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The Road More or Less Traveled:
The Debate Over RS 2477
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Moderator: Lori Potter, Esq.
Partner
Kaplan Kirsch & Rockwell LLP
Denver, Colorado

Panelists: Nada Wolff Culver
BLM Legal Analyst
The Wilderness Society
Denver, Colorado

Michael S. Freeman, Esq.
Partner
Faegre & Benson
Denver, Colorado

John R. Henderson, Esq.
Partner
Vranesh & Raisch LLP
Boulder, Colorado
The Rocky Mountain Land Use Institute  
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PRESENTER BIOGRAPHIES

**Lori Potter, Esq.**, has more than 20 years of experience in the areas of environmental, public lands, land use, and water law. Her practice involves both litigation and counseling. She has practiced in state and federal courts and before administrative agencies across the country. Her practice also includes advice and litigation in the areas of access to information under open records and open meetings laws, administrative law, and the public involvement process. Her clients include governmental and quasi-governmental entities, businesses, ranches, citizens’ organizations, and individuals.

Prior to entering private practice, Ms. Potter served as Regional Director of the Sierra Club Legal Defense Fund’s Rocky Mountain Office, handling and supervising high-profile environmental litigation throughout the western states. She was a Fulbright Professor of environmental law at the National Law School of India in 1993.

Ms. Potter’s practice has involved representation of an interstate compact commission in litigation over the compact; negotiation of a complex settlement agreement with the U.S. Forest Service on behalf of environmental organizations, allowing forest thinning in sensitive areas and setting aside other land for designation as protected wilderness; and enforcement of one of Colorado’s largest conservation easements on behalf of the donor, a working ranch.

Her education includes: B.A., summa cum laude, University of Illinois, 1973; M.A., with honors, University of Illinois, 1975; J.D., Harvard Law School, 1980; and she acted as a Judicial Law Clerk for Justice Jean Dubofsky, Colorado Supreme Court. She is a member of the Colorado and Texas bar associations, many federal district courts, Courts of Appeal, and U.S. Supreme Court.

**Nada Wolff Culver, Esq.**, is the BLM Legal Analyst at The Wilderness Society. Prior to joining The Wilderness Society, Nada was a partner in the Denver Office of Patton Boggs, where she focused on energy development, environmental remediation, and nuclear energy. She is a graduate of the University of Pennsylvania School of Law.

**Michael S. Freeman, Esq.**, is a partner in the Denver, Colorado, office of Faegre & Benson. He represents private companies, individuals, and nonprofit groups in environmental and commercial litigation, as well as on public lands issues. From 1998-2000, Mike was an attorney with Earthjustice Legal Defense Fund. He graduated in 1994 from the University of Chicago Law School.

**John R. Henderson, Esq.**, was first admitted to the bar in 1978 and has been a Partner with Vranesh & Raisch, LLP since 1983. He graduated from the University of Wisconsin in 1975 with a Bachelor of Business Administration and received a Juris Doctor from the University of Colorado in 1978. He was Chairman of the Colorado Bar Association Mineral Law Section from 1993-1994. Specific areas of practice include all areas of mining law, Water Court litigation, right-of-way disputes, and general litigation involving real property matters.
The Road More or Less Traveled: The Debate Over RS 2477 Access

Rocky Mountain Land Use Institute
March 12, 2004
Lori Potter, Kaplan Kirsch Rockwell LLP

Moderator’s Overview

“*The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted.*”

Why does this single sentence, enacted by Congress as part of the Mining Law in 1866 (codified as Revised Statute 2477), and repealed by the Federal Land Policy and Management Act of 1976, still matter? This panel will try to answer that question.


No matter what your perspective – as a developer needing access across federally owned land, as a County regulating development and requiring access roads at certain standards, as a citizen advocating public land preservation – RS 2477 is a legal force to be reckoned with. It may tie a proposed project up in knots, or threaten to create a highway over a dirt track in wilderness, or solve all of a project’s access problems, or create confusion about overlapping federal and local authority. Therein lies its ongoing importance, and its controversy.
Adding to the controversy is the fact that RS 2477 issues can have a long dormancy period. For example, a wagon road or four-wheel drive track created on unreserved public domain land at the turn of the 20th century may have fallen into disuse, only to spring to life 100 years later with the assertion of an RS 2477-based claim to improve that track or road to present-day highway standards. Assume that after the wagon road was created, Congress reserved the federal land on which the track lies as a national park, forest or wilderness area. As a result, the public expects that the land is protected from building of new or improved roads or highways. The claimant expects that the right-of-way constitutes a valid existing right and can be maintained, modernized and expanded. The land manager is squarely in the cross-fire, sometimes resisting assertions of RS 2477 access, as in the Humboldt County case, and sometimes facilitating those claims, as in the SUWA case.

RS 2477 itself provides few answers to the host of legal issues it raises. The panelists will debate what those answers are, or should be.
Concerns Related to New Access Through R.S. 2477 "Routes"
Rocky Mountain Land Use Institute
March 12, 2004
Nada Wolff Culver, The Wilderness Society

The conservation community and the public have significant concerns related to those pushing (with apparent success) for more control over and access to our public lands. The actions of Moffat County in Colorado, the State of Utah, especially Kane, Garfield and San Juan Counties, and off-road vehicle interests are examples of these.

1. Potential physical impacts
   a. road construction, maintenance, improvement and use leads to:
      o increased off-road vehicle use through greater access
      o degraded water quality – erosion, runoff
      o fragmentation of habitat
      o air pollution
      o noise pollution
      o spread of noxious weeds/non-native plant species
      o damage to archaeological sites
   b. public and private lands will be affected

2. Potential legal impacts
   a. destruction of qualification as wilderness
      o definition of “wilderness” generally requires land to be “undeveloped” and
        “without permanent improvements or human habitation” (16 U.S.C. §
        1131(c)) and National Wilderness Preservation System looks to “roadless”
        character (43 C.F.R. Part 19, Subpart A)
      o new “roads” would destroy existing wilderness and prevent protection of
        new wilderness
   b. destruction of other values entitled to protection
      o such as threatened and endangered plant and animal species
      o monument objects
   c. opening to oil and gas/mining development
   d. undermining ability of federal agencies to enforce environmental protections
      o right-of-way holder gets right to use/passage
      o may include right to upgrade, maintain or expand route
      o route cannot be completely closed and may be more difficult to impose
        conditions on use to protect resources

3. Indications of “intent”
   a. claimed routes in national monuments, on rivers and up vertical cliffs
   b. claimed routes that cannot meet a common sense definition of “highway”
o not connecting the public with identifiable destinations or places – often
not even connecting one point with another
o no legitimate transportation objective

c. “special process” instead of using established FLPMA Title V Process (43 U.S.C.
§§ 1761 et seq., 43 C.F.R. Part 2800)
  o Memorandum of Understanding with Utah – found illegal by GAO
  o Amended Disclaimer Rule - no NEPA review, undefined standards, less
    and possibly less effective public involvement
  o State of Utah is still denying obligation to provide access to documents
    relating to 20 routes identified on its website as targeted for disclaimer
    applications – want to preserve right to sue outside MOU

d. Kane County, Utah – tearing down federal signs in designated Grand Staircase-
Escalante National Monument, criminal charges against county officials

e. Moffat County, Colorado – stated intent to open up areas for oil and gas/mining
  development

f. Blue Ribbon Coalition (California-based ORV group) – wants to prevent
  wilderness designation

g. Barking Dog Tail, Boulder, Colorado – R.S. 2477 as a justification for trespassing
  and destruction on private land

4. Jarbridge, Nevada case - shows how R.S. 2477 can frame a debate

  a. U.S. Forest Service and Bureau of Land Management complying with obligations
     under the Endangered Species Act and National Environmental Policy Act

  b. local objection to road closure, couched as R.S. 2477 claim and leads to
     establishment of a “Shovel Brigade”

  c. escalation to vandalism and threats

  d. up to $15,000 of taxpayer money to empty an outhouse
Access Through RS 2477 “Routes”

Why Worry?
- Physical impacts
- Legal impacts
- Questionable intentions
Potential Physical Impacts

- Increased ORVs and cross-country use
Potential Physical Impacts

- Degraded water quality
Potential Physical Impacts

- Fragmentation of habitat
Potential Physical Impacts

- Air pollution
- Noise pollution
Potential Physical Impacts

- Weeds
Potential Physical Impacts

- Damage to cultural sites
Potential Legal Impacts

- “Wilderness” quality destroyed under Wilderness Act
  - No wilderness designation
  - No wilderness protection
Potential Legal Impacts

- Threatened and endangered species habitat destroyed for purposes of Endangered Species Act
  - No longer present to protect
Potential Legal Impacts

- Cultural resources not subject to historic designation under National Historic Preservation Act or state equivalents
  - Cannot require preservation
  - Cannot require analysis of impacts prior to projects
Potential Legal Impacts

- Oil and gas development permitted
  - No need to impose restrictions or limitations on use
Potential Legal Impacts

- Federal and state agencies’ ability to enforce environmental protections is undermined.
  - Right-of-way holder has right of use.
  - Right may include upgrading or expanding.
  - Cannot close routes.
  - Practically, many resources designed to protect may conveniently disappear.
Indications of Intent

- Claimed “highways” in rivers, up cliffs
- Claimed “highways” that go nowhere
Indications of Intent

- **Special process**— ignoring FLPMA Title V
  - Utah MOU
    - found illegal by GAO
    - Colorado and Alaska interest but “on hold”
  - Amended disclaimer rule
    - Significant changes (exempting state and county claims from Quiet Title Act statute of limitations) but no NEPA review
  - Utah still preserving right to sue on the rest
    - Claims of Utah and DOI about avoiding litigation were just “political expressions of hope”
    - Not bound by MOU limitations on national parks, wilderness/wilderness study areas, national wildlife refuges
Indications of Intent

- Kane County, Utah
  - Tearing down federal signs in designated monument
  - Criminal charges brought against county officials
Indications of Intent

- Moffat County, Colorado
- Previously proposed taking over all federal lands within the county
- Opposed to wilderness designations
- Stated intent to open areas to oil & gas and mining
Indications of Intent

• Blue Ribbon Coalition
  • ORV focus
  • Stated intent to prevent wilderness designations
Indications of Intent

- Barking Dog Trail – Boulder, Colorado
  - Justification for trespassing on private land
  - ORVers claim right to “bulldoze”
Indications of Intent

- Jarbridge, Nevada
  - USFS & BLM complying with Endangered Species Act – listed bull trout
  - Objection to road closure becomes “Shovel Brigade” – RS 2477 and concern with water quality as justification
  - Escalation to vandalism, threats
  - Up to $15,000 to empty an outhouse
Why worry:

- Need special processes created in backroom deals without public scrutiny
- Cannot find routes, let alone construct highways
- Used to justify violating public/private rights in land, jeopardizing resources and encouraging hostility/opposition to public and private owners of land
- Not the hallmarks of valid claims
Revised Statute 2477:

• “The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted.”

Act of July 26, 1866, ch. 272, § 8 (formerly codified as Revised Statute 2477, and 43 U.S.C. § 932)
RS 2477 - PART OF BROADER POLICY TO ENCOURAGE DEVELOPMENT OF AMERICAN WEST:

• “not reserved for public use” meant public lands not set aside as National Park, national forest, etc.

• Similar rights granted for railroads, homesteading, and mining on public lands.

• Much of western road infrastructure started as RS 2477 roads on public lands.
FLPMA ENACTED IN 1976:

- Adopted federal policy of retaining public ownership of land.
- Repealed RS 2477.
- Existing rights of way grandfathered.
TODAY, RS 2477 HAS BECOME A PROXY IN BATTLES OVER PUBLIC LANDS MANAGEMENT:

- Thousands of RS 2477 claims asserted in otherwise roadless areas.
- RS 2477 ROWs affect: wilderness/roadless designations, off-road vehicle access, availability for energy development.
- Also affect private lands.
MAIN REASONS FOR DEBATE:

- No application or notice was required to perfect RS 2477 ROWs.

- “Construction” and “highway” not defined in statute or legislative history.
SOME COUNTIES AND STATES ARGUE THAT STATE LAW GOVERNS DEFINITIONS OF “CONSTRUCTION” AND “HIGHWAY”:

• Mechanical road construction not necessarily required.

• Periodic foot/horseback travel through an area can create RS 2477 ROW.


• Recent developments in public lands law cannot erase property rights created decades earlier.
VIEW OF CONSERVATIONISTS AND (SOMETIMES) FEDERAL GOVERNMENT:

• Plain language of RS 2477 requires actual construction of a recognizable road.

• State law cannot create broader rights than were granted by Congress.

Garfield County, Utah
Grand Staircase--Escalante National Monument
San Juan County, Utah
Dinosaur National Monument
POTENTIAL IMPACTS:

• Seven million acres of potentially affected National Park Service land in Rocky Mountain region

• Utah: asserts existence of 15,000 RS 2477 ROWs

• Alaska: Thousands of RS 2477 ROWs asserted, including in Denali and ANWR

• San Bernadino and Riverside Counties, California: claims in Mojave National Preserve, Joshua Tree National Park, Death Valley National Park
IMPACTS ON PRIVATE LANDOWNERS

- Historically, RS 2477 case law developed primarily in private disputes.
- RS 2477 affects rights of access to inholdings and property adjacent to public land.
- Some private landowners face RS 2477 assertions by ORV users accessing federal land.
Recent Developments
Efforts in the 1990s to Address RS 2477

- 1994: Proposed DOI regulations would have set a two-year deadline to file RS 2477 claims, and established an administrative process for adjudicating them.

- 1996: Rider in DOI’s appropriations bill precluded any final rule or regulation “pertaining to” recognition of RS 2477 ROWs without Congressional approval.

- 1997: DOI adopted an interim policy deferring all RS 2477 ROW determinations unless there was “a demonstrated, compelling and immediate need.”
2003 RS 2477 DEVELOPMENTS:

• Jan. 2003 -- regulations for obtaining administrative disclaimers of title to federal land amended

• April 2003 -- Utah memorandum of understanding (MOU): amended disclaimer regulations to be used for RS 2477 determinations

• Colorado and Alaska also seeking RS 2477 MOUs

• Moffat County, Colorado asserting numerous RS 2477 ROWs on federal land
Amended Disclaimer Regulations
43 C.F.R. § 1864.1

• Administrative disclaimers of federal ownership of property provide an alternative to Quiet Title Act lawsuits.
• 2003 amendments make administrative disclaimers available for RS 2477 claims.
Utah MOU

- Amended disclaimer regulations will be applied to RS 2477 determinations.

- Defines “highway” broadly, but doesn’t address “construction.”

- Only applies to areas within the State of Utah.
DOI Draft Policy on RS 2477

• Broad definitions of “highway” and “construction”:
  – “Construction” would not require mechanical construction.
  – “Highway” could include a footpath.
  – Alaska may be able to assert every section line as an RS 2477 ROW.
2004 RS 2477 DEVELOPMENTS

• Jan. 2004: Utah submits first application for disclaimer under MOU.
  – Weiss highway - central Utah

• Feb. 2004: General Accounting Office concludes Utah MOU violates Congressional moratorium on RS 2477 regulations.
February 2004 General Accounting Office opinion on Utah MOU and amended disclaimer regulations:

• The Utah MOU violates Congressional moratorium, because it is a substantive rule pertaining to the “recognition, management, or validity” of RS 2477 ROWs.
  – Utah and DOI apparently still plan to proceed.

• The amended disclaimer regulations do not violate moratorium, because they do not specifically address RS 2477.
Previous Disclaimer Regulations

• Applicant had to be “present owner of record.”

• 12-year statute of limitations - similar to Quiet Title Act.
Amended Disclaimer Regulations

- 12-year statute of limitations inapplicable to “states.”
- “States” defined to include cities, counties and other local governmental entities -- broader definition than in Quiet Title Act.
- No “owner of record” requirement.
Elements of the Utah MOU

• Road must be “public,” capable of accommodating 4-wheel vehicles and subject to periodic maintenance.

• MOU does not address “construction” element.

• MOU does not apply to National Parks, pre-1993 wilderness study areas, etc.
Opposition to Amended Disclaimer Regulations

• May violate 1996 Congressional moratorium on issuance of final RS 2477 regulations.

• House passed rider prohibiting DOI from using 2004 appropriation funds for administrative disclaimers in national parks, wildlife refuges, and WSAs -- stripped in conference committee.
Moffat County

• County resolution asserts RS 2477 ROWs on federal land including:
  – Dinosaur National Monument
  – Browns Park National Wildlife Refuge
  – Yampa River
  – BLM wilderness study areas

• Resolution inapplicable to private and state lands, unless full consent by all parties.
Proposed MOUs

• Colorado’s proposal to DOI
  – No construction or maintenance required under state law.
  – Encompasses RS 2477 claims in national parks and wilderness study areas.

• Alaska’s proposal to DOI:
  – Determinations on 14 routes as “pilot project.”
  – Broad state law standards would apply.
Public lands, recreation and R.S. 2477

BY HEIDI McINTOSH

Recently, the focus of debate over use of the nation’s public lands—the national parks, national forests and the vast western landscapes managed by the Bureau of Land Management (BLM)—has evolved to recognize the importance of recreation and the shrinking opportunities for wilderness-related recreation in the face of growing development and off-road vehicle (ORV) use. Controversy over application of an old law, Revised Statute (R.S.) 2477, a repealed provision of 1866 Mining Law, highlights these concerns.

In this context, recent court decisions, a new Department of the Interior regulation facilitating the recognition of R.S. 2477 “highways” and a surprise “Memorandum of Understanding” struck between Interior and Utah’s Gov. Michael Leavitt on April 9, 2003, on state and county R.S. 2477 “highway” claims, all highlight the growing interest in and impact of recreational interests ranging from ORV groups to hiking and wildlife organizations. After Leavitt’s nomination to head EPA, R.S. 2477 MOU and a second sudden deal with Interior limiting BLM’s ability to identify and protect wilderness-eligible lands, members of the Outdoor Industry Association threatened to move their semi-annual, $26 million convention from Salt Lake City.

Off-road vehicle use and land protection

R.S. 2477 provides simply: “the right-of-way for the construction of highways across public lands, not reserved for public uses, is hereby granted.” Broadly interpreting R.S. 2477’s construction requirement to include simple vehicle passage and the “highway” requirement to include trails with no apparent destination, Utah could make up to 20,000 R.S. 2477 claims. At the same time, ORV registration in Utah alone has risen from about 20,000 vehicles in 1988 to well over 100,000 currently.

BLM has just begun to identify valid trails and ORV’s environmental effects. R.S. 2477 claims have already interfered with BLM’s ability to effectively comply with its duty to map and enforce ORV trail designations that provide some measure of land protection.

For example, in Southern Utah Wilderness Alliance v. Norton, 301 F.3d 1217 (10th Cir. 2002), the state of Utah and several counties argued in preliminary injunction proceedings that the court could not impose restrictions on off-road vehicle routes—even if created in violation of Federal Land Policy and Management Act (FLPMA) and regardless of environmental impacts—because they were R.S. 2477 claims.

The litigation backdrop

In 1996, three Utah counties cited R.S. 2477 as their authority for grading dirt trails and little used tracks on BLM lands in the Grand Staircase-Escalante National Monument in wilderness study areas protected under the Federal Land Management Protection Act and on BLM lands with 1964 Wilderness Act protection.

In Southern Utah Wilderness Alliance v. Bureau of Land Management, 147 F. Supp. 2d 1130 (D. Utah 2001), 2003 WL 21486609 (10th Cir. 2003), the court found BLM’s requirement that routes be “constructed” was consistent with R.S. 2477 and that routes created by vehicle passage alone did not meet the statutory standard. See id. at 1138–1143. The court also upheld BLM’s determination that routes that vanish in the desert with no apparent destination did not amount to “highways.” Lastly, a 1906 easel withdrawal was found a “reservation” within the meaning of R.S. 2477 and, accordingly, routes not constructed as highways as of the reservation date were not valid R.S. 2477 claims. Id. at 1143–45. On appeal, the 10th Circuit ruled the case was not ripe for appeal. At this writing, the district court action is proceeding, with further appellate proceedings likely.

