

*WILDERNESS SOCIETY V. KANE COUNTY, UTAH: A  
WELCOME CHANGE FOR THE TENTH CIRCUIT AND  
ENVIRONMENTAL GROUPS*

INTRODUCTION

In an August 2009 decision siding with two environmental groups, the Tenth Circuit confronted the contentious issue of Revised Statute 2477 (“R.S. 2477”).<sup>1</sup> The statute, which consisted of a single clause in the Lode Mining Act of 1866, granted “right of way for the construction of highways over public lands, not reserved for public uses.”<sup>2</sup> The Federal Land Policy Management Act (“FLPMA”) repealed R.S. 2477 in 1976, but R.S. 2477 rights-of-way perfected prior to FLPMA’s enactment remain “valid existing rights.”<sup>3</sup>

Conflicts over R.S. 2477 typically arise between local governments, which assert legal title to public rights-of-way, and the federal government, which manages the federal lands on which the roads are situated. The most contentious of these conflicts involve local efforts to open new public routes—or expand existing routes—in sensitive or protected areas. Such was the case when Kane County officials removed thirty federal signs which prohibited off-road vehicle use on certain Bureau of Land Management (“BLM”) lands in Utah, replacing them with 268 signs that purported to open sixty-three new routes to public off-road vehicle use. In support of its actions, Kane County subsequently enacted Ordinance 2005-03 which purported to give authority to the County to open roads to off-road vehicles and to “post signs” opening these routes which were otherwise closed under federal land management plans.<sup>4</sup>

Two environmental groups<sup>5</sup> challenged the County’s actions in federal court, setting the stage for the Tenth Circuit to revisit the decades-old R.S. 2477 debate. Underlying the specific conflict between Kane County and the environmental groups is the growing tension between conflicting uses of federal lands at the local level. Generally, advocates of local control favor motorized access and expansion of public uses while proponents of federal management prefer limited use that favors environmental preservation over further development. The Tenth Circuit’s 2–1 decision in favor of the environmental groups marked a shift

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1. *Wilderness Soc’y v. Kane County, Utah*, 581 F.3d 1198 (10th Cir. 2009).

2. An Act Granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for Other Purposes, ch. 262, § 8, 14 Stat. 251, 253 (1866) (codified at 43 U.S.C. § 932 (repealed 1976)).

3. *Id.* § 701(h), 90 Stat. at 2786.

4. *Wilderness Soc’y*, 581 F.3d at 1207.

5. The Wilderness Society and the Southern Utah Wilderness Alliance.

in the Tenth Circuit's position to one that favors federal and environmental interests over those of state and local governments.<sup>6</sup> In February 2010, the Tenth Circuit decided to revisit the issue by granting en banc review of the decision.

Part I of this Comment provides a brief history of R.S. 2477 and describes the current state of R.S. 2477 law. Part II discusses the complicated questions that underlie R.S. 2477 determinations. Part III explores the attempts by each of the three branches of government to resolve the R.S. 2477 conflict, in addition to an explanation of the Tenth Circuit's most recent commentary on R.S. 2477 in *Wilderness Society*. Finally, Part IV analyzes the potential impact of *Wilderness Society* on the future of R.S. 2477 conflicts and provides an appeal for a permanent, legislative solution to this seemingly intractable problem.

### I. THE COMPLICATED FRAMEWORK OF R.S. 2477

One of the greatest federal lands controversies in the Western United States today is the debate over roads created pursuant to R.S. 2477.<sup>7</sup> Consisting of a single clause in the Lode Mining Act of 1866, R.S. 2477 simply states: “[T]he right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.”<sup>8</sup> The statute “was passed during a period in our history when the federal government was aggressively promoting settlement of the West.”<sup>9</sup> R.S. 2477 effectively vested American pioneers with the license to construct roads across unreserved public lands in support of economic development and progress.<sup>10</sup>

In 1976, the Federal Land Policy and Management Act repealed R.S. 2477.<sup>11</sup> This repeal was subject to valid existing rights; thus, existing roads became “grandfathered” property rights.<sup>12</sup> From 1976 forward, however, the repeal prevented establishment of new rights of way. Even

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6. See *Wilderness Soc'y*, 581 F.3d at 1219–26.

7. DAVID G. HAVLICK, NO PLACE DISTANT: ROADS AND MOTORIZED RECREATION ON AMERICA'S PUBLIC LANDS 71 (2002).

8. An Act Granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for Other Purposes, ch. 262, § 8, 14 Stat. 251, 253 (1866) (codified at 43 U.S.C. § 932 (repealed 1976)).

9. U.S. DEP'T OF THE INTERIOR, REPORT TO CONGRESS ON R.S. 2477: THE HISTORY AND MANAGEMENT OF R.S. 2477 RIGHTS-OF-WAY CLAIMS ON FEDERAL AND OTHER LANDS I (1993) [hereinafter R.S. 2477 REPORT].

10. See *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 741 (10th Cir. 2005) (“If someone wished to traverse unappropriated public land, he could do so, with or without an R.S. 2477 right of way, and given the federal government's pre-1976 policy of opening and developing the public lands, federal land managers generally had no reason to question use of the land for travel. Roads were deemed a good thing.”).

11. “Effective on and after the date of approval of this Act, R.S. 2477 (43 U.S.C. 932) is repealed in its entirety and the following statutes or parts of statutes are repealed insofar as they apply to the issuance of rights-of-way over, upon, under, and through the public lands and lands in the National Forest System.” Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 706(a), 90 Stat. 2743, 2793.

12. HAVLICK, *supra* note 7, at 71.

so, it is unknown how many valid, pre-1976 rights-of-way exist in Utah. Commentators estimate that “Utah counties have filed perhaps 10,000 to 15,000 R.S. 2477 right-of-way claims through national parks, national monuments, and wilderness study areas, in addition to multiple-use public lands.”<sup>13</sup> State laws exhibit little consensus among the states regarding the best approach for managing claims that seek to establish local title to such roads.<sup>14</sup> State laws differ as to the quantum of proof or the period of public use required to establish a public right-of-way pursuant to R.S. 2477.<sup>15</sup> Despite these inconsistencies, the lack of federal guidance on the issue leaves courts with no option but to look to state laws to determine what is required for the perfection of R.S. 2477 rights-of-way.<sup>16</sup>

## II. THE PROBLEM: QUESTIONS CENTRAL TO THE R.S. 2477 DEBATE

At the heart of the R.S. 2477 debate lies a dispute over definitions and terminology. The drafters of R.S. 2477 provided no guidance for interpretation of the statute, leaving many questions unsettled.<sup>17</sup> Unsettled questions include: (1) should state or federal law define the statutes ambiguous terms, thereby determining the scope of R.S. 2477 grants state-by-state; (2) what constitutes a “highway”; (3) what constitutes “construction”; and finally, (4) what lands qualify as “public lands, not reserved for public uses”?

