) (2006). After inventory, but prior to congressional action, BLM must manage WSAs so as not to impair their suitability for future wilderness designation, subject to existing regulations. See *id.* § 1782(c). However, BLM has discretion to permit off-road vehicle (ORV) use on WSA lands. See *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004).

42. Rasband, *supra* note 3, at 1010.

43. See Kenworthy, *supra* note 38; Todd Wilkinson, *Roads to Nowhere*, NAT'L PARKS, Jan.–Feb. 1998, at 22, 23.

44. Wilkinson, *supra* note 43, at 25.

45. This is particularly true when the road construction “scrapes flat” a previously rugged trail, and is actually “a determined effort to make sure that large areas are unsuitable for designation as possible wilderness.” Kenworthy, *supra* note 38.

46. 2 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUB. NAT. RESOURCES L. § 10E:19 (2007) (“Access to Federal Lands and Natural Resources: Rights-of-Way Across Federal Land: Pre-1976 Rights-of-Way”).

II. HISTORICAL PERSPECTIVE ON R.S. 2477: FROM 1866 THROUGH THE PRESENT

R.S. 2477 remained in effect for over one hundred years, and forty years after its repeal, uncertainty about road ownership persists. Preserving pre-1976 R.S. 2477 rights-of-way has had lasting effects, in that, “[i]t may take decades for the courts and agencies to sort out questions concerning the existence, extent, duration, or scope of such preexisting easements.”⁴⁷ According to a report prepared by DOI in 1993, about 1,455 R.S. 2477 rights-of-way had been recognized by either the courts or the agency, about 5,600 known claims remained, and an indeterminable number of potential claims had yet to be asserted.⁴⁸

A. *Enactment under Mining Act of 1866*

As established under the 1866 Mining Act,⁴⁹ the specific language of R.S. 2477 stated, “*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.”⁵⁰ DOI further specified that no application need be filed, and action on the part of the federal government was unnecessary.⁵¹ Therefore, “acceptance” of this self-executing grant did not require registration or notice, only the assertion of a right-of-way claim by a person or entity (in most cases, a local government),⁵² and construction of a road over unreserved federal land. By requiring “no formal act of public acceptance on the part of the states or localities in whom the right was vested,”⁵³ R.S. 2477 was unique in establishing rights-of-way without administrative formalities, such as entry, application, license, patent, or deed. Consequently, a single sentence in an 1866 statute allowed for the establishment of most of the transportation routes in the western United States,⁵⁴ and the only restriction was that a right-of-way could not be created after the land had been divested or specifically reserved by the federal government for another use.⁵⁵

47. *Id.*

48. U.S. DEP’T OF 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 29 (1993).

49. Lode Mining Act of 1866, ch. 262, 14 Stat. 251 (subsequently codified at 43 U.S.C. § 932) (repealed 1976). It was entitled, “An Act granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for other Purposes.” *Id.*

50. *Id.* § 8.

51. Rights-of-Way for Roads & Highways Over Public Lands, 56 Interior Dec. 533, 551 (1938).

52. Olson, *supra* note 12, at 297.

53. *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 741 (10th Cir. 2005), *as amended on denial of rehearing* (2006).

54. *Id.* at 740.

55. Bader, *supra* note 7, at 491. Likewise, once the easement has been established, subsequent reservation or disposition is subject to the easement and does not extinguish it. *Id.*

B. Repeal under Federal Land Policy Management Act of 1976

During the 20th century, public attitudes and political will shifted toward preservation of public land. An era of retention ultimately led to a long-term strategy for comprehensive management of the public lands under ownership of the federal government.⁵⁶ A major milestone in the prohibition of exploitive uses on protected areas of federal land was the enactment of the Wilderness Act in 1964,⁵⁷ which recognized wilderness as “an area where the earth and its community of life are untrammelled by man.”⁵⁸

Congress did not overlook R.S. 2477 easements when it tightened the reins on disposition of public lands.⁵⁹ It prospectively repealed the open-ended grant in 1976, under the Federal Land Policy Management Act (FLPMA).⁶⁰ However, the Act protected existing R.S. 2477 claims, such that “nothing in this Act . . . shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on [October 21, 1976].”⁶¹ The statute also established a process for seeking new rights-of-way across public lands.⁶² Since Congress did not also include a formal administrative process for determining the validity of pre-FLPMA claims, though, this savings clause opened the door for controversy over what constitutes a valid right-of-way, as it existed in October 1976.⁶³

C. Post-Repeal Claim Resolution Strategies

Prior to the passage of FLPMA, most disputes regarding contested R.S. 2477 claims were resolved in state courts using state law.⁶⁴ In 1938, DOI published a formal regulation providing: “This grant becomes effective upon the construction or establishing of highways, in accordance

56. Jan G. Laitos & Thomas A. Carr, *The Transformation on Public Lands*, 26 *ECOLOGY L.Q.* 140, 147–79 (1999) (explaining the four distinct stages of federal governance of public lands: “acquisition, disposal, retention, and management”).

57. Hayes, *supra* note 14, at 207.

58. 16 U.S.C. § 1131(c) (2006).

59. 43 U.S.C. § 1701 (2006). The federal government retained approximately 657 million acres—roughly one-third of the U.S. land base. Hayes, *supra* note 14, at 208. FLPMA also required BLM to retain the public lands in federal ownership, under a multiple-use mandate. 43 U.S.C. § 1701 (2006).

60. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 706, 90 Stat. 2743, 2793 (1976).

61. *Id.* § 701.

62. *Id.* §§ 501–511.

63. This conflict can be framed in terms of two constituencies—those who wish to “maximize” R.S. 2477 claims and those who wish to “minimize” them. Wolter, *supra* note 9, at 323.

64. Rasband, *supra* note 3, at 1027; *see also* *Sierra Club v. Hodel*, 848 F.2d 1068, 1082–83 (10th Cir. 1988), *overruled on other grounds*, *Vill. of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992).

with the State laws, over public lands not reserved for public uses.”⁶⁵ After FLPMA, however, regulators have struggled to create lasting guidelines pertaining to both the validity of these right-of-way claims and their scope—or the extent to which the holders of valid easements can improve or expand valid rights-of-way. In 1979 DOI attempted to amass records of valid claims, by proposing regulations that would have required state and local governments to submit maps to BLM within three years, showing the location of highways constructed under R.S. 2477.⁶⁶ The maps were for planning purposes only, but when DOI published the final regulations, this “requirement” had been reduced to an “opportunity,”⁶⁷ and when new regulations were published in 1982, the mention of a three-year window had been eliminated altogether.⁶⁸ This lost opportunity closed the door on a potentially efficient and timely means of establishing a baseline for existing claims.

1. *Federal versus State Law: Ferguson, Hodel, and Sierra Club v. Hodel*

In 1980, Deputy Solicitor Ferguson issued a letter in which he suggested that R.S. 2477 disputes should be resolved under federal law. The “Ferguson letter” attempted to create a definition for “construction” as the “actual building of a highway” involving “the performance of work” and not “mere use.”⁶⁹ His letter was put to the test a few years later when the Sierra Club brought suit against BLM and Garfield County in opposition to the county’s plan to convert a one-lane, twenty-eight mile long dirt road into a two-lane gravel road.⁷⁰ This road, called the Burr Trail, traverses across and alongside multiple-use federal lands, two wilderness study areas, Capitol Reef National Park, and Glen Canyon National Recreation Area.⁷¹

Issuing its decision in *Sierra Club v. Hodel* in 1988, the Tenth Circuit minimized the effect of the Ferguson letter. The court upheld Garfield

65. Rights-of-Way for Roads & Highways Over Public Lands, 56 Interior Dec. 533, 551 (1938).

66. Federal Land Policy and Management Act; Management of Rights-of-Way and Related Facilities on Public Lands and Reimbursement of Costs, 44 Fed. Reg. 58,106, 58,118 (Oct. 9, 1979) (proposed rulemaking).

67. Rights-of-Way, Principals and Procedures; Federal Land Policy and Management Act; Management of Rights-of-Way and Related Facilities on Public Lands and Reimbursement of Costs, 45 Fed. Reg. 44,518, 44,531 (July 1, 1980) (final rulemaking).

68. Rights-of-Way, Principles and Procedures; Amendment, 47 Fed. Reg. 12,568–70 (Mar. 23, 1982) (final rulemaking).

69. Rasband, *supra* note 3, at 1029.

70. *Sierra Club v. Hodel*, 848 F.2d 1068, 1073 (10th Cir. 1988), *overruled on other grounds*, *Vill. of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992). The county had a valid claim for a “highway” under R.S. 2477, however the dispute was over the scope of its claim—what it could do with the road. *Id.*

71. *Id.*

County's construction activities as allowable within the scope of its R.S. 2477 easement, finding that congressional intent as well as historical precedent favored state law in interpreting the scope of R.S. 2477 claims.⁷² The opinion cited evidence that states had already developed standards for perfecting these right-of-way claims, based on a consistent application by the courts since 1866. The court also held that congressional silence on which law should be determinative amounted to acceptance of the state law standard.⁷³ Therefore, the court concluded that, "[a] change to a federal standard would adversely affect existing property relationships" and "disturb the expectations of all parties to these property relationships."⁷⁴

Ultimately, the Tenth Circuit held that rights to "improve" the Burr Trail were frozen in scope to those rights that existed in 1976.⁷⁵ This did not mean that the road had to be maintained in exactly the same physical condition as existed in 1976.⁷⁶ Rather, an R.S. 2477 road could be improved to the extent necessary to meet the needs of increased travel, "in the light of traditional uses to which the right-of-way was put."⁷⁷ Because Utah common law before 1976 allowed rights-of-way to "be widened to meet the exigencies of increased travel," the court determined that the county could proceed with road improvements.⁷⁸ However, *Hodel* placed some limits on allowable improvements. First, states could not create new rights through post-1976 legislation.⁷⁹ Second, the "exigencies" of travel could not be interpreted to allow construction of a multi-lane highway.⁸⁰ Finally, improved roads could not unduly degrade WSAs, and federal agencies with jurisdiction over such lands would need to regulate them accordingly.⁸¹

Shortly after the 1988 *Hodel* decision, Interior Secretary Hodel issued a new policy statement to guide interpretation of R.S. 2477 claims.

72. *Id.* at 1083.

73. *Id.* at 1080–83.

74. *Id.* at 1082–83.

75. *Id.* at 1081.

76. *Id.*

77. *Id.* at 1083.

78. *Id.* (citing *Lindsay Land & Livestock Co. v. Churnos*, 285 P. 646, 649 (Utah 1929); *Whitesides v. Green*, 44 P. 1032, 1033 (Utah 1896)).

79. *Sierra Club v. Hodel*, 848 F.2d 1068, 1083 (10th Cir. 1988), *overruled on other grounds*, *Vill. of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992).

80. *Id.* at 1083.