Interior issues a disclaimer

Within this backdrop, the Department of the Interior finalized an amended rule permitting claimants to file “recordable disclaimer of interests” to establish rights of way across public lands under R.S. 2477. See 68 Fed. Reg. 494 (Jan. 6, 2002) (amending 43 C.F.R. Part 1660; see also Section 315 of FLPMA, 43 U.S.C. 1745 (authorizing secretary of Interior to issue a disclaimer of interest where “ . . . a record interest of the United States in lands has terminated by operation of law or is otherwise invalid”). The amended rule expanded the eligible claimant class to include states and counties and eliminated the 12-year statute of limitations to submit claims.

Conclusion

The effect of R.S. 2477 claims on the public lands will likely be considerable for recreational opportunities, wilderness protection, national parks, wildlife habitat and other sensitive and scenic landscapes across the West. Federal land managers’ ability to protect valuable public resources and to plan for their use is also at stake. With claimants asserting increasing numbers of “highways” across the public lands and creating heightened conflicts with other uses, additional litigation is likely.

Heidi McIntosh is a lawyer and the conservation director at the Southern Utah Wilderness Alliance and a board member of Western Resource Advocates (formerly the Land and Water Fund of the Rockies).
February 6, 2004

The Honorable Jeff Bingaman
Ranking Minority Member
Committee on Energy and Natural Resources
United States Senate

Subject: 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

Dear Senator Bingaman:

This responds to your request for our opinion on actions by the Department of the Interior (the Department or DOI) in recognizing rights-of-way across public lands granted by Revised Statute 2477 (R.S. 2477), through use of a Federal Land Policy and Management Act (FLPMA) disclaimer-of-interest process which the Department has incorporated into a Memorandum of Understanding with the State of Utah (Utah MOU). Specifically, this opinion addresses:

(1) Whether either the Department’s January 2003 amendments to its disclaimer-of-interest regulations implementing FLPMA § 315, 43 U.S.C. § 1745 (2003 Disclaimer Rule), or the Utah MOU entered into in April 2003 is a “final rule or regulation . . . pertaining to the recognition, management, or validity of a right-of-way pursuant to [R.S. 2477]” prohibited from taking effect by section 108 of the Department of the Interior and Related Agencies Appropriations Act, 1997 (Section 108); and, independent of this Section 108 prohibition,

(2) Whether the Department may use the authority of FLPMA § 315 to disclaim interests in R.S. 2477 rights-of-way.

Your request raises a number of legal issues as to which no court has ruled to date and as to which there are a range of colorable arguments. As summarized below and detailed in the enclosed opinion, we conclude that the 2003 Utah MOU, but not the

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2 Memorandum of Understanding Between The State of Utah and The Department of the Interior On State and County Road Acknowledgment (Apr. 9, 2003).
2003 Disclaimer Rule, is a final rule or regulation prohibited from taking effect by Section 108. We further conclude, based on applicable rules of statutory construction and administrative law, that on balance, FLPMA § 315 otherwise authorizes the Department to disclaim United States' interests in R.S. 2477 rights-of-way.

In preparing this opinion, we requested the legal views of the Department on the issues raised by your request. We obtained these views through the Department’s written responses to our inquiries, an in-person conference, and a number of telephone interviews with the Department’s legal staff. We also reviewed the Department’s responses to separate inquiries by you and by Senator Lieberman on these matters, as well as the Department’s statements in various regulatory and policy documents and reports.

BACKGROUND

In order to promote settlement of the American West in the 1800s and provide access to mining deposits located under federal lands, Congress granted rights-of-way across public lands for the construction of highways by a provision of the Mining Law of 1866, now known as R.S. 2477. Congress repealed R.S. 2477 in 1976 as part of its enactment of FLPMA, along with the repeal of other federal statutory rights-of-way, but it expressly preserved R.S. 2477 rights-of-way that already had been established. In its entirety, R.S. 2477 provided that:

“the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.”

R.S. 2477 was self-executing and did not require government approval or public recording of title. As a result, uncertainty arose regarding whether particular rights-of-way had in fact been established. This uncertainty, which continues today, has implications for a wide range of entities, including the Department and other federal agencies, state and local governments who assert title to R.S. 2477 rights-of-way, and those who favor or oppose continued use of these rights-of-way. In an effort to resolve questions regarding the existence of particular R.S. 2477 rights-of-way, the Department has issued a series of policy and other documents over the years discussing how it would administratively recognize or validate specific rights-of-way. By 1993, according to the Department, the agency and the courts together had recognized about 1,453 R.S. 2477 rights-of-way across Bureau of Land Management

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(BLM) lands, with about 5,600 claims remaining, primarily in Utah, and an unknown number of unasserted potential claims. After the Department issued a proposed rule in 1994 to establish a formal process for evaluating R.S. 2477 claims, Congress responded by enacting temporary moratoria and, in 1996, a permanent prohibition on certain R.S. 2477-related activity. The permanent prohibition, set forth in Section 108, states that:

“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 [R.S. 2477] shall take effect unless expressly authorized by an Act of Congress subsequent to the date of enactment of this Act.”

Mindful of this Section 108 restriction, DOI took two major actions in 2003 relating to R.S. 2477 rights-of-way that have generated considerable attention in Congress and elsewhere and are the focus of your request. First, the Department issued the 2003 Disclaimer Rule on January 6, 2003, amending the Department’s existing regulations, promulgated in 1984, implementing FLPMA § 315. FLPMA § 315 authorizes the Department to issue recordable disclaimers of U.S. interests in lands in certain circumstances. As pertinent here, § 315 provides that:

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

FLPMA § 315(a), 43 U.S.C. § 1745(a). DOI’s FLPMA § 315 regulations establish a disclaimer application process, see 43 C.F.R. subpart 1864, and in the preamble to the 2003 Disclaimer Rule, DOI formally announced for the first time that it might use this process to validate R.S. 2477 rights-of-way, although it stated that FLPMA § 315 has always provided such authority. The Department also stated in the January 2003 preamble that because the 2003 Disclaimer Rule did not contain “specific standards” for evaluating asserted R.S. 2477 rights-of-way, it did not “pertain” to their recognition, management, or validity and thus did not run afoul of Section 108. See 68 Fed. Reg. at 496-97.


3 In addition to your request for our legal opinion and your correspondence to the Secretary, at least 88 members of the House of Representatives, as well as Senator Lieberman, have written to the Secretary in 2003 expressing concern about these actions.
The Department’s second major R.S. 2477-related action in 2003 was issuance of the Utah MOU on April 9, 2003. The Utah MOU states that DOI will implement a “State and County Road Acknowledgment Process” to “acknowledge the existence of certain R.S. 2477 rights-of-way on [BLM] land within the State of Utah,” and the process DOI will use to make these acknowledgments is the FLPMA § 315 disclaimer process. See Utah MOU at 2-3. The State of Utah or any Utah county may request initiation of this acknowledgment/disclaimer process for “eligible roads”; such roads must meet specified criteria including “meet[ing] the legal requirements of a right-of-way granted under R.S. 2477.” Id. at 3. On January 14, 2004, the Governor of Utah submitted the first application under the Utah MOU for acknowledgment and a recordable disclaimer of interest of specific R.S. 2477 rights-of-way.

SUMMARY OF CONCLUSIONS

As detailed in the enclosed opinion, we conclude that the 2003 Utah MOU, but not the 2003 Disclaimer Rule, is a final rule or regulation prohibited from taking effect by Section 108. We further conclude that FLPMA § 315 otherwise authorizes the Department to disclaim United States’ interests in R.S. 2477 rights-of-way.

With respect to the first issue, although the 2003 Disclaimer Rule itself is clearly a “final rule or regulation,” we do not believe it is a final rule or regulation “pertaining to the recognition, management, or validity” of R.S. 2477 rights-of-way subject to Section 108. Because the terms of the 2003 Disclaimer Rule (as well as the original 1984 regulations) are silent on R.S. 2477 rights-of-way, we do not believe the Rule pertains to R.S. 2477 rights-of-way as contemplated by Section 108. The preamble to the 2003 Disclaimer Rule does discuss recognition and validity of R.S. 2477 rights-of-way, but the preamble does not qualify as a substantive rule under the Administrative Procedure Act (APA), which we believe was Congress’ intention in using the term “final rule or regulation” in Section 108. Moreover, because the 2003 Disclaimer Rule preamble does not prescribe procedural or substantive standards by which R.S. 2477 rights-of-way will be evaluated, it does not “pertain” to R.S. 2477 rights-of-way within the meaning of Section 108.

On the other hand, we conclude that the Utah MOU is a final rule or regulation subject to Section 108’s prohibition. There is little question that the MOU pertains to the “recognition, management, or validity” of R.S. 2477 rights-of-way; the purpose of the MOU was to resolve years of conflict over these precise issues. We also believe the MOU is an APA substantive rule and thus a “final rule or regulation” under Section 108. It both satisfies the APA’s definition of “rule”—“an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy,” see 5 U.S.C. § 551(4)—and meets the key test by which courts have defined substantive rules—it has a binding effect on the agency and other parties and represents a change in law and policy.

Apart from Section 108’s prohibition, on balance, we conclude that FLPMA § 315 authorizes DOI to disclaim interests in R.S. 2477 rights-of-way. This interpretation of FLPMA § 315 represents a novel application of the statute by the Department, but one
which, under applicable principles of statutory construction and administrative law, is entitled to substantial deference. A number of the key terms in FLPMA § 315 are ambiguous—notably, “lands,” “interests in lands,” and “cloud on title”—and in such instances, we afford considerable weight to the interpretation of the agency charged with implementing the statutes so long as the interpretation is reasonable. We find the Department’s interpretations of these terms to be reasonable. The Department reads “lands” to include a partial interest in lands, consistent with its longstanding definition of that term in its FLPMA § 315 disclaimer regulations. Under this interpretation, a particular R.S. 2477 right-of-way—which is an “interest in lands”—suffers a “cloud on title” when there is uncertainty about whether the right-of-way has in fact been established, or whether instead the United States has retained its right to exclusive use of the surface property at issue. The remaining requirement of FLPMA § 315—that a “record interest of the United States in lands has terminated by operation of law”—also is satisfied. When an easement such as an R.S. 2477 right-of-way is granted, it creates two separate property interests: a servient estate (here, owned by the United States) and a dominant estate (here, owned by the holder of the R.S. 2477 right-of-way). At the same time, a record interest of the United States terminates because its interest in exclusive use of the land over which the right-of-way now runs terminates. We recognize that this interpretation of FLPMA § 315 by DOI is a novel one and it is not the only reasonable interpretation. However, under established principles of statutory construction and firmly embedded in administrative law, courts give substantial deference to an implementing agency’s interpretation if it is one of several reasonable interpretations, and thus we do so here in opining on how courts would address these issues.

In sum, we conclude that the Utah MOU, but not the 2003 Disclaimer Rule, is a final rule or regulation prohibited from taking effect by Section 108. We conclude further that FLPMA § 315 otherwise authorizes the Department to disclaim the United States’ interests in R.S. 2477 rights-of-way.

Please contact Susan D. Sawtelle, Associate General Counsel, at (202) 512-6417, Karen Keegan, Assistant General Counsel, at (202) 512-8240, or Amy Webbink, Senior Attorney, at (202) 512-4764, if there are questions concerning this opinion.

Sincerely yours,

Anthony H. Gamboa
General Counsel

Enclosure
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

In 2003, the Department of the Interior (the Department or DOI) took two major actions relating to so-called R.S. 2477 rights-of-way that have generated considerable attention and are the subject of this opinion. First, on January 6, 2003, the Department issued revisions to its existing regulations, originally promulgated in 1984, implementing section 315 of the Federal Land Policy and Management Act (FLPMA) (2003 Disclaimer Rule). FLPMA § 315, 43 U.S.C. § 1745, authorizes the Department to issue recordable disclaimers of U.S. interests in lands in certain circumstances, and DOI’s FLPMA § 315 regulations establish a process by which to apply for such disclaimers. In the preamble to the 2003 Disclaimer Rule, DOI formally announced for the first time that it might use this FLPMA disclaimer process to evaluate the validity of rights-of-way across public lands for the construction of highways, granted by an 1866 mining law now known as Revised Statute 2477 (R.S. 2477). Although R.S. 2477 was repealed by FLPMA in 1976, Congress expressly preserved rights-of-way that already had been established. The self-executing nature of these rights-of-way has led to considerable uncertainty about whether particular rights-of-way have in fact been established, and DOI’s 2003 preamble statement announced a new approach to resolving this uncertainty—the use of FLPMA § 315.

Second, following on to this preamble announcement, on April 9, 2003, the Department signed a Memorandum of Understanding with the State of Utah (Utah MOU). The Utah MOU states that DOI will implement a “State and County Road Acknowledgment Process” to “acknowledge the existence of certain R.S. 2477 rights-of-way on Bureau of Land Management [BLM] land within the State of Utah,” and the process DOI will use to make these acknowledgments is the FLPMA § 315 disclaimer process. Under the Utah MOU, the State or any Utah county may request initiation of this acknowledgment/disclaimer process for “eligible roads”; such roads must meet certain standards including “meet[ing] the legal requirements of a right-of-way granted under R.S. 2477.” On January 14, 2004, the Governor of Utah submitted the first application under the Utah MOU for acknowledgment and a recordable disclaimer of interest for specific R.S. 2477 rights-of-way.

Two principal legal concerns have been raised with respect to these recent actions by the Department. The first is whether either the 2003 Disclaimer Rule or the Utah MOU violates a statutory prohibition contained in section 108 of the Department of the Interior and Related Agencies Appropriations Act, 1997 (Section 108). Section
108 prohibits any final rule or regulation “pertaining to the recognition, management, or validity” of R.S. 2477 rights-of-way from taking effect without express congressional authorization, and the question is whether the 2003 Disclaimer Rule or the Utah MOU constitutes a final rule or regulation covered by Section 108. The second legal concern is whether, apart from this Section 108 prohibition, the Department may use the authority of FLPMA § 315 to disclaim interests in R.S. 2477 rights-of-way.

These concerns raise a number of legal issues as to which no court has ruled to date and as to which there are a range of colorable arguments. As discussed below, we conclude that the 2003 Utah MOU, but not the 2003 Disclaimer Rule, is a final rule or regulation prohibited from taking effect by Section 108. We further conclude, based on applicable rules of statutory construction and administrative law, that on balance, FLPMA § 315 otherwise authorizes the Department to disclaim United States’ interests in R.S. 2477 rights-of-way.

FACTUAL AND LEGAL BACKGROUND

In order to promote settlement of the American West in the 1800s and provide access to mining deposits located under federal lands, Congress granted rights-of-way across public lands for the construction of highways by a provision of the Mining Law of 1866, now known as R.S. 2477. In 1976, Congress enacted FLPMA, which reflected a shift from Congress’ historic approach of encouraging disposition and settlement of federal public domain lands to an approach favoring retention and management of public lands. As part of this new approach, FLPMA repealed R.S. 2477, along with other federal statutory rights-of-way, but R.S. 2477 rights-of-way that already had been established were expressly preserved. See 43 U.S.C. §§ 1701 note, 1769(a). In its entirety, R.S. 2477 provided that:

the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.”

In the words of one court, R.S. 2477 made “an open-ended and self-executing grant.” Sierra Club v. Hodel, 848 F.2d 1068, 1078 (10th Cir. 1988). R.S. 2477 did not require government approval, issuance of an identifying record such as a land patent, or public recording of title. A state or county needed only to satisfy the requirements set forth in R.S. 2477—namely, to engage in some form of “construction” of a “highway” over non-reserved public lands—in order to establish a valid R.S. 2477 right-of-way. See Southern Utah Wilderness Alliance v. BLM, 147 F. Supp. 2d 1130, 1140 (D. Utah 2001), appeal dismissed, 2003 WL 21480689 (10th Cir. 2003).

As a result of this lack of formal approval and public documentation, uncertainty arose regarding whether particular R.S. 2477 rights-of-way had in fact been established. In an effort to resolve some of this uncertainty, the Department has issued a series of policy and other documents over the years, discussing methods of

administratively recognizing or validating R.S. 2477 rights-of-way. In 1988, for example, DOI Secretary Hodel issued the so-called Hodel Policy, stating that although R.S. 2477 did not authorize the Department to “adjudicate” applications for R.S. 2477 rights-of-way, it could “administratively recognize[e]” and record them on DOI land records. The Hodel Policy directed DOI land management bureaus to develop internal procedures for issuing such administrative recognitions and laid out the criteria by which recognitions should be made. In a 1993 report to Congress on R.S. 2477 issues, DOI stated that its R.S. 2477 administrative decisions were intended to facilitate practical resolutions of R.S. 2477 disputes but were not legally binding. As the Department explained:

“Administrative recognitions [of R.S. 2477 rights-of-way under the Hodel Policy] are not intended to be binding, or a final agency action. Rather, they are recognitions of ‘claims’ and are useful only for limited purposes. Courts must ultimately determine the validity of such claims . . . . An administrative determination is an agency recognition that an R.S. 2477 right-of-way probably exists. The process used to make an administrative determination has been developed in response to claims filed and provides an administrative alternative to litigating each and every potential right-of-way. [It] is not intended to be binding or final agency action, but simply a ‘recognition’ of ‘claims’ for land-use planning purposes.”

U.S. Dep’t of the Interior, Report to Congress on R.S. 2477: The History and Management of R.S. 2477 Right-Of-Way Claims on Federal and Other Lands (June 1993) (DOI Report to Congress) at 25-26. According to the Department, as of 1993, DOI and the courts together had recognized about 1,453 R.S. 2477 rights-of-way across BLM lands, with about 5,600 claims remaining, primarily in Utah, and an unknown number of unasserted potential claims. Id. at 29.

The following year, in 1994, the Department attempted to create a more formal administrative process for adjudicating R.S. 2477 claims. It proposed a regulatory process that it said would result in “binding determinations of [the] existence and validity” of R.S. 2477 rights-of-way. See “Revised Statute 2477 Rights-of-Way,” 59 Fed. Reg. 39216, 39216 (Aug. 1, 1994). Congress was concerned with this regulatory proposal, however, as it had been with some of the Department’s earlier approaches to validating R.S. 2477 rights-of-way, and responded by enacting temporary moratoria and, in 1996, a permanent prohibition on certain R.S. 2477-related activity. The 1996 prohibition provided that:

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2 Memorandum from the Acting Assistant Secretary for Fish and Wildlife and Parks and the Assistant Secretary for Land and Minerals Management to the Secretary of the Interior, approved by Secretary Hodel, “Departmental Policy on Section 8 of the Act of July 26, 1866, Revised Statute 2477 (Repealed), Grant of Right-of-Way for Public Highways (RS2477)” (Dec. 9, 1988).

“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 [R.S. 2477] shall take effect unless expressly authorized by an Act of Congress subsequent to the date of enactment of this Act.”


In response to the Section 108 prohibition, DOI Secretary Babbitt issued the so-called Babbitt Policy in 1997. The Babbitt Policy, revoking the Hodel Policy, states that until any R.S. 2477 rules become effective, and as an alternative to litigation in federal court, the Department will continue to “process” and “give its views” on “assertions” of R.S. 2477 rights-of-way, but only in cases where there is a “demonstrated, compelling, and immediate need” to do so. In such cases, DOI will issue “determinations” that “recognize” those rights-of-way meeting the R.S. 2477 statutory criteria.