Two opposing positions frame the R.S. 2477 debate. Along with state and local governments, lobbyists seeking to maintain off-road vehicle access support broad definitions of the terms “highway” and “construction,” and argue that a very specific reservation is required to remove federal land from the category of “public lands, not reserved for public uses.”<sup>18</sup> Groups that support this “access” approach often urge their members to “take back” the roads to maintain broad public access to federal lands.<sup>19</sup> Advocates of the second, preservation-oriented approach argue that a stricter interpretation of R.S. 2477 terminology should apply; that establishment of a right-of-way requires more than a

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13. HOWARD G. WILSHIRE ET AL., *THE AMERICAN WEST AT RISK: SCIENCE, MYTHS, AND POLITICS OF LAND ABUSE AND RECOVERY* 152 (2008).

14. R.S. 2477 REPORT, *supra* note 9, at 2.

15. Utah state law, for example, requires ten years of continuous public use. UTAH CODE ANN. § 72-5-104(1) (2009).

16. *See* S. Utah Wilderness Alliance v. Bureau of Land Mgmt., 425 F.3d 735, 762 (10th Cir. 2005).

17. *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) (“Despite sporadic litigation in recent years, legal questions persist about the exact showing necessary to validate a claim, the scope of any valid right-of-way, and the role of state law in interpreting R.S. 2477.”).

18. *See, e.g.*, § 72-5-104.

19. *See* Official RS 2477 Rights-of-Way Homepage, <http://www.rs2477roads.com> (last visited Oct. 31, 2009).

mere footpath.<sup>20</sup> These groups promote federal legislation to limit the scope of R.S. 2477 rights-of-way to mechanically constructed roadways that existed prior to R.S. 2477's repeal in 1976. Environmental groups advocate this approach because limits on the use of roads through federal lands can minimize erosion, protect native species, and preserve undeveloped areas.<sup>21</sup>

#### A. State or Federal "Law"?

"The most fundamental and controversial [R.S. 2477] issue is the proper role of state law in validating the establishment of R.S. 2477 rights-of-way."<sup>22</sup> This threshold determination necessarily affects the scope of the right. The federal government has inconsistently interpreted the statute over time.<sup>23</sup> This inconsistency springs from the reliance on state laws—in the absence of federal guidance—to determine what constitutes an R.S. 2477 right-of-way.<sup>24</sup>

#### B. What Is a "Highway"?

Black's Law Dictionary defines a highway as "any main route on land, on water, or in the air" and a "main public road connecting towns or cities."<sup>25</sup> In its 1993 Report to Congress, the United States Department of the Interior ("DOI") explained the "highway" dilemma at base as a conflict between an expansive definition of "highway" on one hand and a more specific definition on the other.<sup>26</sup> One approach would define a highway as *any type* of thoroughfare, be it a footpath, road, or primitive trail which is open to the public. Under this definition, mere use is sufficient to manifest public acceptance of the highway.<sup>27</sup> Alternatively, many environmental groups—and, at times, the federal government—contend that a highway is only a *vehicular* road which connects "towns or cities." Quoting a 1993 report written by the Congressional Research Service, DOI noted that "the most likely interpretation of [R.S. 2477] is that a highway was intended to mean a significant type of road, that is: 'one that was open for public passage, received a significant amount of public

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20. See Southern Utah Wilderness Alliance, Revised Statute 2477 (RS 2477): Highway Robbery Seeks to Swipe Scenic Lands from America's Wilderness Bank, [http://www.suwa.org/site/PageServer?pagename=work\\_rs2477](http://www.suwa.org/site/PageServer?pagename=work_rs2477) (last visited Apr. 29, 2010).

21. 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, 1019–20 (2005).

22. PAMELA BALDWIN, CONG. RESEARCH SERV., HIGHWAY RIGHTS OF WAY ON PUBLIC LANDS: R.S. 2477 AND DISCLAIMERS OF INTEREST 41 (2003), [http://assets.opencrs.com/rpts/RL32142\\_20031107.pdf](http://assets.opencrs.com/rpts/RL32142_20031107.pdf) [hereinafter CRS REPORT].

23. See *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 759–62 (10th Cir. 2005) (describing the inconsistencies in federal agency interpretation of R.S. 2477 and determining that it was appropriate for "federal law [to] look[] to state law to flesh out details of interpretation").

24. See, e.g., *id.* at 762–63.

25. BLACK'S LAW DICTIONARY 431–32 (8th ed. 2004).

26. R.S. 2477 REPORT, *supra* note 9, at 11–12.

27. CRS REPORT, *supra* note 22, at 38–40.

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use, had some degree of construction or improvement, and that connected cities, towns, or other significant places, rather than simply two places.”<sup>28</sup>

### C. What Constitutes “Construction”?

Similar to the opposing views of the definition of “highway,” the debate over the definition of “construction” can be summarized as a conflict between the broad and narrow meanings of the term. Proponents of the broad definition view “construction” as continuous use over a period of time that establishes the equivalent of a beaten path. Advocates of the narrow definition argue that affirmative road-building steps should be required. As discussed in more detail below, the DOI approach to “construction” has often fluctuated; while “consistently maintain[ing] that some construction must have taken place,” the DOI has also at times “construed ‘construction’ broadly.”<sup>29</sup>

The Tenth Circuit’s 2005 decision in *Southern Utah Wilderness Alliance v. Bureau of Land Management*<sup>30</sup> (“*SUWA*”) largely resolved the definition of “construction” for Tenth Circuit litigants by determining that “mechanical construction” could serve as evidence of public use, but was not required to prove a R.S. 2477 right-of-way.<sup>31</sup> The court concluded that:

[T]he common law standard of use[], which takes evidence of construction into consideration along with other evidence of use by the general public, seems better calculated to distinguish between rights of way genuinely accepted through continual public use over a lengthy period of time, and routes which . . . served limited purposes for limited periods of time, and never formed part of the public transportation system.<sup>32</sup>

### D. What Are “Public Lands, Not Reserved for Public Uses”?

Because there are a variety of purposes for federal land grants, the definition of “public lands, not reserved for public uses” also generates controversy.<sup>33</sup> Proponents of one approach argue that a federal land reservation must be particularized and explicit to exempt it from the R.S. 2477 grant. For example, the establishment of a grazing district would not be classified as land that is reserved for public uses. Rather, “reserved lands are those that have been withdrawn or dedicated for a more particular purpose, such as a National Park or Indian Reservation.”<sup>34</sup>

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28. R.S. 2477 REPORT, *supra* note 9, at 12.

29. CRS REPORT, *supra* note 22, at 50.

30. 425 F.3d 735 (10th Cir. 2005).

31. *Id.* at 778.

32. *Id.* at 782.

33. See R.S. 2477 REPORT, *supra* note 9, at 12 (explaining the disparities in definition for “public lands, not reserved for public uses”).

34. *Id.*

Alternatively, environmental groups arguing for a more restrictive R.S. 2477 standard maintain that any lands set aside for any specific public purpose by the federal government should be exempt from R.S. 2477 claims.<sup>35</sup>

### III. THE ELUSIVE ANSWER: EACH BRANCH OF GOVERNMENT (UNSUCCESSFULLY) ATTEMPTS TO RESOLVE THE R.S. 2477 DEBATE

Since the repeal of R.S. 2477, Congress, DOI, and courts have all attempted to resolve the conflict between federal land management regimes and local government property rights over R.S. 2477 roads.<sup>36</sup> Because of the complicated nuances of the issue, and with the control over potential rights-of-way across public lands at stake, all attempts have fallen short of a permanent solution.

