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Protecting Public Lands from the Public: Kane County and Revised Statute 2477

I. INTRODUCTION

In 1866, Congress passed Revised Statute 2477 ("R.S. 2477").[1] This Reconstruction-era statute granted a "right of way for the construction of highways over public lands, not reserved for public uses,"[2] to encourage the development and construction of highways on public lands.[3] The statute was an open-ended grant and did not require any action by local governments—or the federal government—to establish a valid right-of-way.[4] Thus, it became difficult—if not impossible—to track valid R.S. 2477 rights-of-way.[5] In 1976, Congress passed the Federal Land Policy and Management Act of 1976 ("FLPMA"), which repealed R.S. 2477.[6] But FLPMA preserved R.S. 2477 rights-of-way established before 1976.[7]

Recently, in *Wilderness Society v. Kane County*,[8] the validity and scope of R.S. 2477 rights-of-way came into question after Kane County passed an ordinance allowing off-highway vehicle ("OHV") use on certain county roads located within Grand Staircase-Escalante National Monument ("Grand Staircase-Escalante"). This Note will address the weaknesses in the *Wilderness Society* opinion, including the Tenth Circuit's decision to grant standing to private third-party

1. S. Utah Wilderness Alliance v. BLM, 425 F.3d 735, 740 (10th Cir. 2005).

2. Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253, *codified at* 43 U.S.C. § 932, *repealed by* Federal Land Policy Management Act of 1976, Pub. L. No. 94-579, § 702, 90 Stat. 2743, 2787 (1976).

3. *See* U.S. Department of the Interior, Bureau of Land Management, *BLM Administrative Determinations on R.S. 2477 Rights-of-Way*, http://www.blm.gov/ut/st/en/prog/more/lands_and_realty/rs2477_rights-of-way.print.html (last visited Feb. 27, 2010).

4. 43 C.F.R. § 244.55 (1938).

5. Michael J. Wolter, Comment, *Revised Statutes 2477 Rights-of-Way Settlement Act: Exorcism or Exercise for the Ghost of Land Use Past?*, 5 DICK. J. ENVTL. L. & POL'Y 315, 319 (1996).

6. Federal Land Policy Management Act § 702.

7. "Nothing in this Act . . . shall be construed as terminating any valid . . . right-of-way . . . existing on the date of the approval of this Act." *Id.* § 701(a). "All actions by the Secretary concerned under this Act shall be subject to valid existing rights." *Id.* § 701(h).

8. 581 F.3d 1198 (10th Cir. 2009).

plaintiffs under the Supremacy Clause[9] and to ignore Kane County's R.S. 2477 rights-of-way. In particular, Part V will explain the pitfalls of the majority opinion by showing that the majority failed to adequately address Kane County's vested rights in R.S. 2477 roads and, in so doing, erred when it held that any county ordinance allowing OHVs in contradiction to federal management plans is preempted under the Supremacy Clause.

II. FACTS AND PROCEDURAL HISTORY

There are more than 1.6 million acres of federal public land within Kane County, Utah.[10] Most of the public land in Kane County lies within Grand Staircase-Escalante.[11] Grand Staircase-Escalante was created on September 18, 1996, by former President Bill Clinton.[12] It encompasses 2700 square miles of land, in two Utah counties, equaling the size of Delaware and Rhode Island combined.[13] Or, stated in different terms, Grand Staircase-Escalante is equal "to a one-and-a-half mile wide tract of land stretching from San Francisco to New York City."[14] Since Grand Staircase-Escalante was created, Kane County has fought to have a voice in the management of these public lands.[15] *Wilderness Society* represents the most recent litigation in this ongoing fight.

The struggle in *Wilderness Society* began in 2000 when the Department of the Interior approved a management plan for Grand Staircase-Escalante.[16] This plan prohibited OHV travel on many roads within Grand Staircase-Escalante, but recognizing the

9. U.S. CONST. art. VI, cl. 2.

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

11. *Id.*

12. Grand Staircase/Escalante National Monument, http://www.nationalparkreservations.com/grand-staircase-escalante-national-park.htm (last visited Feb. 17, 2010).

