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Public Lands -- The Road Less Traveled: The 10th Circuit Adjudicates R.S. 2477 Claims Using a Piecemeal State-Law Approach Instead of a Uniform Federal Policy; Southern Utah Wilderness Alliance v. Bureau of Land Management, 425 F.3d 735 (10th Cir. 2005)

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CASE NOTE

PUBLIC LANDS—The Road Less Traveled: The 10th Circuit Adjudicates R.S. 2477 Claims Using a Piecemeal State-Law Approach Instead of a Uniform Federal Policy; *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735 (10th Cir. 2005).

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INTRODUCTION

In the fall of 1996 road crews employed by San Juan, Garfield, and Kane counties (hereinafter the "Counties") began construction on sixteen "roads" that ran through Bureau of Land Management (BLM) controlled lands in southern Utah.[1] Armed with graders and other earth-moving equipment, the Counties began to improve the existing primitive trails into graded roadways without permission or notification to the BLM.[2] With a few exceptions, the claimed rights-of-way were never previously graded by the Counties, although a few appeared to show signs of previous construction.[3] The Counties asserted ownership of several routes pursuant to Revised Statute 2477 (R.S. 2477), a Civil War-era law which granted rights-of-way for the "construction" of "highways" over public lands.[4] R.S. 2477 was repealed by the Federal Land Policy and Management Act of 1976 (FLPMA).[5] FLPMA, however, contained a savings clause which permitted R.S. 2477 claims perfected as of 1976 to continue to be valid.[6]

Nine of the asserted rights-of-way are located in the Grand Staircase-Escalante National Monument; six are situated in wilderness study areas; and six others lie on a mesa overlooking the Needles District of Canyonlands National Park.[7] Given the location of the claimed routes, it did not take long for conservation groups such as the Southern Utah Wilderness Alliance (SUWA) to take notice.[8] On October 2, 1996, SUWA filed suit against the BLM to force the agency

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[1] Southern Utah Wilderness Alliance v. Bureau of Land Management, 425 F.3d 735, 742 (10th Cir. 2005) [hereinafter *SUWA II*].

[2] *Id.*

[3] *Id.*

[4] *Id.* The meaning of the terms "construction" and "highway" are disputed in the principal case. *See, e.g,. infra* notes 92-93 and accompanying text for discussion of "highways" and note 99 and accompanying text for a discussion of "construction."

[5] Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 (2000).

[6] Pub. L. No. 94-579, § 701(a), 90 Stat. 2743 (1976).

[7] *SUWA II*, 425 F.3d at 742.

[8] *Id.* at 742.

to protect the "stunning red-rock canyon formations" and "pristine wilderness areas."[9] This lawsuit kicked off a nine-year court battle which culminated in the principal United States Court of Appeals for the Tenth Circuit case, *Southern Utah Wilderness Alliance* v. *Bureau of Land Management.*

The procedural path leading to the current case was lengthy and convoluted.[10] In the initial 1996 suit brought by SUWA against the BLM and the Counties, the BLM filed cross-claims against the Counties, alleging trespass and degradation of federal property.[11] The BLM sought injunctive and declaratory relief, as well as damages to restore the areas.[12] Despite objections from the Counties, the district court stayed the proceedings to allow the BLM to determine whether the routes in question were valid rights-of-way pursuant to R.S. 2477.[13] Lacking title records or any formal recording process, the BLM sought old maps, photographs, maintenance records, and public testimony to determine whether the Counties had established R.S. 2477 rights-of-way prior to 1976.[14] To aid in its determinations concerning validity of the rights-of-way, the BLM applied its own interpretations of the statutory language of R.S. 2477 instead of referring to Utah state law as suggested by the Counties.[15] The district court held that the BLM had primary jurisdiction over the claims and thus reviewed the BLM's voluminous findings concerning the history of the alleged rights-of-way under an arbitrary and capricious standard.[16] Having found that the BLM acted neither arbitrarily nor capriciously, the district court held that the Counties lacked valid rights-of-way on fifteen of the sixteen roads, and that Kane County had exceeded the scope on the sixteenth road.[17] The court did, however, find in favor of the Counties on the trespass issues.[18] The Counties appealed the decision to the Tenth Circuit Court of Appeals, claiming that the district court erred in granting the BLM primary jurisdiction and that the BLM should not have relied on its own interpretation of the statute but instead should follow state law.[19]

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[9] *Id.*

[10] Only the salient procedural history will be given here. For a more complete summary, *see SUWA II*, 425 F.3d 735, 742-44 (10th Cir. 2005).

[11] *SUWA II*, 425 F.3d at 742-43.

[12] *Id.*

[13] *Id.* at 743.

[14] *Id.* As will be discussed *infra*, the public acceptance of an R.S. 2477 grant required no formal action on the part of local governments, and the grantee was not required to record title. *See also SUWA II*, 425 F.3d at 741.

[15] *Id.* at 759.

[16] Southern Utah Wilderness Alliance v. Bureau of Land Management, 147 F. Supp. 2d 1130, 1134 (D. Utah 2001) [hereinafter *SUWA I*].

[17] *Id.* at 1137.

[18] *SUWA II*, 425 F.3d at 744.

[19] *Id.* at 758.

This case note will concern itself with only one of the Tenth Circuit's most controversial holdings, that concerning primary jurisdiction.[20] The court held that Congress did not grant the BLM authority to make binding determinations regarding the existence of valid R.S. 2477 claims.[21] Therefore, the court concluded "that the BLM lacks primary jurisdiction and that the district court abused its discretion by deferring to the BLM."[22] Consequently, "a remand [was] required to permit the district court to conduct a plenary review and resolution of the R.S. 2477 claims."[23] On remand the Tenth Circuit directed the district court to apply Utah state law to determine the validity of the R.S. 2477 claims.[24]

Ultimately, the Tenth Circuit made no specific findings concerning the sixteen roads.[25] However, the holdings it reached and precedents it set are certain to have far-reaching effects for those living in the West.[26] This case note will explore the controversial history of R.S. 2477 and identify the actors that make this seemingly simple law so contentious. Next, it will analyze the principal case and argue that the court incorrectly decided the issue of primary jurisdiction. Finally, this note will discuss the future of R.S. 2477, and argue that Congress should act to create a unified process in which to resolve these disputes.

BACKGROUND

In the 1860s, filled with the spirit of "manifest destiny," eastern settlers rapidly began homesteading on the newly acquired territories in the American West.[27]

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[20] *Id.* at 757. Black's Law Dictionary defines primary jurisdiction as "[a] judicial doctrine whereby a court tends to favor allowing an agency an initial opportunity to decide an issue in a case in which the court and the agency have concurrent jurisdiction." BLACK'S LAW DICTIONARY 1208 (Deluxe 7th ed. 1999).

[21] *SUWA II*, 425 F.3d at 757.

[22] *Id.* The court summed up its argument by stating "nothing in the terms of R.S. 2477 gives the BLM authority to make binding determinations on the validity of the rights of way granted thereunder, and we decline to infer such authority from silence when the statute creates no executive role for the BLM." *Id.* at 758.

[23] *SUWA II*, 425 F.3d at 758.

[24] *Id.* at 768.

[25] *Id.* at 758.

[26] The BLM manages roughly 258 million acres of land, most of which is located in twelve western states. BLM, *BLM Facts*, http://www.blm.gov/nhp/facts/index.htm (last visited March 8, 2007). It should be noted that while BLM-managed lands are in question in this case, the Tenth Circuit's decision has implications for all federally managed lands as well as private lands acquired from the federal government. *See generally* Brief of Amici Curiae Property Owners for Sensible Roads Policy et al. in Support of Affirmance of the District Court's Orders and in Support of Appellees Southern Utah Wilderness Alliance, Sierra Club, & the BLM, SUWA v. BLM, 425 F.3d 735 (10th Cir. 2005) (Nos. 04-4071, 04-4073).

[27] John Warfield Simpson, VISIONS OF PARADISE: GLIMPSES OF OUR LANDSCAPE'S LEGACY 98 (University of California Press 1999).

To encourage future growth and validate existing settlements, Congress enacted a series of laws, including the Mining Law of 1866.[28] Now codified in part as R.S. 2477, this statute contains few words and is seemingly straightforward. R.S. 2477 reads, in its entirety: "the right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted."[29]

More than a hundred years later, amidst the cultural transformations of the 1970s, Congress passed FLMPA.[30] FLPMA marked a change in the relationship of the American people vis-à-vis the land.[31] Instead of promoting the disposal of public lands and private settlement, the goals of FLPMA were conservation, preservation, multiple use, and retention of federal lands.[32] Consistent with this policy, FLPMA expressly repealed R.S. 2477.[33] However, in an innocuous sounding savings clause, FLPMA permitted those R.S. 2477 rights-of-way perfected prior to October 1, 1976, to remain in existence.[34] Thousands of R.S. 2477 claims are still in existence, and their validity remains uncertain.[35]

Despite the relatively uncontroversial history of R.S. 2477 prior to 1976, the death of the statute has, ironically, sparked considerable controversy for a variety of reasons.[36] Chief among these reasons are the uncertainty surrounding the statute's interpretation and implementation, inconsistent state and federal court opinions, and increased litigation.[37]

Statutory Uncertainty

Revised Statute 2477 has lead to much uncertainty for a variety of reasons.[38] First, the sparse language of the statute and legislative history give little guid-

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[28] *See* Brett Birdsong, *Road Rage and R.S. 2477: Judicial and Administrative Responsibility for Resolving Road Claims on Public Lands*, 56 HASTINGS L.J. 523, 526 (2005).

