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Road Rage and R.S. 2477: Judicial and Administrative Responsibility for Resolving Road Claims on Public Lands

BRET C. BIRDSONG*

INTRODUCTION

The past decade has seen the D-4 Caterpillar bulldozer become a significant tool for those seeking to challenge federal land management agencies' authority to protect resources federal lands by reducing access. The power of the bulldozer is both symbolic and pragmatic. It cuts an iconographic image of local officials standing up against federal control over vast areas of land in the rural west. But it also, in many cases, provokes litigation, allowing claims to property rights to receive judicial attention that might otherwise evade them.

Consider a few recent examples.

During the summer and fall of 1994, Dick Carver, a county commissioner in Nye County, Nevada, took it upon himself, on behalf of his county, to promote access to the public lands in defiance of federal land managers' orders. On July 4, he climbed atop a county-owned bulldozer and "reopened" the Jefferson Canyon Road in the Toiyabe National Forest, a road that had been washed out some eleven years earlier and never repaired. Despite a Forest Service employee's efforts to stop him, Carver graded a new roadbed while waving a pocket copy of the Constitution to the cheers of dozens of armed onlookers.¹ After filing an affidavit seeking to prosecute the Forest Service agent for interfering with county business, Carver redeployed the bulldozer in October to "reopen" another road the Forest Service had ordered closed.²

A few years later in Elko County, Nevada, several hundred miles to

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² Nye County, 920 F. Supp. at 1112.
the north, the scene repeated. A remote dirt road leading through the Humboldt National Forest to a wilderness trailhead washed out in a storm. The Forest Service initially decided to rebuild the road, but reversed course when the population of bull trout resident in the adjacent stream was listed designated for protection under the Endangered Species Act. Elko County sent bulldozers to reopen the road in July 1998. The dozers were halted by cease and desist orders issued by federal and state agencies, but not before provoking a federal lawsuit alleging trespass and Clean Water Act violations. Several hundred protesters—dubbed the Shovel Brigade—returned to the site on July 4, 2000, to reopen the road by manual labor. The Shovel Brigade pledged allegiance to the flag, sang the national anthem, and then took up positions along a tug-of-war line to remove a four-ton boulder from the road’s path.3

In southern Utah, several counties have deployed bulldozers on trails across federal lands designated for protective management, including wilderness study areas, Capitol Reef National Park, and the Grand Staircase-Escalante National Monument. Their actions provoked lawsuits by environmental groups and the Bureau of Land Management (“BLM”), who assert regulatory authority, based on federal ownership, to limit the counties’ road building activities.4

Underlying each of these protagonists’ legal positions, if not their motivations, is a right-of-way grant enacted as part of the Mining Act of 1866: “The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.”5 For 110 years, from its enactment in 1866 until its repeal in 1976, this obscure statute known as R.S. 2477 granted the right-of-way across unreserved federal public lands for the construction of highways. For most of its lifetime, the terse and obscure grant caused little stir, except for the occasional claim that now private lands are subject to R.S. 2477 rights-of-way established during earlier public ownership. Since its repeal, however, R.S. 2477 has become a flashpoint in the ongoing battle for control over western public lands and the resources they harbor. Throughout the west, states, counties, and even individuals and groups pushing for unrestricted motorized access to remote public lands are using R.S. 2477 to try to frustrate environmentally protective measures imposed by federal land managers. Some of these groups are seeking to establish R.S. 2477 highway claims in order to preclude the potential future designation of public lands for protection under the Wilderness Act of 1964.

No small amount of ink has been spilled over R.S. 2477. The brevity and apparent simplicity of the statute masks the complexity of the problems the antiquated grant presents in the context of modern public land law. Most of the commentary has focused on substantive legal issues posed by R.S. 2477, including the meaning of the terms of the statutory grant, the role of federal and state law in construing the statute, and the regulation of valid rights-of-way by federal agencies. The commentary has not led to any consensus in the academic literature or the courts about the specific standards for determining the validity of R.S. 2477 claims or the legal relationship between the owner of a valid claim and the federal agency managing the public lands crossed by the claim.

An overlooked aspect of the R.S. 2477 controversy has been the allocation of responsibility among federal courts and federal land managers—specifically, the Department of the Interior (“DOI”)—for resolving disputed R.S. 2477 claims. Whether courts or federal land managers have primary authority to interpret and apply R.S. 2477 is more than a question of mere procedure or choice of forum. It is central to the ability of federal land management agencies to administer the obsolete land grant in a way that harmonizes the intent of the Congress that created it and the intent of Congresses that have since repealed the grant and mandated the management of public lands for various uses, including protecting their primitive condition. This Article argues that federal land management agencies should replace the courts as the institution with primary responsibility for resolving issues that arise from R.S. 2477 claims. In this view, DOI should be accorded the opportunity to interpret R.S. 2477 and to make an initial determination of the validity and scope of claimed R.S. 2477 rights-of-way. The judicial role, though still substantial, would be limited to that customary in administrative law cases, namely, the review of agency action for abuse of discretion and impermissible resolution of statutory ambiguities. Agency primacy would ensure the consistency and uniformity of R.S. 2477 decisions and, if the process is properly structured, ensure that the unique problems presented by this antiquated grant are, at long last, finally settled in a manner that both permits public participation and interpretation of R.S. 2477 in the proper context of the modern public land management regime.

The Article proceeds in four parts. Part I frames the problem by recounting the history of R.S. 2477. It explains how limitations on judicial resolution of R.S. 2477 claims have contributed to a kind of “road rage” on western public lands, and describes recent efforts to create an effective administrative process for resolving R.S. 2477 disputes. Part II examines judicial resolution of R.S. 2477 claims under the federal Quiet Title Act (“QTA”), which the Supreme Court has held provides the exclusive means for a plaintiff to sue the United States on issues of title.
It demonstrates that the QTA, as it has been interpreted and applied in the courts, fails to provide an effective mechanism for resolving R.S. 2477 disputes. Rather, restrictions on the availability of that form of judicial action have encouraged R.S. 2477 claimants to provoke the United States or third parties to file litigation in some other form—for example, trespass or mandamus—that is capable of resulting in an adjudication of title. Part III examines the case for making DOI the first-instance adjudicator of R.S. 2477 rights. Particularly, it argues that DOI's historically broad authority to administer the public lands and the doctrine of primary jurisdiction justifies recognition of the agency's primacy in determining the existence and contours of nonfederal interests in federal land. Recognizing the great potential variability of agency processes that might be employed to resolve R.S. 2477 claims, Part IV proposes principles that should guide policymakers in framing an appropriate administrative process. It urges that DOI implement a mandatory, two-tiered process—using notice-and-comment rulemaking to interpret the statutory grant and a formalized adjudication to apply the standards it adopts to individual claims—to render decisions subject to judicial review under traditional administrative law standards.

I. R.S. 2477 AND THE RISE OF ROAD RAGE

A. FROM FRONTIER TO FLPMA: THE LIFE AND TIMES OF R.S. 2477

Congress enacted R.S. 2477 in the midst of an era when federal policy aggressively promoted the settlement of the western public lands, albeit with a grand incoherence. During much of the early nineteenth century, Congress had disposed of public lands to settlers through veterans' bounties and cash and credit sales. By the Civil War, legendary abuse and ineffectiveness of these policies led to their replacement by conditional grants, under which the United States granted title upon the satisfaction of specific conditions. The Homestead Act of 1862, which authorized settlers to enter public lands to establish homesteads of 160 acres and provided for fee patents to issue if the settlers cultivated the lands for five years, exemplified the conditional grant. During this same period, Congress granted significant amounts of lands directly to states and railroads to fund the development of essential infrastructure, intending those lands to be sold to settlers. Policies to prospectively promote the orderly settlement of the West, however, often came late and were complicated by the fact that many settlers already occupied western lands, either in trespass or under a license implied by congressional acquiescence to their presence. So Congress attempted to accommodate the expectations of these early settlers by according actual

settlers with rights to preempt later settlers or by granting federal rights recognizing the local customs of rights of occupancy, as in the mining districts.

Amid this policy confusion, Congress adopted R.S. 2477. Originally enacted as section 8 of “An Act Granting Right of Way to Ditch and Canal Owners over the Public Lands, and for other Purposes,” R.S. 2477 provides, in its entirety: “The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.” Although the cryptic language and sparse legislative history of R.S. 2477 leave Congress’s exact purpose somewhat obscure, R.S. 2477 is now generally accepted to embrace Congress’s policies both to promote orderly future settlement and to legitimize the occupancy of settlers whose presence had outpaced the law. R.S. 2477 thus granted rights retroactively to those who had already constructed highways across public land and prospectively to those who would do so in future. 8

R.S. 2477 spawned relatively little controversy, at least with respect to the federal government, before its repeal in 1976. State courts were occasionally called upon to adjudicate claims by private landowners asserting access rights across neighbors’ property; the plaintiffs typically claimed that highways had been established under R.S. 2477 before the neighbor’s private lands had passed from federal ownership. 9 As these cases implicated no federal property interest, the United States typically

7. Act of July 26, 1866, 14 Stat. 251, 253 (reenacted and codified as Revised Statute 2477, 43 U.S.C. § 932 (repealed 1976)). That Act is often called the Mining Act of 1866. Its most lasting and heralded contribution to public land law was the creation of the location system for valuable minerals.

8. That R.S. 2477 granted rights prospectively has not always been clear. The only Supreme Court decision to address R.S. 2477 directly applied it retroactively to recognize the priority of a highway right-of-way based on use predating 1866. Cent. Pac. Ry. Co. v. Alameda County, 284 U.S. 463, 473 (1931). In an earlier case interpreting other sections of the 1866 act, the Court had quoted with approval the act’s author stating that the law “merely recognized the obligation of the government to respect private rights which had grown up under its tacit consent and approval.” Jennison v. Kirk, 98 U.S. 453, 459 (1878) (quoting Senator William M. Stewart). Although the Ninth Circuit once interpreted these cases not to grant prospective rights, United States v. Dunn, 478 F.2d 443, 445 n.2 (9th Cir. 1973), it has since aligned itself with other courts and longstanding administrative interpretations which view R.S. 2477 as operating prospectively to grant rights-of-way when the statutory conditions of the grant were satisfied after 1866. See United States v. Gates of the Mountains Lakeshore Homes, Inc., 732 F.2d 1411, 1413 n.3 (9th Cir. 1984) (questioning the reasoning of Dunn, 478 F.2d 443); Humboldt County v. United States, 684 F.2d 1276, 1282 n.6 (9th Cir. 1982) (calling the prospective application of R.S. 2477 an open question); see also United States v. Garfield County, 122 F. Supp. 2d 1201, 1226–27 (D. Utah 2000) (finding that road construction activities from 1938 to 1967 perfected a R.S. 2477 right-of-way); Sierra Club v. Hodel, 675 F. Supp. 594, 604 (D. Utah 1987), rev’d in part on other grounds, 848 F.2d 1068 (10th Cir. 1988); Regulations Governing Rights-of-Way for Canals, Ditches, Reservoirs, Water Pipe Lines, Telephone and Telegraph Lines, Tramroads, Roads and Highways, Oil and Gas Pipe Lines, Etc., 56 Interior Dec. 533, 551 (1938) [hereinafter Regulations Governing Rights-of-Way].

made no appearance. In the absence of federal participation, state courts ventured to construe the federal statutory grant liberally, often applying definitions and standards for the establishment of public roads taken from state law.\footnote{10}

During this period, federal administrative oversight of R.S. 2477 was generally light, though not entirely invisible. Several DOI policy statements stated without elaboration, for example, that R.S. 2477 highway rights-of-way became effective upon their construction or their “establishment” in accordance with state laws.\footnote{11} Nonetheless, DOI bristled at egregious attempts to usurp the public domain, as when in 1898, a county issued an order purporting to “accept” the R.S. 2477 grant and then requested that subsequent federal patents to third parties note reservations, in favor of the county, of R.S. 2477 highways on every section line.\footnote{12} In rejecting the request, Secretary Bliss noted that the county’s order “embodies the manifestation of a marked and novel liberality on the part of the county authorities in dealing with public land,” particularly given the lack of any necessity for or actual construction of highways.\footnote{13}

The rarity of conflicts between the federal government and those claiming rights-of-way under R.S. 2477 before its repeal, though attributable in part to generally quiescent federal policy about what was required to validate a claim, was also the result of the federal policy that R.S. 2477 highways could be perfected without any determination of validity by the federal government.\footnote{14} The lack of any requirement for claimants to obtain federal validation of specific road claims, or even to

\footnote{10. E.g., \textit{Lindsay Land \\& Live Stock}, 285 P. at 648; \textit{McRose}, 22 P. at 394.}
\footnote{12. Right of Way—Highway—Section 2477, R.S., 26 Pub. Lands Dec. 446, 447 (1898). The Douglas County board of commissioners had passed an order asserting, by acceptance of the R.S. 2477 grant, a right-of-way extending thirty feet on each side of all section lines on public lands in the county, unless the section line formed the boundary between public and private land, in which case the accepted right-of-way would extend from the section line a distance of sixty feet onto the public land. Under the Public Land Survey System, initiated by the Land Ordinance of 1785, the western public lands are surveyed according to a standard system. The survey system divides lands into square townships, each comprising thirty-six one-square-mile sections. Section lines on surveyed lands thus form a grid of north-south and east-west lines spaced at one mile intervals. See \textit{Paul W. Gates, History of Public Land Law Development} 65 (1968).}
\footnote{13. Right of Way—Highway—Section 2477, R.S., 26 Pub. Lands Dec. at 447. Secretary Bliss held: 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. \textit{Id.}}
\footnote{14. See \textit{id.}}
notify the United States or record their claims in local land records, is the root of the difficult problem R.S. 2477 presents federal land managers today—the identification and validation of claims decades after the law's repeal and often many decades after "construction" of the alleged "highway."

By the passage of the Federal Land Policy and Management Act of 1976 ("FLPMA"), Congress ended the wide scale disposition of federal lands. FLPMA closed the public domain to most forms of entry, and declared it to be the policy of the United States to retain ownership of the public lands. FLPMA directed the Secretary of the Interior to administer the retained public lands (which had formerly been subject to disposition) for multiple uses and in all events to regulate their use to prevent "unnecessary or undue degradation" of the lands.

To these ends, FLPMA repealed R.S. 2477 and replaced its open-ended grant of highway rights-of-way with an exclusive administrative process for permitting limited rights-of-way. Title V of FLPMA authorizes the Secretary of the Interior to issue rights-of-way for various purposes, including "roads, trails, highways, railroads, canals, tunnels, tramways, airways, livestock driveways, or other means of transportation." Rights-of-way issued under FLPMA are limited in duration, fixed in physical scope, and subject to prior analysis and minimization of environmental impacts. While replacing the open-ended grant of rights-of-way under R.S. 2477 with Title V permitting procedures, FLPMA recognized valid R.S. 2477 rights-of-way established before its enactment. In addition to disclaiming the termination of then-existing rights-of-way, a general saving clause further made all agency

17. Id. §§ 1712(c), 1732(a), (b).
18. FLPMA, Pub. L. No. 94-579, § 706(a), 90 Stat. 2743, 2793 (1976) ("Effective on and after the date of approval of this Act, R.S. 2477 (43 U.S.C. § 932) is repealed in its entirety.").
19. 43 U.S.C. §§ 1761-70. Section 1770(a) provides that Title V is the exclusive procedure for issuing rights-of-way "for the purposes listed under this subchapter." Id. § 1770(a).
20. Id. § 1761(a)(6). Rights-of-way may also be issued for water storage and conveyance, pipelines for other liquids and gas, transmission and generation of electricity and communication signals, and "other necessary transportation or other systems or facilities which are in the public interest and which require rights of way over, upon, under, or through such lands." Id. § 1761(a)(7).
21. Id. § 1764(b) (limiting rights-of-way to "a reasonable term in light of all circumstances concerning the project" and making rights-of-way renewable under terms and conditions specified by the Secretary).
22. Id. § 1764(a). Factors limiting the permissible physical scope of rights-of-way include the amount of ground to be occupied by the project or necessary to its operation and maintenance, the requirements of public safety, and the required prevention of "unnecessary damage to the environment." Id.
23. Id. § 1765.
24. The savings provisions of FLPMA state that "[n]othing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or
actions under FLPMA "subject to valid existing rights."\(^5\)

FLPMA capped the long period of withdrawal and reservation of lands from the public domain and set the stage for increasing conflicts between R.S. 2477 claimants and federal land managers, particularly BLM. As a general matter, it provoked a backlash against federal control over public lands that continues to animate many R.S. 2477 disputes today.\(^6\) At the same time, along with the National Forest Management Act, enacted the same year, it completed the development of a pervasive regime of federal land management, premised on comprehensive planning, that authorized, and in some cases, required land managers to restrict the use and access of federal lands. In short, FLPMA gave R.S. 2477 claimants an impetus to press their road claims on public lands: by securing the recognition of existing property rights, they might limit federal regulatory measures that would otherwise restrict public access and the development of roads.

Moreover, FLPMA offered opponents of federal protection for wilderness areas an even greater opportunity. After FLPMA, they could attempt to foreclose designation of additional public lands as protected "wilderness"\(^7\) by asserting and validating R.S. 2477 claims. FLPMA directed the Secretary of the Interior to identify all roadless areas of 5,000 acres or more having "wilderness characteristics" and to study those areas’ suitability for congressional designation as protected wilderness.\(^8\) FLPMA requires BLM to manage such "wilderness study areas" ("WSAs") "in a manner so as not to impair the suitability of such areas for preservation as wilderness."\(^9\)

Because WSAs and statutory wilderness areas must both be roadless,\(^10\) gaining recognition of valid R.S. 2477 highways in WSAs carries for wilderness opponents the dual hope of precluding the statutory wilderness designation of "roaded" lands and

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\(^5\) FLPM 701(a), 90 Stat. 2743, 2786 (1976); 43 U.S.C. § 1701 note (2000) (Savings Provision); see also FLPMA § 509, 43 U.S.C. § 1769(a) (2000) ("Nothing in this subchapter shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted, or permitted.").