Finally, in 2003 and still mindful of the restrictions of Section 108, DOI took the two actions that are the focus of this opinion. First, as noted above, it issued the 2003 Disclaimer Rule on January 6, 2003, revising its existing regulatory process for issuance of recordable disclaimers of U.S. interests in lands under FLPMA § 315. See “Conveyances, Disclaimers and Correction Documents,” 68 Fed. Reg. 494 (Jan. 6, 2003), amending 43 C.F.R. subpart 1864. As pertinent here, FLPMA § 315 provides that:

“After consulting with any affected Federal agency, the [Department] is authorized to issue a document of disclaimer of interest or interests in

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4 We have previously determined that the prohibitions of Section 108 are permanent. See B-277719, Aug. 20, 1997. The Department recently suggested that Section 108 might have expired at the end of fiscal year 1997, see, e.g., “Conveyances, Disclaimers and Correction Documents,” 68 Fed. Reg. 494, 496 (Jan. 6, 2003), but it has previously acknowledged that Section 108 is, in fact, permanent legislation. See “Wilderness Management,” 65 Fed. Reg. 78358, 78370 (Dec. 14, 2000) (“BLM is forestalled by a 1997 statute from promulgating regulations on R.S. 2477 rights-of-way without Congressional consent.”). Although language in annual appropriations acts generally applies only during the fiscal year to which the statute pertains, appropriations act provisions are considered permanent if the statutory language or the nature of the provision makes it clear that Congress intended the provision to be permanent. One clear indicator of permanency is use of so-called “words of futurity,” such as “hereafter” or, as in Section 108, “subsequent to the date of enactment.” See, e.g., United States v. Vulte, 233 U.S. 509, 512 (1914); Norcross v. United States, 142 Ct. Cl. 767, 768 (1958); 70 Comp. Gen. 351, 353 (1991). The permanency of Section 108 also is demonstrated by the fact that it is a substantive provision, rather than merely a restriction on the use of appropriations. See, e.g., United States v. Vulte, above, 233 U.S. at 513; Cell v. United States, 208 F.2d 778 (7th Cir. 1953).


6 Babbitt Policy at 1-2. DOI had previously articulated these fundamental aspects of the Babbitt Policy in 1993. See DOI Report to Congress, above, at 5 and App. II, Ex. A.
any lands in any form suitable for recordation, where the disclaimer will help remove a cloud on the title of such lands and where [the Department] determines (1) a record interest of the United States in lands has terminated by operation of law or is otherwise invalid; or (2) the lands lying between the meander line shown on a plat of survey approved by [BLM] or its predecessors and the actual shoreline of a body of water are not lands of the United States; or (3) accreted, relicted, or avulsed lands are not lands of the United States.”

FLPMA § 315(a), 43 U.S.C. § 1745(a). The 2003 Disclaimer Rule expanded the circumstances under which disclaimer applications could be filed. As amended, the regulations now: (a) allow state and local governments to apply for a disclaimer at any time, removing the deadline applicable to other entities (who must file within 12 years of the time they knew or should have known of a possible U.S. claim); (b) allow “any entity claiming title to lands,” not just current owners of record, to apply for a disclaimer; and (c) provide that disclaimers will not be issued if a federal land management agency other than BLM with jurisdiction over the affected lands makes a “valid objection” to issuance of the disclaimer. See 68 Fed. Reg. at 502-03.

In addition to issuing the revisions themselves, DOI formally announced for the first time, in the preamble to the 2003 Disclaimer Rule, that the agency might use the FLPMA § 315 disclaimer process to validate R.S. 2477 rights-of-way. According to DOI, FLPMA § 315 and the agency’s 1984 implementing regulations had always authorized this approach:

“Recordable disclaimers may be issued [under FLPMA § 315] where applicants assert title previously created under now expired authorities. For example, after adjudicating [an R.S. 2477] claim, BLM may issue a recordable disclaimer of interest to disclaim the United States’ interest in a highway right-of-way under R.S. 2477 . . . BLM may issue recordable disclaimers relating to valid R.S. 2477 rights-of-way under the existing 1984 regulations, and this capability will continue under today’s rule.”

68 Fed. Reg. at 496-97. The Department also stated in the preamble that because the 2003 Disclaimer Rule did not contain “specific standards” for evaluating asserted R.S. 2477 rights-of-way, it did not “pertain” to their recognition, management, or validity and so did not run afoul of the restrictions of Section 108. Id. at 497.

The Department identified such “specific standards” for recognizing R.S. 2477 rights-of-way three months later when it signed the Utah MOU, its second major R.S. 2477-related action of 2003. See Memorandum of Understanding Between the State of Utah and the Department of the Interior on State and County Road Acknowledgment (Apr. 9, 2003). As noted above, the Utah MOU states that DOI will implement a “State and County Road Acknowledgment Process” to “acknowledge the existence of certain R.S. 2477 rights-of-way on [BLM] land within the State of Utah,” and the process DOI will use to make these acknowledgments is the FLPMA § 315 disclaimer process. Utah MOU at 2-3. The State or any Utah county may request initiation of this process—for which it must reimburse BLM its processing costs—with regard to “eligible roads,” the standards for which include the following:
• The road must have existed prior to enactment of FLPMA in 1976 and be in current use;
• The road must be identifiable by centerline description or other appropriate legal description;
• The existence of the road prior to FLPMA must be sufficiently documented to show that the road meets the legal requirements of an R.S. 2477 right-of-way; and
• The road was and must continue to be public and capable of accommodating four-wheel cars or trucks and must have been subject to some type of periodic maintenance.

Id. at 3. The Utah MOU also provides that the State and Utah counties will not assert rights-of-way under the MOU for roads within the National Park System, the National Wildlife Refuge System, or designated Wilderness Areas or Wilderness Study Areas designated before October 1993, or lands administered by agencies other than DOI except by their consent. Id. at 2-3. In order to “facilitate” the Utah MOU Acknowledgment Process, the MOU provides that the 1997 Babbitt Policy’s requirements for R.S. 2477 determinations will not apply to such requests but will continue to apply to all other requests for R.S. 2477 recognitions. Id. at 4.

In June 2003, the Department issued additional guidance (Utah MOU Guidance) regarding how applications will be processed under the Utah MOU.7 Reflecting DOI’s FLPMA § 315 disclaimer application regulations, the Utah MOU Guidance explains that: (1) applicants must pay BLM’s administrative costs of processing applications (see 43 C.F.R. §§ 1864.1-2 and -3); (2) at least 90 days before BLM makes a decision on an application, it will publish a notice in the Federal Register summarizing the application and noting an opportunity for public comment (see 43 C.F.R. § 1864.2); and (3) adverse decisions can be appealed by the applicant or any adverse claimant (see 43 C.F.R. § 1864.4).

During the summer of 2003, various riders were proposed to the House Department of Interior Appropriations bill for FY 2004 that would have prohibited DOI from using appropriated funds to implement the 2003 Disclaimer Rule under certain circumstances. None of these riders was enacted.

Finally, on January 14, 2004, the Governor of Utah submitted the first application under the Utah MOU for acknowledgment and a recordable disclaimer of interest of specific R.S. 2477 rights-of-way. As of the date of this opinion, BLM has not yet published a Federal Register notice regarding this application.

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7 Memorandum from the BLM Deputy Director to the BLM State Director for Utah, “Processing Applications for Recordable Disclaimers of Interest-Acknowledgment of R.S. 2477 Rights-of-Way Pursuant to the Memorandum of Understanding (MOU) of April 9, 2003” (June 25, 2003).
I. Applicability of the Section 108 Prohibition to the 2003 Disclaimer Rule and the Utah MOU

A. Applicability of Section 108 to the 2003 Disclaimer Rule

As discussed above, Section 108 prohibits any “final rule or regulation . . . pertaining to the recognition, management, or validity of a right-of-way pursuant to [R.S. 2477]” from taking effect unless expressly authorized by an Act of Congress, but does not define the phrase “final rule or regulation.” For the reasons discussed below, we believe Congress intended Section 108 to apply only to substantive rules under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-706, the statute generally governing agency rulemaking and adjudications.

The APA defines a “rule” as:

“the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . ..”

5 U.S.C. § 551(4). There are different types of APA rules, the principal distinction being ‘between ‘substantive rules’ on the one hand and ‘interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice’ on the other.” Chrysler Corp. v. Brown, 441 U.S. 281, 315 (1979). Substantive rules, also called legislative rules, affect individual rights and obligations and must be published for notice and comment under 5 U.S.C. § 553(b). They are the only rules that can have a “binding effect” or the “force and effect of law.” Chrysler Corp., 441 U.S. at 315. As the D.C. Circuit Court of Appeals explained in Troy Corp v. Browner, 120 F.3d 277, 287 (D.C. Cir. 1997)(citation omitted), “[a] legislative rule . . . is one that: (1) ‘supplements’ a statute; (2) ‘effect[s] a change in existing law or policy’; or (3) ‘grant[s] rights, impose[s] obligations, or produce[s] other significant effects on private interests.’” By contrast, interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice are not subject to notice and comment requirements and lack enforceable legal effect. See, e.g., Davidson v. Glickman, 169 F.3d 996, 998 (5th Cir. 1999) (“Interpretive rules state what the administrative officer thinks the statute or regulation means while legislative rules affect individual rights and obligations and create law.”) (internal quotation and citation omitted).8

We believe that by using the language “final rule or regulation,” Congress intended the restrictions of Section 108 to apply only to APA substantive rules. First, Section

8 See also Syncor v. Shalala, 127 F.3d 90 (D.C. Cir. 1997) (only legislative rules can create law that binds the agency, courts, and third parties); Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974) (“A properly adopted substantive rule establishes a standard of conduct which has the force of law . . . a general statement of policy, on the other hand, does not establish a ‘binding norm.’”).
108 refers to no final rule or regulation “taking effect” and only substantive rules have a “binding effect” and the “force and effect of law.” Similarly, the legislative history of Section 108 indicates that Congress intended to bar only the implementation of final, substantive regulations, not, as did the earlier temporary moratoria, agency activity preliminary to implementation of final rules.9 Finally, Congress and courts often equate the terms “final rule” and “regulation” with an agency rule subject to notice and comment, that is, an APA substantive rule. See, e.g., 5 U.S.C. § 604 (“When an agency promulgates a final rule under section 553 of [Title 5, U.S.C.], after being required by that section or any other law to publish a general notice of proposed rulemaking . . . the agency shall prepare a final regulatory flexibility analysis.”); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 127, 145 (2000) (referring to FDA and FTC substantive rules as FDA and FTC “final rules”).

Consistent with the above, in determining whether particular agency statements constitute APA substantive rules, courts have focused on three basic factors: (1) how the agency characterizes its own statement; (2) whether the statement was published for notice and comment; and (3) whether the statement binds private parties or the agency. See, e.g., Molycorp Inc. v. EPA, 197 F.3d 543 (D.C. Cir. 1999). Of these factors, the third—a statement’s binding effect—is the most critical. As the D.C. Circuit Court of Appeals explained in Molycorp, “[t]he first two criteria serve to illuminate the third, for the ultimate focus of the inquiry is whether the agency action partakes of the fundamental characteristic of a regulation, i.e., that it has the force of law.” 197 F.3d at 545. See also Ctr. for Auto Safety v. NHTSA, 710 F.2d 842, 846 (D.C. Cir. 1983) (“The mere fact that NHTSA did not denominate its withdrawal of the January Notice a ‘rule’ is not determinative of whether it did, in fact, issue a rule within the meaning of the statute. It is the substance of what the agency has purported to do and has done which is decisive.”) (internal quotations and citations omitted).

Applying these three factors, the 2003 Disclaimer Rule is clearly a substantive APA rule and thus potentially—if it pertains to the recognition, management, or validity of a R.S. 2477 right-of-way—subject to Section 108. First, the Department itself has characterized the 2003 Disclaimer Rule as a “final rule” in publishing it in the Federal Register. See 68 Fed. Reg. at 494; see also Letter from DOI Associate Solicitor, Division of Land and Water Resources, to GAO Associate General Counsel (Jul. 15, 2003) (DOI Response to GAO) at 4 (referring to 2003 Disclaimer Rule as a “rule” and “final rule”). Second, the 2003 Disclaimer Rule is clearly a rule promulgated under APA notice and comment procedures. Third and most critically, it has a binding effect and the force of law. As the preamble to the 2003 Disclaimer Rule states at the

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9 See, e.g., S. Rep. No. 104-261 (1996) at 1-2 (“Resolution of R.S. 2477 right-of-way claims has been a very complex and contentious process” and the provision that ultimately became Section 108 “will allow the Department to proceed with the development of new regulations, while prohibiting their implementation until expressly approved by an Act of Congress.”).

10 See also Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 682-83 (1987) (equating final rules and regulations with substantive rules promulgated after notice and comment); Franklin Assoc. Fisheries of Maine, 989 F.2d 54, 59 (1st Cir. 1993) (same); Alabama Tissue Ctr. v. Sullivan, 975 F.2d 373, 377 (7th Cir. 1992) (same); NRDC v. EPA, 683 F.2d 752 (3d Cir. 1982) (same).
outset, “This rule is effective February 5, 2003. Any application for a recordable disclaimer pending on the effective date of this final rule will be subject to this final rule.” 68 Fed. Reg. at 495. The 2003 Disclaimer Rule also, under Troy Corp. v. Browner, above, “effect[s] a change in existing law or policy” . . . and ‘grant[s] rights, impose[s] obligations, or produce[s] other significant effects on private interests.” As noted above, it expanded both the entities that may apply for a FLPMA § 315 disclaimer and the time period in which they may do so.

The remaining issue concerning the applicability of Section 108 to the 2003 Disclaimer Rule is whether it “pertain[s] to the recognition, management, or validity” of R.S. 2477 rights-of-way. In our view, it does not. Nothing in language of the Disclaimer Rule itself discusses or refers in any way to R.S. 2477 rights-of-way. This is consistent with the fact, emphasized by the Department, that the disclaimer regulations are not designed to deal just with R.S. 2477 recognitions but instead are a “‘catch-all’ provision of [FLPMA] that allows the BLM to ‘help remove a cloud on the title’ to Federal land . . .”11 The only mention of R.S. 2477 is in the preamble to the Rule, where DOI discusses how it may use the FLPMA § 315 disclaimer process as a means of recognizing R.S. 2477 rights-of-way. We do not believe the preamble is a Section 108 “final rule or regulation,” however. Preambles generally are treated as non-binding agency policy statements, not as substantive rules as required by Section 108,12 and there is nothing in the 2003 Disclaimer Rule preamble indicating the Department intends to be bound by its pronouncements regarding R.S. 2477. At most, therefore, the preamble might be deemed to be an interpretive rule,13 which would not fall within Section 108. Moreover, we do not believe the preamble pertains to the recognition, validity, or management of R.S. 2477 rights-of-way in the manner contemplated by Section 108. The plain language and legislative history of Section 108 indicate that it was intended to prevent the Department from creating and applying substantive standards for validating the existence of R.S. 2477 rights-of-way or prescribing how they should be managed, because Congress itself wanted to define the key standards and scope of R.S. 2477 grants or at least maintain the status quo.14


12 See, e.g., Clean Air Implementation Project v. EPA, 150 F.3d 1200, 1208 (D.C. Cir. 1998) (“It is doubtful that the preamble alone is definite and specific enough to be a binding statement of agency policy. For one thing, the statements concerning the permit shield were not published in the Code of Federal Regulations. For another, EPA has claimed that its statements were no more than “an interpretation” . . . and [the petitioner] has presented no evidence that the preamble has a direct and immediate effect on it.”) (internal citations omitted); City of Seabrook, Tex. v. EPA, 659 F.2d 1349, 1365 (5th Cir. 1981) (two preamble statements referred to as “policy statements . . . not rules adopted in accordance with administrative rulemaking procedure; they are merely ‘interpretive rules’ or ‘general statements of policy.’”).


14 See, e.g., United States v. Garfield County, 122 F. Supp. 2d 1201, 1236-37 (citing S. Rep. No. 104-261 (1996) at 2, court states that “Congress was concerned with rule-making concerning the process for deciding the validity of R.S. § 2477 claims”); 141 Cong. Rec. S17530-08 (1995) (statement of Sen. Hatch) (discussing DOI’s 1994 proposed R.S. 2477 rule, court states that “[t]he Secretary’s regulations are evidence that the task of achieving a solution that protects the intent and scope of the original statute
Nothing in the preamble identifies any such standards. In sum, we conclude that
neither the 2003 Disclaimer Rule itself nor its preamble is a final rule or regulation
subject to the restrictions of Section 108.

**B. Applicability of Section 108 to the Utah MOU**

We reach a different conclusion regarding the applicability of Section 108 to the Utah
MOU. In contrast to our conclusion regarding the 2003 Disclaimer Rule, we believe
Section 108 applies to the Utah MOU. As a threshold matter, there can be little doubt
that the Utah MOU “pertains” to the “recognition, management, or validity” of R.S.
2477 rights-of-way. The purpose of the MOU was to address years of “unresolved
conflicts” over these precise issues, which DOI had “traditionally approached . . . by
trying to define the precise legal limits of the original [R.S. 2477] statutory grant,” see
Utah MOU at 1, and as discussed below, the MOU includes substantive provisions
pertaining to all three issues. The remaining question is whether the Utah MOU is a
“final rule or regulation,” meaning, as discussed above, that it is both an APA rule and
a substantive rule. We conclude that it is both.

1. **The Utah MOU as an APA Rule**

The Utah MOU meets the definition of an APA rule, that is, “an agency statement of
general or particular applicability and future effect designed to implement, interpret,
or prescribe law or policy.” 5 U.S.C. § 551(4). Although the Utah MOU does not
apply to all R.S. 2477 claimants in the United States, it applies to all claimants for
certain locations in Utah; agency MOUs or other statements applicable to just one or
a handful of entities, or just one individual, have been held to be APA rules of either
“general or particular applicability.”

In addition, courts sometimes look to whether
the agency statement will also affect entities indirectly as well as directly, in
determining the scope of its “applicability.” In *Hercules Inc. v. EPA*, 598 F.2d 91, 118
(D.C. Cir. 1978), for example, the court noted that “even when only one manufacturer
is subject to the standards, that manufacturer is not the only affected entity. The
standards affect the multitude who fish, take drinking water, or otherwise, directly or
indirectly, come in contact with waters containing the discharged toxic substance, all
of whom may appear in proceedings. . . Rulemaking, not adjudication, is the
appropriate, flexible procedural mechanism to accommodate the input of all
concerned.” Likewise, the Utah MOU will affect not only the Utah governmental
while preserving the infrastructure of rural communities must involve Congress. . . [W]e are beyond a
regulatory fix on this subject”.

15 For example, in *West Virginia Mining and Reclamation Ass'n v. Snyder*, 1991 WL 331482 (N.D. W. Va.
1991), involving DOI's Office of Surface Mining Reclamation and Enforcement (OSM), the court held
that an MOU between OSM and the West Virginia Division of Energy was an APA rule where it
established a policy under which OSM would “provide[] financial and technical assistance to West
Virginia in exchange for direct involvement in regulation of the [Surface Mining Control and
Reclamation Act].” See also *Mitchell Energy & Devt. Corp. v. Fain*, 311 F.3d 685 (5th Cir. 2002)
(statement by Secretary of Labor was APA rule of “particular applicability” where it applied to certified
states and implemented “methods of administration” required by the Social Security Act for the
federal/state unemployment compensation system); *City of Alexandria v. Helms*, 728 F.2d 643 (4th Cir.
1984) (FAA order to implement scatter plan test at National Airport was APA rule of particular
applicability designed to implement agency policy).
entities applying for R.S. 2477 acknowledgments/disclaimers, but also persons using
the asserted rights-of-way, those who disfavor continued use, and those owning the
underlying land where the federal government is no longer the owner. The Utah
MOU thus is an “agency statement of general or particular applicability.”

The Utah MOU also is an agency statement of “future effect.” Courts have applied
this requirement to mean statements having future legal consequences, and the Utah
MOU meets this test. It addresses how DOI will evaluate R.S. 2477 claims in the
future, not rights-of-way that already have been recognized. Finally, the Utah MOU is
“designed to implement, interpret, or prescribe law or policy.” It prescribes and
implements the law and policy by which Utah government entities will seek
recognition of their asserted R.S. 2477 rights-of-way. See, e.g., Lefevre v. Secretary,
Dep’t of Veterans Affairs, 66 F.3d 1191, 1196-97 (Fed. Cir. 1995) (“The determination
was a rule because . . . it prescribed the basis on which the Department would
adjudicate every claim seeking disability or survivor benefits for specified diseases
allegedly caused by exposure to herbicides in Vietnam.”); Hercules Inc., above, 598
F.2d at 117 (“The standards are designed to ‘implement’ and ‘prescribe law’ pursuant
to the authority of the 1972 Act.”).

