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**Questioning the Rule of Capture Metaphor for
Nineteenth Century Public Land Law:
A Look at R.S. 2477**

by

James R. Rasband

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QUESTIONING THE RULE OF CAPTURE METAPHOR FOR
NINETEENTH CENTURY PUBLIC LAND LAW:
A LOOK AT R.S. 2477

BY
JAMES R. RASBAND*

The literature of public land and natural resources law has spawned a number of powerful metaphors to describe Euro-American settlement of the American West and its consequences. This conference participates in that venerable tradition, using "The Rule of Capture" as a metaphor for nineteenth century public land and natural resources law and inviting participants to investigate the rule's consequences. Public land and natural resources law in the nineteenth century, however, cannot fairly be circumscribed by the metaphor of capture. The settlement of the American West, and the public land laws designed to facilitate it, required more than simple resource capture. At least as often, ownership depended upon improvement.

Although the various public land laws requiring improvement had plenty of capture characteristics, the problem with the metaphor is that it both undervalues and overvalues the nature of resource ownership in the nineteenth century. The capture metaphor undervalues resource ownership because the imagery of capture is of farmers, ranchers, miners, and other settlers acquiring ownership merely by possession, which subtly devalues their ownership claims and reliance interests. On the other hand, because pure capture can be the basis of a legitimate ownership claim, describing improvement-demanding natural resource laws as rules of capture may inadvertently strengthen an otherwise dubious claim of vested rights.

This article investigates the viability of the capture metaphor by considering a rather obscure section of the 1866 mining law known as R.S. 2477 which grants to state and local governments "the right of way for the construction of highways over public lands, not reserved for

* © James R. Rasband, 2005. Professor of Law, J. Reuben Clark Law School, Brigham Young University. B.A. 1986, Brigham Young University; J.D. 1989 Harvard Law School. The author also serves as Utah Governor Jon Huntsman Jr.'s appointee to the Utah Constitutional Defense Council. By statute, the Constitutional Defense Council advises the governor and state legislature on a variety of public land issues in Utah, including R.S. 2477. See UTAH CODE ANN § 63C-4-102, et seq. The views expressed in this article are those of the author and do not necessarily reflect the views of either the Governor or the Constitutional Defense Council. I thank Paul Shakespear for his helpful research assistance. Comments can be directed to Rasbandj@lawgate.byu.edu.

public uses." Although R.S. 2477 was repealed with the passage of the Federal Land Policy Management Act (FLPMA) in 1976, FLPMA also promised to preserve valid existing rights, meaning that any R.S. 2477 right-of-way created prior to 1976 would not be lost. Given the vast number of R.S. 2477 claims and because designation of wilderness generally requires an area to be roadless, the presence of an R.S. 2477 road can have significant consequences. The actual impact of the statute depends upon what sort of activities amount to "construction" under the statute. Whether R.S. 2477 is understood as an improvement rule requiring self-conscious, mechanical construction, as the environmental community suggests, or as a capture rule allowing construction to be accomplished by mere use, the so-called "beaten path" standard advocated by states and rural counties, depends in part on whether the capture metaphor is an accurate characterization of nineteenth century public land and natural resources law.

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I. INTRODUCTION

The literature of public land and natural resources law has spawned a number of powerful metaphors to describe Euro-American settlement of the American West and its consequences. Referring to the voracious resource consumption and land acquisition of speculators, miners, railroads, and timber companies during the second half of the nineteenth century, historian Vernon Parrington labeled the era "The Great Barbecue."¹ In the 1990's, Charles Wilkinson described as "The Lords of Yesterday" the approximately 3500 public land laws adopted by Congress between 1785 and 1880 that

¹ See VERNON L. PARRINGTON, BEGINNINGS OF CRITICAL REALISM IN AMERICA: 1860-1920, at 23 (1958).

continue to exert a powerful influence on natural resource policy.² This conference participates in that venerable tradition by using “The Rule of Capture” as a metaphor for nineteenth century public land and natural resources law, and asking participants to investigate the rule’s consequences.

Characterizing capture as mere metaphor may strike some as inaccurate. After all, there is a legal doctrine of capture. Generations of first year law students have been introduced to property law by the venerable case of *Pierson v. Post*,³ which held that as between two fox hunters, the hunter who actually killed the fox was entitled to possession rather than the hunter who first flushed, chased, and tired the fox.⁴ Ownership of the fox was a function of capture, of reducing *ferae naturae* to possession. At one level then, the rule of capture is not a metaphor for nineteenth century natural resources law; it was the law itself. But the conference invitation seemed to have something broader in mind. Participants were invited to think of the rule of capture as exemplary of not just wildlife laws but of all nineteenth century natural resource laws—e.g., water, mining, grazing, road building. The invitation is tempting because it contains a good deal of truth, and perhaps that is all that can be expected of any metaphor. But in the end, the metaphor is one to be resisted or at least more narrowly applied. Public land and natural resources law in the nineteenth century cannot fairly be circumscribed by the metaphor of capture. The settlement of the American West, and the public land laws designed to facilitate it, required more than simple resource capture. At least as often, ownership depended upon improvement. Water vested only in those who put the water to beneficial use; unpatented mining claims required yearly assessment work; Desert Land Act patents required irrigation; and homestead claims required cultivation.⁵ In a nation imbued with John Locke’s labor theory of property,⁶ it typically was not enough to grab a resource. Title depended upon investing the land or resource with one’s labor.

It is also the case that the requirements of such laws were relatively minimal, often circumvented, and rarely enforced.⁷ Thus, it is fair to say that

² CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* 17 (1992) (“[W]estwide, natural resource policy is dominated by the lords of yesterday, a battery of nineteenth-century laws, policies, and ideas that arose under wholly different social and economic conditions but that remain in effect due to inertia, powerful lobbying forces, and lack of public awareness.”).

³ 3 Cai. 175 (N.Y. Sup. Ct. 1805).

⁴ *Id.* at 267.

⁵ See *infra* Part II (discussing these laws).

⁶ JOHN LOCKE, *THE SECOND TREATISE ON GOVERNMENT* 17 (Thomas P. Peardon ed., Bobbs Merrill 1952) (1690). (“Whatsoever then he removes out of the state that nature hath provided and left it in, he has mixed his labor with, and joined to it something that is his own, and thereby makes it his property.”). The labor theory of property was not only supported by Locke’s natural law justification, but also by the arguments of utilitarian philosophers like Bentham and Hume: “Who sees not . . . that whatever is produced or improved by man’s art or industry ought, for ever, to be secured to him, in order to give encouragement to such useful habits and accomplishments?” DAVID HUME, *TREATISE ON HUMAN NATURE*, VOL. II, 196 (1739) (quoted in RICHARD SCHLATTER, *PRIVATE PROPERTY: THE HISTORY OF AN IDEA* 242 (1951)).

⁷ See *infra* Part II (discussing some of the fraudulent manipulations of the public land

even the public land laws requiring improvement had plenty of capture characteristics. Why, then, does this paper resist the capture metaphor when it accurately describes a significant swath of natural resource law history? The problem with the metaphor is that it both undervalues and overvalues the nature of resource ownership in the nineteenth century. It is at once too pejorative and too generous.

The capture metaphor undervalues resource ownership because the imagery of capture is of farmers, ranchers, miners, and other settlers acquiring ownership merely by possession. Although mere capture can give rise to ownership even under a traditional Lockean view because the effort of capture can be understood as mixing the captured resource with the labor of the capturer,⁸ the capture image devalues the way in which ownership is perceived. Favoring the cultivator and improver has a long and distinguished pedigree in our land and resource law, beginning with the Jeffersonian ideal of yeoman farmers virtuously mixing their labor with the land.⁹ Indeed, historically, the distinction between capture and cultivation was an argument against Indian ownership claims. According to this argument, as mere hunter-gatherers who did not improve their land,¹⁰ Indian tribes could

laws).

