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Revised Statutes 2477 Rights-of-Way Settlement Act: Exorcism or Exercise for the Ghost of Land Use Past

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Revised Statutes 2477 Rights-of-Way Settlement Act: Exorcism or Exercise for the Ghost of Land Use Past?

I. Introduction

"R.S. 2477"[1] is shorthand[2] for a congressional grant to the states contained in Section 8 of the Lode Mining Act of 1866.[3] The statute read in its entirety, "The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted."[4] Though R.S. 2477 was repealed in 1976 by the Federal Land Policy and Management Act[5] (FLPMA), rights-of-way granted before FLPMA's enactment were preserved.[6] Yet only in its demise, it seems, has this tiny statute of twenty-odd words achieved such impressive stature.[7] Now, stitched

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[1] 43 U.S.C. § 932 (1938) (originally enacted as Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253 (1868), and reenacted as Revised Statutes 2477 (1873)), *repealed by* Federal Land Policy Management Act of 1976, § 706(a), 90 Stat. 2744, 2793 (1976).

[2] The term is an artifact of the section's initial codification as Revised Statutes (R.S.) § 2477 (1873).

[3] Act of July 26, 1866, ch. 262, 14 Stat. 251 (1866).

[4] *Id.*

[5] Act of July 21, 1976, § 706(a), 90 Stat. 2744, 2793 (1976).

[6] Pub. L. 94-579, § 701 (1976) (codified at 43 U.S.C. § 1701 (1994)). Devotees of the analogy between legislation and sausage-making will point to the current situation as a consequence of having kept a law past its expiration date. The author declines to indulge in such waggery.

[7] One indicator of this statute's stature is the number of publications it has prompted. Publications addressing issues arising from R.S. 2477 include the following: PAMELA BALDWIN, CONG. RES. SERV., CRS REPORT FOR CONGRESS NO. 93-74A, HIGHWAY RIGHTS OF WAY: THE CONTROVERSY OVER CLAIMS UNDER R.S. 2477 (1993) [hereinafter BALDWIN]; UNITED STATES DEPARTMENT OF THE INTERIOR, REPORT TO CONGRESS ON R.S. 2477: THE HISTORY AND MANAGEMENT OF R.S. 2477 RIGHTS-OF-WAY CLAIMS ON FEDERAL AND OTHER LANDS (1993) [hereinafter DOI REPORT]; Harry R. Bader, *Potential Legal Standards for Resolving the R.S. 2477 Right of Way Crisis*, 11 PACE ENVTL. L. REV. 485 (1994) (proposing uniform standards, based upon state law, for adjudicating acceptance and scope of R.S. 2477 rights-of-way); D.J. Baxter, *A Brief Introduction to R.S. 2477 Rights-of-Way*, 14 J. ENERGY NAT. RESOURCES & ENVTL. L. 295 (1994) (providing an introduction to the topic); Barbara G. Hjelle, *Reply to Mr. Lockhart: An Explanation of R.S. 2477 Precedent*, 14 J. ENERGY NAT. RESOURCES & ENVTL. L. 349 (1994) (propounding state law as appropriate criteria for evaluating acceptance of R.S. 2477 rights-of-way); Barbara G. Hjelle, *Ten Essential Points Concerning R.S. 2477 Rights-of-Way*, 14 J. ENERGY NAT. RESOURCES & ENVTL. L. 301 (1994) (arguing that proposed DOI regulations would limit or restrict scope of existing rights); Leroy K. Latta, Jr., *Public Access Over Alaska Public Lands as Granted by Section 8 of the Lode Mining Act of 1866*, 28 SANTA CLARA L. REV. 811 (1988) (noting that DOI rights-of-way assertion requirements are unnecessarily burdensome and urging that R.S. 2477 right-of-way claims be validated promptly); William J. Lockhart, *Federal Statutory Grants are Not Placeholders for Manipulated State Law: a Response to Ms. Hjelle*, 14 J. ENERGY NAT. RESOURCES & ENVTL. L. 323 (1994) (arguing that resolving R.S. 2477 grants using a "mish-mash of state court opinions" would subject public lands, as well as private lands formerly in the public domain, to belated R.S. 2477 assertions); Brian Widmann, *Tenth Circuit Survey: Land and Natural Resources Survey*, 72 DENV. U. L. REV. 763 (1995) (stating that United States v. Jenks,

together by a group of angry, if not actually mad, solons, R.S. 2477 lies tabled, awaiting the votage to reanimate it and send it shambling across the public-land states, leaving a swath of demise, destruction, and dismemberment to pale Sherman's March.

This Comment examines R.S. 2477's life, death, and imminent resurrection. Part II reviews how R.S. 2477 lived and died, and the nuisance it caused as it lay across the public-land states. Part III attempts to understand R.S. 2477's true nature. Part IV examines how a decent-burial proposal[8] inspired a reanimation plot.[9] Part V compares and

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22 F.3d 1513 (10th Cir. 1994), correctly interpreted Department of Agriculture regulations as permitting a landowner to assert an R.S. 2477 right-of-way as a defense to an agency's regulation of certain roads) Christopher Bulman, Note, *The Tenth Circuit Rediscovers NEPA's Public Participation Policies in* Sierra Club v. Hodel, 30 NAT. RESOURCES J. 203 (1990) (concluding that the decision in Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988) gave meaning to the statutory requirement for BLM to perform an environmental assessment prior to permitting expansion of an R.S. 2477 right-of-way); Catherine L. Butcher, Note, *Not Just Another Federal Pre-Emption Case*, 30 NAT. RESOURCES J. 217 (1990) (concluding that the decision in Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988) "ensures that management of public lands with R.S. 2477 roads will be inefficient, variable, and problematic"); Joel A. Ferre, Note, Shultz v. Department of Army*: Seasonal Use of a Trail with Definite Termini Sufficient to Establish an R.S. 2477 Right-of-Way in Alaska*, 15 J. ENERGY NAT. RESOURCES & ENVTL. L. 100 (1995) (concluding that Shultz v. Department of Army, 10 F.3d 649 (9th Cir. 1993) departed from earlier law by obviating requirements for fixed route or particular manner of use to establish an R.S. 2477 right-of-way); Laramie D. Merritt, Note, Garfield County v. WHI, Inc.: *Omen of Change for Public Land Access*, 9 B.Y.U. J. PUB. L. 135 (1994) (predicting that the decision in Garfield County v. WHI, Inc., 992 F.2d 1061 (10th Cir. 1993), that threatened injury to the public could itself create governmental standing to litigate a public-access case represented a change in public policy giving those committed to responsible access to and use of public lands cause for both hope and concern); R. Blain Andrus, *Access to Private and Public Lands Under R.S. 2477*, NEVADA LAWYER, June 1993, at 10-14 (advocating that legislation be enacted to help ascertain the existence and scope of valid existing rights); Kristina Clark, *Public Lands Right-of-Way: Who Pays for the Environmental Studies?*, NATURAL RESOURCES & ENV'T, Spr. 1986, at 3 (discussing evaluation of scope of existing rights); Gina Guy, *Ghost of a Law Long Past - Historic Use Rights-of-Way*, NAT. RESOURCES & ENV'T, Spring 1988, at 39-40 (discussing Sierra Club v. Hodel, 675 F. Supp. 594 (D. Utah 1987), then pending appeal). Even if R.S. 2477 claims are resolved with no further loss of vegetation, R.S. 2477 will have resulted in significant deforestation just to provide the paper for these learned publications and the published opinions they report. The reader will be relieved to learn that, if this Comment does not advance a solution, by virtue of its publication on recycled paper, it will have done no further harm.

[8] Regulations proposed by the United States Department of the Interior (DOI) would have provided R.S. 2477 a decent burial and ensured that its beneficiaries received their due. *See* Revised Statute 2477 Rights-of-Way, 59 Fed. Reg. 39,217 (1994) (to be codified at 43 C.F.R. pt. 39) (publication and solicitation of comments Aug. 1, 1994), *available in* Westlaw, 1994 WL 392977. *See infra* subpart V.A. for a detailed discussion of the provisions of the proposed regulations.

[9] Legislation pending in the United States Congress would have the effect of resurrecting the law with renewed vitality. *See* H.R. 2081, 104th Cong., 1st Sess. (1995); S. 1425, 104th Cong., 1st Sess. (1995). *See infra* subpart V.B. for a detailed discussion of the provisions of these bills as they entered committee.

contrasts the regulatory and legislative plans for dealing with R.S. 2477. Finally, Part VI offers yet another opinion as to what should be done about R.S. 2477.

II. Causes and Effects of the R.S. 2477 Controversy

Uncertainty as to the number, scope, and validity of R.S. 2477 claims causes problems for federal land managers and for the public. This Part will examine the roots of this uncertainty in the history of R.S. 2477, the dilemma in which this uncertainty places federal land managers, and the concerns of constituent groups.

A. Causes of the R.S. 2477 Controversy

The circumstances under which R.S. 2477 was enacted, administered, and ultimately repealed have combined to make evaluation of claimed rights-of-way a daunting proposition. First, it is impossible to know how many actual or potential R.S. 2477 rights-of-way burden federal land; second, R.S. 2477 has no definitions and virtually no legislative history; and, finally, judicial interpretation has been left largely to the states, with predictably varying results.

The uncertainty as to the number of potential R.S. 2477 rights-of-way results from the failure of past congresses and administrations to require formal recognition or even recording of such rights-of-way.[10] In 1980, however, the United States Department of the Interior (DOI) promulgated a regulation to allow filing of information concerning R.S. 2477 rights-of-way.[11] The regulation established a three-year window of opportunity.

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[10] *See, e.g.*, 43 C.F.R. § 244.55 (1938), *reprinted in* DOI REPORT, *supra* note 7, at app. II, exhibit C (providing that "[n]o application [to Department of the Interior for a right-of-way] should be filed under [R.S. 2477], as no action on the part of the Federal Government is necessary."); and 43 C.F.R. § 2822.1-1 (1974), *reprinted in* DOI REPORT, *supra*, at app. II, exhibit E (providing that "[n]o application should be filed under R.S. 2477, as no action on the part of the Government is necessary").

[11] Rights of Way, [Principles] and Procedures; Federal Land Policy and Management Act; Management of Rights-of-Way and Related Facilities on Public Lands and Reimbursement of Costs, 45 Fed. Reg. 44,530 (1980) (subsequently codified at 43 C.F.R. § 2802.3-6) (promulgated July 1, 1980), *reprinted in* DOI REPORT, *supra* note 7, at app. II, exhibit G. "In order to facilitate proper management of the public lands and to assist the authorized officer in developing a sound transportation plan, any person or State or local government which has constructed public highways under the authority of R.S. 2477 . . . is provided the opportunity to file within 3 years of the effective date of these regulations a map showing the location of all such public highways constructed under R.S. 2477. . . . The submission of such maps depicting the location of alleged R.S. 2477 highways shall not be conclusive evidence as to their existence. Similarly,

During this period, persons or government entities that had constructed R.S. 2477 highways were permitted to file, for planning purposes only, maps showing their locations. In 1982, a new regulation[12] continued the opportunity but removed the time limit.[13] Thus, virtually no records of R.S. 2477 rights-of-way exist.[14]

In 1988, DOI began employing a temporary management tool called "administrative recognition."[15] That administrative recognition has been ineffective is illustrated by the vast disparity in estimates of the number of potential claims. In June 1993, DOI estimated that 1455 such rights-of-way — 1453 on Bureau of Land Management (BLM) lands and two in National Park Service (NPS) units — had been recognized administratively or decreed judicially,[16] and that 5600 claims, 5000 in Utah alone, were pending.[17] Yet, other sources estimate that Alaska has between 500[18] and 1700[19] actual or potential claims, and that Utah may have "more than

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failure to depict such roads shall not preclude a later finding as to their existence." *Id.*

[12] Rights-of-Way, Principles and Procedures; Amendment, 47 Fed. Reg. 12,570 (1982) (subsequently codified at 43 C.F.R. § 2802.5) (promulgated March 23, 1982), *reprinted in* DOI REPORT, *supra* note 7, at app. II, exhibit I. "In order to facilitate management of the public lands, any person or State or local government which has constructed public highways under the authority of R.S. 2477 . . . may file a map showing the location of such public highways with the authorized officer. . . . The submission of such maps showing the location of R.S. 2477 highway(s) on public lands shall not be conclusive evidence as to their existence. [Similarly], a failure to show the location of R.S. 2477 highway(s) on any map shall not preclude a later finding as to their existence." *Id.*

[13] With profound understatement, DOI notes that response to this regulation, lacking as it was both carrot and stick, was "incomplete." Revised Statute 2477 Rights-of-Way, 59 Fed. Reg. 39,217 (1994) (to be codified at 43 C.F.R. pt. 39) (publication and solicitation of comments Aug. 1, 1994), *available in* Westlaw, 1994 WL 392977. However, in its 1993 report, DOI is more explicit: "Most jurisdictions failed to reply." DOI REPORT, *supra* note 7, at 28.

[14] 59 Fed. Reg. 39,217 (1994).

[15] "Administrative recognitions 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." DOI REPORT, *supra* note 7, at 25.

[16] DOI REPORT, *supra* note 7, at 29.

[17] *Id.*

[18] 141 CONG. REC. S8791 (daily ed. June 21, 1995) (statement of Senator Murkowski), *available in* Westlaw, 1995 WL 368506. Senator Frank Murkowski (R-Alaska) refers to "some 500 and some" of what he termed "traditional trails, winter trails, access wagon roads, across Federal lands that have been utilized and those that have been completed." *Id.* However, Anna Plager, in charge of the Alaska Department of Natural Resources project preparing R.S. 2477 claims, stated in 1993 that then-Road Commissioner Bruce Campbell had "mapped and documented 1,500 eligible trails throughout the state in 1974 [but that] most of the documentation has been lost." *State Seeks Right of Ways; Officials Rush to Claim Trails*, ANCHORAGE DAILY NEWS, September 13, 1993, at E-1.

[19] In 1994, a spokesman for National Parks and Conservation Association stated that "1,700 right of way claims have been made to build roads through most of [Alaska's] 18 wildlife refuges and across 13 of 15 national parks." Frank Clifford, *Dispute Brewing Over Road Building in*

10,000."[20] This situation clouds the title of potentially affected lands and impairs the abilities of land owners, land managers, and potential claimants to exercise their rights and responsibilities.[21]

A second problem also stems from uncertainty — uncertainty as to how rights are granted under R.S. 2477. The R.S. 2477 grant has never been defined by Congress or the executive branch. The legislative history for the Mining Act of 1866[22] is silent as to Section 8, which became R.S. 2477.[23] If the FLPMA's "grandfathering" of existing R.S. 2477 rights-of-way presented Congress with a second opportunity to define R.S. 2477, it was an opportunity missed.[24] Over the years, DOI's R.S. 2477 policies and practices have been inconsistent with one another.[25]

The third and overriding problem is that the thrust of public lands philosophy from 1866 until the years immediately preceding enactment of FLPMA was disposal and exploitation, rather than retention and management.[26] Thus, prior to 1976, the federal government had little incentive to participate in R.S. 2477 litigation. As a result, the United States was a party in virtually none of the reported decisions construing R.S. 2477,[27] and R.S. 2477 has been largely, and inconsistently, construed in light of a crazy quilt of state law. State laws used in determining whether a person or government has accepted the R.S. 2477 grant of a

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Parks, ANCHORAGE DAILY NEWS, August 2, 1994, at A-8.

[20] 141 CONG. REC. S17,531 (daily ed. Nov. 27, 1995) (statement of Senator Hatch), *available in* Westlaw, 1995 WL 696492. *See infra* note 374. Just five months earlier, Senator Theodore "Ted" Stevens (R-Alaska) had estimated that Utah had 3815 claims pending validation. 141 CONG. REC. S8883 (daily ed. June 22, 1995) (remarks of Senator Stevens), *available in* Westlaw, 1995 WL 370509. If so, R.S. 2477 may provide proof that memories can actually improve with the passage of time.

[21] 59 Fed. Reg. 39,217 (1949).

[22] *See generally* CONG. GLOBE, 39th Cong., 1st Sess. 3135 (referral of H.R. 365, without § 8, to Committee on Public Lands); 3751 (mention by Senator Stewart), 3759 (postponement of amendment consideration), 3825 (return to committee), 3916 (return to Senate with amendment), 3951 (first appearance in H.R. 365 of § 8), 3951-52 (discussion of extralateral rights in hard-rock mining by Senators Conness, Fessenden, and Stewart), 4036 (House concurrence in amendments), 4072 (enrolled bill signed) (1866).

[23] BALDWIN, *supra* note 7, at 9-10.

[24] Nonetheless, the 94th Congress may have left some indication of the degree of construction necessary for a road to qualify as a highway under R.S. 2477; *see infra* notes 104-10 and accompanying text.

[25] Latta, *supra* note 7, at 812 & n.5; 59 Fed. Reg. 39,217 (1994). *See also* discussion of administrative interpretations, *infra* notes 133-50 and accompanying text.

[26] DOI REPORT, *supra* note 7, at 20.

[27] *See* Letter from Frederick N. Ferguson, Deputy Solicitor, Department of the Interior, to Hon. James W. Moorman, Assistant Attorney General, Land and Natural Resources Division, Department of Justice 1 (Apr. 28, 1980), *reprinted in* DOI REPORT, *supra* note 7, at app. II, exhibit J [hereinafter Ferguson].

right-of-way generally fall into one of three categories.[28] These three categories are (1) statutory designation of all section lines as public highways;[29] (2) acceptance by public user[30] with no requirement for construction or maintenance;[31] and (3) formal local or state government resolution following actual construction.[32] This uncertainty concerning the number of potential R.S. 2477 rights-of-way, the precise scope of the offer embodied in R.S. 2477, and the criteria for acceptance of the statutory offer have led to a number of problems for the agencies responsible for managing public lands and for the public in whose interests these lands are managed.

B. Effects Perceived by DOI

DOI has inherited a number of problems stemming from the nature of R.S. 2477.[33] The first is the body of interpretations resulting from the

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[28] Ferguson, *supra* note 27, at 9.

[29] Examples are Alaska, Kansas, and South Dakota. *See e.g.*, ALASKA STAT. § 19.10.010 & .015 (1988 & Supp. 1995) and Girves v. Kenai Peninsula Borough, 536 P.2d 1221, 1226 (Alaska 1975); KAN. STAT. ANN. §§ 68-101 to 68-106 (1992 & Supp. 1994) and Tholl v. Koles, 70 P. 881, 883 (Kan. 1902); and S.D. CODIFIED LAWS ANN. § 31-18-1 through -4 (1984 & Supp. 1996) and Pederson v. Canton Township, 34 N.W.2d 172, 173 (S.D. 1948).

[30] Not a typographical error but "[t]he actual exercise or enjoyment of any right, property, drugs, franchise, etc." BLACK'S LAW DICTIONARY 1383 (5th ed. 1979).

[31] These states include Colorado, New Mexico, Oregon, Utah, and Wyoming. *See, e.g.*, COLO. REV. STAT. § 43-2-201 (1993) and Nicolas v. Grassle, 267 P. 196, 197 (Colo. 1928); N.M. STAT. ANN. § 67-2-1 (1978 & Supp. 1996) and Wilson v. Williams, 87 P.2d 683, 685 (N.M. 1939); OR. REV. STAT. § 368.131 (1993) and Montgomery v. Somers, 90 P. 674 (Or. 1907); UTAH CODE ANN. § 27-12-89 (1995) and Lindsay Land & Livestock Co. v. Churnos, 285 P. 646, 648-49 (Utah 1930); and WYO. STAT. § 24-1-101 (1993) and Hatch Bros. Co. v. Black, 165 P. 518, 520 (Wyo. 1917). Note that Utah in 1993 liberalized its statute to include "pedestrian trials, horse paths, livestock trails, wagons roads [and] jeep trails." 1993 Utah Laws, ch. 6, § 2 (effective Oct. 21, 1993: codified at UTAH CODE ANN. § 27-16-102(3)(b) (1995)). At the same time, Utah waived two former requirements for establishing highways, those requiring counties to record all roads and highways in their jurisdictions, UTAH CODE ANN. 27-12-26 (1995) and to provide maps showing all roads and highways existing prior to October 21, 1976, UTAH CODE ANN. § 27-15-3 (1995). UTAH CODE ANN. § 27-16-105 (Supp. 1995); *Hearings on S. 1425 Before the Senate Comm. on Energy and Natural Resources*, S. 1425, 104th Cong. 2d Sess. (1995) (statement of John D. Leshy, Solicitor, DOI, Mar. 14, 1996), *reprinted in* Fax, Monica Burke, DOI 4 (Jun. 2, 1996) (on file with the author) [hereinafter Leshy]. As discussed *infra* section V.B.7, the proposed statute's incorporation of state law would effectively reenact R.S. 2477 in more liberal terms.