\(^8\) 43 U.S.C. § 1782(a).

\(^9\) Id. § 1782(c).

\(^10\) See 16 U.S.C. § 1131(c) (defining wilderness, in part, as "an area of underdeveloped Federal land retaining its primeval character and influence, without permanent improvements ... which ... generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable"); 43 U.S.C. § 1782; Interpretation of Section 603 of the Federal Land Policy and Management Act of 1976—Bureau of Land Management (BLM) Wilderness Study, 86 Interior Dec. 89, 100 n.24 (1979).
freeing those lands from the restrictions of the non-impairment standard for WSAs.

B. **Uncertainty and Angst: The Legacy of R.S. 2477**

Since the enactment of FLPMA, R.S. 2477 disputes have increasingly wound their way to federal court, presenting themselves in a surprising variety of procedural postures. The disputes turn on two essential issues—first, the validity of R.S. 2477 rights-of-way claimed to have been perfected before its repeal or the withdrawal of affected lands from the public domain and, second, the impact of valid R.S. 2477 rights on federal land managers’ authority to restrict the use of roads. Both federal land managers and potential R.S. 2477 claimants face continuing uncertainty over these issues. The uncertainty is amplified by confusion over the proper roles of courts and federal agencies in resolving R.S. 2477 disputes.

Chief among the causes of uncertainty, at least for federal land managers, is the inchoate nature of R.S. 2477 claims, which remain largely unidentified. Courts and federal agencies have long considered R.S. 2477 to be a self-effectuating grant. According to this accepted view, nonfederal property interests in the subject federal land arise by operation of law at the time the factual conditions of the R.S. 2477 grant are satisfied. In the absence of any requirement for R.S. 2477 claimants ever to record their claims in local land records, register them with the federal agencies managing the land they burden, or otherwise to identify the lands subject to their claims, federal agencies simply do not know the number of possible R.S. 2477 highways that cross lands entrusted to their care, or the locations of those claims. Federal attempts to catalog R.S. 2477 claims based on voluntary reporting have yielded only an incomplete inventory. Exacerbating the lack of certainty over the exact number and locations of claims is the probability that the number of claims—whether valid or not—runs in the thousands.

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34. For example, the State of Utah has indicated it claims more than 5,000 R.S. 2477 rights-of-way on federal lands. Letter from Stephen G. Boyden, Assistant Attorney General, State of Utah, to Bruce
Unresolved R.S. 2477 claims present a number of significant problems for federal land managers as well as states and counties. Congress has mandated the major federal land management agencies—the Forest Service, the National Park Service, BLM, and the U.S. Fish and Wildlife Service—to adopt comprehensive, long-term planning documents to guide management decisions by assessing the condition of the land, identifying current and future uses, and evaluating various land management policies, including environmental protection measures. The possible existence of valid nonfederal property interests clouds land managers' ability to determine the extent to which restrictive measures may be imposed on lands burdened by those interests. At worst, such uncertainty could interfere with federal agencies' ability to ensure that their land management plans will meet congressional mandates. More frequently, the uncertainty encourages federal land management officials to be timid when imposing access restrictions they otherwise believe to be sound management. The recently adopted plan for the new Grand Staircase-Escalante National Monument in Utah, for example, closes to public use all routes within the monument other than those specified in the plan. But the plan explicitly makes the closure "subject to valid existing rights," leaving both the public and BLM unsure of the status of particular routes that might be claimed as R.S. 2477 highways. The identification and resolution of R.S. 2477 claims would remove these clouds and enable federal land managers to ascertain the protective measures they may lawfully impose on lands crossed by valid rights-of-way.

The perils of uncertainty are not visited only upon the federal land


37. See, e.g., BUREAU OF LAND MGMT., MANAGEMENT PLAN FOR GRAND STAIRCASE ESCALANTE NATIONAL MONUMENT 46 & n.1 (2000). The plan states:

It is unknown whether any R.S. 2477 rights would be asserted within the Monument which are inconsistent with the transportation decisions made in the Approved Plan or whether any of those claims would be determined to be valid. To the extent inconsistent claims are made, the validity of those claims would have to be determined. If claims are determined to be valid R.S. 2477 highways, the Approved Plan will respect those as valid existing rights. Otherwise, the transportation system described in the Approved Plan will be administered in the Monument. Nothing in this Plan extinguishes any valid existing right-of-way in the Grand Staircase Escalante National Monument. Nothing in this plan alters in any way legal rights the Counties of Garfield or Kane or the State of Utah has [sic] to assert and protect R.S. 2477 rights, and to challenge in Federal court or other appropriate venue, any BLM road closures that they believe are inconsistent with their rights.

Id. at 46 n.1.
managers. State and local governments also need to plan for the development of road networks within their jurisdiction. The lack of certainty over whether various roads over public lands are valid rights-of-way impedes their ability to plan for economic growth and to provide road safety. Establishing which of their claims are valid would enable state and local entities to develop existing rights-of-way, subject to some federal oversight, and to pursue additional rights-of-way they deem necessary to local interests under Title V of FLPMA.

1. "Bulldozer Diplomacy": A Snapshot of Federal R.S. 2477 Disputes

A brief review of a few of the major R.S. 2477 disputes since the grant's repeal illustrates the scope, complexity, and intransigence of these problems.

The most prominent cases to date involve the Burr Trail in southern Utah, a historic road that crosses unreserved BLM lands, WSAs, Capitol Reef National Park and the Glen Canyon National Recreation Area. The first dispute arose in connection with Garfield County's plans in the mid-1980s to improve a portion of the Burr Trail adjacent to a WSA by widening it from one lane to two, paving its bed with gravel, and eliminating several sharp curves to provide for safer travel. Garfield County maintained that the activities would be within the scope of a valid R.S. 2477 right-of-way, though that claim had never been adjudicated by either BLM or a court. Despite never having determined the validity of the R.S. 2477 claim, BLM agreed to monitor the county's activities to ensure that the county stayed within the scope of its right-of-way. The Sierra Club sought judicial review of BLM's failure to assert firmer regulatory oversight under FLPMA and to consider the environmental impacts of its management actions as required by the National Environmental Policy Act ("NEPA"). Specifically, the plaintiffs argued that no valid R.S. 2477 right existed, that the road improvement would exceed the scope of any valid right-of-way, and that, in any event, BLM's involvement triggered statutory management and environmental review responsibilities under FLPMA and NEPA. The district court held that the county owned a valid right-of-way under R.S. 2477 and that the proposed improvements were within the scope of the county's right-of-way. Acknowledging that BLM should be given first opportunity to determine the scope of the right-of-way, the Tenth Circuit applied a standard from Utah state law—that "reasonable and necessary" uses of the road were within the scope of the R.S. 2477 right-of-way—and

38. DOI, REPORT TO CONGRESS, supra note 36, at 48.
40. Id. at 617.
ultimately agreed that the improvements fell within the scope of the right-of-way.\footnote{Sierra Club, 848 F.2d at 1084-85. The court did not address the question of the validity of the county's R.S. 2477 claim, which the plaintiffs conceded on appeal. \textit{id.} at 1079.}

Garfield County reprised the Burr Trail litigation more than a decade later when it used heavy equipment to improve a one-mile portion of the road within Capitol Reef National Park without prior approval of the Park Service.\footnote{United States v. Garfield County, 122 F. Supp. 2d 1201, 1212-13 (D. Utah 2000). The improvements included widening the road and improving sight lines by bulldozing portions of two hillsides. \textit{id.} at 1214.} This time, BLM sued the county for trespass. As a defense, the county claimed its activities fell within the scope of its R.S. 2477 right-of-way, as defined by a "reasonable and necessary" standard developed in Utah state courts.\footnote{\textit{Id.} at 1247 (citing 36 C.F.R. § 5.7). A separate Park Service regulation made 36 C.F.R. part 5 applicable to "all persons," including "public bodies," respecting all lands administered by the Park Service, including lands in which the United States owns a "less-than-fee interest." \textit{id.} at 1248 (citing 36 C.F.R. § 1.2(\textit{a})(1) & (5)).} Without disputing the applicability of that state-law standard to determine the scope of the right-of-way, the Park Service maintained that the county's activities were subject to federal regulatory authority. Specifically, the Park Service asserted that its regulation against "construction" of roads in national parks without Park Service approval limited the county's activities on the road even if they were within the "scope" of the right-of-way under the "reasonable and necessary" standard.\footnote{\textit{Id.} at 1214 (citation omitted).} The county parried with a claim that its activities constituted "maintenance," rather than "construction," and therefore were not subject to Park Service oversight.\footnote{\textit{Id.} at 1254-57.} The court found both that the county had engaged in unauthorized "construction" in violation of Park Service regulation and that its activities were not "reasonable and necessary" and therefore exceeded the scope of its R.S. 2477 right-of-way.\footnote{\textit{Id.} at 1264.}

Despite such judicial exhortations to cooperate, it appears that R.S. 2477 disputants will not easily resolve their differences through accommodation. In Jarbidge, Nevada, for example, a long and bitter dispute erupted after the Forest Service decided to permanently close a canyon road washed out by a flood. After initially recommending rebuilding the road, the Forest Service reversed course after, at the

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\footnote{Sierra Club, 848 F.2d at 1084-85. The court did not address the question of the validity of the county's R.S. 2477 claim, which the plaintiffs conceded on appeal. \textit{id.} at 1079.}
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\footnote{\textit{Id.} at 1254-57.}
\footnote{\textit{Id.} at 1264.}
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behest of environmental groups, the U.S. Fish and Wildlife Service listed the Jarbidge River population of bull trout as a threatened species under the Endangered Species Act.48 Outraged county officials dispatched bulldozers to rebuild the road, claiming the right to maintain a “county” road, but a federal court injunction stopped them. Later, on the Fourth of July, a group of protesters, equipped with shovels and hand tools, rebuilt several hundred yards of the road by hand. When the Forest Service filed a trespass suit for failure to obtain prior approval, the Jarbidge “Shovel Brigade” and Elko County claimed they had acted within their rights under R.S. 2477. After months of confidential negotiations, the parties reached a settlement in which the United States agreed not to contest Elko County’s claim to a right-of-way under R.S. 2477 but retained “its authority to manage federal lands and natural resources in accordance with federal environmental laws.”49 It now appears that the settlement may not stick. After the terms of the agreement were publicly disclosed, two environmental groups intervened, arguing that the United States failed to adequately represent their interests when it agreed to concede Elko County’s claim to a R.S. 2477 right-of-way.50

At the end of the Clinton administration, southern Utah counties continued to press their R.S. 2477 claims in litigation. An episode evocative of the Burr Trail saga ensued when three counties, without BLM approval, bulldozed a number of trails on federal land, including some in WSAs and others in the Grand Staircase-Escalante National Monument. Environmental groups sued BLM in 1996 to compel it to exercise its regulatory authority over the counties’ activities. BLM, in turn, sued the counties for trespass, and the counties defended their actions as being within the scope of valid R.S. 2477 rights-of-way.51 At BLM’s suggestion, the district court stayed the litigation pending an administrative determination by BLM of the validity and scope of the claimed R.S. 2477 rights-of-way and then later upheld BLM’s determinations that all but one of the claims were invalid.52

48. Jim Carlton, Bitter Battle Over Rural West, WALL ST. J., Feb. 16, 2001, at B1. The Forest Service instead planned to replace the road with a trail in order to pose less threat to the bull trout in the Jarbidge River.
49. United States v. Carpenter, 298 F.3d 1122, 1124 (9th Cir. 2002).
50. Id. at 1125 (reversing the district court’s denial of the groups’ motion to intervene).
52. Id. at 1133–34, 1147. The counties’ appeal of the district court’s order, arguing that the court should not have deferred to the BLM’s determinations of the counties’ claimed property interests in federal land and that the BLM and court applied incorrect legal standards in making the determination, was dismissed for lack of jurisdiction. S. Utah Wilderness Alliance v. BLM, No. 01-4173, 2003 WL 21480689 (10th Cir. June 27, 2003). The district court has now entered an appealable order. See S. Utah Wilderness Alliance v. BLM, No. 2:96-CV-836 TC (D. Utah Feb. 23, 2004) (order granting and denying motions).
In addition to these cases, several states and counties have actively pursued strategies to assert R.S. 2477 rights through suits to quiet title. Most prominently, Utah notified the United States of its intention to file suit to quiet title to some 5,000 roads crossing federal lands within its borders. After dedicating substantial funds to preparing its claims, the State entered into a Memorandum of Understanding ("MOU") to resolve certain of its claims by applying for "recordable disclaimers of interest" under FLPMA. Environmental advocates have denounced the MOU and the recordable disclaimer process, and sued the Bush administration and the State for public disclosure of records associated with negotiations regarding the State's R.S. 2477 claims. Meanwhile, Utah has filed its first requests for recordable disclaimers with DOI. In one form or another, the Utah dispute seems headed to court.

R.S. 2477 festers outside Utah as well. In 1993, Alaska initiated a R.S. 2477 project to work toward validating its R.S. 2477 claims. After researching some 2,000 possible R.S. 2477 claims, it concluded that 647 trails should qualify as R.S. 2477 rights-of-way. Alaska also has enacted statutes claiming title to some 602 R.S. 2477 rights-of-way, and is pursuing its own MOU with DOI in an effort to validate R.S. 2477 claims while threatening a quiet title suit. In California, several counties have

54. Id.
56. Memorandum of Understanding Between the State of Utah and the Department of the Interior on State and County Road Acknowledgment 3 (Apr. 9, 2003) (on file with author). See infra notes 115-127 and accompanying text.
58. The State withdrew its first application after discovering that the ninety-nine-mile Weiss Highway had been constructed in the 1930s by the federal Civilian Conservation Corps. State Backs Off Its Claim to Disputed Juab Road, SALT LAKE TRIB., Sept. 17, 2004, at B2. On the same day, it filed two additional claims. Id.
59. Environmental advocates vigorously disputed the Weiss Highway application on grounds ranging from the illegality of the MOU and the recordable disclaimer rule to specific factual inadequacies. See Letter From Edward B. Zukoski, Staff Attorney, Earthjustice, to Sally Wisely, State Director, Bureau of Land Management (May 6, 2004) (on file with author).
60. Alaska Department of Natural Resources, Division of Mining Land and Water, R.S. 2477 Project, available at http://www.dnr.state.ak.us/mlw/trails/rs2477 (last visited Feb. 15, 2005).
62. See Letter from Frank Murkowski, Governor, State of Alaska, to Steve Griles, Deputy Secretary, Department of the Interior 4-6 (Mar. 25, 2004) (on file with author).
passed resolutions claiming R.S. 2477 highways have been established, among other ways, by mere inclusion of a right-of-way on a map, plat or description of county roads, or by public use irrespective of actual construction. San Bernardino and Imperial Counties’ resolutions purport to establish that the scope of the R.S. 2477 right-of-way “includes the right to widen the highway as necessary to accommodate the increased travel associated with all accepted uses” and to “modify or change horizontal alignment” where required for public safety. Both Alaska and Colorado are pursuing MOUs with DOI to establish a protocol for resolving their claims through the “recordable disclaimer” process under FLPMA.

2. Unresolved Substantive Legal Questions

Contributing to practical problems it presents to federal land managers, R.S. 2477 boils with legal uncertainties stemming from the terseness of the statutory grant. Despite sporadic litigation in recent years, legal questions persist about the exact showing necessary to validate a claim, the scope of any valid right-of-way, and the role of state law in interpreting R.S. 2477.

a. The Elements of a Valid R.S. 2477 Claim

To date, no federal appellate court has ruled on the precise requirements to perfect a valid R.S. 2477 right-of-way. The language of the statute, from which any inquiry must begin, suggests on its face three essential elements: (1) the “construction” (2) of a “highway” (3) upon “public lands not reserved for public uses.” The interpretation of these evident requirements by courts and commentators, however, has resulted in little clarity, particularly with respect to what kind of “construction,” if any, is necessary to establish a valid claim.

The most extreme interpretation departs from the touchstone of “construction” altogether. Under this view, the “establishment” of highways in accordance with requirements of state law, would satisfy the terms of the R.S. 2477 grant. Several states, notably Alaska, North

63. Bd. of Supervisors of the County of Inyo, California, Reaffirming and Establishing Standards for the Recognition of Rights-of-Way in Accordance with United States Revised Statute 2477, Res. 2002-36 (May 14, 2002); Bd. of Supervisors of the County of Imperial, California, Asserting County Road Rights-of-Way Created under United States Revised Statute 2477 throughout Imperial County, Res. 2002-24 (Mar. 26, 2002); Bd. of Supervisors of the County of San Bernardino, California, Reaffirming Road Rights-of-Way in Accordance with Revised Statute 2477, Res. 2001-241 (Sept. 18, 2001) (asserting claims to 2,341 miles of roads, including roads across the Mojave National Preserve).

64. Bd. of Supervisors of the County of San Bernardino, California, supra note 63, at § 6(b); Bd. of Supervisors of the County of Imperial, California, supra note 63, at § 2(7)(b).