[29] 43 U.S.C. § 932 (repealed in 1976 by FLPMA). R.S. 2477 is part of the original 1866 Mining Law. *See SUWA II*, 425 F.3d 735, 740 (10th Cir. 2005).

[30] 43 U.S.C. § 1701 (2000).

[31] *SUWA II*, 425 F.3d at 740.

[32] *See* 43 U.S.C. § 1701 (2000).

[33] *Id.*

[34] 43 U.S.C. § 1701 (2000).

[35] As of 1993, the Department of the Interior stated there were approximately 5,600 pending R.S. 2477 claims. U.S. Dep't of Interior, Report to Congress on R.S. 2477: The History and Management of R.S. 2477 Claims on Federal and Other Lands 29 (June 1993) (microfiche available at University of Wyoming, Coe Library) [hereinafter DOI Rep. to Congress].

[36] Michael J Wolter, *Revised Statute 2477 Rights-of-Way Settlement Act: Exorcism or Exercise for the Ghost of Land Use Past?*, 5 DICK. J. ENVTL. L. & POL'Y 315, 317-18 (1996).

[37] *See infra* notes 38-109 and accompanying text.

[38] Wolter, *supra* note 36, at 319.

ance on how the public establishes a valid R.S. 2477 right-of-way.[39] Second, "the establishment of R.S. 2477 rights-of-way required no administrative formalities: no entry, no application, no license, no patent, and no deed on the federal side; no formal act of public acceptance on the part of the states or localities in whom the right was vested."[40] Therefore, it is often difficult to determine whether a valid right-of-way was established prior to the statute's repeal.[41]

State Law

Contributing to the uncertainty is the inconsistency of state case law.[42] The BLM has allowed states to interpret R.S. 2477 with the aid of state law.[43] Disputes that arose in state courts prior to 1976 usually involved adjudicating "claims by private landowners asserting access rights across neighbor's [sic] property."[44] These cases usually did not involve any federal interests and, thus, the federal government rarely made an appearance.[45] In the absence of federal participation, states construed R.S. 2477 liberally and applied various standards taken from state law.[46] According to a 1993 Report to Congress from the Department of the Interior:

> Some state statutes contain language that is very broad, while others specifically lay out definitions and formal procedures. In other states, only formal petitions through public officials are sufficient to establish a highway. Some statutes declare that public use of a road over time can establish a highway. Other statutes set forth definitions of highways that are open to interpretation. Many states have enacted multiple statutes providing for several factors that may operate to establish a highway. Some state statutes refer to undocumented roads.[47]

There are, however, some principles that seem to be fairly established by state law.[48] Courts have generally held that the federal government, by enacting R.S. 2477, was making an offer to the public for the establishment of highways.[49] As

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[39] *Id.*

[40] *SUWA II*, 425 F.3d 735, 741 (10th Cir. 2005).

[41] *Id.*

[42] *Id.*

[43] For example, the terms "construction" and "highway" were interpreted by reference to state law. *See, e.g.*, *SUWA II*, 425 F.3d at 762.

[44] Birdsong, *supra* note 28, at 527.

[45] *Id.*

[46] *Id.* at 527. Moreover, the state law that does exist generally does not deal with R.S. 2477 directly but focused on the issue of public highways. DOI Rep. to Congress, *supra* note 35, at 15.

[47] DOI Rep. to Congress, *supra* note 35, at 15.

[48] Wolter, *supra* note 36, at 328.

[49] *See* Wolter, *supra* note 36, at 327 (citing 59 Fed. Reg. 39,218 (Aug. 1, 1994)).

Wolter stated, "[s]tate law governs the terms of acceptance and scope of the right-of-way, insofar as those terms consist with those of the offer."[50] There are limits imposed by the language of R.S. 2477 on how a state can make its acceptance.[51] For example, many states attempted to accept the offer of R.S. 2477 highways by enacting legislation that would create a road on every map section line.[52] Interior Secretary Bliss, in 1898, rejected one such attempt by Douglas County, Washington, and stated that the idea "embodies the manifestation of a marked and novel liberality on the part of the county authorities dealing with the public land."[53]

A 2003 Wyoming Supreme Court opinion illustrates how the application of state law governs R.S. 2477 claims.[54] In this case, a rancher brought suit to enjoin recreationists from using a trail across his property to access a national forest.[55] The recreationists claimed that an R.S. 2477 right-of-way had been established.[56] The court found that a 1919 Wyoming statute was controlling on the issue regarding the establishment of a valid R.S. 2477 right-of-way.[57] The statute "effectively vacated the public status of any road, including those established pursuant to R.S. 2477, which [sic] were not recorded and established by the pertinent board of county commissioners."[58] Thus the claimed R.S. 2477 right-of-way was invalid because the road was not registered with the state as required by Wyoming law.[59]

In addition to state case law, federal case law has fleshed out some important principles concerning R.S. 2477. As will be discussed below, however, federal courts have generally reached inconsistent results.

Federal Cases

Despite R.S. 2477's 100-plus-year existence, there is relatively little federal case law concerning this statute.[60] Most of the cases that do exist were decided

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[50] Wolter, *supra* note 36, at 328. *See also* Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988) (discussing the application of state law to establish scope of an R.S. 2477 right-of-way).

[51] Wolter, *supra* note 36, at 328.

[52] DOI Rep. to Congress, *supra* note 35, at 15. The establishment of these "highways" would have checkered the country at one mile intervals. *See* Douglas County, Washington, 26 Pub. Lands Dec. 446 (U.S. Dept. of Int. 1898).

[53] Douglas County, Washington, 26 Pub. Lands Dec. 446 (U.S. Dept. of Int. 1898).

[54] Yeager v. Forbes, 78 P.3d 241 (Wyo. 2003).

[55] *Id.* at 245.

[56] *Id.* at 255.

[57] *Id.* The 1919 statute was amended in a 1920 statute which was codified as Wyo. Stat. Ann. § 24-1-101. *See Yeager*, 78 P.3d at 251.

[58] *Yeager*, 78 P.3d at 255.

[59] *Id.*

[60] Birdsong, *supra* note 28, at 528.

after 1976.[61] One reason for the paucity of cases is that the federal government's primary goal prior to 1976 was the quick disposal of land, therefore, there was little need for federal litigation over these property rights.[62] Additionally, the grant of the right-of-way was self-executing and required no formal process of recognition by the federal government.[63] According to a 1993 Department of Interior Report to Congress, the federal cases had "established no clear judicial precedents."[64]

There are, however, some federal precedents that have wide approval. In general, courts have held that R.S. 2477 applied both retrospectively and prospectively.[65] One of the first Supreme Court cases to discuss R.S. 2477 was *Central Pacific Railway Co. v. Alameda County*.[66] In *Central Pacific*, the Court held that a road established prior to the enactment of the statute was afforded protection under R.S. 2477, and that the statute applied retrospectively and amounted to congressional recognition of pre-existing rights.[67] Most federal courts have also held that R.S. 2477 rights apply equally to roads used for mining and homesteading purposes as to other purposes.[68] Furthermore, an R.S. 2477 right-of-way is

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[61] *Id.*

[62] *Id.*

[63] 43 C.F.R. § 244.58 (1939) ("No application should be filed under R.S. 2477, as no action on the part of the Government is necessary.").

[64] *See* DOI Rep. to Congress, *supra* note 35, at 16.

[65] DOI Rep. to Congress, *supra* note 35, at 16. *Contra* United States v. Dunn, 478 F.2d 443 (9th Cir. 1973) (holding that R.S. 2477 applied only to rights which existed prior to 1866—the statute's enactment—and did not establish any new rights after 1866).

[66] Cent. Pac. R.R. Co. v. Alameda County, 284 U.S. 463 (1932). The Supreme Court also addressed R.S. 2477 in Colorado v. Toll, 268 U.S. 228 (1925). In that case the State of Colorado passed a bill that forbade the superintendent of Rocky Mountain National Park from establishing a monopoly over R.S. 2477 rights-of-way across the park in a scheme for profit. *Id.* at 229. The Court stated that the statute creating the park did not affect the preexisting rights of private landholders or the state, particularly the right to use the road. *Id.* at 231. The statute also did not, absent an act of cession from the state and acceptance from the national government, curtail the jurisdiction of the state. *Id.* Thus the Court ordered an injunction to prevent the superintendent from continuing actions in which he lacked authority. *Id.*

[67] *Cent. Pac. R.R. Co.*, 284 U.S. at 471. In *Central Pacific*, the railroad company sued Alameda County in an action to quiet title on a right-of-way used as a railroad track. *Id.* at 465. Prior to the railroad track, there had been a public highway through the same steep canyon. *Id.* at 455-66. Flood waters forced the highway to be moved from one side of the canyon to the other, putting the railroad right-of-way in conflict with the proposed road. *Id.* at 466. The original road was established by the county, in accordance with state law, "by the passage of wagons, etc., over the natural soil." *Id.* at 467. Central Pacific claimed that Alameda County had no right to the highway because it was established in 1859, twenty-seven years prior to R.S. 2477. *Id.* at 467. The Court disagreed and stated that Congress acquiesced to the public's use and establishment of highways, and therefore R.S. 2477 was a voluntary recognition of preexisting rights. *Id.* at 471.