#### *A. Congressional Attempts to Resolve the Issue*

Congress's inability to come to a consensus regarding R.S. 2477—whether they are weighing the scope of the R.S. 2477 grant, time limits for filing R.S. 2477 claims, or the question of whether state or federal laws govern these issues—has fueled the controversy surrounding the statute. Congress attempted to address R.S. 2477 roads in 1991 by passing H.R. 1096, which would have imposed a cutoff date for filing new R.S. 2477 claims.<sup>37</sup> While the bill passed the House of Representatives, “[t]he Senate adjourned without acting on H.R. 1096.”<sup>38</sup> Again in 1993, lawmakers unsuccessfully attempted to pass a House appropriations bill that would have imposed a moratorium on processing R.S. 2477 claims until federal legislation addressed the issue.<sup>39</sup>

Even the most recent congressional efforts have failed. In 2003,<sup>40</sup> and then again in 2005,<sup>41</sup> Colorado Representative Mark Udall proposed House bills which narrowly constrained R.S. 2477 rights-of-way. The bills defined construction as “an intentional physical act . . . using mechanical tools” and imposed a four year time limit for the filing of R.S. 2477 claims.<sup>42</sup> In the latest unsuccessful attempts to legislate on this issue, New Mexico Representative Steve Pearce introduced House bills in

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35. *Id.* More information about the large area of unreserved lands managed by the BLM is available at the BLM's Land Resources and Information Homepage, [http://www.blm.gov/public\\_land\\_statistics/resources.htm](http://www.blm.gov/public_land_statistics/resources.htm).

36. R.S. 2477 rights-of-way can also exist on National Forest System Lands, managed by the United States Department of Agriculture, to the extent that the rights-of-way were perfected prior to the date of reservation of the lands comprising the relevant national forest.

37. See H.R. 1096, 102d Cong. (1991).

38. R.S. 2477 REPORT, *supra* note 9, at 4.

39. H.R. 5503, 102d Cong. (2d Sess. 1992).

40. H.R. 1639, 108th Cong. (2003). The 2003 bill was cosponsored by 59 democrats and no republicans, and never came to a vote in the House.

41. H.R. 3447, 109th Cong. (2005). The 2005 bill also never came to a vote in the House.

42. *Id.*; H.R. 1639.

2006<sup>43</sup> and again in 2007<sup>44</sup> that favored state and local governments. The bills would have applied state laws to R.S. 2477 questions, perpetuating existing uncertainties.<sup>45</sup>

### B. DOI's Attempts to Resolve the Issue

#### 1. Formal Rulemaking

Prior to the repeal of R.S. 2477, the Department of Interior provided very little guidance with respect to the meaning of the statute, and generally took a hands-off approach to R.S. 2477.<sup>46</sup> The Secretary of the Interior applied state law to R.S. 2477 with a “federal law reasonableness limit on the scope” of a road grant.<sup>47</sup> In 1938, the Secretary published a regulation instructing that the R.S. 2477 “grant becomes effective upon the construction or establishing of highways, in accordance with state laws, over public lands not reserved for public uses.”<sup>48</sup> This position was largely maintained by DOI until FLPMA repealed R.S. 2477 in 1976.<sup>49</sup>

After the repeal, changes in agency policy generally corresponded with changes in political control of the executive branch.<sup>50</sup> Starting in the early 1980's during the Carter administration, Deputy Solicitor Frederick Ferguson announced that R.S. 2477 was a question of federal law, and that the plain meaning of “construction” for the purpose of interpreting R.S. 2477 was mechanical construction,<sup>51</sup> which required such activities as “grading, paving, placing culverts, etc.”<sup>52</sup> In 1989, Ronald Reagan's Secretary of the Interior Donald Hodel issued a new R.S. 2477 policy

43. H.R. 6298, 109th Cong. (2d Sess. 2006).

44. H.R. 308, 110th Cong. (2007).

45. H.R. 6298 § 5 reads, in its entirety:

- (5) The applicable *laws of each State govern* the resolution of issues relating to the validity and scope of R.S. 2477 rights-of-way, including—
- (A) what constitutes a highway and its essential characteristics;
  - (B) what actions are required to establish a public highway;
  - (C) the length of time of public use, if any, necessary to establish a public highway and resulting R.S. 2477 right-of-way;
  - (D) the necessity of mechanical construction to establish a public highway and resulting R.S. 2477 right-of-way; and
  - (E) the sufficiency of public construction alone without proof of a certain number of years of continuous public use to establish a public highway and resulting R.S. 2477 right-of-way.

H.R. 6298 § 5 (emphasis added).

46. See R.S. 2477 REPORT, *supra* note 9, at 20.

47. Rasband, *supra* note 21, at 1026–27.

48. R.S. 2477 REPORT, *supra* note 9, at 20 (internal quotation marks omitted) (quoting 43 C.F.R. pt. 244.55 (1938)); *id.* app. II, exhibit C (providing full-text of regulation).

49. See *id.* at 20.

50. See Rasband, *supra* note 21, at 1039.

51. Under the Ferguson-era policy, construction required more than “mere use.” Letter from Frederick N. Ferguson, Deputy Solicitor, to James W. Moorman, Assistant Attorney Gen. 5 (Apr. 28, 1980), in R.S. 2477 REPORT, *supra* note 9, app. II, exhibit J [hereinafter Ferguson Letter]. “If actual use were the only criterion, innumerable jeep trails, wagon roads and other access ways—some of them ancient . . . might qualify as public highways under R.S. 2477.” *Id.* at 7.

52. *Id.* at 8; see also Rasband, *supra* note 21, at 1029.

statement in response to the Tenth Circuit's decision in *Sierra Club v. Hodel*.<sup>53</sup> Known as the "Hodel Policy," it proclaimed that the scope of a right-of-way was a question of state law and propounded a long-term use standard for determining the validity of a right-of-way, meaning that maintaining a road for many years was tantamount to construction.<sup>54</sup> The Hodel policy, in stark contrast to the Ferguson policy, established public highways as any public route open to vehicular, pedestrian, or pack animal traffic.<sup>55</sup>

In 1994, during the Clinton administration, DOI proposed new R.S. 2477 regulations that would have implemented the suggestions made by DOI's 1993 R.S. 2477 Report to Congress<sup>56</sup> by creating a comprehensive federal policy for resolving R.S. 2477 claims.<sup>57</sup> The proposed rules were "intended to clarify the meaning of [R.S. 2477] and provide a workable administrative process and standards for recognizing valid claims,"<sup>58</sup> and imposed a two-year time limit on the filing of R.S. 2477 claims, which were to be resolved based on federal law.<sup>59</sup> However, the rules were derailed by another change in the Congressional majority,<sup>60</sup> and marked a final end to formal R.S. 2477 rulemaking by enacting a permanent moratorium on agency R.S. 2477 rulemaking without Congressional authorization.<sup>61</sup>

## 2. Agency Policy Interpretations

In 2003, the United States Department of Interior ("DOI") signed a Memorandum of Understanding ("MOU") with the State of Utah in an effort to resolve Utah's R.S. 2477 controversies.<sup>62</sup> The MOU acknowledged "publicly traveled and regularly maintained roads" in Utah that were "unquestionably part of the State's transportation infrastructure" and were not part of national parks, refuges, and wilderness areas.<sup>63</sup> Environmental groups contended that the MOU was insufficiently protective of Utah's wilderness areas because it incorporated an expansive

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53. *Sierra Club v. Hodel*, 848 F.2d 1068, 1083 (10th Cir. 1988) (concluding that state law should control the scope of the right-of-way).