[32] The only state taking this position is Arizona. *See, e.g.*, ARIZ. REV. STAT. ANN. § 28-1861 (1989 & Supp. 1995), *repealed by* 1995 Ariz. Laws, ch. 132, § 1 (effective Jan. 1, 1997; to be codified at ARIZ. REV. STAT. ANN. § 28-7041 (1995)); and Tucson Consol. Copper Co. v. Reese, 100 P. 777, 778 (Ariz. 1900). As discussed *infra* notes 99-150 and accompanying text, only Arizona's means of acceptance comports with the terms of the offer by meeting the element of construction.

[33] 59 Fed. Reg. 39,216 (1994) (to be codified at 43 C.F.R. pt. 39).

vagueness of the grant itself.[34] The second is R.S. 2477's anachronistic nature; R.S. 2477 is a relic of an era before federal land managers had any responsibility to conserve or preserve the public lands. The third problem is the wild-card nature of the R.S. 2477 grant, which encourages many state and county governments to view it as the key to circumventing environmental and land-use statutes, obtaining easy access to public lands and resources, and preempting potential wilderness designations.[35]

Thus formless, archaic, and unpredictable, R.S. 2477 prejudices DOI's ability to carry out its responsibilities under FLPMA's declared policy of periodic, systematic inventory of the public lands and coordination of land use planning with state planning efforts.[36] Because of the lack of past recording requirements and present validation procedures, federal land managers and private land buyers have no protection from the sudden emergence of an R.S. 2477 right-of-way.[37]

C. Effects Perceived by Constituent Groups

DOI has many constituencies with regard to public lands. For purposes of R.S. 2477, these constituencies may be boiled down to just two: those who believe that R.S. 2477 rights-of-way should be minimized and those who believe that R.S. 2477 rights-of-way should be maximized. Those who would minimize R.S. 2477 rights-of-way can point to a number of problems in the nature of R.S. 2477. Profusion of roads threatens already beleaguered ecosystems in a number of ways. Effects of roads include habitat fragmentation[38] and reduction,[39] edge effects,[40] large animal mortality[41]

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[34] 59 Fed. Reg. 39,216-17 (1994).

[35] 59 Fed. Reg. 39,216 (1994).

[36] 59 Fed. Reg. 39,217 (1994); *see also* 43 U.S.C. § 1701(a)(2) (1994).

[37] 59 Fed. Reg. 39,217 (1994).

[38] Roads divide habitats, which interferes with species dispersal and migration. Christine Schonewald-Cox & Marybeth Buechner, *Park Protection and Public Roads*, *in* CONSERVATION BIOLOGY, THE THEORY AND PRACTICE OF NATURE CONSERVATION, PRESERVATION, AND MANAGEMENT 373, 375 (Peggy L. Fiedler & Subodh K. Jain eds., 1992) (citing A.N. van der Zande et al., *The Impact of Roads on the Densities of Four Bird Species in an Open Field Habitat: Evidence of a Long-Distance Effect*, 18 BIOLOGICAL CONSERVATION 299-321 (1980)). Attempts to mitigate this effect through construction of wildlife corridors are often ineffective. Such corridors are too narrow to provide food or shelter for animals moving through them; non-indigenous vegetation invades from the margins; and, finally, the corridors tend to attract predators. John Bonner, *Wildlife's Roads to Nowhere?*, NEW SCIENTIST, Aug. 20, 1994, at 30, 33.

[39] For animals that avoid contact with roads and their margins, roads reduce the size of the remaining habitat by far more than their own width. Schonewald-Cox & Buechner, *supra* note 38, at 381-82. Increased exposure to pollutants further reduces vegetation. The smaller the area, the more profound the effects. W.R. Sheate & R.M. Taylor, *The Effect of Motorway*

or flight,[42] and increased noise, pollution, and runoff.[43] Additionally, roads have a "foot in the door" effect, providing easier access to develop-

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Development on Adjacent Woodland, 31 J. ENVTL. MGMT. 261, 265 (1990). Species or populations that cannot counteract this effect through colonization face extinction. Schonewald-Cox & Buechner, *supra*, at 378 (citing P. Opdam, *Populations in Fragmented Habitat*, *in* MUNSTERSCHE GEOGRAPHISCHE ARBEITEN 29, CONNECTIVITY IN LANDSCAPE ECOLOGY: PROCEEDINGS OF THE 2ND INTERNATIONAL SEMINAR OF THE INTERNATIONAL ASSOCIATION FOR LANDSCAPE ECOLOGY 75-78 (K.F. Schreiber ed., 1988); and M.E. Gilpin, *Spatial Structure and Population Vulnerability*, *in* VIABLE POPULATIONS FOR CONSERVATION 125-39 (M.E. Soulé ed., 1987)).

[40] "Edge effects" refers to the effect in the cleared verges of roads carved into vegetated plots. The edges of the roads serve as corridors for exotic species, which may act as predators or competitors for food sources. Schonewald-Cox & Buechner, *supra* note 38, at 379-80. Additionally, roads have margins that support exotic vegetation, which may in turn deprive native vegetation of nutrients and light. *Id.*

[41] For animals forced to cross roads or actually lured to roads by food or warmth, roads are deadly. In 1974 alone, state officials counted 146,229 white-tail deer killed on roads nationwide, despite fences and warning devices. Schonewald-Cox & Buechner, *supra* note 38, at 382 (citing G.A. Feldhamer et al., *Effects of Interstate Highway Fencing on White-Tailed Deer Activity*, 50 J. WILDLIFE MGMT. 497-503 (1986)).

[42] The road avoidance effect is much more pronounced for animals, such as elk, lions, and bears, that require large ranges. Schonewald-Cox & Buechner, *supra* note 38, at 382. Because such effects of a road might extend ten kilometers or more from its edge, *id.* at 386, "[e]ven the largest parks [have] relatively little area" not already impacted by roads. *Id.*

[43] Roads bring four major types of pollution: Noise, gases, particulates, and liquids. Although noise is tolerated by some animals, Sheate & Taylor, *supra* note 39, at 263, noise can induce loss of the acute hearing animals need for survival, Anabelle Andrews, *Fragmentation of Habitat by Roads and Utility Corridors: A Review*, AUSTRALIAN ZOOLOGIST, Sept. 1990, at 130, 135 (citing B.H. Brattstrom & M.C. Bondello, *Effects of Off-Road Vehicle Noise on Desert Vertebrates*, *in* ENVIRONMENTAL EFFECTS OF OFF-ROAD VEHICLES, IMPACT AND MANAGEMENT IN ARID REGIONS (R.H. Webb & H.H. Wilshire eds., 1983)). Gaseous vehicle emissions include hydrocarbons, carbon monoxide, peroxyacetyl-nitrate (an ozone constituent) and nitrogen oxides (which contribute to acid rain). Sheate & Taylor, *supra*, at 263. Particulates include dust and lead. *Id.* Even dust can impinge leaf function. *Id.* Lead and other heavy metals have secondary animal effects. Schonewald-Cox & Buechner, supra note 38, at 379-81. For example, heavy-metal contamination increases among small mammals and earthworms adjacent to roads. *Id.* at 381. These contaminants can bioaccumulate among higher organisms in the food chain. *See generally* J. Burger, *A Risk Assessment for Lead in Birds*, J. TOXICOLOGY & ENVTL. HEALTH, Aug. 1995, at 369 (lead can bioaccumulate, increasing lead toxicosis in predators); J. Burger & M. Gochfeld, *Behavioral Impairments of Lead-Injected Young Herring Gulls in Nature*, FUNDAMENTAL & APPLIED TOXICOLOGY, Nov. 1994, at 553 (lead can bioaccumulate among higher organisms); *but see* W. Stansley & D.E. Roscoe, *The Uptake and Effects of Lead in Small Mammals and Frogs at a Trap and Skeet Range*, ARCHIVES OF ENVTL. CONTAMINATION & TOXICOLOGY, Feb. 1996, at 220 (speculating that lead concentration in bones rather than more digestible tissues minimizes predatory uptake into the food chain). Liquid pollution may take the form of dissolved road salts, which disturb both land-based and aquatic ecosystems, altering species composition or population levels. Sheate & Taylor, *supra*, at 263. Liquid pollution might also include culvert runoff, which increases sedimentation and reduces trout stocks. Gregory S. Eaglin & Wayne A. Hubert, *Effects of Logging and Roads on Substrate and Trout in Streams of the Medicine Bow National Forest, Wyoming*, 13 N. AM. J. FISH. MGMT. 844, 845 (1993).

ers,[44] poachers,[45] polluters, and vandals. Some areas and species are more sensitive than others[46] and should be carefully avoided in route selection and planning.[47] Of course, where an R.S. 2477 right-of-way is claimed, no weight need be given such considerations. The road's justification is no more and no less than "because it is there."

Those who would maximize R.S. 2477 rights-of-way see R.S. 2477 as an essential tool for maintaining freedom of movement, facilitating exploration and exploitation, and maintaining their livelihoods.[48] Some point out that R.S. 2477 made settlement of the West possible.[49] Others emphasize R.S. 2477's utility in obtaining access to mineral claims, particularly in an area thick with public lands.[50] Others maintain that modern public-land access

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[44] Andrews, *supra* note 43, at 137. It has also been observed that, "[i]n the United States, road building is a critical part of the sprawling development and reliance on automobiles that has characterized growth for many decades." WORLD RESOURCES INSTITUTE, WORLD RESOURCES 1994-1995, A GUIDE TO THE GLOBAL ENVIRONMENT 40 (1994).

[45] Poaching is one reason that wild turkey populations do not thrive in areas with elevated road densities. Andrews, *supra* note 43, at 137 (citing H.T. Holbrook & M.R. Vaughan, *Influence of Roads on Turkey Mortality*, 49 J. WILDLIFE MGMT. 611-14 (1985)). Roads have also been shown to cause an increase in the hunting of grizzly bears. *Id.* (citing B.N. McLellan & D.M. Shackleton, *Grizzly Bears and Resource-Extraction Industries: Effects of Roads on Behaviour, Habitat Use and Demography*, 25 J. APPLIED ECOLOGY 451-60 (1988)).

[46] Examples are raptor nests; wintering areas for large game; habitats for rare, threatened, or endangered species; and streams with high wildlife value. Schonewald-Cox & Buechner, *supra* note 38, at 379.

[47] PAUL A. ERICKSON ET AL., OFFICE OF ENVIRONMENTAL POLICY, FEDERAL HIGHWAY ADMINISTRATION, PUB. NO. FHWA-RWE/OEP-78-2, HIGHWAYS AND ECOLOGY: IMPACT ASSESSMENT AND MITIGATION 33, 35 (1978). Erickson emphasizes that "sound ecological judgment is important" in selecting "corridors and alternate alignments . . . to avoid *ecologically sensitive areas*." *Id.* Among the criteria used to evaluate ecological sensitivity are productivity, density, species diversity, and habitat quality and diversity. *Id.* at 35.

[48] Some Alaskans apparently see R.S. 2477 as essential to maintaining their statehood. *See, e.g.*, 141 CONG. REC. S8883 (daily ed. June 22, 1995) (statement of Senator Stevens), *available in* Westlaw, 1995 WL 370509:

> Now, I do believe that there is no question about it that there are a lot of forces out there which, if they had their way now, would reverse statehood. They would take away from us the right to be a State. Not having that ability, what they do is take away from us the right to have the same access to our land mass that other States in the lower 48 have had.

Id.

[49] R.S. 2477 rights-of-way now provide federal agencies "an extensive network of roads . . . built and maintained at the expense of local government and taxpayers." Constituent comment, DOI REPORT, *supra* note 7, at 39.

[50] The mineral industry depends on unimpeded access to remote areas. "Any attempt to restrict the scope of valid [R.S. 2477 rights] will . . . hamper mineral exploration and development that is absolutely vital to the country's economy and national security." Constituent comment, DOI REPORT, *supra* note 7, at 43. "Access across public lands to private lands is [particularly important to reach] patented mining claims surrounded by public lands and the old railroad checkerboard system of land ownership." *Id.*

provisions are too restrictive or cumbersome to provide meaningful access.[51] Finally, there are those who claim that the source of the problem is not R.S. 2477, but the federal government's current land-use policy.[52]

Thus, uncertainty about the number, scope, and validity of R.S. 2477 claims impacts upon federal land managers, upon those concerned about preservation of the natural values of the federal land, and upon users of putative R.S. 2477 rights-of-way. Although different perspectives abound as to how these problems arose and how they should be resolved, there is little dispute that R.S. 2477 is a problem that must be addressed.

III. The Grant and Acceptance of an R.S. 2477 Right-of-Way

R.S. 2477 is not evil. R.S. 2477 is misunderstood, archaic, and unpredictable. If one seeks to understand R.S. 2477's true nature, its place in the modern world, and how it works, we can deal safely with R.S. 2477. This Part will seek to convey an understanding of R.S. 2477's true nature by illustrating the interplay between federal and state law and defining such essential terms as "construction" and "highway."

This Part will proceed by adopting Deputy Solicitor Frederick N. Ferguson's analogy of R.S. 2477 to a contract between the federal government and the states.[53] In R.S. 2477, the federal government offered a valuable property right for a certain purpose, under certain conditions. No formal words of acceptance are required; it proposes a unilateral contract and implicitly invites acceptance via conforming performance by the offeree.[54] Use of this analogy does not suggest that an actual, literal contract was formed between the 39th Congress and the proprietors of R.S. 2477 rights-of-way, any more than the social contract between the government and the governed is an actual, literal contract, such as one for "a trade of pepper and coffee, calico or tobacco, or some

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[51] "[Federal Land Policy and Management Act (FLPMA)] and [Alaska National Interest Lands Conservation Act (ANILCA)] are inadequate and do not provide the flexibility that R.S. 2477 provides to state and local government right-of-way needs." Constituent comment, DOI REPORT, *supra* note 7, at 47. "Average citizens will never see access with Title XI. There are too many loopholes; even major corporations won't use it." *Id.*

[52] "A conflict between management objectives and an R.S. 2477 claim is grounds for reconsidering the management objective." Constituent comment, DOI REPORT, *supra* note 7, at 43.

[53] *See, e.g.*, Ferguson, *supra* note 27, at 13 n.4.

[54] *See, e.g.*, Carlill v. Carbolic Smoke Ball Co., 1 Q.B. 256 (C.A. 1892).

such other low concern."[55] The concept of contract is offered as analogy, as it apparently was offered by Mr. Ferguson. If made to carry more than it can bear, the analogy might collapse under such weighty issues as whether R.S. 2477 was an offer or merely an advertisement,[56] whether the performing party need be aware of the offer,[57] whether the statute of frauds applies and, if so, whether it has been complied with,[58] or whether notice of performance was required.[59] Still, a seeker of the fabled "seamless web" of the law might be excused for proceeding as if the "primary authorities . . . could be used as indicia of the larger structure and could be analyzed and parsed as a means to mapping out the system."[60]

A. The Interplay Between Federal and State Law

Starting, then, from the analogy to the rules of contract formation, let us examine both the offer and the acceptance. For the offer, look to the language of the statute; for the acceptance, look to whether the acceptance was valid under the law of the state where the performance occurred. This two-part inquiry defines the roles of federal and state law in validating R.S. 2477 rights-of-way.

1. Federal Law Defines the Offer.

In R.S. 2477, Congress offered to grant the right to use federal property for a particular purpose; thus, federal law defines the terms of that offer.[61] This rationale finds support in the federal government's constitutional power. The Property Clause[62] gives the federal government

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[55] EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE, *reprinted in* EDMUND BURKE: ON TASTE; ON THE SUBLIME AND BEAUTIFUL; REFLECTIONS ON THE FRENCH REVOLUTION; A LETTER TO A NOBLE LORD 232 (Charles W. Eliot ed., 1963).

[56] *See Craft v. Elder & Johnson Co.*, 38 N.E.2d 416, 417 (Ohio App. 1941).

[57] *See Broadnax v. Ledbetter*, 99 S.W. 1111, 1112 (Tex. 1907).

[58] *See, e.g.*, 33 PA. STAT. § 1 (1967) (providing that no "leases, estates, interests of freehold or terms of years, or any uncertain interest of, in, or out of any messuages, manors, lands, tenements or hereditaments" shall be binding unless placed in writing and signed by the parties).

[59] *See Bishop v. Eaton*, 37 N.E. 665, 667 (Mass. 1894).

[60] Robert C. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 CAL. L. REV. 15, 16-17 (1987).

[61] 59 Fed. Reg. 39,218 (1994).

[62] U.S. CONST. art. IV, § 3, cl. 2. "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." *Id.*

unlimited control over the public lands.[63] Doubts as to grants of federal lands are resolved in favor of the government,[64] though effect is given to legislative intent.[65] Therefore, to understand whether the offer was validly accepted, one must first understand the terms of the offer.

2. State Law Defines the Acceptance.

State law governs the terms of acceptance and scope of the right-of-way, insofar as those terms consist with those of the offer.[66] State law can restrict the means of acceptance, but cannot broaden them beyond what the statute offers.[67] In other words, the state cannot accept the federal offer by establishing highways pursuant to state laws that do not satisfy the requirements of the federal statute.[68] Thus, for example, a state may not accept an offer of rights-of-way for construction of highways through a blanket designation of all section lines as "highways."[69]

This position is consistent with the contract law analogy and is supported both by federal jurisprudence and by the legislative intent of FLPMA. As in contract, the plain language of the offer indicates that the

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[63] United States v. City & County of San Francisco, 310 U.S. 16, 29 (1940). "The power over the public land thus entrusted to Congress is without limitations." *Id.*

[64] Andrus v. Charlestone Stone Prods. Co., 436 U.S. 604, 617 (1978). Federal land grant issues should be "resolved for the Government not against it." *Id.*

[65] "To ascertain [Congressional intent in granting land], we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together." Leo Sheep Co. v. United States, 440 U.S. 668, 681-82 (1979) (citing Winona & St. Peter R.R. Co. v. Barney, 113 U.S. 618, 625 (1885)).

[66] 59 Fed. Reg. 39,218 (1994).