⁸ Locke reasoned:

We see in commons, which remain so by compact, that it is the taking any part of what is common and removing it out of the state nature leaves it in which begins the property, without which the common is of no use. And the taking of this or that part does not depend on the express consent of all the commoners. Thus the grass my horse has bit, the turfs my servant has cut, and the ore I have digged in any place where I have a right to them in common with others, become my property without the assignation or consent of anybody. The labor was mine, removing them out of that common state they were in, has fixed my property in them

Though the water running in the fountain be every one's, yet who can doubt but that in the pitcher is his only who drew it out? His labor has taken it out of the hands of nature where it was common and belonged equally to all her children, and has thereby appropriated it to himself.

LOCKE, *supra* note 6, at 18.

⁹ Jefferson's belief that a country of yeoman farmers would produce a virtuous and engaged citizenry and ensure a republican form of government is well documented. *See, e.g.*, 8 THOMAS JEFFERSON, THE PAPERS OF THOMAS JEFFERSON 426 (1953) (quoted in DANIEL KEMMIS, COMMUNITY AND THE POLITICS OF PLACE 20 (1990)) (writing in 1785 to John Jay, Jefferson stated: "We have now lands enough to employ an infinite number of people in their cultivation. Cultivators of the earth are the most valuable citizens. They are the most vigorous, the most independent, the most virtuous, and they are tied to their country, and wedded to its liberty and interests, by the most lasting bonds.").

¹⁰ The idea that Indian tribes were purely hunter-gatherer societies is something of a fiction, but a persistent one. Indians, particularly the eastern tribes, were also agriculturalists and fishermen. *See* Wilcomb E. Washburn, *The Moral and Legal Justifications for Dispossessing the Indians*, in SEVENTEENTH-CENTURY AMERICA: ESSAYS IN COLONIAL HISTORY 23-24 (James M. Smith ed., 1959) (discussing the creation of the "myth" that Indians were merely nomadic hunters); David R. Lewis, *Native Americans: The Original Rural Westerners*, in THE RURAL WEST SINCE WORLD WAR II 12 (R. Douglas Hurt ed., 1998) ("Nearly half of all native groups participated in some form of agriculture, producing between 25 and 75 percent of their total subsistence needs.").

not possess good title.¹¹ The notion that improvement increases the strength of an ownership claim is not relegated to the nineteenth century; it remains a fixture of the law today. Thus, use of the capture metaphor can subtly undermine and devalue the ownership claims of those who legitimately rely on nineteenth century public land laws as the source of their title.

At the same time that the capture metaphor has the potential to undervalue legitimate resource ownership claims, it can overvalue them as well. Because pure capture can be the basis of a legitimate ownership claim,¹² describing certain resource laws as rules of capture may inadvertently strengthen an otherwise dubious claim of vested rights. Consider, for example, the water law doctrine of beneficial use. To describe water rights as a capture rule may tacitly concede that the beneficial use doctrine was never intended to be an impediment to permanent vested rights. While historically states have been slow to use the beneficial use doctrine to limit water diversions,¹³ the doctrine's existence suggests a stronger public interest in water than does a rule of capture metaphor. In other words, recognizing that nineteenth century judges and lawmakers did not recklessly adopt capture rules for all resources may actually open opportunities to challenge assertions of vested rights in natural resources.

If one of the core functions of takings doctrine is to protect property owners' reliance interests, it is imperative to accurately identify those interests. In the terminology of *Lucas v. South Carolina Coastal Council*,¹⁴

¹¹ Consider the seminal case of *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), in which the Court was faced with the question of what sort of title Indian tribes possessed to their traditional lands. McIntosh, the party claiming title from the United States, argued that the Indians could not give good title because "by the law of nature," the Indians could not have acquired a property interest in their lands:

Upon this principle the North American Indians could have acquired no proprietary interest in the vast tracts of territory which they wandered over; and their right to the lands on which they hunted, could not be considered as superior to that which is acquired to the sea by fishing in it. The use in the one case, as well as the other, is not exclusive. According to every theory of property, the Indians had no individual rights to land; nor had they any collectively, or in their national capacity; for the lands occupied by each tribe were not used by them in such a manner as to prevent their being appropriated by a people of cultivators. All the proprietary rights of civilized nations on this continent are founded on this principle.

Id. at 569–70. See also Carol M. Rose, *Possession As the Origin of Property*, 52 U. CHI. L. REV. 73, 85–86 (1985) (discussing the implications of this argument in *Johnson v. M'Intosh*). Chief Justice Marshall did not specifically address M'Intosh's argument and instead relied on the doctrine of discovery to decide that Indian tribes had the right to use and occupy their land subject to the sovereign taking that land by either purchase or conquest. One wonders, however, what impact the view of Indians as non-cultivators had on Marshall's reasoning. The argument certainly had an impact on Indian policy throughout the nineteenth century. See generally James R. Rasband, *The Rise of Urban Archipelagoes in the American West: A New Reservation Policy?*, 31 ENVTL. L. 1, 14–15 (2001) (citing similar arguments from President Andrew Jackson, Theodore Roosevelt, and others).

¹² See *supra* note 8 (quoting Locke).

¹³ See Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENVTL. L. 919, 947–48, 961 (1998) (discussing the evolution of the states' application of the beneficial use doctrine both in the courts and the legislature).

¹⁴ 505 U.S. 1003 (1992).

the key question is whether the restricted or eliminated property right originally "inhere[d] in the title."¹⁵ Thus, labeling the nineteenth century as the century of capture suggests that many natural resource users have indisputably good title to those resources because that their title depended only upon capture. Under both *Lucas* and *Penn Central Transportation Co. v. New York City*,¹⁶ reallocation of a resource obtained under a rule of capture is more likely to be a taking than reallocation of a resource that is not being used in conformity with the terms of the grant. While it may be appealing to reallocate resources away from an owner who took the resource under a "primitive" capture rule that has now fallen out of favor, it is less just because of its refusal to recognize reasonable reliance interests. Recognizing this truth does not mean that the capture metaphor is never appropriate for public land laws. It simply means that capture is a double-edged sword. In the end, it seems wisest to carefully identify the reasonable reliance interests associated with the ownership requirements of individual resources.

In the sections that follow, the article will investigate the viability of the capture metaphor for nineteenth century public land and resources law, and then test the proposition that the metaphor is both over- and under-inclusive by considering a rather obscure section of the 1866 mining law known as R.S. 2477, which grants state and local governments "the right-of-way for the construction of highways over public lands, not reserved for public uses . . ."¹⁷ Although R.S. 2477 was repealed with the passage of the Federal Land Policy Management Act (FLPMA) in 1976,¹⁸ FLPMA also promised to preserve valid existing rights,¹⁹ meaning that any R.S. 2477 right-of-way created prior to 1976 would not be lost. Given the vast number of potential R.S. 2477 claims in the West—by one estimate, there are 10,000 R.S. 2477 roads in Utah alone²⁰—this is no small matter. Moreover, because designation of wilderness generally requires at least 5000 acres of *roadless* lands, the presence of an R.S. 2477 road, particularly a road that can be managed and improved by a state or local government, can preclude the designation of wilderness. Thus, this "obscure" statute presents one of the most significant potential limitations on wilderness designation in the West.

The actual impact of R.S. 2477 depends in large measure upon the interpretation given to three statutory terms. Namely, what does the statute

¹⁵ *Id.* at 1015.

¹⁶ 438 U.S. 104, 123–24 (1978).

¹⁷ Mining Act of 1866 § 8, 14 Stat. 251, 253 ("An Act Granting the Right of Way to Ditch and Canal Owners over the Public Lands and for Other Purposes"). This statute was codified in 1873 in the Revised Statutes as section 2477 and subsequently recodified in 1934 as 43 U.S.C. § 932. It was repealed with the passage of the Federal Land Policy Management Act (FLPMA) of 1976. 43 U.S.C. §§ 1701-1785 (2000) (Mining Act of 1866 repealed at 43 U.S.C. § 706(a)).