81. *Id.* at 1085–88. Ten years after *Hodel*, in the face of continuing conflict over the Burr Trail, Garfield County unilaterally bulldozed a portion of the Trail in Capitol Reef National Park. The County claimed that the work was essential, since the road had deteriorated, due in part to DOI delays in approving construction. *Second Session on S. 1425*, *supra* note 34, at 43 (statement of Barbara Hjelle). In this case, though, the Utah district court ordered the County to pay for revegetation of the area, holding that the National Park Service was within its power to regulate road construction within the national park. *United States v. Garfield County*, 122 F. Supp. 2d 1201 (D. Utah 2000).

The “Hodel Policy” rejected Ferguson’s definition of construction and replaced it with a standard similar to Utah state law, such that:

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. . . . *The passage of vehicles by users over time may equal actual construction.*⁸²

Secretary Hodel’s new interpretive guidance broadened the definition of construction to include the “mere use” standard that Secretary Ferguson had rejected.

2. *Different Political Parties, Different Legal Standards: 1997 Babbitt Policy*

In 1994, under Secretary Babbitt, DOI attempted to return to Ferguson’s federal standard⁸³ for determining the scope of “construction” on R.S. 2477 claims.⁸⁴ DOI proposed standards and administrative procedures for determining the validity of claims.⁸⁵ These regulations would have imposed a two-year filing requirement; defined the key statutory terms “construction,” “highway,” and “reserved for public uses”; and clarified the relationship between state and federal law in adjudicating claims.⁸⁶ By establishing a two-year limit on the filing of claims, the fallback for stale claims would have been federal retention and foreclosure of any future claims. In essence, these procedures would have brought to light any unknown R.S. 2477 claims and created a process for determining their validity.

Legislators in the Republican-controlled Congress mustered a strong reaction though, prohibiting DOI from promulgating these rules, as well as any future rules regarding R.S. 2477.⁸⁷ Congress took immediate action

82. Memorandum from Assistant Sec’y for Fish & Wildlife & Parks, and Land & Minerals Mgmt., U.S. Dep’t of Interior, to Donald Hodel, Sec’y, U.S. Dep’t of Interior (Dec. 7, 1988) (“Departmental Policy on Section 8 of the Act of July 26, 1866, Revised Statute 2477 (Repealed), Grant of Right-of-Way for Public Highways (RS-2477)”) (emphasis added), available at <http://www.rs2477roads.com/2hodel.htm>; see also Rasband, *supra* note 3, at 1031.

83. For the purpose of this Note, a “federal construction standard” requires the actual performance of construction *work* on the road prior to October 1976, whereas a “state construction standard” generally requires only that the road was *used* prior to that time. See *infra* notes 151–53 and accompanying text.

84. See Revised Statute 2477 Rights-of-Way, 59 Fed. Reg. 39,216 (Aug. 1, 1994) (proposed rule).

85. *Id.*

86. COGGINS & GLICKSMAN, *supra* note 46.

87. See, e.g., *Second Session on S. 1425*, *supra* note 34, at 7 (statement of Utah Sen. Orrin G. Hatch). According to Utah Republican Senator Orrin Hatch, the proposed regulations would create “a lengthy, frustrating, and time-consuming application process that places the [financial and evidentiary] burden on local governments.” *Id.*

to cut the legs out from under DOI's regulations, using a budget rider to place a moratorium on DOI enacting any rules or regulations pertaining to R.S. 2477 until 1996.⁸⁸ Then, before the moratorium expired, Congress made the prohibition permanent: "no final [R.S. 2477] rule . . . shall take effect unless expressly authorized by an Act of Congress subsequent to the date of the enactment of this [1997 Interior Appropriations] Act."⁸⁹

Representatives from Utah and Alaska⁹⁰ also championed alternative legislation that strongly favored standards based on state law and greater retention of state and county claimants' rights over outstanding R.S. 2477 claims.⁹¹ These "Rights of Way Settlement" bills stipulated that claimants could file within a five- to ten-year period, and that notice need only include the location and scope of the claimed route.⁹² Once filed, the federal government would have two years to accept the claim; if it chose to reject the claim, it would have to file suit in federal district court, bearing the full burden of proof on all issues. Further, state law would govern resolution of questions about the criteria for "construction" and "highway," even if it contravened the plain language of R.S. 2477. Neither bill passed,⁹³ but the strategic maneuvering of representatives from states that have much to gain from a state law standard epitomizes the continuing struggle between state and federal interests; such states prefer a standard that is generous to R.S. 2477 claimants, rather than a less liberal, but more expedient federal law standard. This particular battle also illustrates how strong interests, unwilling to compromise, have hindered both administrative and congressional attempts to resolve this issue.

Resigned to continued uncertainty under the status quo, in 1997 Secretary Babbitt attempted to staunch the flow of new R.S. 2477 claims.

88. National Highway System Designation Act of 1995, § 349(a)(1), Pub. L. No. 104-59, 109 Stat. 568, 617-18.

89. Department of the Interior and Related Agencies' Appropriations Act, 1997, § 108, Pub. L. No. 104-208, 110 Stat. 3009, 3009-200 (1996) (enacted by the Omnibus Consolidated Appropriations Act of 1997). In 1997, after several congressional requests for clarification, the General Accounting Office issued an interpretation of section 108, stating that it was "permanent law." Decision Letter from Robert P. Murphy, General Counsel, Gen. Accounting Office, No. B-277719, at 1 (Aug. 20, 1997); see also Patrick Parenteau, *Anything Industry Wants: Environmental Policy Under Bush II*, 14 DUKE ENVTL. L. & POL'Y F. 363, 399; Rasband, *supra* note 3, at 1031-32.

90. Both Alaska and Utah are comprised largely of federal public land. Further, constituents from both states typically elect (Republican) representatives who champion "state's rights," and many local residents who live and work on federal land would prefer greater local control of the land. Therefore, legislators from both states have an interest in resolving R.S. 2477 claims using a state law standard that is more generous to state claimants.

91. Olson, *supra* note 12, at 313-14.

92. See *Second Session on S. 1425*, *supra* note 34. President Clinton's DOI Solicitor, John Lesby opposed these bills. *Id.* at 11.

93. Both pieces of legislation were ultimately defeated, but the moratorium on DOI rulemaking remains. See *supra* notes 88-89 and accompanying text.

He issued an interim departmental policy statement in which he revoked the “Hodel Policy” and specified that state law should be applied to R.S. 2477 right-of-way disputes, “to the extent it is consistent with Federal law.”⁹⁴ Secretary Babbitt also limited the recognition of claims to only those presenting a “compelling and immediate need,” pending a set of final R.S. 2477 rules.⁹⁵ To date, the legislative stalemate between those who advocate a state law “mere use”⁹⁶ standard and those who prefer resolution under a federal “mechanical construction” standard has not been broken. Ten years after Secretary Babbitt’s interim policy, no R.S. 2477 legislation or final rules have materialized.

3. *Negotiated Settlement via Memorandum of Understanding: 2003 Norton Policy*

In 2000, Utah utilized the Quiet Title Act⁹⁷ to assert rights to hundreds of “highways” over federal land. Initially, the state sent DOI a notice that it intended to bring suit to quiet title on more than one thousand R.S. 2477 right-of-way claims, located in every county in Utah.⁹⁸ But in 2001, before the notice expired, a new federal administration had taken office—one that was more amenable to granting Utah’s claims and less likely to “[usurp] property rights vested in the State.”⁹⁹ Gail Norton, who replaced Bruce Babbitt as Secretary of the Interior, entered into negotiations with Utah Governor Mike Leavitt to develop a simplified process for quieting title on Utah’s road claims¹⁰⁰ and Utah never filed the Quiet Title suit.

Negotiations between Interior Secretary Norton and Governor Leavitt culminated in a Memorandum of Understanding (MOU), signed

94. Rasband, *supra* note 3, at 1032.

95. *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 757 n.11 (10th Cir. 2005), *as amended on denial of rehearing* (2006).

96. The *SUWA* court deems this “mere use” characterization a “caricature of the common law standard.” *Id.* at 781. It asserts that the state/common law standard for construction of an R.S. 2477 highway is more accurately a “continuous public use” standard that does not require “mechanical construction.” *Id.*

97. The Quiet Title Act waives sovereign immunity (allows the United States to be named as a defendant) for civil suits involving “title to real property in which the United States claims an interest.” Quiet Title Act, 28 U.S.C. § 2409a(a) (2006). The Act allows states to bring an action against the United States within twelve years of receiving “notice of the Federal claims to the lands.” *Id.* § 2409a(g)–(i) (2006); *see also infra* Part IV.A.5.

98. Letter from Stephen G. Boyden, Assistant Attorney Gen., State of Utah, to Bruce Babbitt, Sec’y, U.S. Dep’t of Interior (June 14, 2000) (“Utah R.S. 2477 Rights-of-Way—Notice of Intention to File Suit”), *available at* http://www.rs2477.com/documents/6-14-2000_ltr_to_Bruce_Babbitt_from_State_of_Utah.pdf.

99. *Id.* at 1.

100. Memorandum of Understanding between the State of Utah and the U.S. Dep’t of Interior (April 9, 2003) [hereinafter R.S. 2477 MOU] (State and County Road Acknowledgment), *available at* <http://www.doi.gov/news/mours2477.htm>; *see also* Parenteau, *supra* note 89, at 399–400.

in April 2003. The document included new disclaimer rules, in which Utah and its counties could seek federal quit claim deeds, or “recordable disclaimer[s] of interest,” from DOI for roads claimed under R.S. 2477 if:

- [1] the road existed prior to the enactment of FLPMA in 1976 and is in use at the present time;
- [2] the road can be identified by centerline description or other appropriate legal description;
- [3] the existence of the road prior to the enactment of FLPMA is 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; this information may include, but is not limited to, photographs, affidavits, surveys, government records concerning the road, information concerning or information reasonably inferred from the road’s current conditions; and
- [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.¹⁰¹

In return for this generous interpretation of rights-of-way, which required Utah’s BLM Director to automatically issue disclaimers if the conditions were satisfied,¹⁰² Utah agreed not to assert claims in National Parks, Wilderness Areas, Wilderness Study Areas (designated prior to 1993), or National Wildlife Refuges.¹⁰³

Several members of Congress questioned the legality of Secretary Norton’s new policy of disclaimers¹⁰⁴ and Colorado Representative Mark Udall successfully pushed the House into amending the 2004 DOI appropriations bill to block settlement of these claims.¹⁰⁵ Many critics believed that the 2003 Norton MOU was the product of secret dealings designed to give away federal interests in public land and undermine the twelve-year statute of limitations imposed on states and municipalities by the Quiet Title Act.¹⁰⁶ According to former Interior Solicitor John Leshy, the MOU was “like pointing a loaded gun at these protected areas and giving the claimants the power to pull the trigger.”¹⁰⁷

101. R.S. 2477 MOU, *supra* note 100, at 3–4; *see also* Rasband, *supra* note 3, at 1039.

102. R.S. 2477 MOU, *supra* note 100, at 3; *see also* Parenteau, *supra* note 89, at 400.

103. R.S. 2477 MOU, *supra* note 100, at 2; *see also* Rasband, *supra* note 3, at 1040. Colorado and Alaska were so enamored of the bargain, that they pursued their own MOUs with the Interior Department. Rasband, *supra* note 3, at 1040.