[67] *Id.*

[68] *Id.*

[69] For example, the proposed regulation cites Board of County Commissioners of Douglas County, Washington, 26 Pub. Lands Dec. 446 (1898). In *Douglas County*, the Secretary of the Interior held that a designation of all section lines in the county as center or side lines of R.S. 2477 highways was ineffective to accept the offer of rights-of-way for the construction of highways before such roads were constructed, planned, or even needed. *Id.* at 447. *See infra* notes 134 and 135 and accompanying text. Similarly, Alaska, Kansas, and South Dakota have statutorily designated all section lines as R.S. 2477 highways. *See supra* note 29 and accompanying text. Because section lines form a grid of one-mile-by-one-mile squares, Solicitor Leshy estimates that Alaska's law, for example, would create more than 984,000 miles of highways, of which 300,000 miles would vivisect national wildlife refuges, 160,000 miles would scar national parks, and 137,500 miles would invade lands to be conveyed to Native Alaskans, thus encumbering a total of between 7.8 and 11.9 million acres of federal land. Leshy, *supra* note 31, at 3-4. On the other hand, Mr. Latta rebutted a similar claim made by then-Deputy Solicitor Ferguson. Latta, *supra* note 7, at 816-17 & nn.29-33. Mr. Latta argues that most of Alaska has not been surveyed, *id.* at 816 & n.32; unsurveyed land has only lines of ink, not lines of survey, *id.* at 816 & n.31; no easement attaches to a section line until the plat is approved; and "federal lands are not subject to the state's section line easement law," *id.* at 816-17 & nn.29-33.

grant may be perfected — the contract formed — by a person accepting a right-of-way for the construction of a highway. An offeree cannot accept more than the offeror has offered.[70] Because acceptance inconsistent with the terms of the offer is ineffective, the offeree's acceptance must comport with the terms and conditions of the offer.[71]

Federal jurisprudence provides that state law which conflicts with federal legislation pursuant to the property power must defer to federal law.[72] Moreover, to permit state law to lower the threshold for acceptance of the grant is tantamount to permitting state condemnation of federal land.[73]

Some cases have suggested that state law alone controls acceptance of the grant. For example, Pamela Baldwin[74] has noted that the court in *Sierra Club v. Hodel*[75] appeared at one point to conclude that the 1980 Ferguson letter[76] supported the position that state law controls acceptance of the grant.[77] Ms. Baldwin went on to point out, however, that this statement, made in the context of a discussion of the grant's scope (the only issue before the appellate court), could not have referred to the acceptance issue, and that the Ferguson letter could not fairly be read to suggest that state law alone controls the manner of establishment.[78]

In concluding that Utah law controlled perfection of the R.S. 2477 right-of-way, the district court[79] in *Hodel* was itself influenced by the facts of *Wilkenson*,[80] a case of first impression.[81] In *Wilkenson*, the parties agreed that Colorado law applied to acceptance by construction of

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[70] Maddox v. Northern Natural Gas Co., 259 F. Supp. 781, 783 (W.D. Okla. 1966).

[71] Minneapolis & St. Louis Ry. Co. v. Columbus Rolling-Mill Co., 119 U.S. 149, 151 (1886).

[72] Kleppe v. New Mexico, 426 U.S. 529, 543 (1976). "[W]here those state laws conflict with . . . legislation passed pursuant to the Property Clause, the law is clear: The state laws must recede." *Id.*

[73] "A different rule would place the public domain of the United States completely at the mercy of state legislation." *Id.*

[74] BALDWIN, *supra* note 7, at 24-25.

[75] 848 F.2d 1068 (10th Cir. 1988).

[76] Ferguson, *supra* note 27, at 6.

[77] "The third possible reading of this letter would return us to BLM's regulations: as a matter of federal law, state law has been designated as controlling. This third reading, we think, is most consonant with reason and precedent." Sierra Club v. Hodel, 848 F.2d 1068, 1081 (10th Cir. 1988).

[78] To the contrary, Ferguson writes at one point, "The question of whether a particular highway has been legally established under R.S. 2477 remains a question of federal law." Ferguson, *supra* note 27, at 4.

[79] Sierra Club v. Hodel, 675 F. Supp. 594, 604 (D. Utah 1987), *aff'd in part, rev'd in part*, 848 F.2d 1068 (10th Cir. 1988).

[80] Wilkenson v. Department of Interior, 634 F. Supp. 1265 (D. Colo. 1986).

[81] *Id.* at 1280.

highways. Although the trial judge noted that under Colorado law use without construction was sufficient,[82] this determination was not essential to the result. The court went on inquire into the circumstances of the prior use of the highway. The evidence indicated that the portion of the road ultimately qualified as an R.S. 2477 right-of-way actually had been surveyed and constructed.[83] In fact, the judge disqualified one section because construction occurred only after the land was reserved for use as a national monument.[84] Thus, even if the court had ruled that inconsistent state law could control, such a ruling was not necessary to the court's findings because the court apparently went on to employ the statute's higher standard. Ms. Baldwin concluded, "We know of no federal case in which the facts presented the issue of an unimproved highway recognized under state law that contradicts the statutory requirements as to establishment of R.S. 2477 rights of way."[85]

In addition to the analogy and the case law, the legislative history of FLPMA supports this view of R.S. 2477's nature. As will be discussed below,[86] the 102d Congress specifically directed that criteria for "assessing the validity of claims . . . be drawn from the intent of R.S. 2477 and FLPMA."[87] Therefore, it is worthwhile to examine the intent of the 94th Congress in enacting FLPMA.

The 94th Congress did not directly address whether state law could provide for more lenient R.S. 2477 criteria than did federal law. However, that Congress did address an analogous issue: Which law should prevail when federal and state standards concerning "public health and safety, environmental protection, and siting, construction, operation, and maintenance of rights-of-way" differed?[88] House and Senate conferees agreed that the state standards would be used only if those standards were

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[82] *Id.* at 1272.

[83] *Id.* at 1268-69, 1272.

[84] *Id.* at 1273. Note that this condition would itself negate the R.S. 2477 offer. *See infra* note 98 and accompanying text.

[85] BALDWIN, *supra* note 7, at 26. Ms. Baldwin wrote at a time before the decision in Shultz v. Department of the Army, 10 F.3d 649 (9th Cir. 1993) *withdrawn pending rehearing* [hereinafter *Shultz II*]. Although the right-of-way in *Schultz II* was so "unimproved" that its route could not be traced with certainty, 10 F.3d at 654, it remains to be seen whether the Alaska law employed in the case actually contradicts the statutory requirements or was merely misconstrued by the court. *See infra* notes 100-06 and accompanying text.

[86] *See infra* note 166 and accompanying text.

[87] H.R. CONF. REP. NO. 901, 102d Cong., 2d Sess., *reprinted in* 138 CONG. REC. H9325 (daily ed. Sept. 24, 1992), *available in* Westlaw, 1992 WL 237510.

[88] H.R. CONF. REP. NO. 1724, 94th Cong., 2d Sess., at 65, *reprinted at* 1976 U.S.C.C.A.N. 6228, 6236.

"more stringent than applicable Federal standards."[89] This agreement in the conference report strongly indicates congressional intent that state law could act as a ceiling but never as a floor with respect to environmental protection and rights-of-way.

Finally, in the FLPMA declaration of policy,[90] Congress delineated thirteen goals; of these goals, five would be particularly ill-served by the 'states' having broad discretion as to acceptance of rights-of-way over federal lands. The first goal is retention of lands unless disposal is in the public interest;[91] however, existence of an R.S. 2477 right-of-way means that an interest in the land is disposed of without regard to the public interest. The second policy goal, periodic inventory and coordination of land-use planning,[92] is negatively impacted by construing the grant as burdening public lands with rights-of-way according to the vagaries of state law. In particular, the eighth policy goal, protection of "scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values,"[93] is incompatible with potentially unfettered recognition of roads across public land. The ninth policy goal, receipt of fair market value for use of lands and resources,[94] cannot possibly be met where lenient requirements for acceptance of an offer under R.S. 2477 reduce the highway grant to highway robbery. Finally, the tenth policy goal, uniform procedures for disposal of public land,[95] demands that some minimum standard be applied to the recognition of an R.S. 2477 grant. If state law alone controlled, uniform treatment of land in different states would be impossible.

B. Definition of Key Terms

Among the rules of intrinsic statutory construction is the "rule to avoid surplusage,"[96] which provides that no statutory provision is completely redundant.[97] The statute reads, "The right-of-way for the *construction* of

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[89] *Id.*

[90] 43 U.S.C. § 1701 (1994).

[91] § 1701(a)(1).

[92] § 1701(a)(2).

[93] § 1701(a)(8).

[94] § 1701(a)(9).

[95] § 1701(a)(10).

[96] WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 644 (2d ed. 1995).

[97] *See, e.g.*, Exxon Corp. v. Hunt, 475 U.S. 355, 369 n.14 (1986) (presuming that each word and each phrase adds something to the statutory command); SUTHERLAND, STATUTORY CONSTRUCTION § 46.01 (4th ed. 1984).

highways over *public lands, not reserved for public uses*, is hereby granted."[98] Thus, acceptance of the offer requires satisfaction of each of the three elements of construction, highways, and unreserved public land.

Congress could have accomplished its grant with greater economy of expression by stating, "The right-of-way over public lands, not reserved for public uses, is hereby granted." Such a grant would have permitted individuals or groups to travel hither and yon, blazing trails or not, as dictated by numbers, mode of travel, preference, climate, or topography, to reach their mining claims. The inclusion of the nouns "construction" and "highways" indicates that Congress wanted roads, not footprints. Absent evidence to the contrary, the better rule is to assume that each word has a function.

1. "Construction."

Although standards of highway construction have changed since 1866, Congress likely intended "construction" to mean intentional physical acts which combine to produce a surface that will support highway traffic.[99] Under this view, the sequence is probably not critical; thus, continual passage of traffic, followed by significant maintenance to produce a durable surface, could also satisfy this element — so long as the maintenance was performed before the land was reserved for public uses or before R.S. 2477 was repealed.

Such an interpretation of "construction" is consistent with three sources of statutory interpretation, with federal jurisprudence, and with administrative opinions. A strict reading of "construction" is supported by examination of one intrinsic and two extrinsic sources of statutory interpretation: first, the plain meanings of "construction" at a date nearer to 1866 and at a date nearer to 1976; next, the legislative context in which R.S. 2477 was enacted; and, finally, the legislative history of FLPMA.

Having no contemporaneous definitions of "construction" to provide its plain meaning, we turn, as Mr. Ferguson did, to the 1912 *Paterson* case. In *Paterson*, the New Jersey Chancery Court interpreted "construction as a highway" to mean "the preparation of the highway for actual ordinary use, and not the mere delineation thereof, or the taking of land for the purpose of a street."[100] Mr. Latta has found Mr. Ferguson's citation of

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[98] 43 U.S.C. § 932 (1938) (emphasis added).

[99] *Accord*, 59 Fed. Reg. 39,220 (1994).

[100] Paterson & Ramapo R.R. Co. v. City of Paterson, 86 A. 68, 70 (N.J. Ch. 1912). The court also said: "[A] highway cannot be said to be 'constructed' until it shall have been made ready for actual use as a highway. The word 'construction' implies the performance of work; it

this 1912 New Jersey case "noteworthy."[101] Granted, the value of the 1912 *Paterson* case in gauging the 1866 meaning of "construction" — a gap of forty-six years — is somewhat attenuated by the passage of time. Yet it seems no more remarkable to use *Paterson* for that purpose than to suppose, for example, that the 39th Congress's definition of "construction" made special allowances for Alaska's peculiar "geography, . . . weather, and . . . sparse and scattered population"[102] in 1866, a year before Alaska had even been purchased.[103]

It might be argued that the 1976 meaning of "construction" is of dubious value in discerning the 1866 connotation of "construction"; yet the 1976 meaning of "construction" is pertinent, whether one regards FLPMA's savings clause as merely a grandfathering of vested rights or a granting of new rights. If the savings clause grandfathered vested rights, the question becomes: What prior existing rights did the 94th Congress believe it was saving?[104] If the savings clause granted new rights, the question becomes: What conditions did the 94th Congress implicitly impose upon the rights it was granting?[105] However one frames the question, the 1976 meaning of "construction" is pertinent to the answer.

With that preamble, we turn to the 1976 meaning of "construction." In 1979, three years after FLPMA was enacted, "construction" denoted "the act or process of building, or of devising and forming; fabrication; erection."[106] The word was derived from the Latin *constructio*, in turn

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implies also the fitting of an object for use or occupation in the usual way, and for some distinct purpose; it means to put together the constituent parts, to build, to fabricate, to form and to make." *Id.* at 69-70, *quoted in* Ferguson, *supra* note 27, at 6.

[101] Latta, *supra* note 7, at 832 & n.125.

[102] *See* Shultz v. Department of Army, 10 F.3d 649, 655 (9th Cir. 1993).

[103] Alaska's purchase was effected by a treaty concluded on 20 March 1867, ratified on 28 May 1867, and signed by then-President Andrew Johnson on 20 June 1867. Treaty Concerning the Cession of the Russian Possessions in North America by His Majesty the Emperor of all the Russias to the United States of America, March 30, 1867, 15 Stat. 539 (1869).

[104] For a discussion of the significance of subsequent legislative history accompanied by enactment of a new statute, see ESKRIDGE & FRICKEY, *supra* note 96, at 806-13 (citing Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 78 (1992) (Scalia, J., concurring in the judgment); Gozlon-Peretz v. United States, 498 U.S. 395, 406 (1991); and Montana Wilderness Ass'n v. U.S. Forest Serv., 655 F.2d 951, 953-57 (9th Cir.), *cert. denied*, 455 U.S. 989 (1981)).

[105] Implicit in the 94th Congress's express preservation of prior existing rights under R.S. 2477 is a belief that it had the power to terminate such rights; otherwise, express language to preserve them would be unnecessary. It follows that FLPMA's "grandfathering" of R.S. 2477 rights-of-way effected a 1976 grant in the same terms as the 1866 grant, except as to the time period in which such rights could be perfected. That being so, the 1976 definition of "construction" does control how a right-of-way must have been perfected in order to be considered valid in 1976 and thus survive the repeal of R.S. 2477.

[106] WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 392 (2d ed. 1979).

rooted in *construere*, meaning to heap together or to build, and formed from the prefix *com* (together) and the verb *struere* (to heap or pile up).[107] Nothing in the definition or etymology of the word even hints that "construction" could connote anything but physical results of intentional effort. One of the 1979 legal definitions of "construction" is "[t]he creation of something new, as distinguished from the repair or improvement of something already existing"; "[t]he act of fitting an object for use or occupation in the usual way, and for some distinct purpose."[108] "To construct" means "[t]o build; erect; put together; make ready for use"; "[t]o adjust and join materials, or parts of, so as to form a permanent whole"; "[t]o put together constituent parts of something in their proper place and order."[109] Although the definition of the verb is more expansive than that of the noun, both forms share the common elements of physical existence and purposeful labor.[110]

We also find some indication of the meaning two senators assigned to "construction" for purposes of R.S. 2477. In a 1974 colloquy[111] between Senators Stevens of Alaska and Haskell of Colorado during the debates on a progenitor of FLPMA, Senator Stevens expressed concern that, if R.S. 2477 were repealed, "de facto public roads" created from trails, then graded, graveled, and maintained by the state, would be eliminated if the state, which "did, in fact, build [these] public highways across federal lands," failed formally to declare them to be highways.[112] Senator Haskell responded that actual use as a public highway prior to the repeal would be sufficient to protect the right of way.[113] While neither senator expressly defined "construction," neither suggested that the element could be satisfied either by intent without physical alteration to the landscape or by unintentional physical alteration.[114]

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[107] *Id.*

[108] BLACK'S LAW DICTIONARY 283 (5th ed. 1979).

[109] *Id.*

[110] This definition does add a distinction, that between "construction" and "maintenance." The possible implications of this distinction are addressed *infra* note 133 and accompanying text.

[111] 120 CONG. REC. 22,283-84 (1974).

[112] *Id.*

[113] *Id.*

[114] The author concedes that a single colloquy is of questionable value in gauging the understanding of an entire legislative body in enacting a statute. This quotation's greater value might lie in measuring how liberal Senator Stevens' views on R.S. 2477 highway construction have become in the years between 1974, when he defended roads that had been "graded, graveled, and maintained by the state," and 1995, when he and Senator Murkowski fought to preserve dogsled trails as R.S. 2477 highways. *See, e.g.*, 141 CONG. REC. S8925 (daily ed. June 22, 1995) (remarks of Senator Murkowski), *available in* Westlaw, 1995 WL 370512.

We next attempt to divine the plain meaning of "construction" by speculating why Congress chose that word. The 39th Congress could have phrased its grant in fewer words.[115] Had Congress intended to require less, it could have used different words. For example, Congress could have stated, "right-of-way for planning of highways," "right-of-way for visualization of highways," "right-of-way for designation of highways," or some combination of the three. A reasonable reading suggests that the noun "construction" was chosen purposefully.

Having concluded that the 39th Congress chose the word "construction" for a purpose, we seek that purpose in the legislative context of R.S. 2477. R.S. 2477 was enacted in an era during which Congress was attempting to encourage settlement of the West.[116] Thus, the word "construction" might well have been motivated by a desire to encourage, not mere sojourns by lone miners, but movement of wagon trains carrying troops, families, merchandise, law libraries, and such truck. Such movement required real roads, not foot trails or cowpaths. Real, durable roads are laid out with some degree of foresight and expenditure of labor beyond that involved in dragging one's feet across the prairie from point A to point B.

Federal court interpretations of "construction" are not consistent because they have almost invariably disregarded the statutory offer and focused on the means of acceptance. For example, in *Shultz II*,[117] the court initially stated that its "decision must take into account the fact that conditions in Alaska present unique questions, not easily answered."[118] The court, however, then concluded that perfection of the R.S. 2477 grant was purely an issue of state law,[119] and that state law required, not a constructed road, not even a definite footpath, but only definite termini.[120] The court apparently relied upon an Alaska case in which the court

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[115] *See supra* subpart III.B. introduction.

[116] *See, e.g.*, BALDWIN, *supra* note 7, at 2-3 (1993). "After the United States acquired the vast territories West of the Mississippi, Congress debated how best to encourage settlement of the lands. Rapid settlement was considered desirable both to secure the new lands from foreign encroachment and to speed the conveyance of lands from federal to state and private ownership in order to build the new nation." *Id. See also* Leo Sheep Co. v. United States, 440 U.S. 668, 670 (1979). In *Leo Sheep*, then-Associate Justice Rehnquist identified "the desire of the Federal Government that the West be settled" as having prompted passage of the Union Pacific Act of 1862, 12 Stat. 489 (1863), which granted public land for construction of the transcontinental railroad. *Id.*

[117] *Shultz*, 10 F.3d 649.

[118] *Id.* at 655.

[119] *Id.* at 656.

[120] *Id.* at 657.

had stated that "a right of way created by public user pursuant to 43 U.S.C. § 932 connotes definite termini."[121]

On the similar facts of the *Adams*[122] case, a different panel of the same court concluded that, because the road at issue was in a different location from the road established while the land was unreserved, it was a different road and therefore not an R.S. 2477 right-of-way.[123] On 15 December 1994,[124] *Shultz II* was reheard *en banc*, presumably because of the conflict with *Adams*.[125] DOI has stated that it will consider the final decision in *Shultz II* in its final rulemaking.[126] That decision has not yet been announced.[127]

In *Morton*,[128] the court found that the state's expressed intention to construct a highway on a right-of-way was sufficient acceptance of the R.S. 2477 grant.[129] *Central Pacific* might suggest that actual use is sufficient.[130] Several commentators[131] have pointed to the circumstance that the highway was "laid out and declared by the county in 1859, and ever since has been maintained."[132] This view that actual use may be sufficient is, however, undercut by the definitional element distinguishing "construction" from maintenance or improvement.[133] This distinction, presumably known to the *Central Pacific* majority, adds weight to an interpretation that the majority understood the road as having been "constructed" when it was formed by traffic, rather than when it was improved and maintained by the county. The obvious counter is that

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[121] Dillingham Commercial Co., Inc. v. City of Dillingham, 705 P.2d 410, 414 (Alaska 1985) (quoting assertion of a party), *cited in Shultz*, 10 F.2d at 657.

[122] Adams v. United States, 3 F.3d 1254 (9th Cir. 1993).

[123] *Id.* at 1258.

[124] Telephone Interview with William B. Lazarus, Environment & Natural Resources Division, Department of Justice (Nov. 21, 1994).

[125] *See* Defendant's Petition for Rehearing and Suggestion for Rehearing *En Banc* at 15, Shultz v. Department of the Army (9th Cir. 1994) (Nos. 92-35197, 92-35580). "Because the panel decision conflicts with another recent decision of this Court, *Adams v. United States*, 3 F.3d 1254, 1258, rehearing *en banc* is warranted." *Id.* (italics in original).

[126] 59 Fed. Reg. 39,218 (1994).

[127] Telephone Interview with William B. Lazarus, Environment & Natural Resources Division, Department of Justice (June 11, 1996).

[128] Wilderness Soc'y v. Morton, 479 F.2d 842 (D.C. Cir. 1973), *cert. denied*, 411 U.S. 917 (1973).

[129] *Id.* at 882.

[130] Central Pac. Ry. Co. v. Alameda County, 284 U.S. 463 (1932). The road "was formed by the passage of wagons, etc., over the natural soil." *Id.* at 467.