¹⁸ 43 U.S.C. § 706(a).

¹⁹ *See id.* § 701(a) ("Nothing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act."); *see also id.* §§ 1769(a), 1701(h) (protecting valid existing rights).

²⁰ Stephen H.M. Bloch & Heidi J. McIntosh, *A View From the Front Lines: The Fate of Utah's Redrock Wilderness Under the George W. Bush Administration*, 33 GOLDEN GATE U. L. REV. 473, 489 (2003).

mean when it refers to 1) "construction" of 2) "highways" over public lands 3) "not reserved for public uses"? While all three questions are important, it is the meaning of "construction" upon which the article will focus. Considering what sort of activities amounted to construction is a particularly useful vehicle for analyzing the capture metaphor because the question cuts across some of the typical conceptions of nineteenth century public land law. With R.S. 2477, the environmental community, which is often inclined to a capture view of the nineteenth century, finds itself vigorously asserting an improvement rule requiring self-conscious, mechanical construction.²¹ On the other side, states and rural counties, who are typically more inclined to view the public land laws as rewarding yeoman settlers for virtuously and diligently improving and cultivating a hostile wilderness, find themselves asserting a "beaten path" standard of ownership under which very little effort at improvement is necessary to acquire title. Whether there are thousands of R.S. 2477 roads across the public lands, as claimed by state and local governments, or many, many fewer, as alleged by the environmental community, depends upon which of these interpretations of the word "construction" prevails.

The article begins its analysis by considering in somewhat more detail in Part II whether the rule of capture is an adequate metaphor for nineteenth century public land law. Part III then provides the context for why R.S. 2477 matters as more than an abstract principle of vested rights. Specifically, this part of the paper considers the concerns of the environmental community that roads have dramatic negative ecological impacts and the concerns of state and local governments that roads are an economic lifeline to rural communities around the West. It also explains the relationship between roads and wilderness that is the real driver of the R.S. 2477 debate. After Part III provides the context for the roads issue, Part IV offers a relatively brief analysis of the statute and of the current R.S. 2477 litigation. Part V offers some concluding thoughts on R.S. 2477 and the rule of capture.

II. WAS THE NINETEENTH CENTURY REALLY THE CENTURY OF CAPTURE?

Although the rule of capture misses the mark as a metaphor for all of nineteenth century natural resources law, it is on target with respect to certain resources. As noted in the Introduction, capture rules typically applied to fugacious (mobile) resources such as fish and wildlife where ownership depended only upon capture of the resource. The capture rule also prevailed in the case of underground resources like oil and groundwater where pumping alone was enough to justify ownership.²² Under such pure

²¹ Ascribing a "capture view" to the entire environmental community paints with quite a broad brush. Commentators have also recognized that the improvement and beneficial use requirements of the nineteenth century tend to have an anti-environment bias because title depends upon altering land's natural ecology to show "improvement." See, e.g., John G. Sprankling, *The Anti-Wilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519, 521 (1996) (asserting that a variety of common law property doctrines—waste, adverse possession, possession as notice to a bona fide purchaser, good faith improver, trespass, and nuisance—resulted in an anti-wilderness bias).

²² See generally JAMES R. RASBAND ET AL., NATURAL RESOURCES LAW AND POLICY 779, 785

capture rules, title to the resource did not depend upon improving the resource in any way, nor did it depend upon using the resource for some beneficial purpose and avoiding waste. Lockean sensibilities were satisfied by the labor of acquisition, however slight.

These sorts of capture rules, of course, were not novel in the nineteenth century, nor were they particularly rare. Characterized more broadly, capture rules can be labeled as “rules of first possession.” As Dean Lueck remarks:

First possession rules are the dominant method of initially establishing property rights. Such rules grant a legitimate ownership claim to the party that gains control before other potential claimants. They have been applied widely in both common and statute law, in such varied settings as abandoned property, adverse possession, bona fide purchasing, the electromagnetic spectrum, emissions rights, fisheries and wildlife, groundwater, hardrock minerals, intellectual property, oil and gas, land, nonbankruptcy debt collection, satellite orbits, spoils of war, treasure trove, and water rights. . . . Beyond the law, first possession rules are tightly woven into the fabric of Anglo-American society, where they are better known as “finders keepers” or “first come, first served,” in cases ranging from retail customer service to street parking to the use of office copiers. These rules are an important social institution and are considerably more far-reaching than typically suggested by the treasure trove and wild animal cases used by property law professors to torment first-year students.²³

To label nineteenth century public land and natural resource laws as rules of first possession is, perhaps, more accurate than labeling them as rules of capture. Whereas capture is generally perceived as both the necessary and sufficient condition for ownership, the rule-of-first-possession label seems to contain greater allowance for the idea that first possession is a necessary but insufficient condition for ownership. To that extent, it is a more accurate description of nineteenth century public land and natural resources law. Certainly it was the case that the first person to use a particular resource had the best shot at title. Nevertheless, because first possession was not necessarily enough for title, describing public land laws as rules of first possession also runs the risk of ignoring the reality that title more often also depended upon labor, cultivation, and improvement.

The idea that pure capture was not sufficient has a long pedigree in public land and natural resources law. Before the Revolution, the Colonies imposed a variety of conditions before a settler could take title to land. Virginia, for example, required settlers to build a house; clear, plant, and tend one acre; and keep stock for one year.²⁴ In Massachusetts, settlers had

(2004) (discussing the rule of capture origins of groundwater law).

²³ Dean Lueck, *The Rule of First Possession and the Design of the Law*, 38 J. L. & ECON. 393, 393–94 (1995).

²⁴ An Act for Seating and Planting (1666), *reprinted in* 2 THE STATUTES AT LARGE, BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 244 (William Waller Hening, ed. 1823). *See also* AN ACT FOR ADJUSTING AND SETTling THE TITLES OF CLAIMERS TO UNPATENTED LANDS UNDER THE PRESENT AND FORMER GOVERNMENT PREVIOUS TO THE ESTABLISHMENT OF THE COMMONWEALTH'S LAND OFFICE, 1779 Va.

to build a house of a certain size and clear five acres fit for mowing and tilling.²⁵ This approach carried forward into the nineteenth century. Consider just a few well-known public land laws. Under the 1841 Preemption Act, before a settler could purchase land on which he had been residing, he had to prove that he had “improv[ed]” the land and “erect[ed] a dwelling thereon.”²⁶ Under the 1862 Homestead Act, to obtain a patent (essentially a federal quitclaim deed) to 160 acres of public land, settlers had to show that they had “resided upon or cultivated the [land] for the term of five years”²⁷ The 1873 Timber Culture Act allowed settlers to claim an additional 160 acre quarter-section if they would “plant, protect, and keep in a healthy, growing condition for ten years forty acres of timber.”²⁸ The 1877 Desert Land Act promised settlers in the arid west an additional 640 acres of land, but only on the condition that they perform irrigation “to reclaim a tract of desert land not exceeding one section.”²⁹ The 1872 Mining Act required \$100 of improvements each year for an unpatented mining claim and \$500 worth of labor before land could be taken to patent.³⁰ Over and

Acts ch. 12, reprinted in 10 THE STATUTES AT LARGE, BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 40 (William Waller Hening, ed. 1823) (“It is hereby declared, That no family shall be entitled to the allowance granted settlers by this act, unless they have made a crop of corn in that country, or resided there at least one year since the time of their settlement.”). See generally AMELIA CLEWLEY FORD, COLONIAL PRECEDENTS OF OUR NATIONAL LAND SYSTEM AS IT EXISTED IN 1800, at 103 (1910) (discussing Virginia legislation).

²⁵ See AN ACT FOR SEATING AND PLANTING, *supra* note 24. See also ALBERT T. VOLWILER, GEORGE GROGHAN AND THE WESTWARD MOVEMENT 1741–1782, at 243 (1926) (recounting the history of land grants in New York and noting that to discourage speculation and enable poor immigrants to obtain land, the British Crown “declared a grant null and void unless a certain proportion of the land was cultivated and settled within a reasonable period of time”).