104. Parenteau, *supra* note 89, at 399.

105. M.E. Sprengelmeyer, *House Blocks Settlement of Road Claims*, ROCKY MOUNTAIN NEWS, July 18, 2003, at A27.

106. Michael Kilian, *U.S. Opens Up Public Lands to More Roads; Foes Say Millions of Acres Affected*, CHI. TRIB., Jan. 7, 2003, at N10; *see also* Parenteau, *supra* note 89, at 399.

107. John D. Leshy, *Natural Resources Policy in the Bush (II) Administration: An Outsider’s Somewhat Jaundiced Assessment*, 14 DUKE ENVTL. L. & POL’Y F. 347, 362 (2004).

Despite this arduous political wrangling, which began in 1976, it still is unclear how, when, and if the thousands of remaining R.S. 2477 rights-of-way will ever be settled. To date, no legislation has survived the journey through both houses of Congress, no final agency rules have been developed, and no consistent jurisprudence has emerged. However, when Garfield County asserted another R.S. 2477 claim in southern Utah wilderness in late 1996, armed with bulldozers to “brighten” the roads, it catalyzed another lawsuit.¹⁰⁸

III. SETTLING R.S. 2477 CLAIMS UNDER *SOUTHERN UTAH WILDERNESS ALLIANCE V. BUREAU OF LAND MANAGEMENT*

In fall 1996, heavy equipment crews dispatched by San Juan, Kane, and Garfield Counties began bulldozing roads into remote areas of federal land in southern Utah.¹⁰⁹ Against a historical backdrop of mistrust of the federal government and frustration over the loss of perceived rights to use the land, the three counties decided to assert claims of right-of-way over federal public land—including six roads running through a WSA, and nine within the Grand Staircase-Escalante National Monument.¹¹⁰ The counties’ construction crews entered BLM lands without prior notification or permission and proceeded to carve roads out of what had previously been merely “primitive trails.” None of these trails had been graded before; however, some were listed on county maps as Class B or Class D (county-maintained) highways.¹¹¹

The counties’ road construction activities came close on the heels of President Clinton’s September 1996 proclamation designating Utah’s Grand Staircase-Escalante as a National Monument. President Clinton’s exercise of authority under the Antiquities Act was not well received by many Utah residents, particularly those living in rural counties who would be most directly affected by the designation.¹¹² Fearing impending infringement on “previously perfected rights-of-way,”¹¹³ San Juan, Kane, and Garfield Counties took action. One Kane County commissioner described their subsequent construction activities on 500–600 miles of back-country roads: ““What we said was, if they are having trouble

108. Rasband, *supra* note 3, at 1033.

109. *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 742 (10th Cir. 2005), *as amended on denial of rehearing* (2006).

110. *See id.*

111. *See id.*; Highway-Robbery.org, Lands at Risk in Utah, <http://www.highway-robbery.org/lands/utah.htm> (regarding the questionable validity of these “highways”) (last visited Sept. 13, 2007).

112. Rasband, *supra* note 3, at 1032–33. The President and Interior Secretary were even hung in effigy in Kane and Garfield counties. *Id.* at 1032.

113. *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 147 F. Supp. 2d 1130, 1133 (D. Utah 2001).

judging if it's a road, we are going to brighten those roads up We smoothed them out. . . . It was to help them with their judgment."¹¹⁴

Alarmed at the counties' intrusion into what it described as "stunning red-rock canyon formations, pristine wilderness areas . . . [and] undisturbed wildlife habitat,"¹¹⁵ Southern Utah Wilderness Alliance (SUWA)¹¹⁶ took counter-action almost immediately. It filed a protest with BLM to halt the counties' construction, but road grading activities continued. Consequently, in October 1996, SUWA filed suit in Utah district court against BLM and the three counties.¹¹⁷ The environmental group asserted that the counties did not have valid R.S. 2477 right-of-way claims on these lands, so it sought formal review of the roads in question. It also invoked FLPMA, the Antiquities Act, and the National Environmental Policy Act (NEPA), attempting to force BLM to take action against the counties. SUWA intended to halt what it considered to be illegal road construction and to enjoin further maintenance or construction on these disputed rights of way.¹¹⁸

A. Procedural History

SUWA's strategy was effective in convincing BLM to change course—under legal pressure from SUWA, BLM filed cross claims against the counties, alleging trespass and violation of FLPMA, and seeking declaratory and injunctive relief, as well as damages to restore the affected areas.¹¹⁹ The counties' defense was that their construction activities were lawful—simply a valid exercise of right-of-way under R.S. 2477.¹²⁰ The district court stayed the litigation, however, finding that BLM would have to make the initial determination regarding the validity and scope of the counties' claimed rights-of-way.¹²¹ After conducting a thorough investigation, BLM issued final administrative decisions in July 1999 and January 2000, concluding that fifteen of the sixteen contested

114. Kenworthy, *supra* note 38.

115. *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 742 (10th Cir. 2005), *as amended on denial of rehearing* (2006).

116. SUWA is a citizen group that works closely with a coalition of environmental organizations called the Utah Wilderness Coalition. SUWA's mission is "preservation of the outstanding wilderness at the heart of the Colorado Plateau, and the management of these lands in their natural state for the benefit of all Americans." Southern Utah Wilderness Alliance, Our Mission, http://www.suwa.org/site/PageServer?pagename=about_mission (last visited Sept. 13, 2007).

117. *S. Utah Wilderness Alliance*, 425 F.3d at 742.

118. *Id.*

119. *Id.* at 742–43.

120. *Id.* at 743.

121. *See S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 147 F. Supp. 2d 1130, 1133 (D. Utah 2001).

rights-of-way claimed by the counties were invalid and that the sixteenth claim was too broad in scope.¹²²

In 2001, SUWA sought enforcement of BLM administrative determinations, and the district court upheld them under a deferential standard of review.¹²³ The counties then appealed to the Tenth Circuit, which found that the district court had entered an incomplete ruling.¹²⁴ On remand, the district court granted the parties' requests for a declaratory judgment, but denied their requests for injunctive relief and damages.¹²⁵ It issued a declaration that: (1) the counties did not have valid rights-of-way under R.S. 2477 on fifteen of the sixteen roads at issue and had exceeded the scope of their valid claim on the sixteenth road; and (2) the counties' action in grading the roads constituted trespass.¹²⁶ The counties appealed again, and the Tenth Circuit issued its *SUWA* decision in September 2005—nine years after the counties had initially bulldozed sixteen roads through southern Utah wild lands.

B. Holding

The Tenth Circuit's 2005 *SUWA* decision had two major parts. First, the Court vested federal land management agencies, such as BLM, with the power to determine the *scope* of valid claims. Second, it held that state courts—and not BLM—had primary jurisdiction to resolve disputes over the *validity* of R.S. 2477 right-of-way claims.

1. BLM Must Determine Scope of Established R.S. 2477 Rights-of-Way

The Tenth Circuit held that federal land management agencies must determine whether “construction” activities undertaken on R.S. 2477 roads fall within the “scope” of established usage.¹²⁷ If the activities exceed the scope of usage, then the agency can bring an action against the claim holder for trespass. The term “scope,” as used by the court, is defined as the “physical boundaries of the right-of-way as well as the uses to which it has been put.”¹²⁸ The term “construction” refers to any

122. *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 743 (10th Cir. 2005), *as amended on denial of rehearing* (2006).

123. *See S. Utah Wilderness Alliance*, 147 F. Supp. 2d at 1134.

124. *See S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 69 Fed. Appx. 927 (10th Cir. 2003) (appeal dismissed).

125. *S. Utah Wilderness Alliance*, 425 F.3d at 744.

126. *Id.* at 744–45.

127. *Id.* at 748. “A right of way is not tantamount to fee simple ownership of a defined parcel of territory; rather, it is an entitlement to use certain land in a particular way.” *Id.* at 747.

128. *Sierra Club v. Hodel*, 848 F.2d 1068, 1073 (10th Cir. 1988), *overruled on other grounds*, *Vill. of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992). “To convert a two-track jeep trail into a graded dirt road, or a graded road into a paved one, alters the use,

activity—such as grading or blading of a valid R.S. 2477 road for the first time—that exceeds “routine maintenance.”¹²⁹ Further, in order to provide federal land management agencies with a fair opportunity to study the potential effects of and alternatives to proposed changes, holders of valid R.S. 2477 rights-of-way are required to consult with the appropriate agency before undertaking any improvements beyond routine maintenance.¹³⁰ Therefore, Garfield, Kane, and San Juan Counties’ road grading activities on *valid* R.S. 2477 rights-of-way would have required advance consultation with BLM—which would have then had primary authority to determine whether the counties had exceeded the scope of their easements, or alternatively, whether proposed changes were reasonable and necessary in light of how the easements were used in 1976.¹³¹

The court looked to *Hodel* and state law to elucidate the “usage” standard for scope.¹³² It explained that determination of the scope of a right-of-way across federal lands is limited by the established utilization of the route, “as necessary to meet the exigencies of increased travel . . . in the light of traditional uses.”¹³³ Under the *Hodel* definition of “traditional usage,” any improvements to a road must be “reasonable and necessary” to the use to which it has been put as of 1976.¹³⁴ Accordingly, a road need not be maintained in its exact original character to stay within the bounds of ordinary usage.

The court also clarified its requirement that easement holders consult with federal land management agencies when undertaking road improvements. It cited several cases illustrating Utah’s adherence to a rule that holders of easements and owners of the land through which they pass must coordinate their activities so as not to interfere with each other’s rights.¹³⁵ Under this rule, the court noted that the holder of a right-of-way may be entitled to make legitimate changes to the roadway, but that in the “spirit of mutual accommodation,” these changes could not be made unilaterally, and anything going beyond “routine

affects the servient estate, and may go beyond the scope of the right of way.” *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 747 (10th Cir. 2005), *as amended on denial of rehearing* (2006).

129. *S. Utah Wilderness Alliance*, 425 F.3d at 749. The court’s use of the term “construction” to describe the extent of road-work undertaken on valid R.S. 2477 claims is not the same as the statutory term “construction,” used to construe the *initial* validity of a claim.

130. *Id.* at 748.

131. *See id.*

132. In *Hodel*, the Tenth Circuit applied Utah state law in defining the scope of a right-of-way over BLM land. *Hodel*, 848 F.2d at 1081. *Hodel* pertained to the *scope* of Garfield County’s *valid* easement. *See supra* Part II.C.2.