13. Eric C. Rusnak, Comment, *The Straw that Broke the Camel's Back? Grand Staircase-Escalante National Monument Antiquates the Antiquities Act*, 64 OHIO ST. L.J. 669, 671 (2003) (citing Matthew W. Harrison, *Legislative Delegation and Presidential Authority: The Antiquities Act and the Grand Staircase-Escalante National Monument—A Call for a New Judicial Examination*, 13 J. ENVTL. L. & LITIG. 409, 410 (1998)).

14. *Id.* (citing Statement of Michael E. Noel, Chairman Kane County Resource Development Committee, *The National Monument Fairness Act of 2001: Hearing on H.R. 2114 Before the House Comm. on Res., Subcomm. on Nat. Parks, Recreation, and Pub. Lands*, 107th Cong. 50–55 (2001)).

15. *See, e.g.*, Highway Robbery: Utah's Lands at Risk, http://www.highway-robbery.com/lands/utah13.htm (last visited Feb. 17, 2010).

16. *Wilderness Soc'y*, 581 F.3d at 1206.

possibility of valid R.S. 2477 rights-of-way, OHV travel was prohibited "subject to valid existing rights."[17]

Kane County officials—believing they had valid R.S. 2477 rights-of-way in parts of Grand Staircase-Escalante—removed thirty-one Bureau of Land Management ("BLM") road signs that prohibited OHV travel.[18] Kane County officials also erected new signs, many of which permitted OHV travel on the disputed roads.[19] Then, on August 22, 2005, Kane County passed an ordinance (the "2005 Ordinance") "to regulate OHV use on county . . . roads."[20]

Two environmental groups—the Wilderness Society and Southern Utah Wilderness Alliance—challenged the 2005 Ordinance and sought an injunction prohibiting Kane County from opening roads on federal public lands to OHVs.[21] Kane County moved to dismiss, "arguing lack of subject matter jurisdiction, failure to state a claim, and failure to join necessary and indispensable parties (the State of Utah and the United States)."[22] The district court rejected Kane County's arguments and stated that it "need not make any final determination regarding the existence of any R.S. 2477 right-of-way in order to grant [the environmental groups'] requested relief."[23]

Kane County then filed a motion to alter the district court's order and sought permission to prove that the county possessed valid R.S. 2477 rights-of-way.[24] The district court denied this motion.[25] On December 11, 2006, Kane County rescinded the 2005 Ordinance.[26] County officials removed some of the county road signs and removed all decals permitting OHV use from the remaining road signs.[27] The district court held that Kane County failed to show that it was absolutely clear the county would not engage in similar conduct once the case was dismissed.[28] The district court granted

17. *Id.*
18. *Id.*
19. *Id.* at 1206–07.
20. *Id.* at 1207.
21. *Id.*
22. *Id.*
23. Wilderness Soc'y v. Kane County, 470 F. Supp. 2d 1300, 1306 (D. Utah 2006).
24. *Wilderness Soc'y*, 581 F.3d at 1207.
25. *Id.*
26. *Id.* at 1208.
27. *Id.*
28. *Id.*

summary judgment for the environmental plaintiffs, holding that Kane County's actions were preempted by the federal management plan.[29] The court further held that unadjudicated R.S. 2477 rights could not defeat a preemption claim.[30] The district court ordered Kane County to take down all "'County road signs that conflict with federal land management plans . . .' and enjoined the County from . . . open[ing] any route closed . . . by governing federal law 'unless and until Kane County proves in a court of law that it possesses a right-of-way to any such route.'"[31] Kane County filed a timely appeal.