²⁶ Proceeds of the Public Lands and Preemption Rights Act, ch. 16, § 10, 5 Stat. 453, 455 (1841).

²⁷ Homestead Act, ch. 75, § 2, 12 Stat. 392 (1862).

²⁸ Timber of Western Prairies Act of 1873, ch. 277, § 1, 17 Stat. 1872, 1872–73 (1873).

²⁹ Desert Lands Act, ch. 107, § 1, 19 Stat. 377 (1877). Because much of the arid land west of the Hundredth Meridian was unattractive for homesteading and preemption, Congress decided to encourage irrigation by promising 640 acres at \$1.25 per acre, rather than the usual 160 acres, to anyone willing to irrigate the land within three years of filing. See RASBAND ET AL. *supra* note 22, at 122.

³⁰ Mining Resources Act, ch. 152, §§ 5 & 6, 17 Stat. 91, 93 (1872). For the first half of the nineteenth century, mineral lands were open for sale and preemption just like other lands, although in a few instances, the United States reserved or leased specified mineral lands. With the discovery of gold in 1848 at Sutter’s Mill on the American River in California, the issue of what to do with public lands containing mineral resources became harder to ignore. In the absence of federal law, the miners developed local associations and adopted rules governing their claims. Their approach was largely confirmed by Congress in the 1872 General Mining Law which still controls hard rock mining on the public lands. The Law provided that anyone who found a valuable mineral deposit on the public lands, staked it out, and complied with local notice and recording rules, was free to mine without paying the government anything. Although a miner could take a claim to patent and obtain fee title to the surface, he did not need to do so. As long as the miner fulfilled the obligation to actually work the claim, he had a protected property interest in his unpatented mining claim. See generally RASBAND ET AL., *supra* note 22, at 123–24.

over again, these sorts of improvement and cultivation requirements appear in public land law statutes.³¹

In addition to requirements that the resource be cultivated and "improved," natural resource laws imposed obligations that a captured resource be used in a manner that was beneficial and not wasteful. Consider the basic common law doctrine of beneficial use that governed water rights in the prior appropriation states of the West. Under that doctrine, water users could only obtain a right to the amount of water they put to beneficial use.³² Although capture and first possession were necessary predicates to a water right, they were not alone sufficient to establish title.

The examples of improvement and cultivation requirements are legion and should give pause to the adoption of a capture metaphor, but they should not be understood as proof that during the nineteenth century the public's natural resources were only disposed of to those who satisfied these criteria. As mentioned in the Introduction, even in those cases where the laws required improvement, cultivation, or beneficial use, it was often the case that such requirements were circumvented or ignored. This article will not attempt to recount this saga of chicanery, but the following passage from the work of historian Vernon Carstensen provides a useful synopsis of this entertaining chapter in the legal history of the public lands.

The history of the public lands has been full of words such as speculators, land monopolists, rings, corrupt officials, hush money, fraudulent entry, bogus entrymen, land lawyers, land sharks. No doubt each new community in the public land states, at one time, had its tales of the "innocent deceits" employed to obtain land. The literal-minded eastern lawyer might regard the land-claim association as a conspiracy to prevent open bidding at the land sale, but westerners were inclined to view such associations as a necessary accommodation to inept federal legislation. Few people in the lead country

³¹ See, e.g., Act of March 3, 1803, ch. 27, 2 Stat. 229 (requiring that a person with land claims in Mississippi territory was obligated to actually settle and cultivate the land before land grants from previous governments could be confirmed); Act of March 2, 1805, ch. 26, § 1, 2 Stat. 324-25 (confirming grants given by the French and Spanish in the Louisiana and Orleans territories to anyone that inhabited and cultivated their grant before October 1, 1800); Act of March 3, 1807, ch. 34, § 2, 2 Stat. 437, 438 (allowing those persons who possessed, occupied, and improved land in the Michigan Territory at time of passage of the act to obtain title to as much as 640 acres of land); Act of February, 5, 1813, ch. 20, § 1, 2 Stat. 797 (giving right of preemption to those who had inhabited and cultivated land in the Illinois territory); Act of September 27, 1850, ch. 76, § 4, 9 Stat. 496, 497 (allowing settlers in Oregon territory to obtain 320 acres if single and 640 if married, if they cultivated the land for four years); Act of July 22, 1854, ch. 103, § 2, 10 Stat. 308 (allowing male settlers over twenty-one in New Mexico, Kansas, and Nebraska to obtain 160 acres if they settled and cultivated those acres for four years).

³² See, e.g., ARIZ. REV. STAT. ANN. § 45-141 (2003) ("Beneficial use shall be the basis, measure and limit to the use of water."). Under the historic rule of prior appropriation a water user could obtain a vested water right by diverting water from a stream and putting that water to beneficial use—irrigation, mining, domestic, industrial, etc. The use of the water not only had to be beneficial in type but also reasonable in amount. In theory, water users were not entitled to waste water by using more than they needed. To the extent a person used more water than was necessary, the user would not obtain a vested right to the excess water. And if a water user stopped using the water for a period of time, the user would abandon or forfeit her water right. See generally Neuman, *supra* note 13, at 923-946. (outlining the history of the beneficial use doctrine).

were disturbed by the story of blindfolding a witness and leading him across land. He could then testify at the land office that he had been on the land and had seen no sign of mineral deposits. A boy might stand on the number 21 and answer truthfully, when asked by the land office official that he was indeed over 21, and an eight- or ten-year-old girl might serve as a wife of record and so give a man right to claim a double portion of land under the Oregon donation law. A bucket of water poured out in a recently ploughed furrow or a shack measured in inches not feet might be used in testimony as evidence of irrigation or habitation. A group of lumbermen in the Puget Sound area was called into court charged with timber theft. They were fined and also sentenced to one day in jail. Their story, told again and again at the annual meetings of the lumbermen's association, was that they paid their fines and then sent the sheriff out for "segars" and potables. When he returned, lumbermen, sheriff, and judge all retired to the jail, the key was turned in the lock, and all hands remained incarcerated for the day. Thus were the demands of the law satisfied.

....

The land grabs, the water grabs, the mineral grabs, the timber grabs, all excite great interest and bring forth lamentations. This represents a melancholy part of the story, but it is not the whole story. The alienation of the public land exhibits much human cunning and avarice, but in many instances what was called fraud represented local accommodation to the rigidities and irrelevance of the laws. The part of the story that involves the vast number of land-seekers who got their land without violating either the spirit or the letter of the law is in one way the least exciting part, but this is the part of the story that provided a lure so strong that it drew millions of people across the Atlantic to the United States in the hope of obtaining land. It was about this aspect that Eugene Davenport, then Dean of the College of Agriculture of Illinois, might have been thinking when in 1915 he discussed briefly the distribution and use of the public domain. Waste and abuse there had been in abundance, "but we have these farms, these cities, these railroads, and this civilization to show for it, and they are worth what they cost."³³

Despite the circumventions of improver and cultivation requirements in public land laws, and despite the historical reluctance of states to enforce beneficial use requirements in the water context,³⁴ the capture metaphor remains inadequate. As Carstensen's analysis suggests, the metaphor is

³³ VERNON CARSTENSEN, *THE PUBLIC LANDS: STUDIES IN THE HISTORY OF THE PUBLIC DOMAIN* xxv-xxvi (Vernon Carstensen ed., 1968) (emphasis in original).

³⁴ As Professor Neuman explained in her comprehensive article on beneficial use:

The requirement of "beneficial use without waste" sounds tight, as if water users must carefully husband the resource, using every drop of water completely and efficiently to avoid both forfeiture and waste. In actuality, the system is quite loose. Beneficial use is in fact a fairly elastic concept that freezes old customs, allows water users considerable flexibility in the amount and method of use, and leaves line drawing to the courts. The prohibitions against waste—even the threat of forfeiture for nonuse—are mostly hortatory concepts that rarely result in cutbacks in water use. In fact, there is widespread agreement that there are significant inefficiencies in western water use, in spite of these concepts of good husbandry that are built into the law.