[68] DOI Rep. to Congress, *supra* note 35, at 16. The DOI report noted:

> The vast majority of cases have found that highway rights-of-way are not limited to the mining and homesteading context. The common logic is that

property which must be compensated by the government if taken by eminent domain.[69] Finally, most courts agree that an R.S. 2477 right-of-way must be accepted by state action, although public use is generally sufficient.[70]

The Tenth Circuit has been involved in greater litigation over the subject than most circuits, with cases from Utah being common.[71] One of the most important cases from that state is *Sierra Club* v. *Hodel*.[72] *Hodel* arose in the early 1990s after Garfield County sought to significantly improve the existing Burr Trail in southern Utah.[73] Conservation groups brought suit in district court to force the BLM to stop the county's construction.[74] They argued that an R.S. 2477 right-of-way had not been created; that even if it had, Garfield County had exceeded the scope of the right-of-way; and that an environmental impact statement was required because the BLM's participation in the project amounted to "major federal action."[75] The district court stated that, according to Tenth Circuit precedent:

> [I]nitial determination of whether activity falls within an established right-of-way is to be made by the BLM and not by the court. The court should pay considerable deference to the BLM's experience in examining the stakes, determining traffic patterns

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> section 8 of the 1866 act has been reenacted, in a distinct and independent statute, Revised Statute 2477, separate from the other provisions of the 1866 Mining Act.

Id.

[69] United States v. 9,947.71 Acres of Land, 220 F.Supp. 328, 337 (D. Nev. 1963) (holding that an R.S. 2477 right-of-way is property that is subject to compensation if taken by the government).

[70] *See, e.g.*, Wilderness Soc'y v. Morton, 479 F.2d 842 (D.D.C. 1973) (holding that the State's contract to build a road to assist in pipeline construction was sufficient to accept the R.S. 2477 right-of-way).

[71] Still Standing Stable, LLC v. Allen, 122 P.3d 556 (Utah 2005); Southern Utah Wilderness Alliance v. Bureau of Land Management, 425 F.3d 735 (10th Cir. 2005); San Juan County, Utah v. United States, 420 F.3d 1197 (10th Cir. 2005); Sierra Club v. Lujan, 949 F.2d 362 (10th Cir. 1991); Wilderness Society v. Kane County, Utah, 2006 WL 2471518 (D. Utah 2006); Southern Utah Wilderness Alliance v. National Park Service, 387 F.Supp. 2d 1178 (D. Utah 2005); Southern Utah Wilderness Alliance v. Babbitt, 2000 WL 33914094 *1 (D. Utah 2000); United States v. Garfield County, 122 F. Supp. 2d 1201 (D. Utah 2000); Washington County v. United States, 1996 WL 590911 *1 (D. Utah 1996).

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

[73] *Sierra Club*, 675 F. Supp. at 596.

[74] *Id.* at 594.

[75] *Id.* at 599. The National Environmental Policy Act (NEPA) mandates that an EIS is required for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C) (2000).

> and evaluating the impact of the project on the surrounding environment.[76]

On appeal to the Tenth Circuit, the Sierra Club conceded the existence of the right-of-way but renewed its argument that the scope of the right-of-way had been exceeded.[77] The appeals court concurred with the district court that the BLM was permitted to make initial determinations, noting that the "district court based its findings of fact largely on the testimony and exhibits of several BLM experts."[78] However, contrary to the Sierra Club's contention, the Tenth Circuit held that state law, not federal law, governed the scope of an R.S. 2477 right-of-way.[79] The court did not reach the issue concerning whether state or federal law governs the establishment of a valid R.S. 2477 right-of-way.[80]

These federal cases leave many unresolved questions concerning R.S. 2477.[81] What is the relationship between state and federal law? How does R.S. 2477 interact with FLPMA's goals? Is actual construction required or can "mere use" be sufficient? To what does the term "highway" refer?

Agency Policies

The BLM and its parent agency, the Department of Interior (DOI), have been inconsistent in how they have interpreted and applied R.S. 2477 through the years.[82]

Prior to 1976, consistent with the policy of federal land disposal, there was little DOI guidance on R.S. 2477.[83] In fact, from 1866 to 1898 the DOI provided no regulations.[84] In 1898, the Secretary of the Interior declared unlawful an attempt by Douglas County, Washington, to dedicate sections lines as R.S. 2477 rights-of-way.[85] In 1938, the DOI stated, for the first time, that an R.S. 2477

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[76] *Id.* at 606 (citing City and County of Denver v. Bergland, 695 F.2d 465, 481 (10th Cir. 1982)).

[77] Sierra Club v. Hodel, 848 F.2d. 1068, 1079 (10th Cir. 1988).

[78] *Id.* at 1085 (citing *Bergland*, 695 F.2d at 481).

[79] *Id.* at 1080. In reaching this conclusion the court found the following relevant: BLM regulations supporting the application of state law, congressional acquiescence in the use of state law, and state court precedents applying state law to determine perfection of an R.S. 2477 right of way. *Id.* at 1082. Applying Utah state law, the court held that the county retains all rights to the roads as they existed in 1976. *Id.* at 1083.

[80] *Id.* at 1079.

[81] DOI Rep. to Congress, *supra* note 35, at 12.

[82] Wolter, *supra* note 36, at 317-18.

[83] DOI Rep. to Congress, *supra* note 35, at 15; Birdsong, *supra* note 28, at 527.

[84] DOI Rep. to Congress, *supra* note 35, at 20.

[85] *See* Douglas County Wash., 26 Pub. Lands Dec. 446 (U.S. Dept. of Int. 1898).

grant becomes effective "upon the construction or establishment of highways, in accordance with state laws, over public lands not reserved for public uses. No application should be filed under the act, as no action on the part of the federal government is necessary."[86] This policy was reestablished several times prior to 1976.[87] A 1955 "decision by the DOI shows that R.S. 2477 was considered an authority by which highways could be established across public lands."[88]

After the repeal of R.S. 2477 in 1976, the DOI and the BLM became more active in their management of federal lands and rights-of-way therein.[89] In 1979, the BLM, after realizing the need to manage valid, existing rights-of-way, initially proposed regulations which would have required claimants to file rights-of-way claims within three years.[90] When the final regulations were proposed, the filing requirement became optional; later, the three-year filing window was dropped altogether.[91] In 1994, following a DOI Report detailing the history and management problems associated with R.S. 2477, the BLM again proposed a rule "to clarify the meaning of the statute and provide a workable administrative process and standards for recognizing valid claims."[92] To this end, the proposed regulation would have defined "construction" to require actual, physical construction, and "highway" to require an open public road connecting "places between which people or goods traveled."[93] The proposed rule was never adopted because, in 1996, before publishing of the final regulations, Congress passed an omnibus bill that prohibited all rulemaking regarding R.S. 2477.[94]

Aside from the agency rulemaking, the 1980s and 1990s witnessed many informal policies adopted by DOI solicitors. In 1980, the Interior Solicitor, concerned about the inconsistent court precedents and management of R.S. 2477 under FLPMA, sent a letter to the Assistant Attorney General of the Department

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[86] 43 C.F.R. § 244.55 (1938).

[87] *See* DOI Rep. to Congress, *supra* note 35, at 20.

[88] DOI Rep. to Congress, *supra* note 35, at 20; *see* 43 C.F.R. § 2822.2-2 (1970).

[89] For example, FLMPA, passed in 1976, required federal land managers to actively manage federal lands and develop extensive land use plans. 43 U.S.C. § 1712 (2000).

[90] 43 C.F.R. § 2802.3-6 (1979). The proposed regulations would have required a project description, an environmental protection plan, and a detailed map. *Id.* Additionally, the proposed regulation provided a process for granting or denying the application. 43 C.F.R. § 2802.4 (1979). The application could be denied if the proposed right-of-way was not in the public interest or if the applicant did not demonstrate the financial or technical capability to complete the construction. *Id.* The requirements necessary to establish the existence of the road, however, were noticeably absent from the proposed rule. *See Id.*

[91] 43 C.F.R. § 2802.3-6 (1980); 43 C.F.R. § 2802.3 (1982).

[92] 59 Fed. Reg. 39216 (Aug. 1, 1994).

[93] *Id.*

[94] 110 Stat. 3009-200 (1996).

of Justice, Land and Natural Resources Division.[95] The solicitor, interpreting R.S. 2477, stated that the federal grant of an R.S. 2477 right-of-way applied prospectively; the validity of any claim was a matter of federal law; the phrase "land not reserved for public use" applied to Indian reservations, wildlife refuges, and national parks; and R.S. 2477 required actual construction, not mere use of a route over time.[96]

In 1988, DOI Secretary Hodel, in response to what was perceived to be Alaska's unique problem of having an underdeveloped transportation system, adopted the so-called Hodel Policy, which defined the criteria for the perfection of an R.S. 2477 right-of-way.[97] The term "construction" was interpreted broadly to allow establishment by mere foot or animal travel, "highways" could be established by the expenditure of government monies, and the federal government was said to have neither the duty nor the authority to adjudicate claims.[98]

In 1997, DOI Secretary Babbitt instituted the "Babbitt Policy" in response to Congress' prohibition on final rulemaking regarding the resolution of R.S. 2477 claims.[99] The Babbitt Policy expressly revoked the Hodel Policy, and allowed agency determinations concerning the validity of R.S. 2477 rights-of-way only in situations where there was a pressing need to do so.[100] According to the Babbitt Policy, R.S. 2477 claims were to be decided by the application of state law which existed at the time of R.S. 2477's repeal, but only "to the extent that it is consistent with federal law."[101]

In sum, this review of relevant state, federal, and DOI precedent demonstrates that the historical interpretations of R.S. 2477 have provided few clear guidelines.[102] There are four reasons for the confusion. First, the statutory lan-

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[95] Letter from Deputy Solicitor Frederick Ferguson, to Hon. James W. Moorman, *Standards to be Applied in Determining Whether Highways Have Been Established under the Repealed Statute R.S. 2477 (43 U.S.C. 932)*, 2 (Apr. 28, 1980) (copy available in DOI Rep. to Congress, *supra* note 35, at appendix).

[96] *Id.* at 2-5.