III. SIGNIFICANT LEGAL BACKGROUND

There are several significant issues in *Wilderness Society*, but one of the most dominant is the question of what is required to establish a valid pre-1976 R.S. 2477 right-of-way. Prior to 1976,[32] the establishment of a valid R.S. 2477 right-of-way "required no administrative formalities: no entry, no application, no license, no patent, and no deed on the federal side; no formal act of public acceptance on the part of the states or localities in whom the right was vested."[33] In fact, before 1976 there was little reason to "raise or resolve potential R.S. 2477 issues" because anyone could travel across public lands and establish a valid right-of-way.[34] But, in 1976 the federal government changed its management policy from a "pro-development lands policy" to a "retention and conservation" policy.[35] To this day, courts are struggling to determine what is required to prove the establishment of pre-1976 R.S. 2477 right.

Southern Utah Wilderness Alliance v. BLM ("*SUWA*")[36] addressed a portion of this question. In *SUWA*, employees from three counties entered federal public lands—without notifying the BLM—and graded sixteen roads.[37] A dispute arose between the

29. *Id*. at 1209.

30. *Id*.

31. *Id*.

32. *See* Federal Land Policy Management Act of 1976, Pub. L. No. 94-579, § 702, 90 Stat. 2743, 2787 (1976).

33. S. Utah Wilderness Alliance v. BLM, 425 F.3d 735, 741 (10th Cir. 2005).

34. *Id*.

35. *Id*.

36. 425 F.3d 735.

37. *Id*. at 742.

counties and the BLM about whether the counties possessed valid R.S. 2477 rights. Relying on a BLM administrative decision, the district court held that the counties did not possess valid R.S. 2477 claims.[38] The Tenth Circuit reversed, holding that the BLM lacks primary jurisdiction over R.S. 2477 rights-of-way,[39] and remanded, instructing the district court to determine the validity of the counties' R.S. 2477 claims.[40]

But, understanding that district courts may need to resolve thousands of R.S. 2477 claims after the *SUWA* decision, the Tenth Circuit provided some guidance on resolving future R.S. 2477 claims. First, *SUWA* held that "the burden of proof lies on those parties 'seeking to enforce rights-of-way against the federal government.'"[41] Second, *SUWA* held that the establishment of a valid right-of-way requires: (1) "the landowner's objectively manifested intent to dedicate property to the public use as a right of way"; and (2) "acceptance by the public."[42] In Utah, to objectively manifest intent to dedicate requires any act sufficient to manifest intent.[43] This does not require any notice, filing, or other affirmative action.[44] And, acceptance by the public simply requires continuous public use for ten years.[45]

Wilderness Society distinguished R.S. 2477 claims, which do not require an affirmative action, from mining claims, which do require affirmative action. In comparing mining claims, the court stated:

38. *Id*. at 743–44.

39. The court reasoned that the BLM lacks primary jurisdiction over R.S. 2477 rights-of-way because, "[i]n sum, nothing in the terms of R.S. 2477 gives the BLM authority to make binding determinations on the validity of the rights of way granted thereunder . . . ." *Id*. at 757. The court further stated,

> This decision is reinforced by the long history of practice under the statute, during which the BLM has consistently disclaimed authority to make binding decisions on R.S. 2477 rights of way. Indeed, there have been 139 years of practice under the statute . . . and the BLM has not pointed to a single case in which a court has deferred to a binding determination by the BLM on an R.S. 2477 right of way.

Id.

40. *Id*. at 758.

41. *Id*. at 768 (quoting S. Utah Wilderness Alliance v. BLM, 147 F. Supp. 2d 1130, 1136 (D. Utah 2001)).

42. *Id*. at 769.

43. *Id*. at 754.

44. *Id*.

45. *Id*. at 771.

> Congress established a very different system for R.S. 2477 rights of way. Because there are no patents, title to rights of way passes independently of any action or approval on the part of the BLM. All that is required . . . are acts on the part of the grantee sufficient to manifest an intent to accept the congressional offer. In fact, because there were no notice or filing requirements of any kind, R.S. 2477 rights of way may have been established—and legal title may have passed—without the BLM ever being aware of it. Thus, R.S. 2477 creates no executive role for the BLM to play.[46]

Thus, the *SUWA* court explained that counties were/are under no obligation to file or record valid R.S. 2477 rights-of-way. This language is crucial to the *Wilderness Society* decision.