The Department states that the Utah MOU is not a rule issued in violation of Section
108 but rather a voluntary agreement with the State of Utah. The courts have
rejected such arguments. Simply because an agency statement sets standards for
participation in a “voluntary” program does not mean the standards are not “rules.”
As the D.C. Circuit held in Sugar Cane Growers Coop. of Florida v. Veneman, 289 F.3d
89, 96 n.6 (D.C. Cir. 2002), “[t]he government’s suggestion that because participation
in the program is ‘voluntary’ the announcement and accompanying documents should
not be considered a rule is not worth a response.” Similarly, in Mitchell Energy &
Dev't. Corp. v. Fain, 311 F.3d 685 (5th Cir. 2002), the Fifth Circuit held that a Labor
Department statement establishing required methods of administration for a
federal/state unemployment compensation system was a rule, even though states had
the option of not participating in the system. Under the theory that standards for
activities voluntarily entered into are not rules, the court observed, “many things in
the Code of Federal Regulations [would not be] rules because the underlying
conduct, from operating a nuclear reactor to listing on the New York Stock
Exchange, is voluntary.” Id. at 688.

The Department also asserts that Section 108 is not implicated by its recent actions
because R.S. 2477 recognition decisions will result from an informal agency
adjudication, not a rulemaking. This may be correct but is beside the point. The

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only plausible reading of [“future effect”] is that rules have legal consequences only for the future.”); Sinclair
Broad. Group, Inc. v. FCC, 284 F.3d 148, 166 (D.C. Cir. 2002) (FCC local ownership rule dealt with
the “future effect, not the past legal consequences of [local marketing agreements].”)

17 See DOI Response to GAO, above, at 6 (“The Utah MOU is not a rule. It was developed to avoid
litigation threatened by Utah and its counties. It is an agreement concerning how Utah will present its
applications for recordable disclaimers for R.S. 2477 rights-of-way for BLM’s consideration.”)

18 DOI Response to Sen. Bingaman, above, at 4; see also 68 Fed. Reg. at 497 (“Even if BLM were to issue
a disclaimer of the United States’ interest in a valid right-of-way under R.S. 2477, the recognition of

Page 11
subject of Congress’ concern in Section 108 was DOI’s establishment of the overall standards for recognizing, managing, and validating R.S. 2477 rights-of-way, not its decision in a particular case—in other words, it was concerned about the “rules of the game,” not a particular game score. The Fifth Circuit rejected a similar argument by the Department in *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622 (5th Cir. 2001). The court in *Babbitt* found that although DOI had issued a decision in a particular adjudication, the decision was governed by a policy change that was a substantive rule. Similarly, in *Hercules Inc. v. EPA*, 598 F.2d 91, 118 (D.C. Cir. 1978), the D.C. Circuit found that certain EPA water pollution standards were rules, not orders, because the “inquiries are the same whether the [toxic] substance is discharged by one manufacturer or one thousand”; the determinations are “categorical, not individual or local. . .” Here, the Utah MOU sets uniform rules for how all R.S. 2477 claims to which the MOU applies will be decided. As the D.C. Circuit has noted, “rule making is not transformed into adjudication merely because the rule adopted may be determinative of specific situations arising in the future.” *Logansport Broad. Corp. v. United States*, 210 F.2d 24, 27 (D.C. Cir. 1954). In sum, the Utah MOU is an APA rule.

2. The Utah MOU as a Substantive Rule

We also find that the Utah MOU is a substantive rule. The Utah MOU does not meet two of the factors discussed above that courts apply in determining whether a rule is a substantive rule—characterization as such by the agency and publication for notice and comment in the *Federal Register*. According to DOI, the Utah MOU is not a rule but rather a cooperative agreement under FLPMA § 307(b). Nor was the Utah MOU published for notice and comment. Nevertheless, as noted above, courts look beyond these first two factors to focus on the third: whether the agency statement has a binding effect and the “force and effect of law.” In our view, there is little question that the Utah MOU has such an effect.

First, DOI itself acknowledges that “the Utah MOU . . . is binding . . . on the parties to the MOU, namely the Department and the State of Utah.” DOI Response to GAO at 4. The fact that the Utah MOU incorporates the FLPMA § 315 disclaimer regulations by reference—which, as DOI also acknowledges, are also “are binding on both the BLM and the applicant”—underscores the binding nature of the Utah MOU. *Id.* Although the Utah MOU contains a standard clause asserting that it does not create a private

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20 FLPMA § 307(b), 43 U.S.C. § 1737(b), gives the Department general authority to enter into “contracts and cooperative agreements involving the management, protection, development, and sale of public lands.”
cause of action in favor of third parties,\(^\text{21}\) that provision does not diminish the substantive rights and responsibilities that the MOU imposes on DOI, the State of Utah, and Utah local government entities.

Second, in the words of \textit{Troy Corp. v. Browner}, above, the Utah MOU is a substantive rule because it "effect[s] a change in existing law or policy’ . . . and ‘grant[s] rights, impose[s] obligations, or produce[s] other significant effects on private interests.” The Utah MOU is not like the MOU between the Korean War Veterans Memorial Advisory Board and the American Battle Monuments Commission in \textit{Lucas v. United States Army Corps of Eng'rs}, 1991 WL 229941 at * 4 (D.D.C. 1991), for example, which the court found was “written to establish procedural guidelines rather than to impose limitations on the Board’s statutory authority” and thus was not a substantive rule. Nor is the Utah MOU like the MOU in \textit{Bragg v. Robertson}, 72 F. Supp. 2d 642 (S.D. W. Va. 1999), between DOI’s Office of Surface Mining, EPA, the U.S. Army Corps of Engineers, and a state environmental agency. That MOU expressed the agencies’ interpretation of certain regulations and was challenged as being a substantive rule that “initiate[d] a profound change in the [existing] regulatory program” without compliance with notice and comment requirements. \textit{Id.} at 654. The court ruled that the MOU was an interpretive rule, not a substantive rule, because the MOU itself “disavow[ed] any substantive effect\(^\text{22}\) and because the court, deferring to the interpretation of the MOU agencies charged with administering the relevant statutes, found that the MOU simply codified the agencies’ current practice and thus “merely reminds affected parties of existing duties . . ..” \textit{Id.} at 655.\(^\text{23}\)

The Utah MOU stands in stark contrast to the MOUs in \textit{Lucas} and \textit{Bragg}. Unlike the MOUs in those cases, the Utah MOU does impose binding obligations—on DOI and Utah. And unlike those cases, the Utah MOU also works changes in existing law and policy—pertaining to the recognition, management, and validity of R.S. 2477 rights-of-way. In broadest terms, the Department will now recognize and validate R.S. 2477 rights-of-way by applying the substance and procedures applicable to FLPMA § 315 disclaimers, and R.S. 2477 rights-of-way acknowledged under this process will be given the same effect as lands or interests disclaimed under FLPMA § 315: the United States will be estopped from asserting a claim as to them. \textit{See} 43 C.F.R. § 1864.0-2(b).

\(^{21}\) The Utah MOU states that it “shall not be construed as creating any right or benefit, substantive or procedural, enforceable at law or in equity, by a party against the State of Utah, Utah counties, the United States, its agencies, its officers, or any other person. This MOU shall not be construed to create any right to judicial review involving the compliance or noncompliance of the State of Utah, Utah counties, the United States, its agencies, its officers, or any other person with the provisions of this MOU.” Utah MOU at 5.

\(^{22}\) The MOU provided in part that “t]he policy and procedures contained in this MOU are intended solely as guidance and do not create any rights, either substantive or procedural, enforceable by any party. \textit{This document does not, and is not intended to, impose any legally binding requirements on Federal agencies, States, or the regulated public; and does not restrict the authority of the employees of the signatory agencies to exercise their discretion in each case to make regulatory decisions based on their judgment about the specific facts and application of relevant statutes and regulations.” \textit{Id.} at 654-55 (emphasis in original).

\(^{23}\) The practice of judicial deference, in certain circumstances, to the statutory interpretation of an agency charged with administration of the statute is discussed in Part II of this opinion.
As the MOU recognizes, this represents a significant change from the Department’s existing policy in recognizing R.S. 2477 rights-of-way—the Babbitt Policy—which will no longer apply to R.S. 2477 rights-of-way covered by the MOU. We identify below examples of some of the specific changes effected by the Utah MOU.


As discussed above, the Utah MOU identifies the criteria for “roads” that will be considered “eligible” for “acknowledgment” as valid R.S. 2477 rights-of-way. While the Department states that the disclaimers it issues under the Utah MOU will “essentially preserve the status quo,” in fact several of these criteria represent a departure from prior case law and/or longstanding Department policy—as the Department seems to recognize by stating that its new approach will only “essentially” preserve the status quo and that “[m]ost” but not all asserted R.S. 2477 claims in the West satisfy the R.S. 2477 “construction” and “highway” requirements under “almost” any statutory interpretation. See DOI Response to Sen. Bingaman at 1; Utah MOU at 1. For example, the Utah MOU criterion that a road have been in existence prior to FLPMA’s enactment in 1976 and be in current use is equivalent to the “continuous use” standard for R.S. 2477 “construction” urged by Utah counties but rejected in Southern Utah Wilderness Alliance v. Bureau of Land Management, 147 F. Supp. 2d 1130 (D. Utah 2001), appeal dismissed, 2003 WL 21480689 (10th Cir. 2003) (SUWA). As BLM successfully argued in SUWA, the term “construction” in R.S. 2477 requires some form of purposeful, physical building or improvement, not simply continuous use. As the court explained, “[a] highway right-of-way cannot be established by haphazard, unintentional, or incomplete actions. . . . [T]he mere passage of vehicles across the land, in the absence of any other evidence, is not sufficient to meet the construction criteria of R.S. 2477 and to establish that a highway right-of-way was granted.” Id. at 1138-39. See also United States v. Garfield County, 122 F. Supp. 2d 1201, 1227 n.5 (D. Utah 2000) (adopting Department’s interpretation of “construction” as meaning actual building and more than mere use).

The Utah MOU also changes the meaning of the basic R.S. 2477 term “highway,” by equating it with the term “road.” Utah MOU at 1. Courts have not always equated the two terms. In SUWA, for example, the court disagreed that highways could be established by the mere passage of wagons, horses, or pedestrians and accepted the Department’s definition of “highway” as “a road freely open to everyone; a public road.” 147 F. Supp. 2d at 1143. The court also agreed with the Department that a road must be a significant one to be an R.S. 2477 highway: “It is unlikely that a route used by a single entity or used only a few times would qualify as a highway . . . a highway connects the public with identifiable destinations or places.” Id.

Finally, the Utah MOU changes the terms under which R.S. 2477 rights-of-way claims will be processed. In order to obtain recognition of its R.S. 2477 right-of-way, the claimant must agree to reimburse BLM’s costs of processing the application. As a neighboring state has objected to the Secretary of the Interior, “[a]n RS-2477 right-of-way arises from a statutory grant and is not a right-of-way permit for which [the
Department] is authorized to charge processing fees.” Whether or not such a fee is legally authorized, it represents a new prerequisite to obtaining recognition by the Department of an R.S. 2477 right-of-way and thus does not simply “remind” applicants of an “existing duty” in the way that an interpretive rule does. Fertilizer Institute v. EPA, 935 F.2d 1303, 1307-08 (D.C. Cir. 1992); see Five Flags Pipeline Co. v. United States Dept’ of Transp., 1992 WL 78773 (D.D.C. 1992) (Department of Transportation fee schedule was legislative rule because it “did not merely ‘remind’ the pipeline companies of an ‘existing duty.’” Rather, the schedule created an entirely new obligation to pay fees in precise amounts based on a specific mathematical computation that did not previously exist.

b. Changes in management standards for valid R.S. 2477 rights-of-way

The Utah MOU also sets standards for management of valid R.S. 2477 rights-of-way different from the standards set by at least some courts. As the Utah MOU explains, road management includes “road width and ongoing maintenance levels . . .” Utah MOU at 3. Courts have found that the appropriate standard for determining what maintenance or improvements an R.S. 2477 holder may undertake to expand the scope of a right-of-way is a “reasonable and necessary” standard. See, e.g., Sierra Club v. Lujan, 949 F.2d 362, 364, 369 (10th Cir. 1991); United States v. Garfield County, 122 F. Supp. 2d 1201 (D. Utah 2000). By contrast, the Utah MOU adopts a ground-width disturbance standard, see Utah MOU at 3, which the Garfield County court explicitly rejected, stating that “[t]he law simply demands a more thoughtful standard than that.” Id. at 1232. Further, courts have measured the extent of an R.S. 2477 right-of-way as of the date of FLPMA’s enactment or when the underlying lands were “reserved for public uses,” whichever is earlier. See Garfield County, 122 F. Supp. 2d at 1228-29; Sierra Club v. Hodel, 848 F.2d 1068, 1084 (10th Cir. 1988). The Utah MOU, by contrast, measures as of the date of the MOU—April 9, 2003. Utah MOU at 3; see also Utah MOU Guidance at 5.

The Department asserts that the Utah MOU is not a substantive rule subject to the prohibitions in Section 108. It states that use of the FLPMA § 315 disclaimer process in concert with the MOU does nothing more than provide a procedure for acknowledging or denying the validity of R.S. 2477 claims, a procedure in lieu of litigation of quiet title claims or takings claims in court. See DOI Response to Sen. Bingaman at 1, 4. The Department appears to be asserting that the Utah MOU is a procedural rule under the APA—“rules of agency organization, procedure, or practice,” see 5 U.S.C. § 553(b)(3)(A)—that would not be prohibited by Section 108. The Department is correct that procedural rules do not require notice and comment, are not substantive rules, and would not be covered by Section 108. However, as the court noted in Public Citizen v. Department of State, 276 F.3d 634, 640-41 (D.C. Cir. 2002), rules that “encode[] a substantive value judgment” are substantive and not procedural. The Utah MOU does considerably more than set procedural guidelines; it prescribes a process and substantive standards for recognizing and determining the

24 Letter from Executive Director, Colorado Department of Natural Resources, to Secretary of the Interior (May 15, 2003) at 2.
validity of R.S. 2477 rights-of-way. As the Department itself emphasizes in its Utah MOU Guidance, the MOU establishes binding legal requirements by which it will review disclaimer applications and “prepare a draft decision that documents whether the claimed right-of-way meets the legal requirements under R.S. 2477 and the provisions of the MOU . . . .” Id. at 5.

Our conclusion that the Utah MOU is the type of “final rule or regulation” that Congress intended to cover in Section 108 is confirmed by its similarity to the 1994 DOI proposed rule that prompted Congress to enact Section 108 in the first instance. As the court observed in Garfield County, in passing Section 108, “Congress was concerned with rule-making concerning the process for deciding the validity of R.S. § 2477 claims.” 122 F. Supp. 2d at 1237 (emphasis added). Like the Utah MOU, the 1994 proposed rule outlined a process for determining which R.S. 2477 rights-of-way were validly acquired. The rule was to put in place a “formal administrative process by which those who claim R.S. 2477 rights-of-way can have the Department make binding determinations of their existence and validity.” See 59 Fed. Reg. at 39216. Like the Utah MOU, the proposed rule also defined the R.S. 2477 statutory terms “highway” and “construction,” noting that these had “not been defined completely or consistently, resulting in uncertainty about the exact nature and extent of the grant.” Id. at 39217. Finally, the Department has described the Utah MOU as “an important first step towards resolving decades of conflict over the status of roads in the State of Utah” and “a reasonable approach that will allow us to clarify ownership of some county roads.” DOI Response to Sen. Bingaman at 1. These are the same sort of reasons Secretary Babbitt presented in support of the 1994 proposed rule that led to the Section 108 prohibition.25

In sum, we conclude that the Utah MOU is a final rule or regulation prohibited from taking effect by Section 108. It is a substantive rule under the APA and pertains to the recognition, management, and validity of R.S. 2477 rights-of-way. The Section 108 prohibition stemmed from congressional intent to prevent implementation of just such processes and standards.

II. Authority to Use FLPMA § 315 to Disclaim Interests in R.S. 2477 Rights-of-Way

The second major legal concern with respect to the Department’s recent R.S. 2477 actions is whether, apart from the prohibition of Section 108, the Department may use the authority of FLPMA § 315 to disclaim U.S. interests in R.S. 2477 rights-of-way. No court has ruled on this question to date, and there are colorable arguments on both sides. Based on rules of statutory construction and deference, on balance, we conclude that FLPMA § 315 authorizes disclaimer of U.S. interests in R.S. 2477 rights-of-way.

25 See 59 Fed. Reg. at 39216-17. The stated purposes of the 1994 proposed rule are also similar to those for the Utah MOU. The proposed rule’s purposes were to: “(a) Establish procedures for the orderly and timely processing of claims for rights-of-way pursuant to R.S. 2477 over lands managed by the Bureau of Land Management, National Park Service, and U.S. Fish and Wildlife Service; (b) Define key terms; (c) Establish public notice and appeal processes of claims for rights-of-way pursuant to R.S. 2477; and (d) Provide for the use of rights-of-way validly acquired pursuant to R.S. 2477, consistent with the management of adjacent and underlying Federal lands.” 59 Fed. Reg. at 39224. Cf Utah MOU at 1-2; Utah MOU Guidance at 1.
As noted above, FLPMA § 315 authorizes the Department to issue a “disclaimer of interest or interests in any lands . . . where the disclaimer will help remove a cloud on the title of such lands” and one of three other conditions applies. Two of those conditions relate to riparian situations, see FLPMA §§ 315 (a)(2), (a)(3), and thus are not relevant to R.S. 2477 highway rights-of-way. The third condition is FLPMA § 315(a)(1), where “a record interest of the United States in lands has terminated by operation of law or is otherwise invalid.” This is potentially applicable to creation of highway rights-of-way under R.S. 2477. Thus for the Department to be authorized to employ FLPMA § 315 to disclaim R.S. 2477 rights-of-way: (1) disclaimer must “help remove a cloud on the title of such lands”; and (2) “a record interest of the United States in lands [must have] terminated by operation of law or [be] otherwise invalid.” The Department has interpreted these requirements as applying to disclaim R.S. 2477 rights-of-way, and on balance, we conclude this is a reasonable interpretation that must be given considerable deference.

First, the Department asserts that disclaimer by the United States “will help remove a cloud on the title” of an R.S. 2477 right-of-way. Congress did not elaborate on the meaning of the phrase “cloud on the title” either in FLPMA § 315 or its legislative history. Under real property law, a “cloud on title” generally refers to an outstanding claim or encumbrance attached to real property that, if valid, would affect or impair the title of the owner of the property. In this case, the Department posits, the “cloud” on title to a particular R.S. 2477 right-of-way results from the uncertainty surrounding whether it was established prior to the repeal of R.S. 2477 in 1976. DOI Response to GAO at 7; 68 Fed. Reg. at 496. As discussed above, R.S. 2477 was self-executing, meaning that no government approvals were necessary and typically no recording was made in public land records when an R.S. 2477 right-of-way was perfected by fulfillment of the statutory elements—“construction” of a “highway” over non-reserved public lands. If an R.S. 2477 right-of-way was not established over public lands, then the U.S. retained its 100 percent fee simple title in the lands—including interests in using and transferring the lands, interests in excluding others from trespassing on the lands, any mineral rights in the lands, and all other property interests. On the other hand, if an R.S. 2477 right-of-way was established, then one of the United States’ property interests—the right to exclusive use of the surface property covered by the right-of-way—was terminated by operation of law or became “invalid.” The lack of certainty about which of these circumstances exists at a given site can create a cloud that disclaimer of the U.S. interest will “help remove.” Although as DOI’s FLPMA § 315 regulations make clear, a disclaimer does not literally “grant, convey, transfer, remise, quitclaim, release or renounce any title or interest in lands,” it has the effect of a quitclaim deed in the sense that it acts as an estoppel against the United States asserting a competing claim to the property interest being disclaimed. See 43 C.F.R. § 1864.0-2(b). Thus issuance of a disclaimer for an R.S. 2477 right-of-way means the United States would no longer assert a competing claim to the right-of-way, removing a “cloud” on its “title.”