[131] *See, e.g.*, Ferguson, *supra* note 27, at 6; BALDWIN, *supra* note 7, at 31.

[132] *Central Pacific*, 284 U.S. at 465.

[133] *See supra* note 108 and accompanying text. "Construct is distinguishable from 'maintain,' which means to keep up, to keep from change, to preserve." BLACK'S LAW DICTIONARY 283 (5th ed. 1979).

construction was completed only when the county "laid out and declared" the road to be a public highway. The majority did not define what it meant by "laid out and declared"; however, "laid out" suggests some sort of physical alignment or marking of the road. If the court was saying, however, that the subsequent maintenance accomplished the element of construction, *Central Pacific* supports the view that "construction" has a physical dimension.

Administrative interpretations of "construction" have been likewise inconsistent. For example, in *Douglas County*,[134] designation of section lines was found insufficient for construction under R.S. 2477.[135] A 1938 regulation,[136] however, introduced an element of confusion by seeming to suggest that an R.S. 2477 grant could be accepted by "establishment," as distinguished from "construction," of a highway.[137] Such verbiage has been seized upon by those seeking to establish that establishment and construction are different, and thus alternative, methods of accepting the R.S. 2477 grant.[138]

Perhaps the most liberal interpretation is that provided by former Secretary of the Interior Donald P. Hodel.[139] This policy,[140] prepared

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[134] Board of County Comm'rs of Douglas County, Washington, 26 Pub. Lands Dec. 446 (1898).

[135] The county commissioners passed a law purporting to accept R.S. 2477's grant by declaring all section lines in the county to be the center lines or the exterior boundaries of highways and public roads, "sixty feet (60) in width," depending upon whether such lines were surrounded by public land sections or formed the boundaries between public land and private land. *Id.* at 447. Affirming the decision of the General Land Office which repudiated the R.S. 2477 grant, Interior Secretary Bliss noted that the purported acceptance manifested a "marked and novel liberality on the part of the county authorities in dealing with the public land." *Id.* He added: "There is no showing of either a present or a future necessity for these roads or that any of them have been actually constructed or that their construction and maintenance is practicable. Whatever may be the scope of the statute under consideration it certainly was not intended to grant a right of way over public lands in advance of an apparent necessity therefor, or on the mere suggestion that at some future time such roads may be needed." *Id.* For discussion of modern section-line statutes, see *supra* notes 29 and 69.

[136] 43 C.F.R. § 244.55 (1938), *reprinted in* DOI REPORT, *supra* note 7, at app. II, exhibit C.

[137] "This grant [under R.S. 2477] becomes effective upon the construction *or establishing of* highways, in accordance with the State laws, over public lands not reserved for public uses." 43 C.F.R. § 244.55 (1938), *reprinted in* DOI REPORT, *supra* note 7, at app. II, exhibit C (emphasis added).

[138] *See, e.g.*, Hjelle, *Essential Points*, *supra* note 7, at 305 & n.16.

[139] Memorandum, Donald Paul Hodel, Secretary of the Interior (Dec. 7, 1988), *reprinted in* DOI REPORT, *supra* note 7, at app. II, exhibit K [hereinafter Hodel].

[140] The document is aptly labeled a "policy statement" rather than a legal opinion. It contains no citations to statute or case law. It implies at one point that a grant could have been accepted after the repeal of R.S. 2477: "[W]idth [of a highway right of way] is determined from the area . . . . actually in use . . . at the *later* of (1) acceptance of the grant or (2) loss of grant authority under RS 2477, *e.g.*, repeal of RS 2477 on October 21, 1979 [sic]." Hodel, *supra* note

in apparent response to concerns from Alaska claimants,[141] was issued without notice or opportunity for public comment.[142] Although the policy required the three elements of construction, highway, and unreserved public land, the definition for each was so broad as to render its requirements nugatory. "Construction" was defined as including "readying the highway for use . . . according to the available or intended mode of transportation — foot, horse, vehicle, etc."[143] According to Mr. Hodel, construction might involve merely "removing high vegetation, moving large rocks out of the way, or filling low spots."[144] Finally, in case these requirements were too stringent, actual construction might consist of "[t]he passage of vehicles by users over time."[145] A highway "need not necessarily be open to vehicular traffic for a pedestrian or pack animal trail may qualify."[146] In the absence of contrary evidence, a "statement by an appropriate public body that the highway was and still is considered a public highway will be accepted."[147] Finally, the requirement that the "highway" be "constructed" prior to the repeal of R.S. 2477 was satisfied if the "[s]urvey, planning, or pronouncement [of the highway] by public authorities [occurred] prior to the repeal of R.S. 2477," so long as "actual construction . . . followed within a reasonable time."[148] The Hodel policy was employed by BLM from 1988 to 1992 in administrative determinations of whether "an R.S. 2477 right of way probably exists"[149] and was also adopted by the U.S. Forest Service.[150]

139, at 4 (emphasis added).

[141] Hodel, *supra* note 139, at 23.

[142] BALDWIN, *supra* note 7, at 20.

[143] Hodel, *supra* note 139, at 3.

[144] *Id.*

[145] *Id.* The absurdity of these criteria can be highlighted by a hypothetical. County X declares that two R.S. 2477 highways, each in its natural state and each intended for foot traffic, lead to the county seat. Southbound Highway is fully ready for use by "the available or intended mode of transportation." Northbound Highway is not yet ready because it has a tall clump of grass, a huge boulder, and a low spot. The routes are otherwise identical in all respects. Under the Hodel criteria, when both routes are ready for foot traffic, only Northbound Highway will have been perfected as an R.S. 2477 highway. Southbound Highway will not be perfected until County X expends upon it some amount of presumably pointless labor.

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] DOI REPORT, *supra* note 7, at 26.

[150] *Id.* at 25.

2. "Highway."

In 1865, "highway" was defined in one dictionary as a public road, or a way open to all passengers.[151] The 1860 edition of the same dictionary defined highway as follows: "a public road; a way *open to all* passengers; so called, either because it is a *great or public* road, or because the *earth was raised* to form a dry path. Highways open a communication from one *city or town* to another."[152] A "way open to all passengers" might also include a footpath, a cowpath, or a canal.[153] Thus, we have no plain meaning of "highway" to be dispositive of the intent of the 39th Congress.

In the late 1970s,[154] "highway" still had two meanings. One was a road freely open to everyone; a public road, main road, or thoroughfare.[155] The other was route of approach, main route by land or water, or a direct way to some objective.[156] Thus, in addition to the earlier possibilities of footpath, cowpath, or canal, "highway" in 1976 might have included dogsled trails and bicycle paths. Although in 1976 most Americans encountered "highways" as asphalt under the wheels of their cars, it is possible that the 94th Congress looked at R.S. 2477, read "highways," and thought "route of approach, main route by land or water or a direct way to some objective." Therefore, the meaning of "highway" is, by itself, not sufficiently plain to dispose of the controversy.

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[151] BALDWIN, *supra* note 7, at 7 (citing WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 627 (1865)). The same dictionary, in turn, defined "road" as follows:

> a riding, a riding on horseback, that on which one rides or travels, a trackway, a road, from *ridan*, to ride . . . a place where one may ride; an *open way* or public passage; *a track for travel*, forming a communication between one city, town, or *place*, and another.

Id. at 1143 (emphasis added).

[152] *Id.* at 7 (citing WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 522 (1860)) (emphasis added). The same dictionary defined "road" as follows:

> an *open way* or public passage; *ground appropriated for travel*, forming a communication between one city, town, or *place*, and another. The word is generally applied to highways, and as a generic term it includes highway, street and lane . . . .

Id. at 959 (emphasis added).

[153] A "way open to all passengers" would not, however, include a railroad. If the Congress of that time meant "railroad," it was quite capable of saying "railroad." *See, e.g.*, Union Pacific Railroad Charter, Law of July 1, 1862, ch. 120, 12 Stat. 489 (1863).

[154] For a discussion of the pertinence to this inquiry of the late 1970s, see *supra* notes 104-05 and accompanying text.

[155] WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 860 (2d ed. 1979).

[156] *Id.*

Words, however, are known by the company they keep.[157] Where a word in a statute is ambiguous, the meaning of words or phrases associated with that word might help to ascertain its meaning.[158] Thus, when one evaluates the word "highways" in the company of its creative, building, and purposeful friend "construction," one comes away with an understanding of a "highway" as being a great or public road, one which construction has raised to form a dry path.

Thus, R.S. 2477 is an offer of land for a particular purpose. That purpose is the building of major public roads. No lesser measure of performance can effect acceptance of the grant. Although a state may require a higher measure of performance to perfect an R.S. 2477 right-of-way, a state cannot allow a lesser measure of performance to perfect an R.S. 2477 right-of-way. Once the true nature of R.S. 2477 is understood, the validation of R.S. 2477 rights-of-way can be easily managed as a factual question.

IV. Recent Legislative and Administrative Activity

Recognizing the problems with R.S. 2477, members of the executive and legislative branches have made sporadic attempts to resolve them. Four major efforts have been made in recent history. The first effort was administrative recognition, employed by DOI from 1988 to 1993. The second effort was legislative; made aware of the problem through an abortive 1991 attempt to pass sunset legislation, Congress in 1992 instructed DOI to report to Congress with recommendations. The third effort, thus, was administrative; in 1991, after studying the problem, DOI reported to Congress and initiated the present rulemaking process. The fourth phase began after the 1994 Republican Revolution; at that time, efforts commenced to derail the rulemaking process and to enact legislation to aid would-be R.S. 2477 rights-of-way holders. This Part will describe the dialectic process in greater detail.

A. Administrative Recognition of Claims

After trying to encourage voluntary disclosure of R.S. 2477 rights-of-way,[159] DOI attempted in 1988 to exercise controls over potential R.S.

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[157] *See* BLACK'S LAW DICTIONARY 956 (5th ed. 1979). "*Noscitur a sociis*" is a rule of intrinsic statutory construction meaning, "It is known from its associates." *Id.*

[158] *Id.* (citing Wong Kam Wo v. Dulles, 236 F.2d 622, 626 (9th Cir. 1956)). *See also* ESKRIDGE & FRICKEY, *supra* note 96, at 637-38.

[159] *See supra* notes 11-14 and accompanying text.

2477 rights-of-way by initiating "administrative recognition" procedures.[160] These procedures were controversial. Disputes arose over evidence required, public notification, definitions, partial recognitions, and the absence of an administrative appeals process.[161]

B. Legislative Cognition of the Problem

In 1991, legislation was proposed which would have imposed a deadline for filing claims. The legislation also specified how DOI would handle future claims.[162] Congress adjourned without taking action on the bill.[163]

In its 1993 appropriations bill, Congress directed the Department of the Interior to report to the appropriate committees with recommendations for "assessing validity of claims."[164] In its directive for the report, Congress gave the Department of the Interior specific instructions regarding the recommendations. First, Congress required consultation with affected interests.[165] Second, Congress noted that "validity criteria should be drawn from the intent of R.S. 2477 and FLPMA."[166]

C. Department of the Interior Action

DOI suspended its "recognition" procedure,[167] formed an interagency task force,[168] initiated "scoping," gave public notice,[169] conducted public

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[160] *See supra* note 15 and accompanying text.

[161] DOI REPORT, *supra* note 7, at 28.

[162] H.R. 1096, 102d Cong., 1st Sess. (1991), *reprinted in* DOI REPORT, *supra* note 7, at app. VI, exhibit A.

[163] DOI REPORT, *supra* note 7, at 4.

[164] H.R. CONF. REP. NO. 901, 102d Cong., 2d Sess., *reprinted in* 138 CONG. REC. H9325 (daily ed. Sept. 24, 1992), *available in* Westlaw, 1992 WL 237510.

[165] *Id.*

[166] *Id.*

[167] DOI substituted a policy of merely "acknowledging" R.S. 2477 assertions. Instruction Memorandum No. 93-113, Bureau of Land Management, Dept. of Interior, January 22, 1993, *reprinted in* DOI REPORT, *supra* note 7, at app. II, exhibit A. "Until such time as the report is completed, the BLM will acknowledge RS 2477 assertions in a most prudent manner. Assertions should only be examined when the State and/or local governmental entities have shown a compelling and immediate need to have a road acknowledged as a RS 2477 highway." *Id.*

[168] The task force included representatives of "each BLM state organization, the BLM Headquarters Office, the Office of the Solicitor, the National Park Service, the Bureau of Indian Affairs, and the U.S. Fish and Wildlife Service." DOI REPORT, *supra* note 7, at 5.

[169] 57 Fed. Reg. 59,122 (1992) (notice, Dec. 14, 1992), *available in* Westlaw, 1989 WL 284332.

meetings[170] from November 1992 through January 1993, and received thousands of pages of written information.[171] After preparing the draft report, DOI distributed it to interested parties,[172] conducted more public meetings,[173] and solicited additional comments.[174] At about the same time, DOI initiated the rulemaking process by giving public notice[175] of rulemaking as to R.S. 2477. After considering all of the information received,[176] DOI reported to Congress, noting both that the rulemaking was proceeding and what issues would be addressed.[177] At the same time it announced the proposed regulation for recognizing R.S. 2477 rights-of-way,[178] DOI gave notice of rulemaking for managing existing R.S. 2477 rights-of-way.[179]

This proposed regulation, unprecedented in the 130-year history of R.S. 2477, warrants comment both for achieving its ambitious objectives[180] and for placing R.S. 2477 in its proper context among provisions for public access to federal lands.[181] Primarily, the regulation would provide an administrative procedure for obtaining formal recognition of R.S. 2477 rights-of-way.[182] The regulation would eliminate the need to litigate R.S. 2477 claims by providing an alternative avenue for claims,[183] and by permitting public comment on claims. The regulation would also minimize judicial review by offering, to the claimant or other parties affected, an

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[170] The hearings were held in Fairbanks and Anchorage, Alaska; Riverside, California; Boise, Idaho; LeGrande, Oregon; Billings, Montana; Reno, Nevada; and Salt Lake City, Utah. DOI REPORT, *supra* note 7, at 5-6, and app. III, exhibit A, at 2.

[171] DOI REPORT, *supra* note 7, at 5-6.

[172] Nearly four thousand copies were sent out. DOI REPORT, *supra* note 7, at 7.

[173] Four hundred persons attended the eight public meetings. *Id.*

[174] DOI received 1000 pages of written comments. *Id.*

[175] 58 Fed. Reg. 56,528 (1994) (proposed rule stage, undated); 59 Fed. Reg. 20,545 (1994) (proposed rule stage, Apr. 25, 1994), *available in* Westlaw, 1994 WL 155516.

[176] Letter from Hon. Bruce Babbitt, Secretary of the Interior, to Hon. Sidney R. Yates, Chairman, Subcommittee on Interior, Committee on Appropriations, House of Representatives (May 28, 1993), [hereinafter Babbitt] at 1, *reprinted in* DOI REPORT, *supra* note 7, at three unnumbered pages between the front cover and the table of contents, which itself precedes page 1.

[177] Babbitt, *supra* note 176, at 2.

[178] 59 Fed. Reg. 39,216 (1994).

[179] 59 Fed. Reg. 39,228 (1994) (to be codified at 36 C.F.R. pt. 14, 43 C.F.R. pt. 2820, and 50 C.F.R. pt. 29) (advance notice of proposed rulemaking, Aug. 1, 1994), *available in* Westlaw, 1994 WL 392978.

[180] 59 Fed. Reg. 39,219 (1994).

[181] 59 Fed. Reg. 39,216-18 (1994).

[182] 59 Fed. Reg. 39,224 (1994) (to be codified at 43 C.F.R. § 39.1).

[183] 59 Fed. Reg. 39,217 (1994). "This rule intends to establish a process to determine which claims to rights-of-way were validly acquired . . . without pursuing court actions . . . ." *Id.*

administrative appeal process.[184] Though it minimizes the need for judicial review, the regulation preserves the right to judicial review. It does so by designating the following as a "final agency determination": (1) an adverse determination after appeal to the agency director;[185] or (2) the authorized officer's refusal to process the claim, based on (a) failure to file within the time limit,[186] (b) refusal to provide sufficient evidence,[187] or (c) a prior adverse administrative or judicial determination.[188] Most significantly, the regulation clarifies the relationship between federal law and state law[189] and clearly defines essential terms contained in the statute.[190] Finally, the regulation's sunset provisions provide that promulgation will start two clocks running: (1) a two-year, one-month, time limit for filing administrative claims and (2) a twelve-year window for filing quiet-title cases against the United States. After announcing the proposed rule, DOI extended the comment period three times[191] and collected and indexed more than three thousand, two hundred comments.[192]

D. Congressional Reaction

Then came the Republican Revolution of 1994. Apparently perceiving a mandate from the electorate, Senate Republicans attempted to put the

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[184] 59 Fed. Reg. 39,227 (1994) (to be codified at 43 C.F.R. § 39.9).

[185] 59 Fed. Reg. 39,227-28 (1994) (to be codified at 43 C.F.R. § 39.9(f)).

[186] 59 Fed. Reg. 39,221 (1994) (to be codified at 43 C.F.R. § 39.7).

[187] 59 Fed. Reg. 39,227 (1994) (to be codified at 43 C.F.R. § 39.8(a)).

[188] 59 Fed. Reg. 39,227 (1994) (to be codified at 43 C.F.R. § 39.8(e)).

[189] 59 Fed. Reg. 39,218 (1994).

[190] 59 Fed. Reg. 39,225-26 (1994) (to be codified at 43 C.F.R. § 39.3).

[191] The initial sixty-day comment period was to have expired on 30 September 1994. 39 Fed. Reg. 39216 (1994). "In response to public request," the comment period was extended to 15 November 1994. 59 Fed. Reg. 46,952 (1994) (proposed rule; extension of period of comments, Sept. 13, 1994), *available in* Westlaw, 1994 WL 493443. On November 21, 1994, the comment period was reopened and extended an additional sixty days, 59 Fed. Reg. 59,975 (1994) (proposed rule; reopening of comment period), *available in* Westlaw, 1994 WL 649586, to 15 January 1995. Telephone Interview with Rene Stone, Solicitor's Office, DOI (Nov. 16, 1994). The comment period was subsequently extended to 1 August 1995. 60 Fed. Reg. 4135 (1995) (proposed rule; extension of comment period), *available in* Westlaw, 1995 WL 18541; Telephone Interview with Rene Stone, Solicitor's Office, DOI (Jan. 13, 1995).

[192] Of those, more than one thousand were received in the first seven months. Telephone Interview with Rene Stone, Solicitor's Office, DOI (Nov. 16, 1994). These comments run the gamut in format, from law review articles to postcard messages composed of words cut from magazines. *Id.* Between November 1994 and March 1996, approximately two thousand more comments have been received. *See* Leshy, *supra* note 31, at 2 (testifying to a total of "over 3,200 public comments").

brakes on the regulation.[193] First, Senator Orrin Hatch (R-Utah) introduced a resolution to request that the proposed rule be withdrawn from the public comment process until the Secretary of the Interior had consulted with the committees in charge of natural resources legislation and had corrected the proposed rule.[194] The resolution was referred to the Senate Committee on Energy and Natural Resources.[195] On 16 March, the House Subcommittee on National Parks, Forests, and Land conducted an oversight hearing on the proposed regulations.[196] On 22 June, Senator Theodore "Ted" Stevens (R-Alaska)[197] introduced an amendment[198] to the National Highway System Designation Act[199] to prohibit any federal agency from "preparing, promulgating, or implementing" any "rule or regulation" regarding R.S. 2477 rights-of-way until 1 December 1995.[200] The amendment was adopted.[201] During the House

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[193] It has been suggested, however, that, in proposing environmental evisceration acts, congressional Republicans are exceeding their perceived mandate. *See, e.g.*, Robert L. Glicksman & Stephen B. Chapman, *Regulatory Reform and (Breach of) the Contract With America: Improving Environmental Policy or Destroying Environmental Protection?*, 5 KAN. J.L. & PUB. POL'Y 9 (1996). Glicksman and Chapman introduce their article in the following terms:

> Before the elections, neither the Contract nor its chief proponent, Newt Gingrich, announced how the Contract would affect environmental regulation. Shortly after the 104th Congress convened, however, it became clear that the Contract's supporters were intent upon enacting a sweeping set of revisions to the nation's environmental and natural resources legislation. Some of these revisions . . . sought to transform substantive environmental legislation or to redirect agency resources through the appropriations process.