54. Memorandum from Susan Recce, Acting Assistant Sec'y, Fish and Wildlife and Parks, to Donald Paul Hodel, Sec'y, Dep't of the Interior 2 (Mar. 8, 1989), in R.S. 2477 REPORT, *supra* note 9, app. II, exhibit K.

55. *Id.*

56. R.S. 2477 REPORT, *supra* note 9, at 55.

57. Revised Statute 2477 Rights-of-Way, 59 Fed. Reg. 39,216 (Aug. 1, 1994).

58. *Id.*

59. *Id.* at 39,222.

60. Rasband, *supra* note 21, at 1031-32.

61. H.R. 3610, 104th Cong., 110 Stat. 3009 (2d Sess. 1996) (enacted).

62. Memorandum of Understanding Between the State of Utah and the Dep't of the Interior on State & County Rd. Acknowledgment (Apr. 9, 2003), available at [http://doi.gov/archive/news/03\\_News\\_Releases/mours2477.htm](http://doi.gov/archive/news/03_News_Releases/mours2477.htm).

63. Press Release, Dep't of the Interior, Memorandum of Understanding: Dep't of the Interior & State of Utah: Resolution of R.S. 2477 Right-of-Way Claims, available at [http://www.interior.gov/news/03\\_News\\_Releases/moutalkingpoints.htm](http://www.interior.gov/news/03_News_Releases/moutalkingpoints.htm).

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definition of “highway.”<sup>64</sup> Despite lingering doubts, Secretary of the Interior Gale Norton announced that the R.S. 2477 issues in Utah were, at long last, resolved: “[B]y working collaboratively with the state of Utah, we are able to resolve a long-disputed issue that may otherwise have lead [sic] to costly and lengthy litigation.”<sup>65</sup> The litigation, however, persisted.

On March 22, 2006, following the Tenth Circuit’s *SUWA* decision, Secretary Norton sent an instructional memorandum (“IM”) to DOI’s departments, directing a change in R.S. 2477 policy to ensure consistency with the *SUWA* decision.<sup>66</sup> More specifically, the IM instructed that the validity of R.S. 2477 claims were to be determined pursuant to state law and that mechanical construction of a road was not necessary to establish an R.S. 2477 right-of-way. Further, “the scope of an R.S. 2477 right of way [was] limited by the established usage of the route as of the date of repeal of [R.S. 2477].”<sup>67</sup> Under the guidelines set forth in the IM, which represent the most recent expression of DOI policy related to R.S. 2477, local governments are permitted to maintain R.S. 2477 roads provided that the maintenance “preserves the status quo.”<sup>68</sup>

### C. The Tenth Circuit Attempts to Resolve the Issue

#### 1. The *SUWA* Case<sup>69</sup>

The Tenth Circuit’s decision in *SUWA* significantly affected the R.S. 2477 debate. In this landmark 2005 case, Judge McConnell ruled on several important R.S. 2477 issues.<sup>70</sup> *SUWA* was an action brought by environmental groups to oppose the grading of sixteen roads or trails on BLM land by three Southern Utah counties.<sup>71</sup> The plaintiffs claimed that “the Counties had engaged in unlawful road construction activities”<sup>72</sup> and

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64. Press Release, The Wilderness Society & Earthjustice, R.S. 2477 Spin vs. Reality: Dep’t of Interior & State of Utah April 9, 2003 Memorandum of Understanding on “Resolution of R.S. 2477 Right of Way Claims” (Apr. 10, 2003) (on file with author).

65. Press Release, Dep’t of the Interior, Interior and State of Utah Reach Landmark Agreement on R.S. 2477 Rights of Way Issue (Apr. 9, 2003), available at [http://www.doi.gov/archive/news/03\\_News\\_Releases/030409a.htm](http://www.doi.gov/archive/news/03_News_Releases/030409a.htm).

66. Memorandum from Gale A. Norton, Sec’y, Dep’t of the Interior, 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 (Mar. 22, 2006), available at [http://www.doi.gov/archive/news/06\\_News\\_Releases/Norton\\_3-22-06.pdf](http://www.doi.gov/archive/news/06_News_Releases/Norton_3-22-06.pdf) [hereinafter Norton Memorandum].

67. Guidelines for Implementation of *SUWA v. BLM* Principles, in Norton Memorandum, *supra* note 66, at 4 (internal quotation marks omitted) (quoting *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 747 (10th Cir. 2005)) [hereinafter Guidelines for *SUWA*].

68. Guidelines for *SUWA*, *supra* note 67, at 6 (internal quotation marks omitted) (quoting *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 756 (10th Cir. 2005)).

69. *S. Utah Wilderness Alliance v. Bureau of Land Mgmt. (SUWA)*, 425 F.3d 735 (10th Cir. 2005).

70. *See id.*

71. *Id.* at 742.

72. *Id.*

that BLM, by not taking action, had violated its duties under a number of federal statutes.<sup>73</sup>

The Tenth Circuit first concluded that BLM did not have the “authority to make binding determinations on the validity of the rights of way granted [under R.S. 2477].”<sup>74</sup> The court went on to hold that state law applied to R.S. 2477 conflicts. While the DOI’s proposed 1994 rules would have allowed BLM to regulate R.S. 2477 rights of way, the 1996 congressional moratorium on formal R.S. 2477 rulemaking by DOI and its subdivisions (including the BLM) explicitly deprived the BLM of any regulation authority over R.S. 2477 claims.<sup>75</sup> Additionally, the court found that the policy was not entitled to *Chevron* deference because it had shown evidence of inconsistency since 1976.<sup>76</sup> Thus, “where Congress has taken action to prevent implementation of agency rules, and those rules have never been adopted by formal agency action, we do not think it appropriate for a court to defer to those rules in the interpretation of a federal statute.”<sup>77</sup>

The *SUWA* court upheld the district court’s determination that the burden of proof for establishing a valid right-of-way fell on the R.S. 2477 claimant.<sup>78</sup> However, the court rejected the argument advanced by *SUWA* and the BLM that “mechanical construction” was required to perfect an R.S. 2477 right-of-way.<sup>79</sup> Instead, the court held that a right-of-way can be established by “continued use of the road by the public for such length of time and under such circumstances as to clearly indicate an intention on the part of the public to accept the grant.”<sup>80</sup> Next, the court held that, for the purpose of R.S. 2477, a “highway” must be a route with continuous public use. Notably, however, the Tenth Circuit remanded to the district court to determine whether a route which did not lead to an “identifiable destination[.]” may nonetheless constitute a highway.<sup>81</sup> Finally, the court adopted a relatively formal public use requirement by holding that land withdrawn by the federal government under the 1910 Coal Withdrawal was not a reservation for public use.<sup>82</sup> In sum, the *SUWA* decision, which exhibited the characteristics of the traditional

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73. See *id.* (“*SUWA* . . . allege[d] that the Counties had engaged in unlawful road construction activities and that the BLM had violated its duties under FLPMA, the Antiquities Act, and the National Environmental Policy Act, by not taking action [to stop the road construction].” (citations omitted)).