IV. THE COURT'S DECISION

On appeal, Kane County argued five issues: (1) the "environmental plaintiffs lacked standing";[47] (2) the rescission of the 2005 Ordinance mooted the case;[48] (3) the environmental plaintiffs lacked a cause of action;[49] (4) the State of Utah and the United States are "necessary and indispensable parties";[50] and (5) the district court erred when it held that alleged R.S. 2477 rights were preempted by a federal management plan under the Supremacy Clause.[51] The majority disagreed with Kane County on each issue and affirmed the district court's decision.

A. Standing

Kane County's first challenge on appeal was that the environmental plaintiffs lacked standing.[52] "Constitutional standing requires (1) an injury in fact, (2) causation, and (3) redressability."[53] To meet the injury in fact requirement, "a plaintiff must show an 'invasion of a legally protected interest,' which is '(a) concrete and particularized, and (b) actual or imminent, not conjectural or

46. *Id*. at 754.
47. Wilderness Soc'y v. Kane County, 581 F.3d 1198, 1205 (10th Cir. 2009).
48. *Id*.
49. *Id*.
50. *Id*.
51. *Id*. at 1219–20.
52. *Id*. at 1205.
53. *Id*. at 1209.

hypothetical.'"[54] To meet the causation requirement, the injury must be traceable to the challenged action of the defendant.[55] Finally, to meet the redressability requirement, it must be likely that the injury will be corrected by a favorable decision.[56]

The *Wilderness Society* majority held that the environmental plaintiffs established "injury in fact" when they submitted affidavits from individual members describing how their recreational use of the public lands was disturbed by OHV use.[57] Moreover, the court held that there is a substantial likelihood that removing and changing road signs that prohibited OHV use would increase OHV use and subsequently harm the recreational interest of the environmental plaintiffs.[58] Finally, the court held that an order declaring Kane County's actions unconstitutional and issuing an injunction would likely correct the alleged injury.[59] Thus, the majority held that the individual members of the two environmental plaintiffs' groups had standing to pursue their preemption claims.[60]

B. Mootness

Next, Kane County argued that the plaintiffs' claims were moot.[61] In order to overcome a mootness defense, there must be an actual controversy at all stages of the case, not just at the time the complaint is filed.[62] In *Wilderness Society*, Kane County rescinded the 2005 Ordinance that opened certain roads on public lands to OHV use.[63] Despite the rescission, however, *Wilderness Society* held that "Kane County rescinded the Ordinance in a deliberate attempt to render the pending litigation moot, and it seems poised to reenact a

54. *Id*. at 1209–10 (quoting Stewart v. Kempthorne, 554 F.3d 1245, 1253 (10th Cir. 2009)).

55. *Id*. at 1210 (citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc. 528 U.S. 167, 180 (2000)).

56. *Id*. (citing *Laidlaw*, 528 U.S. at 181).

57. *Id*. at 1210–13.

58. *Id*. at 1213.

59. *Id*.

60. *Id*.

61. *Id*. at 1214.

62. *Id*.

63. *Id*. at 1208.

similar ordinance."[64] As a result, the court held that the issue was neither constitutionally nor prudentially moot.[65]

C. Cause of Action and Prudential Standing

Kane County's third challenge was that the environmental plaintiffs lacked a cause of action and prudential standing.[66] Kane County argued that the Supremacy Clause does not provide a private right cause of action.[67] Further, Kane County alleged that the plaintiffs did not have prudential standing because "(1) they . . . assert[ed] the legal rights of the United States; (2) their claims raise[d] generalized grievances; and (3) their claims [fell] outside the zone of interest protected by the Supremacy Clause."[68]