133. *S. Utah Wilderness Alliance*, 425 F.3d at 746.

134. *Sierra Club v. Hodel*, 848 F.2d 1068, 1084 (10th Cir. 1988), *overruled on other grounds*, *Vill. of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992).

135. *See, e.g.*, *United States v. Garfield County*, 122 F. Supp. 2d 1201 (D. Utah 2000).

maintenance” would require consultation with the holder of the servient land (here the federal government).¹³⁶

Finally, the Tenth Circuit provided guidance on differentiating between construction and routine maintenance. It defined construction as “any ‘improvement,’ ‘betterment,’ or any other change in the nature of the road that may significantly impact” the resources or values of the public lands at stake.¹³⁷ This would include widening or realignment of a road, or a significant change in its surface composition (such as from dirt to gravel). In contrast, routine maintenance would not require agency approval and includes upkeep and repair or replacement of existing features in a way that preserves the road. In this case, the court found that the record was not sufficient to determine whether the counties had performed construction or merely routine maintenance.¹³⁸ Therefore, the issue on remand to the district court was whether the work undertaken by the counties went beyond routine maintenance and thus constituted trespass; it was trespass if they had undertaken “construction” in an attempt to expand the routes beyond their established uses.¹³⁹

2. Courts Must Determine Validity of R.S. 2477 Right-of-Way Claims Based on State Law

In the second part of its decision, the Tenth Circuit determined that BLM does not have primary jurisdiction¹⁴⁰ to establish the validity of rights-of-way across federal land. Rather, the court found that the authority to make the initial validity determination rests with the courts.¹⁴¹ It explained that the doctrine of primary jurisdiction applies when Congress has overtly assigned an issue to a specific administrative

136. *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 748 (10th Cir. 2005), *as amended on denial of rehearing* (2006); *see also* UTAH CODE ANN. § 72-5-303(2)–(3) (2007) (“The holder of an R.S. 2477 right-of-way and the owner of the servient estate shall exercise their rights without unreasonably interfering with one another. The holder of the R.S. 2477 right-of-way shall design and conduct construction and maintenance activities so as to minimize impacts on adjacent federal public lands, consistent with applicable safety standards.”).

137. *S. Utah Wilderness Alliance*, 425 F.3d at 749 (citing the definition used in *Garfield*); *Garfield*, 122 F. Supp. 2d at 1253.

138. *S. Utah Wilderness Alliance*, 425 F.3d at 745.

139. *Id.* at 788. On remand, the case was dismissed for lack of “live case or controversy,” as construction had ceased on the contested rights-of-way. *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, No. 2:96CV0836BSJ, 2006 WL 2572116, at *1 (D. Utah Aug. 30, 2006).

140. “Primary jurisdiction is a prudential doctrine designed to allocate authority between courts and administrative agencies.” *S. Utah Wilderness Alliance*, 425 F.3d at 750. In instances where an agency has primary jurisdiction to make a binding determination, the Tenth Circuit’s judicial review is limited to an “abuse of discretion” standard, in which the court will only overturn the agency’s decision if it can not find “substantial evidence” to support the agency’s determination. *Id.* at 750.

141. *Id.* at 757.

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agency,¹⁴² based on its special expertise, in order to create a uniform regulatory scheme.¹⁴³ In those instances where an agency has been explicitly charged with determining “issues of fact” the doctrine promotes judicial deference to agency expertise.¹⁴⁴

The court found that statutory language, congressional intent, and precedent all supported its holding that BLM did not have primary jurisdiction in this case. First, the language of R.S. 2477 makes no mention of which agencies or courts should resolve right-of-way disputes.¹⁴⁵ Second, Congress had explicitly prohibited BLM from promulgating rules governing the adjudication of R.S. 2477 right-of-way disputes.¹⁴⁶ Third, not only had Congress explicitly upheld claim holders’ rights to their day in court, but this was also the first time that BLM had even attempted to determine the initial validity of an R.S. 2477 claim. The court chastised BLM, noting that until this particular dispute, the agency had never before asserted primary jurisdiction and had in fact refused to adjudicate these claims—BLM had consistently taken the position that this was a matter to be determined by the courts.¹⁴⁷ Therefore, the court clarified that BLM could make R.S. 2477 “administrative determinations” for its own internal land use planning purposes, but these determinations would not be legally binding.¹⁴⁸ So, while BLM could propose regulations regarding invalid claims and present findings as evidence in district court, its interpretation regarding the validity of claims would be given “no more ‘respect’ than what comes from [the interpretation’s] ‘persuasiveness.’”¹⁴⁹

The *SUWA* decision also clarified that while federal law governs interpretation of R.S. 2477, it “borrows” from long-established principles

142. *Id.* at 750 (citing *Williams Pipe Line Co. v. Empire Gas Corp.*, 76 F.3d 1491, 1496 (10th Cir.1996)).

143. *Id.* at 751 (citing *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956)).

144. *Id.*

145. *Id.*

146. *Id.* at 756; Department of the Interior and Related Agencies’ Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009-200 (1996) (enacted by the Omnibus Consolidated Appropriations Act of 1997); *see also* Revised Statute 2477 Rights-of-Way, 59 Fed. Reg. 39,216, 39,219–27 (Aug. 1, 1994) (proposed rule). Congress invalidated Interior Secretary Babbitt’s proposed regulations in 1994 and then placed a moratorium on DOI rulemaking. *See supra* Part II.C.3.

147. *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 755 (10th Cir. 2005), *as amended on denial of rehearing* (2006); *see also* U.S. DEP’T OF INTERIOR, *supra* note 48, at 25.

148. *S. Utah Wilderness Alliance*, 425 F.3d at 757; *see also infra* Part IV.A.2 (discussion of nonbinding administrative determinations).

149. *Id.* at 761 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001)); *see also* *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (“The weight of [administrative] judgment in a particular case will depend upon . . . all those factors which give it power to persuade, if lacking power to control.”).

of common law and state law.¹⁵⁰ The court rejected both BLM's assertion that a federal standard of "construction" should prevail and the counties' contention that a state "usage" standard should take precedence. The court noted that the mechanical construction standard¹⁵¹ advocated by BLM had "never been adopted by the agency through a formal rule or regulation and [did] not have the force of law."¹⁵² Alternately, it was not convinced by the counties' argument that *Hodel* established a usage standard,¹⁵³ since the issue in *Hodel* pertained to the scope of a claim but not the validity of a claim. Weighing the merits of the "construction" versus "usage" tests, the court explained that they were not mutually exclusive and application of either would lead to similar results.¹⁵⁴ It reasoned that, under either analysis, state law would be used to "flesh out details of interpretation."¹⁵⁵

To support its decision, the court relied on the choice of law test developed in *Wilson v. Omaha Indian Tribe* (and also articulated in *Hodel*), which uses a federal standard to establish the validity of R.S. 2477 right-of-way claims, coupled with a strong reliance on state law, particularly to interpret the terms "construction" and "highway."¹⁵⁶ In *Wilson*, the Supreme Court provided criteria for courts to consider when deciding to borrow from state law in the interpretation of federal statutes.¹⁵⁷ These are: whether a national uniform body of law is required; whether federal functions or policy would be frustrated by the use of state law; and whether and to what extent existing relationships under state law would be impacted by a federal rule.¹⁵⁸ The *SUWA* court determined that borrowing state law to interpret "construction of highways" served the evident purpose of R.S. 2477, citing numerous state court decisions in which state law definitions of highway construction were used to resolve R.S. 2477 disputes.¹⁵⁹ Thus, it rejected the need for a uniform body of law.

150. *S. Utah Wilderness Alliance*, 425 F.3d at 768; see also U.S. DEP'T OF INTERIOR, *supra* note 48, at 9–10.

151. The federal "construction" standard looks to whether (1) the claim was originally established on unreserved public lands; (2) it was a "highway" within the meaning of the law at the time; and (3) some form of actual *mechanical* construction or improvement of the road had occurred prior to 1976. *S. Utah Wilderness Alliance*, 425 F.3d at 759.

152. *Id.*

153. Under the state "usage" standard, judicial decisions would be based primarily on whether the claimant could establish the "passage of vehicles by users over time." *Id.* at 758.

154. *Id.* at 758–59.

155. *Id.* at 762.

156. See *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 671–72 (1979).

157. *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 763 (10th Cir. 2005), *as amended on denial of rehearing* (2006).

158. See *Wilson*, 442 U.S. at 671–72.

159. *S. Utah Wilderness Alliance*, 425 F.3d at 764 n.16.

The court's opinion also outlined how federal R.S. 2477 land grants under the original 1866 statute applied common law legal principles of "continuous public use"¹⁶⁰ to determine "the nature of public highways and how they are established."¹⁶¹ The court drew on case law to illustrate how state court decisions "embodied" this common law principle; the United States "impliedly adopted and assented to a state rule of construction,"¹⁶² such that federal law controls the terms of the "offer" of land, while interpretation of "acceptance" of the grant is aided by state law.¹⁶³ It noted that state law provides a useful interpretive tool to determine the validity of claims contested under *SUWA*. For instance, under a 1929 Utah Supreme Court case, *Lindsay Land & Livestock Co. v. Churnos*, "[a] highway shall be deemed and taken as dedicated and abandoned to the use of the Public when it has been continuously and uninterruptedly used as a Public thoroughfare for a period of ten years."¹⁶⁴ The *SUWA* court explained that the Utah district court, and not BLM, would have the "difficult task" of looking at *Lindsay Land* and other pre-1976 Utah legal precedent, along with specific factual circumstances of each case, to determine proper "acceptance" of claimed R.S. 2477 rights-of-way.¹⁶⁵

C. Analysis

Despite its fifty-three page decision explicating an extensive holding—that courts must determine the *initial validity* of R.S. 2477 rights-of-way, and BLM may only regulate the *scope of activity* on those claims—the Tenth Circuit's *SUWA* decision does little to rectify the overall problem of outstanding, indeterminate claims. The court expands its *Hodel* holding (that state law should be used to define the scope of an R.S. 2477 claim) to also include reliance on state law and a common law "continuous use" standard to determine the initial validity of the claim.¹⁶⁶ To its credit, the court had little choice but to retreat to state law and case-by-case adjudication of R.S. 2477 claims, given Congress's moratorium on DOI rulemaking¹⁶⁷ and concomitant inability to clarify choice of law for determining "construction." Also, by giving BLM

160. *Id.* at 781.

161. *Id.* at 764.

162. *Id.* at 762–63 (citing *United States v. Oregon*, 295 U.S. 1, 28 (1935)).

163. *Id.* According to the court, use of state law to interpret acceptance of the grant—whether a "highway" had been "constructed" over unreserved federal land—is "an expression of the authority of the state to govern its own acceptance of rights of way." *Id.* at 763 n.15.

164. *Lindsay Land & Livestock Co. v. Churnos*, 285 P. 646, 648 (Utah 1929).

165. *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 772 (10th Cir. 2005), *as amended on denial of rehearing* (2006).