Dakota,68 and South Dakota,69 have enacted statutes that purport to establish public roads on every section line. At least one state attorney general and several state courts have opined that such section line laws perfected R.S. 2477 rights.70 The view apparently rests on the untenable assumption that state law governs the perfection of R.S. 2477 rights irrespective of the terms of the federal statute.71 No federal court has endorsed this assumption, which was rejected by the Secretary of the Interior in 1898 as a "marked and novel liberality" on the part of the claimants.72

A somewhat less markedly liberal, but still expansive, interpretation—advanced by some states, counties and commentators—would recognize as valid R.S. 2477 rights-of-way trails established by continued public use sufficient to create a beaten path.73 Public highways may be established in a number of states, including Alaska,74 Utah,75 Oregon,76 Idaho,77 Colorado,78 Washington,79 and Wyoming,80 by public use, in some cases without any official action by the state or county government. Numerous state courts and some federal district courts have taken this view, with varying degrees of analysis.81 In a policy issued by Secretary Hodel in 1988, DOI stated that the "passage of vehicles over time may equal actual construction."82

A narrower interpretation of the statute would require actual construction by actions beyond mere use, a position endorsed by DOI both before and after the Hodel Policy. Under this view, "construction"

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68. ALASKA STAT. § 19.10.010 (Michie 2002).
71. See Heitkamp, supra note 70 passim.
73. See, e.g., S. Utah Wilderness Alliance v. BLM, 147 F. Supp. 2d 1130, 1141 (D. Utah 2001); Hjelle, supra note 66, at 313.
75. UTAH CODE ANN. § 72-5-104 (2001); see Lindsay Land & Livestock Co. v. Churnos, 285 P. 646, 648 (Utah 1930) (holding that public use constituted an acceptance of a R.S. 2477 grant).
76. See, e.g., Montgomery v. Somers, 90 P. 674, 677 (Or. 1907).
78. See, e.g., Nicolas v. Grassle, 267 P. 196, 197 (Colo. 1928).
79. See, e.g., Okanogan County v. Cheetham, 80 P. 262, 263 (Wash. 1905).
would require some purposeful performance of work to prepare the road. The Deputy Solicitor of the Interior opined in 1980 that an "actual construction" standard comports with dictionary definitions of the term and would avoid the "potentially unmanageable" problem of administering a "mere use" standard. More recently, BLM stated that "some form of mechanical construction" is required to establish a valid R.S. 2477 highway, a view endorsed by a federal district court in Utah.

b. The "Scope" of the R.S. 2477 Right-of-Way

The scope of the right-of-way that arises in federal land upon the perfection of a R.S. 2477 grant presents a distinct interpretive issue that remains unresolved. R.S. 2477 does not address the nature or extent of the rights it granted. Sierra Club v. Hodel is the only appellate decision to address the issue. It characterized the scope of a R.S. 2477 as "the bundle of property rights possessed by the holder of the right-of-way... defined by the physical boundaries of the right-of-way as well as the uses to which it has been put." Borrowing from Utah common law, Hodel held that the scope of the R.S. 2477 right-of-way on the Burr Trail was "that which is reasonable and necessary" to accommodate the uses to which it had been put before FLPMA's repeal of R.S. 2477, the latest date on which new uses could have been established in accordance with the grant.

c. The Choice of Law

Interpretation of both the requirements to perfect a R.S. 2477 claim and the scope of a valid right-of-way implicates the choice of law. Although it is clear that federal law governs the terms of federal land grants, where the statutory grant is silent or ambiguous, as is R.S. 2477, there remains the question about the extent to which borrowed state law might provide the rules of decision to fill the gap. In Hodel, the Tenth Circuit found it appropriate to borrow Utah law to define the scope of the R.S. 2477 right-of-way, according Chevron deference to several historical DOI policies that refer to state law in the context of R.S. 2477. The Hodel court also applied the choice of law analysis of Wilson v.
Omaha Indian Tribe," assessing "whether there is a need for a nationally uniform body of law to apply in situations comparable to this, whether application of state law would frustrate federal policy or functions, and the impact a federal rule might have on existing relationships under state law."93

Hodel leaves uncertain the role of state law in R.S. 2477 disputes. First, Hodel borrowed state law to determine the scope of a valid R.S. 2477 right-of-way, an issue on which Congress was silent in the statute. Hodel did not address whether, or to what extent, it might be appropriate to borrow state law to determine whether a R.S. 2477 claim is valid in the first place. Because the statute plainly contains requirements for the perfection of the grant, the choice of law analysis under Wilson might be very different, even if the statutory requirements are somewhat ambiguous.92 Second, Hodel's borrowing of state law to define "scope" is subject to criticism. Professor Lockhart, for example, has argued that the court overlooked limitations on scope implicit in the statutory requirements of "construction" and "highway," and that its choice of law analysis under Wilson, which addressed a non-statutory issue, gave insufficient considerations both to statutory terms in R.S. 2477 and to federal interests in administering the lands under the management criteria imposed by FLPMA.93 Third, since Hodel, federal courts have been inconsistent regarding the extent to which state law applies to determine the validity and scope of R.S. 2477 claims.94

C. ATTEMPTS TO ESTABLISH AN ADMINISTRATIVE PROCESS FOR RESOLVING R.S. 2477 CLAIMS

The practical and legal uncertainties presented by numerous inchoate R.S. 2477 claims that are addressed only by sporadic and often inconsistent judicial decisions have led to a number of attempts to establish an effective administrative process for determining the existence and validity of R.S. 2477 claims. In 1988, while disclaiming any "duty or authority to adjudicate," Secretary of the Interior Donald Hodel ordered land management agencies within DOI to develop procedures to "recognize with some certainty the existence, or lack

91. Hodel, 848 F.2d at 1081-82 (quoting Wilson, 442 U.S. at 672-73).
94. Compare S. Utah Wilderness Alliance, 147 F. Supp. 2d at 1141-42 (rejecting "continued use" standard for establishing highways under Utah law as inappropriate to determine the validity of a R.S. 2477 claim), with Barker v. County of La Plata, 49 F. Supp. 2d 1203, 1214 (D. Colo. 1999) (holding that a R.S. 2477 may be established by the public use standard under Colorado law).
thereof, of public highway grants obtained under R.S. 2477.\textsuperscript{95} While useful for “limited purposes,” administrative determinations under the Hodel policy were not considered binding.\textsuperscript{96} Rather, the policy embraced the view that “[c]ourts must ultimately determine the validity of such claims.”\textsuperscript{97} More recently, the Clinton and Bush administrations have proposed their own administrative solutions.

1. The Clinton Administration’s 1994 Proposed Rule

In 1993, DOI proposed an administrative process to resolve R.S. 2477 claims after finding that existing and potential R.S. 2477 claims threatened its ability to protect lands and resources under its stewardship (including WSAs) and to manage them in accordance with statutory mandates.\textsuperscript{98} It proposed to promulgate a rule both to establish a formal administrative process for adjudicating R.S. 2477 claims and to interpret the terms of R.S. 2477.\textsuperscript{99} Administrative adjudication under such a rule, according to DOI, would provide federal land managers with coherent guidance on how to apply R.S. 2477 and how to “manage its potential conflicts with other existing laws.”\textsuperscript{100} DOI’s proposed process sought to identify and determine the validity of all R.S. 2477 claims on lands managed by BLM, the National Park Service, and the U.S. Fish and Wildlife Service by imposing a compulsory claims process.\textsuperscript{101} Failure to file a timely claim would preclude administrative determination of any purported R.S. 2477 rights, although a claimant could still pursue a judicial remedy to quiet title.\textsuperscript{102}

Under the 1994 proposed rule, timely claims would have been adjudicated, in an informal process, by officials of the agency or agencies with authority over the lands on which the claim is located. The proposed rule would have required the claimant “to include sufficient information” both to demonstrate satisfaction of each element of R.S. 2477 and to

\textsuperscript{95} Memorandum on Departmental Policy on Section 8 of the Act of July 26, 1866 (Dec. 7, 1988), reprinted in DOI, REPORT TO CONGRESS, supra note 36, app.II, ex.K, at 2.

\textsuperscript{96} DOI, REPORT TO CONGRESS, supra note 36, at 25.

\textsuperscript{97} Id.

\textsuperscript{98} See id. at 33–35, 55–56.


\textsuperscript{100} Id. at 39217.

\textsuperscript{101} Id. at 39221. Within two years of the promulgation of a final rule, all claimants would have been required to file a request for an administrative determination of the validity and/or scope of claimed R.S. 2477 rights-of-way.

\textsuperscript{102} Id. at 39222. The relationship of the proposed administrative process to judicial determination under the QTA is not clear. The proposed rule provided that promulgation of the final rule would have triggered the QTA’s twelve-year statute of limitations by providing notice that the United States claimed an interest in all potential R.S. 2477 highways. The inclusion of an express “notice” provision suggests that, even if the regulation had been made final, DOI understood that the QTA would still provide a method for determining the validity of claims. See id. (stating that the claim would be extinguished after both DOI’s two-year and the QTA’s twelve-year periods lapsed).
determine the scope of any right-of-way.\textsuperscript{103} It also would have enumerated standard types of proof generally necessary to support a finding that a claim is valid.\textsuperscript{104} The proposed process would have ensured opportunity for substantial public participation. After determining that a claim was complete, the adjudicating official would be required to provide public notice of the claim and consider public comments in her determination and consult with other federal agencies affected by the claim.\textsuperscript{105} Any party or entity adversely affected by a determination could appeal to the director of the agency making the determination.\textsuperscript{106}

In addition to creating a process for administrative adjudication, the proposed rule would have exercised agency authority to interpret R.S. 2477, a positive step toward resolving legal uncertainties. As an initial matter, the proposed rule sought to clarify the relationship between federal and state law by establishing that requirements of federal and state law were cumulative. The proposal recognized that state law could operate to impose additional requirements for establishing a R.S. 2477 grant, but it could not negate or lessen the federal statutory requirements imposed by R.S. 2477 itself.\textsuperscript{107} Specifically, the proposed rule suggested that state laws that authorize the “establishment” of highways without requiring the actual construction of highways across unreserved federal public lands would conflict with federal law.\textsuperscript{108} The proposed rule also interpreted the essential terms of the statutory grant under R.S. 2477: construction, highway, and land not reserved for public purposes.\textsuperscript{109} Thus, the proposed rule not only would have, for the first time ever, required R.S. 2477 claimants to step forward to prove their claims, but it would have clarified the substantive law applicable to the claims.

Not surprisingly, given the climate of the 104th Congress, the 1994 proposed rule provoked a hostile congressional response. Beginning in 1995, Congress enacted a series of annual moratoria prohibiting DOI from finalizing the proposed rule.\textsuperscript{110} A 1997 rider to an appropriations act provided that “[n]o final rule or regulation or any agency...pertaining to the recognition, management or validity” of R.S. 2477 rights-of-way may take effect unless expressly authorized by a further congressional enactment.\textsuperscript{111} In addition, several bills have been introduced in recent

\textsuperscript{103} Id. at 39221–22.
\textsuperscript{104} Id.
\textsuperscript{105} Id. at 39227.
\textsuperscript{106} Id.
\textsuperscript{107} Id. at 39218.
\textsuperscript{108} Id.
\textsuperscript{109} Id. at 39219–20.
years that would shift the burden to DOI to disprove the validity of R.S. 2477 claims under state law standards. The Clinton administration successfully opposed these efforts, but also failed to win enactment of its own proposed legislation embracing the approach taken in the proposed rule.

2. The Bush Administration’s Recordable Disclaimer Rule

Given congressional blockage of the 1994 proposed rule, it appeared until recently that courts would continue to provide the only forum for resolving R.S. 2477 disputes and, as a result, would exercise primary authority to interpret R.S. 2477. In January 2003, however, BLM amended its regulations implementing its authority under FLPMA to issue administrative disclaimers of federal interests in land. The amendments enable BLM to adjudicate R.S. 2477 claims pressed by states and counties in the context of applications for recordable disclaimers of federal interest.

Section 315 of FLPMA authorizes the Secretary to issue such a disclaimer “in any form suitable for recordation” where the disclaimer both will “help remove a cloud on the title of such lands” and where the Secretary has determined that the United States’ “record interest . . . has terminated by operation of law or is otherwise invalid.” Under the statute, recordable disclaimers, which have the same effect as a quitclaim deed, may be issued only upon a written application explaining the grounds and after public notice by publication in the Federal Register.

DOI first issued regulations interpreting and implementing section 315 in 1984. The preamble to that rule stated that the objective of the disclaimer provision was “to eliminate the necessity for court action or private legislation in those instances where the United States asserts no ownership or record interest, based upon a determination by the Secretary of the Interior that there is a cloud on the title to the lands, attributable to the United States.” The regulations established a


112. E.g., H.R. 2081, 104th Cong. (1995); S. 1425, 104th Cong. (1995). Under the proposed legislation, claimants would have ten years to file R.S. 2477 claims with DOI, which would then be required to accept or reject the claim within two years. In order to finally reject the claim, DOI would be required to file a suit in which it would bear the burden of proof on all issues. H.R. 2081 §§ 2–3. The validity of R.S. 2477 claims would be determined under state law. H.R. 2081 § 5.


116. Id. § 1745(b), (c).

117. 49 Fed. Reg. 35296, 35297 (Sept. 8, 1984) (to be codified as 43 C.F.R. § 1864.0-2). The QTA allows the United States to disclaim “all interest in the real property or interest adverse to the
minimal procedure for issuing recordable disclaimers that required a written application and provides for administrative appeal of adverse determinations. Only aggrieved applicants or other “claimants” were authorized to appeal.\footnote{8}

The 1984 recordable disclaimer rule did not offer R.S. 2477 claimants the opportunity to obtain binding administrative determinations of title. They permitted only a “present owner of record” to apply for a recordable disclaimer.\footnote{9} Because title under R.S. 2477 passes by operation of law without any recordation, R.S. 2477 claimants—even those with unquestionably valid claims—are not owners of record. Moreover, the regulations took an approach to potentially stale claims that mirrored the federal QTA, as originally enacted in 1972. Applications for recordable disclaimers would be denied if filed more than twelve years after the claimant knew or should have known about the United States’ claim to the lands.\footnote{10} Thus, a binding administrative determination of title was available only to title disputants whose judicial remedy under the QTA would not be time barred. To the extent that any claims against the United States would be barred by the twelve-year limitations period under the QTA, the regulations precluded DOI from issuing a recordable disclaimer of interest.

By two seemingly minor adjustments, the new recordable disclaimer rule substantially extends BLM’s authority to administratively determine the validity of R.S 2477 claims asserted by states and counties. First, it expands the class of claimants entitled to present applications for administrative disclaimer. Under the amended regulation, “[a]ny entity claiming title to lands”—whether or not a record owner of an interest in land, as previously required—may apply for a disclaimer of federal interest.\footnote{11} The justification for this change is that some persons who legitimately claim some interest in federal lands will not presently hold record title; though interests in land might have passed from the United States to the claimant, they might never have been “recorded.” Although this might be true of some other interests in federal land—states’ title to the beds of navigable waters obtained under the equal footing doctrine, for example—it is pointedly the case with R.S. 2477 claims.\footnote{12}
Second, the new rule now entirely exempts states and counties from the twelve-year application deadline the earlier rule had imposed. The stated justification for this change is to maintain consistency with the QTA, which was amended in 1986 to exempt states from its limitations period unless they had received clear notice of adverse federal claims. The proposed rule, however, only selectively incorporates the amended QTA. The amendments to the QTA did not give states a wholesale exemption from the twelve-year limitations period. Recognizing that important federal land management interests would be threatened by the unrestricted assertion of stale claims by states, Congress limited the states’ waiver from the limitations period by application of a clear notice rule. Where the United States, or its authorized designee, has made substantial improvements or investments, or where it has “conducted substantial activities pursuant to a management plan,” a state must pursue its quiet title action within twelve years of receiving notice of the federal claim.

Environmental advocates are poised to challenge any use of the recordable disclaimer rule to disclaim federal title to R.S. 2477 highways. As a threshold matter, they maintain that the rule violates Congress’s 1997 moratorium on new rules relating to R.S. 2477 claims. A legal opinion by the U.S. General Accounting Office (“GAO”) establish title under equal footing doctrine).

123. Id. at 501.
124. QTA, 28 U.S.C. § 2409a(i) (2000). The QTA defines notice to a state as “public communications with respect to the claimed lands which are sufficiently specific as to be reasonably calculated to put the claimant on notice of the Federal claim to the lands, or... the use, occupancy, or improvement of the claimed lands which, in the circumstances, is open and notorious.” Id. § 2409a(k).
125. See Enviros: BLM Disclaimer Regs Violate R.S. 2477 Regs Ban, PUBLIC LAND NEWS, Mar. 21, 2003, at i.

Environmental groups also argue that the amendments exceed BLM’s statutory authority under section 315 of FLPMA. Comments by Environmental Organizations, supra note 126, at 9–11. Arguably, the structure of FLPMA and its legislative history indicate that Congress viewed section 315 as merely a housekeeping provision to resolve uncontroversial issues. The recordable disclaimers provision was initially included in Title II of the proposed act generally setting forth DOI’s authority to manage public lands, including provisions for land disposal by sales and exchanges. See H.R. REP. No. 94-1163, at 11 (1976), reprinted in 1976 U.S.C.C.A.N. 6175, 6185. As enacted, the recordable disclaimer provision appears in Title III, which collects provisions pertaining to BLM administration, while the sale and exchange provisions remained in Title II, entitled “Land Use Planning and Land Acquisition and Disposition.”
supports this view. Specifically, GAO found that DOI's implementation of the recordable disclaimer rule through a memorandum of understanding with the State of Utah—though not the rule itself—is prohibited without a further act of Congress.