74. *Id.* at 757.

75. See *id.* at 756–57; Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 108, 110 Stat. 3009, 3009-18 (1996).

76. *SUWA*, 425 F.3d at 760.

77. *Id.* at 761.

78. *Id.* at 768.

79. *Id.* at 782.

80. *Id.* at 781 (internal quotation marks omitted) (quoting *Lindsay Land & Live Stock Co. v. Churnos*, 285 P. 646, 648 (Utah 1929)).

81. *Id.* at 783–84.

82. *Id.* at 784–85.

state law approach to the R.S. 2477 issue, became the foremost authority on R.S. 2477 in the Tenth Circuit.<sup>83</sup>

## 2. *Wilderness Society v. Kane County, Utah*<sup>84</sup>

In August 2009, a Tenth Circuit court divided 2–1 declined to extend the reasoning relied on for nearly five years after *SUWA*. In a decision for the plaintiff environmental groups, the Tenth Circuit’s holding in *Wilderness Society* has the potential to impact the next generation of R.S. 2477 litigants.

### a. Facts

Beginning in the summer of 2003, representatives of Kane County, Utah (“the County”)<sup>85</sup> removed BLM and National Park Service signs that restricted motor vehicle access in four federally-managed and ecologically-sensitive areas.<sup>86</sup> In all, the County removed thirty-one signs from purported R.S. 2477 roads throughout the Grand Staircase-Escalante National Monument, Glen Canyon National Recreation Area, Paria Canyon-Vermillion Cliffs Wilderness Area, and Moquith Mountain Wilderness Study Area.<sup>87</sup>

Just over a year after taking down the signs, the County erected its own signage, in some places replacing the federal signage that it had removed the previous year. At least sixty-three of the new County signs opened routes to motor vehicles that were previously closed to motorized travel under the federal management plans.<sup>88</sup> Shortly thereafter, the BLM sent a letter to the County requesting that it discontinue the removal and replacement of federal signs.

In seeming defiance of the BLM request, the County enacted the “Ordinance to Designate and Regulate the Use of Off-Highway Vehicles,” or Ordinance 2005-03 (“the Ordinance”), in August 2005. The Ordinance purported to authorize the County to “post signs” designating roads as open to motor vehicle use.<sup>89</sup> In October 2005, plaintiffs Wilder-

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83. Norton Memorandum, *supra* note 66, at 4. *But see SUWA*, 425 F.3d at 787 (departing from the Ninth Circuit Court of Appeals precedent on the coal withdrawal issue).

84. 581 F.3d 1198 (10th Cir. 2009).

85. Plaintiffs alleged in their complaint that those responsible for the removal of the signs were Kane County Commissioner Mark Habbeshaw and Sheriff Lamont Smith. Complaint for Declaratory & Injunctive Relief at 15, *Wilderness Soc’y v. Kane County, Utah*, 470 F. Supp. 2d 1300 (D. Utah 2006) (No. 2:05-CV-854 TC), 2005 WL 3197808 [hereinafter *Wilderness Soc’y Compl.*].

86. *Wilderness Soc’y*, 581 F.3d at 1205–06.

87. Here, the majority of the public lands in question were in Grand Staircase-Escalante National Monument: “Nearly 1.3 million of the 1.6 million acres of federal public land in Kane County lie within Grand Staircase-Escalante National Monument.” *Id.* at 1205. Grand Staircase, created in 1996 by President Clinton, is managed by the BLM, rather than the National Parks Service. VISIONS OF THE GRAND STAIRCASE-ESCALANTE: EXAMINING UTAH’S NEWEST NATIONAL MONUMENT, at xiii (Robert B. Keiter et al. eds., 1998).

88. *Wilderness Soc’y*, 581 F.3d at 1206–07.

89. *Id.* at 1207.

ness Society and Southern Utah Wilderness Alliance (collectively, “TWS”) filed a complaint in federal district court.<sup>90</sup> TWS claimed that both the County’s removal of federal signs and the enactment of the county Ordinance conflicted with existing federal land management plans, which designated the routes in question as closed to motor vehicle use.<sup>91</sup> TWS based its argument on the theory that the federal plans preempted County actions under the Supremacy Clause of the United States Constitution.<sup>92</sup>

In response, the County repealed the Ordinance during December 2006<sup>93</sup> and filed a motion to dismiss in which it alleged that the Supremacy Clause did not preempt the County’s actions because, pursuant to R.S. 2477, the County possessed valid rights-of-way to the roads in question.<sup>94</sup> The County also challenged the federal court’s jurisdiction, arguing that TWS lacked standing and that the court did not have subject matter jurisdiction over the controversy.

#### b. The District Court Decision

The District Court disagreed with the County, and exercised its jurisdiction to rule on TWS’s claims in August 2006.<sup>95</sup> In May 2008, the court granted TWS’s motion for summary judgment, reasoning that Kane County’s failure to prove its R.S. 2477 rights-of-way in a previous quiet title action prevented the County from using its purported property rights to contravene federal land management policies.<sup>96</sup> Because the County had not clearly established property rights along the roadways, the court held that the County’s decisions to remove federal signage and expand trail use to include off-road vehicles were preempted by federal law under the Supremacy Clause.<sup>97</sup>

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90. *Id.* For their specific injuries-in-fact, Plaintiffs submitted declarations of their members “alleg[ing] harms to their health, recreational, scientific, spiritual, educational, aesthetic, and other interests.” *Id.* at 1210. The declarations specifically stated that members of TWS often use “areas adjacent to” some of the roads in question, that they “seek[] out and prefer[] to use those federal public land[s] that are . . . not burdened by [off-road vehicle] use,” and that their “interests are directly affected and harmed by Kane County’s actions in erecting signs and adopting [the] [O]rdinance.” *Id.* at 1210–11 (third alteration in original) (internal quotation marks omitted) (quoting declarations from plaintiffs’ group members).

91. Of the public lands in Kane County, BLM “manages about 1.6 million acres . . . and the National Park Service about 400,000 acres.” *Wilderness Soc’y v. Kane County, Utah*, 470 F. Supp. 2d 1300, 1303 (D. Utah 2006).

92. See *Wilderness Soc’y Compl.*, *supra* note 85, at 18–19.

93. *Wilderness Soc’y*, 581 F.3d at 1208.

94. See Defendants’ Motion to Dismiss at 1, *Wilderness Soc’y*, 470 F. Supp. 2d 1300 (No. 2:05-CV-854 TC), 2006 WL 5986753; Memorandum in Support of Motion to Dismiss at 4, *Wilderness Soc’y*, 470 F. Supp. 2d 1300 (No. 2:05-CV-854 TC), 2006 WL 813473.

95. *Wilderness Soc’y*, 470 F. Supp. 2d at 1304.

96. *Wilderness Soc’y v. Kane County, Utah*, 560 F. Supp. 2d 1147, 1165–66 (D. Utah 2008).