[97] DOI Rep. to Congress, *supra* note 35, at 21-22. The goal of the Hodel Policy was to establish criteria in which federal land managers and interested parties could recognize the existence of R.S. 2477 claims and apply these criteria to all lands under DOI jurisdiction. *Id.* at 23.

[98] *Id.* at 23-24. *See also* Memorandum from Secretary of the Interior, Gale Norton, to Assistant Secretaries of Land and Minerals Management, Fish, Wildlife, and Parks, Indian Affairs, and Water and Science Departmental Implementation of SUWA v. BLM 2 (Mar. 22, 2006) [hereinafter "Norton Memo"] (copy located in DOI Rep. to Congress, *supra* note 35, at appendix).

[99] *See* Norton Memo, *supra* note 98, at attachment 1, 2.

[100] *See id.* While the Hodel Policy permitted broad determinations of the validity of R.S. 2477 claims, the Babbitt Policy restricted agency determinations to rare situations in which a "claimant demonstrated an immediate and compelling need for a determination." *Id.*

[101] *Id.*

[102] Birdsong, *supra* note 28, at 531.

guage and legislative history of R.S. 2477 are shrouded in mystery.[103] Second, the granting of the right-of-way required no formal action of recognition on the part of the government. Thus, often few records exist to determine the validity of a claimed right-of-way.[104] Third, the paucity of federal case law concerning R.S. 2477, coupled with often inconsistent state cases, has created much confusion in interpreting the statute.[105] Finally, there has been a lack of uniformity in determining rights-of-way by the BLM and DOI throughout the statute's lifetime.[106]

By 1996, all of the various threads had coalesced to knot up the courts with confusion and uncertainty.[107] Against this backdrop the Southern Utah Wilderness Alliance filed its case in Utah federal district court. The Tenth Circuit's resolution of the case in 2005 now forms the guidepost for DOI/BLM policy nationwide.[108] Thus, in a sense, it is a step toward clarity. However, it has also opened a Pandora's box.[109]

PRINCIPAL CASE

In October of 1996, SUWA brought suit in federal court against the BLM and the Counties, claiming the Counties were engaging in unlawful road building activities and the BLM was unlawfully acquiescing to the Counties.[110] The BLM cross-claimed against the Counties, alleging trespass in violation of FLPMA.[111] The district court stayed the proceedings to allow the BLM to make an initial determination of the validity of the Counties' claims.[112] After the BLM concluded that fifteen of the sixteen rights-of-way were invalid and that the scope of one of the rights-of-way was exceeded, SUWA sought summary judgment in the district court to enforce the BLM's findings.[113] The district court, interpreting the motion for summary judgment as an agency appeal, discussed the validity of the BLM's findings in accordance with the Administrative Procedure Act's (APA) arbitrary and capricious standard.[114]

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[103] *Id.* at 526.

[104] *SUWA II*, 425 F.3d 735, 741 (10th Cir. 2005).

[105] Norton Memo, *supra* note 98, at attachment 1, 6.

[106] *SUWA II*, 425 F.3d at 760.

[107] Wolter, *supra* note 36, at 319; Birdsong, *supra* note 28, at 527-33.

[108] Norton Memo, *supra* note 98, at 1.

[109] *See infra* notes 166-77 and accompanying text.

[110] SUWA v. BLM, No. 96-836, slip op. at 2-3 (D. Utah May 11, 1998). Specifically, SUWA claimed the Counties violated FLPMA, the Antiquities Act, and the National Environmental Policy Act. *SUWA II*, 425 F.3d at 742.

[111] *SUWA II*, 425 F.3d at 742-43.

[112] *Id.* at 743.

[113] *Id.*

[114] *SUWA I*, 147 F. Supp.2d at 1136. The APA requires a court to review a final action to determine whether the action is arbitrary or capricious. Administrative Procedures Act, 5 U.S.C. § 706(2)(A) (2000).

District Court (SUWA I)

The court began its analysis by discussing the proper scope of review for informal agency adjudications under the APA.[115] The court asserted that the proper standard of review for the agency's factual conclusions was an arbitrary or capricious standard.[116] An arbitrary or capricious standard, which the Tenth Circuit interprets as requiring "an administrative agency determination . . . [to] be supported by 'substantial evidence' found in the administrative record as a whole."[117] On the other hand, review of an agency's statutory interpretation, if made in an "informal policy statements and opinion letters, rather than a formal rule or regulation," is given *Skidmore* deference.[118] Under *Skidmore*, an agency's interpretation is given deference only if it has the "power to persuade."[119]

With these standards in place, the court moved to the substantive issues of the case. It began by reviewing the factual record and determined that the Counties failed to carry their burden of proving the BLM acted arbitrarily and capriciously.[120] Specifically, the court found the BLM's conclusions—that all of the rights-of-way claimed by the Counties were invalid, save one—were supported by the "substantial evidence" required, and, therefore, it upheld the BLM's determinations.[121]

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[115] *SUWA I*, 147 F. Supp. 2d 1130, 1133 (D. Utah 2001).

[116] *Id. See also* 5 U.S.C. § 706(2)(A). The definition of this standard comes from a United States Supreme Court decision, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983), which states that an agency decision is arbitrary and capricious if:

> the agency has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not ascribed to a difference in view or the product of agency expertise.

Motor Vehicle, 463 U.S. at 43.

[117] *SUWA I*, 147 F. Supp. 2d at 1136-37 (citing Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1575 (10th Cir. 1994)). According to *Olenhouse*:

> Where questions of due process and sufficiency of the evidence are raised on appeal from an agency's final decision, the district court must review the agency's decisionmaking process and conduct a plenary review of the facts underlying the challenged action. *It must find and identify substantial evidence to support the agency's action and may affirm agency action, if at all, only on the grounds articulated by the agency itself.*

42 F.3d at 1566 (emphasis added).

[118] *SUWA I*, 147 F. Supp. 2d at 1135 (citing Skidmore v. Swift & Co., 323 U.S. 134 (1944)).

[119] *Id.* at 1135 (quoting *Skidmore*, 323 U.S. at 140).

[120] *Id.*

[121] *Id.* at 1137-38. The court did not discuss how the record supported each and every invalidation of the Counties' claims, but summarily stated that "[t]he amount and nature of the evidence presented in support of each of the BLM's determinations is certainly more than a mere scintilla, is sufficient to support the agency's conclusions, and is not outweighed by contrary evidence." *SUWA I*, 147 F. Supp. 2d at 1137.

Two years after the district court ruled on *SUWA I* the Tenth Circuit Court of Appeals decided the case on appeal.[122]

Tenth Circuit Court of Appeals (SUWA II)

In *SUWA II,* the court addressed the issue of primary jurisdiction over R.S. 2477 rights-of-way and ultimately found that the doctrine did not apply.[123] First, the court noted that "[t]he circuits are split over the standard of review of decisions whether to recognize the primary jurisdiction of an administrative agency."[124] The Tenth, Fourth, and District of Columbia Circuits apply an abuse of discretion standard; the First, Second, Eighth, and Ninth Circuits apply a *de novo* standard to the decision over whether to recognize primary jurisdiction.[125] The court ultimately chose to follow Tenth Circuit precedent and apply the former standard.[126] Under the abuse of discretion standard, courts can disturb the BLM's factual findings only if they are arbitrary or capricious.[127] The court set forth the following framework for determining whether primary jurisdiction applied. First, a court must determine whether Congress has "given authority over the issue to an administrative agency."[128] Second, the court must consider whether the reasons and purposes for primary jurisdiction are present.[129] The reasons for primary jurisdiction are twofold.[130] First, the doctrine is used to promote uniformity.[131] Second, it allows those with special expertise to adjudicate issues that are not normally fully understood by judges.[132] If all of these elements are present, a court will apply the doctrine of primary jurisdiction.[133]

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[122] *SUWA II,* 425 F.3d 735 (10th Cir. 2005). Initially, the appeals court rejected the Counties' request for repeal for lack of jurisdiction, reasoning that it could not rule on the case until the district made a final order as required under 28 U.S.C. § 1291. SUWA v. BLM, 69 Fed. Appx. 927 (10th Cir. 2003). Shortly thereafter, the Southern Utah Wilderness Alliance went to the district court, seeking injunctive relief and damages. *SUWA II,* 425 F.3d at 744. The district granted these requests, and the Counties, now with a final order to appeal, brought the case to the Tenth Circuit Court of Appeals where review was granted. *Id.*

[123] *SUWA II,* 425 F.3d at 757.

[124] *Id.* at 750.

[125] *Id.*

[126] *Id.*

[127] *SUWA II,* 425 F.3d at 750.

[128] *Id.* at 751.

[129] *Id.*

[130] *Id.*

[131] *SUWA II,* 425 F.3d at 751.