Should it withstand judicial scrutiny, the new recordable disclaimer rule would provide a vehicle for DOI to determine with binding effect the validity of R.S. 2477 rights-of-way, a task until now left to the courts. The effect, as a practical matter, would be a significant reallocation of authority from the courts to DOI. The agency's assumption of responsibility for R.S. 2477 carries some risk that an administration solicitous of states' interests and generally hostile to environmental advocates would interpret R.S. 2477 in a way that accommodates states' claims. That risk, however, must be weighed against the continuing harm that the inchoate status of R.S. 2477 claims and the statute's inconsistent interpretation and application by courts poses to effective federal land management. As shown next in Part II, leaving R.S. 2477 exclusively to the courts under the existing legal framework has failed to yield progress either in identifying and validating (or invalidating) many R.S. 2477 claims and to reduce the legal uncertainty those claims present.

II. THE FAILURE OF JUDICIAL RESOLUTION OF R.S. 2477 CLAIMS

In the absence of the exercise of administrative authority to resolve R.S. 2477 claims on federal land, responsibility to date has fallen exclusively on the federal courts. But the courts have proven to be an ineffective institution for bringing resolution and finality to claims asserted under the ancient law. Understanding why requires an exploration, in some depth, of the primary mechanism for judicial resolution of title disputes against the United States: the QTA.12

A. COURTS, QUIET TITLE AND SOVEREIGN IMMUNITY

Courts have historically provided the primary forum for resolving competing claims to private property.19 The form of action and the relief available from courts depends on the circumstances of the case, but can

127. Letter from Anthony H. Gamboa, General Counsel, U.S. Gen. Accounting Office, to Jeff Bingaman, U.S. Senator, Committee on Energy and National Resources, Recognition of R.S. 2477 Rights-of-Way Under the Department of the Interior's FLPMA Disclaimer Rules and Its Memorandum of Understanding with the State of Utah, at 4–5 (Feb. 6, 2004) (on file with author). GAO, applying definitions from the Administrative Procedure Act (APA), found that the MOU is a "rule" pertaining to R.S. 2477 and thus requires a further act of Congress to become effective. Id.


129. See John Montague Steadman, "Forgive U.S. Its Trespasses?": Land Title Disputes with the Sovereign—Present Remedies and Prospective Reform, 1972 DUKE L.J. 15, 46–50 (1972) (summarizing the complex array of actions in an area of law “[s]teeped in the ancient history of English law, bedeviled by the remnants of the old common law forms of action, and barnacled by the encrustment of centuries of judicial decisions”).
be sorted into three categories: suits for a judicial declaration of title (i.e., quiet title), suits for damages for invasion of property interests (i.e., trespass), and suits for specific relief against persons interfering with property interests (i.e., ejectment). The quiet title action, which arose from two ancient equitable remedies—the bill of peace and the bill *quia timet*—has grown in modern times to encompass all actions to obtain a judicial declaration of title. The action provides the most direct means of resolving title disputes before any actual invasion of a claimed property interest. Actions for trespass and ejectment, which arise after the alleged invasion of property interests, also require courts to determine title because clear title is a predicate question to the requested relief. Because resolution of that predicate issue has res judicata effect, issues of title are permanently resolved as between the parties to the action.

The doctrine of sovereign immunity complicates the role of courts in resolving title to property claimed by the United States. A person's options for obtaining judicial resolution of title in a dispute over putative rights in public land are limited by whether the United States has waived its sovereign immunity to suit and, if so, the terms of the waiver. Before the United States waived its immunity to quiet title suits in 1972, parties in land title disputes with the sovereign could obtain a judicial determination of title in two ways, only one of which would result in retaining valid title. They could incite the United States to file a suit to quiet title or for trespass and then assert a claim of title as a defense. Alternatively, they could sue the United States under the Tucker Act of 1887 for money damages alleging an uncompensated taking of property in violation of the Fifth Amendment. However, even a successful Tucker Act suit would secure for the claimant only compensation for the property interest taken by the government, not title or possession.

These restraints led to a third tactic, the "officer's suit," which proved largely unsuccessful. Some land title disputants styled their suits as "officer's suits" to enjoin federal agents from "interfering" with their

130. Id.
131. Id. at 48–49.
132. There are grounds for questioning the historical applicability of sovereign immunity to suits challenging federal administration of the public land laws. It has been suggested that suits challenging DOI's administration of the public land laws constituted, in historical practice though not abstract theory, a category of cases to which the Supreme Court, except in a few aberrant cases, did not consider sovereign immunity to apply. See Antonin Scalia, Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Land Cases, 68 Mich. L. Rev. 867, 879, 880 (1970). The Supreme Court has indicated, however, that whatever the historical reach of sovereign immunity, the jurisdiction of federal courts today depends on the scheme reflected by congressional waivers in the QTA, the APA, and other statutes. See Block v. North Dakota, 461 U.S. 273, 285–86 & n.22 (1983) (declining to consider whether sovereign immunity would have barred claims at issue would have been before the enactment of the QTA in 1972).
claimed property rights. Following prevailing doctrine, courts would often, though not always, rebuff such cases on sovereign immunity grounds unless they could show that the officers’ acts of interference exceeded statutory powers or that the exercise of statutory powers in the particular case violated the Constitution. Congress waived the United States’ sovereign immunity to suits over title in the QTA of 1972, but because the waiver contains some significant limitations, the doctrine of sovereign immunity continues to exert a powerful influence over the role of courts in resolving title claims, including those arising under R.S. 2477.

B. SUITS UNDER THE QTA

The QTA expressly waives the United States’ sovereign immunity from suits to “adjudicate title to real property in which the United States claims an interest.” Suits under the QTA, however, are subject to exceptions and limitations designed to protect the United States’ interests when defending its title. First, the government’s possession of any disputed property is guaranteed. During the pendency of an action, a prohibition on preliminary injunctions protects the United States from immediate dispossession. Following any adverse decision on the merits, the United States may elect to “retain possession or control” upon payment of just compensation to the victorious claimant. Second, the QTA barred the acquisition of title against the United States by adverse possession, a codification of a judicially-established rule. Third, the statute exempted “trust and restricted Indian lands.” Finally, to prevent the assertion of stale claims, the QTA imposed a twelve-year limitations period running from accrual of an action, defined as “the date the plaintiff or his predecessor knew or should have known of the claim of the United States.”


135. Section 2409a(a) provides, in full:

The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. §§ 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. § 666).

136. Id. § 2409a(b) & (c).

137. Id. § 2409a(b).

138. Id. § 2409a(n).


140. 28 U.S.C. § 2409a(a).

141. Id. § 2409a(g). After the Supreme Court held in Block v. North Dakota ex rel. Bd. Of
These limitations on the QTA action, as interpreted by the Supreme Court and lower courts, constrain the judicial role in resolving contested title to federal property. Most significantly, the Supreme Court has held that the QTA provides the exclusive means for a nonfederal party to seek judicial resolution of title disputes against the United States. As a result, the availability of the quiet title remedy precludes judicial review that might otherwise be available under the Administrative Procedure Act ("APA"), which waives sovereign immunity for actions seeking injunctive and declaratory relief against federal agencies.\footnote{Block, 461 U.S. at 285.}

1. The Exclusivity of the QTA

In Block v. North Dakota, the Supreme Court held that the QTA provides the exclusive means for adverse claimants to challenge the United States' title to property.\footnote{Block, 461 U.S. at 285.} North Dakota claimed ownership of lands submerged by the Missouri River under the equal footing doctrine, which holds that federal title to the beds of navigable waterways passed to the states by operation of law upon their admission to the federal union.\footnote{Pollard's Lessee v. Hagan, 44 U.S. 212 (3 How. 212) (1845). The equal footing doctrine holds that states entering the union enter on an equal footing with the original thirteen states. The Supreme Court has interpreted equal footing to mean that all states enjoy the same political rights and incidents of sovereignty. 145.} Framing its case as an "officer's suit," North Dakota brought suit under the APA to enjoin the federal officials from leasing the submerged lands for oil and gas development and to obtain a judicial declaration that the Little Missouri River was navigable, a factual question on which title depends.\footnote{Id. at 285.} The Court held that the APA claim could not proceed because the QTA provided the exclusive means to adjudicate North Dakota's claim, which was barred by the QTA's twelve-year statute of limitations.\footnote{Such an interpretation was necessary, the court reasoned, to avoid undermining the QTA's "carefully crafted provisions . . . deemed necessary . . . to protect the public interest" in suits challenging federal title. Block, 461 U.S. at 284–85. In particular, the Court noted that permitting title suits under the APA would "render[] nugatory" the Indian lands exception meant to insulate the United States' discharge of its trust obligations from interference and would also potentially dispossess the United States of lands it claimed, "thereby thwarting congressional intent to avoid disruptions of costly federal activities." Id. at 285. Justice O'Connor dissented, but only with respect to the issue of whether the twelve-year statute of limitations under the QTA applied to the states. Id. at 293.} The court reasoned that allowing an

\begin{footnotes}
\item Block, 461 U.S. at 285. See, e.g., Pollard's Lessee v. Hagan, 44 U.S. 212 (3 How. 212) (1845). The equal footing doctrine holds that states entering the union enter on an equal footing with the original thirteen states. The Supreme Court has interpreted equal footing to mean that all states enjoy the same political rights and incidents of sovereignty.
\item Block, 461 U.S. at 278. In addition to the judicial review provisions of the APA, 5 U.S.C. §§ 701-706, North Dakota cited as jurisdictional bases for its suit federal question jurisdiction, 28 U.S.C. § 1331, the federal mandamus statute, 28 U.S.C. § 1361, and provisions declaratory judgment and other relief, 28 U.S.C. §§ 2201–2202. The State omitted any claim under the QTA until ordered by the district court to amend its complaint to state such a claim.
\item Such an interpretation was necessary, the court reasoned, to avoid undermining the QTA's "carefully crafted provisions . . . deemed necessary . . . to protect the public interest" in suits challenging federal title. Block, 461 U.S. at 284–85. In particular, the Court noted that permitting title suits under the APA would "render[] nugatory" the Indian lands exception meant to insulate the United States' discharge of its trust obligations from interference and would also potentially dispossess the United States of lands it claimed, "thereby thwarting congressional intent to avoid disruptions of costly federal activities." Id. at 285. Justice O'Connor dissented, but only with respect to the issue of whether the twelve-year statute of limitations under the QTA applied to the states. Id. at 293.
\end{footnotes}
“officer’s suit” under the APA would subvert Congress's narrow waiver of sovereign immunity in the QTA, which was intended to protect the United States from stale claims.\textsuperscript{147}

Lower courts have interpreted \textit{Block} to mean that the QTA’s exclusivity extends to any suit against the United States or its agencies that raises federal ownership as a predicate issue to the requested relief. Challenges to federal control and regulatory authority over public lands are sometimes predicated on the argument that the United States does not possess sufficient property interests to support its regulatory authority.\textsuperscript{148} Adhering strictly to \textit{Block}, both the Ninth and Tenth Circuits have rejected assertions of such claims under the APA on the grounds that their essence is to challenge federal title.\textsuperscript{149} Challenges to federal regulatory authority on the basis of title are thus precluded if they are not brought under the QTA. The Seventh Circuit applied similar reasoning in a case arising in a context closely analogous to R.S. 2477, holding that the QTA provides the exclusive cause of action to bring a challenge to the constitutional authority of the Forest Service to restrict the use of claimed private easements across National Forest lands.\textsuperscript{150}

2. \textbf{The QTA’s Statute of Limitations}

The exclusivity of the QTA would not be such a hindrance to those seeking judicial resolution of land title claims were it not for the QTA’s statute of limitations. Together, the QTA’s exclusivity and its twelve-year limitations period bar the straightforward judicial resolution of many claims against the United States, forcing many would-be plaintiffs to find other ways into court. The QTA bars quiet title actions brought more than twelve years after the plaintiff knew or should have known that the United States asserted an interest in the disputed property.\textsuperscript{151} Courts have held that the QTA’s statute of limitations is a condition of the United States’ waiver of sovereign immunity and, as such, must be

\begin{footnotesize}
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  \item \textsuperscript{147} O'Connor, J., dissenting). She agreed with the majority that the QTA provided the exclusive remedy for North Dakota's claim of title to the submerged lands at issue. \textit{Id.}
  \item \textsuperscript{148} See, e.g., Shawnee Trail Conservancy v. Glickman, 222 F.3d 383, 387 (7th Cir. 2000); Rosette, Inc., v. United States, 141 F.3d 1394, 1395 (10th Cir. 1998) (challenging BLM regulation of geothermal energy on the basis that geothermal steam had not been included in the patent's reservation of mineral interests to the United States); Nevada v. United States, 731 F.2d 633, 636 (9th Cir. 1984) (upholding a challenge to the United States' authority to regulate activities within a national wildlife refuge encompassing Ruby Lake on the basis that the United States did not own sufficient property within the refuge to permit federal regulation).
  \item \textsuperscript{149} Nevada, 731 F.2d at 636; Rosette, 141 F.3d at 1395.
  \item \textsuperscript{150} Shawnee Trail, 222 F.3d at 388. The Shawnee Trail dispute arose in connection with alleged public and private road easements established before federal acquisition of these lands. Like several recent R.S. 2477 conflicts, the Shawnee Trail case began with a road closure. Several outdoor recreation groups sued to challenge the Forest Service's authority to restrict access. \textit{Id.} at 385.
  \item \textsuperscript{151} 28 U.S.C. § 2409a(g) (2000)
\end{itemize}
\end{footnotesize}
strictly construed and enforced.\textsuperscript{152}

The QTA's statute of limitations creates an incentive for disputants to cast a claim to title as something else, namely an action to enjoin federal land managers from unlawfully interfering with nonfederal property. Indeed, it was the strict statute of limitations that led North Dakota and most of the other plaintiffs in the cases just discussed to cast their claims as modern "officers' suits" under the APA. Under the APA, a person aggrieved by an agency action concerning public lands—such as the closing of a road to motorized vehicles or an order to install geothermal metering devices—could normally seek judicial review within six years of that action. Because it is the action of the land management agency that triggers the limitations period, persons involved in a continuing regulatory-type relationship with the agency can usually obtain judicial review of a regulatory decision that aggrieves them. Under \textit{Block} and its progeny, however, recourse to the courts to challenge actions by federal land managers, even recent actions, is blocked entirely if a dispute raises a predicate issue of title and if the claimant knew or should have known of the United States' adverse property interest for more than twelve years.\textsuperscript{153}

The statute of limitations under the QTA was conceived as a means to protect federal interests by preventing stale claims.\textsuperscript{154} But there is an important weakness in its protective shield. The strict application of the limitations period prevents the plaintiff from invoking the jurisdiction of the court to declare title in a suit against the United States, but it neither extinguishes otherwise valid nonfederal title nor constrains the United States' ability to engage the courts to enforce rights flowing from its title.\textsuperscript{155} While the statute of limitations may bar a QTA claim for a declaration of title and the exclusivity of the QTA may bar an APA claim for injunctive relief, land title disputants still have the stick-in-the-eye strategy (and the incentive to use it). As in the days before the waiver of federal sovereign immunity, claimants may still press their claims to title in the hope of provoking the United States itself to sue to quiet title or for trespass, in which case sovereign immunity would not bar adjudication of the claim on the merits.\textsuperscript{156} This suggests that the bulldozer is as much a litigation tool as a construction tool for counties asserting R.S. 2477 claims, for it allows the claimants, as defendants in actions filed by others, to present claims to title that might otherwise be time-barred. The survival of the claim to title for presentation in another

\textsuperscript{152} E.g., Park County, Mont. v. United States 626 F.2d 718, 720–21 (1980) (single sign asserting federal authority over a road, posted forty-one miles from the county seat, constitutes notice).

\textsuperscript{153} See \textit{Nevada}, 731 F.2d at 636; \textit{Rosette}, 141 F.3d at 1395; \textit{Shawnee Trail}, 222 F.3d at 388.


\textsuperscript{155} Id. at 291–92.

\textsuperscript{156} Id. at 292.
forum erodes some of the advantage the United States enjoys as a result of the statute of limitations.

It might be argued that the incentive for R.S. 2477 claimants to deploy bulldozers to provoke lawsuits is muted by the exemption Congress has given states from the QTA's statute of limitations. After the Supreme Court held in Block that the QTA's time limitation applied to claims filed by states, Congress amended the QTA in response to states' objections. The 1986 amendment exempts states from the twelve-year limitation period but limits the exemption by imposing a clear notice rule for claims asserting title to actively managed federal lands. When a state claims title to land on which the United States or its lessees/grantees have made substantial improvements, or on which the United States has conducted "substantial activities pursuant to a management plan," the state's claim is barred unless commenced within twelve years after receiving notice of federal claims to the land. Effective notice may be served either by "public communications" or by the government's "use, occupancy, or improvement of the claimed lands which, in the circumstances, is open and notorious."

At a minimum, the 1986 amendments contribute to substantial uncertainty about the widespread availability of the quiet title remedy in the R.S. 2477 context. First, many R.S. 2477 claims are asserted by counties, rather than states. Although counties are political subdivisions of states, Congress did not explicitly include them in the exemption crafted for states, and the only court to venture an opinion on the matter held the exemption inapplicable to counties. Second, the exemption may not prove useful even to those claimants who can claim it. What constitutes "substantial activities pursuant to a land use plan" sufficient to trigger the notice provision and open and notorious "use" or "occupancy" of lands sufficient to provide notice of a federal claim has never been litigated. States can be expected to argue that only substantial and affirmative physical land management activities would trigger the limitations period. The clear notice provision of the QTA is susceptible of an interpretation that would bar stale claims only if the United States has actively conducted substantial physical activities. Such an

158. Id. § 2409a(k).
159. Calhoun County v. United States, 132 F.3d 1100, 1103 (5th Cir. 1998) (holding, without discussion, that a county is not a state within the meaning of the QTA, and stating that, even if it were, the twelve-year limitations period under 28 U.S.C. § 2409a(i) would apply because the United States had conducted wildlife habitat improvement activities on the contested land).
160. 28 U.S.C. 2409(i) provides that a state must commence its action within twelve years of receiving notice if its claim involves lands "on which the United States or its [authorized users] has made substantial improvements or substantial investments or on which the United States has conducted substantial activities pursuant to a management plan such as range improvement, timber harvest, tree planting, mineral activities, farming, wildlife habitat improvement, or similar activities."
interpretation might enable them to claim they never received clear notice of federal ownership of lands that federal agencies have managed under restrictive standards but never subjected to intensive physical management such as timber harvesting or construction of wildlife habitat improvement facilities. However, the legislative history reflects Congress’s intent that claims be pursued within twelve years of the time that “the federal government . . . acted as if it were the owner of the land.” Inactive management measures, such as designating the land for preservation in a primitive state to maintain its wild character, clearly indicate federal assertion of ownership and should trigger the twelve-year limitation period where federal land managers adopt them pursuant to a management plan developed in plain view of state officials in public processes.