Second, the Department asserts that the requirement for “a record interest of the United States in lands [to have] terminated by operation of law or [become] otherwise invalid” is satisfied if the conditions of R.S. 2477 were satisfied—that is, if, at some time between 1866 and 1976, there was “construction” of a “highway” over non-reserved public lands. At this point, in the Department’s view, the complete fee simple ownership of the United States in the land was altered to that of a holder of the servient estate. DOI Response to GAO at 10. In property law parlance, the land became “burdened” by the right-of-way or easement and the owner of the land—the United States—was required to abstain from acts that impermissibly interfered with or were inconsistent with use of the easement. See United States v. Garfield County, 122 F.Supp. 2d 1201, 1243 (D. Utah 2000). Thus the unburdened fee interest of the U.S. was terminated or invalidated by creation of the R.S. 2477 right-of-way. See Estes Park Toll-Road Co. v. Edwards, 32 P. 549 (1893)(“After entry and appropriation of the right of way granted, and the proper designation of it, the way so appropriated ceased to be a portion of the public domain, was withdrawn from it.”).

There are certain objections to this analysis. Some have argued that the holder of an R.S. 2477 right-of-way does not have technical title to the right-of-way, but only a usufruct right in it—the right to use property owned by another party— and therefore FLPMA § 315 cannot be used to remove a cloud on it. However, the Department points out, and we agree, that “title” is a term often used synonymously with various types of ownership. DOI Response to GAO at 8; see, e.g., Garfield County, above, 122 F. Supp. 2d at 1241-42 (discussing the county’s ownership of an R.S. 2477 right-of-way while clarifying that R.S. 2477 did not grant the county fee simple title); Dover Veterans Council v. City of Dover, 407 A. 2d 1195, 1196 (S. Ct. N.H. 1979)(“Title” can denote any estate or interest, including a leasehold or merely the right of possession.). Thus we find the view that disclaimer of U.S. interests in an R.S. 2477 right-of-way would remove a cloud on its “title” for purposes of FLPMA § 315 is reasonable.

The Department’s interpretation has also been challenged by noting that, by its terms, FLPMA § 315 requires the “cloud ” to be on title to “lands,” not on an interest in lands such as a right-of-way. According to this argument, Congress referred to “lands” and “interests in lands” as distinct concepts in FLPMA § 315, and under traditional rules of statutory construction, should be viewed as reflecting different meanings. 2A Sutherland Statutory Construction § 46:06 at 193-94 (6th ed. 2000). Because, in their view, a disclaimer of an R.S. 2477 right-of-way would not remove a cloud on the title to the land underlying the right-of-way, the Department’s interpretation is inconsistent with FLPMA § 315.

It is also argued that the terms “lands” and “interests in lands” are used as distinct concepts in other provisions of FLPMA, as well as in other land management statutes. See, e.g., FLPMA § 205, 43 U.S.C. § 1715(c) (“lands and interests in lands”); FLPMA § 206(a), 43 U.S.C. § 1716(a) (“a tract of land or interests therein”); FLPMA § 206(b), 43 U.S.C. § 1716(b) (“title to any non-Federal land or interests therein in exchange for such land, or interest therein”); 43 U.S.C. § 1716(i) (“exchange lands or interests in lands”); 16 U.S.C. § 79c; 16 U.S.C. § 271a; 16 U.S.C. § 396f note (e); 16 U.S.C. § 410hh-1 note (a)(6); 16 U.S.C. § 460mm-46; 16 U.S.C. § 521c.
In our view, the language of FLPMA § 315 does not clearly indicate that Congress used these different references to capture discrete, contrasting concepts. In this regard, FLPMA § 315 authorizes the Department to disclaim an “interest or interests in any lands” where the disclaimer will help remove a cloud on the title of “such lands.” Here, the reference to “such lands” potentially refers either just to the land itself or to both the land as well as lesser interests in the land. Since the Department promulgated its original 1984 regulations implementing FLPMA § 315, it has defined the term “lands” to include “lands and interests in lands . . . .” 43 C.F.R. § 1864.0-5(e). Given that the terms “lands” and “interests in lands” are closely connected concepts, it is plausible to conclude, as the Department did when it promulgated the 1984 regulations and today, that “lands” in FLPMA § 315 means “lands and interests in lands.” We are reluctant to conclude that the Department’s statutory interpretation is impermissible.

The legislative history of FLPMA § 315 introduces some doubt on the Department’s position. In the final analysis, however, it is inconclusive. The Department first proposed what became FLPMA § 315 in a draft public lands bill submitted to Congress, which Senator Jackson introduced by request on February 28, 1973.29 Before FLPMA was enacted, the Secretary of the Interior had no express statutory authority to issue recordable documents disclaiming interests in land.30 The General Land Office, BLM’s predecessor, had a need to issue disclaimers as a kind of correction device, which it did even though it had no express authority. The purpose of § 315 was, as the Senate Committee on Interior and Insular Affairs reported to the Senate, to authorize the Secretary “to issue documents of disclaimer when the United States has no interest in certain lands . . . .”31 The Senate report states that the section authorizes the Secretary to issue such documents in “three specified instances where he finds no Federal interest and where there is a cloud on the title.”32 This authority is necessary, the report continues, to eliminate the need for judicial or legislative relief “in those cases where the United States asserts no ownership or interest.”33 The House report is to the same effect.34 It is not clear from these statements, however, whether the Congress intended disclaimers to be issued when the United States has

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29 S. 1041, § 308, reprinted in Comm. on Energy and Natural Resources, 95th Cong., Legislative History of the Federal Land Policy and Management Act of 1976, at 1508-1509 (Comm. Print 1978). The language of section 315(a) was substantially the same as what later became law, but did not include the phrase “or is otherwise invalid.”


33 S. Rep. No. 94-583, at 51.

no remaining interests in the interest being disclaimed or whether there must be no remaining interests in the land at all. So viewed, the legislative history neither supports nor contradicts the Department’s interpretation of § 315 as allowing it to disclaim R.S. 2477 rights-of-way even when some federal interest in the property at issue will remain.

A final argument against the Department’s interpretation is that no “record interest of the United States has terminated by operation of law,” as required by the statutory language. This view asserts that when R.S. 2477 granted rights-of-way or easements over public land, dominant and servient estates were created, but no record interests of the U.S. were terminated. The Department states, however, and we agree, that the creation of an easement involves the creation of two separate interests in real property: a servient estate, here owned by the United States, and a dominant estate, here owned by the holder of the R.S. 2477 right-of-way. DOI Response to GAO at 10; see, e.g., C/R TV v. Shannondale, 27 F.3d 104, 107 (4th Cir. 1994). Under such circumstances, it follows that upon the creation of these two interests, a record interest of the United States terminated: its interest in exclusive use of the surface property over which the right-of-way ran.

We recognize that the Department’s interpretation of FLPMA § 315, as potentially applying to R.S. 2477 rights-of-way, is a novel one. That fact alone, however, should not condemn it. It is not uncommon for the scope and application of a grant of remedial administrative authority such as FLPMA § 315 to evolve with changing factual circumstances. Moreover, in analyzing whether FLPMA § 315 authorizes the Department to do what it seeks to do under the Utah MOU, we are mindful of the considerable weight that should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer. United States v. Mead, 533 U.S. 218 (2001); Udall v. Tallman, 380 U.S. 1 (1965). Indeed, under bedrock principles of statutory construction and judicial deference in cases involving agency action, where Congress has not spoken clearly to the precise question at issue—for example, where a statute is ambiguous or silent—courts defer to the interpretation of an agency charged with implementing the statute if the interpretation is not unreasonable, nor arbitrary or capricious. Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984). This rule applies even where a court believes that there is a more reasonable interpretation, and even where the agency’s interpretation is a

35 Similarly, the Department’s regulations, stating that “[t]he objective of the disclaimer is to eliminate the necessity for court action or private legislation in those instances where the United States asserts no ownership or record interest” are not conclusive on this point. 43 C.F.R. § 1864.0-2(a) (emphasis added).

36 One final legislative history argument has been made in opposition to the Department’s interpretation that § 315 authorizes it to disclaim R.S. 2477 rights-of-way. As noted above, Congress repealed R.S. 2477 in FLPMA while preserving already perfected R.S. 2477 rights-of-way. Congress also created Title V of FLPMA to establish a process for granting new rights-of-way over public land. It has been argued that in light of the considerable attention Congress focused on rights-of-way in FLPMA, if Congress had meant to allow the Department to disclaim R.S. 2477 rights-of-way through the use of § 315, it would have said so. While this view may have some merit, we find it just as plausible to conclude that Congress did not consider the issue at all, especially because no explicit statutory solution was provided in FLPMA for the resolution of R.S. 2477 claims.
departure from past practice. See, e.g., American Fed’n of Govt. Employees, Local 3884 v. FLRA, 930 F.2d 1315, 1324 n. 12 (8th Cir. 1991).

As applied here, principles of statutory construction and deference firmly embedded in administrative law counsel substantial deference to DOI’s interpretation of FLPMA § 315. As discussed above, a number of terms in FLPMA § 315 are ambiguous, notably, “lands,” “interests in lands,” and “cloud on title.” 37 Although the Department’s interpretation is not necessarily the only reasonable one, DOI is the agency responsible for management of the public lands and for administration of FLPMA. For the reasons discussed above, we find the Department’s interpretations of these terms and of FLPMA § 315 as a whole to be reasonable.

CONCLUSION

In sum, we conclude that the 2003 Disclaimer Rule is not a final rule or regulation covered by the prohibition in Section 108, but that the Utah MOU is covered because it is a substantive rule under the APA that “pertain[s] to the recognition, management, and validity” of R.S. 2477 rights-of-way. We also conclude that, independent of this Section 108 prohibition, the Department has authority under FLPMA § 315 to disclaim interests in R.S. 2477 rights-of-way.

February 6, 2004

37 To the extent that DOI has filled the statutory gaps through notice and comment rulemaking as it has with respect to the definition of “lands,” we view such interpretation as conclusive under Chevron and Mead.
HAZEL L. STALEY, an individual, and EVELYN BERNICE STALEY, as Trustee of the 1990 Staley living trust dated January 25, 1990, Plaintiffs, v. UNITED STATES OF AMERICA, and its federal agency FOREST SERVICE, DONALD H. GRIFFITH, an individual, JEAN ANN GRIFFITH, an individual, and DALE V. SCOBY, an individual, CENTEX HOME EQUITY CORPORATION, a Nevada corporation, JOHN R. VANDERHART, as the Public Trustee of the County of Boulder, Colorado, and all unknown persons who claim an interest in the subject matter of this action, Defendants.

Civil Action No. 06-WY-477-CB

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

168 F. Supp. 2d 1209; 2001 U.S. Dist. LEXIS 22636

January 31, 2001, Decided

February 6, 2001, Filed, Entered on the Docket

DISPOSITION:

[**1] Plaintiffs' First Claim for Relief DISMISSED WITH PREJUDICE. Plaintiffs' Motion for Summary Judgment DENIED. Plaintiffs' Motion to Strike DENIED.

COUNSEL:

For HAZEL L. STALEY, EVELYN BERNICE STALEY, plaintiffs: Geoffrey P. Anderson, Matthew B. Dillman, Burns, Figa & Will, P.C., Eaglewood, CO USA.

For USA, defendant: Paul J. Johns, United States Attorney's Office, Denver, CO USA.

For DONALD H. GRIFFITH, JEAN ANN GRIFFITH, DALE V. SCOBY, defendants: Howard Bittman, Howard Bittman, Atty, Boulder, CO U.S.A.

JUDGES:

CLARENCE A. BRIMMER, UNITED STATES DISTRICT JUDGE.

OPINIONBY:

CLARENCE A. BRIMMER

OPINION:

[**211]

ORDER

Plaintiffs bring this action to gain access to a mining claim by crossing the Defendants' property. The matter is currently before the Court on several issues: (1) whether the County of Boulder or the State of Colorado should be joined as parties to this action; (2) Plaintiffs' Motion for Summary Judgment; and (3) Plaintiffs' Motion to Strike Defendants' Designation of Thomas Kahn as an Expert Witness. After reading the briefs, hearing oral argument, and being fully advised in the premises, the Court FINDS and [**2] ORDERS as follows:

Background

Plaintiffs bring this action seeking the declaration of a road that would provide access to a parcel of land located in Boulder County, Colorado. Plaintiffs' property is located near Boulder County Road 132, also known as Magnolia Road. However, the land lying between Plaintiffs' parcel and the Magnolia Road is owned by several of the Defendants. Plaintiffs' proposed road would cross United States Forest Service land, a parcel of land owned by Defendant Dale V. Scoby, and a parcel known as the Telephone Mill Site which is owned by Defendants Donald H. Griffith, Jean Anne Griffith and Dale V. Scoby ("Private Defendants"). Plaintiffs' Complaint brings several claims for relief to declare that a road exists across Defendants' property. Plaintiffs' first
claim for relief seeking the declaration of a public road pursuant to Federal Law R.S. 2477 draws particular attention from Defendants and this Court.

During an October 4, 2000 Status Conference, the Court granted Plaintiffs leave to file a brief on the question of whether the County of Boulder and the State of Colorado are proper parties to this action. The United States of America and [**3] the Forest Service ("Defendants USA") have responded to Plaintiffs' brief. Plaintiffs subsequently filed a reply brief, as well as supplemental authority, to which Defendants USA have responded. The issues raised by the parties' briefing raise the jurisdiction of this Court.

Jurisdiction

A. Jurisdiction over Plaintiffs' First Claim for Relief

Plaintiffs, assert this Court's jurisdiction n1 pursuant to 28 U.S.C. § 1346(f); [HN1] "The district courts shall have exclusive original jurisdiction of civil actions under [28 U.S.C. § 2409a] to quiet title to an estate or interest in real property in which an interest is claimed by the United States." Accordingly, [HN2] jurisdiction pursuant to Section 1346(f) is only proper where the conditions of 28 U.S.C. § 2409a (the "Quiet Title Act") are satisfied.

n1 In their Complaint, Plaintiffs allege this Court has jurisdiction pursuant to 28 U.S.C. § § 2201-2202, 1331, 1346(f), and 1367.

[**4]

[HN3] The Quiet Title Act waives sovereign immunity in civil actions brought "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a). As a waiver of sovereign immunity, the conditions of the Quiet Title Act must be strictly observed. [*1212] See Vincent Murphy Chevrolet Co., Inc. v. United States, 766 F.2d 449, 452 (10th Cir. 1985). One condition is "the complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States." 28 U.S.C. § 2409a. The Tenth Circuit has interpreted the Quiet Title Act as requiring a plaintiff to have some interest in the title to the property. See Kinscherff v. United States, 586 F.2d 159 (10th Cir. 1978). In Kinscherff, the Plaintiffs asserted a real property interest in the disputed road as members of the public entitled to use the public road. 586 F.2d at 160. The court held that such an interest was not the type of interest contemplated [***5] by Section 2409a. Id.

In their first claim for relief, Plaintiffs claim that a public road was created by operation of R.S. 2477, 43 U.S.C. § 932 (repealed by Federal Land Policy Management Act of 1976, § 706(a), Pub.L. No. 94-579, 90 Stat. 2793). n2 Defendants USA argue that this Court lacks jurisdiction to hear an action brought under the Quiet Title Act where the plaintiff is a private party who is seeking only a right of access over a public road. The essence of Defendants' argument is that an action under the Quiet Title Act requires the plaintiff to have a title interest in the disputed real property. Defendants USA cite the Kinscherff holding that an interest asserted as a member of the public entitled to use a public road is not the type of interest which allows a private plaintiff to bring a claim under the Quiet Title Act. 586 F.2d at 160.

n2 R.S. 2477 granted a "right of way for the construction of highways over public lands, not reserved for public uses." 43 U.S.C. § 932.

[**6]

Plaintiffs argue that Kinscherff was construing New Mexico law when it found that members of the public do not possess the requisite interest to enable them to bring an action under the Quiet Title Act. Plaintiffs assert that under Colorado law, a landowner has significant property rights in abutting public roads. Therefore, this Court must analyze whether Plaintiffs are correct in suggesting that Colorado property owners have sufficient interests in abutting public roads to constitute an "interest in real property contemplated by [the Quiet Title Act]."

Id.


[**5]

[HN5] (1) If any road has been established by law, the transfer of all or any part of the property upon which such road is constructed to any party, including, but not limited to, any government agency, shall not act to vacate such road. No such transfer shall act to diminish the rights of any person in such a road. (2) If any public [**7] rights have been established by law in a road that provides access to any parcel of land, such rights may be transferred when such parcel of land is transferred.
Plaintiffs argue that these provisions demonstrate that Colorado, unlike New Mexico, confers a title interest in public roads to certain landowners.

Plaintiffs also cite several cases to support their proposition. In Jackson v. Kiel, the Colorado court allowed a plaintiff to recover damages from a railroad which had continually kept freight cars in an intersection thereby blocking the plaintiff's access to his home via a public street. 13 Colo. 378, 22 P. 504 (Colo. 1889). The Court stated, [*1213] "the right to a free use of this space of street intersection for purposes of ingress and egress was therefore as closely identified with his lot, and interference therewith was as peculiar and personal an injury, as if the obstruction had prevented access from his lot to the street immediately adjacent thereto." 13 Colo. 378, 22 P. 504. In a case dealing primarily with the question of abandonment of a public road, a Colorado court of appeals stated, [HN6] "reasonable surface use, including access, is part of the 'bundle of sticks' [**8] of mineral claim property rights, including unpatented claims." Heath v. Parker, 30 P.3d 746, 2000 WL 1732345, *4 (Colo. App. 2000). The court also stated, "[a] county cannot, without compensation, formally abandon a public road if such action would deprive abutting landowners of access to their property." 30 P.3d at 746 *3 (citing Colo. Rev. Stat. § 43-2-303(2)(a)).

While Plaintiffs may correctly assert that abutting landowners may have rights beyond those of the general public in certain public roads, the authorities cited above cannot be fairly construed to mean that an abutting landowner has a title interest in any public road such that they can maintain an action under the Quiet Title Act. See Kinscherff, 586 F.2d at 160. The Court refuses Plaintiffs' invitation to blur the lines between a title interest and a right of access to a public road. When the Tenth Circuit found that the public does not have a real property interest in public roads under New Mexico law, it did so by reviewing that state's laws pertaining to quiet title actions. Id. Under New Mexico law, the interest necessary to pursue a quiet title action was an interest in the title to the [**9] property. Id. (citing Rock Island Oil & Refining Co. v. Simmons, 73 N.M. 142, 386 P.2d 239 (N.M. 1963)). Contrary to Plaintiffs' suggestion, Colorado law does not differ on this point. [HN7] Like New Mexico, Colorado law requires a plaintiff to possess an interest in the title to the property in order to maintain a quiet title action. See Hutson v. Agricultural Ditch & Reservoir Co., 723 P.2d 736, 738 (Colo. 1986) ("[A] plaintiff in a quiet title action ... bears the burden of establishing title in the property superior to that of the defendant .... The plaintiff must rely on the strength of his own title rather than on the weakness in or lack of title in defendants") (citation omitted). Therefore, the Court finds that Kinscherff is controlling in this case and Plaintiffs' attempt to distinguish it on the basis of differences between New Mexico and Colorado substantive law is not persuasive. The Court holds that under the law of this circuit, Plaintiffs do not have a title interest in a public road that would properly invoke the jurisdiction of the Court over Plaintiffs' First Claim for Relief. See Kinscherff, 586 F.2d at 160. [**10]

B. Jurisdiction over Plaintiffs' remaining claims for relief

At this point, the Court must determine whether it has jurisdiction over Plaintiffs' six additional claims for relief. All but one of these are state law causes of action. However, Plaintiffs' Sixth Claim for Relief alleges the existence of an easement pursuant to federal law. This claim seeks the declaration of an implied right of ingress and egress pursuant to federal law.

The Kinscherff decision addressed the federal court's jurisdiction over such a claim.

Plaintiffs also claim an interest by virtue of an implied easement of necessity, as successor in interest to a grantee of the United States by patent in 1936. [HN8] Easements are real property interests subject to quiet title actions. The legislative history of 28 U.S.C. § 2409a indicates that Congress intended easements to be included in the real property rights adjudicated in a quiet title action. The House Report states: "The quieting of title where the plaintiff claims an [*1214] estate less than a fee simple an easement or the title to minerals is likewise included in the terms of the proposed statute." H.R.Rep.No. 92-1559, 92d [**11] Cong., 2d Sess. reprinted in (1972) U.S. Code Cong. & Admin. News 4552.