[132] *Id.*

[133] *Id.*

The *SUWA II* court then applied these elements to the facts.[134] The first issue addressed by the court was whether Congress had given the BLM the authority necessary for primary jurisdiction.[135] The court, relying on the absence of explicit authority in R.S. 2477, past agency positions, and recent congressional prohibitions on R.S. 2477 rulemaking, concluded that the BLM did not have primary jurisdiction of R.S. 2477 right-of-way disputes.[136]

The first rationale the court gave for denying the BLM primary jurisdiction to make binding determinations of the validity of R.S. 2477 claims was the absence of explicit congressional authority.[137] The statutory language of R.S. 2477 does not state whether courts or an agency should resolve R.S. 2477 disputes.[138] The BLM contended that, in the absence of explicit statutory authority, general statutes giving BLM the authority to administer the public lands provided a sufficient basis for primary jurisdiction.[139] Specifically, the agency claimed that 43 U.S.C. § 2 (2000) and 43 U.S.C. § 1201 (2000) both give the Secretary of the Interior broad authority to administer the public lands, including the authority to make binding administrative determinations concerning the validity of R.S. 2477 claims.[140] The BLM also relied on the Supreme Court's decision in *Cameron v. United States* to support its claim of primary jurisdiction.[141] In *Cameron* the Court held that the Land Department (precursor to the BLM) was permitted to make a binding determination concerning the validity of an unpatented mining claim despite the absence of explicit statutory authority.[142] The *Cameron* Court stated that in the absence of some direction to the contrary, general statutory provisions gave the Land Department the authority to adjudicate the validity of unpatented mining claims.[143] Similarly, the BLM argued in *SUWA II*, in the absence of congressional direction to the contrary, the general statutory authority vested in the Secretary of the Interior provides the authority necessary for primary jurisdiction over R.S. 2477 disputes.[144]

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[134] *Id.*

[135] *Id.*

[136] *Id.* at 751-58.

[137] *SUWA II*, 425 F.3d at 757.

[138] *Id.* at 751.

[139] *Id.* at 752.

[140] *Id.* 43 U.S.C. § 2 (2000) states: "The Secretary of the Interior or such office . . . shall perform all executive duties appertaining to the surveying and sale of the public lands of the United States . . . and the issuing of patents for all grants of land under the authority of the Government." 43 U.S.C. § 1201 states: "The Secretary of the Interior . . . is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of Title 32 of the Revised Statutes not otherwise specifically provided for."

[141] *SUWA II*, 425 F.3d at 753 (citing Cameron v. United States, 252 U.S. 450 (1920)).

[142] *Id.*

[143] *Id.* (citing *Cameron*, 252 U.S. at 461).

[144] *Id.*

The *SUWA II* court took issue with the comparison drawn between the unpatented mining claim in *Cameron* and R.S. 2477 rights-of-way.[145] The court noted that, with respect to unpatented mining claims, Congress provided a specific system—the issuance of a patent—for the agency to pass legal title to a claimant who satisfies certain statutory prerequisites.[146] Prior to issuance of a patent, the BLM has the authority to make binding determinations concerning the validity of the unpatented mining claim; after issuance of a patent, disputes concerning the mining claim are resolved in court.[147] In R.S. 2477 Congress established a different system.[148] R.S. 2477 provides no patent process and legal title may pass independent of any formal agency action.[149] Unlike the formal requirements needed for issuance of a patent for a mining claim, R.S. 2477 requires only "acts on the part of the grantee sufficient to manifest an intent to accept the congressional offer."[150] And unlike the patent process for mining claims, "R.S. 2477 creates no executive role for the BLM to play."[151] *Cameron*, the court concluded, does not stand for the proposition that general statutory provisions provide the congressional authority necessary for the agency to adjudicate the validity of R.S. 2477 rights-of-way.[152]

In addition to the absence of explicit congressional authority to adjudicate R.S. 2477 claims, the *SUWA II* court found that longstanding BLM practice confirmed that the BLM did not historically believe it had primary jurisdiction over R.S. 2477 disputes.[153] The court observed that "until very recently, the BLM staunchly maintained that it lacked authority to make binding decisions on R.S. 2477 rights-of-way."[154] In support of this contention, the court referred to several Interior Board of Land Appeal (IBLA) decisions in which the agency generally asserted, "'courts [are] . . . the proper forum for determining whether there is a public highway under [R.S. 2477].'"[155] Additionally, the court noted that "[t]he BLM also has been reluctant, until very recently, to issue regulations governing R.S. 2477 rights-of-way."[156] For example, from 1939 to 1974 the agency refused

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[145] *Id.*

[146] *Id.*

[147] *SUWA II*, 425 F.3d at 753-54 (citing Steel v. St. Louis Smelting & Refining Co., 106 U.S. 447, 451 (1882); *see* United States v. Schurz, 102 U.S. 378, 396 (1880)).

[148] *SUWA II*, 425 F.3d. at 754.

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *SUWA II*, 425 F.3d. at 754.

[154] *Id.*

[155] *Id.* at 755 (quoting Leo Titus, Sr., 89 IBLA 323, 337 (1985)).

[156] *Id.*

to involve itself in R.S. 2477 disputes.[157] Moreover, the court noted that Congress barred the agency from recent attempts to promulgate rules relating to R.S. 2477 by a 1997 omnibus bill.[158] Although the court acknowledged this congressional prohibition referred only to rulemaking, "its mere existence undercuts the BLM's primary jurisdiction argument. For primary jurisdiction is appropriate only if R.S. 2477 is an 'issue[] which, under a regulatory scheme, ha[s] been placed within the special competence of an administrative body.'"[159]

The court concluded that, in the absence of an explicit grant of congressional authority, the BLM did not have primary jurisdiction over R.S. 2477 rights-of-way disputes.[160] The court, however, explicitly stated that the agency may make non-binding adjudications for land use planning purposes.[161] These non-binding administrative determinations are not given formal legal deference, but may be used as evidence in litigation.[162] An example of this non-binding administrative determination procedure, the court stated, was *Sierra Club v. Hodel*.[163] According to the *SUWA II* court, *Sierra Club v. Hodel* was not, as argued by the BLM, a primary jurisdiction referral, but an opportunity for the agency to "determine its own position in the litigation."[164]

Because the *SUWA II* court concluded that the district court abused its discretion when it found the doctrine of primary jurisdiction applied to R.S. 2477 disputes, the case was remanded "to permit the district court to conduct a plenary review and resolution of the R.S. 2477 claims."[165]

ANALYSIS

The *SUWA II* court's holding, that the DOI does not have primary jurisdiction over R.S. 2477 rights-of-way, instigated a reversal in DOI policy.[166] The Secretary of the Interior stated that *SUWA II* "effectively requires the Department

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[157] *Id.* at 755-56. *See, e.g.*, 43 C.F.R. § 244.55 (1939); 43 C.F.R. § 244.58(a) (1963); 43 C.F.R. § 2822.1-1 (1974).

[158] *SUWA II*, 425 F.3d at 756 (citing Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208 (1996)).

[159] *SUWA II*, 425 F.3d at 756-57 (quoting United States v. W. Pac. R.R. Co., 352 U.S. 59, 64 (1956)).

[160] *Id.* at 757 ("[N]othing in the terms of R.S. 2477 gives the BLM authority to make binding determinations on the validity of the rights of way granted thereunder . . . [w]e conclude that the BLM lacks primary jurisdiction . . . .").

[161] *SUWA II*, 425 F.3d at 757.

[162] *Id.* at 758.

[163] *Id.* at 757 (citing Sierra Club v. Hodel, 848 F.2d. 1068 (10th Cir. 1988)).

[164] *SUWA II*, 425 F.3d at 758.

[165] *Id.*

[166] Norton Memo, *supra* note 98, at 1.

to alter its current administration of R.S. 2477" nationwide.[167] Thus, the Hodel and Babbitt policies were terminated.[168] The DOI will now apply state law, to the extent it does not conflict with federal law, to make non-binding determinations concerning the validity of an R.S. 2477 right-of-way, therefore, the possibility of adopting a nationwide interpretation of R.S. 2477 has been foreclosed.[169] Given the potential problems of making non-binding R.S. 2477 validity determinations on a state-by-state basis, the agency urges resolution of R.S. 2477 disputes through other means, such as "Title V of FLPMA or other right-of-way authorities, recordable disclaimers, and the Quiet Title Act."[170] Because the DOI is prohibited from making binding determinations on R.S. 2477 claims in the Tenth Circuit, the DOI has formulated a six-step process for making non-binding validity determinations (NBD).[171] These NBDs have no force of law, bind neither party, and are simply a tool for the BLM to plan and manage the land.[172] As will be discussed below, this nationwide change in DOI policy could have been avoided if the *SUWA II* court would have correctly decided the issue of primary jurisdiction.

Primary jurisdiction, as the *SUWA II* court explained, is a prudential doctrine that allocates responsibility between agencies and courts.[173] The application of the doctrine is used to promote uniformity and to allow agency experts to resolve complex issues not generally within the normal competence of the judiciary.[174] The framework for analyzing primary jurisdiction proffered by the *SUWA II* court is

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[167] *Id.* at Attachment 1, 4.

[168] *Id.*

[169] *Id.* ("Thus, while the Department may make non-binding, administrative determinations for its own land-use planning and management purposes, it cannot create a single national standard governing the validity of all R.S. 2477 claims, but instead must look to the particular laws of each State in which a claimed right of way is situated.").

[170] Norton Memo, *supra* note 98, at Attachment 1, 4. Title V of FLPMA permits the granting of rights-of-way, irrespective of potential R.S. 2477 rights, through recordable disclaimers. *See* 43 U.S.C. § 1745. However, many groups prefer the use of R.S. 2477 because it requires no administrative process and is subject to fewer restrictions. Recordable disclaimers are discussed in 43 C.F.R. § 1864, and derive statutory authority from FLPMA § 315. As asserted by the Memo, these disclaimers "have the same effect as a quitclaim deed, estopping the United States from asserting a claim to the interest that is disclaimed." Norton Memo, *supra* note 98, at Attachment 1, 6. Because *SUWA II* determined that claims to property interest are judicial functions, claimants seeking "binding determinations of . . . R.S. 2477 rights . . . must file a claim under the Quiet Title Act, 28 U.S.C. § 2409(a)." *Id.* For an example of a proposed solution to the problems associated with R.S. 2477 *see supra* notes 95-96 and accompanying text.

[171] Norton Memo, *supra* note 98, at Attachment 1, 4.