C. THE COURTS AND THE LINGERING R.S. 2477 PROBLEM

It is apparent that lawsuits to quiet title under the QTA have proven to be a poor mechanism for resolving the continuing R.S. 2477 controversy. One problem is that the QTA, because of its limitations on access to courts, has enabled courts to resolve only a handful of the potentially thousands of claims. Another problem is that courts exercising jurisdiction under the QTA to address the merits of R.S. 2477 disputes have issued a series of arguably inconsistent rulings that contribute to, rather than resolve, legal uncertainty.

To be sure, R.S. 2477 claimants, through bulldozer diplomacy, have succeeded in engaging federal courts outside the QTA context by provoking land managers or citizens groups to initiate litigation, as counties did in the Burr Trail cases and recently in southern Utah. But the availability of judicial relief in such cases does little to aid orderly resolution of the longstanding R.S. 2477 problem. As an initial matter, obtaining court jurisdiction outside the QTA requires claimants to provoke the ire of federal land managers by engaging in land-disturbing

U.S.C. § 2409a(i) (emphasis added). Similarly, the statute defines notice as specific public communication, or “use, occupancy, or improvement of the claimed lands which, in the circumstances, is open and notorious.” Id. § 2409a(k).

161. H.R. REP. No. 99-924, at 4 (1986), reprinted in 1986 U.S.C.C.A.N 5643, 5645 (“In any event, the federal use, occupancy, or improvement must have been of such a nature as to reasonably put a state on notice of a federal claim of ownership. The federal government must have acted as if it were owner of the land.”).

162. The Ninth Circuit, for example, has held, without elaboration, that failure to comply with state laws defining the establishment of public highways is fatal to establishing the existence of a valid R.S. 2477 right-of-way. Schultz v. Dep’t of the Army, 96 F.3d 1222, 1223 (9th Cir. 1996). But it has also rejected other R.S. 2477 claims without reference to state law. Adams v. United States, 3 F.3d 1254, 1257–58 (9th Cir. 1993); Humboldt County v. United States, 684 F.2d 1276, 1281–82 (9th Cir. 1982). The Ninth Circuit also has held, in a non-QTA case, that the scope of a R.S. 2477 right-of-way is a matter of federal law. United States v. Gates of the Mountains Lakeshore Homes, Inc., 732 F.2d 1411, 1413 (1984).
activities like bulldozing roads in WSAs. Aside from the adverse physical impacts such activities entail, they play to a political milieu that reveres local challenges to federal control over public lands, as evidenced by the "Sagebrush Rebellion" of the 1980s and the county supremacy movement of the 1990s. The existence of such passions already makes the task of federal land management difficult, and inflaming those passions can only make it more so. Moreover, courts’ sporadic rulings on R.S. 2477 outside the QTA have done little to bring uniformity to the law of R.S. 2477 or even to bring resolution to the particular claims they address. A different approach is needed.

III. THE CASE FOR ADMINISTRATIVE RESOLUTION OF R.S. 2477 CLAIMS

The alternative to relying solely on courts to resolve R.S. 2477 claims is to place greater responsibility on the federal land management agencies, particularly DOI. This might be done in a number of ways. DOI could assert authority to adjudicate R.S. 2477 claims administratively, as it was poised to do in 1994 and now is doing under the new recordable disclaimer rule. Aggrieved parties could then seek judicial review of the decision under either the APA or the QTA.¹⁶³

Even in the absence of a prior administrative adjudication of a claim’s validity, courts whose jurisdiction is properly invoked might choose to defer to agency authority and expertise by ordering the agency to address the validity of the claims before the court. A court recently did this in Southern Utah Wilderness Alliance v. Bureau of Land Management, in which BLM sued three Utah counties in trespass.¹⁶⁴ After ruling that the counties’ actions would not constitute trespass if within the scope of any valid rights under R.S. 2477, the district court stayed the case “pending an administrative determination by BLM as to the validity and scope of the claimed R.S. 2477 rights-of-way.”¹⁶⁵ Following an ad hoc administrative determination, the court resumed its review function, applying customary administrative law standards of judicial review.

Placing primary reliance on DOI is consistent with its historic role in public land law and consistent with modern administrative law principles, including the doctrine of primary jurisdiction. The allocation of responsibility for determining the validity and scope of R.S. 2477 claims should depend not on the posture of the lawsuit, but on the principles that justify—or do not, depending on the circumstances of each case—judicial deference to agencies in any case, including the intent of Congress, the value of agency expertise, and the need for uniform rules.

¹⁶³ See infra note 213 and accompanying text.
¹⁶⁵ Id. at 1133.
the agency is best situated to formulate. Underpinning this argument is the broad authority Congress has given federal land management agencies to administer federal lands for nearly 200 years. That power extends to the administration of federal interests in land and to the identification and validation of nonfederal interests arising under the public land laws. In light of this delegation of power, the principles underlying the primary jurisdiction doctrine—concern for uniformity of rules regarding pervasively regulated interests and the wisdom of courts tapping specialized agency expertise—offer additional support. As will be shown, the application of these principles in an analogous public lands context—the determination of the validity of mining claims under the Mining Act of 1872—offers a useful model.

A. DOI's Pervasive Authority to Administer the Public Lands

DOI and its predecessor, the General Land Office, have long exercised pervasive authority, delegated them by Congress, over the public lands. Congress created the General Land Office in 1812, and empowered its commissioner “to superintend, execute and perform, all such acts and things, touching or respecting the public lands of the United States, and other lands patented or granted by the United States.” In 1836, it restated that authority as executing, supervising and controlling duties “in anywise respecting ... public lands.” In codifying the revised statutes in 1874, Congress reaffirmed the commissioner’s authority, by then under the direction of the Secretary of the Interior, “to enforce and carry into execution, by appropriate regulations, every part of the provisions of this Title [relating to public lands].” The Secretary of Interior today has general authority and duty to “perform all executive duties ... in anywise respecting such public lands,” including “the issuing of patents for all grants of land.”

This broad authority has historically included the administration of public land grants. In the usual situation, Congress contemplated the future transfer of title based upon conditions set forth by statute. Congress provided for the actual transfer of legal title by means of patents issued after the General Land Office surveyed the lands in question and verified that the terms of the applicable grant had been satisfied. In such cases, the Supreme Court repeatedly emphasized that the authority to determine the validity of rights claimed under land grants rested with the Secretary of the Interior as long as legal title

166. Act of Apr. 25, 1812, ch. 86, § 1, 2 Stat. 716, 716.
remained in the United States or, in other words, before a patent issued. In other situations, Congress made an in praesenti grant, effecting the immediate passage of equitable title, to be memorialized by later issuance of a patent. In such cases, the Supreme Court recognized the Secretary of the Interior’s authority to identify the specific lands included in the grant before issuing a patent transferring legal title.

The Supreme Court has explicitly recognized that the Secretary’s broad statutory authority to administer public land includes the power to determine which specific lands are included in statutory grants that transfer title without a patent or “confirm” title that had previously passed. It has justified its interpretation by adverting to the need to protect the public interest in the disposition of federal lands. Where Congress by statute confirmed a Catholic mission’s title to lands it had historically occupied, for example, the Court held in Catholic Bishop v. Gibbon that the power to determine the particular lands in which title vested was “within the scope of the general powers vested in that department,” even though Congress had not specifically delegated the secretary the task of identifying the lands it had granted. The Court in Catholic Bishop recognized a “general rule that, in the absence of some specific provision to the contrary in respect to any particular grant of public land, its administration falls wholly within the jurisdiction of [DOI].” Similarly, in Knight v. United States, the Court upheld the Secretary’s prerogative to identify, according to a surveying convention of its choice, the lands subject to a similar confirmatory congressional grant. It characterized the Secretary as “the guardian of the people,” obliged by statute “to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it.”

As noted above, DOI’s historical authority to administer public lands has been carried forward by statute and still exists today. Beginning in the late nineteenth century, however, Congress began to define with greater specificity the management standards applicable to categories of lands designated for particular uses. In 1897, for example, the Forest

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171. E.g., Mich. Land & Lumber Co. v. Rust, 168 U.S. 589, 591–92 (1897) (construing secretarial authority under the Swamp Lands Act of 1850, which granted swamp lands to states in praesenti, subject to later identification to be memorialized in a patent). These cases might be read to suggest that the Secretary’s authority to administer land grants terminates upon the transfer of legal title. Indeed, the Supreme Court stated in Michigan Land & Lumber that “[a]fter the issue of a patent, the matter becomes subject to inquiry only in the courts and by judicial proceedings.” Id. at 593. The cases cited for that proposition involved government attempts to revoke or nullify patents that had been improperly issued. In such instances, only a judicial remedy was available to the government.
172. 158 U.S. 155, 167 (1895) (citing R.S. 441 and 453).
173. Id. at 167.
175. Id. at 181.
Service Organic Act empowered the President to create national forest reserves and further gave the Secretary of the Interior the authority to "make such rules and regulations ... as will insure the objects of [the reserved forests], namely, to regulate their occupancy and use and to preserve the forests ... from destruction." That authority was transferred to the Secretary of Agriculture in 1905. In 1916, Congress created the National Park Service and directed that the service "shall promote and regulate" the use of national parks "in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." The Supreme Court upheld a grazing permit requirement imposed by departmental regulation as a valid exercise of the Forest Service's general authority to protect forests from degradation. Similarly, the enactment of FLPMA in 1976 recognized the Secretary's historically broad authority over the unreserved public lands, among other ways by providing authority to issue recordable disclaimers of interest, while imposing constraints on the management of those lands to protect against unnecessary or undue degradation.

It is clear, then, that Congress has empowered both the executive and the judicial branches to make title determinations concerning private property rights arising under the public land laws. But what are the ramifications of this overlapping jurisdiction? Did Congress, by providing DOI sweeping authorization to administer the public land laws, intend the agency to be the primary interpreter of the statute and finder of fact with respect to R.S. 2477 and other public land laws? Or, by creating an exclusive cause of action under the QTA, did it mean to transfer to federal courts the interpretive and fact-finding authority traditionally vested in the land management agencies? What is the proper allocation of decision-making authority between courts and agencies that have overlapping jurisdiction over legal and factual matters involving statutory grants in public land? The administrative law doctrine of primary jurisdiction sheds helpful light.

B. The Doctrine of Primary Jurisdiction

The judge-made doctrine of primary jurisdiction addresses the allocation of responsibility between courts and administrative agencies to decide matters that fall within the jurisdiction of both. Primary jurisdiction

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177. Act of Feb. 1, 1905, ch. 288, 33 Stat. 628 (providing for the transfer of forest reserves from DOI to the Department of Agriculture).
181. The related doctrine of exhaustion rests on the same policies as primary jurisdiction, and it provides additional support for the view that agencies should be afforded an opportunity to make an initial determination of the validity and extent of R.S. 2477 rights before judicial involvement. The
jurisdiction questions typically arise when a party files a lawsuit invoking a court's jurisdiction and the opposing party seeks to stay the judicial action pending an initial determination of one or more issues by an administrative agency. At its core, the doctrine of primary jurisdiction seeks to achieve a pragmatic, workable "division of functions" between courts and agencies.

The doctrine of primary jurisdiction holds that courts should, and sometimes must, refrain from exercising their jurisdiction to allow administrative agencies initially to decide issues before the court. Courts and commentators have asserted two justifications for the primary jurisdiction of administrative agencies. Most often advanced is that agencies often possess specialized expertise or knowledge that makes them more competent than courts to decide certain issues. But the doctrine initially grew out of recognition that, where uniformity is necessary or desirable, it is often better achieved through agency than by judicial decision-making.

The Supreme Court first recognized the doctrine of primary jurisdiction in Texas & Pacific Railway Co. v. Abilene Cotton Oil Co., a railroad rate case. Abilene Cotton sued the railway to recover shipping

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exhaustion doctrine achieves a division of labor between courts and agencies by requiring a litigant to exhaust available agency remedies before a court exercises jurisdiction. See Richard J. Pierce, Jr., Administrative Law Treatise §§ 15.2-15.3 (4th ed. 2002); Peter L. Strauss et al., Gelhorn and Bye's Administrative Law: Cases and Comments 1244 (10th ed. 2003). The Supreme Court has advanced several justifications for the rule of exhaustion. First, the exhaustion requirement protects agencies against "premature interruption" of their processes, thereby allowing them to correct their own errors and discouraging parties from circumventing agency procedures by invoking the jurisdiction of a court. McKart v. United States, 395 U.S. 185, 193-94 (1969). Not only does this enhance the effectiveness of agencies as a practical matter, but it also preserves agency autonomy in accordance with congressional intent to assign agencies (rather than courts) particular duties and functions to be discharged based on the agencies' expertise and discretion. Id. at 194; Louis L. Jaffe, Judicial Control of Administrative Action 425 (1965). A second justification for exhaustion is that it enhances judicial review by ensuring the fullest opportunity for the agency to develop a record of pertinent facts and analysis, avoiding piecemeal court review of issues that arise before agencies, and obviating the need for judicial review altogether when the agency self corrects mistakes to the satisfaction of potential litigants. McCarthy v. Madigan, 503 U.S. 140, 145 (1992); McKart, 395 U.S. at 194-95.

The similarities between exhaustion and primary jurisdiction can lead to confusion as to which doctrine, if either, applies in a given situation. The Supreme Court has said:

"[e]xhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. "Primary jurisdiction," on the other hand, ... comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.


184. 204 U.S. 426, 440-41 (1907).
charges it alleged were "unjust and unreasonable" in violation of the Interstate Commerce Act ("ICA"). The railway argued that the state court lacked jurisdiction to decide whether the rate charged was "unjust and unreasonable" until the Interstate Commerce Commission ("ICC") had made such determination under the ICA. Agreeing with the railway, the Court reasoned that Congress's concern for uniform application of railroad rates, reflected by the ICA's particular focus on preventing preferences and discrimination among shippers, vested exclusive authority in the ICC to determine the reasonableness of rates. If the courts and the ICC had equal power to pass on the reasonableness of rates, the Court opined, divergent decisions on the same rates could defeat Congress's design of uniformity.

The Court broadened its view of the primary jurisdiction doctrine in *Great Northern Railway Co. v. Merchants' Elevator Co.* The Court examined the doctrine in the context of interpretation, rather than fact finding, and established that relevant agency expertise, in addition to uniformity, is a factor to be considered by courts in deciding whether to defer to an agency's primary jurisdiction. At issue was whether the railway was entitled to a surcharge pursuant to a tariff rule, or whether, as the shipper maintained, an exception to the rule applied. The Court characterized the question as one solely of construction, a pure issue of law. It held that primary jurisdiction did not require the court to refer to the ICC for its initial construction of the rules. But the Court distinguished issues of construction that masquerade as legal questions but actually turn on factual findings or the exercise of administrative discretion. In such cases, the Court said, the agency ordinarily reaches a determination "upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of [the subject] is indispensable, and such acquaintance is commonly to be found only in a body of experts." Notwithstanding the underpinnings of the doctrine in concerns for uniformity and agency expertise, courts sometimes balk at relinquishing or delaying their jurisdiction in favor of initial agency decisions. Courts are reluctant to abstain in favor of an agency's primary jurisdiction when the issues subject to concurrent jurisdiction are within the courts' own competence to decide. Thus, in *Great Northern*, the court declined to dismiss a matter of interpretation that it considered a pure question of law, which courts and the agency were equally competent to resolve. Courts have also been reluctant to defer to agencies' primary jurisdiction

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185. *Id.*
188. *Id.* at 291.
when the reach of agency jurisdiction does not entitle it to grant the same remedy as the court, as when the agency may impose injunctive relief in its enforcement capacity but not award damages to private plaintiffs. 189

C. LESSONS FROM THE MINERAL LAWS: DOI'S PRIMARY JURISDICTION OVER MINERALS ON FEDERAL LANDS

Judicial application of the primary jurisdiction doctrine in public lands cases has been relatively sparse. Courts have most clearly applied the primary jurisdiction doctrine in cases involving mineral interests in federal lands, particularly the validity of unpatented mining claims under the Mining Act of 1872. The unpatented mining claim is an apt comparison for R.S. 2477. In addition to their common origin in the 1866 mining law, they share some important attributes. Like R.S. 2477, the unpatented mining claim is a property interest that arises upon the occurrence of certain facts specified by statute—the discovery of a valuable deposit of minerals on public lands open to entry under the mining laws. 190 And, like R.S. 2477, no specific governmental act is required before a valid property interest in an unpatented mining claim arises and is subject to recognition and protection in the courts. Moreover, like a R.S. 2477 right-of-way, the unpatented mining claim is a limited property interest subject to the continued property interests of the United States in the lands on which it sits. 191

The recognition of primary jurisdiction in the mineral context rests largely on principles established in two Supreme Court cases interpreting

189. In Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 306-07 (1976), for example, the Supreme Court held that primary jurisdiction doctrine did not require a federal court hearing a private, common-law misrepresentation claim for airline overbooking to defer to the Civil Aeronautics Board's ("CAB's") jurisdiction on the question of whether the airline's overbooking of flights was "an unfair or deceptive practice." CAB's jurisdiction under the Federal Aviation Act empowered it to issue "cease and desist" orders, while the court's common-law jurisdiction empowered it to award damages to the injured plaintiff. The Court reasoned, in part, that the plaintiff's judicial remedy for injury to his private rights should not be displaced by an administrative remedy concerned with broader public law issues. Id. at 305.