Id. at 9 (footnotes omitted).

[194] S. Res. 288, 103d Cong., 2d Sess., *reprinted in* 140 CONG. REC. S15436-02 (daily ed. Dec. 1, 1994), *available in* Westlaw, 1994 WL 672263, would have "request[ed]" that Secretary Babbitt "immediately withdraw the proposed rule . . . and . . . reissue [it] for public review and comment, only after . . . consulting with the Committee on Energy and Natural Resources of the Senate and the Committee on Natural Resources of the House of Representatives; and . . . revising the proposed rule to adequately reflect and comply with all pertinent laws, Executive orders, rules, and historical and legal precedent."

[195] *Id.*

[196] *See* 141 CONG. REC. D368 (digest Mar. 15, 1995) (committee meetings for Thursday, March 16, 1995), *available in* Westlaw, 1995 WL 108447. Testimony was presented by Senator Orrin Hatch; Representative Orton; John D. Leshy, Solicitor, Department of the Interior; Elizabeth Barry, Assistant Attorney General, State of Alaska; Ted Stewart, Director, Department of Natural Resources, State of Utah; and public witnesses. *Id.*

[197] Co-sponsors were fellow Alaska Senator Murkowski and fellow Republican Senators Kay Hutchison (Texas) and Robert Bennett (Utah). 141 CONG. REC. S8924-01 (daily ed. June 22, 1995), *available in* Westlaw, 1995 WL 370512.

[198] Number 1467.

[199] S. 440, 104th Cong., 1st Sess. (1995).

[200] 141 CONG. REC. S8924-01 (daily ed. June 22, 1995) (legislative clerk, reading amendment no. 1467), *available in* Westlaw, 1995 WL 370512.

[201] *Id.* at S8925.

and Senate conference on the bill,[202] the proposed moratorium was extended to 30 September 1996.[203]

On 20 July 1995, H.R. 2081 was introduced with remarks[204] by co-sponsor[205] Representative James Hansen (R-Utah) and was referred to the House Resources Committee and the House Judiciary Committee.[206] On 26 and 27 July, 1995, the House Subcommittee on National Parks, Forests and Land held hearings on the bill.[207] On 31 October 1995, the Subcommittee on National Parks, Forests, and Land approved the bill, as amended, for full committee action.[208]

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[202] *See* H.R. CONF. REP. NO. 345, 104th Cong., 1st Sess. (1995), 141 CONG. REC. H12,459 (daily ed. Nov. 15, 1995), *available in* Westlaw, 1995 WL 677982.

[203] *Id.* at H12,459 (quoting amended § 349(a)(2)); *see also id.* at H12,488 (reflecting that the conference "adopts the Senate provision with a modification of the date . . . . "). The House version of the moratorium had originally been inserted into the Department of the Interior and Related Agencies Appropriations Bill, H.R. 1977. *See* H.R. REP. NO. 173, 104th Cong, 1st Sess. (1995) (discussing § 110), *available in* Westlaw, 1995 WL 390918 [page numbers not available], adopted by the Committee on Appropriations on 30 June 1995. For criticism of this provision, see 141 CONG. REC. H6936 (daily ed. July 13, 1995) (statement of Representative Yates), *available in* Westlaw, 1995 WL 415059; 141 CONG. REC. H9688 (daily ed. Sep. 29, 1995) (statement of Representative Vento), *available in* Westlaw, 1995 WL 573172.

[204] 141 CONG. REC. E1479-01 (daily ed. July 20, 1995) (statement of Representative Hansen), *available in* Westlaw, 1995 WL 428879.

[205] Original house co-sponsors were Republican Representatives James Hansen of Utah, John Doolittle of California, and John Shadegg of Arizona. 104 Bill Tracking H.R. 2081, *available in* LEXIS, Library GENFED, file BLTRCK (search for records containing the words "H.R. 2081"). Added later were Republican Representatives Wester Cooley of Oregon and J.D. Hayworth of Arizona on 6 September 1995, 141 Cong. Rec. H8597-01 (daily ed. Sep. 6, 1995), *available in* Westlaw, 1995 WL 524696; Michael Crapo of Idaho on 11 October 1995, 141 CONG. REC. H9897-01 (daily ed. Oct. 11, 1995), *available in* Westlaw, 1995 WL 598747; and Bob Stump of Arizona on 8 November, 1995, 141 CONG. REC. H11,939-01 (daily ed. Nov. 8, 1995), *available in* Westlaw, 1995 WL 656150.

[206] 141 CONG. REC. H7378-06 (daily ed. July 20, 1995), *available in* Westlaw, 1995 WL 428868.

[207] 141 CONG. REC. D926-01 (digest July 26, 1995), *available in* Westlaw, 1995 WL 441837; 141 CONG. REC. D938 (digest July 27, 1995), *available in* Westlaw, 1995 WL 444138 (reflecting that "[t]estimony was heard from John D. Leshy, Solicitor, Department of the Interior; and public witnesses").

[208] 104 Bill Tracking H.R. 2081 (citing 141 CONG. REC. D1285), *available in* LEXIS, Library GENFED, file BLTRCK (search for records containing the words "H.R. 2081"). Only the introduced version of H.R. 2081, uploaded on 26 July 1995, is available in LEXIS, Interview with Rhonda, LEXIS Customer Service (June 14, 1996); Westlaw has no H.R. 2081 at all, Interview with Steve, West Reference Attorney (June 14, 1996). The amendment makes few changes. *See* H.R. 2081, 104th Cong., 1st Sess. (Oct. 30, 1995) ("Amendment in the Nature of a Substitute; Offered by Mr. Hansen"), *reprinted in* Fax, Kim Harb, USDI 1-7 (June 17, 1996) (on file with the author). A definitions section is added. *Id.* § 2. The period for notice is changed to seven years. *Id.* § 3(a). The notice must include a 1:100,000 or greater scale map (*i.e.*, one inch on the map represents 100,000 inches on the ground). *Id.* Recognition or objection is made to the noticing party, state, and political subdivision involved. *Id.* § 3(b)(1). The secretary must recognize transportation routes recognized in pre-FLPMA federal land management plans,

On 27 November 1995, S. 1425 was referred to the Senate Energy and Natural Resources Committee.[209] Senator Frank Murkowski[210] and two of his three co-sponsors,[211] Senator Orrin Hatch[212] and Senator Robert Bennett,[213] rose and spoke in support of the bill. On 14 March 1996, the Senate Energy and Natural Resources Committee conducted its hearings on the bill.[214] The amended bill[215] was reported out of committee on 1 May 1976[216] and submitted to the Senate 9 May 1976.[217] As amended, S. 1425 "states that no final rule or regulation of any agency of the Federal Government pertaining to recognition, management, or validity of a right-of-way pursuant to a R.S. 2477 rights-of-way *[sic]* shall take effect unless expressly authorized by an Act of Congress enacted subsequent to the date of enactment of this Act."[218]

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memoranda of understanding, or agreements. *Id.* § 3(b)(1)(B). The former § 4 begins, "A right-of-way accepted or deemed to be accepted under this Act is valid *against the United States*." *Id.* § 5(a) (emphasis added). The Secretary must inventory, record, and make accessible to the public transportation routes discussed in § 3(b)(1)(B). *Id.* § 5(b). Former § 5(e), "ROAD CLOSURES," is deleted. Finally, all internal cross references are updated. *Id., passim.*

[209] 141 CONG. REC. D1383-01 (digest Nov. 27, 1995), *available in* Westlaw, 1995 WL 696508; 141 CONG. REC. S17,531 (daily ed. Nov. 27, 1995), *available in* Westlaw, 1995 WL 696492.

[210] 141 CONG. REC. S17,530-08 (daily ed. Nov. 27, 1995) (statement of Senator Murkowski), *available in* Westlaw, 1995 WL 696492.

[211] The third is Senator Theodore "Ted" Stevens of Alaska. 104 Bill Tracking S. 1425, *available in* LEXIS, Library GENFED, file BLTRCK (search for records containing the words "S. 1425").

[212] *Id.* at S17,531-08 (statement of Senator Hatch).

[213] *Id.* at S17,532 (statement of Senator Bennett).

[214] S. REP. No. 261, 104th Cong., 2d Sess. (1996), *available in* Westlaw, 1996 WL 252623 [page numbers not available]. *See also* 142 CONG. REC. D200 (digest Mar. 14, 1996), *available in* Westlaw, 1996 WL 112095. The committee had heard testimony from Senator Stevens; Solicitor John D. Leshy, Department of the Interior; Elizabeth J. Barry, Alaska Assistant Attorney General; Alaska State Senator Loren Leman; Chip Dennerlien, National Parks and Conservation Association; Scott Groene, Southern Utah Wilderness Alliance; and Barbara G. Hjelle, Washington County, Utah. *Id.*

[215] As amended, S. 1425 merely prohibits any rule or regulation as to "recognition, management, or validity" of an R.S. 2477 right-of-way without congressional approval. Staff draft substitute — S. 1425, *reprinted in* Fax, Monica Burke, Solicitor's Office, DOI 2 (May 29, 1996) (on file with the author). *See also* David Whitney, *Trails-to-Roads Standoff Remains: Bill Would Preserve Alaska Claims to Rights-of-Way on Federal Lands*, ANCHORAGE DAILY NEWS, May 2, 1996, at B4 (reporting approval of the amendment by the Senate Energy and Natural Resources Committee on Wednesday, 1 May 1996).

[216] 142 CONG. REC. D399-02 (digest May 1, 1996), *available in* Westlaw, 1996 WL 218161.

[217] 142 CONG. REC. D448-01 (digest May 9, 1996), *available in* Westlaw, 1996 WL 239135; 142 CONG. REC. S4937-01 (daily ed. May 9, 1996), *available in* Westlaw, 1996 WL 238980.

[218] S. REP. No. 261, 104th Cong., 2d Sess. (1996), *available in* Westlaw, 1996 WL 252623 [page numbers not available].

V. Comparison and Contrast: Rulemaking and Legislation

In one sense, the following discussion of the original House and Senate bills would be moot if legislation were enacted in substantially the form of the current Senate or House version. The original bills are nonetheless relevant for two reasons: uncertainty and history. The uncertainty exists because much can happen during the scheduling, floor consideration, and reconciliation process. Thus, the final legislation might resemble the original bills more than it does the current versions. The historical significance of the original bills is that the original bills indicate the positions likely to be taken by the opponents of subsequent DOI rulemaking. Thus, the original bills are instructive as to positions that might need to be addressed as DOI drafts what would in effect become substantive legislation if it should be submitted to the Congress for approval. Therefore, the following discussion will compare and contrast the proposed regulations with the proposed legislation — that is, S. 1425 and H.R. 2081 in their original forms.

A. Proposed Regulation

Section V.A.1 will examine the purposes of the proposed regulation. Section V.A.2 will touch upon the underlying assumptions of the drafters. Section V.A.3 will review the provisions for claiming a right-of-way. Section V.A.4 will address the effect of failure to file a claim. Section V.A.5 will discuss the administrative appeals process. Section V.A.6 will describe activity permitted during the pendency of the determination and appeal process. Finally, section V.A.7 will raise questions left unanswered by the proposed regulation.

1. Purposes.

Section 39.1 defines the regulation's purposes, which are to provide for orderly and prompt claims processing, define key terms, allow for public notice and appeals, and permit use of valid rights-of-way consistent with federal land management.[219]

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[219] 59 Fed. Reg. 39,224 (1994) (to be codified at 43 C.F.R. § 39.1) (publication and solicitation of comments Aug. 1, 1994), *available in* Westlaw, 1994 WL 392977.

2. Assumptions.

Section 39.2 explains that part 39 applies only to R.S. 2477 rights-of-way on land currently managed by DOI, BLM, U.S. Fish and Wildlife Service (USFWS), and NPS.[220] It goes on to explain each agency's responsibilities and major statutory authorities.[221]

The regulation defines the key elements of the R.S. 2477 grant, "construction,"[222] "highway,"[223] and "public lands not reserved for public uses or unreserved public lands,"[224] and other terms used in the regulation. The regulation introduces the concept of "latest available date"[225] and defines it as the earlier of when FLPMA was enacted and when the land was reserved for public uses.[226] "Scope" of the right of way[227] is defined, with "routine maintenance" defined as maintenance activities within the scope,[228] and "improvement" defined as maintenance or construction activities which expand the scope of the right-of-way.[229] An "authorized officer" is defined as the BLM state director, USFWS regional director, NPS regional director, or a designee.[230]

Section 39.4 provides that neither the validity[231] nor the scope[232] of an R.S. 2477 right-of-way will be recognized unless the determination has been made by either an authorized officer[233] or a federal court at the

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[220] 59 Fed. Reg. 39,224-25 (1994) (to be codified at 43 C.F.R. § 39.2).

[221] *Id.*

[222] "[I]ntentional physical act or series of intentional physical acts that were intended to [accomplish], and that accomplished, preparation of a durable, observable, physical modification of land for use by highway traffic." 59 Fed. Reg. 39,225 (1994) (to be codified at 43 C.F.R. § 39.3(e)).

[223] "[A] thoroughfare that is currently and was prior to the latest available date used by the public without discrimination against any individual or group, for the passage of vehicles carrying people or goods from place to place." *Id.* (to be codified at 43 C.F.R. § 39.3(f)).

[224] Unreserved land owned by the United States which is available to the public under laws providing for their disposition. *Id.* (to be codified at 43 C.F.R. § 39.3(l)). Examples of ineligible categories of land are provided in subparagraphs (i) through (v) of paragraph 39.3(l)(1). *Id.*

[225] "[L]atest date on which [the R.S. 2477 right-of-way] could have been acquired." 59 Fed. Reg. 39,225 (1994) (to be codified at 43 C.F.R. § 39.3(j)).

[226] *Id.*

[227] "[W]idth, surface treatment, and location actually in use for public highway purposes at the latest available date." 59 Fed. Reg. 39,225 (1994) (to be codified at 43 C.F.R. § 39.3(o)).

[228] 59 Fed. Reg. 39,225 (1994) (to be codified at 43 C.F.R. § 39.3(n)).

[229] *Id.* (to be codified at 43 C.F.R. § 39.3(h)).

[230] *Id.* (to be codified at 43 C.F.R. § 39.3(b)).

[231] 59 Fed. Reg. 39,226 (1994) (to be codified at 43 C.F.R. § 39.4(a)).

[232] *Id.* (to be codified at 43 C.F.R. § 39.4(b)).

[233] *Id.* (to be codified at 43 C.F.R. § 39.4(a)(2), (b)(2)).

district, territorial, or higher level.[234] This provision represents an apparent compromise. The exclusion of state court adjudications negates the effect of litigation to which the federal government was not a party; yet, as has been seen, not all federal court decisions have employed the same conceptual framework.

Section 39.5 provides that a claimant found to be a valid right-of-way holder has been granted a "right-of-way for public access for highway purposes," and cannot acquire new rights after the latest available date.[235] The holder performs routine maintenance, construction, improvement, use, and operation subject to regulation by the United States, which retains the rights to "regulate, enter, and authorize other uses of the right-of-way."[236]

3. Claim of a Right-of-Way.

Section 39.6 requires that claims, including proof of any prior judicial determinations, be filed within two years and thirty days after the final rule is published.[237] If, for example, a claimant had received a prior judicial determination of validity but no determination as to scope, the scope of the right-of-way would be determined administratively.[238]

A claimant whose right-of-way crosses land managed by several agencies can obtain "one-stop shopping" and thus avoid the costs and delays occasioned by presenting the claim piecemeal.[239] If any part of a claim crosses NPS land, the NPS regional office has jurisdiction over the entire claim.[240] If any part of the claim crosses USFWS land but not NPS land, the USFWS regional office has jurisdiction over the entire claim.[241] The BLM state office has jurisdiction over any claim which crosses BLM land, but not USFWS or NPS land.[242]

The minimum informational requirements of a claim are: (1) the claimant's name and affiliation;[243] (2) the claimant's address, agent, and authority of the agent;[244] (3) a description of the highway, including name or number, terminal points, surface, width, and identification on map

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[234] *Id.* (to be codified at 43 C.F.R. § 39.4(a)(1), (b)(1)).
[235] *Id.* (to be codified at 43 C.F.R. § 39.5(a)).
[236] *Id.* (to be codified at 43 C.F.R. § 39.5(a), (b)).
[237] *Id.* (to be codified at 43 C.F.R. § 39.5(a)).
[238] *Id.*
[239] 59 Fed. Reg. 39,221 (1994) (to be codified at 43 C.F.R. § 39.6)).
[240] 59 Fed. Reg. 39,226 (1994) (to be codified at 43 C.F.R. § 39.6(b)(1)).
[241] *Id.* (to be codified at 43 C.F.R. § 39.6(b)(2)).
[242] *Id.* (to be codified at 43 C.F.R. § 39.6(b)(3)).
[243] 59 Fed. Reg. 39,221 (1994) (to be codified at 43 C.F.R. § 39.6(c)(1)).
[244] *Id.* (to be codified at 43 C.F.R. § 39.6(c)(2)).

sufficiently detailed to permit accurate location by an engineer or surveyor;[245] (4) a history of construction and use of the right-of-way to the time of the claim;[246] (5) a statement of where any "profiles, constructions, as-built or similar detail maps or diagrams" may be viewed;[247] (6) citation, result, and dates of prior judicial or administrative determinations;[248] (7) citation to state law in effect on latest available date;[249] (8) evidence of each element of the construction definition, including intentional physical acts with tools and evidence of "durable, observable, physical modification" as indicated by records of expenditures or activities at such intervals as to indicate maintenance of a "relatively continuous" travel route;[250] (9) evidence of each element of the highway definition, including public use as indicated by records of official acknowledgement, funding, or maintenance by state or local highway management agency from before the latest available date to the present, vehicular use as indicated by historic evidence of commercial or personal use by "vehicles appropriate to the time and terrain," and that the road provided access between public destinations;[251] and (10) evidence that the land was unreserved public land when the highway was constructed.[252]

4. Effect of Failure to File a Claim.

Section 39.7 provides that any claim not submitted during the period allowed will be waived and will not be processed.[253] Refusal to process a claim constitutes a final agency action[254] for purposes of judicial review under the Administrative Procedure Act.[255] Finally, the publication serves as notice of the United States' assertion of an adverse interest in purported R.S. 2477 rights-of-way across federal lands, which tolls the twelve-year statute of limitations provided by the Federal Quiet Title Act[256] in cases in which no prior notice was given.[257] Thus, no adminis-

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[245] *Id.* (to be codified at 43 C.F.R. § 39.6(c)(3)).
[246] *Id.* (to be codified at 43 C.F.R. § 39.6(c)(4)).
[247] *Id.* (to be codified at 43 C.F.R. § 39.6(c)(5)).
[248] *Id.* (to be codified at 43 C.F.R. § 39.6(c)(6)).
[249] *Id.* (to be codified at 43 C.F.R. § 39.6(c)(7)).
[250] *Id.* (to be codified at 43 C.F.R. § 39.6(c)(8)).
[251] *Id.* (to be codified at 43 C.F.R. § 39.6(c)(9)).
[252] *Id.* (to be codified at 43 C.F.R. § 39.6(c)(10)).
[253] *Id.* (to be codified at 43 C.F.R. § 39.7).
[254] *Id.*
[255] 5 U.S.C. § 704 (1988).
[256] 28 U.S.C. § 2409a (1994).
[257] 59 Fed. Reg. 39,226-27 (1994) (to be codified at 43 C.F.R. § 39.7). This provision addresses how the federal government may extinguish R.S. 2477 rights-of-way through operation

trative claims will be permitted more than two years and thirty days after the effective date of regulation, and no judicial claims can be heard more than twelve years after the effective date of the regulation.[258] Another example of final action, discussed in section 39.8, is the refusal of the authorized officer to process the claim based upon the claimant's failure to provide additional information after written notice and an opportunity to respond.[259]

Because the regulation provides claimants with "one-stop shopping,"[260] the authorized officer for the agency with jurisdiction over the claim must consult with other stakeholding agencies, including federal agencies managing lands upon which the claim lies.[261] Where the claim affects land owned by or held in trust for Native Americans or Native American Tribes, or owned by the United States under DOI jurisdiction because it was acquired for the sole benefit of Native Americans, is pending allotment, or is pending conveyance to corporations created under provisions of the Alaska Native Claims Settlement Act,[262] the authorized officer will consult with the area Bureau of Indian Affairs (BIA) office.[263]

The regulation provides an opportunity for public comment. Members of the public will have at least thirty days, following publication of a notice identifying the claim, in which to examine the claim and submit comments.[264]

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of the Federal Quiet Title Act, 28 U.S.C. § 2409a (1994). Because a quiet title action against the United States is barred unless commenced within 12 years of its accrual, 28 U.S.C. § 2409a(g) (1994), the government can force the issue, even absent an R.S. 2477 assertion, by giving notice of an interest adverse to any R.S. 2477 rights-of-way. However, in Shultz v. Department of Army, 886 F.2d 1157 (9th Cir. 1989) [hereinafter *Shultz I*], the court held that the Army's erection of a fence, an open gate, and an unmanned guardhouse at the entrance to Shultz's right-of-way, without more, was insufficient to put Shultz on inquiry notice and thus trigger the statute of limitations. 886 F.2d at 1162. The court distinguished both Park County v. United States, 626 F.2d 718 (9th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981), and Howell v. United States, 519 F. Supp. 298, 304 (N.D. Ga. 1981), in which the government's notice had been ruled effective. *Shultz I*, 886 F.2d at 1160. In *Park County*, the government had erected a rock barrier and sign on the right-of-way; the latter alerted the public that motor vehicles were prohibited in the national forest area. *Park County*, 626 F.2d at 721. In *Howell*, the government had painted boundary lines, but did not actually interfere with the landowner's property. *Howell*, 519 F. Supp. at 304. Ironically, though *Shultz I* provided the impetus for the regulatory provision, the provision itself, had it existed prior to *Shultz I*'s filing, would probably not have been dispositive. For further discussion, see *infra* notes 286-88 and accompanying text.