166. *See id.* at 782.

167. *See id.* at 767.

authority to limit the scope of permissible improvements to valid R.S. 2477 roads, the court obligates the agency to assure adequate protection for sensitive federal public lands burdened by these claims. Unfortunately, the opinion relied too heavily on state law, explicitly stripping DOI of its ability to make binding agency determinations regarding the validity of these claims. Under the decision, each and every contested R.S. 2477 claim must undergo costly and time-consuming litigation in order to be resolved.

1. *In Determining Scope, SUWA Almost Got It Right*

One encouraging element of the *SUWA* decision is that it renewed BLM authority to conduct practical local administration of valid R.S. 2477 roads in a way that strikes a balance with the rights of easement holders. The court delineated a system in which those wishing to undertake “construction” to improve R.S. 2477 roads must first consult with appropriate land management agencies, such as BLM. In return, federal land managers cannot be overly restrictive in allowing counties to repair roads and ensure safe access across federal lands, unless the repairs and improvements conflict with specific land management mandates. By recognizing BLM as a major player in assessing the scope of valid R.S. 2477 claims, the court illuminated the agency’s unique stake in resolving this issue. Simultaneously, the decision unambiguously charges BLM with *protecting* public lands from potential damage caused by R.S. 2477 roads.¹⁶⁸

Although BLM is but one DOI agency, it has jurisdiction over more public land than any other federal agency. It is responsible for a total land area the size of Texas and California combined.¹⁶⁹ In Utah, it administers more than 42% of the State’s total land base,¹⁷⁰ which is more than half of Utah’s public land.¹⁷¹ Of the 1,455 R.S. 2477 rights-of-way assessed by DOI in 1993, only two were not located on BLM land.¹⁷² Under FLPMA

168. “BLM has obligations to protect the land over which the roads at issue here pass.” *S. Utah Wilderness Alliance*, 425 F.3d at 747.

169. U.S. DEP’T OF INTERIOR, BUREAU OF LAND MGMT., ANNUAL REPORT ON PERFORMANCE & ACCOUNTABILITY 5 (2005), available at <http://www.blm.gov/nhp/info/stratplan/ARFY05-text.pdf>.

170. Bureau of Land Mgmt., Utah: In the Spotlight, <http://www.blm.gov/ut/st/en.html> (last visited Sept. 12, 2007).

171. In 2005, BLM had exclusive jurisdiction over nearly 23 million acres of Utah’s 54 million acre land base. U.S. DEP’T OF INTERIOR, BUREAU OF LAND MGMT., PUBLIC LAND STATISTICS 15, tbl. 1-4 (2005), available at http://www.blm.gov/natacq/pls05/pls1-4_05.pdf. Nearly 67% of the land in Utah is under federal ownership. Utah History to Go, Physical Geography of Utah, http://historytogo.utah.gov/utah_chapters/the_land/physicalgeographyofutah.html (last visited Sept. 12, 2007).

172. U.S. DEP’T OF INTERIOR, *supra* note 48, at 29.

(the organic act that created BLM), the agency must manage federal lands “on the basis of multiple use and sustained yield unless otherwise specified by law.”¹⁷³ FLPMA also applied the Wilderness Act to BLM, mandating that wilderness areas and potential WSAs must be managed under a heightened standard of protection “to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection.”¹⁷⁴ BLM has specific rules for administering rights-of-way under FLPMA, but these rules do not address highways established under R.S. 2477.¹⁷⁵ Consequently, *SUWA* brings administrative standards under FLPMA together with logical management of R.S. 2477 roads, solidifying a line of jurisprudence that requires BLM to protect public lands against impairment and degradation.¹⁷⁶

However, the court merely refined *Hodel's* holding regarding the choice of law that should be applied to determining the scope of R.S. 2477 rights-of-way. The court attempted to preserve the status quo of “frozen” pre-1976 R.S. 2477 rights by distinguishing maintenance and construction in a way that “protects existing uses without interfering unduly with federal land management and protection.”¹⁷⁷ In doing so, it indicated that the line between construction and maintenance could be clearly drawn, based on the “nature of the work”:

“[C]onstruction” . . . includes the widening of the road, the horizontal or vertical realignment of the road, the installation (as distinguished from cleaning, repair, or replacement in kind) of bridges, culverts and other drainage structures, as well as any significant change in the surface composition of the road (e.g., going from dirt to gravel, from gravel to chipseal, from chipseal to asphalt, etc.), or any “improvement,” “betterment,” or any other change in the nature of the road that may significantly impact Park lands, resources, or values.

“Maintenance” preserves the existing road, including the physical upkeep or repair of wear or damage whether from natural or other causes, maintaining the shape of the road, grading it, making sure that

173. 43 U.S.C. § 1701(a)(7) (2006).

174. *Id.* § 1782.

175. 43 C.F.R. § 2801.6(b)(5) (2007). Under these standards, “using, occupying, or developing the public lands or their resources without a required authorization or in a way that is beyond the scope and terms and conditions” of the right of way is prohibited and it “includes acts or omissions causing unnecessary or undue degradation to the public lands or their resources.” 43 C.F.R. § 2808.10(a)–(b).

176. *See S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 747 (10th Cir. 2005), *as amended on denial of rehearing* (2006).

177. *Id.* at 749.

the shape of the road permits drainage[, and] keeping drainage features open and operable—essentially preserving the status quo.¹⁷⁸

Under these definitions, if the counties in *SUWA* decided to grade a trail, such action would be considered construction and would thus require advance consultation with BLM. In contrast, if the counties wanted to grade an existing road “to preserve the character of the road in accordance with prior practice,” the action would not be considered construction.¹⁷⁹

Unfortunately, this requirement that claimholders consult with BLM whenever a road is “improved” allows the holder of the right-of-way to make the critical initial determination of whether to approach BLM, effectively shifting the burden to BLM to sue for trespass if this consultation does not happen.¹⁸⁰ This loophole is problematic because BLM lacks personnel and resources to monitor activity on the hundreds of miles of backcountry that it administers, and is unlikely to sue a county for “smoothing” out or widening a trail unless forced to do so by a citizen group such as *SUWA*.¹⁸¹

In cases where BLM does bring suit for trespass on public lands, *Hodel* is instructive of how the district court must interpret the scope of R.S. 2477 claims. In *Hodel*, the Tenth Circuit upheld the district court’s determination that a construction standard based on Utah state law—allowing widening of the road to meet the “exigencies of increased travel” so long as it comported with the “traditional” use of the road—permitted Garfield County to turn a one-lane dirt road into a two-lane gravel road.¹⁸²

While state laws enacted after 1976 should not be dispositive of R.S. 2477 claims, Utah modified its laws in the wake of *Hodel* to “clarify” state standards for construction of highways. In 1993, it enacted the Rights-of-way Across Federal Lands Act, which defines “construction” as “any physical act of readying a highway for use by the public according to the available or intended mode of transportation, including, foot, horse,

178. *Id.* (quoting *United States v. Garfield County*, 122 F. Supp. 2d 1201, 1253 (D. Utah 2000)).

179. *Id.* at 749.

180. Though the court forbids easement holders from undertaking any “unilateral” activity that changes the character of the road, few rural counties are going to let a circuit court judge’s pronouncement stop them from brightening up a road. *See id.* at 747; *Birdsong*, *supra* note 21, at 546–47.

181. The procedural history leading up to *SUWA* provides a perfect example. BLM only brought suit against the counties for their road-grading activities after the Southern Utah Wilderness Alliance brought suit against BLM.

182. *Sierra Club v. Hodel*, 848 F.2d 1068, 1073 (10th Cir. 1988), *overruled on other grounds*, *Vill. of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992). This gravel road was ultimately paved. *See S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 746 (10th Cir. 2005), *as amended on denial of rehearing* (2006).

vehicle [or] pipeline.”¹⁸³ The Act further defines “highways” as pedestrian trails, horse paths, and any other path that moves people from one point to another “without regard to how or by whom the way was constructed or maintained.”¹⁸⁴ “Highways” also include adjacent lands, such as turnouts, and “need not have [distinguishable] destinations or termini.”¹⁸⁵ The *SUWA* court interpreted Utah state law to mean “construction necessary to enable the general public to use the route for its intended purposes.”¹⁸⁶

Utah’s statute illustrates how generous state legislators can be when “clarifying” state law standards that will determine state ownership of easements across federal public land. Under Utah’s statute, an R.S. 2477 claimant has the burden of proof, but this burden only entails evidence of an identifiable route to get from one place to another by foot, horse, or vehicle, and a showing that it must be widened, paved, or leveled to accommodate increased traffic. Using this standard, a rarely-used foot-path could presumably be widened and leveled to accommodate increased use by all-terrain-vehicles, for the sole purpose of recreation. This is a far cry from the necessary access routes that R.S. 2477 easements were originally envisioned to be.

The *SUWA* decision does, however, create some limits on how generous state law can be in sanctioning improvement of R.S. 2477 roads. The court upheld traditional common law protections for property burdened by easements, in that easement holders may only exercise their rights “so as not to interfere unreasonably with the rights of the owner of the servient estate.”¹⁸⁷ The court also clarifies both parties’ obligations: BLM has a duty to protect these burdened lands from degradation; and counties holding R.S. 2477 easements have a duty to consult with BLM before undertaking even “legitimate” changes within the physical confines of the existing right-of-way. This means that while R.S. 2477 claims perfected prior to 1976 may still be upheld as valid on federal lands, the scope of construction activity on claims that are reviewed by BLM may be at least somewhat curtailed by the agency.

2. *In Determining Validity, SUWA Got It Wrong*

The court’s pronouncement regarding the use of state law to determine validity and its excision of BLM from the process signified a

183. UTAH CODE ANN. § 72-5-301(2) (2007). This includes vegetation removal, moving obstructions, filling low spots, maintenance over several years, creation of an identifiable route by use over time, and other similar activities. *Id.*

184. § 72-5-301(4).

185. *Id.*

186. *S. Utah Wilderness Alliance*, 425 F.3d at 781.

187. *Id.* at 747. The court notes that an easement is not equivalent to fee simple ownership of the land, but rather “an entitlement to use certain land in a particular way.” *Id.*

missed opportunity to create consistency in the adjudication of claims across different states. The *SUWA* court contended that a uniform national rule for determining the validity of claims was unnecessary.¹⁸⁸ It relied primarily on “Congress’s decision to perpetuate non-uniform standards”¹⁸⁹ by forbidding DOI rulemaking. However, the current stalemate and resulting inaction can hardly be characterized as a “decision.” The only evidence cited to support the court’s proposition is a 1993 DOI report to Congress, which found that lack of uniformity in state laws and the handling of claims has created “few problems” despite “numerous and conflicting state and federal court rulings on R.S. 2477.”¹⁹⁰

By eschewing a uniform rule, the *SUWA* court saddles district courts with the task of wading through ancient case law, various iterations of state legislation, and archaic federal land use statutes each time an R.S. 2477 claim is litigated. Such a requirement burdens district court judges with the intensive chore of conducting in-depth investigations into state law pertaining to rights-of-way, circa 1976. Presumably, this inquiry could extend back as far as 1866 (a complicated endeavor in Utah, which did not attain statehood until 1896). Under this “standard” it is doubtful that district court decisions will be consistent even within a state.