97. See *id.* at 1165.

c. The Tenth Circuit Affirms the District Court

On appeal, the Tenth Circuit narrowed the issues to be decided,<sup>98</sup> stating that the only issues before the court included (1) whether federal jurisdiction over the plaintiffs' claims was proper, and (2) whether a county may "exercise management authority over federal lands in a manner that conflicts with the federal management regime without proving that it possesses valid R.S. 2477 rights of way."<sup>99</sup> Although the case involved hotly-debated R.S. 2477 rights, the Tenth Circuit made it clear that it was *not* deciding "the validity of [Kane County's] purported R.S. 2477 rights of way over federal land."<sup>100</sup>

i. Federal Jurisdiction

The Tenth Circuit held in favor of the plaintiffs TWS on all jurisdictional issues, including standing, mootness, and joinder. To establish standing, TWS was required to satisfy the constitutional standing requirements of Article III, including: (1) injury in fact; (2) a causal link between the TWS's injury and the County's actions; and (3) that a favorable resolution by the court would redress the injury.<sup>101</sup> The majority opinion reasoned that "[i]n the environmental context, a plaintiff who has repeatedly visited a particular site, has imminent plans to do so again, and whose interests are harmed by a defendant's conduct has suffered injury in fact."<sup>102</sup> The court reasoned that declarations from members of the plaintiff organizations adequately established injury in fact.<sup>103</sup> Similarly, the court found that the County's actions caused the harm alleged by the TWS because there was a "substantial likelihood" that the County's replacement of federal signs increased off-highway vehicle

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98. In its opening brief, Kane County named five issues for review:

1. Whether the District Court erred in finding that R.S. 2477 rights-of-way do not exist unless and until adjudicated in court.
2. Whether the District Court erred in finding it had subject matter jurisdiction of TWS's constitutional claims.
3. Whether the District Court erred in deciding that the State of Utah was not a necessary party and in failing to address whether the United States was a necessary and indispensable party.
4. Whether the District Court erred in denying Kane County's motion to dismiss on grounds of constitutional and prudential mootness.
5. Whether the District Court erred in denying Kane County's motions to strike and request for attorneys' fees by merely deciding it would not consider the improper materials.

Appellants' Opening Brief at 3, *Wilderness Soc'y*, 581 F.3d 1198 (No. 08-4090), 2008 WL 4212652.

99. *Wilderness Soc'y*, 581 F.3d at 1205.

100. *Id.* at 1219.

101. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

102. *Wilderness Soc'y*, 581 F.3d at 1210 (citing *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009)). Declarants in *Wilderness Society* alleged harms to their "health, recreational, scientific, spiritual, educational, aesthetic, and other interests" arising from increased off-road vehicle routes on the BLM lands in question. *Id.*

103. While this Comment does not address in detail the interesting standing issue presented in *Wilderness Society*, the history of the standing doctrine, especially in the environmental context, is "one of pendulum shifts: first toward generous standing, then back toward more restrictive standing, then back again toward a more generous approach." Daniel A. Farber, *A Place-Based Theory of Standing*, 55 UCLA L. REV. 1505, 1508 (2008).

usage on the roads.<sup>104</sup> Finally, the plaintiffs' complaint satisfied the re-dressability requirement because an injunction requiring Kane County to remove its signs and prohibiting the County from taking similar actions in the future "would likely dissuade at least one person from driving an [off-road vehicle] on a disputed route."<sup>105</sup>

The court also determined that TWS's claim satisfied the requirements for prudential standing.<sup>106</sup> The court reasoned TWS's complaint was not a generalized grievance, "but rather one that particularly impacts their members."<sup>107</sup> Furthermore, the court noted that "[i]f the zone of interest test applies in a preemption case, it is clear that the environmental plaintiffs fall within the zone of interest protected by the Supremacy Clause."<sup>108</sup>

In considering mootness, the Tenth Circuit found that the case was not mooted by Defendant's removal of some of the signs permitting motor vehicle use on the routes in question or by the County's repeal of Ordinance 2005-03 in the wake of TWS's complaint. The court recognized that the County only rescinded the Ordinance to "secure the most successful legal resolution," and that the County Commissioner himself hinted at his intention to reenact the ordinance after the resolution of the litigation.<sup>109</sup>

Finally, because the court was "not passing on the validity of any alleged R.S. 2477 rights of way," the court determined neither the State of Utah nor the United States was a necessary party.<sup>110</sup> The majority noted that it would have been improper to adjudicate the R.S. 2477 claims because the United States was not a party and because the County had not filed a Quiet Title Act claim.

#### ii. Preemption

In a rather unique and controversial step, the Tenth Circuit found that the Supremacy Clause, even without an associated statutory right of action, was a valid cause of action.<sup>111</sup> As a result, TWS's preemption claims succeeded on the merits. The Tenth Circuit stated that, where the County's actions conflict with federal land management plans, the

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104. *Wilderness Soc'y*, 581 F.3d at 1213.

105. *Id.*

106. *See, e.g., Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (explaining that the requirements for judicially-imposed prudential standing include "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked" (internal quotation marks omitted) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984))).

107. *Wilderness Soc'y*, 581 F.3d at 1217.

108. *Id.*

109. *Id.* at 1214 (internal quotation marks omitted) (quoting Kane County Comm'n).

110. *Id.* at 1218.

111. *Id.* at 1216.

County may not exercise management authority over purported R.S. 2477 roads without first proving the existence of valid rights-of-way in court.<sup>112</sup> The court refused to allow Kane County to “defend [this] preemption suit by simply alleging the existence of R.S. 2477 rights of way.”<sup>113</sup>

To determine whether state law was, in fact conflicting with or obstructing federal law, the court evaluated each of the federal lands’ respective management plans. While the management plans stipulate that the managing agency “may not encroach upon ‘valid existing rights,’” the court denied the existence of valid existing rights because Kane County had yet to establish the R.S. 2477 routes in court.<sup>114</sup> The majority concluded by noting that the County’s “claimed rights may well have been created and vested decades ago, but until it proves . . . those rights, we agree with the district court that its regulations on federal lands that otherwise conflict with federal law are preempted.”<sup>115</sup>

#### d. Judge McConnell’s Dissent

In his dissent, Judge McConnell—the author of the landmark *SUWA* decision—took issue with the majority’s treatment of preemption as a valid constitutional cause of action.<sup>116</sup> McConnell argued that the “plaintiffs assert no legal claim upon which relief may be granted” because “[t]he Supremacy Clause is not an independent source of rights but a rule of priority that determines who wins when state and federal law conflict.”<sup>117</sup> Judge McConnell attacked the merits of the plaintiffs’ case, arguing that the provision in the Grand Staircase-Escalante National Monument Management Plan preserving “valid existing rights” precluded a preemption claim, thereby removing any conflict between federal policy and local laws. Moreover, Judge McConnell reasoned that “even if there were a conflict between county law and federal law, [the

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112. This portion of the Tenth Circuit’s holding conformed to their earlier conclusion in the related case of *Kane County, Utah v. Salazar*, 562 F.3d 1077 (10th Cir. 2009) (holding that the BLM has no duty to determine the validity of all potential R.S. 2477 rights-of-way in preparing a travel management plan designating routes for public motor vehicle travel in the Grand Staircase-Escalante National Monument).

113. *Wilderness Soc’y*, 581 F.3d at 1221.

114. *Id.* at 1220.

115. *Id.* at 1221.