The Court's ruling in Schor v. Commodity Futures Trading Commission, 478 U.S. 833 (1986), recognizes potential limitations in Congress's power to shift jurisdiction over state law remedies to federal agencies. In that case, the Court held that Commodity Futures Trading Commission's exercise of jurisdiction over a counterclaim arising under state law did not violate separation of power principles. The Court emphasized that the determination whether Article III powers have been unconstitutionally delegated turns on several factors, including "the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III." Id. at 851. These factors raise even fewer concerns in the primary jurisdiction context because the rights subject to adjudication arise within a regulatory scheme the administration of which Congress has delegated to an expert administrative agency. The exercise of agency jurisdiction is in aid, not derogation, of judicial power.


the United States' rights to proceed in court against putative owners of unpatented mining claims. In *Cameron v. United States*, the United States sued in trespass to enjoin Ralph Cameron from occupying, asserting right to, and interfering with public use of land Cameron claimed as a lode mining claim under the Mining Act of 1872. Before the Grand Canyon had been withdrawn from entry, the famously opportunistic Cameron had located a lode mining claim on a portion of the south rim that included the head of the Bright Angel Trail leading into the canyon. Cameron applied for a patent, but his claim was contested by the Grand Canyon Railway, whose tourist passengers Cameron had begun charging for access to the Bright Angel trailhead. The Secretary of the Interior, on appeal from a hearing and decision of the General Land Office, concluded that the claims were invalid because the lands were not valuable for mining purposes, but Cameron continued to physically occupy the claim. The lower courts had given the Secretary's determination conclusive effect and granted the United States the requested relief.

Before the Supreme Court, Cameron argued that the Secretary lacked the authority to determine the validity the mining claim. Though the Secretary could deny a patent, Cameron argued, he lacked the power to determine whether a mining claimant has made a discovery of valuable minerals, as required by the Mining Law to establish a valid claim. The Court dismissed Cameron's "naked proposition" based on the pervasive authority Congress had given the Secretary over public lands. It characterized the Land Department as a "special tribunal" entrusted with the execution of public land disposal laws and "general care" of those lands. It is the Secretary's responsibility, as head of the department, to see "that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved."

More than forty years later, the Court reprised these themes in *Best v. Humboldt Placer Mining Co.* The United States filed a condemnation action to obtain immediate possession of unpatented mining claims on property needed for a dam and reservoir. The court issued a writ of possession, but honored the government's request to allow it to determine the validity of the mining claims in administrative

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195. *Id.* at 459-60. The Court cited sections 441, 453, and 2478 of the Revised Statutes.
196. *Id.*
proceedings before BLM. The mining claimant then filed an action to enjoin BLM’s validity determination. Citing both *Cameron* and *Abilene Cotton*, the Court rejected the contention that the jurisdiction of the district court, having been invoked by the United States, was exclusive as to the validity of the mining claims. The Court reaffirmed its view that Congress vested DOI with “plenary authority over the administration of public lands, including mineral lands,” beginning in 1812.198 “It is difficult to imagine a more appropriate case” for a court to defer to the jurisdiction of a federal agency, Justice Douglas wrote, than the disposition of public lands under the Mining Law.199

Just months after deciding *Best*, the Court, in *Boesche v. Udall*, reiterated the principles justifying the application of primary jurisdiction to the administration of federal minerals, this time in the context of federal mineral leases.200 First, the Court reaffirmed the extent of the Secretary’s general authority to administer public lands. The Court upheld DOI’s authority to cancel a noncompetitive oil and gas lease by means of an administrative proceeding. The cancelled lease had earlier been granted despite facts rendering the lease application ineligible for approval under the terms of the statute. Although the Mineral Leasing Act of 1920, under which the lease had been issued, did not expressly authorize cancellation, the Court held that the Secretary’s “general power of management over the public lands” empowered him to cancel a lease for “invalidity at its inception.”201

Perhaps more important, the Court indicated that the allocation of primary decision-making responsibility among courts and the Secretary depends on whether the federal government retains control over the lands granted. The aggrieved lessee argued that the Secretary lacked authority to administratively cancel the lease, relying on earlier cases holding “that land patents once delivered and accepted could be cancelled only in judicial proceedings.”202 In those earlier cases, the Court held that the Secretary could exercise administrative powers where equitable title had passed but legal title remained in the United States (i.e., where a patent had not issued); after legal title had passed, however, the Court’s earlier cases suggested that cancellation of the property interest required judicial action.203 Justice Harlan, writing for the court in

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198. *Id.* at 336 (citing 2 Stat. 716).
199. *Id.* at 338. Justice Douglas noted that DOI had, by then, established a procedure for validity determinations and that the procedure was well subscribed. Mining claim validity determinations accounted for more than three-fourths of the work of nine hearing examiners. *Id.* at 339 n.8.
201. *Id.* at 476.
202. *Id.* at 477 (citing *Johnson v. Towsley*, 80 U.S. 72 (13 Wall. 72) (1871) and *Moore v. Robbins*, 96 U.S. 530 (1877)).
203. *Johnson*, 80 U.S. at 87; *Moore*, 96 U.S. at 533.
Boesche, found the distinction between equitable and legal title inapposite:

We think that no matter how the interest conveyed is denominated the true line of demarcation is whether as a result of the transaction ‘all authority or control’ over the lands has passed from ‘the Executive Department,’ or whether the Government continues to possess some measure of control over them.204

In assessing the extent of secretarial control, Justice Harlan compared a mineral lease with other government grants of interests in federal property. Under the Mineral Leasing Act, he emphasized, Congress required a federal reservation of a fee interest in the leased lands and, further, provided for continued supervision by the Secretary, who may prescribe “rules and regulations governing in minute detail all facets of the working of the land.”205 A land patent, by contrast, divests the United States of title entirely, passing “full ownership” to the patentee. Justice Harlan also distinguished the property interest in an unpatented mining claim, which he characterized as “an unencumbered estate in the minerals.”206 In an explanatory footnote, Justice Harlan quoted the Court’s description of the interest in an unpatented mining claim, in an earlier case, as “property in the fullest sense of that term,” securing its owner a “right of present and exclusive possession” which, “for all practical purposes of ownership, is as good as though secured by patent.”207 As to the question of secretarial authority to cancel the mineral lease without resort to the courts, the Court concluded in Boesche: “Since the Secretary’s connection with the land continues to subsist, he should have the power, in a proper case, to correct his own errors.”208

The Court’s decisions in Cameron, Best, and Boesche sound several themes that justify the application of primary jurisdiction doctrine in the context of the administration of mineral rights in federal lands. First, they establish that the Secretary of the Interior’s authority to decide the validity of mining claims and to cancel erroneously-granted mineral

205. Id. at 477-78.
206. Id. at 478.
207. Id. at 478 n.7 (quoting Wilbur v. U. S. ex rel. Krushnic, 280 U.S. 306, 316-17 (1930)). Justice Harlan’s suggestion that judicial action is required to extinguish a valid mining claim is undermined somewhat by United States v. Locke, 471 U.S. 84 (1985). In that case, the Court upheld BLM’s cancellation of a valid unpatented mining claim for the claimant’s failure to timely file a notice of intent to hold the claim, a requirement which had been imposed by Congress in FLPMA, 43 U.S.C. § 1714. The Court emphasized that the unpatented mining claim is a “unique form of property,” Locke, 471 U.S. at 104 (quoting Best v. Humboldt Placer Mining Co., 371 U.S. 334, 334-35 (1963)), over which the “[g]overnment retains substantial regulatory power” as the owner of the underlying fee interest. Id. at 105. In light of Locke, Justice Harlan’s characterization of an unpatented mining claim as more similar to patented lands than to a mineral lease interest seems mistaken.
208. Boesche, 373 U.S. at 478 (emphasis added).
leases, despite the lack of specific authorization, is necessarily incident to the congressionally-delegated general authority over the disposition and use of public lands. Second, these cases recognize the specialized expertise of DOI, whose "province is that of determining questions of fact and right under the public land laws, of recognizing or disapproving claims according to their merits, and of granting or refusing patents as the law may give sanction for the one or the other." 209 Third, the cases reflect the Court's recognition that the disposition of public lands is a matter of substantial public interest, and that Congress has entrusted the Secretary of the Interior with the protection of that interest, subject to review by courts.210 Finally, they indicate that the "line of demarcation" between administrative and judicial authority turns not on the passage of formal title, but on the degree of agency control over the interest at stake.

Lower court decisions have further refined the principle that courts should recognize DOI's authority to make an initial determination of the validity of mineral interests in federal lands. The Ninth Circuit has held that a mining claimant may not obtain a de novo judicial determination of the validity of unpatented claims by asserting the claim of ownership as an affirmative defense or counterclaim to an ejectment and declaratory judgment action brought by the government after an agency determination that the claim is invalid.211 Such a case "is essentially one to review the agency decision," which, if not governed precisely by the APA, "is at least one in which the district court has no broader reviewing function than it would have under that Act."212 It has recently held that, under the doctrine of primary jurisdiction, the agency is "entrusted with the function of making the initial determination" of a mining claim's validity and that the APA, not the QTA, provides the vehicle for judicial consideration of the issue.213 Primary jurisdiction thus prevents a mining claimant from obtaining either an initial or a de novo judicial determination of the validity of his claim.

Lower court decisions also indicate how the doctrine operates differently when the United States invokes judicial authority to declare a claim invalid. In that situation, primary jurisdiction justifies a judicial stay during the pendency of agency proceedings if the determination of validity turns on whether the claimant has made a discovery of valuable minerals, because that question falls within the particular expertise of the

209. Id. at 464.
210. See Best, 371 U.S. at 338 n.7.
211. Adams v. United States, 318 F.2d 861, 861 (9th Cir. 1963).
212. Id. at 867.
213. Hoefler v. Babbitt, 139 F.3d 726, 728 (9th Cir. 1998) (rejecting the argument that the QTA gives district courts exclusive jurisdiction to determine the validity of unpatented mining claims and reviewing the Interior Board of Land Appeals determination of invalidity under the APA).
D. PRIMARY JURISDICTION AND THE DETERMINATION OF R.S. 2477 CLAIMS

The principles underlying primary jurisdiction, and their application in the minerals cases, support the initial determination of R.S. 2477 claims by DOI rather than exclusive adjudication by federal courts. Congress has entrusted DOI with administration of the public lands, including land grants. As an initial matter, it seems clear that the Secretary does not lose her authority to determine the validity of a R.S. 2477 grant by virtue of the right-of-way having allegedly been perfected at some point in the past. As long as DOI maintains a “connection with the land” in which the claims arise by continuing “to possess some measure of control over them,” the courts’ jurisdiction to determine the validity of the claims is not exclusive. The United States’ connection with federal lands in which even valid R.S. 2477 claims exist is not subject to dispute; the United States owns a fee interest subject to a right-of-way, in the nature of an easement, for the construction of highways.

Giving DOI a lead role in addressing R.S. 2477 would further the twin goals of the primary jurisdiction doctrine. Most important, it would enable the agency to impose a uniform interpretation of the terms of the grant, something that piecemeal adjudication in courts has failed to provide. Permitting DOI to make an initial administrative determination

214. United States v. Haskins, 505 F.2d 246, 253 (9th Cir. 1974); see also United States v. Henri, 828 F.2d 526, 528 (9th Cir. 1987) (holding that the proper course is for the court to stay, not dismiss, the judicial proceeding because primary jurisdiction postpones, rather than ousts, the court’s jurisdiction).

215. United States v. Bagwell, 961 F.2d 1450, 1454 (9th Cir. 1992); United States v. Russell, 578 F.2d 806, 807-08 (9th Cir. 1978) (holding that primary jurisdiction does not deprive district court jurisdiction to enter a default judgment declaring a mining claim invalid where the claim is alleged to be held in bad faith); United States v. Zweifel, 508 F.2d 1150, 1155-56 (10th Cir. 1975); United States v. Nogueira, 403 F.2d 816, 823–25 (9th Cir. 1968).

216. Bagwell, 961 F.2d at 1454; Zweifel, 508 F.2d at 1155.

217. Bagwell, 961 F.2d at 1454; Zweifel, 508 F.2d at 1156.


219. See, e.g., Vogler v. United States, 859 F.2d 638, 642 (9th Cir. 1984).
of the validity and scope of asserted R.S. 2477 rights-of-way will ensure that uniform rules apply to all claims, regardless of the state in which the claims arise. Further, prior administrative determination will enable courts to benefit from agency experience and expertise. An agency process that allows for the application of agency expertise through extensive field investigations into claims, broad public participation and input would enhance the quality of the factual determinations and their consistency with the purposes of modern federal land management laws.

IV. TOWARD A RATIONAL, REPRESENTATIVE, AND EFFECTIVE PROCEDURE TO RESOLVE R.S. 2477 CLAIMS

Not all agency processes, of course, are equally desirable. The past two administrations have proposed divergent processes for administrative determination of R.S. 2477 claims. As discussed earlier, the Clinton administration proposed to issue regulations through notice and comment rulemaking procedures that would interpret the terms of the R.S. 2477 grant, establish a compulsory procedure of adjudication to validate claims, and provide a framework for the exercise of valid R.S. 2477 rights on federal lands now dedicated to conservation or multiple use.220 The Bush administration, by amending the recordable disclaimer rule after notice and comment, has opted for a system of voluntary adjudication without the aid of quasi-legislative rulemaking to formulate agency interpretations of R.S. 2477 that would bind future adjudicators.221 It has chosen to follow a system of ad hoc interpretation of the statute through adjudication. Ultimately, the value of allocating greater responsibility to DOI will depend on the quality of the process through which it exercises its interpretive and fact finding authority and the role of the courts in reviewing its actions.

This Part turns, then, to three issues raised by the suggestion that DOI assume—or be accorded—a primary role in resolving R.S. 2477. It will first consider the form that an effective and representative administrative process should take. It next addresses potential legal barriers to implementation of that process. Last, it examines the role of courts in reviewing decisions resulting from the process.

A. PRINCIPLES FOR A FAIR AND REPRESENTATIVE AGENCY PROCESS

Any attempt to craft a favored administrative process for resolving the problems of outstanding R.S. 2477 claims should begin with recognition of the principles to guide that process. While many of the general goals of administrative justice—fairness, accuracy, public legitimacy, interest representation, efficiency, and administrative

220. See infra Part I.C.1.
221. See infra Part I.C.2.
flexibility—are at play here, there are three principles worth highlighting in some detail. These are adequate public participation, mandatory participation by claimants, and the preference for policymaking by rulemaking rather than adjudication.\textsuperscript{222} Consideration of these principles suggests that the best process for administrative resolution of the R.S. 2477 controversy would be to interpret the terms of R.S. 2477 through notice and comment rulemaking and then to establish an adjudicative procedure for determining the validity of individual claims according to the standards adopted in the rulemaking.

I. Adequate Public Participation

The first principle is that any administrative process for resolving R.S. 2477 claims should provide for adequate public participation by all interested persons. The value of quality public participation to public lands decision-making is widely accepted and has become a central tenet of public natural resources management during the past thirty years.\textsuperscript{223}

\textsuperscript{222} Another fundamental principle of any administrative process for resolving R.S. 2477 claims is that it should allow claimants a fair opportunity to present and prove their claims. Constitutional due process may not demand formal adjudication under the APA, 5 U.S.C. §§ 554, 556, 557, but at a minimum, formal, adversarial trial-type procedures would best ensure that the claimants' factual assertions are most accurately resolved. See Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) (holding that the determination of whether a particular procedure is due depends on a weighing of the property interests at stake against the burdens the procedural safeguard would impose); Greene v. Babbitt, 64 F.3d 1266, 1275 (9th Cir. 1995) (affirming district court's determination that the APA's formal adjudication procedures provided an "appropriate model" for a due process hearing to decide a application for federal recognition of an Indian tribe). Indeed, DOI conducts hearings contesting mining claims under formal APA procedures, even though it is not required to do so by any statute. Kaycee Bentonite Corp., 79 I.B.L.A. 182, 186-90 (1984). This practice was based on the Supreme Court's ruling in Wong Yang Sung v. McGrath, 339 U.S. 33, 49-50 (1950), suggesting that due process requires a formal APA hearing in deportation cases. Later Supreme Court rulings make clear that Wong Yang Sung does not establish a uniform constitutional rule that a formal APA hearing is required whenever a protected property or liberty interest is at stake. See Mathews, 424 U.S. at 335 (establishing an inconsistent balancing test); Richardson v. Perales, 402 U.S. 389, 399 (1971) (holding that Social Security disability benefits may be denied based on medical reports that are not subject to cross-examination, a procedure provided by the APA, 5 U.S.C. § 554(d)); Marcello v. Bonds, 349 U.S. 302, 314 (1955) (upholding Congress's post-Wong Yang Sung legislation providing for deportation hearing procedures that deviated from the APA).