While state law has been and continues to be the norm for adjudicating R.S. 2477 claims,¹⁹¹ relying on it can be problematic, since each state has a different standard for determining the validity of claims and even the same standard can lead to inconsistent results. Courts in different western states have grappled with similar standards regarding the length of time a road was used and the character of that use, but have come to inconsistent conclusions about what constitutes a valid R.S. 2477 right-of-way.¹⁹² For example, Montana and Utah both have a “use” standard; but use alone is *not* sufficient to establish a valid R.S. 2477 right-of-way under Montana state law,¹⁹³ whereas the *SUWA* court held that use alone *is* sufficient under Utah law.¹⁹⁴ In Utah, the court’s ruling means that continued public use could establish the existence of a valid highway, even on a stretch of road where clearing of brush is the only “construction.” In contrast, clearing of brush to facilitate use on an R.S. 2477 claim in Montana might also establish a valid claim, but only if a

188. To put it colloquially, the court feels that if it ain’t broke, don’t fix it.

189. *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 767 (10th Cir. 2005), *as amended on denial of rehearing* (2006).

190. *Id.* (citing U.S. DEP’T OF INTERIOR, *supra* note 48, at 2, 21).

191. *See supra* part II.C.1.

192. Bader, *supra* note 7, at 492–93.

193. *See Richter v. Rose*, 962 P.2d 583, 589 (Mont. 1998).

194. *See also Barker v. Bd. of County Comm’rs of La Plata*, 49 F. Supp. 2d 1203, 1214 (D. Colo. 1999) (holding that Colorado law’s public use standard was sufficient to perfect an R.S. 2477 right-of-way).

municipality also took action to declare the route a “highway” prior to 1976.

The *SUWA* court also dismissed the potential for collusion between claimants and states, rejecting the argument that use of state law would be “outcome determinative” in favoring municipalities.¹⁹⁵ In actuality, state standards are much more generous in validating contested R.S. 2477 claims than the federal “mechanical construction” standard. State law favors city and county claimants in their attempts to reclaim (and sometimes expand) access rights on federal public land. The most generous standard, asserted by Alaska, North Dakota, and South Dakota, is that each mapped section line constitutes a public road.¹⁹⁶ Other states, such as Oregon, Idaho, Colorado, Washington, Wyoming, and Utah assert rights-of-way based on continued public use.¹⁹⁷ Moreover, many states aggressively promote the validation of claims by creating new laws, such as Utah’s Rights-of-Way Across Federal Lands Act, which “clarifies” state law standards in order to strengthen their municipalities’ grasp on unresolved R.S. 2477 claims.

The second part of the court’s decision—that validity determinations must be made by courts and not BLM—only increases uncertainty and inconsistency. By disallowing BLM determination of validity of R.S. 2477 claims, the *SUWA* court placed the issue of unresolved claims in limbo. On remand to district court, this particular case was dismissed for lack of a continued dispute, since construction activities had stopped, and therefore BLM no longer had a case for trespass.¹⁹⁸ Technically, without a “case” or “controversy,” Utah R.S. 2477 road claims must await the next aggressive road-building tactic of a frustrated local government and the subsequent intervention of conservationists to pressure BLM into bringing suit for trespass.¹⁹⁹

If resolution *must* be judicial, though, then a single test for claim validity, applied uniformly across states, would go hand in hand with BLM’s ability to manage the land on which these claims sit. Consistent application of federal common law definitions of “highway” and “use” could allow R.S. 2477 litigation to determinatively cease at the district court level (rather than consuming BLM resources for a decade, as the litigation in *SUWA* did). It would also allow BLM, R.S. 2477 claim holders, and environmental groups to more easily assess—prior to

195. See *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 758 (10th Cir. 2005), *as amended on denial of rehearing* (2006).

196. Birdsong, *supra* note 21, at 537–38.

197. *Id.* at 538.

198. *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, No. 2:96CV0836BSJ, 2006 WL 2572116, at *1 (D. Utah Aug. 30, 2006).

199. See Birdsong, *supra* note 21, at 551 (explaining how claimant “bulldoze first” tactics serve to provoke federal plaintiffs into suing for trespass).

bringing suit—which claims are likely to satisfy the test for validity. Absent congressional action, or formal BLM or DOI rulemaking, a reliable, transparent judicial standard would at least make it easier to distinguish among roads that are invalid and should be challenged, and those that are valid and require agency approval before improvements are made.

IV. CURRENT OPTIONS FOR RESOLVING OUTSTANDING R.S. 2477 CLAIMS

Litigation over the Burr Trail has ceased for now, but tension remains high. Utah's federal lands are thick with latent R.S. 2477 claims—routes that could extend for hundreds of miles into predominantly undeveloped wild lands. Further, in 1993, 5,000 of the 5,600 *known* remaining R.S. 2477 claims were in Utah.²⁰⁰ But when *unknown* claims are factored in, the actual number of R.S. 2477 roads in Utah may more appropriately number 10,000.²⁰¹

Concomitantly, Congress still has not settled the issue of how much Utah land to set aside as “wilderness.” About 70 percent of the land base in Utah is held as public land by the federal government.²⁰² With competing assertions about how much of this land qualifies for wilderness designation, the comprehensive management of nearly six million acres remains an “intractable controversy.”²⁰³ Uncertainty about the validity of R.S. 2477 claims is a volatile issue for the different interests involved, especially within the context of wilderness designation.²⁰⁴ Going to court provides little relief. It is time consuming and expensive to litigate R.S. 2477 claims one by one, “[making] it difficult for states and counties to assert their rights and for conservation groups to assert their interests.”²⁰⁵ Consequently, DOI and states have moved toward informal agreements that do not adequately engage the broader public.

200. U.S. DEP'T OF INTERIOR, *supra* note 48, at 29. This number comes with the caveat that many more claims could exist because efforts to encourage voluntary reporting have been largely unsuccessful. Revised Statute 2477 Rights-of-Way, 59 Fed. Reg. 39,216, 39,217 (Aug. 1, 1994) (proposed rule).

201. Rasband, *supra* note 3, at 1010.

202. *Second Session on S. 1425*, *supra* note 34, at 6 (statement of Utah Sen. Orrin G. Hatch).

203. Hayes, *supra* note 14, at 217. In 1980, BLM reported that 2.5 million acres qualified for wilderness designation and President Bush recommended 1.9 million acres for wilderness designation. However, many thought the original number was too low, including BLM. Local citizens conducted another inventory, establishing that 5.7 million acres qualified as WSAs, and Democratic Utah legislators attempted to pass bills in a “5.7 Wild” campaign. After a legal contest BLM conducted another inventory, after which it increased its original 2.5 million acre estimate to 5.8 million qualifying acres. *Id.* at 218–23.

204. *See supra* Part I.

205. R.S. 2477 MOU, *supra* note 100 (describing the high costs of litigating R.S. 2477 disputes and judicial holdings that leave “numerous questions” unresolved).

A. *Department of the Interior's 2006 Implementation Guidelines*

Despite the need for conclusive resolution, the status of fifteen of the sixteen disputed roads in *SUWA* is still indeterminate; they were neither designated valid nor invalid. Yet, these roads represent only a minute fraction of outstanding R.S. 2477 claims. If the Burr Trail dispute is any indication, adjudicating these right-of-way claims one by one will be a Sisyphean task.²⁰⁶ Ultimately, Congress needs to develop a more comprehensive process that lays the issue to rest. In the interim, those who reside in proximity to these lands and those tasked with management of these lands do not have the luxury of waiting for Congress to act.

Consequently, in March 2006, Secretary Norton responded to the *SUWA* decision with a set of nonbinding guidelines for federal land managers.²⁰⁷ In a press release, Norton assured, “under the guidelines announced today, a dirt road will remain a dirt road and a two-track road will remain a two-track road unless there is a permitting process and environmental analysis.”²⁰⁸ Under Secretary Norton’s guidelines, the options available to land managers to address right-of-way claims are numerous, but many of them present practical problems or are only partial solutions. The following discussion analyzes each of these options in turn, noting their potential strengths and likely shortcomings.

1. *Road Maintenance Agreements*

The BLM may enter into road maintenance agreements (RMAs) with claimants who desire to maintain the status quo of a road. RMAs are informal agreements that outline routine maintenance activities. They are not meant to affect claim validity or legal rights, and finalization of the agreements rests on notice to the public and adequate opportunity to

206. Sisyphus was “condemned eternally to repeat the cycle of rolling a heavy rock up a hill in Hades only to have it roll down again as it nears the top.” MERRIAM-WEBSTER, ONLINE DICTIONARY, <http://www.m-w.com/dictionary/Sisyphus> (last visited Sept. 13, 2007).

207. Memorandum from Gail Norton, Sec’y, U.S. Dep’t of Interior, to Assistant Sec’y for Land and Minerals Mgmt. et al., U.S. Dep’t of Interior (March 22, 2006) [hereinafter Norton Memorandum] (“Departmental Implementation of *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735 (10th Cir. 2005); Revocation of Jan. 22, 1997, Interim Policy; Revocation of Dec. 7, 1988, Policy”), available at http://www.doi.gov/news/06_News_Releases/Norton_3-22-06.pdf. Interpretive guidelines are policy statements, not final rules or regulations, and do not pose binding rights or obligations, so are therefore not published in the Code of Federal Regulations. See Department of the Interior and Related Agencies’ Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009-200 (1996) (enacted by the Omnibus Consolidated Appropriations Act of 1997).

208. Press Release, U.S. Dep’t of Interior, Interior Department Announces Guidelines to Implement Court Decision on R.S. 2477 (March 22, 2006), available at http://www.doi.gov/news/06_News_Releases/060322a.htm [hereinafter DOI Press Release]. As a corollary, Secretary Norton also officially revoked Secretary Babbitt’s 1997 departmental policy statement. See *supra* part II.C.2.

comment “on the roads to be covered and the maintenance levels to be permitted.”²⁰⁹ Secretary Norton specified that these agreements should only be used to the extent that status quo maintenance is consistent with BLM’s preexisting obligations to protect “underlying and surrounding Federal lands.”²¹⁰

Traditionally, RMAs have been used to allocate road maintenance responsibilities between local governments and BLM field offices. If they are only applied to “status quo” maintenance, as described by Secretary Norton, the effect should be relatively benign. However, since this guideline was placed in the context of R.S. 2477 claim resolution, some conservation-minded legislators fear that “proposed road maintenance agreement[s] would make it easier for States or counties to perform landscape-changing highway maintenance and construction on public lands, without adequate environmental analysis or protections.”²¹¹ Regardless of the possibility for abuse, these agreements are a bare necessity for the prudent management of existing roads and avoidance of hazardous road conditions. Further, by requiring a notice and comment period, they incorporate an element of transparency and public oversight.