The *Wilderness Society* court rejected all three claims.[69] First, the court held that the plaintiffs relied on their own injuries, not any harm to the United States.[70] Next, the court held that the injuries the plaintiffs alleged in the submitted affidavits were specific rather than general.[71] Finally, the court held that "[t]he Supremacy Clause is at least arguably designed to protect individuals harmed by the application of preempted enactments."[72]

D. Necessary and Indispensable Parties

Kane County's fourth claim on appeal was that the environmental plaintiffs failed to add the State of Utah and the United States to the action as necessary and indispensable parties.[73] Federal Rule of Civil Procedure 19 has two steps: (1) necessity, and (2) indispensability.[74] "Only necessary parties can be indispensable parties."[75] The *Wilderness Society* majority was able to avoid this question by expressly declaring that its decision—like that of the

64. *Id.* at 1215.
65. *Id.*
66. *Id.* at 1215–16.
67. *Id.* at 1216.
68. *Id.*
69. *Id.*
70. *Id.* at 1217.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*

district court—was not based on the validity of any alleged R.S. 2477 rights.[76] Therefore, the court ultimately held that the State of Utah and the United States were not necessary parties because the court was deciding the merits of the case without determining the validity of any R.S. 2477 rights.[77]

E. The Merits: Preemption

After the *Wilderness Society* court worked its way through Kane County's four initial claims on appeal, the court was finally able to reach the merits of the case.[78] Specifically, the court asked, "[I]s county regulation of alleged but unproven R.S. 2477 rights preempted when the local regulation conflicts with the federal, or are counties free to regulate such routes prior to adjudication?"[79]

Kane County's defense to the preemption claim was that it held valid R.S. 2477 rights and therefore it could not be preempted.[80] Yet, the court held that "Kane County [could not] defend a preemption suit by simply alleging the existence of R.S. 2477 rights of way; it must prove those rights in a court of law."[81] The majority recognized that in *SUWA* it held that "the establishment of R.S. 2477 rights of way required no administrative formalities: no entry, no application, no license, no patent, and no deed on the federal side; no formal act of public acceptance on the part of the states or localities in whom the right was vested," but reasoned that the creation of R.S. 2477 rights was not an issue in this case.[82] Instead, the court held that Kane County's "claimed rights may well have been created and vested decades ago, but until it proves up those rights, we agree with the district court that its regulations on federal lands that otherwise conflict with federal law are preempted."[83]

Thus, the *Wilderness Society* court affirmatively required Kane County to adjudicate to establish its rights before it could use its rights as a defense, while in the same breath recognized that R.S.

76. *Id.* at 1218.
77. *Id.* at 1218–19.
78. *Id.* at 1219.
79. *Id.*
80. *Id.* at 1220–21.
81. *Id.* at 1221.
82. *Id.* (citation omitted).
83. *Id.*

2477 did not require any formalities to establish these rights.[84] This inconsistency is troublesome; however, the majority had to overcome some major procedural hurdles before it even reached the substance of this obstacle. This Note posits that, while the majority may have been sympathetic to the environmental plaintiffs, the plaintiffs lacked standing and a cause of action, and therefore the plaintiffs' suit should have been dismissed. Further, even if standing and a valid cause of action is assumed, the majority failed to properly recognize Kane County's R.S. 2477 rights-of-way in public lands.

IV. ANALYSIS

The *Wilderness Society* majority failed to recognize Kane County's vested rights in R.S. 2477 roads and, in so doing, erred when it held that any county ordinance allowing OHVs in contradiction to a federal management plan is preempted under the Supremacy Clause. The district court denied Kane County's claim that it had valid existing R.S. 2477 rights without even considering evidence regarding the existence of R.S. 2477 rights.[85] "Why? '[B]ecause the County has yet to establish the validity of those rights in a court of law.'"[86] The *Wilderness Society* court accepted this circular reasoning. Essentially, the majority's holding means that Kane County has no valid rights under R.S. 2477 unless it obtains a legal judgment from a court of law.[87] This holding is expressly contradictory to the language in *SUWA*, which states that "the establishment of R.S. 2477 rights of way required no administrative formalities . . . no formal act of public acceptance on the part of the states or localities in whom the right was vested."[88]