Neuman, *supra* note 13, at 922.

unduly critical of the many land-seekers and resource users who complied with the terms of the law. And, as described in the Introduction, the image of public resource users as mere capturers can improperly undermine and subtly devalue the ownership claims of those who legitimately rely on nineteenth century public land laws as the source of their title. Ironically, in the takings context, it can also overvalue ownership interests by ignoring the improvement or beneficial use requirements that inhere in the title.³⁵

Before turning to R.S. 2477 as a vehicle for considering the competing nineteenth century metaphors of capturer and cultivator, it is necessary first to consider some background about roads—their role in public land law and why they matter to questions of preservation and environmental protection.

III. ROADS ON THE PUBLIC LANDS

A. Federal Support of Road Building and Rights-of-Way on the Public Lands

Although today the roads that crisscross our public lands are a source of environmental concern for many, that has not always been the case.³⁶ During the nineteenth century, and even for much of the twentieth, roads were viewed as an almost unqualified good. If America was to move West to meet its “manifest destiny,” it needed transportation infrastructure. And Congress went about encouraging that infrastructure in just about every way it could, subsidizing an array of roads, canals,³⁷ railroads, and other “internal improvements.”³⁸

The story of Congress’ support for railroads is a familiar one. Early on, Congress granted railroads a free right-of-way through public lands but the right-of-way alone proved insufficient to stimulate entrepreneurs to undertake the great task of extending railroads across the nation. The builders pushed for a stronger incentive and Congress complied. In 1850, Congress decided to subsidize the construction of the Illinois Central

³⁵ See *supra* notes 14–16 and accompanying text (discussing takings doctrine).

³⁶ See *infra* Part III.B (discussing the impact of roads on the environment).

³⁷ Early on in our nation’s history the greater emphasis was probably on canals. See, e.g., Act of March 30, 1822, ch. 14, § 1, 3 Stat. 659 (granting Illinois a right-of-way for a canal from the Illinois River to Lake Michigan); Act of May 26, 1824, ch. 165, § 1, 4 Stat. 47 (granting land to Indiana to build and finance a canal connecting the Wabash and Miami rivers); Act of March 2, 1827, ch. 56, §§ 1–2, 4 Stat. 236 (granting land to Indiana for the construction and financing of a canal from the Wabash River to Lake Erie); Act of March 2, 1831, ch. 73, §§ 1–2, 4 Stat. 474 (granting a right-of-way to Florida for the construction of a canal); Act of August 8, 1846, ch. 170, §§ 1–3, 9 Stat. 83 (granting land to Wisconsin for the construction and finance of a canal linking the Fox and Wisconsin Rivers); Act of August 26, 1852, ch. 92, §§ 1–4, 10 Stat. 35–36 (granting a right-of-way to Michigan for a canal to circumvent St. Mary’s Falls as well as 750,000 acres of land to finance the construction); Act of July 3, 1866, ch. 160, §§ 1–3, 14 Stat. 80–81 (granting Michigan land to build a canal to link Lake Superior with Lake La Belle); Act of July 28, 1868, ch. 228, §§ 1–5, 15 Stat. 169 (granting Minnesota land to build a dam and a lock to improve the navigation of the Mississippi River, as long as the dam and lock were completed within two years, and always remained public).

³⁸ See generally CARTER GOODRICH, GOVERNMENT PROMOTION OF AMERICAN CANALS AND RAILROADS 1800-1890 (1960) (documenting the many ways that all levels of government, in cooperation with private interests, promoted canals and railroads).

Railroad from Chicago to Mobile by granting Alabama, Mississippi, and Illinois a 200 foot wide right-of-way and every even numbered section of land for six sections on either side of the right-of-way, which the states could sell to subsidize Illinois Central.³⁹ In 1862, Congress promised the Union Pacific and the Central Pacific railroads alternate sections of the public land for a distance of ten miles, and then later twenty miles, on either side of the track for the entire length of the transcontinental railroad.⁴⁰ Then, in 1864, the Northern Pacific Railroad (to be built from Duluth to Tacoma and then Portland) was given the largest grant of all, alternate sections out to 40 miles on each side of the railroad within territories and to 20 miles within states, which amounted to approximately 45 million acres, an area slightly larger than the state of Missouri.⁴¹ A variety of other railroad grants followed. By the time Congress ended railroad grants in 1871, railroad corporations had received more than 94 million acres of land (a million acres more than the entire acreage of Montana) and another 37 million acres had been given to states for the specific benefit of railroads.⁴²

A part of the internal improvement story that often receives less attention, however, is roads. Almost all of the early state enabling acts, for example, contained specific "proceeds clauses," which provided that the state would receive five percent of the income from federal land sales, which the state was to spend on "public roads."⁴³ Beginning with the famous

³⁹ Act of September 20, 1850, ch. 61, §§ 1-7, 9 Stat. 466-67. Congress saw this approach as more than a simple subsidy. As Congress envisioned it, the checkerboard grant assured that the railroads would not hold a monopoly along the lands near the primary transportation route and the presence of the railroad would allow the federal government to sell its own alternate sections at a premium, effectively paying for the subsidy to the railroad. Although the finances did not work out in practice, the approach continued. See SAMUEL TRASK DANA & SALLY K. FAIRFAX, *FOREST AND RANGE POLICY* 20 (2d ed. 1980) (discussing rights-of-way granted by the Act); PAUL W. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 385-86 (1968) (summarizing total grants to states and railroads from the federal government).

⁴⁰ Act of July 1, 1862, ch. 120, §§ 2-3, 12 Stat. 489, 491-92; See also DANA & FAIRFAX, *supra* note 39, at 20; GATES, *supra* note 39, at 356-86 (providing a history of railroad land grants).

⁴¹ Act of July 2, 1864, ch. 217, 13 Stat. 365. See DANA & FAIRFAX, *supra* note 39, at 20 (regarding the Northern Pacific Railroad Grant); GATES, *supra* note 39, at 356-86 (explaining the development of railroads in the west).

⁴² See DANA & FAIRFAX, *supra* note 39, at 20 (discussing specific acreage granted to the railroads); See generally GATES, *supra* note 39, at 356-86 (exploring the history of railroad land grants).

⁴³ The first proceeds clause appeared in Ohio's enabling act, which provided that the state would receive a percentage of sales proceeds for "laying out and making public roads" if the state agreed not to tax any public lands sold by the United States for five years after their sale. Enabling Act of 1802, ch. 40, § 7, 2 Stat. 173, 175 (1802). As Congress saw it, the transportation infrastructure built with the proceeds clause "would at once enhance the value of the public lands, and cement more strongly together the various interests of the confederacy." See OHIO: DISPOSITION OF PUBLIC LANDS AND CONDITIONS OF ADMISSION INTO THE UNION, REPORT NO. 161, 7th Cong., at 341 (2d sess. 1803). These proceeds clauses, which later included authority to build canals as well as roads, remained a fixture of state enabling acts until 1864. See 26 CONG. REC. 1, 218-20 (1893) (quoting the proceeds clauses from all states admitted to the Union as of that date). Beginning with Nebraska in 1864, land sale proceeds were to be spent on schools. See Nebraska Enabling Act, ch. 59, § 12, 13 Stat. 47, 49 (1864). The only partial exception to the pre-1864 focus on roads was with Illinois' enabling act which required that two percent be spent on internal improvements and three percent on "the encouragement of learning." Act of April 18,

Cumberland National Road (between Cumberland, Maryland and the Ohio River),⁴⁴ Congress also routinely appropriated funds for the construction of a wide variety of roads.⁴⁵ In some cases, Congress gave quite explicit instructions about how the road was to be constructed.⁴⁶ In the case of R.S. 2477, however, Congress was terse, providing no time limit and describing no specific construction standards. Adding to the potential for future confusion and litigation, R.S. 2477 grants were self-executing: claimants did not need to apply for the right-of-way, notify the United States, or even record their claim.⁴⁷ A state or local government might thus assume that a right-of-way had vested, while at the same time, the federal government might plausibly assume that it had not.⁴⁸

Although the turn of the nineteenth century saw a gradual movement away from federal disposition of the public lands and toward federal retention, that hardly altered the drive to build roads. If anything, it probably increased it. The federal public land agencies could hardly authorize and build roads fast enough, sometimes for recreation and visitation in the national parks, but more often as necessary to access federal timber on lands managed by the Forest Service. The result of federal policy in the nineteenth and most of the twentieth century is that there are roads everywhere on the public lands. "The current national forest road system

1818, ch. 67, § 6, 3 Stat. 428, 430 (1818).