2. *Nonbinding Administrative Determinations*

A nonbinding determination (NBD) is an informal method by which BLM (and other administrative agencies) interpret rules to guide and inform their internal decision making. In situations where a claimant wishes to perform construction or expand the use of an R.S. 2477 easement beyond the status quo and the simpler RMA process is not appropriate, BLM may issue a NBD. The process is as follows: BLM must gather information from the claimant, as well as other relevant landowners and agencies; it must then provide public notice and opportunity for comment; finally, if the validity of the right-of-way is supported by a “preponderance of the evidence,” BLM may issue the determination.²¹² Because NBDs are not rules they are *nonbinding*, and thus, not judicially enforceable. Accordingly, BLM must keep the process “as simple and straightforward as possible.”²¹³ Further, BLM land managers may not allow road expansion under NBDs if the expansion is

209. Norton Memorandum, *supra* note 207.

210. *Id.*

211. Letter from Senators Dianne Feinstein, Ken Salazar, Richard Durbin, Maria Cantwell, Jeff Bingaman & Barbara Boxer, to Lynn Scarlett, Acting Sec’y, U.S. Dep’t of Interior (April 20, 2006) (regarding DOI’s 2006 RS 2477 Interpretive Guidelines), *available at* <http://feinstein.senate.gov/06releases/r-roadclaims-ltr.pdf>.

212. Norton Memorandum, *supra* note 207. The “preponderance of the evidence” must support the existence of the claim as a valid right-of-way, under state law, as of 1976.

213. *Id.*

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inconsistent with the “traditional uses” to which the road has been put, or construction would unduly degrade the land.²¹⁴

Similar to RMAs, these determinations do not establish enforceable rights and they purportedly apply only to valid existing claims. However, the process described by Secretary Norton may be used by the agency in determining the *existence* of pre-1976 easements. So despite the Tenth Circuit’s admonition in *SUWA* that only courts may issue binding evaluations of validity, improperly generated NBDs could allow potentially irreparable expansion or widening of an invalid right-of-way. On the other hand, NBDs are a practical necessity for BLM’s effective day-to-day management of R.S. 2477 roads on federal land. If BLM is to heed the court’s instruction to minimize interference with the rights of valid easement holders, it must have the ability to develop informed determinations about the history of each road and allowable construction activities. Undoubtedly, some amount of information gathering and public input is better than none at all, especially when a city or county—armed with a bulldozer—wants to widen a road. Lastly, given *SUWA*’s holding that BLM determinations about R.S. 2477 validity are to be given no more weight than their power to persuade, surreptitious attempts to establish the existence of R.S. 2477 easements, using NBDs, would not likely hold up in court.

3. Recordable Disclaimers of Interest in Land

Recordable disclaimers, authorized by section 315 of FLPMA, enable DOI to eliminate the government’s interest in specific portions of public land. The agency may:

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 [DOI] determines [that] a record interest of the United States in lands has terminated by operation of law or is otherwise invalid.²¹⁵

In order to obtain a recordable disclaimer, the holder of a claim pays a \$100 fee and submits an application to BLM, including a description of the land and why the claim holder thinks the disclaimer is appropriate.²¹⁶ The DOI administrator then publishes notice of the application and proposed grounds for disclaimer before issuing a final decision. Recordable disclaimers provide formal attestation that the federal

214. DOI Press Release, *supra* note 208.

215. Federal Land Policy and Management Act of 1976 § 315(a), 43 U.S.C. § 1745(a) (2006); *see also* 43 C.F.R. § 1864 (2007).

216. 43 C.F.R. § 1864.1.

government recognizes the claimant's interest in the land and does not dispute the road claim.²¹⁷

In its 2003 revised disclaimer rule, DOI asserted that BLM could use these disclaimers to settle R.S. 2477 claims, as this authority had previously existed under FLPMA section 315.²¹⁸ Further, DOI stated that the process of applying disclaimers to R.S. 2477 routes is not foreclosed by Congress's 1996 moratorium because the recordable disclaimer rule is to be broadly applied and, therefore, not a "final rule" pertaining specifically to evaluating R.S. 2477 rights-of-way.²¹⁹ The revised rule applies to all federal lands; it removes the previous twelve-year filing deadline for state and local governments; and it allows any claimant, not just the present owner of record, to apply for a disclaimer of interest.²²⁰

DOI's use of recordable disclaimers in its 2003 MOU with Utah was highly controversial.²²¹ Environmental groups expressed concern that disclaimers provide a loophole for agencies to give away federal land to local interests.²²² However, in its assessment, the Government Accountability Office found that the 2003 disclaimer rules are valid because they do not overtly pertain to R.S. 2477 claims (though it did find that the 2003 MOU was an administrative rulemaking on R.S. 2477, and therefore impermissible under Congress's moratorium).²²³

Issuance of recordable disclaimers does not seem like a promising method for resolving the broader universe of outstanding claims. It may be true that some benign R.S. 2477 claims from which a cloud on title could be easily removed by a recordable disclaimer will not be challenged. Yet, even where BLM and states negotiate compromises, the controversial 2003 Utah MOU process foreshadows the possibility that courts and Congress might view BLM's actions as overstepping its (nonexistent) authority to develop methods for assessing the validity of R.S. 2477 claims. While disclaimers offer claimants an alternative to going to court to clear title—a seemingly expeditious way to resolve outstanding claims—the possibility that this method will be used to disclaim environmentally sensitive federal lands will continue to render

217. DOI Press Release, *supra* note 208.

218. Conveyances, Disclaimers and Correction Documents, 68 Fed. Reg. 494, 497–98 (Jan. 6, 2003).

219. *Id.* at 497.

220. *See* 43 C.F.R. § 1864.

221. *See supra* part II.C.3.

222. *See* Conveyances, Disclaimers and Correction Documents, 68 Fed. Reg. at 496 (explaining that DOI received a "significant number of comments" pertaining to the use of disclaimers to give away public land).

223. Decision Letter from Anthony H. Gamboa, General Counsel, Gen. Accounting Office, No. B-300912 (Feb. 6, 1997) ("Recognition of R.S. 2477 Rights-of-Way under the Department of the Interior's FLPMA Disclaimer Rules and Its Memorandum of Understanding with the State of Utah"), *available at* http://www.gao.gov/decisions/other/300912.htm#_ftnref6.

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this method contentious and unwieldy. Since controversy invites both scrutiny and potential litigation, recordable disclaimers, used on a broad scale, will likely cause more problems than they will solve. Despite the possibility of legal challenge, local governments may still view recordable disclaimers as a welcome alternative to adjudicating claims under the Quiet Title Act or applying for formal rights-of-way under Title V of FLPMA.

4. Title V of FLPMA

Under Title V of FLPMA, BLM may grant rights-of-way for “roads, trails, highways . . . or other means of transportation.”²²⁴ According to Secretary Norton’s memorandum, Title V grants may be approved irrespective of R.S. 2477 and can be used where the R.S. 2477 status of a road is unclear, but the claimant and land manager agree on the need for the road.²²⁵ The requirements for granting rights-of-way under FLPMA are more stringent than the recordable disclaimers of interest described above since they go beyond notice to require public participation and environmental review.²²⁶ BLM has granted thousands of routes under this formal process.²²⁷ Conservation groups, such as SUWA, favor the Title V process because it ensures public involvement and agency oversight to fully account for possible environmental harms. Even Garfield County, one of the counties involved in the SUWA suit, filed a Title V claim to eliminate conflict on one of its local roads.

Given the tenacity of Congress’s restriction on DOI’s ability to promulgate rules specific to resolving the validity of R.S. 2477 claims, Title V is the best avenue for proactive resolution of these disputes. Title V applies a set of consistent standards that piecemeal retroactive adjudication cannot. It also moves disputed roads outside the realm of R.S. 2477—including its attendant reliance on outdated law and decades old evidence about whether rights to an easement were “frozen” in time—providing a clean slate upon which to assess the present-day need for a particular road. However, it is not the method preferred by state claimants with hundreds of miles of road at stake. While the lengthy process mandated by Title V is less arduous than adjudication under the Quiet Title Act (described below), it is more complicated than proceeding under NBDs or recordable disclaimers. The outcome of the process is also more uncertain, since it allows for public participation and environmental assessment. Yet, Title V provides finality and certainty

224. 43 U.S.C. § 1761(a) (2006).

225. DOI Press Release, *supra* note 208.

226. 43 U.S.C. § 1761(a).

227. Heidi McIntosh, *New Highways Under an Old Law? R.S. 2477 and Its Implications for the Future of Utah’s Federal Public Lands*, UTAH BAR JOURNAL, Mar.–Apr. 2005, at 16.

regarding the validity of R.S. 2477 claims, through means that are less dubious than recordable disclaimers, more permanent than NBDs and RMAs, and less expensive and time consuming than adjudication through the Quiet Title Act.

5. *Quiet Title Act*

Unlike a Title V right-of-way, filing a claim under the Quiet Title Act is the only means by which a claimant may acquire a “definitive, binding determination of its R.S. 2477 rights.”²²⁸ The Quiet Title Act allows state claimants to file quiet title actions in district court to seek binding determinations regarding vested easement rights under R.S. 2477.²²⁹ The Act waives sovereign immunity for disputes over “title to real property in which the United States claims an interest,” and gives claimants twelve years to bring an action.²³⁰ While the time limit has expired for individual claimants, the Act exempts state claimants from its twelve-year filing requirement, unless the federal government has “conducted substantial activities pursuant to a management plan.”²³¹ In such cases, the state may bring suit within twelve years of “open and notorious” federal use or other action that could have been reasonably expected to put the state on notice.²³² Lastly, at least six months prior to suing the federal government, the state must provide notice of intent to sue to the appropriate federal land management agency.²³³

This is the strategy Utah used prior to entering into its 2003 MOU discussions with DOI.²³⁴ In its 2000 notice to the federal government that it intended to sue, Utah claimed thousands of miles of “roads” in all twenty-nine of its counties.²³⁵ Following DOI’s response that the notice needed to be more specific, the state responded with claims for two dozen roads. However, after entering into negotiations with Secretary Norton to develop their 2003 MOU, Utah stopped pursuing the quiet title action and has yet to file suit in connection with any of its original claims.²³⁶ Ironically, one of the submitted claims had to be withdrawn when

228. Norton Memorandum, *supra* note 207. Vested R.S. 2477 rights are more expansive than the rights granted under FLPMA Title V, which generally come with numerous strings attached. Further, Title V requires a formal environmental review process, whereas a quiet title action does not.

229. DOI Press Release, *supra* note 208.

230. Quiet Title Act, 28 U.S.C. § 2409a(g) (2006).

231. *Id.* § 2409a(h)–(j).