However, the holding of *Wilderness Society* has deeper effects. Specifically, if Kane County does not possess valid R.S. 2477 rights unless it obtains a court judgment, then all of the county's road management constitutes illegal trespass.[89] This is detrimental to "federal as well as local interests."[90] Improvements on public lands

84. *Id*.
85. *Id*. at 1228 (McConnell, J., dissenting).
86. *Id*. (citation omitted).
87. *See id*.
88. S. Utah Wilderness Alliance v. BLM, 425 F.3d 735, 741 (10th Cir. 2005).
89. *Wilderness Soc'y*, 581 F.3d at 1229 (McConnell, J., dissenting).
90. *Id*.

will constitute illegal activity and, as a result, Kane County rights are removed, the United States loses the benefit of these improvements, and transportation across public lands is hampered. This detrimental holding occurred only after the *Wilderness Society* court got through several procedural hurdles, many of which have significant impacts on future cases.

A. Standing

The *Wilderness Society* majority erred when it held that the environmental plaintiffs had standing to bring a suit against Kane County. In order to have standing, "the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural' or 'hypothetical.'"[91] In its opinion, the majority spent a lot of time discussing the concreteness and actuality of the environmental plaintiffs' injury, without discussing "whether the injury is to a 'legally protected interest.'"[92] In fact, the plaintiffs do not point to a single law that gives them a legally protected interest in this case.[93]

The majority relied on a string of cases that all arose under the Administrative Procedures Act ("APA") and other statutes that provided parties with a statutory right to challenge agency actions that harmed aesthetic interests.[94] *Wilderness Society* did not arise under the APA or any other statute providing rights to challenge actions based on aesthetic preservation.[95] Thus, the cases used by the majority do little to establish that the environmental plaintiffs had standing based on a legally protected interest. Further, the majority relied on *San Juan County v. United States*[96] to establish that the environmental plaintiffs had standing. *San Juan* stated that, "SUWA's environmental concern is a legally protectable interest."[97] But this language comes from the portion of the case discussion about whether SUWA was able to intervene in a lawsuit where other

91. *Id.* (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).

92. *Id.*

93. *Id.*

94. *See id.* at 1210–11 (majority opinion); *see also id.* at 1229–30 (McConnell, J., dissenting).

95. *Id.* at 1230 (McConnell, J., dissenting).

96. 503 F.3d 1163 (10th Cir. 2007) (en banc).

97. *Id.* at 1199.

parties already had standing.[98] "Standing and intervention present two different questions."[99]

Finally, any interest the environmental plaintiffs may have in the enjoyment of Grand Staircase-Escalante, derives from the United States' ownership of the land.[100] Thus, the plaintiffs' must meet the standards of third-party standing, rather than meeting the requirements of regular standing merely requiring an injury in fact.[101] Third-party standing requires that when a plaintiff brings a claim the plaintiff must show "a close relationship to the third party."[102] There is no evidence in the opinion to suggest that the environmental plaintiffs had a close relationship with the United States in order to bring a suit as a third-party plaintiff. Therefore, the plaintiffs lack regular standing, and they also lack the heightened third-party standing, which is more applicable in this case.[103]

B. Cause of Action

The environmental plaintiffs in *Wilderness Society* pointed to no statute giving them a cause of action. Instead, the plaintiffs relied "on the Supremacy Clause and the astounding idea that any time a state action arguably conflicts with a federal law, a cause of action exists."[104] In other words, "[i]f 'preemption' were a sufficient basis for a cause of action, then every federal statute would implicitly authorize a private cause of action against a state or local government defendant."[105] Therefore, the environmental plaintiffs

98. *Wilderness Soc'y*, 581 F.3d at 1230–31 (McConnell, J., dissenting).

99. *Id*. at 1230.

100. *Id*. at 1231–32.

101. *Id*. at 1232.

102. *Id*. (citation omitted).