[172] *Id.*

[173] *SUWA II*, 425 F.3d 735, 750 (10th Cir. 2005).

[174] *Id.*; United States v. W. Pac. R.R. Co, 352 U.S. 59 (1956).

accurate.[175] However, the court reached the wrong conclusion by misapplying the elements and ignoring important precedent.[176] As acknowledged by the *SUWA II* court, analysis of primary jurisdiction involves a three-step process.[177] First, the court must determine whether Congress has given authority to the agency to deal with the issue.[178] If authority has been given, the driving question becomes whether the purpose of the doctrine—uniformity and agency expertise—are present.[179] The second step is to determine if application of the doctrine would promote uniformity.[180] In the third step, the court inquires as to whether the issue is one within the normal competency of judges, or whether the issue is better handled by an agency, given its special expertise.[181]

Did Congress give the Bureau of Land Management authority to adjudicate the validity of R.S. 2477 claims?

The *SUWA II* court answered this question in the negative, holding that the BLM may make non-binding, internal determinations of the validity of R.S. 2477 claims for planning purposes, but may not formally adjudicate claims.[182] As will be shown, this conclusion is not only unsupported by precedent, but it has negative public policy consequences.

In *Sierra Club v. Hodel,* the Tenth Circuit held that the BLM has primary jurisdiction over R.S. 2477 rights-of-way when it stated that the "initial determination of whether activity falls within an established right-of-way is to be made by the BLM and not by the court."[183] The *SUWA II* court rejected reliance on this case, holding that the *Hodel* court was merely allowing the BLM to make non-binding determinations of the scope of an R.S. 2477 right-of-way.[184] This non-binding determination, the *SUWA II* court stated, was not entitled to any formal deference in court.[185] However, in *Hodel,* the district court stated that

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[175] *See W. Pac.*, 352 U.S. 59; Great N. Ry. Co. v. Merchants' Elevator Co., 259 U.S. 285 (1922); Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907); Williams Pipe Line Co. v. Empire Gas Corp., 76 F.3d 1491 (10th Cir. 1996); Volkman v. United Transp. Union, 73 F.3d 1047 (10th Cir. 1996).

[176] *See infra* notes 212-45 and accompanying text.

[177] *SUWA II*, 425 F.3d at 751.

[178] *Id.*; *W. Pac.*, 352 U.S. at 64.

[179] *SUWA II*, 425 F.3d at 751. *See Tex. & Pac. Ry.* Co., 204 U.S. at 440-41 (promotion of uniformity); *Great N. Ry. Co.*, 259 U.S. 285 (agency expertise).

[180] *SUWA II*, 425 F.3d at 751.

[181] *Id.*

[182] *Id.* at 758.

[183] Sierra Club v. Hodel, 848 F.2d 1068, 1084-85 (10th Cir. 1988) (citing City & County of Denver v. Bergland, 695 F.2d 465 (10th Cir. 1982)).

[184] *SUWA II*, 425 F.3d at 758.

[185] *Id.*

it "should pay considerable deference to the BLM's experience" in determining the scope of the R.S. 2477 right-of-way in question. The considerable deference given to the BLM's findings is not the *de novo* standard the *SUWA II* court stated should apply to non-binding determinations.[186] Moreover, in order to determine the scope of an R.S. 2477 right-of-way, the issue in question in *Hodel* on appeal, the BLM must first determine whether the right-of-way is valid in the first place. Therefore, *Hodel* requires the application of primary jurisdiction to R.S. 2477 disputes.

Assuming arguendo that the issue of primary jurisdiction had not been previously addressed, an analogy may be drawn to other mineral laws. The Mining Act of 1872 provides a useful comparison because of its similarities with R.S. 2477.[187] Aside from sharing common language originating from the same 1866 statute, the property interest in an unpatented mining claim and an R.S. 2477 right-of-way require the establishment of certain statutory prerequisites before any interest is conveyed. To establish a valid R.S. 2477 right-of-way the claimant must "construct" a "highway" on "land not reserved for public use"; to establish a valid unpatented mining claim the claimant must discover a valuable mineral on public land.[188] Further, the unpatented mining claim, like an R.S. 2477 right-of-way, requires no governmental action in order for the courts to recognize its validity and give the owner proper protection.[189] Finally, the unpatented mining claim, similar to a perfected R.S. 2477 claim, does not give the owner unfettered rights, but both claims are subject to the rules and regulations of the owner of the

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[186] *See id.* at 750.

[187] *See generally* Birdsong, *supra* note 28, at 557-64. The language found in R.S. 2477, section one, is almost identical to that found in the Mining Act of 1877. Section one of R.S. 2477 states the following:

> [T]he mineral lands of the public domain, both surveyed and unsurveyed, are herby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulation as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States.

30 U.S.C. §§ 22-23 (2000). The Mining Act of 1872, codified as 30 U.S.C. § 22, states:

> Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

30 U.S.C. § 22 (2000).

[188] *See* 43 U.S.C. § 932 (repealed in 1976 by FLPMA) (discussing requirements for R.S. 2477); United States v. Coleman, 390 U.S. 599 (1968) (discussing requirements for mining claim).

[189] *See* Birdsong, *supra* note 28, at 560.

dominant estate, the United States government.[190] Given the similarities between the unpatented mining claim and the R.S. 2477 right-of-way, it is informative to examine how the courts have dealt with the Mining Act in relation to primary jurisdiction. As will be shown below, the same authorities allowing primary jurisdiction in the unpatented mining claim context should permit primary jurisdiction in the R.S. 2477 context.

In 1920, the Supreme Court established that the Land Department had authority to adjudicate the validity of unpatented mining claims in *Cameron v. United States*.[191] Cameron claimed to have perfected a valid mining claim on the rim of the Grand Canyon.[192] The Secretary of the Interior, in the context of a patent hearing, denied his application for a patent because the claim did not fulfill statutory prerequisites.[193] Cameron appealed, claiming that, "although the Secretary had ample authority to determine whether Cameron was entitled to a patent, he was without authority to determine the character of the land or the question of discovery, or to pronounce the claim invalid."[194] The Supreme Court acknowledged that the Mining Act did not explicitly confer authority on the agency to determine the validity of an unpatented mining claim but nonetheless rejected Cameron's claim, holding that "in the absence of some direction to the contrary, the general statutory provisions before mentioned vest [authority] in the Land Department."[195]

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[190] *See* United States v. Locke, 471 U.S. 84, 104 (1985). *See also SUWA II*, 425 F.3d at 747-48 (holding that R.S. 2477 rights-of-way are not tantamount to fee-simple ownership, and those seeking new construction must consult with the BLM); Birdsong, *supra* note 28, at 560.

[191] Cameron v. United States, 252 U.S. 450 (1920).

[192] *Id.* at 457.

[193] *Id.*

[194] *Id.* at 459.

[195] *Id.* at 461 (citing Nesqally v. Gibbon, 158 U.S. 155 (1895)). *See also Cameron*, 252 U.S. at 463 (stating that to hold otherwise "would encourage the use of merely colorable mining locations in the wrongful private appropriation . . ." of public lands). The Land Department is now the Department of the Interior. The general statutory provisions cited by the *Cameron* Court as providing agency authority to adjudicate the validity of unpatented mining claims included Revised Statutes §§ 441, 453, and 2478, which were codified at 43 U.S.C. §§ 1457, 2, and 1201. Section 1457 states: "The Secretary of the Interior is charged with the supervision of public business relating to the following subjects and agencies: . . . 4. Bureau of Land Management." 43 U.S.C. § 1457 (2000). Section 2 of title 43 of the United States Code states the following:

> The Secretary of the Interior or such officer as he may designate shall perform all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government.

43 U.S.C. § 12 (2000). Section 1201 of title 43 of the United States Code states: The Secretary of the Interior, or such officer as he may designate, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of Title 32 of the Revised Statutes not otherwise specially provided for. 43 U.S.C. § 1201.

Forty-three years later, in *Best v. Humboldt Placer Mining Company,* the Court reestablished the principle that general statutory provisions vest authority in the DOI to determine the validity of unpatented mining claims.[196] In *Best,* the United States sought to build a dam on federal lands.[197] Humboldt claimed to have an unpatented mining claim on the land in question.[198] The United States sued in district court to condemn the property and asked the court to allow the BLM to conduct administrative proceedings to determine the validity of the claim.[199] After the district court granted the United States' request for agency adjudication, Humboldt brought suit to enjoin the proceedings.[200] The district court granted summary judgment to the United States, the appeals court reversed, and the Supreme Court granted certiorari to determine whether the agency was permitted to adjudicate the validity of the claim.[201] The Court first noted that, although underlying legal title to unpatented mining claims is retained by the United States, the "claims are, however, valid against the United States," if the "statutory requirements have been met."[202] The Court concluded that Congress had given the DOI plenary authority to administer the public lands, including the authority to adjudicate the validity of unpatented mining claims.[203] Moreover, not only did the Court permit such proceedings, but it stated "[i]t is difficult to imagine a more appropriate case for invocation of the jurisdiction of an administrative agency."[204]

In sum, as articulated by Professor Bret Birdsong, *Cameron* and *Best* stand for the following principles:

> First, they establish that the Secretary of the Interior's authority to decide the validity of mining claims . . . , 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

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[196] Best v. Humboldt Placer Min. Co., 371 U.S. 334 (1963).

[197] *Id.* at 334-35.

[198] *Id.*

[199] *Id.*

[200] *Id.*

[201] *Best,* 371 U.S. at 335.

[202] *Id.* at 336.

[203] *Id.* at 339. The statutes cited by the Court giving the DOI plenary power include 43 U.S.C. § 1201, quoted at *supra* note 195.