232. *Id.* § 2409a(k).

233. *Id.* § 2409a(m).

234. *See supra* part II.C.3.

235. Letter from Stephen G. Boyden, *supra* note 98. To see a map of the “highways” claimed in Zion National Park, which includes cowpaths, hiking trails, and streambeds, see http://www.highway-robbery.org/documents/zion_small.pdf (last visited Sept. 13, 2007).

236. *See McIntosh, supra* note 227.

conservationists discovered that the road had actually been built pursuant to a federal program, and was thus a federal road.²³⁷ Currently, only six active claims are listed on BLM's website, most of which have lingered there for years.²³⁸ Utah's experience illustrates the ineffectiveness of the quiet title process, except perhaps as a negotiation strategy. By asserting rights to large numbers of R.S. 2477 claims and threatening litigation, states may use notice as a means of forcing DOI to the bargaining table.

The process for filing a claim under the Quiet Title Act can be time consuming and costly.²³⁹ Also, as a practical matter, it is likely to be usurped by recordable disclaimers of interest. Where possible, a state will seek to quiet title through the informal agency process of federal disclaimers of interest in the land rather than undertaking litigation. While environmental groups have resisted the use of recordable disclaimers because of political concerns, disclaimers may provide for a more efficient, agency-driven process than that provided under the Quiet Title Act. However, under existing regulations the most legitimate process for assessing both the need for a state, county, or city right-of-way across federal public land and its potential environmental impacts appears to be that provided by Title V of FLPMA. Rights-of-way obtained through this Title allow for full public participation in the agency decisionmaking process while still allowing access across federal land for legitimate city and county roads. However, this method does not address the meta-issue of DOI's inability to make rules that specifically pertain to the expeditious resolution and holistic management of all outstanding R.S. 2477 claims.

B. Congressional Action

The strategies outlined above, including Title V of FLPMA, will provide only incoherent resolution of a fraction of outstanding R.S. 2477 claims. Yet, congressional impotence has stymied the development of a more comprehensive solution—not only denying guidance to federal land management agencies, but also stripping them of their ability to promulgate rules to resolve R.S. 2477 claims.²⁴⁰ Congress's 1996 moratorium on DOI promulgation of rules to resolve R.S. 2477 claims shackled DOI with a permanent prohibition against R.S. 2477

237. *Id.* at 19–20.

238. Utah Bureau of Land Mgmt., R.S. 2477 Claims, <http://www.ut.blm.gov/RS2477/claims.htm> (last visited Sept. 13, 2007).

239. In January 2004, four years after providing notice of its intent to sue, and after spending \$10,000 to study the road, Utah submitted a claim for Weiss Highway in Juab County, only to withdraw it eleven months later. *See supra* note 237 and accompanying text.

240. *See* Birdsong, *supra* note 21, at 578–79 (contending that “piecemeal congressional interference with DOI's development of policies to resolve outstanding claims” has not proven successful).

rulemaking.²⁴¹ Within this regulatory vacuum, the only authoritative path is that offered by the Tenth Circuit in *SUWA* and *Hodel*. Unfortunately, its jurisprudence operates in a pre-FLPMA time warp, where legal interpretations must be based on decades- and sometimes centuries-old state law.

Congress must learn from previous unsuccessful attempts and revisit R.S. 2477 in a way that addresses both state and municipal apprehension over losing access rights, and environmental concern for protecting sensitive federal lands. Both “Rights of Way Settlement” bills proposed in 1995 were defeated because they were too deferential to states.²⁴² In 2003, Colorado Representative Mark Udall introduced a “RS 2477 Rights-of-Way Act” which was apparently, not deferential enough.²⁴³ The bill died in committee and was reintroduced in 2005, only to languish again.²⁴⁴ In 2006, New Mexico Representative Steve Pearce introduced the “R.S. 2477 Rights-Of-Way Recognition Act,”²⁴⁵ a throwback to the 1995 “Rights of Way Settlement” bills. It would have granted broad rights to states seeking title to R.S. 2477 claims. Like its predecessors, though, it failed to garner sufficient support.

Western legislators have a common desire to put R.S. 2477 uncertainty to rest, so the logical next step is bipartisan legislation that incorporates BLM expertise, public participation, and retention of valid access routes across the West. The recent turnover to Democratic majorities in both houses of Congress bodes well for a possible resurgence in legislative yen to address environmental issues. However, political partisanship will persist in hindering true compromise. States with the most unresolved R.S. 2477 claims, including Utah and Alaska, are Republican strongholds, whose representatives are less likely to favor

241. “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 . . . shall take effect unless expressly authorized by an Act of Congress.” Department of the Interior and Related Agencies Appropriations Act, 1997, § 108, Pub. L. No. 104-208, 110 Stat. 3009, 3009-200 (1996) (enacted by the Omnibus Consolidated Appropriations Act of 1997). Section 108 is permanent law. See Decision Letter from Robert P. Murphy, *supra* note 89 and accompanying text; see also *supra* part II.C.2.

242. See *supra* part II.C.2.

243. The Act spelled out a process for resolving claims and requiring claimants to file outstanding R.S. 2477 claims with the government within four years, after which claims would be considered abandoned. See 149 CONG. REC. E671 (daily ed. Apr. 3, 2003) (“Introduction of Bill Dealing with Claims for Rights-of-Way under R.S. 2477” by Rep. Udall). The abandonment provision was written to parallel section 314 of FLPMA, which required unpatented mining claims to be recorded within three years. *Id.*

244. R.S. 2477 Rights-of-Way Act, H.R. 1639, 108th Cong. (2003); Highway Claims Resolution Act, H.R. 3447, 109th Cong. (2005).

245. Among other things, the Act stipulated that claim resolution would be based on state law, that routine maintenance would not require agency consultation, and that states would be given a blanket grant of all state routes “shown in 1976–86 era official governmental maps.” R.S. 2477 Rights-Of-Way Recognition Act, H.R. 6298, 109th Cong. (2006).

federal rights over state rights. On the other hand, left-leaning states such as California also have unresolved claims. The possibility for mutual benefit among “red” and “blue” states could spawn legislation that balances the needs of rural communities—locked within the confines of protected public lands—against the long-term protection of the nation’s last remaining wild lands.

Based on past congressional efforts, a strict federal standard that imposes a time limitation paired with an evidentiary burden borne solely by states will be strongly opposed by Utah and other states that could stand to lose thousands of miles of access routes. Likewise, conservationists and federal bureaucrats will eschew a lenient standard that favors states and imposes the entire burden of disproving claims on federal land managers, while allowing local governments complete discretion over road maintenance activities.

Regardless of the political pitfalls, Congress should take the minimum step of giving DOI authority to promulgate rules for standardizing R.S. 2477 validity determinations. This step would allow for a full and transparent administrative process for applying uniform regulations and remove uncertainty about the role of land management agencies.²⁴⁶ It would also draw on DOI’s specialized agency expertise in local land management issues and give it primary jurisdiction over resolution of outstanding R.S. 2477 claims. Proactive agency rules for determining validity—as opposed to retroactive adjudication through the courts—could be developed through notice and comment rulemaking, allowing for consistency, local input, and clear recourse for agency abuse of discretion.²⁴⁷ Agency assessment of R.S. 2477 claim validity would streamline a process whereby cities and counties could verify rights-of-way and undertake maintenance of public thoroughfares. Also, under standard administrative procedures, claimants could contest truly “capricious” agency decisions in federal court. Most importantly, concrete uniform rules could eliminate frivolous claims at the outset by allowing both federal land managers and claimants to accurately gauge whether or not a disputed claim is likely a “highway” under R.S. 2477.

246. See, e.g., *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 757 (10th Cir. 2005), *as amended on denial of rehearing* (2006) (declining to infer BLM authority to “make binding determinations on the validity” of R.S. 2477 rights-of-way when “the statute creates no executive role” for it); see also Birdsong, *supra* note 21, at 579 (calling for a “transparent, reasoned, and deliberative resolution of the . . . controversy” and removal of restrictions on DOI rulemaking).

247. See Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2006) (used to challenge agency processes that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

CONCLUSION

With continued uncertainty regarding unresolved R.S. 2477 claims, thousands of miles of federal public land are at risk of degradation. While the conceptual approach of relying on the judiciary to resolve outstanding R.S. 2477 claims may sound good in a courtroom, it does not conform to the practical realities facing federal land management agencies. A substantial number of disputed R.S. 2477 claims are in Utah's arid, southern desert. These lands can be harsh and desolate, and extremely difficult to monitor. (The very roads used by BLM agents to patrol these lands may even be the same ones in dispute.) Protecting sensitive areas of land in the face of "bulldoze first, talk later" tactics inhibits BLM's ability to do its job.²⁴⁸ Once the holder of a claim starts bulldozing a road, the forces of inertia move against any agency charged with managing the servient federal estate and wild lands can be lost forever to development.

Some unsettled claims serve a valid purpose, but even in these cases both parties face a difficult task in proving or disproving a claim. Often, both sides lack indisputable evidence to prove both the scope and validity of R.S. 2477 claims. Additionally, monitoring and controlling the various "improvements" undertaken on these claims over time is a monumental agency task. Requirements for proof and review on public land are frustrating for local governments who "fear that federal land managers and conservationists are attempting to redefine [their rights-of-way] out of existence,"²⁴⁹ as well as for land managers facing pressure and hostility from those who want to exceed the scope of a right-of-way. Claimholders and environmental advocates who choose to take these cases to court gamble on the vagaries of case-by-case adjudication, spending large amounts of time and money on uncertain outcomes. Thus, both parties would benefit from a clear set of rules governing the validity and scope of allowable improvements on R.S. 2477 claims.

Thirty years have elapsed since Congress enacted FLPMA, attempting to halt the haphazard disposition of public lands, yet the issue of vested rights to easements over these lands still lingers. Various legislative policies and agency rules have come and gone, but competing perspectives on how to identify and uphold vested easement rights on the last stretches of public land persist. Those valid existing R.S. 2477 rights-of-way that are essential to local communities' transportation infrastructure need to be recognized. However, the road building and maintenance that local governments propose must have limits and must respect the standards of heightened protection required on fragile terrain such as national park lands, wildlife refuges, designated wilderness, and wilderness study areas.

248. See generally Birdsong, *supra* note 21.

249. *S. Utah Wilderness Alliance*, 425 F.3d at 742.

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Congress should construct a comprehensive solution for determining the validity of unresolved R.S. 2477 claims, and possibly a scheme for consistent determination of existing rights on federal public lands. Legislators from “public land states” need to recognize the importance of preserving federal lands in the interest of the American public as a whole, and for the benefit of future generations. Conversely, legislators wishing to protect these lands cannot succeed if they attempt to place undue burdens of proof on states and municipal governments. Both sides of the political aisle need to come together to balance the conflicting interests of stakeholders.

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