[258] 59 Fed. Reg. 39,222 (1994).

[259] 59 Fed. Reg. 39,227 (1994) (to be codified at 43 C.F.R. § 39.8(a)).

[260] *See supra* note 239 and accompanying text.

[261] 59 Fed. Reg. 39,227 (1994) (to be codified at 43 C.F.R. § 39.8(b)).

[262] Pub. L. 92-203, §§ 7-8, 85 Stat. 688, 691-94 (1972).

[263] 59 Fed. Reg. 39,227 (1994) (to be codified at 43 C.F.R. § 39.8(c)).

[264] *Id.* (to be codified at 43 C.F.R. § 39.8(d)).

Next, the regulation has a collateral estoppel provision. If the claim was previously determined invalid through judicial or DOI administrative process, the authorized officer will not consider it.[265] This provision is intended to discourage forum-shopping.[266]

In reviewing the claim, the authorized officer must determine whether the evidence adequately supports the claimed right-of-way.[267] The authorized officer should exercise flexibility, looking at the sufficiency of the claim as a whole.[268] The authorized officer's administrative determination, following review of evidence, BLM records, and applicable state law, as well as agency consultation and consideration of public comment, is not final. It requires concurrence of any other authorized officer of the BLM, USFWS, or NPS with jurisdiction over the lands burdened by the claimed right-of-way.[269]

Following that concurrence or nonconcurrence as to validity and scope of the right-of-way, the administrative determination will be sent to the claimant.[270] The administrative determination will then be published in the local newspaper and in the Federal Register.[271]

5. Appealing Administratively.

Section 39.9 encourages efficiency and consistency[272] by providing for an administrative appeal to the director of the authorized officer's agency.[273] Any person or entity affected adversely by the determination[274] may file a claim, in writing, within thirty days after the determina-

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[265] *Id.* (to be codified at 43 C.F.R. § 39.8(e)).

[266] 59 Fed. Reg. 39,223 (1994). "A claimant may not make multiple claims or shop for a different result in different offices." *Id.* The collateral estoppel provision seems facially unfair to those putative right-of-way holders who unsuccessfully sought "administrative recognition" of their rights, because such determinations were supposedly not binding on the claimant or the government. *See supra* note 15. It might be argued, however, that administrative efficiency dictates this apparently incongruous result. It is difficult to imagine how any claim that failed to meet even the lenient Hodel criteria, *supra* notes 139-48 and accompanying text, could be found valid under the new, stricter criteria of the proposed regulation.

[267] 59 Fed. Reg. 39,227 (1994) (to be codified at 43 C.F.R. § 39.8(f)).

[268] 59 Fed. Reg. 39,223 (1994).

[269] 59 Fed. Reg. 39,227 (1994) (to be codified at 43 C.F.R. § 39.8(g)(1), (2)). This provision apparently refers to situations in which the claimed rights-of-way cross lands managed by more than one agency.

[270] *Id.* (to be codified at 43 C.F.R. § 39.8(g)(3), (4)).

[271] *Id.* (to be codified at 43 C.F.R. § 39.8(h)).

[272] 59 Fed. Reg. 39,223 (1994).

[273] 59 Fed. Reg. 39,227 (1994) (to be codified at 43 C.F.R. § 39.9(b)).

[274] *Id.*

tion is published.[275] Unless the agency director considers the record inadequate to support the determination and orders production of further evidence or a hearing,[276] the record for appeal will consist merely of the authorized officer's official files and the evidence relied upon in the determination;[277] the appellant's name, address, and phone number, and statement of interest, issues, and factual or legal errors;[278] and, if the claimant is not the appellant, the claimant's response to the matters presented by the appellant.[279] The written appeal decision, concurred in by each department director whose authorized officer participated in the initial determination, will state the reasons for the decision and will be served on the appellant and claimant, as appropriate.[280] The decision on appeal constitutes final agency action.[281]

6. Interim Activity.

While a claim or appeal is being processed, section 39.10 permits the claimant to perform routine maintenance.[282] The claimant will provide three days' notice to, and receive approval of, the BLM area or district office, NPS superintendent, or National Wildlife Refuge (NWR) manager responsible for the land on which maintenance will take place.[283] Interim authority is limited to rights-of-way currently maintained by the plaintiff; after the passage of the period for submitting claims, this activity is limited to rights-of-way as to which claimant has pending claims.[284]

7. Unanswered Questions.

Left unresolved by the rulemaking are such issues as whether the DOI's interpretation of R.S. 2477 will survive judicial review, whether the notice under the Quiet-Title Act applies to other than DOI-managed lands, and whether DOI is barred by equitable estoppel from employing arguably more stringent requirements than those employed during past administrations.

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[275] *Id.* (to be codified at 43 C.F.R. § 39.9(b)(1)).
[276] *Id.* (to be codified at 43 C.F.R. § 39.9(d)).
[277] *Id.* (to be codified at 43 C.F.R. § 39.9(c)).
[278] *Id.* (to be codified at 43 C.F.R. § 39.9(b)(2)).
[279] *Id.* (to be codified at 43 C.F.R. § 39.9(c)).
[280] 59 Fed. Reg. 39,227-28 (1994) (to be codified at 43 C.F.R. § 39.9(e)).
[281] *Id.* (to be codified at 43 C.F.R. § 39.9(f)).
[282] 59 Fed. Reg. 39,228 (1994) (to be codified at 43 C.F.R. § 39.10(a)).
[283] *Id.* (to be codified at 43 C.F.R. § 39.10(b)).
[284] *Id.* (to be codified at 43 C.F.R. § 39.10(c)).

Only time will tell whether a federal court performing judicial review of an adverse DOI determination would give deference to DOI's interpretation of R.S. 2477. Because DOI's proposed rule interprets ambiguous provisions of the statute — the meaning of the key terms "construction" and "highways" and the requirements for perfection — the test should be whether DOI's interpretation is based on a permissible construction of the statute.[285] Under that standard, DOI would likely prevail.

The quiet-title provisions[286] of the proposed regulations purport to start the clock running as to "any purported rights-of-way traversing Federal lands claimed pursuant to R.S. 2477."[287] Yet, the quiet-title provisions seem to be limited only to DOI-managed lands.[288] Therefore, they would appear to be ineffective to serve notice as to R.S. 2477 rights-of-way located entirely on public lands managed by other agencies, such as USDA, Department of Defense, Bureau of Prisons, and Department of Energy.

Some claim that the government should be estopped, at this late date, from evaluating the validity of R.S. 2477 claims. Senators Murkowski[289]

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[285] Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984) (holding that a court must defer to a reasonable agency interpretation of a statute unless the agency's interpretation is inconsistent with the clearly expressed intent of Congress). *See also* EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 115 (1988) (finding that an agency's interpretation of a statute "for which it has primary enforcement responsibility . . . need only be reasonable to be entitled to deference"); EPA v. National Crushed Stone Ass'n, 449 U.S. 64, 83 (1980) ("When faced with a problem of statutory construction [this Court] shows great deference to the interpretation given the statute by the officers or agency charged with its administration.")

[286] 59 Fed. Reg. 39,226-27 (1994) (to be codified at 43 C.F.R. § 39.7). "These regulations, from [the effective date of the final rule] shall serve as notice for purposes of the Quiet Title Act, 28 U.S.C. 2409a, that the United States claims an adverse interest in any purported rights-of-way traversing Federal lands claimed pursuant to R.S. 2477; provided, however, that this provision will not interfere with or affect any prior notice that might have been given of an adverse Federal claim." *Id.*

[287] *Id.*

[288] *Id.* (to be codified at 43 C.F.R. § 39.2). "The regulations in this part apply to right-of-ways claimed pursuant to R.S. 2477 on Federal lands administered by the Bureau of Land Management, National Park Service, all land managing agencies under the U.S. Department of the Interior." *Id.* The supplementary information indicates that "[f]ederal lands under the administrative jurisdiction of other bureaus in the Department of the Interior or other Federal agencies would not be affected by these regulations. . . . The Department does not intend to make administrative determinations of claims for rights-of-way that cross lands that are now in State, private, Indian, or Alaska Native ownership or under the jurisdiction of another Federal agency." 59 Fed. Reg. 39,219 (1994).

[289] 141 CONG. REC. S17,530 (daily ed. Nov. 27, 1995) (statement of Senator Murkowski), *available in* Westlaw, 1995 WL 696492. "[F]or almost 130 years State law has applied to the validation of R.S. 2477 right-of-ways." *Id.*

and Stevens[290] of Alaska, and Senator Robert Bennett of Utah,[291] have suggested as much on the Senate floor. Soon after the rulemaking was proposed, it was suggested that "an established body of case law, legislative history, historical precedents, and departmental decisions . . . does not appear to be reflected in the proposed rule."[292] These observations raise the possibility that DOI might now be estopped, after 130 years of acquiescence in sloppily established R.S. 2477 rights-of-way, from changing or even enforcing the rules, where potential R.S. 2477 holders have relied upon such acquiescence to their detriment.[293]

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[290] 141 CONG. REC. S8883 (daily ed. June 22, 1995) (statement of Senator Stevens), *available in* Westlaw, 1995 WL 370509. Senator Stevens said:

> The last schedule I saw showed [Utah] had 3,815 claims pending to be validated. Validated by whom? There is no administrative process required to validate these claims. Now the Department of the Interior says they are going to determine whether these rights-of-way are valid. This is not what we said in 1976. If they were valid in 1976 under State law, they were to be valid forever.
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> . . . .
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> This is part of the highway system. The highway system in the western United States came into being because of revised statute 2477. And now in my State, unfortunately in other States now, the Department of the Interior has decided it is going to determine what is valid, and why? Because it has made reservations of lands since 1976 that it says have validity and have prior rights over the rights established by the people of those States over Federal lands before that date.
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> . . . .
>
> We have no way to have construction of the highways proceed that we get money for under [the National Highway System Designation Act] if the Department of the Interior is to tell us that the rights-of-way we are going to use now are subject to their interpretation of whether they are valid or not.

Id.

[291] 141 CONG. REC. S17,532 (daily ed. Nov. 27, 1995) (statement of Senator Bennett), *available in* Westlaw, 1995 WL 696492. Senator Bennett said:

> The original act recognized State law and relied on State law to provide many of the details of its implementation. In years past, the Department of the Interior has generally acquiesced to State law. Since the passage of FLPMA, and even up until the recent administration took office, the Department of the Interior's policy has generally looked to State law to determine what constitutes a public highway.

Id.

[292] S. Res. 288, 103d Cong., 2d Sess., *reprinted in* 140 CONG. REC. S15436-02 (daily ed. Dec. 1, 1994), *available at* 1994 WL 672263.

[293] For equitable estoppel to operate, the following elements must be present: (1) The party to be estopped must know the facts; (2) the party to be estopped must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the party asserting estoppel must be ignorant of the true facts; and (4) the party asserting estoppel must rely on the other's conduct to his injury. United States v. Ruby Co., 588 F.2d 697, 703 (9th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979) (citing United States v. Wharton, 514 F.2d 406, 412 (9th Cir. 1975); and United States v. Georgia-Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970)).

A similar argument was employed in *Bergland*.[294] There, the United States Forest Service (USFS), DOI, and the Public Works Administration (PWA) had consented to the city water project's deviations[295] from the right-of-way granted to it by DOI pursuant to a specific congressional delegation of authority.[296] As a result, the City of Denver claimed that USFS was estopped from preventing continued work off of the original grant.[297] Citing the *California* case,[298] the court noted that estoppel, if it operated at all, applied only to "an agency to which Congress has delegated the authority to dispose of lands held in trust for the public . . . ."[299] That limitation excluded PWA but included DOI and possibly USFS.[300] If anything is clear from the tangled history of R.S. 2477, it is that DOI has largely played the role of helpless bystander. Therefore, even if the other elements of estoppel were met, estoppel would not seem to operate against DOI.

B. Proposed Statute

This subpart will describe the House[301] and Senate[302] versions of the pending legislation,[303] in terms of their purpose, presumptions, requirements, procedures, and unquestioned answers. Section V.B.1 will examine the purported purposes of the proposed legislation. Section V.B.2 will touch upon the presumptions sought to be imposed by the drafters.

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[294] City & County of Denver Bd. of Water Comm'rs v. Bergland, 695 F.2d 465 (10th Cir. 1982).

[295] *Id.* at 468.

[296] *Id.*

[297] *Id.*

[298] United States v. California, 332 U.S. 19 (1947). To the state argument that the United States was barred from asserting title over the ownership of submerged coastal land because its agents had taken prior inconsistent positions, the Court responded: "The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act." *Id.* at 39-40 (citations omitted).

[299] *Id.* at 482.

[300] *Id.*

[301] H.R. 2081, 104th Cong., 1st Sess. (1995), *available in* LEXIS, Library GENFED, file BLTEXT (search for records containing the words "H.R. 2081").

[302] S. 1425, 104th Cong., 1st Sess. (1995), *available in* LEXIS, Library GENFED, file BLTEXT (search, on 9 April 1996, for records containing the words "S. 1425").

[303] In their original form, these bills were virtually identical. Where both bills contain the same provisions, the bill will not be specifically identified in the text; where, however, only one bill contains a particular provision, the bill will be identified by number, chamber, or primary sponsor. Capitalization is as displayed in the text obtained from LEXIS.

Section V.B.3 will review the provisions for giving notice of a right-of-way. Section V.B.4 will address the effect of failure to file an objection to a claim notice. Section V.B.5 will discuss the unappealing prospects for the Secretary to litigate groundless claims. Section V.B.6 will describe the forced inactivity and acquiescence in the occupation and spoliation of the servient public estate during the pendency of litigation. Finally, section V.B.7 will challenge the heretofore unquestioned answers supposedly provided by the proposed legislation.

1. Cross-Purposes.

The House and Senate sponsors of the legislation seem to be working at cross-purposes. According to Representative Hansen of Utah, who co-sponsored the House version, the purpose of the Revised Statutes 2477 Rights-of-Way Settlement Act is to provide "a reasonable and efficient way to resolve the thousands of RS 2477 right-of-way claims that exist in the West."[304] According to Senator Murkowski, co-sponsor of the Senate version, the legislation is intended to preserve "the rights of the States to validate and use their rights-of-ways."[305] Moreover, according to co-sponsor Senator Bennett, the bill "forces both the claimant and the Federal Government to come to the table [and] narrows the time frame in which claims might be filed to five years."[306] In fact, as shall become apparent, Senator Murkowski's statement of purpose was perhaps more candid than that of Representative Hansen, Senator Bennett, or even the short title of the bill.[307] First, the process required by the bills is neither reasonable nor efficient. Second, the legislation will not, in fact, force anyone to come to the table, narrow the time frame in which claims might be filed, or settle the R.S. 2477 issue. Rather, each provision seems to have been devised with the purpose of ensuring that not only states, but political subdivisions and individuals, will be able to validate their purported R.S. 2477 rights-of-way — regardless of whether such rights-of-way are, in fact, valid; and that

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[304] 141 CONG. REC. E1429-01 (Extension of Remarks, July 20, 1995), *available in* Westlaw, 1995 WL 428879.

[305] 141 CONG. REC. S17,531 (daily ed. Nov. 27, 1995) (statement of Senator Murkowski concerning S. 1425), *available in* Westlaw, 1995 WL 696492.

[306] 141 CONG. REC. S17,532 (daily ed. Nov. 27, 1995) (statement of Senator Bennett), *available in* Westlaw, 1995 WL 696492.

[307] "SHORT TITLE. This Act may be cited as the 'Revised Statues 2477 Rights-of-Way Settlement Act'." H.R. 2081 § 1; S. 1425 § 1. All citations are to the versions as introduced. For amendments, see *supra* notes 208 and 215.

the issue will remain unresolved, so that others may come along later and take another quaff at the federal trough.

2. Presumptions.

To help achieve its actual purpose of allowing claimants to "validate and use their rights-of-ways," both the Senate and the House versions of the Revised Statutes 2477 Rights-of-Way Settlement Act make some necessary presumptions.[308] First, in any court action brought under this act, the United States has the burden of proving every issue.[309]

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[308] An observant reader will already have noted that section V.A.2., *supra*, which parallels this section in describing the proposed regulation, is labeled "assumptions." The author uses "assumption" in the sense of "postulate, or proposition assumed." *See* WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE - UNABRIDGED 114 (2d ed. 1979). By contrast, as will be seen, in the conceptual universe drawn by the drafters of these bills, certain facts give rise to the existence of presumed facts, a situation fitting the dictionary meaning of "presumption." *See* BLACK'S LAW DICTIONARY 1067 (5th ed. 1979). Moreover, in the drafters' universe, laws are truncated both as to time and forum, environmental policies do not apply, whole categories of persons are denied standing, and procedural avenues are foreclosed. In fact, because many of these presumptions are unrebuttable, they are not presumptions at all, but immutable truths. "Presumptions," however, fairly well covers the field.

[309] H.R. 2081 § 3(B) provides as follows:

> BURDEN OF PROOF.-IN ANY ACTION BROUGHT PURSUANT TO SUBSECTION (A), THE UNITED STATES SHALL BEAR THE BURDEN OF PROOF ON ALL ISSUES, INCLUDING (BUT NOT LIMITED TO) PROVING THAT-
>
> (1) THE RIGHT-OF-WAY WAS NOT A PUBLIC RIGHT-OF-WAY;
>
> (2) THE RIGHT-OF-WAY WAS NOT ACCEPTED OR ESTABLISHED IN ACCORDANCE WITH THE LAWS OF THE STATE WHERE THE RIGHT-OF-WAY IS LOCATED OR BY AN AFFIRMATIVE ACT OF A STATE OR POLITICAL SUBDIVISION THEREOF INDICATING ACCEPTANCE OF THE GRANT;
>
> (3) THE LAND ON WHICH THE RIGHT-OF-WAY IS LOCATED WAS RESERVED FOR PUBLIC USE AT THE TIME OF ACCEPTANCE OF THE RIGHT-OF-WAY; AND
>
> (4) THE SCOPE OF THE RIGHT-OF-WAY IDENTIFIED IN THE NOTICE OF RIGHT-OF-WAY EXCEEDS THAT PERMITTED UNDER STATE LAW.

