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# M E M O R A N D U M

May 6, 2014

**TO:** Senator Owen Hill

**FROM:** David Beaujon, Senior Research Analyst, 303-866-4781

**SUBJECT:** Resolving R.S. 2477 Right-of-way Claims on U.S. Department of Interior Lands

**Summary**

This memorandum responds to your request for information about the federal law, R.S. 2477, that granted rights-of-way across unreserved federal public lands prior to its repeal in 1976, and the process that may be available to resolve remaining right-of-way claims. It describes the federal law that repealed R.S. 2477 and discusses the current law concerning new R.S. 2477 rights-of-way on federal land. It also discusses the process by which a person or governmental entity may apply for a recordable disclaimer from the federal Bureau of Land Management or may file quiet title action in federal court to resolve R.S. 2477 claims. Finally, it discusses a process the U.S. Department of Interior and the State of Utah developed to resolve R.S. 2477 right-of-way claims in that state.

***Background on R.S. 2477 rights-of-way.*** Prior to its repeal in 1976, R.S. 2477[1] granted rights-of-way across unreserved federal public lands. Unreserved lands were those public lands that were not withdrawn and that were dedicated to a particular federal purpose, such as military reservations or national parks. R.S. 2477allowed local governments to acquire a property interest in roads and other public highways they constructed across unreserved federal land. The establishment of R.S. 2477 rights-of-way did not require administrative measures, such as a patent or deed from the federal government, or public acceptance on the part of the states or localities

[1]Codified until repeal as 43 U.S.C. § 932.

in which the right was vested. R.S. 2477 was repealed in 1976 by the Federal Land Policy and Management Act (FLPMA). This law also granted the Secretary of the Interior broader powers to regulate rights-of-way including determining the extent, duration, location, construction, maintenance, transfer or assignment, and termination of such rights.[2]

According to the U.S. Department of Interior (DOI), there is no longer any way to secure a new R.S. 2477 right-of-way. Valid R.S. 2477 rights-of-way on unreserved federal lands that were established prior to the law's repeal may remain in effect. Federal law includes procedures for resolving R.S. 2477 right-of-way claims. A brief summary of these procedures follows.

***Disclaimers of interest.*** Federal law authorizes the Secretary of the Interior, through a delegation of authority to the federal Bureau of Land Management (BLM), to issue a document of disclaimer of interest in lands where the disclaimer will help remove a cloud on the land's title and where a record interest of the United States in such lands has terminated by operation of law or is otherwise invalid.[3] The BLM may issue recordable disclaimers to disclaim federal title in a variety of instances, including survey errors, clerical errors, or when applicants assert title previously created under expired authority, such as an interest in a highway right-of-way under R.S. 2477. Issuance of a document of disclaimer by the Secretary has the same effect as a quit-claim deed from the United States. Under such deeds, the grantee is *quitting* any claim or interest he or she may have in the real property. The following requirements must be met before the Secretary can issue a disclaimer:

- an applicant must file a written application with the Secretary;
- the Secretary must publish a notice in the Federal Register of the application setting forth the grounds supporting it at least 90 days before the issuance of the disclaimer;
- the applicant must pay the Secretary the administrative costs associated with issuance of the disclaimer; and
- the Secretary must consult with any affected federal agency.[4]

The BLM adopted regulations implementing Section 315 of FLPMA concerning recordable disclaimers of interest. According to these regulations, the objective of the disclaimer is to eliminate the necessity for court action or private legislation in those instances where the United States asserts no ownership or record interest.[5] Any entity claiming title to lands may file an application to have a disclaimer of interest issued if there is reason to believe that a cloud exists on the title to the lands as a result of a claim or potential claim of the United States and that such lands are not subject to any valid claim of the United States.[6] The BLM may not approve an application, except for applications filed by a state, if more than 12 years have elapsed since the applicant knew, or should have known, of the claim of the United States. The exception to the 12-year deadline also applies to any governmental instrumentality within a state, including cities,

[2] 43 U.S.C. § 1761 (a) and (b).

[3] 43 U.S.C. § 1745 (a).

[4] 43 U.S.C. § 1745.

[5] 43 C.F.R. 1864.0-2 (a).

[6] 43 C.F.R. 1864.1-1.

counties, or other official local governmental entities.[7] The regulations specify the information the applicant must submit in the application and the costs associated with submitting an application. For example, an applicant is required to submit all documents that show to the satisfaction of the authorized officer the applicant's title to the lands.[8] This requirement may be waived if BLM believes the documentation is not needed to properly adjudicate the application. Before filing such an application, the law encourages the applicant to meet with BLM to determine if the regulations apply to the applicant.

***MOUs concerning R.S. 2477 rights-of-way on BLM land.*** Ths DOI has signed memorandums of understanding (MOU) with certain states to address R.S. 2477 rights-of-way on federal lands. For example, on April 9, 2003, the DOI signed a memorandum of understanding with the state of Utah to implement a process to acknowledge the existence of certain state and county R.S. 2477 rights-of-way on BLM land within that state. According to the MOU, the DOI will use the FLPMA Section 315 disclaimer process to make these acknowledgments. Under the MOU, the state or any Utah county may request initiation of this disclaimer process for eligible roads. Such roads must meet certain standards, including the legal requirements of a right-of-way granted under R.S. 2477. The MOU precludes consideration of rights-of-way within congressionally designated wilderness areas or wilderness study areas designated on or before October 21, 1993. Colorado has not signed an MOU with the federal government to address R.S. 2477 rights-of-way on BLM land in Colorado.

***Judicial process to address title disputes concerning federal property interests.*** The federal Quiet Title Act[9] permits suit against the federal government to adjudicate title disputes involving real property in which U.S. claims an interest. In a Quiet Title Act suit, a claimant must prove title to rights-of-way that vested on or before October 21, 1976, the date of FLPMA's enactment. The act prohibits civil action unless it is commenced within 12 years of the date upon which it accrued. Such action will be deemed to have accrued on the date the plaintiff or his or her predecessor in interest knew or should have known of the claim of the United States.[10] The law provides that in a Quiet Title Act lawsuit, the United States may disclaim all interest in the real property or interest at any time prior to the actual commencement of the trial if that disclaimer is confirmed by order of the court.

***Utah case to quiet title for roads.*** In 2010, Utah's Kane County filed suit under the Quiet Title Act requesting the federal district court to grant partial summary judgement quieting title to Kane County's R.S. 2477 public highway rights-of-way for eight roads in the county.[11] According to the claim, these roads had long been Kane County public thoroughfares, and provided needed access from private and public lands to cities, schools, stores, places of employment, and recreational areas within Kane County. Where these eight roads crossed public lands, the county claimed rights-of-way were granted by Congress through R.S. 2477 as an express grant of rights-of-way and that the county could show at least ten years of continuous public use prior to October 21, 1976. The county also claimed that Kane County demonstrated acceptance of the

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[7] 43 C.F.R. 1864.0-5 (h).

[8] 43 C.F.R. 1864.1–2 (c)(3)

[9] 28 U.S.C. § 2409a.

[10] 28 U.S.C. 2409a (g).

[11] Case No. 2:08-CV-0315 CW.

express grant through designation of these roads as Class B – County General Highways and/or Kane County's improvement, maintenance, or repair of these roads at Kane County's and the state of Utah's expense. In 2011, the district court recognized Kane County's right-of-way claim for four of the roads identified in the lawsuit, including approximately 26 miles of the 33-mile-long Skutumpah Road that is located in the Grand Staircase-Escalante National Monument.