103. Judge McConnell introduces the following analogy to provide guidance:

> Imagine that my next-door neighbor, who keeps his property neat and tidy, is faced with a competing claimant to the land, who is likely to allow the property to fill with weeds. I might very much hope my neighbor wins. My property values and aesthetic interests could seriously be affected. I may be impatient with my neighbor's inclination toward compromise and apparent disinclination to go to court. But no one would say I have standing to sue in defense of my neighbor's property rights. The Wilderness Society is in precisely that situation.

Id.

104. *Id*. at 1233.

105. *Id*.

did not assert a legal cause of action to bring their claims against Kane County.

C. The Merits: Preemption

In his dissent, Judge McConnell argues three reasons why the Kane County 2005 Ordinance is not preempted by federal law.[106] This Note argues that two of these reasons provide the strongest support against the majority's preemption holding. First, the BLM's management plan does not preempt Kane County's 2005 Ordinance because the management plan was "subject to valid existing rights."[107] And second, even if there is a conflict between the federal management plan and the 2005 Ordinance, preemption cannot be determined until the court reaches a conclusion on Kane County's potential R.S. 2477 rights-of-way.[108]

First, it is difficult to reach the conclusion that the BLM's management plan preempted Kane County's 2005 Ordinance because the management plan contains a non-preemption clause. The BLM plan expressly states that it is "subject to valid existing rights." This phrase was likely included to address unknown R.S. 2477 claims. In fact, this non-preemption clause may be an admission by the BLM that it had no idea how many valid R.S. 2477 rights-of-way existed at the time the plan was set in motion.[109] Accordingly, it is difficult to make the jump from the non-preemption clause to a holding that Kane County's 2005 Ordinance was preempted by the BLM plan. As a result, the majority erred when it held that federal law preempted Kane County's actions.

Second, even if there is a conflict between the BLM plan and Kane County's 2005 Ordinance, there is no reason why the county's

106. (1) "Federal regulations are expressly subject to 'valid existing rights,' thus precluding preemption." *Id.* at 1235. (2) "Even apart from the reservation of "valid existing rights," the county ordinance and BLM regulations can coexist." *Id.* at 1237. (3) "Even if there were a conflict between county law and federal law, we cannot determine which prevails without adjudicating the county's claimed rights-of-way." *Id.* at 1239.

107. *See id.* at 1235 (quoting identical language from "Congress (in FLPMA), the President (in the Executive Order creating the Monument), and the BLM (in the Monument Plan)" (citing S. Utah Wilderness Alliance v. BLM, 425 F.3d 735, 760 (10th Cir. 2005))).

108. *See id.* at 1239.

109. *See S. Utah Wilderness Alliance*, 425 F.3d at 754 ("In fact, because there were no notice or filing requirements of any kind, R.S. 2477 rights of way may have been established—and legal title may have passed—without the BLM ever being aware of it. Thus, R.S. 2477 creates no executive role for the BLM to play.").

claims are automatically preempted without a decision on whether the county possessed valid R.S. 2477 rights. Kane County attempted to prove its R.S. 2477 rights in district court, but was denied an opportunity to do so.[110] "To say that the County's claims are preempted until they are proven is to presume, without proof, that none are valid."[111]

IV. CONCLUSION

The *Wilderness Society* majority erred for several reasons. First, the environmental plaintiffs lacked standing because they held no legally protected interest. Second, the environmental plaintiffs did not have a valid cause of action. The Supremacy Clause does not provide a private right of action anytime federal law and state law conflict. Otherwise, this would provide standing to an expansive group that has never enjoyed Article III standing. Finally, the majority erred in holding that federal law preempted Kane County's actions because the federal law contained a non-preemption clause and the court failed to address the validity of Kane County's alleged R.S. 2477 rights. The *Wilderness Society* decision, therefore, adds confusion and inconsistency to an already difficult area of law.

Douglas P. Farr[*]

110. *Wilderness Soc'y*, 581 F.3d at 1239 (McConnell, J., dissenting).

111. *Id.*

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