116. While Judge McConnell admits that preemption can be used “as a *defense* to the enforcement against [a party] of state regulations that conflicted with federal law,” he did not agree with the majority that a “third party [could] bring a freestanding preemption claim to enforce compliance with federal law.” *Id.* at 1233 (McConnell, J., dissenting). Judge McConnell also disagreed that the environmental groups had standing to bring the suit, alleging that the groups were just “interested outsiders,” *id.* at 1231, without a “legally protected interest,” *id.* at 1229.

117. *Id.* at 1234 (citing *Andrews v. Maher*, 525 F.2d 113, 119 (2d Cir. 1975)) (arguing that FLPMA does not contain citizen enforcement provisions and the Supremacy Clause is a “fundamental structural principle of federalism” not an “independent source of rights”).

court] cannot determine which prevails without adjudicating the County's claimed rights-of-way."<sup>118</sup>

#### IV. ANALYSIS

Both the district court and Tenth Circuit emphasized that *Wilderness Society* is not about the adjudication of R.S. 2477 rights-of-way between Kane County and the federal government. However, by attempting to resolve the apparent discrepancy between the presumption favoring the federal government property owner and the widely-held view that the R.S. 2477 rights-of-way are recognized without administrative formalities, *Wilderness Society* could signal a Tenth Circuit shift towards a more "environmentally friendly" resolution of R.S. 2477 disputes.

##### A. The Significance of Wilderness Society

The *SUWA* rule recognizing rights-of-way without formal adjudication has proven itself to be unworkable in the cases where a local government is attempting to open new routes or expand seldom-used routes. Of the roads throughout the West today, thousands are unproven R.S. 2477 rights-of-way. The majority of these rights-of-way do not give rise to conflict, however, because they have been used continuously for many years, are well-established, and do not traverse sensitive areas. In these cases, formal adjudication is impractical and unnecessary. Conflicts arise, however, when counties stretch the application of R.S. 2477 to open new roads, re-establish rarely used trails, or continue to use unimproved roads in recently-designated federal wilderness areas. Such "highways" often do not look like roads at all, and often cross environmentally sensitive areas. For these types of cases, recognition of a right-of-way without a formal process or adjudication inevitably leads to litigation.

By rejecting Kane County's argument that the routes in question were "valid existing rights," and by requiring that the rights-of-way be proven in court before being asserted as a defense, the Tenth Circuit in effect adopted a more straightforward rule governing county management of routes on public lands. While *Wilderness Society* does not expressly overturn *SUWA*,<sup>119</sup> the Tenth Circuit sends a strong message: state and local governments must prove R.S. 2477 rights-of-way in court before exercising unilateral management authority over roads on federal lands. While not a permanent solution to the R.S. 2477 dispute, the majority's rule adds some certainty to the treatment of alleged R.S. 2477

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118. *Id.* at 1239 (alterations omitted).

119. Appellant's Petition for Panel Rehearing & Request for Rehearing en Banc at 15, *Wilderness Soc'y*, 581 F.3d 1198 (No. 08-4090). In fact, the County argued that TWS broke new ground on the R.S. 2477 issue and that "the [Tenth Circuit] panel effectively overrules *SUWA* 'by implication.'" *Id.*

rights-of-way and offers the promise of minimizing county actions on federal lands that foster R.S. 2477 disputes.

Importantly, the Tenth Circuit's decision to grant standing to the environmental plaintiffs promotes transparency and certainty. The *Wilderness Society* decision suggests that all regular users of federal lands will likely have standing to sue state and local governments that take actions on federal lands in contravention of federal management plans. Furthermore, the concept established in *Wilderness Society*—that local governments must prove the existence of R.S. 2477 rights-of-way *before* those rights will be recognized as a defense—adds a substantial caveat to the traditional view that R.S. 2477 rights-of-way may be established without “administrative formalities.” While state and local governments may continue to maintain the “status quo” of purported R.S. 2477 roads without formally proving their rights through a quiet title action,<sup>120</sup> they may not rely on unproven R.S. 2477 rights-of-way to defend uses of such roads that are inconsistent with federal land management policy.<sup>121</sup> In the several decades of Tenth Circuit jurisprudence related to R.S. 2477,<sup>122</sup> *Wilderness Society* represents the first occasion in which the court favors the interests of the federal government—not to mention those of an environmental plaintiff—over the interests of a local government. The implications of this decision could be wide-reaching: because of the West's expertise on R.S. 2477, DOI and other circuit courts have historically deferred to the decisions of both the Ninth and Tenth Circuits.<sup>123</sup>

### B. An Appeal for a Preservation-Oriented Approach

To lend certainty and closure to the R.S. 2477 debate while concurrently protecting states' rights and the environment, the federal approach to R.S. 2477 must reach three objectives: (1) impose a time limit for filing of claims; (2) define ambiguous terminology from the R.S. 2477 statute; and (3) provide for an administrative process to resolve claims in a timely and efficient manner. This approach would mirror the Department of Interior's 1994 proposal,<sup>124</sup> and be very similar to the Udall proposals of 2003 and 2005.<sup>125</sup>

“The uncertainty attending [the] issue [of R.S. 2477] makes planning and development difficult, compromises an agency's mission, and undermines the relationship between federal officials and the people they

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120. *S. Utah Wilderness Alliance v. Bureau of Land Mgmt. (SUWA)*, 425 F.3d 735, 756 (10th Cir. 2005).

121. *Wilderness Soc'y*, 581 F.3d at 1219–21.

122. *See, e.g., SUWA*, 425 F.3d at 785; *Sierra Club v. Hodel*, 848 F.2d 1068, 1074 (10th Cir. 1988).

123. *See, e.g., Norton Memorandum, supra* note 66 (adopting the Tenth Circuit's approach in *SUWA* as a DOI policy).

124. Revised Statute 2477 Rights-of-Way, 59 Fed. Reg. 39,216, 39,216–17 (Aug. 1, 1994).

125. H.R. 3447, 109th Cong. (2005); H.R. 1639, 108th Cong. (2003).

serve.”<sup>126</sup> The authority of federal agencies to manage access to federal lands is critical.<sup>127</sup> As demonstrated in *Wilderness Society*, the federal government’s ability to protect and manage its land resources is severely undermined by state and local government actions that expand access to R.S. 2477 roads.<sup>128</sup> The economic planning and development goals of state and local governments are also compromised by the indeterminate state of R.S. 2477.<sup>129</sup>

As populations grow and open spaces disappear, it becomes ever more important to protect the lands set aside by the federal government as wilderness areas, national monuments, or for other public enjoyment purposes.<sup>130</sup> Because “[w]ilderness areas and Wilderness Study Areas (WSAs) are roadless by definition,”<sup>131</sup> the continued influx of R.S. 2477 claims compromises the federal government’s ability to set aside wilderness areas in the future.<sup>132</sup> The DOI has recognized the “potential to misuse [R.S. 2477] greatly in a way that would destroy so much important wildlife and recreational lands and corresponding local and regional economies.”<sup>133</sup> The comprehensive approach advocated in this Comment provides superior protection to environmental interests by making it more difficult for local governments to claim continuously-used trails as R.S. 2477 roads.