586 F.2d at 161. Therefore, this Court has jurisdiction to hear Plaintiffs' Sixth Claim for Relief. The remainder of Plaintiffs' claims for relief involve the same controversy as this federal claim. As a result, this Court properly asserts supplemental jurisdiction over Plaintiffs' remaining state law claims. See 28 U.S.C. § 1367.

State and County as Parties

The parties' briefs also address the issue of whether the State of Colorado and County of Boulder should be joined as parties to this action. First, the parties agree that the State of Colorado is not a proper party to this action. Defendants USA concede that the road at issue in this litigation would be owned by the County of Boulder if it were to be declared a public road. [HN9] The State of Colorado only controls those roadways that are included in the "state highway system." See Colo. Rev. Stat. § 43-2-101 (2000). It is undisputed that the road at
issue in this case will not be part of the state highway system, therefore, the Court finds that the State of Colorado is not a proper party to this [**12] action.

Next, the parties disagree as to whether the County of Boulder is a proper party to this action. Plaintiffs contend that the County of Boulder may intervene if they so desire, but they are not required to be joined to this action. Defendants USA, on the other hand, contend that the County of Boulder must be joined to this action. The parties' arguments apply to two different questions: (1) whether the County of Boulder is a necessary party to Plaintiffs' First Claim for Relief; and (2) whether the County of Boulder should be joined to Plaintiffs' remaining causes of action.

A. County of Boulder as party to First Claim for Relief

Defendants USA suggest Plaintiffs should be required to join the County of Boulder as a party or amend its Complaint to eliminate the First Claim for Relief. The Court's previous finding that it lacks jurisdiction over Plaintiffs' First Claim for Relief would not be affected by joining the County of Boulder to this action. Unless Plaintiffs can convince the County of Boulder to join as a co-plaintiff n3 in this action, the Court lacks jurisdiction to hear Plaintiffs' First Claim for Relief. Joinder of the County of Boulder as a defendant [**13] would be ineffective to cure the jurisdictional defect raised above. Naming the County of Boulder as a defendant does not address the fact that Plaintiffs, the parties prosecuting the action, lack the necessary title interest in the disputed road. See Kinscherff, 586 F.2d at 160; see also Long v. Area Manager, Bureau of Reclamation, 236 F.3d 910, 2001 WL 8570, *4 (8th Cir. 2001) ([HN10] "The proper plaintiff to challenge the condemnation of a public road is the governmental entity that owns the easement.").

B. County of Boulder as party to remaining claims

A different analysis, however, must be applied to the question of whether the [**12][15] County of Boulder should be joined for purposes of Plaintiffs' other claims for relief, particularly the state law claims. In this instance, Plaintiffs correctly point out that [HN13] under Colorado law, a private party may bring a claim to declare the existence of a public road. See Goluba v. Griffith, 830 P.2d 1090, 1090-92 (Colo. Ct. App. 1992) (affirming the trial court's finding that the road at issue was a public highway pursuant to Colo. Rev. Stat. § 43-2-201(1)(c) in an action between private parties); Lowhorn v. Salisbury, 701 P.2d 142, 144-45 (Colo. Ct. App. 1985) (affirming the trial court's decision insofar as it declared the road in question to be a public road in an action between private parties). Therefore, the County of Boulder is not required to be joined to Plaintiffs' remaining claims for relief.

Plaintiffs' Motion for Summary Judgment

Because this Court lacks subject matter jurisdiction to hear Plaintiffs' First Claim for Relief, Plaintiffs' Motion for Summary Judgment on their first [**15] claim for relief must be denied.

Plaintiffs' Motion to Strike

The Private Defendants have designated Thomas Kahn as an expert witness on the issue of real property valuation. Plaintiffs contend that Mr. Kahn has failed to comply with Colo. Rev. Stat. § 38-1-118 (2000). [HN14] This statute allows an expert to state the consideration involved in a comparable sale of real property if the expert has personally examined the record of transfer and personally verified the amount of consideration with either the buyer or seller. Colo. Rev. Stat. § 38-1-118 (2000). Plaintiffs complain that Mr. Kahn was unable to specifically identify any comparable sales that he had used in formulating his valuation opinions. Plaintiffs also contend that Mr. Kahn's testimony would be unreliable and that Mr. Kahn's testimony should be stricken based on inadequacies of his report. The Private Defendants respond to Plaintiffs' motion in several ways. In particular, Defendants point out that Mr. Kahn has twenty-five years of experience in the real estate market in the County of Boulder.

[HN15] The decision whether to strike an expert witness is vested within the discretion of this Court. See Munoz v. St. Mary-Corwin Hosp., 221 F.3d 1160, 1168 (10th Cir. 2000). [**16] Due to Mr. Kahn's substantial experience in the relevant real estate market, the Court feels it would be improper to strike Mr. Kahn as an expert at this point of the litigation. However, Plaintiffs may renew their objections to Mr. Kahn's designation as

n3 Fed. R. Civ. P. 19(a) provides that [HN11] "if the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff." However, this provision to join a party as an involuntary plaintiff is not available in this case. See 7 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 1606 (2d ed. 1986) ([HN12] "A party may be made an involuntary plaintiff only if he is beyond the jurisdiction of the court, and is notified of the action, but refuses to join.").
an expert at the time of trial if it appears that his testimony does not comply with the various standards set forth regarding expert testimony.

Conclusion

This Court lacks subject matter jurisdiction to hear Plaintiffs' First Claim for Relief. Therefore, **IT IS HEREBY ORDERED THAT** Plaintiffs' First Claim for Relief be **DISMISSED WITH PREJUDICE** and Plaintiffs' Motion for Summary Judgment be **DENIED**. **IT IS FURTHER ORDERED THAT** Plaintiffs' Motion to Strike Defendants' Designation of Thomas Kahn as an Expert Witness be **DENIED**.

Dated this 31st day of January, 2001.

CLARENCE A. BRIMMER

UNITED STATES DISTRICT JUDGE
United States District Court,
D. Colorado.

Ruth BARKER and William T. Stephens, Jr.,
Trustee of the Thomas W. Seton
Trust, Plaintiffs,
v.
THE BOARD OF COUNTY COMMISSIONERS
OF THE COUNTY OF LA PLATA, COLORADO,
Tom Henderson, the United States Forest Service,
Theodore Levin and Pamela S. Levin, Seymour L. Gross and Elaine L. Gross,
Ronald S. Shafer and Georgia G. Shafer, John H. Miller and Barbara C. Miller,
Maxine Walker Perini, Donald L. Briggs, Berna Deane-Briggs, Nila Gaye Briggs
Sterns, Donald Earl Briggs, Jason Edward Briggs and Ronald L. Enge, the Heirs of
Reese McCloskey, Vincent Walker Perini, Frank Thomas Perini, Charles Whitting
Perini, and All Unknown Persons
Who Claim Any Interest in the Subject Matter of
This Action, Defendants.

No. CIV.A. 97-B-1912.

Nov. 12, 1998.

Landowners with mining claims brought action against county, United States Forest Service, and other landowners to quiet title to road that traversed their claims. Various parties moved for summary judgment. The District Court, Babcock, J., held that: (1) county resolution did not make road a public road; (2) fact questions precluded summary judgment on claim that road was public road pursuant to statute granting right-of-way for construction of public roads over public lands; (3) fact questions precluded summary judgment on adverse possession claim; and (4) landowners that had used road since 1883 had non-exclusive easement.

So ordered.

West Headnotes

[1] Highways ☞25
200k25 Most Cited Cases

County resolution did not, standing alone, make road traversing mining claims a public or county road.

170Ak2532 Most Cited Cases

Landowners with mining claims would be allowed to join in another landowners' motion for partial summary judgment, in action to quiet title to road that traversed their claims, even though motion was filed several weeks after deadline for filing dispositive motions, since landowner's summary judgment motion was filed before the deadline expired; however, joining landowners' arguments would be limited to arguments made by original landowner.

170Bk430 Most Cited Cases

Whether and when the offer of grant is accepted by the public, for purposes of federal statute granting a right-of-way for the construction of public roads over public lands, are questions resolved by state law. 43 U.S.C. (1970 Ed.) § 932.

[4] Dedication ☞34
119k34 Most Cited Cases

For purposes of statute creating an express dedication for a right-of-way for a road over land belonging to the government not reserved for public use, acceptance of grant through public use must occur before the land in question is withdrawn from the public domain or included within a reserve. 43 U.S.C. (1970 Ed.) § 932.

[5] Public Lands ☞4
317k4 Most Cited Cases

[5] Public Lands ☞5
317k5 Most Cited Cases

"Public land," or land on the public domain, is land which is open to sale or other disposition under general laws.

[6] Public Lands ☞4
317k4 Most Cited Cases

[6] Public Lands ☞5
317k5 Most Cited Cases

Any land to which any claims or rights of others have attached does not fall within the designation of
land on the public domain.

[7] Public Lands &– 64
317k64 Most Cited Cases

The date of a mining claim patent's issuance is not necessarily the date the land is withdrawn from the public domain, for purposes of federal statute granting a right-of-way for the construction of public roads over public lands. 43 U.S.C.(1970 Ed.) § 932

170Ak2504 Most Cited Cases

Fact question as to whether the public had used a road, or its equivalent, before the land on which it traversed was withdrawn from the public domain, precluded summary judgment on claim that road was public road pursuant to statute granting a right-of-way for the construction of public roads over public lands. 43 U.S.C.(1970 Ed.) § 932.

[9] Adverse Possession &– 114(1)
20k114(1) Most Cited Cases

Under Colorado law, one claiming title by adverse possession has the burden of proving the claim by a preponderance of the evidence. West's C.R.S.A. § 43-2-201(1)(c).

[10] Adverse Possession &– 13
20k13 Most Cited Cases

To acquire land by adverse possession, under Colorado law, one must prove possession of the disputed parcel for the statutory period and that this possession was hostile, adverse, actual, under a claim of right, exclusive, and uninterrupted. West's C.R.S.A. § 43-2-201(1)(c).

20k58 Most Cited Cases

A showing of force or actual dispute is not necessary to constitute hostile entry or to lay a foundation for a claim of adverse possession, under Colorado law; all that is required to establish hostility is that the person claiming adverse possession occupy the property adversely to the rights of the record holder. West's C.R.S.A. § 43-2-201(1)(c).

170Ak2504 Most Cited Cases

Genuine issue of material fact as to when, and if, public's use of road traversing mining claims was interrupted, precluded summary judgment on government's adverse possession claim. West's C.R.S.A. § 43-2-201(1)(c).

170Ak2504 Most Cited Cases

Genuine issue of material fact as to whether land in question was vacant, unoccupied, unenclosed, and unimproved, such that road across land was a permissive use, precluded summary judgment on government's adverse possession claim. West's C.R.S.A. § 43-2-201(1)(c).

[14] Adverse Possession &– 85(1)
20k85(1) Most Cited Cases

Under Colorado law, the presumption of adverse use, as well as the presumption of permissive use, are rebuttable, not conclusive presumptions, and may be overcome by competent evidence.

[15] Easements &– 36(1)
141k36(1) Most Cited Cases

Under Colorado law, presumption of permissive use that attaches to footpath or road across vacant, unoccupied, unenclosed, and unimproved land applied to steep terrain.

[16] Federal Civil Procedure &– 2411
170Ak2411 Most Cited Cases

A trial court is vested with broad discretion in deciding whether to enter default judgment.

170Ak2414 Most Cited Cases

Rule prohibiting court from entering default judgment against the United States or an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court derives from the rationale that the taxpayers at large should not be subjected to the cost of a judgment entered as a penalty against a government official which comes as a windfall to the individual litigant. Fed.Rules Civ.Proc.Rule 55(e), 28 U.S.C.A.

[18] Federal Civil Procedure &– 2415

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Entry of default is appropriate only when a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend. Fed.Rules Civ.Proc.Rule 55(a), 28 U.S.C.A.

[19] Federal Civil Procedure § 2416

170Ak2416 Most Cited Cases

Default judgment against government defendants was not warranted in action to quiet title to road traversing mining claims, which was brought by multiple landowners, even though government defendants did not file formal answer to one landowner's cross-claim, since the defendants had presented a vigorous defense of the action before that landowner entered its appearance, and that landowner's claims paralleled those of another landowner, which defendants had answered in a timely manner. Fed.Rules Civ.Proc.Rule 55(e), 28 U.S.C.A.

[20] Easements § 5

141k5 Most Cited Cases

Under Colorado law, landowners who had been using road to access mines since 1883 had acquired at least a non-exclusive easement for access to the mines.

*1122 William E. Zimsky, L.W. McDaniel, Durango, CO, for Plaintiffs.

Jeffrey P. Robbins, Michael McLachlan, Durango, CO, for Defs. La Plata County, Enge, Briggs, Sterns.

Fred C. Kuhlwilm, David Reese Miller, Denver, CO, for Defts. McCloskey.


Ted C. Wright, Durango, CO, for Defts. Gross and Levin.

Stephen D. Alfers, Craig R. Carver, Denver, CO, for Perini defendants.

MEMORANDUM OPINION AND ORDER

BABCOCK, District Judge.

In this action to quiet title to Lewis Creek Road in the County of La Plata, Colorado, plaintiff Ruth Barker ("Mrs. Barker") moves for partial summary judgment regarding the legal effect of Resolution 1976-84, adopted in 1976 by defendant Board of County Commissioners of the County of La Plata, Colorado ("the County"). Mrs. Barker also moves for partial summary judgment regarding whether defendants can demonstrate that Lewis Creek Road is a public road. Plaintiff William T. Stephens, Jr., Trustee of the Thomas W. Sefton Trust ("the Sefton Trust"), and defendants Vincent Walker Perini, Frank Thomas Perini, and Charles Whiting Perini (collectively, "the Perinis" or "the Perini defendants") join in Mrs. Barker's second motion for partial summary judgment. The Perinis also move for partial summary judgment regarding their ownership of a prescriptive easement to use Lewis Creek Road to access their patented mining claims. The Sefton Trust moves for entry of default and *1123 default judgment against defendant United States Forest Service ("the Forest Service"). Lastly, the Perinis and Maxine Walker Perini move for her dismissal because she neither claims nor owns any right, title, or interest in Lewis Creek Road. The motions are adequately briefed and oral argument will not materially aid their resolution. Jurisdiction exists pursuant to 28 U.S.C. §§ 1331, 1442 & 2409a (1997).

For the reasons set forth below, I grant, as stipulated, Mrs. Barker's motion for partial summary judgment regarding the validity and legal effect of Resolution 1976-84. I deny Mrs. Barker's motion for partial summary judgment regarding the defendants' ability to show Lewis Creek Road is a public road. I also deny the Sefton Trust's motion for entry of default and default judgment. Lastly, I grant the Perinis motion for partial summary judgment and the motion to dismiss Maxine Walker Perini.

I. PROCEDURAL HISTORY

Mrs. Barker commenced this quiet title action on May 8, 1997 in the District Court for the County of La Plata, Colorado. Mrs. Barker contends that Lewis Creek Road is private where it crosses her mining claims in La Plata County. The County and the Forest Service aver that the entirety of Lewis Creek Road is a public road.

In her original and amended complaints, Mrs. Barker named Thomas W. Sefton as a defendant. By written order entered on November 28, 1997,

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William T. Stephens, Jr., Trustee of the Thomas W. Sefton Trust, was substituted for Thomas W. Sefton. By written order entered on August 14, 1998, the Sefton Trust was re-aligned and became a named plaintiff. Like Mrs. Barker, the Sefton Trust contends that Lewis Creek Road is private where it traverses the trust's mining claims. The Sefton Trust does not contest the rights claimed by Mrs. Barker.

The Perinis, owners of patented mining claims, claim a right to use the entirety of Lewis Creek Road. The Perinis claim they acquired, pursuant to federal mining laws, the right to use those portions of the road that traverse public lands administered by the Forest Service. The Perinis further claim they acquired, by prescriptive use, the right to use those portions of the road that traverse private lands. All parties recognize the validity of the Perinis' claimed prescriptive right of use.

The heirs of Reese McCloskey ("the heirs of McCloskey"), also owners of mining claims, contend that the entirety of Lewis Creek Road is privately-owned. They allege that they acquired, by prescriptive use, the right to use that portion of Lewis Creek Road that runs from County Road 124 to Walls Gulch.

Default judgment entered on October 23, 1998 against defendants Tom Henderson, Theodore Levin, Pamela S. Levin, Seymour L. Gross, Elaine L. Gross, Ronald S. Shafer, Georgis A. Shafer, John H. Miller, Barbara C. Miller, and all unknown persons who claim any interest in the subject matter of this action ("the defaulting defendants"). The default judgment declares that the defaulting defendants have "no right, title, or interest in the real property that is the subject of this quiet title action." The default judgment, therefore, applies to all claims, cross-claims, and counterclaims against the defaulting defendants.

II. FACTS

The following facts are undisputed unless otherwise noted. Lewis Creek Road is located within a remote area of the San Juan National Forest, approximately 22 miles from Durango, Colorado. It begins at County Road 124, also known as La Plata Canyon Road. The terrain is steep and mountainous. From its junction with County Road 124, Lewis Creek Road runs approximately 3 1/3 miles in an easterly direction to the summit of Eagle Pass. Lewis Creek Road then continues 1 mile down the eastern side of Eagle Pass to a dead-end. It traverses public land within the San Juan National Forest, as well as several privately-owned mining claims.

Mrs. Barker owns three mining claims, the Bonanza Extension Lode Mining Claim, the Eagle Pass Mining Claim, and the Eureka Mining Claim (collectively, "the Barker Claims"). The heirs of McCloskey own the Barnagatt Mill Site, the Barnagatt No. 2 Mill Site, and the Crete Mining Claim (collectively, "the McCloskey Claims"). The Sefton Trust owns the Flying Swede Mining Claim *124 and the Terrible Swede Mining Claim (collectively, "the Sefton Claims"). The Perinis own the Ashland Lode, the Parole #2 Lode, the Sylvan #2 Lode, the Ten Broeck Lode, the Parole Ext Lode, the Brawnere Lode, the Durango Girl Lode, and the New Hope Lode (collectively, "the Perini Claims"). The Briggs own the Gold King Mining Claim ("the Briggs Claim"). Lewis Creek Road crosses through the Barker Claims. The McCloskey Claims, the Sefton Claims, the Perini Claims, and the Briggs Claim abut or are accessed from Lewis Creek Road. (Pretrial Ord. of 10/29/98 at 7.)

The Perinis or their predecessors in title have used Lewis Creek Road, including those portions that cross the Barker Claims and public lands, to access the Perini Claims since 1883 when the Ashland-Ten Broeck Mine commenced operations. They also used Lewis Creek Road to access the New Hope and Durango Girl Mines beginning in 1893. The parties concede that, because of such historic use by the Perinis or their predecessors in title, the Perinis acquired a non-exclusive prescriptive easement to use the Lewis Creek Road from its origin at County Road 124 to its dead-end on the other side of Eagle Pass, including those portions of the road that cross the Barker Claims and public lands. (Pretrial Ord. of 10/29/98 at 8.)

III. SUMMARY JUDGMENT LEGAL STANDARDS

Rule 56 provides that summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, admissions, or affidavits show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The non-moving party has the burden of showing that issues of
undetermined material fact exist. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A party seeking summary judgment bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, interrogatories, and admissions on file together with affidavits, if any, that it believes demonstrate the absence of genuine issues for trial. *Celotex*, 477 U.S. at 323, 106 S.Ct. 2548; *Mares v. ConAgra Poultry Co., Inc.*, 971 F.2d 492, 494 (10th Cir.1992). Once a properly supported summary judgment motion is made, the opposing party may not rest on the allegations contained in the complaint, but must respond with specific facts showing the existence of a genuine factual issue to be tried. *Ottesen v. United States*, 622 F.2d 516, 519 (10th Cir.1980); Fed.R.Civ.P. 56(e). These specific facts may be shown "by any of the kinds of evidentiary materials listed in Rule 56(e), except the pleadings themselves." *Celotex*, 477 U.S. at 324, 106 S.Ct. 2548.