Id.

S. 1425 § 3(b) provides as follows:

> BURDEN OF PROOF.-In any action brought under subsection (a), the United States shall bear the burden of proof on all issues, including, but not limited to, the burden of proving that-
>
> (1) the right-of-way was not a public right-of-way;
>
> (2) the right-of-way was not accepted or established in accordance with the law of the State where the right-of-way is located or by an affirmative act of a State or political subdivision of a State indicating acceptance of the grant of the right-of-way;
>
> (3) the land on which the right-of-way is located was reserved for public use at the time of acceptance of the right-of-way; and

Next, only state law applies in an action under the proposed statute. State law only is employed both as to the validity of the right-of-way[310] and as to the scope of the right-of-way.[311] Moreover, the role of state law is not limited to those areas specifically mentioned in the statute.[312] Finally, should state law allow the Secretary any latitude, the Secretary is further bound by DOI regulations in effect on October 20, 1976, the date FLPMA was enacted.[313]

Having turned the greater part of R.S. 2477 law on its head, Senator Murkowski's version would, in a single sentence, continue on to invert the common law of restraints against excessive burdens on servient estates and

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(4) the width of the right-of-way identified in the notice of the right-of-way exceeds the width permitted under State law.

Id.

[310] H.R. 2081 § 2(B)(1) includes the following:

IN CONSIDERING ANY RIGHT-OF-WAY NOTICE FILED UNDER SUBSECTION (A), THE SECRETARY SHALL RECOGNIZE ANY RIGHT-OF-WAY WHICH WAS ACCEPTED OR ESTABLISHED IN ACCORDANCE WITH THE LAWS OF THE STATE WHERE THE RIGHT-OF-WAY IS LOCATED OR BY AN AFFIRMATIVE ACT OF A STATE OR POLITICAL SUBDIVISION THEREOF INDICATING ACCEPTANCE OF THE GRANT.

Id.

S. 1425 § 2(b)(1) provides as follows:

The Secretary shall recognize any right-of-way that was accepted or established-

(A) in accordance with the law of the State where the right-of-way is located; or

(B) by an affirmative act of a State or political subdivision of a State indicating acceptance of the grant of the right-of-way.

Id.

[311] H.R. 2081 § 5(C) provides, "IN EVERY PROCEEDING THE LAW OF THE STATE WHERE THE RIGHT-OF-WAY IS LOCATED SHALL DETERMINE THE SCOPE OF THE RIGHT-OF-WAY." *Id.*

S. 1425 § 5(b)(2) states the following: "(2) PROCEEDINGS.-In a proceeding to determine the validity of such a right-of-way, the law of the State where the right-of-way is located shall determine the attributes of the right-of-way." *Id.*

[312] H.R. 2081 § 5(C) includes the following: "APPLICATION OF STATE LAW. NOTHING IN THIS ACT SHALL BE CONSTRUED TO LIMIT THE APPLICATION OF STATE LAW IN DETERMINING THE VALIDITY OF RIGHTS-OF-WAY GRANTED UNDER SECTION 2477 OF THE REVISED STATUTES." *Id.*

S. 1425 § 5(b)(1) provides that "[n]othing in this Act limits the application of State law in determining the validity of any right-of-way granted under section 2477 of the Revised Statutes." *Id.*

[313] H.R. 2081 § 5(C) provides as follows: "THE PUBLISHED REGULATIONS OF THE DEPARTMENT OF THE INTERIOR PERTAINING TO SECTION 2477 OF THE REVISED STATUTES WHICH WERE IN EFFECT UNTIL THE DATE OF ENACTMENT OF THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976 SHALL BE BINDING ON THE SECRETARY IN ALL SUCH PROCEEDINGS."

S. 1425 § (5)(b)(2) also provides that "[t]he published regulations of the Department of the Interior pertaining to section 2477 of the Revised Statutes that were in effect on October 20, 1976, shall be binding on the Secretary in all such proceedings." *Id.*

to abrogate federal land managers' responsibilities as to the public lands. Once the claim is validated, the Secretary would be required, not to ensure that the right-of-way would not unduly burden the adjoining public lands, but to manage the burdened lands so as not to interfere with the use of the right-of-way.[314] Should the Secretary devise some means to mitigate damage to adjoining lands, the Senate version would prohibit the Secretary from promulgating, with respect to these rights-of-way, any regulation which is not absolutely necessary to carry out the proposed act's specified purposes.[315]

Lest interested individuals or groups attempt to intervene by attempting to force action by the Secretary, Congressman Hansen's version denies standing to any party who has no property interest in the right-of-way or the lands "served thereby."[316] Finally, if the Secretary or anyone else — even someone meeting Representative Hansen's stringent standing requirements[317] — should attempt to interfere with this restoration of 19th century public-land-use policies, the House version states that the National Environmental Policy Act of 1969 (NEPA) does not apply to actions implementing the proposed act.[318] The Senate version, similarly, obviates the preparation or submission of any NEPA-required "environmental document" in connection with the Secretary's actions pursuant to the proposed act.[319] Given the sort of baseless claims the bills seem designed to encourage, the sponsors would do well also to exempt actions

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[314] S. 1425 § 4(a) provides, "The Secretary shall . . . manage the land subject of the right-of-way in a manner that does not interfere with the use of the right-of-way." *Id.* Arborphiles, however, will derive great comfort from Senator Murkowski's assurances that "we will not supersede existing environmental protections." 141 CONG. REC. S17,530-08 (daily ed, Nov. 27, 1995) (statement of Senator Murkowski), *available in* Westlaw, 1995 WL 696492.

[315] S. 1425 § 4(b) states, "The Secretary, or any public land management official, is hereby prohibited from promulgating any regulations relating to R.S. 2477 rights-of-way that are not essential to carry out the express purposes of this Act." *Id.*

[316] H.R. 2081 § 3(D) provides: "STANDING.-STANDING TO CHALLENGE AN ACTION OF THE SECRETARY UNDER THIS ACT RELATING TO THE EXISTENCE, DESCRIPTION, ROUTE, OR SCOPE OF A RIGHT-OF-WAY SHALL BE LIMITED TO A PARTY WITH A CLAIM OF A PROPERTY INTEREST IN OR TO THE RIGHT-OF-WAY OR IN LANDS SERVED THEREBY." *Id.*

[317] *Id.*

[318] H.R. 2081 § 5(D) provides: "NEPA.-THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 SHALL NOT APPLY WITH RESPECT TO ACTIONS TAKEN TO CARRY OUT THIS ACT." *Id.*

[319] S. 1425 § 5(c) provides the following: "NEPA.-The National Environmental Policy Act of 1969 (83 Stat. 852) shall not be construed, in whole or in part, as requiring the preparation or submission of any environmental document for any action taken by the Secretary pursuant to this Act." *Id.*

under the act from the provisions of the False Claims Act,[320] particularly its qui tam provisions.[321] Such an exemption would prevent any chilling of the rights to be granted by the proposed legislation.

3. Notice of a Right-of-Way.

Both H.R. 2081 and S. 1425 authorize any state, political subdivision, or other holder of a right-of-way across public lands granted under R.S. 2477 before October 31, 1976, or any person who uses or could use such a right-of-way for passage across public lands, to file a notice of the right-of-way with the head of the agency or department managing the public lands.[322] Although presumably owners of R.S. 2477 rights-of-way have been aware of the existence of such interests for at least twenty years, each version of the legislation provides generous time limits for the filing of such notice: The Senate bill requires that these notices must be filed not later than five years after the enactment of the statute,[323] while the House version allows a period of ten years.[324] The notice need only identify the state and political subdivision through which the right-of-way

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[320] 31 U.S.C. §§ 3729-31 (1994).

[321] § 3730.

[322] H.R. 2081 § 1 provides:

> ANY STATE, POLITICAL SUBDIVISION THEREOF, OR OTHER HOLDER OF A RIGHT-OF-WAY ACROSS PUBLIC LANDS WHICH WAS GRANTED UNDER SECTION 2477 OF THE REVISED STATUTES BEFORE THE ENACTMENT OF THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976, OR ANY PERSON WHO USES OR COULD USE THE RIGHT-OF-WAY FOR PASSAGE ACROSS SUCH LANDS TO ACCESS PROPERTY IN WHICH SUCH PERSON HAS AN INTEREST, MAY FILE WITH THE APPROPRIATE SECRETARY OF THE DEPARTMENT CONCERNED (HEREAFTER IN THIS ACT REFERRED TO AS THE "SECRETARY") A NOTICE OF THE RIGHT-OF-WAY.

Id.

S. 1425 § 2(a)(1) provides as follows:

> IN GENERAL.-Any State, political subdivision of a State, or other holder of a right-of-way across public lands that was granted under section 2477 of the Revised Statutes before October 21, 1976, or any person who uses or could use such a right-of-way for passage across public lands, shall file with the head of the agency or department managing such public lands (referred to in this Act as the "Secretary") a notice of the right-of-way.

Id.

[323] S. 1425 § 2(a)(2)(A) provides that this notice shall "be filed not later than 5 years after the date of enactment of this Act . . . ." *Id.*

[324] H.R. 2081 § 2(a) provides: "THE NOTICE SHALL BE FILED WITHIN 10 YEARS AFTER THE DATE OF THE ENACTMENT OF THIS ACT . . . ." *Id.*; *but see* note 208, *supra.*

passes and contain a map and a general description of the route, termini, and width of the right-of-way.[325]

4. Effect of Failure to Object to the Notice.

The Act requires the Secretary to recognize any right-of-way accepted or established in accordance with state law or by an affirmative act of a state or political subdivision indicating acceptance of the grant of the right-of-way.[326] The notification must be provided both to the person who filed the notice and to the state and the political subdivision through which the right-of-way passes.[327] However, unlike the claimant, who had to provide only minimal support for the existence of the right of way, the Secretary must state the objections and the factual and legal basis for each objection.[328] Although preparing the objection and basis might require

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[325] H.R. 2081 provides: "THE NOTICE SHALL BE FILED WITHIN 10 YEARS AFTER THE DATE OF THE ENACTMENT OF THIS ACT, SHALL IDENTIFY THE STATE OR POLITICAL SUBDIVISION THEREOF THROUGH WHICH THE RIGHT-OF-WAY PASSES, AND SHALL CONTAIN A MAP AND A GENERAL DESCRIPTION OF THE ROUTE, TERMINI, AND SCOPE OF THE RIGHT-OF-WAY." *Id.*; *but see* note 208, *supra.*

S. 1425 provides as follows:

(2) FILING OF NOTICE.-The notice shall-

(A) be filed not later than 5 years after the date of enactment of this Act;

(B) identify the State and political subdivision of a State through which the right-of-way passes; and

(C) contain a map and a general description of the route, termini, and width of the right-of-way.

Id. These rudimentary proof requirements are reasonable, in that, with as much as thirty years having passed since any R.S. 2477 right-of-way could possibly have been perfected, many witnesses to the events would have moved on, and much of the documentary evidence, including diagrams, construction records, and photographs, would have been destroyed or have decomposed. Doubtless the Secretary would encounter less liberality when, the claimant having finally given notice of a claim allegedly perfected between three and thirteen decades earlier, the Secretary attempts to gather the evidence to support the "factual and legal basis for each objection," H.R. 2081 § 2(B)(3); S. 1425 § 2(b)(2)(B), to the claim.

[326] See *supra* note 310 and accompanying text.

[327] H.R. 2081 § 2(B)(1) provides that "THE SECRETARY SHALL NOTIFY THE HOLDER, OR OTHER PARTY GIVING NOTICE, OF THE RECOGNITION OR OBJECTIONS OF THE SECRETARY OF THE RIGHT-OF-WAY OR ANY PORTION THEREOF." *Id.*

S. 1425 § 2(b)(1) provides that "the Secretary shall inform the person who filed the notice, and the State, and political subdivision through which the right-of-way passes, in writing of any objection to, the right-of-way or any portion of the right-of-way." *Id.*

[328] H.R. 2081 § 2(B)(3) reflects the following: "OBJECTIONS.-IF THE SECRETARY OBJECTS TO THE RIGHT-OF-WAY AS PRESENTED UNDER SUBSECTION (A), THE SECRETARY SHALL SPECIFICALLY STATE THE SECRETARY'S OBJECTIONS TO THE EXISTENCE, IDENTITY OF THE HOLDER, ROUTE, OR SCOPE OF THE RIGHT-OF-WAY, OR PORTION THEREOF, AND SHALL PROVIDE THE FACTUAL

factual and legal research not required of the claimant, the Secretary must marshal the evidence and law to support the objection, not within five or ten years, but within two years of the filing of the notice.[329] If the Secretary fails to object within two years, the right-of-way is deemed to be valid as presented.[330] Thereafter, the Secretary would be obliged to record the "valid" right-of-way in the appropriate land records and on the Secretary's maps.[331]

5. Unappealing Litigation.

The only means by which the Secretary could challenge the validity of the claim and thus vindicate the federal interest is to file a quiet-title action in U.S. district court.[332] This action must be filed within two years of the

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AND LEGAL BASIS FOR EACH OBJECTION." *Id.*

S. 1425 § 2(b)(2) provides as follows:

> OBJECTIONS.-If the Secretary objects to the right-of-way as filed under subsection (a), the Secretary shall-
>
> (A) specifically state any objections that the right-of-way was not legally accepted or established or is otherwise invalid and any objections to the route or width of the right-of-way, or portion of the right-of-way; and
>
> (B) provide the factual and legal basis for each objection.

Id.

[329] *Id.*

[330] H.R. 2081 § 2(b)(4) provides as follows: "EFFECT OF FAILURE TO OBJECT.-IF THE SECRETARY DOES NOT OBJECT WITHIN THE TWO-YEAR PERIOD REQUIRED BY THIS SUBSECTION, THE RIGHT-OF-WAY SHALL BE DEEMED TO BE VALID AS IT WAS PRESENTED TO THE SECRETARY UNDER SUBSECTION (A)." *Id.*

S. 1425 § 2(b)(3) includes the following: "EFFECT OF FAILURE TO OBJECT.-If the Secretary does not object within the 2-year period from the date on which notice is filed, the right-of-way shall be deemed to be valid as it was presented to the Secretary." *Id.*

[331] H.R. 2081 § 4 provides as follows: "MANAGEMENT OF LANDS. A right-of-way accepted or deemed to be accepted under this Act is valid. The Secretary shall record the right-of-way in the land records and on maps of the Secretary and shall manage the lands subject to the right-of-way accordingly."

S. 1425 § 4(a) states, "(a) The Secretary shall record any valid right-of-way in the appropriate land records and on maps of the Secretary . . . ." *Id.*

[332] H.R. 2081 § 3(a) provides as follows: "QUIET TITLE ACTION RELATING TO OBJECTIONS.-NOT LATER THAN TWO YEARS AFTER THE DATE ON WHICH the Secretary notifies a holder under section 2(b) of objections to a right-of-way, or portion thereof, the Secretary may bring an action based on those objections in a United States district court in which the right-of-way or a portion thereof is located to challenge the validity of the right-of-way or portion thereof."

S. 1425 § 3(a) provides the following:

> QUIET TITLE ACTION RELATING TO OBJECTION.-Not later than 2 years after the first date on which the Secretary notifies a holder, or person who filed a notice, under section 2(b) of objection to a right-of-way, or portion of a right-of-way, the Secretary may bring an action based on the objection in the United States district court

filing of the objection.[333] If the Secretary fails to file a quiet-title action within the required period, the right-of-way is deemed valid.[334]

6. Interim Inactivity.

The Senate bill would prevent any public land management official from promulgating any R.S. 2477 regulations not essential to carry out the Act[335] and, thus, apparently would prevent any interim restrictions on the scope or use of a purported R.S. 2477 right-of-way. The House bill prohibits the Secretary from taking prompt action to prohibit use of purported rights-of-way[336] or, in fact, any action that would have the effect of leaving a private landowner without a means of access.[337]

7. Unquestioned Answers.

These legislative answers to the R.S. 2477 dilemma raise more questions than they purport to answer. These questions include whether state law enacted after enactment of FLPMA would ease the requirements for acceptance of R.S. 2477 rights-of-way, whether non-governmental

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for the district in which the right-of-way or portion of the right-of-way is located to challenge the validity of the right-of-way or portion of the right-of-way.

Id.

[333] *Id.*

[334] H.R. 2081 § 3(C) provides as follows: "FAILURE TO BRING ACTION.-IF THE SECRETARY DOES NOT BRING SUCH AN ACTION WITHIN THE TWO-YEAR PERIOD REQUIRED BY THIS SUBSECTION, THE RIGHT-OF-WAY SHALL BE DEEMED TO BE VALID IN THE FORM PRESENTED UNDER SECTION 2(A)." *Id.*

S. 1425 § 3(c) states the following: "[FAILURE] TO BRING ACTION.-If the Secretary does not bring an action under subsection (a) within the 2-year period described in subsection (a), the right-of-way shall be deemed to be valid in the form in which it was filed with the Secretary." *Id.*

[335] S. 1425 § 4(b) provides, "The Secretary, or any public land management official, is hereby prohibited from promulgating any regulations relating to R.S. 2477 rights-of-way that are not essential to carry out the express purposes of this Act." *Id.*

[336] H.R. 2081 § 5(E) provides as follows: "THE SECRETARY SHALL NOT CLOSE ANY RIGHT-OF-WAY GRANTED UNDER SECTION 2477 OF THE REVISED STATUTES WHICH WAS IN USE PRIOR TO OCTOBER 21, 1976, UNTIL ONE YEAR AFTER PROVIDING NOTICE TO THE STATE AND ANY POLITICAL SUBDIVISION THEREOF WITH JURISDICTION OVER HIGHWAYS IN THAT LOCATION WHICH DESCRIBES THE RIGHT-OF-WAY AND THE PURPOSE OF THE INTENDED CLOSURE." *Id.*; *but see* note 208, *supra.*

[337] "IN NO EVENT SHALL THE SECRETARY CLOSE ANY SUCH RIGHT-OF-WAY IF CLOSURE WOULD LEAVE ANY NON-FEDERAL LANDS ADJOINING THE RIGHT-OF-WAY WITHOUT AN ESTABLISHED PUBLIC OR PRIVATE ACCESS." *Id.*; *but see* note 208, *supra.*

owners would have standing to litigate R.S. 2477 claims, what sorts of actions might be required in order to manage public lands burdened by R.S. 2477 rights-of-way so as not to interfere with the use of the rights-of-way, and whether the statute would, in fact, settle the R.S. 2477 question or effectively reenact R.S. 2477 in more liberal terms.

First, the bills' incorporation of all state law,[338] not merely that pertaining to validity or scope of the right-of-way, invites the use of all state law which might affect R.S. 2477 rights-of-way, whether enacted before or after the effective date of FLPMA. Thus, the statute would validate even statutes such as that of Utah,[339] enacted with the apparent intent of providing "an additional window of opportunity to file new R.S. 2477 claims that were not documented in accordance with . . . state law at the time the R.S. 2477 offer was still open."[340]

Second, it is questionable whether private property owners or Indian tribes would have standing to litigate to prevent their land from being burdened by purported R.S. 2477 rights-of-way. The House version limits standing to those who have property interests in the right-of-way or the lands "served thereby."[341] The House version, therefore, would likely exclude from litigation those whose property would be burdened, rather than served, by the rights-of-way. Because legitimate R.S. 2477 rights-of-way might have been effected on land subsequently conveyed to private owners or Indian tribes,[342] R.S. 2477 does cloud the title of private and tribal lands.[343]

Third, the Secretary would be required to manage the land subject to the right-of-way so as not to interfere with the use of the right-of-way.[344] This provision goes beyond the ambit of the rest of the legislation, which would merely force the Secretary to stand by helplessly as forests, parks, and wilderness areas were carved up by highways. To comply with this provision, the Secretary would presumably turn public lands into looking-glass versions of themselves, where forest managers and park superintendents would chain-saw encroaching redwoods from road verges or exterminate wandering herds of bison whose presence discomfited drivers.