[204] *Best,* 371 U.S. at 338.

> the other."[205] 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.[206]

The above principles apply equally to R.S. 2477 rights-of-way.[207] Thus, the same general statutory provisions that apply to the unpatented mining claim—43 U.S.C. sections 2, 12, 1201, and 1457—should also vest authority in the Secretary to adjudicate R.S. 2477 disputes.[208] In these statutes, "Congress has entrusted DOI with administration of the public lands, including land grants."[209] For example, 43 U.S.C. § 1201 provides authority to the Secretary of the Interior to "enforce and carry into execution, by appropriate regulations, every part of the provisions of Title 32 of the Revised Statutes."[210] Title 32 of the Revised Statutes originally encompassed R.S. 2477.[211] Thus, section 1201 expressly provides the Secretary authority over R.S. 2477 rights-of-way. While this authority does not explicitly grant the Secretary of the Interior the power to adjudicate R.S. 2477 disputes, this power "is necessarily incident to the congressionally delegated general authority over the disposition and use of public lands."[212] Therefore, the doctrine of primary jurisdiction applies to R.S. 2477 claims as it does to unpatented mining claims.

The *SUWA II* court, however, expressly rejected *Cameron* and the analogy between the unpatented mining claim and R.S. 2477 rights-of-way, holding that general statutory provisions do not vest authority in the BLM over R.S. 2477 disputes.[213] The *SUWA II* court's rationale for finding *Cameron* inapplicable was based on the fact that R.S. 2477 rights-of-way require no patent for legal title to pass, while mining claims require issuance of a patent prior to conveyance of legal title.[214] Because the patent process is the means by which the agency ensures statutory requirements have been satisfied, the absence of a patent process, the

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[205] Birdsong, *supra* note 28, at 564-65 (citing Boesche v. Udall, 373 U.S. 472, 478 (1963)).

[206] *Id.*

[207] *See id.* at 565.

[208] *See supra* note 195.

[209] Birdsong, *supra* note 28, at 565.

[210] 43 U.S.C. § 1201 (2000).

[211] *Id.*

[212] *See* Birdsong, *supra* note 28, at 563-64.

[213] *SUWA II*, 425 F.3d at 753-57.

[214] *See SUWA II*, 425 F.3d at 753 ("However, this argument ignores a fundamental difference between mining claims and R.S. 2477 rights of way: title to a mining claim passes by means of a patent . . . . Title to an R.S. 2477 right-of-way, by contrast, passes without any procedural formalities and without any agency involvement.").

court concluded, leaves "no executive role for the BLM to play."[215] The alleged passage of legal title, the court believed, forms the line of demarcation between court and agency adjudicative authority: prior to passage of legal title, the DOI may determine the validity of claims against the public lands; after passage of legal title, courts are vested with the sole authority to adjudicate public land disputes.[216] The *SUWA II* court's argument is erroneous because it assumes that after legal title passes the agency is divested of authority to adjudicate the interest conveyed. This contention was expressly rejected in *Boesche v. Udall*.[217] Additionally, the court ignores the fact that a mining patent passes title only to the surface; even without a patent, a valid mining claim gives title to the minerals.[218]

Boesche arose in the context of the Mineral Leasing Act, not the Mining Act.[219] Mineral leases, unpatented mining claims, and R.S. 2477 rights-of-way are different property interests.[220] The principle underlying *Boesche*, however, applies as much to R.S. 2477 rights-of-way as to mineral leases.[221] In *Boesche v. Udall*, the petitioner was awarded an 80-acre, non-competitive mineral lease by Secretary of the Interior Stewart Udall.[222] Udall later realized that the lease awarded to Boesche failed to meet the statutory prerequisites and sought to cancel it.[223] Boesche objected, claiming the Secretary did not hold such power because the Mineral Leasing Act permits cancellation of leases only when the lessee fails to comply with the lease terms.[224] Since Boesche was in compliance with the lease terms the Secretary was powerless to cancel the lease.[225] The Court, citing *Cameron*

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[215] *Id.* at 754. "In fact," the court stated, "because there were no notice or filing requirements of any kind, R.S. 2477 rights of way may have been established—and legal title may have passed—without the BLM ever being aware of it." *Id.*

[216] *Id.* at 754-55 n.6. ("Only after a patent issues is the claim perfected, and from that point onward, issues regarding the nature and extent of the property right are resolved in court." (citing United States v. Schruz, 102 U.S. 378, 396)).

[217] Boesche v. Udall, 373 U.S. 472 (1963).

[218] *See* United States v. Locke, 471 U.S. 84, 86 (1985):

> "Discovery" of a mineral deposit, followed by the minimal procedures required to formally "locate" the deposit, gives an individual the right of exclusive possession of the land for mining purposes, 30 U.S.C. § 26 . . . . For a nominal sum, and after certain statutory conditions are fulfilled, an individual may patent the claim, thereby purchasing from the Federal Government the land and minerals and obtaining ultimate title to them. Patenting, however, is not required, and an unpatented mining claim remains a fully recognized possessory interest.

[219] Mineral Leasing Act, 30 U.S.C. §§ 181-263 (2000).

[220] *See supra* note 187-90 and accompanying text (discussing similarities between unpatented mining claim and R.S. 2477 rights-of-way).

[221] *See* Birdsong, *supra* note 28, at 563-66.

[222] *Boesche*, 373 U.S. at 474.

[223] *Id.*

[224] *Id.* at 475.

[225] *Boesche*, 373 U.S. at 475.

and *Best* for analogous support, rejected the notion that the Mineral Leasing Act was the sole source of statutory power, and held that Congress gave the Secretary broad power to manage public lands, including the power to administratively cancel leases.[226] This authority is assumed present unless Congress had expressly withdrawn it.[227] The Court concluded the Secretary had the power to cancel the lease because Congress had not withdrawn authority.[228] In reaching this conclusion, the Court rejected the distinction between equitable title interests and legal title interests and stated:

> We are not persuaded by petitioner's argument—based on cases holding that land patents once delivered and accepted could be canceled only in judicial proceedings (e.g. Johnson v. Townsley, 13 Wall. 72 [(1871)] . . . Moore v. Robbins, 96 U.S. 530 [(1877)] . . .)—that the administrative cancellation power established by Cameron and the other cases cited is confined to so-called equitable interests, and that a lease, which is said to resemble more closely the legal interest conveyed by patent, is not subject to such power. *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.*[229]

Thus, contrary to the *SUWA II* court's opinion, the real test for whether the BLM retains authority over R.S. 2477 rights-of-way is not whether legal title has passed, but whether the BLM "continues to possess some measure of control" over the right-of-way.

One need not look any further than the *SUWA II* court's opinion to determine whether the government continues to possess any measure of control over the rights-of-way.[230] In response to the Counties' argument that notification to the BLM is not necessary to begin new construction on R.S. 2477 rights-of-ways, the court stated: "right of way is not tantamount to fee simple ownership of a defined territory."[231] Numerous other cases also demonstrate that the BLM retains control

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[226] *Id.* at 476.

[227] *Id.*

[228] *Id.* at 485.

[229] *Boesche,* 373 U.S. at 477 (quoting Moore v. Robbins, 96 U.S. 530, 533 (1877)) (emphasis added).

[230] *SUWA II,* 425 F.3d 735, 748 (10th Cir. 2005).

[231] *Id.*

over R.S. 2477 rights-of-way.[232] The interest conveyed in R.S. 2477 right-of-way is not in 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."[233] Therefore, under the *Boesche* standard, the BLM's authority to adjudicate R.S. 2477 claims is not extinguished by the alleged passing of legal title, but continues because of the agency's continuing ownership of underlying land and continued control over the rights-of-way.

The *SUWA II* court's additional rationales for denying the BLM primary jurisdiction over R.S. 2477 disputes are equally unavailing. Relying on past agency actions and a 1997 Omnibus Act which prohibited the agency from making "final rules or regulations," the court contented that Congress did not give the BLM authority to adjudicate R.S. 2477 claims.[234] The 1997 Omnibus Act states, in its entirety:

> 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 Revised Statute 2477 (43 U.S.C. [§] 932) shall take effect unless expressly authorized by an Act of Congress subsequent to the date of enactment of this Act [Sept. 30, 1996].[235]

The distinction between agency rulemaking and adjudication is well established.[236] "Agency rulemaking sets a prospective standard of conduct," whereas "agency adjudication by individual order resolves an individual dispute by retrospectively applying law and policy to particular facts."[237] Surely Congress was aware of this distinction when it passed the bill. The fact that agency adjudication was omitted from the statute indicates that Congress did not intend to curtail this authority.[238]

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[232] *See, e.g.*,United States v. Vogler, 859 F.2d 638 (9th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989) (holding that the National Park Service had authority to regulate access and mining within Alaska's national parks); United States v. Garfield County, 122 F. Supp. 2d 1201 (D. Utah 2000) (holding that the county must consult with the NPS and get permission prior to widening an existing R.S. 2477 right-of-way).

[233] Birdsong, *supra* note 28, at 565 (citing Vogler v. United States, 859 F.2d 638, 642 (9th Cir. 1988)).

[234] *See SUWA II*, 425 F.3d at 756.

[235] Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208 (1996).

[236] *See* 5 U.S.C. §§ 551(4), 551(7) (2000) (agency rulemaking and agency adjudication, respectively).

[237] *See* Brief of Federal Appellee at 30, SUWA v. BLM, 425 F.3d 735, Nos. 04-4071, 04-4073 (10th Cir. 2004).