\textsuperscript{223} See, e.g., PUB. LAND LAW REVIEW COMM’N, ONE THIRD OF THE NATION’S LAND: A REPORT TO THE PRESIDENT AND THE CONGRESS 11-16 (1970) (Recommendation 11: “Provision should be made for public participation in land use planning, including public hearings on proposed Federal land use plans, as an initial step in a regional coordination process”; Recommendation 22: “Public hearings with respect to environmental considerations should be mandatory on proposed public land projects or decisions when requested by the states or by the Council on Environmental Quality”; Recommendation 109: “Congress should direct the public land agencies to restructure their adjudication organization and procedures in order to assure ... greater third party participation”; Recommendation 137: “Statutory authority should be provided for public land citizen advisory boards and guidelines for their operation should be established by statute”). The Public Land Law Review Commission also commented that it favored extending the APA's notice and comment requirements generally applicable to legislative rules to the public land agencies, notwithstanding the statutory exemption for rules involving public property. Id. at 252; see 5 U.S.C. § 553 (1996).

Congress has largely taken to heart PLLRC’s exhortations to increase public participation.
Scholars have argued persuasively in a vast administrative law literature, some of it particular to the context of public lands, that public participation enhances and protects a variety of important interests. It promotes democratic values by providing a direct or representative voice in decisions affecting the public interest and by subjecting agencies to greater accountability during the decision-making process. It can also lend greater legitimacy to administrative decisions, a particularly important consideration in the R.S. 2477 context given the public interest in retained federal property interests. Public participation has also been hailed as a means to provide comity to the states and the principles of federalism and to promote policy interpretations in concert with present-day public values. Perhaps most important, public participation leads to better decisions by allowing public land agencies access to relevant information that would otherwise not be available to them, including information about present public values.

To offer adequate opportunity for the public to participate, the administrative process for resolving R.S. 2477 should incorporate public input at each significant level of policy formulation and implementation. There are at least four significant levels for public participation in the R.S. 2477 context. The first is the development of the process to resolve the validity of R.S. 2477 claims. The second is the interpretation of the


225. Rossi, supra note 224, at 182-83.

226. Id. at 187.


terms of the statute, the articulation of the specific standards that will determine the validity of R.S. 2477 claims. The third is the determination of facts relevant to deciding particular R.S. 2477 claims and the application of the applicable legal standards to those facts. Finally, with respect to valid claims, federal land management agencies should seek broad public participation about how the existence of valid claims should affect federal policy choices about its retained property interests.  

2. Mandatory Participation by Claimants  

A second fundamental principle is that the administrative process should be mandatory for all claimants. This is essential for the process to effectively remove the clouds on federal title and management authority posed by unresolved, inchoate highway claims.  

The value of a compulsory process is readily demonstrated by the familiar analogue from the hardrock mining law: the unpatented mining claim. Before the passage of FLPMA in 1976, neither federal statute nor regulation required prospectors to register unpatented mining claims with the federal government. Like R.S. 2477 rights, the miner's property interest in the unpatented claim—the exclusive right to use the surface to extract minerals from the claim—arose by operation of law upon the occurrence of particular facts, specifically the discovery of a valuable mineral deposit. Though miners were required to record their claims in county land records, there was no federal registration system, leaving federal land managers unaware of which federal lands were subject to mining claims. DOI determined the validity of the claims only in unusual circumstances, such as when a claimant sought a patent or when the land management agency sought to withdraw the land from operation of the mining law. As a result, by 1975, some six million mining claims dotted the public lands, many of them dormant, abandoned, or invalid for lack of discovery or other reasons. Amid this "virtual chaos," each time federal land managers wished to convey federal land, BLM needed to conduct a title search of local records and, if it identified an outstanding claim, even one apparently dormant, abandoned or invalid, initiate a formal adjudication to determine the claim's validity.  

Congress's fix was both simple and hugely successful. FLPMA's mandatory federal recording system required all mining claimants to register their unpatented claims with BLM initially within three years  

229. Depending on the scope of a rulemaking to establish an agency process for adjudicating R.S. 2477 claims, substantial opportunity for public comment might be provided in a single rulemaking. Opportunity to comment on broad policy matters, like statutory interpretation, procedural design, or the extent of agency authority over valid R.S. 2477 rights of way, however, does not obviate the value of public participation in specific determinations of claims' validity.  


and thereafter to file an annual notice of intent to continue holding the claim. FLPMA deemed failure to comply with either requirement "conclusively to constitute an abandonment of the mining claim." The results were quick and dramatic; by 1983, the number of mining claims had dropped from an estimated six million to 1.7 million recorded claims. In Death Valley National Park, an estimated 50,000 claims shrunk to merely 863 duly recorded under FLPMA. The reductions in outstanding claims would likely have been even greater had more been required of claimants than mere recordation. Thus, the requirement that R.S. 2477 claimants prepare and present proof of their claims for administrative adjudication can reasonably be expected to dramatically reduce the number of claims.

3. The Preference for Rulemaking

A third principle that should guide the development of an agency procedure for addressing R.S. 2477 claims is that rulemaking is a superior process to adjudication for agency policymaking, including policy-based statutory interpretation. Administrative law scholars have nearly unanimously argued that agencies given the flexibility to choose between alternative processes to formulate policy should opt to announce general rules and policies through quasi-legislative rulemaking rather than ad hoc adjudication, unless particular circumstances, such as the difficulty of fashioning a general rule or the lack of agency knowledge or experience,

233. Id. § 1744(c).
234. LESHY, supra note 193, at 82.
235. Id. at 319.
236. The imposition of a mandatory "claim rental fee" of $100 in 1992 and later doubling to $200 in 1993 reduced the remaining active claims by more than half, from 760,000 to about 300,000. GEORGE C. COGGINS & ROBERT L GLICKSMANN, PUBLIC NATURAL RESOURCES LAW § 25:22, at 25-44 (2002).
237. It might be argued that the analogy to unpatented mining claims is inapt insofar as R.S. 2477 claimants are governmental rather than private entities. But sovereign immunity would not bar mandatory judicial proceedings to resolve states' R.S. 2477 claims. Alden v. Maine, 527 U.S. 706, 755 (1999) ("In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government."). Nor, by extension, would sovereign immunity bar a mandatory administrative adjudication of state claims to property interests against the United States. See Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760 (2002) (holding that sovereign immunity prevents the adjudication of private claims before the Federal Maritime Commission, but recognizing that sovereign immunity does not bar actions by the federal government). Indeed, in rejecting the argument in Block v. North Dakota, that applying a statute of limitations to bar states' claims to property vested in it by the Constitution violates the Tenth Amendment, the Court strongly intimated that states enjoy no greater property protection than private persons. 461 U.S. at 273, 291-92 (1983). The Court suggested that Congress's deprivation of constitutionally granted property without just compensation would perhaps violate the Fifth Amendment, not the Tenth. Id. Any Fifth Amendment concerns were obviated by the fact that the statute of limitations did not extinguish valid title but merely prevented North Dakota from asserting it in a quiet title claim. Id. Even if the failure to adjudicate R.S. 2477 claims led to a conclusive determination that unasserted claims were invalid, Fifth Amendment concerns would likely be satisfied under the Court's analysis in Locke, upholding the FLPMA recordation requirements for unpatented mining claims. 471 U.S. at 107-10.
favor a case-by-case approach to policymaking. The Supreme Court, while acknowledging that the choice of procedure "lies primarily in the informed discretion of the administrative agency," has exhorted agencies to choose, "as much as possible, . . . [the] quasi-legislative promulgation of rules to be applied in the future." Among the widely recognized advantages of rulemaking is that it "yields higher-quality decisions . . . because it invites broad participation in the policymaking process by all affected entities and groups, and because it encourages the agency to focus on the broad effects of its policy rather than the often idiosyncratic adjudicative facts of a specific dispute." In addition, rulemaking promotes efficiency, clarity, transparency, and fairness of agency decision-making.

The usual advantages of rulemaking over adjudication for setting policy apply with particular force in the public lands context. Despite a provision of the APA exempting matters relating to "public property" from notice and comment rulemaking requirements, the Public Land

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240. Pierce, Two Problems, supra note 238, at 308.

241. Id.


"Public rulemaking within the spirit of the APA . . . offers an effective route for citizen participation as new public land statutes are implemented and administrative precedents under old statutes are codified and revised. The people need and demand a voice in administrative rulemaking. They are entitled to the orderliness and stability provided where feasible by formally stated legislative, interpretative, and procedural rules in the development of administrative decisions and the conduct of administrative affairs."

Id.; see also John A. Carver, Jr., The Federal Proprietary Functions—A Neglected Aspect of Federal Administrative Law, 19 ADMIN. L. REV. 107, 116 (1966-1967) (arguing that the development of a system of "standards derived from public rulemaking, under which the applicable statutes will be interpreted and the delegated discretion will be carried out," is the "very essence of substantive due process"); Peter L. Strauss, Mining Claims on Public Lands: A Study of Interior Department Procedures, 1974 UTAH L. REV. 185, 262-63 (1974) [hereinafter Mining Claims] (arguing for the introduction of rulemaking procedures into mining claim adjudications raising major issues of interpretation or unresolved legal standards); Peter L. Strauss, Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law, 74 COLUM. L. REV. 1231, 1274-75 (1974) (decrying DOI's "hidden law" developed through adjudications and internal policy memoranda and manuals and analyzing DOI's reluctance to engage in notice and comment rulemaking).

Law Review Commission urged in 1970 that public land agencies use rulemaking processes to make policy, a recommendation carried forward, though without binding force, by Congress in FLPMA.\(^{244}\)

This widely accepted preference that public lands policy be established through rulemaking rather than adjudication procedures counsels for the use of notice and comment rulemaking procedures to clarify the overarching policies that affect the determination of the validity of R.S. 2477 claims. At a minimum, this means using notice and comment rulemaking to interpret and clarify the standards that will apply to the determination of R.S. 2477 claims as well as the architecture of the agency adjudicative process that will apply those standards to individual claims. The Clinton administration essentially followed this process when it proposed its 1994 rulemaking to establish an adjudicative process for validating R.S. 2477 claims and issued a notice of advanced rulemaking to address the management of R.S. 2477 claims found to be valid.

In stark contrast, the Bush administration has pursued a course that permits far less transparency. The center of its strategy for administratively addressing R.S. 2477 claims is the expansion of FLPMA's recordable disclaimer mechanism. Though it effectuated this expansion by notice and comment rulemaking, it did so with considerable stealth with respect to the particular application to R.S. 2477 claims; its notice of proposed rulemaking did not even mention the potential applicability of the expanded mechanism to R.S. 2477 claims. More important, the recordable disclaimer rule change activated a procedural mechanism for resolving R.S. 2477 claims without addressing any of the substantive or particular procedural requirements for validating a R.S. 2477 claim—issues that should be resolved through notice and comment rulemaking. Rather, to the extent DOI seems willing to address these issues at all other than through adjudicative decisions on individual claims, it has done so only by entering into a MOU with the State of Utah. The Utah MOU, which agreed that Utah would seek resolution of certain R.S. 2477 claims through the recordable disclaimer process and which rescinded an informal 1997 departmental policy statement on R.S. 2477 standards, was negotiated in private and never subject to public comment before its adoption.\(^{245}\) At least two other states—Colorado and Alaska—are pursuing separate MOUs with DOI.

\(^{244}\) 43 U.S.C. § 1701(a)(5) (1986) (declaring it to be the policy of the United States that "in administering public land statutes and exercising discretionary authority granted by them, the Secretary [of the Interior] be required to establish comprehensive rules and regulations after considering the views of the general public").

\(^{245}\) Indeed, BLM indicated it would not even publish the final MOU in the Federal Register. See CRS REPORT FOR CONGRESS, HIGHWAY RIGHTS OF WAY ON PUBLIC LANDS: R.S. 2477 AND DISCLAIMERS OF INTEREST 20 (2003).
regarding their R.S. 2477 claims, and it is unclear whether the MOUs, if completed, will adopt any further policy changes. Even if the administration foregoes additional MOUs, it seems poised to address overarching policy considerations and R.S. 2477 interpretations on a case-by-case basis when adjudicating individual applications for recordable disclaimers, a process mostly shielded from broad public participation. Announcing broad policy standards and interpretations in such informally negotiated agreements or in individual adjudications of recordable disclaimer requests plainly violates the consensus principle that notice and comment rulemaking is the better process.

B. Legal Constraints on DOI's Choice of Procedure

Even though notice and comment rulemaking is superior to ad hoc, case-by-case adjudication as a procedure for clarifying standards for determining the validity and scope of R.S. 2477 rights-of-way, DOI would face some legal constraints should it choose to exercise that option. The Supreme Court's historic deference to agency choice of procedure presupposes that Congress has empowered an agency to act by rulemaking and adjudication without specifying when one or the other procedure should be used. However clear the wisdom of addressing R.S. 2477 claims through a two-tier administrative process adopting policy decisions and statutory interpretations through notice and comment rulemaking and then applying them in individual adjudications, there are two potential legal constraints to such a procedure. The first is the general prohibition against the use of rulemaking to establish retroactively-applicable standards absent a clear congressional statement of the agency's authority to do so. The second is Congress's specific limitation of the use of rulemaking procedures to address R.S. 2477 claims.

1. Retroactive Rulemaking

The use of rulemaking to adopt standards applicable to longstanding R.S. 2477 claims could be viewed as an exercise of retroactive rulemaking. In the absence of specific statutory authority to address R.S. 2477 through rulemaking, DOI must rely on Congress's general grant of rulemaking authority to promulgate regulations necessary to administer public lands. However, the Supreme Court has established a clear statement rule for retroactive rulemaking, disfavoring the use of general rulemaking authority to promulgate rules with retroactive effect. Thus, if a rulemaking to interpret and clarify the terms of R.S. 2477 would operate retroactively, additional congressional authorization may be

246. Michael C. Blumm, supra note 65, at 10408.
required.

In *Bowen v. Georgetown University Hospital*, the Court rejected the retroactive application of a Medicare cost-reimbursement rule. Justice Kennedy opined for the court:

[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.

There are two relevant aspects of the retroactivity problem. The first is whether any rule that interpreted the legislative grant in R.S. 2477 would be a retroactive rule at all. If it is a retroactive rule, then it may only be promulgated consistent with *Bowen*.

As evidenced by a string of recent Supreme Court cases, there is considerable disagreement over how to determine whether a legal rule operates retroactively. Any enactment that changes the legal significance of past facts may be considered, at some level, retroactive. *Landgraf v. USI Film Products* suggests that a majority of the Court would “ask whether the new provision attaches new legal consequences to events completed before its enactment.” The *Landgraf* majority characterizes the determination of retroactivity as “a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event,” all in light of “familiar considerations of fair notice, reasonable reliance, and settled expectations.” The essential focus of the inquiry is whether the rule at issue would impair “vested rights.”

By this measure, whether a legislative rulemaking interpreting R.S. 2477 standards would be retroactive would depend not only on the extent to which it departed from past administrative or judicial

249. Id.

250. Id.

251. Professor Luneburg, for example, juxtaposes three examples of retroactivity: (1) a new air quality regulation that imposes civil penalties for pre-adoption emissions; (2) a new air quality standard that requires polluters to invest in state of the art pollution control equipment and to dismantle existing pollution control mechanisms that satisfied an earlier standard; and (3) the post-construction denial of an operating permit, based on a new standard, to a power plant that had been designed and constructed in accordance with regulations in effect during construction. Only the first, he argues, would clearly be a case of formal retroactivity, though the others would implicate expectation and reliance interests. William V. Luneburg, *Retroactivity and Administrative Rulemaking*, 1991 Duke L.J. 106, 109 (1991).


253. Id. at 270.

254. Id. at 269 (discussing and quoting Justice Story’s opinion in *Society for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756 (C.C.N.H. 1814) (No. 13,156)); see also *Landgraf*, 511 U.S. at 290 (Scalia, J., concurring).
interpretations, but also on the extent of the claimant's reliance on those earlier interpretations. Suppose, for example, that DOI issued a rule interpreting the statutory term “construction” to require construction and maintenance of the highway by mechanical means. A state or county claiming a R.S. 2477 right-of-way might argue that its rights “vested” by operation of law at the moment a trail had been “constructed” by the passage of vehicles if, at that time, DOI or a court interpreted such action to perfect R.S. 2477 rights. Though a claimant’s expectations might be unsettled in such a case, its actual reliance interests would arguably be weak, especially if it had done little to maintain the right-of-way after its alleged perfection. Given DOI’s broad authority to interpret and administer the public land laws, a more restrictive interpretation of the statute should not surprise claimants, particularly in light of FLPMA’s policy to retain federal ownership of public lands and to manage them for particular purposes. It would seem that, under the Landgraf majority’s approach, such an interpretation is not a retroactive application of a legal rule. But reasonable minds could differ as to just how Landgraf’s factors should be applied, and it is possible that a court would find the supposed rule retroactive and therefore subject to Bowen’s clear statement rule.

Though endorsed by a majority of justices on the current court, the Landgraf approach is not the only one that apparently has currency. Justice Scalia has proposed a different approach to retroactivity, which may yet garner support. Justice Scalia, concurring in Landgraf’s result, sharply criticized the majority’s approach to defining retroactivity as applying a “fundamentally wrong” criterion, and, to boot, wrongly applying it. The proper inquiry for determining whether applying a rule

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255. Here, too, a comparison to the mining law is apt. In proposing the incorporation of hybrid rulemaking procedures into the process of adjudicating the validity of mining claims, Professor Strauss considered the claim that such a procedure would amount to impermissible retroactive rulemaking. Mining Claims, supra note 242, at 264. He found:

In the context of a claim to government property gratuitously made available, not private property subjected to outside control, the citizen’s claim to “nonretroactivity” is fairly limited to the avoidance of adverse consequences from behavior apparently lawful when undertaken—without regard to the character of the proceedings in which the rules governing his obligation are eventually defined. While existing claims obviously could not be abrogated by fiat, neither Congress nor the Department lacks the authority to clarify governing law or to alter for the future the circumstances under which the claims are held.