⁴⁴ Act of March 29, 1806, 2 Stat. 357.

⁴⁵ See, e.g., Act of February 28, 1823, ch. 16, § 1, 3 Stat. 727 (granting 120 feet, plus another mile on both sides, to Ohio for the construction of a road from the Miami River rapids to the Connecticut Western Reserve); Act of March 2, 1827, ch. 52, § 1, 4 Stat. 234–35 (granting land to Indiana to build a road from Lake Michigan to the Ohio River); Act of March 3, 1827, ch. 93, § 1, 4 Stat. 242 (granting land to Ohio to build and finance a road from Columbus to Sandusky).

⁴⁶ With the Cumberland National Road, for example, Congress required that the middle of the road be raised "with stone, earth, or gravel and sand . . . leaving or making . . . a ditch or watercourse on each side . . . and in no instance shall there be an elevation in said road when finished, greater than an angle of five degrees with the horizon." Act of March 29, 1806, ch. 20, § 4, 2 Stat. 357, 359. In the 1860s, Congress passed a number of statutes granting rights-of-way that set forth specific construction requirements. See, e.g., Act of June 25, 1864, ch. 153, § 4, 13 Stat. 183, 184 (requiring the "road-bed proper to be not less than thirty-two feet wide, and constructed with ample ditches on both sides . . . All stumps and roots to be thoroughly grubbed out between the ditches the entire length of said road; the central portion of which to be sufficiently raised to afford a dry road-bed by means of drainage from the centre to the side ditches. . ."); Act of July 5, 1866, ch. 174, § 3, 14 Stat. 89 ("said road shall be constructed with such width, graduation, and bridges, as to permit its regular use as a wagon road . . ."); Act of July 4, 1866, ch. 167, § 3, 14 Stat. 86 (using similar language to the Act of July 5, 1866).

⁴⁷ The interpretation of R.S. 2477 grants as being self-executing is longstanding and widely accepted. See *Sierra Club v. Hodel*, 848 F.2d 1068, 1078 (10th Cir. 1988) ("According to regulations issued by the Department of the Interior and, after 1946, the Bureau of Land Management, a right-of-way could be obtained without application to, or approval by, the federal government.") (citing 43 C.F.R. § 244.55 (1939)), *overruled on other grounds by Village of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992).

⁴⁸ In the absence of any specific process for resolving R.S. 2477 claims, there have been various proposals to develop an administrative process to resolve disputes. For a helpful recapitulation of those proposals, see Bret C. Birdsong, *Road Rage and R.S. 2477: Judicial and Administrative Responsibility For Resolving Road Claims on Public Lands*, 56 HASTINGS L.J. 523, 540–46 (2005). Professor Birdsong argues that federal land management agencies should have primary responsibility to resolve R.S. 2477 claims with federal courts limited to their customary administrative law role of reviewing the agency decision for abuse of discretion. *Id.*

includes 380,000 miles of road, enough road to circle the globe more than 15 times.⁴⁹ BLM lands contain another 81,700 miles of roads, and wildlife refuges and national parks contain 7,000 and 8,500 miles of roads respectively.⁵⁰ For a bit broader perspective on roads in the United States, consider that there are 4 million miles of roads; 23 trillion vehicle miles were traveled on those roads in 2002; there are an average of 253,000 animal-vehicle accidents annually; and there are 1 million vertebrates run over each day (a rate of one every 11.5 seconds).⁵¹

B. Roads and the Environment

All of these roads on the public lands have an impact on the environment. Roads can displace species sensitive to disturbance or dependent upon unbroken forest habitat; roads can create barriers to the movement of certain animals; roads—or more precisely the vehicles that use the roads—can spread non-native plants, animals, and insects; roads—particularly dirt roads like those used for logging—can significantly increase hillside erosion; the erosion, in turn, can introduce high sediment loads into streams, reducing opportunities for fish to spawn and degrading the health of aquatic ecosystems; and, as discussed at greater length below, roads bring people and development into areas where they otherwise would not come.⁵²

Perhaps the most important impact of roads on the environment is not their impact on the environment per se, but their impact on the potential for designating a particular area as wilderness. For an area to be designated as wilderness, it must contain at least 5,000 roadless acres.⁵³ Thus, to the extent

⁴⁹ National Forest System Roadless Areas, 64 Fed. Reg. 56,306 (Oct. 19, 1999).

⁵⁰ Department of the Interior, DOI Quick Facts, <http://www.doiu.nbc.gov/orientation/facts2.cfm> (last visited Nov. 20, 2005).

⁵¹ Eliza Murphy, *Caught in the Headlights*, HIGH COUNTRY NEWS, Feb. 7, 2005, at 9–11.

⁵² See generally AYESHA ERCELAWN, END OF THE ROAD: THE ADVERSE ECOLOGICAL IMPACTS OF ROADS AND LOGGING: A COMPILATION OF INDEPENDENTLY REVIEWED RESEARCH (1999) (discussing different impacts of roads on the environment).

⁵³ Wilderness Act, 16 U.S.C. §§ 1131–33 (2000). The Act defines wilderness “as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain.” *Id.* § 1131(c). Wilderness must be

an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation [that] (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; [and] (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition.

Id. § 1131. Applying this standard, permanent and temporary roads are generally prohibited in wilderness. *Id.* § 1131(c). Deciding what constitutes a road or what counts as a permanent improvement has not been as straightforward as it may seem. The Forest Service, for example, has identified areas with fences and water troughs as wilderness; and in the eastern United States, where few areas would otherwise qualify, the Forest Service has said that areas which contain no more than a half mile of improved road for each 1000 acres have wilderness potential. See FOREST SERV., U.S. DEPT OF AGRIC., FOREST SERVICE MANAGEMENT HANDBOOK § 1909.12, ch. 7 (1992). Congress, of course, is free to pass legislation designating an area as wilderness regardless of its physical characteristics. Nevertheless, as a working description, the

an area of the public lands contains an R.S. 2477 road, particularly where that road can be maintained or upgraded by a state or county government, that area is unlikely to be designated by Congress as wilderness.

Although the Wilderness Act was passed in 1964, the question of what public lands should be designated as wilderness is not yet close to resolution. This is particularly the case with respect to lands managed by the Bureau of Land Management (BLM), but also to a lesser degree with national forests. As initially enacted, the Wilderness Act designated as wilderness only 9.1 million acres of land that had previously been set aside by the Forest Service as "wilderness," "wild," or "canoe" areas.⁵⁴ In addition, the Act provided for a review, to be completed within ten years, of the wilderness potential of all the areas within the national forests that had previously been designated as "primitive areas," as well as a review of "every roadless area of five thousand contiguous acres or more in the national parks, monuments and other units of the national park system and every such area of, and every roadless island within, the national wildlife refuges and game ranges. . . ."⁵⁵ BLM lands—"the land no one wanted"⁵⁶—were not mentioned in the Wilderness Act and their review only began in 1976 with the passage of the Federal Land Policy and Management Act⁵⁷ (FLPMA) and its requirement of a wilderness review.