[238] *See id.* The *SUWA II* court responded that the prohibition referred only to final rules or regulations because the BLM never had the authority to adjudicate R.S. 2477 disputes. *SUWA II*, 425 F.3d at 756 ("there was . . . no such authority to preserve."). This ignores the fact that the

As additional support for the lack of primary jurisdiction, the court, referring to a series of state court opinions, averred that "[u]ntil very recently, the BLM staunchly maintained that it lacked authority to make binding decisions on R.S. 2477 rights of way."[239] These cases, however, simply do not support the claim the BLM has "staunchly maintained" the lack of authority to adjudicate R.S. 2477 claims, but, instead, demonstrate only that it had declined to do so in the past.[240] Additionally, the *SUWA II* court bolstered its conclusion by reference to the 1993 DOI Report to Congress.[241] In its report, the DOI acknowledged that "[c]ourts must ultimately dertermine [sic] the validity of such [R.S. 2477] claims."[242] The passage, read in context, "states generally that BLM does not make binding R.S. 2477 determinations, but does not state that the BLM lacks the authority to make binding R.S. 2477 determinations if it chooses to do so."[243] Moreover, policy statements found in reports do not legally bind the agency or have the force of law.[244]

After examination of the *SUWA II* court's argument and case precedents, it is clear that Congress, by general statutory provisions, permitted the BLM to adjudicate claims concerning the validity of R.S. 2477. However, for the doctrine of primary jurisdiction to apply, the twin goals of the doctrine must also be present.[245]

Would applying the doctrine of primary jurisdiction to R.S. 2477 claims promote regulatory uniformity?

The *SUWA II* court never had occasion to reach this question specifically because it concluded that Congress never gave the BLM authority to adjudicate

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BLM had been attempting to adjudicate R.S. 2477 disputes in the past. *See supra* notes 89-94 and accompanying text. Surely Congress would have been aware of this fact and taken action accordingly to prohibit R.S. 2477 adjudication.

[239] *SUWA II*, 425 F.3d at 754.

[240] *See* Brief of Federal Appellee, *supra* note 237, at 26. For example, the *SUWA II* court relied on the following to back up its assertion that the BLM had maintained that it lacked authority to adjudicate R.S. 2477 claims: Kirk Brown, 151 IBLA 221, 227 n.6 (1999) ("Normally, the existence of an R.S. 2477 road is a question of state law for adjudication by state courts."); James S. Mitchell, William Dawson, 104 IBLA 377, 381 (1988) ("[T]he Department has taken the consistent position that, as a general proposition, state courts are the proper forum for determining whether, pursuant to [R.S. 2477], a road is properly deemed to be a 'public highway.'").

[241] *SUWA II*, 425 F.3d at 755.

[242] DOI Rep. to Congress, *supra* note 35, at 25.

[243] Brief of Federal Appellee, *supra* note 237, at 26.

[244] *See* Am. Mining Cong. v. Marshall, 671 F.2d 1251, 1263 (10th Cir. 1982).

[245] *SUWA II*, 425 F.3d 735, 751 (10th Cir. 2005). As discussed previously, the twin aims of primary jurisdiction are to promote uniformity and allow agencies with special expertise decide issues generally outside the competence of judges.

R.S. 2477.[246] However, in the court's opinion concerning the application of federal and state law, the court stated that R.S. 2477 has been applied without any unified standard for over 130 years, and concluded that there is no need for a uniform policy.[247] The court reasoned that specific areas, such as Alaska, require unique policies.[248] Applying state law would ensure that policies responded to each state's distinctive geographic environments.[249] In this respect, the court erred.

Allowing the BLM to adjudicate claims using a federal standard "would enable the agency to impose a uniform interpretation of the terms of the grant, something that piecemeal adjudication has failed to provide."[250] Moreover, contrary to the *SUWA II* court's decision, a national uniform policy is necessary to serve agency goals articulated in FLMPA.[251] For example, FLPMA requires the BLM to manage the lands for multiple use and sustained yield and to "take any action necessary to prevent unnecessary or undue degradation."[252] Although the agency may not diminish or reduce a right-of-way established prior to 1976, the agency has a statutory duty to prevent claimants from asserting bogus R.S. 2477 claims if they would unnecessarily degrade the environment.[253] Prior to taking action and developing land use planning documents, the agency must know if a dry creek bed or old foot trail is a valid R.S. 2477 right-of-way. However, as evidenced by the past, courts have interpreted R.S. 2477 differently.[254] Agency adjudication would allow for the development of a uniform statutory standard and, over time, provide a body of agency precedents that would ensure greater predictability.

Private land owners also would benefit from agency adjudication.[255] Federal lands sold to individuals are subject to preexisting R.S. 2477 rights-of-way.[256] Given the informal nature of the grant, these rights-of-way do not generally

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[246] *SUWA II*, 425 F.3d at 749-58.

[247] *Id.* at 766-67.

[248] *Id.* at 767.

[249] *Id.*

[250] Birdsong, *supra* note 28, at 566.

[251] 43 U.S.C. § 1701 (2000). As acknowledged by the *SUWA I* court, "Congress has specifically stated that determination of the validity of R.S. 2477 claims 'should be drawn from the intent of R.S. 2477 and FLPMA.'" *SUWA I*, 147 F. Supp. 2d 1130, 1138 (D. Utah 2001) (citing H.R. Conf. Rep. No. 10-5503 (1992)).

[252] 43 U.S.C. § 1701(7); *see also* 43 U.S.C. § 1732(b).

[253] *Cf.* Mineral Policy Center v. Norton, 292 F. Supp. 2d 30, 42 (D D.C. 2003) ("FLPMA, by its plain terms, vests the Secretary of the Interior with the authority—and indeed the obligation—to disapprove of an otherwise permissible mining operation because the operation, though necessary for mining, would unduly harm or degrade the public land.").

[254] *See supra* note 64 and accompanying text.

[255] *See generally* Brief of Amici Curiae, Property Owners for Sensible Roads Policy and Jana and Ron Smith, SUWA v. BLM, 425 F.3d 735, Nos. 04-4071, 04-4073 (10th Cir. 2005).

[256] *Id.*

show up in title searches.[257] Often the first sign of an R.S. 2477 right-of-way on private property comes from an individual boldly asserting his or her rights.[258] For example, the Chamberlins, homeowners living in the mountains outside of Boulder, Colorado, purchased a home without notice of any existing rights-of-way.[259] Thereafter, recreational users, asserting an R.S. 2477 right-of-way, tore down no trespassing signs and drove recreational vehicles across the property, day and night.[260] Not only was the Chamberlins' property affected, but the neighbors experienced increased noise, diminished property values, and vandalism due to the recreational users' activities.[261] In protest to the Chamberlins' insistence on blocking access, recreational users smashed a neighbor's car windows and killed one of the neighbor's dogs.[262] The application of a national unified standard would make it easier for private land owners to determine whether their property is subject to R.S. 2477 rights-of-way, and therefore, better understand and enforce their rights.

Would applying the doctrine of primary jurisdiction to R.S. 2477 allow agency experts to resolve complex issues not generally within the normal competence of the judiciary?

As *SUWA I* and *SUWA II* demonstrate, the adjudication of R.S. 2477 disputes is a highly factual determination.[263] Old maps and photographs must be located, testimony concerning prior land uses must be taken, city and county maintenance logs must be dug up, personnel must be deployed to investigate current and past road conditions, and comment and evidence must be submitted by the contesting parties.[264] For example, in the principal case, the BLM evaluated the proposed "Devil's Garden" right-of-way by reference to site inspections, BLM and geological surveys, aerial photographs, land survey systems, wilderness inventories, BLM maintenance records, BLM planning documents, project records for the Federal Highway Administration, and letters and interviews from constituency groups.[265] After this extensive review of the record, the agency concluded that no right-of-way had been established.[266] Certainly, most judges do not have access to

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[257] Property Owners for Sensible Roads Policy, http://www.posrp.org/Testimony%20by%20AJ.htm (last visited March 8, 2007).

[258] *Id.*

[259] *Id.*

[260] *Id.*

[261] *Id.*

[262] Brief of Amici Curiae, Property Owners for Sensible Roads Policy and Jana and Ron Smith, supra note 255, at 7.

[263] *SUWA I*, 147 F. Supp. 2d 1130, 1137-38 (D. Utah 2001).

[264] *Id.* at 1137.

[265] *Id.*

[266] *Id.*

this kind of information, and would not have the expertise or time to analyze it if they did. As summarized by Professor Birdsong, "[a]n 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."[267] It is clear that the BLM possesses special expertise not generally within the normal competency of judges. Therefore, the third element required for primary jurisdiction, special agency expertise outside the competence of judges, is present.

Given that all three elements of primary jurisdiction are present—Congressional approval, regulatory uniformity, and agency expertise—the *SUWA II* court should have affirmed the district court's decision to allow the BLM to make binding adjudications.

CONCLUSION

Since its repeal in 1976, R.S. 2477 has been plagued with uncertainty. State and federal cases have reached varying results, and DOI and BLM policy has been inconsistent. Given the indeterminable nature of R.S. 2477 claims, increased litigation, and more stringent management mandates under FLPMA, the need for a uniform national policy for the statute has never been greater. *SUWA I*, applying the doctrine of primary jurisdiction, opened the door for the BLM to make binding adjudications of R.S. 2477 claims, subject to judicial review. However, just as the door opened, the *SUWA II* court slammed it shut again. The *SUWA II* court, while clarifying some unresolved questions, foreclosed the possibility of binding BLM adjudication. Not only was this decision reached in error, but, without primary jurisdiction, the uncertainty created by piecemeal court decisions will. It is clear that Congress must now do what the *SUWA II* court forbade: pass legislation allowing agency adjudication of R.S. 2477 rights-of-way.

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[267] Birdsong, *supra* note 28, at 566.