Id. (emphasis added).


257. 511 U.S. at 291 (Scalia, J., concurring). Scalia argues that the “vested rights” approach is really just a restatement of the substantive-procedural distinction applied to retroactivity analysis in the ex post facto context. Id. at 290. But the majority ignores the line, he argues, by admitting that some procedural rules would not be applied retroactively despite settled law that there are no vested rights in modes of procedure. Id. (citing Ex Parte Collett, 337 U.S. 55, 71 (1949) and Crane v. Hahlo, 258 U.S. 142, 147 (1922)).
would implicate retroactivity concerns, according to Scalia, is whether the activity meant to be regulated by the rule occurs before or after the rule is adopted.\textsuperscript{258} Thus, a rule that regulates "primary conduct" which is the subject of a trial should not be applied retroactively. On the other hand, a rule that regulates the conduct of trial, such as a new rule of evidence, does operate retroactively at all, because the relevant activity the rule regulates is the introduction of the evidence at trial.

Under Scalia's approach, determining whether the hypothetical R.S. 2477 regulation requiring mechanical construction operates retroactively depends on how one characterizes the conduct or activity to which the rule is addressed. If the rule is regarded as addressing the actions taken to "construct" the right-of-way claim—acts which must have occurred prior to the enactment of FLPMA in 1976, at the latest—then it would be retroactive. However, if the rule is regarded as addressing activity that has not yet occurred, then it is not a retroactive rule at all, and the clear statement requirement of \textit{Bowen} is not implicated.

Whether any rule clarifying the standards to be applied to determine the validity of R.S. 2477 claims addresses past or future conduct depends on just what DOI is doing when it adjudicates a R.S. 2477 claim. If it is making a binding determination of whether property rights have arisen in favor of the claimant by operation of law and the past occurrence of certain facts, then a finding of retroactivity seems inescapable under either \textit{Landgraf} or Scalia's test. But if DOI is merely deciding what respect it will give the assertion of a R.S. 2477 claim in land management decisions—leaving the ultimate question of the claimant's property rights to the courts to decide in a future case—then the rule seems to address future acts by DOI.\textsuperscript{259} Under Scalia's view, at least, this would be a \textit{prospective}, not a retroactive application.

Another approach to retroactivity, specific to the context of agency regulations, is suggested by Justice Scalia's opinion for a unanimous Court in \textit{Smiley v. Citibank}.\textsuperscript{260} In that case, without much analysis, the Court held that a regulation issued by the Comptroller of the Currency interpreting the statutory term "interest" to include late fees was not a retroactive regulation even when applied to past transactions.\textsuperscript{261} The court noted that the agency's interpretation did not replace a prior

\textsuperscript{258} \textit{Id.} at 291.

\textsuperscript{259} This is probably the effect of a recordable disclaimer issued pursuant to FLPMA. Rather than transferring or adjudicating any property interest per se, the disclaimer of interest serves effectively to estop the United States from asserting a property interest in later proceedings. See Paul Smyth, Deputy Associate Solicitor, United States Department of the Interior, Presentation to the 50th Annual Rocky Mountain Mineral Law Foundation (July 23, 2004) (comments on file with author).

\textsuperscript{260} 517 U.S. 735 (1996).

\textsuperscript{261} \textit{Id.} at 744 & n.3 (according the Comptroller's interpretation of the National Bank Act \textit{Chevron} deference).
agency interpretation and reasoned that it would be “absurd to ignore the agency’s current authoritative pronouncement of what the statute means” when a court addresses “transactions that occurred at a time when there was no clear agency guidance.”265 Under this view, whether DOI rules interpreting R.S. 2477 would implicate the retroactivity analysis of Bowen would depend on whether a court believed DOI’s earlier guidance on R.S. 2477 was clear at the time the claim was alleged to have been perfected. This would add an additional element of “ad hocery” to the analysis because the retroactivity determination would turn on the specificity and perhaps breadth of DOI’s earlier, changing pronouncements at any given time.263

Even if considered retroactive, a rule clarifying the standards for determining valid R.S. 2477 claims would not necessarily be barred by Bowen. First, Bowen both involved and expressed its clear statement rule as applicable to “legislative rulemaking authority.”264 An agency rule interpreting R.S. 2477 and imposing a procedure for presenting outstanding claims for administrative adjudication would be not a legislative rule, but an interpretive and procedural rule.265 Both interpretive and procedural rules require additional agency action for their implementation; they are not applied to any legal detriment of an individual until their actual implementation, usually by adjudication. In this light, Bowen’s import is to limit the agency’s choice of procedure by which it can announce a new and binding rule, viz. through legislative rulemaking binding of itself or through adjudication. A rule like the 1994 proposed rule would not violate Bowen because it would be implemented only through adjudication of actual R.S. 2477 claims.

Second, Bowen’s language suggests that its clear statement rule is subject to exception. Bowen holds that, “as a general matter,” grants of legislative rulemaking authority will not encompass the power to make retroactive rules unless Congress expressly says so.266 It further intimates that courts might find retroactive rulemaking authority absent an express grant “where some substantial justification for retroactive rulemaking is presented,” though they should do so only “reluctant[ly].”267 The Court did not suggest what might amount to a “substantial justification”

262. Id. at 744 n.3.
263. See Pauly v. USDA, 348 F.3d 1143, 1152 (9th Cir. 2003) (holding that the retroactivity analysis used in Smiley, 517 U.S. 735, “does not apply to a situation, such as the one here, where an agency’s new regulation represents an explicit break with prior practice”).
265. See 5 U.S.C. § 553 (1996). Under the APA, the distinction between legislative rules and those that are interpretive or procedural is essential to whether “notice and comment” rulemaking procedures are required. Id. Legislative rules, which are binding as law and encompass substantive value judgments, may be promulgated only after public notice and opportunity to comment. Id.
266. 488 U.S. at 208–09.
267. Id.
warranting departure from its general rule, but it acknowledged, without addressing, two arguments for retroactivity in the context of curative retroactive rulemaking—retroactive rulemaking to fill a regulatory void left by an earlier rule's invalidation. In *Bowen*, the government had argued, first, that curative rulemaking presents a unique circumstance in which there is a "heightened need" for retroactivity to ensure that congressional intent and "important administrative goals" will not be frustrated. Second, the government argued that countervailing reliance interests are less compelling where the earlier invalidated rule provided notice of the later-enacted restrictions sought to be applied retroactively.\(^{268}\)

The first of these acknowledged arguments is potentially applicable to the R.S. 2477 situation. A DOI regulation such as the 1994 proposed rule would be curative to the extent that it would seek to fill a regulatory void created not by judicial invalidation of earlier rules but by DOI's failure to provide sufficiently clear guidance before R.S. 2477's repeal to eliminate uncertainty about the validity of claims. DOI's inability to do so now would frustrate important administrative goals for public land management and, quite possibly, the intent of Congress with respect to ongoing retention and federal management of the public lands.

Congress, of course, could resolve this confusion by enacting legislation that would explicitly grant DOI the power to issue regulations with retroactive effect. Given that congressional action will be required for any standards established through rulemaking to become effective, as discussed next, Congress should take the opportunity to state clearly that it authorizes DOI to issue standards for R.S. 2477 that may be applied retroactively to presently unresolved claims.

2. **Congressional Interference with Agency Authority to Address R.S. 2477**

The recent history of the R.S. 2477 controversy is rife with piecemeal congressional interference with DOI's development of policies to resolve outstanding claims. The Republican-controlled Congress responded to the Clinton administration's 1994 proposed rule by passing a series of appropriations riders prohibiting any rules pertaining to R.S. 2477 rights-of-way from becoming effective without further congressional approval. The permanent prohibition now in place provides: "No final rule or regulation of any agency of the Federal Government pertaining to the recognition, management, or validity of a right-of-way pursuant to [R.S. 2477] shall take effect unless expressly authorized by an Act of Congress.

\(^{268}\) It is not clear how this second argument would relate to Congress's *intent* to delegate to the agency the authority to make retroactive rules, which is the focus of the *Bowen* inquiry. This argument is better characterized (or perhaps recast) as one that the rule is not retroactive under the *Landgraf* test because it does not unduly interfere with reliance interests.
subsequent to the date of the enactment of this Act.\textsuperscript{269} More recently, the House passed a rider to the FY 2004 Interior appropriations bill that would have prevented the use of recordable disclaimers to resolve R.S. 2477 claims, though the provision was dropped by the conference committee.\textsuperscript{270}

This kind of piecemeal congressional interference in agency policymaking has contributed to the gridlock that continues to prevent a transparent, reasoned, and deliberative resolution of the longstanding R.S. 2477 controversy. The prohibition against using rulemaking to clarify standards for the validity of R.S. 2477 has likely encouraged the Bush administration to address R.S. 2477 policy through less open procedures, including the recordable disclaimer rule and the Utah MOU. Legislatively blocking the use of rulemaking as a means of exercising agency policymaking discretion regarding R.S. 2477 may be politically expedient. But it is unwise as a policy matter to channel or limit the exercise of agency discretion to the realm of adjudication and private agreements, which do not benefit from the kind of open, deliberative process that makes rulemaking the favored procedure of judges and scholars.

One solution would be for Congress to address R.S. 2477 comprehensively, in effect exercising the policy discretion that it originally entrusted to DOI but has since restrained. Colorado Representative Udall introduced legislation in the 108th Congress to do this.\textsuperscript{271} The Udall bill would compel R.S. 2477 claimants to present their claims within four years to federal land management agencies for administrative adjudication according to standards and procedures set forth in the bill. The bill specifically defines the key R.S. 2477 terms “construction,” “highways” and “public lands not reserved for public uses,” establishes evidentiary standards applicable to administrative determinations, limits judicial review of R.S. 2477 determinations to the administrative record, and deems the failure to file a timely administrative claim an abandonment of the claim to a R.S. 2477 right-of-way. The Udall bill would establish clear administrative primacy over the courts in determining the validity of R.S. 2477 claims by removing federal courts’ authority to address R.S. 2477 claims other than by reviewing administrative determinations. But it also limits agency discretion to resolve matters of interpretation and policy by setting forth the structure of the administrative process and, more importantly, defining the substantive standards to be applied.

\textsuperscript{270} Blumm, supra note 65, at 10409.
Predictably, the Udall bill has not moved in Congress. Much good could be accomplished with more modest legislation that would preserve agency autonomy to interpret the original statutory grant. A congressional enactment that removed restrictions on the use of rulemaking would be a start, though one that mandated land management agencies to interpret R.S. 2477 standards and establish an administrative process through notice and comment rulemaking would be considerably better. To be minimally effective, legislation must remove the existing barriers to administrative resolution of R.S. 2477 claims and address those unresolved issues that the land management agencies' are arguably powerless to address themselves. Perhaps first among those would be to compel participation of all claimants in the administrative process either by deeming unpursued claims abandoned, as does the Udall bill, or by removing the jurisdiction of federal courts to consider them in future cases.

C. Judicial Review of Agency Determinations of R.S. 2477

The establishment of an agency process to interpret R.S. 2477 and adjudicate R.S. 2477 claims alters, but does not eliminate, the judicial role, changing it from one of primary administration of the law to one of oversight. Rather than finding facts and interpreting the R.S. 2477 grant as both primary and ultimate finder of fact and law, the court's role becomes one of reviewing prior agency determinations of fact and interpretations of law under traditional standards of administrative law. However, courts would still retain significant authority even if their review of agency action is limited by administrative law principles; they will retain authority both to set aside or overrule the agency action and to determine that valid property rights have been taken by federal regulation of the exercise of any valid rights.

As discussed above in Part II, the QTA provides the exclusive avenue to assert claims of title against the United States. Following the Supreme Court's emphatic statement of this rule in Block v. North Dakota, the lower courts have faithfully rejected nearly every challenge to agency action brought under the APA if the challenge requires the determination of title. Nonetheless, there are two situations in which courts have applied the scope of review under the APA to consider challenges to agency determinations of property interests in public lands. Further analysis of these categories suggests that, even if the QTA technically provides the right of action to engage the courts on issues of title, traditional principles of judicial review—as codified in the APA and expressed in judicial precedent—nonetheless should define the courts' role in reviewing agency determinations of property rights in public land.

The first of these situations involves the familiar analogue, the unpatented mining claim. Running somewhat against the grain of QTA
"exclusivity" cases, the Ninth Circuit held, in Hoefler v. Babbitt, that the APA provides the "sole means for challenging the legality" of a determination by the Interior Board of Land Appeals ("IBLA") that an unpatented mining claim is invalid. In an administrative proceeding, BLM determined that the plaintiffs' unpatented mining claims were void ab initio because they had been located on lands that had been withdrawn from mineral entry. After IBLA rejected their administrative appeal, the plaintiffs filed a lawsuit posing claims under both the QTA and the APA and seeking an evidentiary hearing to introduce evidence not placed before the agency. The district court dismissed the QTA claim, holding that it could review the agency's decision only under the APA for violation of the standards set forth in 5 U.S.C. § 706. The court rejected the plaintiffs' characterization of their case as asserting that the United States claimed adverse title to the unpatented mining claim itself. Rather, it apparently agreed with the government that the United States owned fee title to the lands and that the proper question was whether, by operation of the Mining Law, the property interest in an unpatented mining claim had arisen in favor of the plaintiffs. Affirming, the Ninth Circuit specifically rejected the plaintiffs' contentions that the QTA gives federal district courts have exclusive jurisdiction to determine the validity of mining claims and that IBLA should have referred the issue to a federal court for resolution under the QTA.

The basis for the holding in Hoefler is that the determination of whether property rights, in the form of an unpatented mining claim, have arisen under the mining law is within DOI's broad authority to administer the public lands. When the department makes such a determination, it is not asserting its own adverse property interests, but administering public land laws under which property interests might arise in certain circumstances. The agency's determination in such a case is not whether it has a superior claim to title—such as courts are typically called upon to decide in quiet title cases—but whether the operation of the mining law in the particular factual situation creates a less-than-fee property interest in federal land. That determination, authorized by Congress and made with the agency's accumulated expertise in public land law, is functionally the same as many other administrative decisions implementing statutory programs, and it is subject to deferential review by federal courts for arbitrariness and lack of statutory authority. It is also indistinguishable from the administrative determination of the

272. Hoefler v. Babbitt, 139 F.3d 726, 728 (9th Cir. 1998).
274. Id. at 1452. Historical practice also influenced the court, which pointedly noted that the plaintiffs cited no cases in which mining claimants had been permitted to challenge mining claim validity determinations under the QTA.
validity or scope of a claimed R.S. 2477 right-of-way, also a property interest that arises by virtue of a law the administration of which Congress has delegated to DOI.

A second line of authority suggesting that courts should deferentially review prior agency determinations whether property rights have arisen under the public land laws stems from FLPMA’s recordable disclaimer provision. In the only recordable disclaimer case to reach a federal appeals court, *Aulston v. United States*, the Tenth Circuit reviewed BLM’s and IBLA’s rejection of an application for a recordable disclaimer. The precise question was whether oil and gas reservations in patents issued under the Agricultural Entry Act of 1949 included carbon dioxide gas. In reviewing IBLA’s determination that the mineral reservation did not include carbon dioxide gas, the court cited the APA’s standard of review and, more importantly, painstakingly analyzed, under *Chevron*, the agency’s interpretation of the Agricultural Entry Act. Finding ambiguity in Congress’s use of the term “gas” in the statute, the court found the agency’s interpretation reasonable. Though the court did not analyze whether the QTA or the APA provided the right of action to obtain review of IBLA’s decision, it recognized that traditional principles of administrative law were applicable to the agency’s administration of prior public land grants by means of the recordable disclaimer provision.

Though arising in different circumstances, both *Hoefler* and *Aulston* recognize the central tenet that courts reviewing DOI determinations of the extent of private property interests arising under the public land laws owe deference to the agency in accordance with general administrative law principles. In *Hoefler*, the court paid deference to the agency’s prior factual determinations implementing the mining law. In *Aulston*, it deferred to the agency’s interpretation of an ambiguous statutory grant on the basis that Congress intended for the agency, rather than the courts, to resolve the ambiguity. There is no basis for courts to do otherwise when reviewing prior agency decisions involving R.S. 2477 claims, even if the QTA, rather than the APA provides the right of action.

**Conclusion**

Nearly forty years after its repeal—and 150 from its enactment—R.S. 2477 is still causing problems. Unfortunately the mechanisms for courts to resolve the problems have been ineffective. Rather, they have arguably added to the problem by creating an incentive for R.S. 2477 proponents to deploy bulldozers to provoke federal land managers to sue. In the few cases in which courts have addressed the merits R.S. 2477

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275. 915 F.2d 584 (10th Cir. 1990).
276. Id. at 587-99 (applying Chevron v. Natural Res. Def. Council, 467 U.S. 837 (1984)).
claims, they have issued confusing and inconsistent rulings, leaving both potential R.S. 2477 claimants and federal land managers uncertain about the validity and the legal effect of outstanding claims.

DOI's experience with property rights determinations in the context of the mining laws suggests a better alternative to exclusive judicial responsibility for resolving R.S. 2477. There is ample justification—given the United States' continuing ownership of the lands subject to R.S. 2477 claims, the historic, pervasive authority of DOI over the public land laws, and the principles of primary jurisdiction—for DOI to assume a primary role in resolving R.S. 2477 claims. An administrative process that enables DOI to address R.S. 2477 claims is the best hope for putting R.S. 2477 to rest and reaching certainty about the existence and the legal significance of valid rights-of-way across millions of acres of federal land. But, in accordance with the great weight of commentary and with DOI's experience with unpatented mining claims, the administrative process should be implemented through notice and comment rulemaking and compulsory adjudication of individual claims.