The wilderness identification process within national parks and wildlife refuges was not particularly controversial because wilderness is not a dramatic departure from the existing preservation mandate for those land systems. However, for national forests and BLM lands, the process has been much more contentious because those lands would otherwise be available for multiple uses, which include logging, grazing, mining and other extractive and commodity uses, as well as high-intensity, motorized recreation.

The full story of wilderness designation on national forest lands is well beyond the scope of this article. Suffice it to say that one of the major themes of the entire national forest wilderness story—from the initial roadless area reviews and evaluations (RARE I during the Nixon administration and RARE II during the Carter administration) to the current

requirements that an area be roadless, at least 5000 acres, and without permanent improvements provide a fairly objective baseline for which areas may even be considered as wilderness. See RASBAND ET AL., *supra* note 22, at 613–14 (discussing the Wilderness Act definition of wilderness and the process of designating wilderness).

⁵⁴ Wilderness Act, 16 U.S.C. § 1132(a).

⁵⁵ *Id.* § 1132(c). As a result of the various reviews, Congress began adding wilderness. "The greatest expansion of the system came as a result of the 1980 Alaska National Interest Lands Conservation Act (ANILCA) which created 35 new wilderness areas in Alaska totaling more than 56 million acres." See RASBAND ET AL., *supra* note 22, at 613. Today, the National Wilderness Preservation System contains 662 areas totaling 105.6 million acres. The National Wilderness Preservation System, Wilderness Fast Facts, <http://www.wilderness.net/index.cfm?fuse=NWPS&sec=fastFacts> (last visited Nov. 20, 2005) (providing facts about the wilderness areas in the United States). For a clickable map identifying all of these wilderness areas including descriptions and photographs, see The National Wilderness Preservation System, Wilderness Areas, <http://www.wilderness.net/index.cfm?fuse=NWPS> (last visited Nov. 20, 2005).

⁵⁶ DYAN ZASLOWSKY & T.H. WATKINS, *THESE AMERICAN LANDS* 135 (2d ed. 1994).

⁵⁷ Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1785 (2000).

tussle over the Bush administration's changes to the Clinton administration's roadless area rule—is that whether an area may be designated as wilderness depends upon whether the area can be classified as roadless.⁵⁸ Nevertheless, the debate about roads in our national forests is not just, or even primarily, about R.S. 2477. Whether additional roads should be built to facilitate timber harvests within our national forests is a major issue.⁵⁹ Moreover, the debate about R.S. 2477 is less significant in the case of national forests than with BLM lands. Because R.S. 2477 granted rights-of-way across only those public lands not otherwise reserved for a particular public use,⁶⁰ once a national forest was created no more R.S. 2477 rights-of-way could be established on that “reserved” land. Given the early date at which most forests were reserved, fewer roads had been constructed and proving the pre-reservation existence of those few roads after so many years is quite difficult.

BLM lands, which have never been reserved for a specific purpose, are a different story. In 1976 Congress passed FLPMA and instructed BLM to conduct a wilderness review of the lands it managed.

Within fifteen years after October 21, 1976, the Secretary shall review those roadless areas of five thousand acres or more and roadless islands of the public lands, identified during the inventory required by section 1711(a) of this title as having wilderness characteristics described in the Wilderness Act . . . and shall from time to time report to the President his recommendation as to the suitability or unsuitability of each such area or island for preservation as wilderness⁶¹

One of the linchpins of the current wilderness debate came in the next part of section 603. There, Congress provided that the areas identified by the Secretary of the Interior as potential wilderness (what are typically called “wilderness study areas” or “WSAs”) were to be managed by the Secretary, and therefore the BLM, for non-impairment of their wilderness characteristics until Congress decides to designate the WSAs as part of the wilderness preservation system or release them for multiple use management.⁶²

R.S. 2477 roads can impact wilderness study areas in a few key ways. First, in determining whether an area was roadless and could be labeled a WSA, BLM defined the term “roadless” to mean an area without any roads built by mechanical means. If it turns out that rural counties are correct and

⁵⁸ For a review of the controversy over wilderness designation in the national forests, see generally RASBAND ET AL., *supra* note 22, at 614–15, 1216–24.

⁵⁹ See generally Robert L. Glicksman, *Traveling in Opposite Directions: Roadless Area Management Under the Clinton and Bush Administrations*, 34 ENVTL. L. 1143 (2004) (discussing the history of Forest Service roadless initiatives and the differing approaches of the Clinton and Bush administrations); Martin Nie, *Administrative Rulemaking and Public Lands Conflict: The Forest Service Roadless Rule*, 44 NAT. RESOURCES J. 687, 699 (2004) (discussing the history of national forest roads and noting that “[s]ince RARE II was completed in 1979, roads had been constructed in an estimated 2.8 million acres of inventoried roadless lands”).

⁶⁰ Act of July 26, 1866, § 8, 14 Stat. 251, 253 (“That the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.”).

⁶¹ 43 U.S.C. § 1782(a).

⁶² *Id.* § 1782(c).

that any "beaten path" is a road, the WSAs could actually be laced with roads. One might respond that if the physical, on-the-ground characteristics of the "beaten path" did not preclude calling an area "roadless" in the initial inventory, why does it matter if that same "path" is later labeled an R.S. 2477 road? The answer is that if a bona fide right-of-way exists in a "beaten path," it is subject to state or county improvement and upgrading. Although WSAs are to be managed for non-impairment, WSA management is subject to valid existing rights.⁶³ Thus, the existence of an R.S. 2477 right-of-way can limit the agency's ability to manage the WSA for non-impairment of its wilderness characteristics. Even if a road would not preclude wilderness designation in its current state, it could after a local government improved its existing right-of-way.

Although at first glance R.S. 2477 may not seem particularly significant, before its 1976 repeal it may have created thousands of rights-of-way across the public lands, which are laced with everything from graded and maintained county roads between ranching communities to rutted jeep trails leading to abandoned uranium mines and old, leaky water tanks. Utah and its counties, for example, claim some 10,000 potential R.S. 2477 roads.⁶⁴ Other state and local governments have similarly significant potential claims. San Bernardino County, California, has claimed

4,986 miles of "highways," 2,567 of which are in the Mojave National Preserve, protected by the California Desert Protection Act of 1994. In Colorado, Moffatt County officials have claimed a spiderweb of trails in Dinosaur National Monument. In Alaska, the state has claimed that nearly 900,000 miles of section

⁶³ Discovering additional roads outside wilderness study areas could also limit the potential for more wilderness designations. Because they view BLM's initial inventory of its lands for roadless areas with wilderness characteristics as inadequate, various preservation organizations have conducted their own inventories and identified additional areas that they claim are roadless and possess wilderness characteristics. See James R. Rasband, *Utah's Grand Staircase: The Right Path to Wilderness Preservation?* 70 U. COLO. L. REV. 483, 492-98 (1999) (discussing the citizen-led wilderness inventory effort). In Utah, the Clinton administration reinventoried the citizen-identified lands and decided that roughly 2.6 million acres had potential wilderness characteristics. See Sarah Krakoff, *Settling the Wilderness*, 75 U. COLO. L. REV. 1159, 1167-78 (2004) (considering Utah's settlement on the management of wilderness inventory areas). The Clinton BLM then began to manage these "wilderness inventory areas" for non-impairment as if they were wilderness study areas. See generally RASBAND ET AL., *supra* note 22, at 661-64 (discussing this debate over the reinventory in Utah). The Bush administration, by way of settling a lawsuit with the State of Utah, concluded that only areas identified in the original FLPMA section 603 wilderness inventory could be managed as wilderness study areas and that other BLM lands had to be managed in accordance with existing land use plans, which called for the citizen-identified areas to be managed for multiple use rather than for non-impairment. See Sarah Krakoff, *Settling the Wilderness*, 75 U. COLO. L. REV. 1159, 1161-74 (2004) (considering Utah's settlement on the management of wilderness inventory areas). The environmental community's challenge to the Utah wilderness settlement is currently before the federal district court in Utah. See *Utah v. Norton*, 396 F.3d 1281, 1287 (10th Cir. 2005) (dismissing appeal as interlocutory because cross-claims were still pending before the district court).