Summary judgment is also appropriate when the court concludes that no reasonable juror could find for the non-moving party based on the evidence present in the motion and response. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The operative inquiry is whether, based on all documents submitted, reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Summary judgment should not enter if, viewing the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor, a reasonable jury could return a verdict for that party. *Liberty Lobby*, 477 U.S. at 252, 106 S.Ct. 2505; *Mares*, 971 F.2d at 494.

IV. ANALYSIS OF MRS. BARKER'S MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING THE LEGAL EFFECT OF RESOLUTION NO.1976-84

Mrs. Barker filed a motion for partial summary judgment on February 19, 1998, arguing that the County had no legal authority to declare by resolution that Lewis Creek Road is a public road. After a public hearing held on September 8, 1976, the County adopted Resolution No.1976-84. That Resolution states, in relevant part:

WHEREAS, C.R.S.1973 43-2-101 provides that a County shall adopt an official road map of the County establishing a County road system; and,

*1125 WHEREAS*, certain changes have been made to the County road system warranting a new map; and,

WHEREAS, a public hearing was held on September 8, 1976 for the purposes of adopting an official County road map designating primary and secondary roads for the County of La Plata; and,

WHEREAS, such hearing was held as required by law; and,

WHEREAS, at such hearing a proposed County road map was introduced into evidence; and,

WHEREAS, various people appeared to testify concerning the public uses of the road commonly known as Louis [sic] Creek Road; and,

WHEREAS, the Commissioners considered all of the evidence concerning the Louis [sic] Creek Road and found that from the testimony it has been openly, notoriously and adversely used without interruption or objections on the part of the owners of such lands for a consecutive period in excess of twenty (20) years by the public and should be considered a public road and should be made a part of the County road system.

NOW, THEREFORE, BE IT RESOLVED that the new official County road map, marked Exhibit "A" and attached hereto, shall be accepted by the County of La Plata and that all roads showing thereon shall become part of the County road system.

BE IT FURTHER RESOLVED that there was sufficient evidence established that the Louis [sic] Creek Road was open to the public and used by the public for a least twenty (20) consecutive years and that a proportion [sic] of Louis [sic] Creek Road extending from the existing County road to the top of Eagle Pass shall be considered as a public road and a County road and that such road shall be maintained by the United State's [sic] Forest Service under a road maintenance agreement.

(Resolution No.1976-84 of 9/21/76, Ex. 2 of Barker Mot. for Summ. J. of 2/19/98.) On October 20, 1981, the County adopted Resolution No.1981-86, which states in relevant part:

WHEREAS, La Plata Canyon Road, also designated as county Road 124, is on the County Road System and is maintained by La Plata County to the Gold King Mine turnaround, being a distance of approximately 7.0 miles from the junction of County Road 124 and U.S. Highway
160, and
WHEREAS, jurisdiction over the continuation of County Road 124 from the Gold King Mine turnaround to Kennebec Pass, a distance of approximately 7.5 miles, is vested in the Board of County Commissioners of La Plata County, and WHEREAS, the Lewis Creek Road, also known as County Road 124-A, being a road approximately 2.8 miles in length, extending easterly from its junction with the La Plata Canyon Road, said junction being located approximately 0.3 miles north of the Gold King Mine turnaround, is likewise a public highway with jurisdiction over same being vested in the Board of County Commissioners, and WHEREAS, the United States Forest Service has expressed a desire to provide maintenance of said roads, subject to the availability of funds, men, and equipment, said maintenance being performed during the summer months, and WHEREAS, it is necessary that the Board of County Commissioners grant to the United States Forest Service authority to so maintain said roads, NOW, THEREFORE, BE IT RESOLVED:
1. The United States Forest Service is hereby authorized to maintain the La Plata Canyon Road north of the Gold King Mine turnaround and the Lewis Creek Road, both as herein described.
2. Said maintenance shall be performed entirely at the cost of the United States Forest Service, and the United States Forest Service shall employ such monies, men, and equipment as it sees fit in said maintenance.

(Resolution No.1981-86, Ex. R of Forest Serv. Resp. of 10/6/98.)

[1] Mrs. Barker contends that Resolution No.1976-84 is void and without any legal *1126 effect. The Forest Service responded, conceding that Resolution No.1976-84 and Resolution No.1981-86 do not, standing alone, render the road public pursuant to C.R.S. § 13-2-201(1)(c). However, the Resolution establishes that, as a matter of law, from the date of its enactment, September 21, 1976, any public use of the road without the permission of the private landowners was open, notorious and adverse to the private landowners and, that since the date of its enactment all subsequent public use, if any, has been adverse to the private landowners. Board of County Commissioners vs. W.H.I., Inc., 992 F.2d 1061, 1066 (10th Cir.1993.)

* * * * *

... Plaintiff and Defendant Board of County Commissioners of La Plata County, Colorado further stipulate that the Court, if it is so inclined, may grant Plaintiff’s Motion for Partial Summary Judgment by entering an Order incorporating the above stipulated agreement ....

(Joint Stipulation of 9/2/98.) Although the Forest Service is not a party to this stipulation, the Forest Service’s position, as stated in its response brief, is consistent with the language of the stipulation. Moreover, the same stipulation is repeated in the pretrial order signed by counsel for the Forest Service. (Pretrial Ord. of 10/29/98 at 8.)

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Accordingly, I grant, as stipulated, Mrs. Barker's motion for partial summary judgment regarding the legal effect of Resolution 1976-84.

V. ANALYSIS OF MRS. BARKER'S MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING WHETHER LEWIS CREEK ROAD IS A PUBLIC ROAD

[2] Mrs. Barker next moves for partial summary judgment regarding the defendants' ability to show Lewis Creek Road is public. The Sefton Trust and the Perinis join in this motion. The Forest Service and the County object to the Perinis' joinder, arguing that the Perinis filed their motion and supporting brief several weeks after the deadline for filing dispositive motions. Because Mrs. Barker filed her second motion before the deadline expired, I exercise discretion to allow the Perinis' joinder in Mrs. Barker's second motion. I agree with the Forest Service and the County, however, that the Perinis' brief in support of Mrs. Barker's second motion contains additional argument and information beyond the scope of Mrs. Barker's second motion. Accordingly, I limit the Perinis' joinder to the arguments made by Mrs. Barker in her second motion and strike the Perinis' brief.

*1127 In support of their contention that Lewis Creek Road is public, the Forest Service and the County offer three alternative arguments derived from three different statutes. First, the Forest Service and the County maintain that Lewis Creek Road is a public road under Revised Statute 2477 ("R.S. 2477"), by which Congress granted the right-of-way for construction of public roads over public lands. Second, the Forest Service and the County contend that Lewis Creek Road is a public road by adverse possession pursuant to C.R.S. § 43-2-201(1)(c). Lastly, the County, but not the Forest Service, contends that Lewis Creek Road is public by operation of C.R.S. § 43-1-202, which declares as "public highways" all roads and highways open to public traffic on May 4, 1921. In her second motion for partial summary judgment, Mrs. Barker attacks only the first two statutory grounds upon which the Forest Service and the County rely. I address each statute separately.

a. Public Use Under R.S. 2477


[4][5][6] Colorado courts have interpreted R.S. 2477 as "an express dedication for a right of way for a road over the land belonging to the government not reserved for a public use." Sprague v. Stead, 56 Colo. 538, 543, 139 P. 544, 545 (1914). In Leach v. Manhart, 102 Colo. 129, 77 P.2d 652 (1938), the Colorado Supreme Court described how the public could have accepted the Congressional grant:

We have had occasion to consider [R.S. 2477] ... in varying situations. The sum of our holdings is that the statute is an express dedication of a right of way for roads over unappropriated government lands, acceptance of which by the public results from use by those for whom it was necessary or convenient. It is not required that work shall be done on such a road, or that public authorities shall take action in the premises. User is the requisite element, and it may be by any who have occasion to travel over public lands, and if the use be by only one, still it suffices. A road may be a highway though it reaches but one property owner. He has a right to access to other roads and the public has a right of access to him. Its character is not determined by the fact that but few persons use it.

Id. at 133, 77 P.2d at 653 (internal quotations and citations omitted) (quoted with approval in Brown v. Jolley, 153 Colo. 530, 537, 387 P.2d 278, 281-282 (Colo.1963)). Of course, such use must occur before the land in question is withdrawn from the public domain or included within a reserve. See, e.g., Jenks, 804 F.Supp. at 235-236 (roads created after Presidential proclamation reserved land as national forest were not public roads under R.S. 2477); Nicolas v. Grassle, 83 Colo. 536, 537, 267 P. 196, 197 (1928) (public right-of-way under
R.S. 2477 perfected before homestead entries.

Greene v. Board of Comm'rs of Park County, 64 Colo. 584, 587, 173 P. 719, 720 (1918) (public right-of-way perfected under R.S. 2477 before land reserved for school purposes); Korf v. Iten, 64 Colo. 3, 7-8, 169 P. 148, 150 (1917) (board of county commissioners' order declaring certain section lines as public highways did not affect the lands for which homestead entry filings existed); Sprague, 56 Colo. at 543, 139 P. at 546 ("subsequent entrymen and claimants" take land subject to rights-of-way created under R.S. 2477). "Public land, or land on the public domain, is land which is open to sale or other disposition under general laws." Ritchey, 888 P.2d at 299; accord Ute Indian Tribe v. State of Utah, 716 F.2d 1298, 1305 *1128 (10th Cir.1983) (creation of an Indian reservation or a forest or other particular use from public land removes it from the public domain). Thus, any land to which any claims or rights of others have attached does not fall within the designation of land on the public domain. Bardon v. Northern Pac. R.R. Co., 145 U.S. 535, 539, 12 S.Ct. 856, 36 L.Ed. 806 (1892).

[7] Applying these established legal principles to this case, the Forest Service and the County must establish public use, as described in Leach, of Lewis Creek Road where it crosses the Barker Claims before the Barker Claims were removed from the public domain. It is undisputed that the portion of the San Juan National Forest through which Lewis Creek Road traverses became part of the national forest reserve on June 13, 1905 by Presidential proclamation. (Proclamation of President Theodore Roosevelt, Ex. D to the Forest Service's Resp. Brf. of 10/6/98.) Thus, the land at issue was withdrawn from the public domain, at the very latest, in 1905. At least two of the three Barker Claims, however, were withdrawn before 1905. It is undisputed that Mrs. Barker's Eureka Mining Claim was patented on February 27, 1883. It is also undisputed that Mrs. Barker's Eagle Pass Mining Claim was patented on December 8, 1890. Apparently, no patent exists for Mrs. Barker's third claim, the Bonanza Extension Lode Mining Claim. Contrary to Mrs. Barker's contentions, however, the date of a patent's issuance is not necessarily the date the land is withdrawn from the public domain; indeed, it may be an earlier date. See, e.g., Benson Mining & Smelting Co. v. Alta Mining & Smelting Co., 145 U.S. 428, 431-432, 12 S.Ct. 877, 36 L.Ed. 762 (1892) (discussing the differences between patented and unpatented mining claims) (holding that a patent, when issued, relates back to the date of the inception of the rights of the patentee in the land); Witherspoon v. Duncan, 71 U.S. (4 Wall.) 210, 216, 18 L.Ed. 339 (1866) (once entry is made and certificate is delivered, land ceases to be a part of the public domain); Ritchey, 888 P.2d at 300 (date of filing of plat, rather than date of patent's issuance by the President, constitutes effective date of land's withdrawal from public domain).

[8] A crucial question remains: did the public use Lewis Creek Road before the land at issue was withdrawn from the public domain? The Forest Service offers historical maps and historical papers, as well as expert reports, showing or opining as to the existence of a road in the vicinity of the present-day road since the late 1800's. (Affs. of Bell, Exs. F, G, H & I to the Forest Service's Resp. Brf. of 10/6/98.) Mrs. Barker identifies the issuance dates of her mining claim patents as dates which would peg when the Barker Claims were withdrawn from the public domain. On the record before me, however, the genuine issue of material fact remains whether the public used Lewis Creek Road, or its equivalent, before the land on which it traverses was withdrawn from the public domain. Thus, viewing the evidence in a light most favorable to the Forest Service and the County, summary judgment is inappropriate.

Another unanswered question pertains to the effect of improvements made to Lewis Creek Road during 1953 and 1954. Mrs. Barker offers testimony of Chester Steward who states that he knows of, or directly participated in, the improvement or new construction of various segments of Lewis Creek Road during 1953 and 1954. (Aff. of Steward ¶ 3, Ex. 1 to Barker Opening Brf. of 9/3/98; Depo. of Steward at 8, 10, 52, 59, Ex. 2 to Barker Opening Brf. of 9/3/98.) Based primarily on his testimony, Mrs. Barker argues that R.S. 2477 is inapplicable because the disputed portions of Lewis Creek Road did not exist until the 1950's and, therefore, it could not have been used by the public before its withdrawal from the public domain. (Barker Reply Brf. of 10/28/98 at 2.) The Forest Service and the County respond that the improvements of 1953 and 1954 did not materially change the path of Lewis Creek Road and, therefore, the public right-of-way obtained under R.S. 2477 applies equally to the road after its improvement in 1953 and 1954. In support of their response, the Forest Service and the County offer the testimony of two expert witnesses who reportedly conducted detailed research of the past
and present locations of Lewis Creek Road. They opine that Lewis Creek Road now follows substantially the same path as it did before 1953. (Aff. of Bell, Report of Bell of 6/18/98 & Report of Gash of 5/28/98, Exs. 1, AA & BB, respectively, to the Forest Service’s Resp. Brf. of 10/6/98.) In her reply brief, Mrs. Barker concedes that a genuine issue of material fact exists regarding the past and present locations of Lewis Creek Road. (Barker Reply Brf. of 10/28/98 at 7.) Accordingly, summary judgment is inappropriate as to the defendants’ ability to show that Lewis Creek Road is a public road under R.S. 2477.

b. Prescription Under § 201(1)(c)

[9][10][11] The Forest Service and the County also rely on § 201(1)(c), which declares that public highways include “[a]ll roads over private lands that have been used adversely without interruption or objection on the part of the owners of such land for twenty consecutive years.” C.R.S. § 43-2-201(1)(c) (1997). One claiming title by adverse possession has the burden of proving the claim by a preponderance of the evidence. Gerner v. Sullivan, 768 P.2d 701 (Colo.1989). To acquire land by adverse possession, one must prove possession of the disputed parcel for the statutory period and that this possession was hostile, adverse, actual, under a claim of right, exclusive, and uninterrupted. Ritchey, 888 P.2d at 300. A showing of force or actual dispute is not necessary to constitute hostile entry or to lay a foundation for a claim of adverse possession. All that is required to establish hostility is that the person claiming adverse possession occupy the property adversely to the rights of the record holder. Anderson v. Cold Spring Tungsten, Inc., 170 Colo. 7, 10, 458 P.2d 756, 758 (1969).

[12] The Forest Service and the County offer extensive evidence of the public’s use of Lewis Creek Road during this century. (Aff. of Charles Perini, Ex. 2 to the Perini’s Brf. of 9/3/98; Depo. of Steward at 44-49, Aff. of Price, Aff. of Blake, Depo. of Slade at 6-7, Depo. of Weaver at 6-8, Depo. of Sefron at 14-18, Aff. of Ferguson, Exs. N, T, U, V, W, M & Y, respectively, to the Forest Service’s Resp. Brf. of 10/6/98; Transcript of 1976 Hearing and Letters Submitted During Hearing, Exs. O & P, respectively, to the Forest Service’s Resp. Brf. of 10/6/98.) Focusing on whether such use was interrupted, Mrs. Barker offers evidence showing that she or her husband maintained a locked cable or gate across Lewis Creek Road beginning in 1974 and continuing through the present. (Depo. of McNeil at 3, 8-9, Depo. of Bell at 6, 8-9, 12, Exs. 7 & 8 to Barker Opening Brf. of 9/3/98; Transcript of 1976 Hearing at 12-13, Ex. H to the County’s Resp. Brf. of 10/6/98.) The Forest Service does not dispute the existence of a locked cable or gate across Lewis Creek Road beginning in 1974. Yet the County offers the testimony of one witness who does not recall seeing a gate or cable blocking access to Lewis Creek Road during his recreational use “throughout the 1950s, 1960s and 1970s.” (Aff. of Price, Ex. A to the County’s Resp. Brf. of 10/6/98 (emphasis added).) Thus, a genuine issue of material fact exists as to when, and if, the interruption began. Of course, if the Forest Service and the County can establish adverse possession before Mrs. Barker’s husband purchased the Barker Claims in 1974, the erection of a barricade beginning in 1974 is irrelevant. See Doty v. Chalk, 632 P.2d 644, 646 (Colo.App.1981) (title to property acquired by adverse possession matures into absolute fee interest after the statutory prescriptive period has expired).

Attempting to narrow the period of potential adverse possession, Mrs. Barker also argues that the disputed portions of Lewis Creek Road did not exist until 1953 and 1954. Again, as noted above, Mrs. Barker concedes in her reply brief that genuine issues of material fact exist as to whether the construction and improvements made during 1953 and 1954 followed the same “reasonably certain and definite line” as the road that existed before 1953. Accordingly, the Forest Service and the County are not, as a matter of law, limited to showing adverse possession after 1953 and summary judgment is inappropriate on this issue.

Lastly with respect to her second motion, Mrs. Barker argues that the use of a road or footpath across vacant, unoccupied, unenclosed, and unimproved land is permissive use. In support of this contention, Mrs. Barker cites Simon v. Pettit ("Simon II"), 687 P.2d 1299, 1301 (Colo.1984). In Simon II, the plaintiffs sought a declaration that two footpaths, each 18 inches wide with definite and specific lines that traversed the *1130 defendants’ lands, were public highways by virtue of adverse possession under § 201(1)(c). The Jury found that the footpaths had been used by the public for twenty consecutive years and that the use was actual, visual, hostile, and with the implied permission of the owners as evidenced by their silent acquiescence. The Colorado Court of Appeals reversed the district
court's judgment, which declared the footpaths public highways, ruling that because the land involved was vacant, unenclosed, and unoccupied, the presumption that the use was adverse did not apply. *Simon v. Pettit* (*Simon I*), 651 P.2d 418, 420 (Colo.App.1982) (collecting cases). Implicit in its holding is the Court of Appeals' recognition that the counter-presumption of permissive use of unenclosed lands for passage, which was unrebutted, controlled. *Id.* at 421. Moreover, the countervailing nature of these two presumptions was again recognized after *Simon II* in *Durbin v. Bonanza Corp.*, 716 P.2d 1124, 1129 (Colo.App.1986).

The Colorado Supreme Court granted certiorari to review the Court of Appeals' decision that the footpaths were "roads" under § 201(1)(c). *Simon II*, 687 P.2d at 1299. The Colorado Supreme Court, reaffirming an earlier decision "that the scope to be given the word ['road'] depends upon the context in which it appears," *see Hale v. Sullivan*, 146 Colo. 512, 518, 362 P.2d 402, 405 (1961), indicated that it did "not believe that the legislature intended an eighteen-inch footpath in a populated, residential, urban area to be considered a 'road' so as to permit it to be declared a public highway." *Simon II*, 687 P.2d at 1302. The Colorado Supreme Court, noting that it resolved the appeal on the issue of whether the footpaths qualify as roads under § 201(1)(c), declined to review the Colorado Court of Appeals' decision that the presumption of adverse use does not apply to vacant, unenclosed, and unoccupied land. *Simon II*, 687 P.2d at 1304. I presume, therefore, that Mrs. Barker intended to cite *Simon I*, rather than *Simon II*, in support of her contention that the use of a Lewis Creek Road was permissive rather than adverse.

[13] The Forest Service and the County respond that the mining claims traversed by Lewis Creek Road were used extensively and continuously by their owners for prospecting, recreation, hunting, vacationing, and commercial enterprise. Further, some of the owners erected structures on their claims, such as cabins. (Depo. of Perini at 13, 34, Depo. of E.T. Barker at 13-14, 18, 22, Depo. of Barry Barker at 10, 16-17, Depo. of Harley Sefton at 11-14; Ex. L, K, I & M, respectively, of the Forest Service's Resp. Brf. of 10/6/98.) Genuine issues of material fact exist, therefore, regarding whether the land in question is, and was, vacant, unoccupied, unenclosed, and unimproved. Resolution of these issues will likely require parcel-by-parcel study, for each owner's use of their land has varied.