The federal government’s failure to finally resolve the R.S. 2477 issue is troublesome. Nearly 35 years after the statute’s repeal, disputes persist. While imposing a time limit for the filing of R.S. 2477 claims would not relieve the tension inherent in the debate, it would ensure that the process does not become even more contentious in the future. The longer Congress waits to impose a time limit for filing claims, the more uncertain the R.S. 2477 issue will become.<sup>134</sup> Confusion over which routes were established prior to 1976 is pervasive: as early as 1993, DOI noted that “[i]ncomplete records and confusion over the law and its ap-

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126. R.S. 2477 REPORT, *supra* note 9, at 33.

127. See Birdsong, *supra* note 17, at 533 (describing the problems that R.S. 2477’s uncertainties present for both federal land managers and state and local governments).

128. See 59 Fed. Reg. 39,216–17.

129. Birdsong, *supra* note 17, at 533 (“State and local governments also need to plan for the development of road networks within their jurisdiction. The lack of certainty over whether various roads over public lands are valid rights-of-way impedes their ability to plan for economic growth and to provide road safety.”).

130. Because of the burdensome effects that roads have on the environment, it is ever more important to adopt a hard line when it comes to opening the purported right of ways. See Rasband, *supra* note 24, at 1019–20.

131. R.S. 2477 REPORT, *supra* note 9, at 38.

132. “If primitive access routes are recognized as R.S. 2477 highways, large areas of public land in some areas currently proposed for wilderness designation by various public-interest groups may be disqualified.” *Id.*; see also Rasband, *supra* note 21, at 1019.

133. R.S. 2477 REPORT, *supra* note 9, at 39.

134. See Revised Statute 2477 Rights-of-Way, 59 Fed. Reg. 39,216, 39,222 (Aug. 1, 1994).

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plication make it difficult to inventory, thus assess, impacts of potential R.S. 2477 claims.”<sup>135</sup>

Finally, because of the ubiquitous presence of R.S. 2477 roads in the United States, federal legislation is preferable to the current *ad hoc* system that relies on inconsistent state laws. “While existing rights pursuant to R.S. 2477 were not terminated [by FLPMA], their preservation did not provide prospective, unrestricted authority to create or improve highways without regard for the purposes of [federal] land management systems, or other environmental and resource protection laws.”<sup>136</sup> Accordingly, federal lands should not be “‘at the mercy of [future] state legislation’ and [changes in] state common law.”<sup>137</sup> A federal law that establishes universal definitions applicable to R.S. 2477 would foster uniform application and drastically reduce conflicts in some states, like Utah,<sup>138</sup> which do not have a clear approach for resolving R.S. 2477 conflicts.<sup>139</sup>

In sum, Congress should enact a comprehensive federal policy for determining the validity of purported R.S. 2477 rights-of-way. A legislative solution would provide much-needed clarity, uniformity, and finality to the R.S. 2477 debate, effectively curbing the mounting costs of litigation for the state, local, and federal government.

### C. Next Steps

While *Wilderness Society* provides a more straightforward rule that removes several uncertainties surrounding R.S. 2477 disputes, it also demonstrates the limitations of the judicial branch to devise a permanent, national R.S. 2477 solution.<sup>140</sup> Similarly, the Congressional moratorium on formal R.S. 2477 rulemaking has rendered federal agencies powerless to promote a national solution. Therefore, the resolution of this controversy must come in the form of long-overdue Congressional legislation. However, with its history of failed attempts, Congress may be reticent to promote comprehensive R.S. 2477 legislation.

Even so, the proposed approach, which assigns succinct definitions to R.S. 2477 terminology and places a time limit on filing claims, is more

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135. R.S. 2477 REPORT, *supra* note 9, at 39.

136. 59 Fed. Reg. 39,218.

137. Matthew L. Squires, Note, *Federal Regulation of R.S. 2477 Rights-of-Way*, 63 N.Y.U. ANN. SURV. AM. L. 547, 596–97 (2008) (quoting *Utah Power & Light Co. v. United States*, 243 U.S. 389, 405 (1917); *Camfield v. United States*, 167 U.S. 518, 526 (1897)).

138. “Utah state law . . . has established very broad criteria for the acceptance of a public highway. No formal acceptance of a highway is necessary, public use is accepted, and no specific road standards are necessary to establish a highway.” R.S. 2477 REPORT, *supra* note 9, at 31.

139. CRS REPORT, *supra* note 22, at 45.

140. See Birdsong, *supra* note 17, at 546, 553 (arguing that the “courts have proven to be an ineffective institution” for resolving R.S. 2477 disputes because of a “series of arguably inconsistent rulings that contribute to, rather than resolve, legal uncertainty”).

attainable now than ever. While historically this has been unrealistic,<sup>141</sup> the Democratic Party's current control of both the legislative and executive branches of the United States government presents a realistic opportunity for meaningful change.

Growing evidence in the local media suggests that state and local governments, as well as their citizens, are growing weary of R.S. 2477 litigation.<sup>142</sup> While counties continue to file and prosecute R.S. 2477 claims, the fact remains that an R.S. 2477 right-of-way claim can take years to resolve, all at the expense of the taxpayer. Yet *Wilderness Society* opened the door for environmental groups and other interested parties to litigate questionable county management of purported R.S. 2477 routes, increasing the probability of future litigation. Citing a recent interview with the president of the Kane County Taxpayer's Association, the Salt Lake Tribune referenced Kane County's mounting legal bills: "Kane County has not succeeded in claiming even one RS 2477 road, and yet taxpayers have had to foot the bill for what appears to be \$1 million in expenses related to this failed attempt to own roads on public land."<sup>143</sup> In the interview, the president of the taxpayer's association also noted that the property taxes for Kane County residents have doubled in recent years due to the mounting costs of litigation.<sup>144</sup> Such a burden may convince advocates of a state law approach to consider the permanent, environmentally-friendly solution that they have rejected so often in the past.

#### CONCLUSION

The Tenth Circuit's decision in *Wilderness Society* shifted the enormous controversy inherent in the R.S. 2477 debate. The decision marked a success for environmental groups who established standing and the proposition that a County could not use an R.S. 2477 right-of-way as a defense to preemption claims without first establishing its rights in court. *Wilderness Society* signals a more restrictive approach to R.S. 2477 jurisprudence in the Tenth Circuit, which could have broader implications nationally. Still, courts have difficulty resolving R.S. 2477 conflicts largely because of the inherent ambiguity of the statute, which has caused an insurmountable lack of consensus among courts, lawmakers, and constituents.

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141. Tova Wolking, Note, *From Blazing Trails to Building Highways: SUWA v. BLM & Ancient Easements over Federal Public Lands*, 34 *ECOLOGY L.Q.* 1067, 1105 (2007) ("[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.").

142. See, e.g., Mark Havnes, *Kane and BLM to Take a Road Much Traveled Today*, *SALT LAKE TRIB.*, Jan. 26, 2009, available at 2009 WLNR 1486614.

143. *Id.*

144. *Id.*

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To date, the federal approach to R.S. 2477 rights-of-way has been unclear. The law is effectively at an impasse, with courts devising fact-specific solutions to each conflict that arises. Going forward, Congress must address the R.S. 2477 issue in a manner that defines the key terms of the statute, provides an efficient manner for state and local governments to file claims, and, crucially, imposes a time limit for the filing of R.S. 2477 claims. A comprehensive solution is not only essential for judicial and economic efficiency, but also to ensure that the future of public lands is secure and protected from further development.

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