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[338] *See supra* notes 310-11 and accompanying text.

[339] *See supra* note 31 and accompanying text.

[340] Leshy, *supra* note 31, at 4.

[341] *See supra* note 316 and accompanying text.

[342] *See, e.g.*, Leshy, *supra* note 31, at 5.

[343] Solicitor Leshy notes that both the Utah and the Alaska statutes expressly provide that R.S. 2477 rights-of-way survive conveyances from public ownership. Leshy, *supra* note 31, at 5-6 (citing UTAH CODE ANN. § 27-16-106(4) (1995) and ALASKA STAT. 19.10.010 (1988)).

[344] *See supra* note 314 and accompanying text.

Finally, and most important, even if it were able to respond to thousands of unsupported claims, to research the factual and legal bases and determine which were objectionable, to file suits in the most egregious cases, to overcome ponderous burdens of proof and limitations as to legal theories and arguments and to prevail at trial and on appeal, the government would have gained only in those cases in which it had fought and won the good fight. After the battles were fought and won or lost, after parks, forests, and former wilderness areas were criss-crossed and fragmented by neonate historic roads, even then, any number of unrecorded claims might still remain. The title of the bills notwithstanding,[345] the statute in fact would not settle the question of R.S. 2477 rights-of-way. Though both versions purport to set a time limit for filing notices,[346] the time limit is toothless. In contrast to the forfeitures suffered by the United States if the Secretary fails to object within two years or fails to file a quiet-title action within an additional two years, no repercussions are prescribed for failure to file notice. In case any doubt might remain on that point, the House version explicitly provides that such failure would not relinquish the right-of-way.[347]

Although presumably DOI could file quiet-title actions on its own,[348] it would first have to find the potential holders of R.S. 2477 rights-of-way. This would itself be a daunting task. Right-of-way holders would have no incentive to file notice, because no punishment is provided for failure to file a notice. Therefore, this legislation places both public and private lands in jeopardy and forces federal land managers to choose between forfeiture and ruinously expensive litigation, yet does nothing to resolve, once and for all, the cloud on the title of public, private, and tribal lands represented by unnoticed R.S. 2477 claims. In fact, it would effectively reenact a shadow R.S. 2477, one that would invite a massive land grab through the filing of spurious, after-the-fact, or outright fraudulent claims, with little attendant risk of having such claims disallowed or sanctioned.

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[345] *See supra* note 307 and accompanying text.

[346] *See supra* notes 323-24 and accompanying text.

[347] H.R. 2081 § 5(B) provides: "RELINQUISHMENT NOT REQUIRED.-NOTHING IN THIS ACT SHALL BE CONSTRUED TO REQUIRE A RELINQUISHMENT OF A RIGHT-OF-WAY GRANTED UNDER SECTION 2477 OF THE REVISED STATUTES. A FAILURE TO FILE THE NOTICE PROVIDED FOR UNDER SECTION 2(A) DOES NOT CONSTITUTE A RELINQUISHMENT OF ANY SUCH RIGHT-OF-WAY." *Id.*

[348] *See* discussion *infra* section V.A.4.

VI. Conclusion

This Comment has reviewed the R.S. 2477 controversy. Part II examined the causes of the controversy, as well as the effects identified by DOI and constituent groups. Part III briefly explored R.S. 2477's true nature and concluded that it was a grant which could be perfected only by the construction of highways. Part IV summarized the recent legislative and administrative history prompting the current confrontation between some members of Congress and the DOI. Finally, Part V compared key provisions of the pending regulation and the proposed statute and evaluated the effectiveness of each in providing for efficient, fair, and final settlement of R.S. 2477 issues. This Comment will conclude by weighing the factors supporting and opposing the regulation and making a recommendation.

A. Factors Supporting Regulation

The proposed regulation would provide potential R.S. 2477 claimants with the guidance they need to evaluate the merits of their claims. The regulation would provide a low-cost alternative to expensive litigation, while preserving access to judicial review. For those who have undergone the expense of establishing their rights in federal court, the regulation would not place their rights in jeopardy. Finally, the regulation would establish a time after which the specter of R.S. 2477 would no longer loom over land managers, land owners, and land users.

B. Factors Opposing Regulation

The regulation's standards and the type of evidence required seem burdensome;[349] however, it is the same type of evidence that would have

[349] For example, Acting Director James S. Creedon, Arizona Department of Transportation, has written: "In Arizona, all fifteen counties, the state and some cities and towns claim rights-of-way under RS 2477. Under [a proposed amendment which would have required recording of R.S. 2477 claims], each of these entities will be required to undertake major research projects to document claims to rights-of-way established prior to October 21, 1976. Some of these claims date back to territorial days. It would be an extremely costly process to undertake. It is doubtful that smaller counties such as Mohave would have the financial resources and personnel required to research many of their unpaved roads." Letter, James S. Creedon, Acting Director, Arizona Department of Transportation, to Hon. Jon Kyl, U.S. House of Representatives (June 3, 1991), *reprinted in* 138 CONG. REC. H9852 (daily ed. Sept. 29, 1992) *available in* Westlaw, 1992 WL 250177.

to be produced in litigation, which is a far more expensive process. The requirements are especially burdensome for roads which have not actually been constructed; the greater the degree of construction, the easier it will be to establish whether and when a right-of-way was established. Thus, the rigorous standards will discourage individuals and governments seeking to expand footpaths, dogsled trails, and jeep trails into R.S. 2477 highways, and will encourage them to seek rights-of-way under other provisions.

A recurring fear is that the regulations will deny access to public lands.[350] This fear is a chimera. Citizens will have casual, temporary, or permanent access to public lands. Casual access can be gained to BLM lands by foot, horse, or pack animal, unless they have been prohibited to protect resources.[351] Casual use is permitted by off-road vehicles except on NPS land and other designated areas.[352] Inholders[353] can gain access to their properties through national forest areas under a provision of the Alaska National Interest Lands Conservation Act (ANILCA),[354] which has been applied outside of Alaska to USDA national forest lands.[355] Inholders can gain access through DOI wilderness areas.[356] A provision

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[350] Former Alaska Governor Walter Hickel expressed concern that the "new, narrower definitions would likely preclude traditional access along Alaska trails by such conveyances as snow machines, sled dog teams, skiffs, floatplanes and even hiking and backpacking." *Hickel Requests Extension on Rights-of-Way Comments*, ANCHORAGE DAILY NEWS, Aug. 5, 1994, at E-2. In Utah, Congressman James V. Hansen claimed, "We have thousands of roads across rural Utah that are used by the public every day and according to these regulations many of those roads will be shut down." Frank Clifford, *Dispute Brewing Over Road Building in Parks*, ANCHORAGE DAILY NEWS, Aug. 2, 1994, at A-8.

[351] DOI REPORT, *supra* note 7, at 51. *See also* 43 C.F.R. 2920.1-1(d) (1994). "No land use authorization is required under the regulations in [part 2920 of the regulations dealing with leases, permits, and easements in public lands under jurisdiction of the BLM] for casual use of the public lands." *Id.* "Casual use" refers to "any short term non-commercial activity which does not cause appreciable damage or disturbance to the public lands, their resources or improvements, and which is not prohibited by closure of the lands to such activities." 43 C.F.R. 2920.0-5(k) (1994).

[352] DOI REPORT, *supra* note 7, at 51. *See generally* 43 C.F.R. Part 8340 (1994) (regulating use of off-road vehicles on BLM lands). An off-road vehicle is a "motorized vehicle capable of, or designed for, travel on or immediately over land, water, or other natural terrain . . . ." 43 C.F.R. 8340.0-5 (1994).

[353] An "inholder" is an owner of "nonfederally owned land" within the boundaries of the National Forest System, 16 U.S.C. § 3210(a) (1994), or surrounded by public lands managed by the Secretary of the Interior, 16 U.S.C. § 3210(b).

[354] § 3210(a). The Secretary of Agriculture shall provide "such access to nonfederally owned land within the boundaries of the National Forest System as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof . . . ." *Id.*

[355] Montana Wilderness Ass'n v. U.S. Forest Serv., 496 F. Supp. 880 (D. Mont. 1980).

[356] § 1134(a). A "[s]tate or private owner shall be given such rights as may be necessary to assure adequate access to such State-owned or privately owned land by such State or private owner and their successors in interest . . . ." *Id.*

of ANILCA[357] has also been held to provide inholder access to DOI wilderness areas outside of Alaska.[358] Discretionary rights-of-way provide others with long-term or permanent access to any USDA or DOI land, other than wilderness areas, wildlife refuges, national park units, and wilderness study areas.[359] Rights-of-way may be established through wilderness areas with presidential approval,[360] through Fish and Wildlife Refuges if compatible with wildlife refuge purposes,[361] and through the national park system in the public interest and for a specified purpose.[362]

The standards for construction and highways might seem particularly unfair to Alaskans.[363] Alaska's special circumstances might dictate special treatment.[364] Alaska's special circumstances, however, also militate against providing special treatment in the form of relaxed standards for R.S. 2477 rights-of-way.[365] Moreover, Alaska's special circumstances have earned special consideration from Congress.[366] ANILCA[367] pro-

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[357] § 3210(b). The Secretary of the Interior shall provide "such access to nonfederally owned land surrounded by public lands . . . as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof . . . ." *Id.*

[358] Utah Wilderness Ass'n, 91 Interior Dec. 165, 173 (1984).

[359] 43 U.S.C. § 1761(a) (1994).

[360] 16 U.S.C. § 1133(d)(4) (1994). The President must find that approval of the right-of-way will "better serve the interests of the United States and the people thereof than will its denial . . . ." *Id.*

[361] § 668dd(d)(1).

[362] § 5; § 79.

[363] For example, Dan Kish, a spokesman for Alaska Representative Don Young, bemoaned: "We've got a bunch of city slickers trying to figure out what a highway is in the West. If we don't have streetlights and a gravel base, then somehow we don't have a highway, according to them. I guess we can't deliver our mail." Meredith Cohn, *Feds' Attempt to Define "Highway" Holds Keys to Alaska Access*, ANCHORAGE DAILY NEWS, July 30, 1994, at C-1.

[364] "Alaska was awarded a generous land grant as part of the 1958 statehood compact. That's the good news. The bad news is the federal government still owns two-thirds of the state, leaving Alaska's communities and land selections isolated from one another, like islands in a vast federal sea." William J. Tobin, *The Voice of the Times: Coghill's Mission*, ANCHORAGE DAILY NEWS, Mar. 14, 1993, at G-3.

[365] Rex Blazer, director of Fairbanks's Northern Alaska Environmental Center, criticized Lieutenant Governor Coghill's plan to establish 1,700 low-volume highways because it would result in "eroded hillsides and muddy streams" when the routes could not be adequately maintained. "It would bypass 30 years of knowledge about how to do roads right and safely." *Coghill Plan Would Turn Mining Trails Into Roads*, ANCHORAGE DAILY NEWS, June 13, 1991, at B-2.

[366] *See, e.g.*, Alaska National Interest Lands Conservation Act, 94 Stat. 2457 (1981) (codified at 16 U.S.C. § 3161 (1994)), which provides:

> Congress finds that—
>
> (a) Alaska's transportation and utility network is largely undeveloped and the future needs for transportation and utility systems in Alaska would best be identified and provided for through an orderly, continuous decision making process involving the State and Federal Governments and the public;

vides generously for casual access, temporary access, and permanent access to various categories of public lands. Those seeking casual access for traditional activities can travel without a permit across conservation system units (CSUs), including NPS units, wildlife refuges, and wilderness areas, by traditional, non-environmentally damaging modes of transportation, including snowmachines, motorboats, airplanes, and nonmotorized surface transportation methods such as dog sleds and horses.[368] Inholders, including lessees or permittees, can obtain permanent access through CSUs to their property "for economic or other purposes."[369] Landowners may cross CSUs for "survey, geophysical, exploratory, or other temporary" purposes, as long as they make no permanent improvements to the CSUs.[370] Non-landowners may obtain permanent access across CSUs for transportation and utility systems (TUS).[371] Access across Alaska Native Claims Settlement Act (ANCSA) lands can be obtained, subject to several restrictions.[372] Thus, the needs of Alaskans are addressed by other provisions, more liberal than those providing access in other states.

Some might fear that by publicizing the issue, the regulations might actually facilitate road building in wilderness areas and national parks. Such rights-of-way might actually exist under R.S. 2477 and could be established in any event. Without the regulations, these R.S. 2477 rights-of-way could be established only after expensive litigation. Moreover, the

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(b) the existing authorities to approve or disapprove applications for transportation and utility systems through public lands in Alaska are diverse, dissimilar, and, in some cases, absent; and

(c) to minimize the adverse impacts of siting transportation and utility systems within units established or expanded by this Act and to insure the effectiveness of the decisionmaking process, a single comprehensive statutory authority for the approval or disapproval of applications for such systems must be provided in this Act.

Id. *See generally* DOI REPORT, *supra*, at 54; Steven P. Quarles and Thomas R. Lundquist, *The Alaska Lands Act's Innovations in the Law of Access Across Federal Lands: You Can Get There From Here*, 4 ALASKA L. REV. 1 (1987); Galen G.B. Schuler, Comment, *Easements by Necessity: A Threshold for Inholder Access Rights Under the Alaska National Interest Lands Conservation Act*, 70 WASH. L. REV. 307 (1995).

[367] Act of Dec. 2, 1980, 94 Stat. 2457 (1981).

[368] 16 U.S.C. § 3170(a) (1994).

[369] § 3170(b).

[370] § 3171.

[371] §§ 3161-66. An agency head shall make recommendations for establishment of a transportation or utility system within a conservation system unit upon a determination that "(1) such system would be compatible with the purposes for which the unit was established; and (2) there is no economically feasible and prudent alternative route for the system." § 3165.

[372] For example, no "reasonable alternative route" may exist "across publicly owned land," 43 C.F.R. 2650.4.7 (1994). The routes must be "limited in number and not duplicative," must be minimized in size and use, and must "[f]ollow existing routes of travel unless . . . otherwise justified." 43 C.F.R. 2650.4-7(b)(1) (1994).

regulations provide for public comment and even appeal by injured parties. Finally, the agencies will retain the prerogative of managing the scope of rights-of-way and minimizing deterioration of public lands.

C. The Choice: Show the Cards or Deal from the Bottom

DOI in this situation might to be compared to a poker dealer. Until twenty years ago, the casino let players bring their own wild cards. Owners of those pre-1976 wild cards might still use them, but need not show them to the dealer. A player will lay a card face down, announce that it is a wild card, pronounce it the card he needs, and scoop up the chips. Past dealers were reluctant to ask a player to show the wild card. The present dealer asks, and usually gets into a fistfight. Other players (who are also stockholders) are starting to complain. On diminished rations and feeling the loss of blood, the dealer stands on legs rapidly turning to rubber. The pit boss is glaring at the dealer and the diminishing pile of chips. As a prudent dealer, DOI has merely asked to see those wild cards.

The so-called "Settlement Act" would force federal land managers to continue — continue the game, continue to litigate every bogus R.S. 2477 claim in court, and continue to wonder how many more are out there — rather than allowing DOI to promulgate a regulation to resolve, with minimum delay and minimum expense for all concerned, claimed rights-of-way on public lands under R.S. 2477.

The choice is not difficult. It is a choice between fair play and gamesmanship, between putting the cards face-up on the table and dealing from the bottom. Under the regulations, R.S. 2477 claimants enjoy the advantages of one-stop shopping and lower-cost administrative procedures. Interested third parties have an opportunity for input. Both retain the options of administrative and judicial review. Honest claimants who actually invested time, labor, and materials in building roads while R.S. 2477 was in effect have nothing to fear. The regulation protects private rights, public lands, and the federal fisc.

Under the legislation, claimants enjoy the unfair advantages of a presumption of legitimacy, a lenient choice-of-law provision, and a congressional promise that fraudulent claims carry no risk of repercussions. Citizens willing to stand up and defend our precious natural heritage would be denied any standing. All disputes would lead to litigation, with severe limitations on potential causes of action. Fraudulent claimants would have valuable property interests to gain and nothing to lose. The legislation invites a raid by private interests upon our natural treasures and our national treasury.

The legislation should not be enacted. If anything, the moratorium should be lifted so that the regulations can be adopted without further delay. Nearly two years have now passed since the proposed rule was announced for public comment.[373] Opponents of the regulations might argue that the regulations should be quashed because of their cost[374] or because revisiting the validity of long-used rights-of-way might constitute a taking without compensation.[375] To those who decry the cost of regulation to would-be owners of rights-of-way, the obvious answer is that administrative procedures cost far less than litigation. Moreover, the sunset provisions ensure that these issues will be resolved quickly, before the passage of time and inflation further escalate costs. To those who attack the regulation as a wrongful "taking" of private property without compensation, the clear answer is that nothing, in fact, is being taken from

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[373] The extension of the comment period, now permitting a full year for submission of comments, signals that DOI wants Congress and the public constructively involved in the process, but does not signal an abandonment of DOI's intention to proceed with the rulemaking. Telephone Interview with Rene Stone, Solicitor's Office, Department of the Interior (Jan. 13, 1995).

[374] *See, e.g.*, 141 CONG. REC. S17,531 (daily ed. Nov. 27, 1995) (statement of Senator Hatch), *available in* Westlaw, 1995 WL 696492. Senator Hatch stated:

> Nearly every county in UT . . . has identified numerous R.S. 2477 rights-of-way claims. These local governments are justifiably concerned that the validation process of each claim may require enduring the same financial and legal burdens as the Burr Trail case, especially considering that more than 10,000 claims have been identified in Utah alone.

Id.

Colorado Congressman A. Wayne Allard stated, with regard to an earlier legislative proposal to require recording of R.S. 2477 rights-of-way, "The Congressional Budget Office estimates that this section could cost States and counties between $5 and $50 million." 138 CONG. REC. H9852 (Sept. 29, 1992) (statement of Representative Allard), *available in* Westlaw, 1992 WL 250177.

[375] Such arguments invariably assume the validity of all putative rights-of-way, which is precisely the fact at issue. *See, e.g.*, Hjelle, *Essential Points*, *supra* note 7, at 305 & n.13. Ms. Hjelle writes:

> As property rights, R.S. 2477 rights-of-way are entitled to the traditional protection afforded such rights. They cannot be taken without just compensation or other appropriate remedy necessitated by the grant of easement from Congress directly to the states and their political subdivisions, acting on behalf of the public.

Id. (citing Block v. North Dakota, 461 U.S. 273, 291 (1983)). Similarly, in 1991, Walter J. Hickel, then Governor of Alaska, wrote:

> Trails, roads, and highways accepted under RS-2477 prior to the repeal of the statute in 1976, established property rights (easements) in the affected lands. These easements conveyed certain rights of access which have consistently been confirmed by courts. Accordingly, *to impose the onerous procedures* contained in [a proposed amendment which would have required recording of R.S. 2477 claims] *could well constitute a taking without compensation under the Fifth Amendment.*

Letter, Hon. Walter J. Hickel, Governor of Alaska, to Hon. George Miller, Chairman, House Committee on Interior and Insular Affairs (May 8, 1991), *reprinted in* 138 CONG. REC. H9852 (1992), *available in* Westlaw, 1992 WL 250177 (emphasis added).

anyone; any rights that actually vested under R.S. 2477 are secure. What is being given to us, and to our children, is an improved opportunity for both our environment and our access to be preserved — for study of wildlife, for quiet enjoyment, and for other uses consistent with the promises made by past lawmakers. The current confrontation over R.S. 2477 may be symptomatic of a fundamental conflict in emphasis between short-term gain and long-term survival. The "contractors" in Congress would do well to recall the words of a true conservative who, confronted with the present revolution, might have counseled that the contract between the government and the governed is not "a partnership agreement in [winning an election], to be taken up for a little temporary interest, and to be dissolved by the fancy of the parties." This legislator might then have continued:

> It is to be looked on with other reverence; because it is not a partnership in things subservient only to the gross animal existence of a temporary and perishable nature. . . . As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born.[376]

As trustees for those who are to be born, those who are living should call out with one voice to quash this legislation.

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[376] BURKE, *supra* note 55, at 232.

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