[14] Even if the land in question was vacant, unoccupied, unenclosed, and unimproved as Mrs. Barker suggests, she would not be entitled to summary judgment. The presumption of adverse use, as well as the presumption of permissive use, are rebuttable, not conclusive presumptions. *Durbin*, 716 P.2d at 1129. Each presumption may be overcome by competent evidence.

[15] Lastly, and for purposes of clarity and finality, I reject the argument of the Forest Service and the County regarding the inapplicability of the presumption of permissive use. If it is eventually shown that the land in question was vacant, unoccupied, unenclosed, and unimproved, then the rebuttable presumption of permissive use shall apply in this case. I am unpersuaded by the Forest Service's and the County's contention that the rule of law established in *Simon I* should not apply to the steep terrain at issue here. *Simon I*, and the cases upon which it relies as persuasive guidance, make no exception for steep terrain. Landowners can, and often do, erect fences on steep terrain.

In summary, genuine issues of material fact exist regarding the defendants' ability to show Lewis Creek Road is public. The theories advanced by the Forest Service and the County remain viable, including their reliance on R.S. 2477 and § 201(1)(c). The cases discussed above, the contradictory evidence offered, and the complex nature of this case counsel against summary judgment on such theories. Resolution of this case will likely require parcel-by-parcel analysis in light of *Simon I* the precise elements of each legal theory. In their dispositive motions, the parties seem to have lost sight of these important concerns. The law simply does not permit me to treat different and varying parcels of land as the same for purposes of R.S. 2477, § 201(1)(c), or any other theory of public or private ownership.

VI. ANALYSIS OF THE SEFTON TRUST'S MOTION FOR ENTRY OF DEFAULT JUDGMENT AGAINST THE FOREST SERVICE

By a written order entered on August 14, 1998, the Sefton Trust was re-aligned and became a named plaintiff. Before the Sefton Trust was re-aligned and became a named plaintiff, it filed a cross-claim
for declaratory relief against all defendants, seeking a declaration that Lewis Creek Road, in its entirety, is a private road. (Answer and Cross Claim of 11/26/97.) The Forest Service never filed a formal answer to the Sefton Trust's cross-claim.

[16][17][18] A trial court is vested with broad discretion in deciding whether to enter default judgment. *Grandbouche v. Clancy*, 825 F.2d 1463, 1468 (10th Cir.1987). Rule 55(e), applicable here, restricts the availability of default judgments against agencies of the United States of America. It states that "[i]n no judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." Fed.R.Civ.P. 55(e). This rule derives from the rationale that "the taxpayers at large should not be subjected to the cost of a judgment entered as a penalty against a government official which comes as a windfall to the individual litigant." *Campbell v. Eastland*, 307 F.2d 478, 491 (5th Cir.1962). Based on this rationale, courts have construed this section liberally, refusing to enter default where the government has failed timely to plead or otherwise defend, or setting aside such default on motion by the government. *Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 2702. See also Anderson v. Federal Bureau of Prisons*, 107 F.3d 880, 1997 WL 121213, *2 (10th Cir.1997) (unpublished opinion) (attached to this order in accordance with the Tenth Circuit's General Order of November 29, 1993) (government did not abandon action when it timely responded to a litigant's motion for summary judgment); *Mason v. Lister*, 562 F.2d 343, 345 (5th Cir.1977) (district court's refusal to enter default was not abuse of discretion where government responded promptly to motion for default judgment). And, critically, entry of default is appropriate only "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend." Fed.R.Civ.P. 55(a) (emphasis added).

[19] Default judgment is inappropriate under the circumstances of this case. The Forest Service began its vigorous defense of this action on September 3, 1997, nearly three months before the Sefton Trust entered its appearance on November 26, 1997. The Sefton Trust's claims parallel those of Mrs. Barker, which the Forest Service answered in a timely manner. The Forest Service also responded timely to three separate motions for summary judgment, including Mrs. Barker's second motion for summary judgment in which the Sefton Trust joined. Moreover, the Sefton Trust is not prejudiced by having to prosecute its claims at trial when it has known for several months of the Forest Service’s defenses and intent to assert such defenses at trial. Further, the Sefton Trust filed its motion for default judgment after the deadline for dispositive motions. Finally, the October 29, 1998 controlling pretrial order setting forth the Forest Service's defenses, approved by counsel for the Sefton Trust, makes no issue of Forest Service default. Accordingly, I conclude that the Sefton Trust's motion for default judgment is without merit.

VII. ANALYSIS OF THE PERINS' MOTION FOR PARTIAL SUMMARY JUDGMENT

[20] The Perins request the issuance of an order declaring that they are owners of a non-exclusive easement for access to the Perini Claims, which easement includes:

... that portion of the Lewis Creek Road that runs through the properties owned by Plaintiff Ruth Barker and other Defendants, including the Defendant United *1132 States. Further, the Perins move the court to declare that the Perins non-exclusive easement is for all lawful purposes, including, without limitation, the easement and right-of-way, and the right to vary the use to a reasonable extent, for all lawful purposes, including, without limitation, for the exploration, development, mining, haulage of timber, equipment, supplies, ores, and any and all purposes incidental thereto.

(Perins' Mot. for Summ. J. of 9/3/98 at 10-11.) The County, Mrs. Barker, the Sefton Trust, the Briggs, and the heirs of McCloskey do not object to the Perins' motion. The Forest Service filed a response to the Perins' motion for partial summary judgment, contending that: (1) if the entire length of Lewis Creek Road is declared to be a public road, then the Forest Service lacks the legal authority to regulate use of the road by the Perins or anyone else; and (2) if the plaintiffs prevail and Lewis Creek Road is declared private as to those sections of the road that cross patented mining claims, then the Forest Service reserves the right to reasonably regulate those portions of the road that cross public land. The Forest Service, envisioning only two possible outcomes of this case, focuses on its ability to regulate those portions of Lewis Creek Road that cross public land.

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The pretrial order, entered on October 29, 1998 and after the Forest Service responded to the Perinis’ motion, contains the following stipulations:

The Perinis and/or their predecessors in title have used Lewis Creek Road from the junction with County Road 124 over Eagle Pass for access to the Perini Claims, or some of them, beginning with the operation of the Ashland-Ten Broeck Mine in 1883, the New Hope Mine and the Durango Girl Mine in 1893. The Perinis and/or their predecessors have used Lewis Creek Road, including that portion over public lands administered by the United States Forest Service, and including that portion of the Lewis Creek Road that runs through the Plaintiff Ruth Barker’s Subject Property. The Perinis have used the road for the exploration, development, and mining, haulage of timber, equipment, supplies, ores, and purposes incidental thereto.

The Perini Brothers and/or their predecessors in title, acquired said non-exclusive prescriptive easement to use the Lewis Creek Road which starts at County Road 124, also known as La Plata Canyon Road, from the junction with County Road 124, over Eagle Pass, including that portion of Lewis Creek Road that runs through the Barker/Subject Property to access the Perini Claims or any of them for all lawful purposes to access their respective mining claims, including, without limitation, the easement and right of way, and the right to vary their use to a reasonable extent, for the exploration, development, and mining, haulage of timber, equipment, supplies, ores, and any and all purposes incidental thereto. The Perinis and/or their predecessors in interest have acquired such prescriptive easements through their use that was continuous, open, notorious, hostile and adverse to the interest of all Defendants and Ruth Barker and her or their predecessors in interest, for a period in excess of twenty (20) years, curing which time the Perinis and their predecessors in interests have used the Lewis Creek Road on a regular basis.

(Preliminary Ord. of 10/29/98 at 8.) These stipulations, read together, concede the relief requested by the Perinis. The pretrial order is signed by each party’s counsel, including counsel for the Forest Service.

Although the Forest Service is apparently concerned about its ability to regulate those portions of Lewis Creek Road that cross public land, the nature of the parties’ rights will determine their ability, or inability, to control others’ use of Lewis Creek Road. While the Perinis’ claimed easement will be of no import if the road is deemed public, the existence of such non-exclusive easement could affect the respective rights of the Forest Service and the Perinis if the entirety of the road is not deemed public. Thus, I fail to see how the Forest Service could stipulate to the existence of such easement when it is well-recognized that private individuals may not possess adversely against the government. See United States v. Osterlund, 505 *1133 F.Supp. 165, 168 (D.Colo.1981); Omaha & Grant Smelting & Refining Co. v. Tabor, 13 Colo. 41, 53, 21 P. 925, 929 (1889). Notably, if Lewis Creek Road became a public right-of-way under R.S. 2477 before adverse use by the Perinis’ predecessors in interest ripened into an absolute fee interest, such adverse use is irrelevant. Likewise, if such adverse use did not ripen into an absolute fee interest before 1905, the inclusion of much of the land within the forest reserve would have permanently tolled the then-applicable required time of possession. I assume, therefore, that the Forest Service has stipulated to the existence of the Perinis’ easement only because such stipulation is consistent with the Forest Service’s position that Lewis Creek Road is public and therefore available to all. At this juncture, it is sufficient that the Forest Service recognizes that the Perinis have acquired at least a non-exclusive right to use the entirety of Lewis Creek Road. Accordingly, I grant the Perinis’ motion for partial summary judgment, noting the Forest Service’s reservation of its rights to regulate the use of Lewis Creek Road to the extent permitted by law. Such regulation, however, is not a question before me.

VIII. ANALYSIS OF THE MOTION TO DISMISS MAXINE WALKER PERINI

The Perinis and Maxine Walker Perini jointly move for her dismissal because she claims no right, title, or interest in the subject matter of this lawsuit. Although Maxine Walker Perini once owned all or part of the Perini Claims, she no longer holds any interest in such claims. No other party objects to her dismissal and, therefore, I grant the motion.

Accordingly, I ORDER that:

(1) plaintiff Ruth Barker’s motion for summary judgment regarding the legal effect of County Resolution No. 1976-84 is GRANTED as stipulated; Resolution No. 1976-84 does not, standing alone, render Lewis Creek Road public pursuant to C.R.S. § 43-2-201(1)(c); nonetheless,
Resolution No. 1976-84 establishes that, as a matter of law, any public use of Lewis Creek Road without the permission of the private landowners after September 21, 1976 was open, notorious, and adverse to those private landowners;

(2) plaintiff Ruth Barker's motion for summary judgment regarding the defendants' ability to show Lewis Creek Road is public is DENIED; the Perini defendants' joinder in such motion is PERMITTED but the Perinis' brief in support of such joinder, filed on September 24, 1998, is STRICKEN;

(3) the Perini defendants' motion for summary judgment regarding their acquisition of a non-exclusive prescriptive easement to use Lewis Creek Road is GRANTED as stipulated by the parties in the pretrial order; the Forest Service's reservation of its rights to regulate the use of the road by the Perinis to the extent permitted by law is noted; and

(4) the Perini defendants' and defendant Maxine Walker Perini's joint motion to dismiss Maxine Walker Perini is GRANTED; defendant Maxine Walker Perini is DISMISSED as a party defendant and the caption is AMENDED accordingly.

END OF DOCUMENT
LEXSEE 586 F.2d 159

JOHN KINSCHERFF and SUNNYLAND DEVELOPMENT CO., INC., a New Mexico corporation, Appellants, vs. UNITED STATES OF AMERICA, THE STATE OF NEW MEXICO, THE PUEBLO OF SANTA ANA, MARK IV ENTERPRISES, a New Mexico corporation, E. M. RIEBOLD and H. E. LEONARD, Appellees.

No. 77-1083

UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

586 F.2d 159; 1978 U.S. App. LEXIS 8072

August 8, 1978, Argued

November 1, 1978, Decided

PRIOR HISTORY:

[**1]

Appeal from the United States District Court for the District of New Mexico (D.C. #76-135-P)

COUNSEL:


Richard L. Russell, Chief Counsel, State Highway Dept., Santa Fe, N. M. (Toney Anaya, Atty. Gen. of New Mexico, and Henry Rothschild, Deputy Chief Counsel, State Highway Dept., Santa Fe, N. M., with him on the brief), for appellee, State of New Mexico.

JUDGES:

Before SETH, Chief Judge, and BARRETT and LOGAN, Circuit Judges.

OPINIONBY:

PER CURIAM

OPINION:

[*160]

This is a quiet title action under 28 U.S.C. § 2409a, seeking declaratory relief and damages against the United States and others. The complaint alleges that the United States had built a road on its land to reach a dam site, and that it continues to control [**2] the use of this road. The road is asserted to be the only access plaintiffs have to their property. Plaintiffs are seeking to develop their land, but the United States would not let them use the road, which is adjacent to the property, to bring in equipment, machinery, or material.

Plaintiffs seek to establish a right to use the road for all purposes as members of the public, and also as a way of necessity. The land of plaintiffs was patented to their predecessors in interest.

The trial court dismissed as to the defendant, State of New Mexico, as to the Pueblo of Santa Ana, and as to several individuals who were residents of New Mexico. Subsequently the court also dismissed the cause as to the United States for failure to state a cause of action under 28 U.S.C. § 2409a, and this appeal was taken.

On this appeal the plaintiffs argue that this is properly an action to quiet title. The statute, [HN1] 28 U.S.C. § 2409a, in permitting suits against the United States in quiet title actions to real property in which the Government claims an interest, requires in part that the plaintiff "... set forth with particularity the nature of [**3] the right, title, or interest which the plaintiff
claims in the real property, the circumstances under which it was required, and the right, title, or interest claimed by the United States." 28 U.S.C. § 2409a(c). Thus plaintiffs assert that they have a real property interest in the Jemez Dam Road as members of the public entitled to use public roads pursuant to N.M.S.A. § 55-1-1 Et seq. (1953 Comp.), and as an owner of land abutting a public highway, and under 43 U.S.C. § 932. This "interest" in plaintiffs, we must hold, is not an interest in real property contemplated by 28 U.S.C. § 2409a. If it exists, it is vested in the public generally. The legislative history of section 2409a refers to the historical development of Quia timet suits in the courts of equity in England, and to quiet title suits as developed in this country. U.S.Code Cong. & Admin.News, 1972, Vol. 3, p. 4547. It thus must be assumed that Congress intended to permit to be brought against the United States the typical quiet title suit, as it has developed in the various states in this country through statutory and case law.

The plaintiffs, [**4] on this point, do not assert that their interest is an easement or any similar right; instead, as mentioned above, the right is claimed by them as members of the public. [HN2] The substantive law in New Mexico for quiet title actions refutes the notion that the public has a real property interest in public roads. A quiet title action may be brought by anyone claiming an interest in the real property. Marquez v. Maxwell Land Grant Co., 12 N.M. 445, 78 P. 40. The interest, however, must be some interest in the title to the property. Rock Island Oil & Refining Co. v. Simmons, 73 N.M. 142, 386 P.2d 239. An attempt to remove a cloud from title presupposes that the plaintiff has some title to defend. Weathers v. Salman, 86 N.M. 203, 521 P.2d 1152.

[HN3] Members of the public as such do not have a "title" in public roads. To hold otherwise would signify some degree of ownership as an easement. It is apparent that a member of the public cannot assert such an ownership in a public road. Plaintiffs [*161] argue also that the general provisions for highways, N.M.S.A. § 55-1-1 Et seq. (1953 Comp.), confer on the public a real property interest in public [*5] roads. Plaintiffs misconstrue the statute because it does no more than define public highways, determine maintenance responsibility, and provide an administrative process for abandoning public roads. Indeed, section 55-1-5 provides that rights of way vest in the State of New Mexico after a state highway has been open to the public for one year.

Thus the "interest" plaintiffs seek to assert as part of the public is not of such a nature to enable them to bring a suit to quiet title.

Plaintiffs also claim an interest by virtue of an implied easement of necessity, as successor in interest to a grantee of the United States by patent in 1936. [HN4] Easements are real property interests subject to quiet title actions. The legislative history of 28 U.S.C. § 2409a indicates that Congress intended easements to be included in the real property rights adjudicated in a quiet title action. The House Report states: "The quieting of title where the plaintiff claims an estate less than a fee simple an easement or the title to minerals is likewise included in the terms of the proposed statute." H.R.Rep.No. 92-1559, 92d Cong., 2d Sess. reprinted in (1972) U.S.Code Cong. & Admin. [**6] News 4552.

An easement of necessity for some purposes could possibly have arisen when the United States granted the patent to plaintiffs' predecessor in interest. The complaint so asserts. [HN5] While nothing ordinarily passes by implication in a patent, Walton v. United States, 415 F.2d 121 (10th Cir.), an implied easement may arise within the scope of the patent. Superior Oil Co. v. United States, 353 F.2d 34 (9th Cir.). In Superior Oil, which involved an alleged implied right of access over a road on Hopi land to the plaintiffs' leasehold, the court stated: "The scope and extent of the right of access depends ... upon what must, under the circumstances, be attributed to the grantor either by implication of intent or by operation of law founded in a public policy favoring land utilization," (citing 2 Thompson, Real Property, § 362). 353 F.2d at 36. In United States v. Dunn, 478 F.2d 443 (9th Cir.), the court held that defendants were entitled to a hearing to determine whether their patent included an implied easement to construct an access road across federal land.

With the dismissal on motion the issues as to the existence [**7] of an implied easement of necessity, its extent, or whether this road is such an easement, were not considered. These are each mixed issues of fact and law. The allegations in the complaint adequately raised the claim of easement of necessity in the lands of the United States, and an easement of such nature is an interest which can be properly raised in a quiet title action under 28 U.S.C. § 2409a. The facts thus must be developed. We, of course, express no opinion as to whether such an easement here exists, nor its extent.

Similarly, [HN6] the limitation issue is a mixed question of fact and law as to whether the patentee or a successor in interest knew or should have known of the Government's claim of no easement or of a limited easement. Again we express no opinion as to such limitation period, and the facts pertinent to the commencement of the limitation period must be developed.
Thus by reason of the factual issues raised, but not before the trial court, as to the easement and the period of limitation, the case must be remanded.

We find no error as to the dismissal of the several defendants nor in the way it was done. The plaintiffs had adequate opportunity [***8] at the hearing to set aside the orders to present their position.

The order of dismissal is set aside, and the case is remanded for further proceedings.
1. For over a century, RS 2477 case law enjoyed consistent interpretation in both the state and federal courts.

2. In my experience, the federal land management agencies seldom questioned the ability of private persons to use roads which were clearly established on the public domain, particularly for access to their own property.

3. Clear rules of analysis applied to road issues for decades appears to be rapidly eroding under revisionist assault.

4. Using Boulder County as an example, the first gold boom began in 1859; the Caribou Silver boom began in 1869, followed by the 1871-1872 telluride boom, which lasted for many years. The silver boom ended with a thud in 1893, but the first tungsten boom was to start around the turn of the century.

5. The National Forest Reserves were established in Boulder County in the period 1905-1917, long after the mining road networks invited by RS 2477 were in place.

6. Most of these roads were clearly mapped, whether or not included in the County road systems then under development. In 1866, there was neither a county government, nor a State of Colorado.

7. As a point of fact, the single greatest responsibility of County Commissioners in the decades following statehood was the development and acquisition of roads. The building of roads was regarded as a good thing.

8. Barker represents a traditional view of RS 2477 in the federal courts, which followed state law. Note, however, that the Forest Service and the County were parties there, and urging that the road at issue was public. After Kinscherff and Staley, it would appear that only states and counties can assert rights to "public" roads, leaving private access at the mercy of county politics, which can vary radically by jurisdiction.

9. Kinscherff and Staley have empowered both the Forest Service and the County to begin to treat longstanding pre-Forest roads as "illegal roads", and, occasionally, to deny vehicular access even when it has historically existed. Thus, the field is in turmoil. It is not just "phantom roads" that are threatened, but all roads, as virtually every mountain road crosses federal lands at some point. Should your rights under the law depend on whether you live in Boulder County, or, San Juan County? I would suggest that they now do so depend.

10. In 1866, roads were a welcome addition to the landscape. They were built by cutting trees, moving rocks, and, sometimes leveling. This was accepted practice.