⁶⁴ Bloch & McIntosh, *supra* note 20, at 489 (citing congressional testimony from a representative of the Utah Association of Counties).

lines (used for survey purposes) with no apparent surface manifestation, are R.S. 2477 highways.⁶⁵

If all of these count as R.S. 2477 roads, it not only limits the potential for wilderness, but it also creates the potential for tremendous management conflicts when the state, local, or federal entity claiming the right-of-way wants to modify or expand a road. Both are reasons for opposition from the environmental community. In its view, most of the so-called “roads” are really just abandoned mining trails, dry stream bottoms, and off-road vehicle routes, some of which are not even visible on the ground.⁶⁶

C. The Benefits of Road Building

The variety of environmental concerns about roads should not be taken too far. Roads are not an unadulterated evil whose primary purpose is to harm the environment and limit wilderness. On the contrary, roads bring a variety of benefits that we all enjoy. As George Bernard Shaw once remarked, “what Englishman will give his mind to politics as long as he can afford to run a motorcar.”⁶⁷ Most of us benefit from the country’s vast transportation infrastructure. Roads create opportunities for economic development. They open up access to recreation opportunities that would otherwise be unavailable to all but a few. And for rural communities surrounded by a sea of public lands, roads are seen as an economic lifeline, providing access to markets, gas and mining development, grazing allotments, and recreational sites, as well as routes for off-road vehicle use.⁶⁸ Roads are also important for emergency, medical, and law enforcement needs in rural areas. While backpackers may not appreciate the whine of an automobile breaking the canyon stillness, that same vehicle sounds very different to the hiker injured and waiting for help.

IV. UNTANGLING R.S. 2477

If one cares about wilderness designation, about the ecological impact of roads more generally, or about the need to assure a transportation infrastructure for rural public land communities, R.S. 2477 matters. The key question then is what Congress intended to grant when it stated in R.S. 2477 “[t]hat the right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted.”⁶⁹ Like most interpretive

⁶⁵ *Id.* at 490 (internal citations omitted).

⁶⁶ *Id.* For pictures of some of the more dubious R.S. 2477 claims, see Southern Utah Wilderness Alliance, *Campaigns*, http://www.suwa.org/page.php? page_id=95 (last visited Nov. 20, 2005).

⁶⁷ See MARK NICHOLSON & MARK WHEATLEY, MARKET DRIVERS: ENDING ROAD RATIONING AND REFINING THE TRANSPORT MARKET 13 (2003), available at <http://www.bowgroup.org/pub/bRR15.pdf>.

⁶⁸ Wilderness and preservation, of course, also have economic value. See generally Pete Morton, *The Economic Benefits of Wilderness: Theory and Practice*, 76 DENV. U. L. REV. 465 (1999) (considering both the market and non-market values of wildlands).

⁶⁹ Mining Act of 1866 § 8, 14 Stat. 253 (1866).

questions of consequence, there is significant disagreement about exactly what Congress intended when it enacted R.S. 2477. The disagreement runs along two axes. First, there is a question about whether Congress intended state or federal law to define the existence of an R.S. 2477 right-of-way. Second, there is a question, under either state or federal law, about what actions are necessary to show "construction" of a "highway" on public lands "not reserved for public use."⁷⁰ At a more basic level, the debate about the meaning of R.S. 2477 is one of competing metaphors. The question is whether R.S. 2477 is a rule of capture or a rule of improvement.

A. R.S. 2477: Federal or State Law?

To the casual observer, the question whether state or federal law governs the existence of an R.S. 2477 right-of-way may seem curious. If R.S. 2477 is a federal law, surely its interpretation must be a matter of federal law. At one level, this is indisputably true. Ultimately, it is the intent of Congress, and not the actions of a particular state legislature, that must give content to R.S. 2477. Yet, it is also possible for Congress, as a matter of federal law, to decide that state law should govern the resolution of a particular dispute or entitlement. Consider other areas of public land law. In the same 1866 mining law containing R.S. 2477, Congress provided that rights to water acquired by prior appropriation were good against subsequent federal patentees if the rights were "recognized and acknowledged by the local customs, laws, and decisions of courts."⁷¹ In the Mining Law of 1872, Congress invited states and local authorities to establish rules for mining claims as long as those rules were "not in conflict with the laws of the United States."⁷² Likewise, in the Desert Land Act, Congress decided that state law would govern the allocation of waters on much of the public domain.⁷³

Thus, it would not be extraordinary for Congress to have intended the existence and scope of R.S. 2477 roads to be resolved with reference to state law. If Congress was willing to let states decide the fate of water and minerals on the public domain, perhaps it was also willing to allow states to decide on road ownership. On the other hand, there have always been limits on how far states can go in allocating natural resources on the public lands

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Mining Law of 1872, 30 U.S.C. §§ 22, 26, 28. A claimant's failure to comply with state procedures may be grounds for cancellation of the claim by the federal government. See *Roberts v. Morton*, 389 F. Supp. 87, 93 (D. Colo. 1975) (explaining the requirements of exploration and mining of lands belonging to the United States), *aff'd*, 549 F.2d 158, 161-62 (10th Cir. 1976), *cert. denied, sub nom.*, *Roberts v. Andrus*, 434 U.S. 834 (1977); *U.S. v. Weber Oil Co.*, 89 Interior Dec. 538, 548, GFS (MIN) 306 (1982) (holding that state and local laws apply to mining claimants).

⁷³ See *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-164 (1935) (stating that "following the act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris*, subject to plenary control of the designated states . . . with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain").

and surely that must also be true of roads. Thus, in the mining context, Congress may have been willing to allow states to decide how claims had to be marked and recorded, and the amount of work on a claim that had to be completed. Congress, however, still required that the state laws not be “in conflict” with federal law,⁷⁴ and that the miner actually locate a “valuable mineral deposit.”⁷⁵ Staking a mining claim to a fantastic trout-fishing spot was not enough, no matter what a state may have thought. Similarly, although Congress may have severed the water from the public domain in the Desert Land Act,⁷⁶ Congress has continued to regulate that water—for example, with the Federal Water Pollution Control Act⁷⁷ or the Endangered Species Act of 1973⁷⁸—and, when necessary, the United States has asserted reserved rights to water for Indian and other federal reservations.⁷⁹

While Congress has at various times assigned to states the authority to dictate ownership rules for resources on the public domain, a minimum of two conditions have still applied to the resource. First, the resource has always remained subject to federal constitutional authority. Second, some reasonable limit on state authority over a resource on the public lands was implicit in the statutory scheme. Thus, for example, even if Congress intended for the states to decide on the existence and scope of an R.S. 2477 right-of-way, surely a state could not have passed a state law declaring that the builder of any road across the public lands was entitled to a three-mile wide right-of-way. Presumably, the Desert Land Act was not intended to allow a state to pass a law allowing one private company to appropriate all of the water in the state for speculative purposes. Although the Mining Law provided only that “not less than \$100 worth of labor shall be performed or improvements made during each year,”⁸⁰ presumably a requirement that a miner perform \$100,000 of labor each year would have been held contrary to the broader federal purposes sought to be achieved with the mining law. Thus, even when a federal statute allows states to allocate a federal resource, it seems implicit in that grant of authority that the state’s allocation decision be reasonable and consonant with broader statutory purposes.

⁷⁴ Mining Law of 1872, 30 U.S.C. §§ 22, 26, 28.

⁷⁵ *Id.* §§ 22, 29.

⁷⁶ See *California Oregon Power Co.*, 295 U.S. at 158 (concluding that the Desert Land Act “effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself”). Desert Land Act, 43 U.S.C. § 321 (repealed 1976).

⁷⁷ 33 U.S.C. §§ 1251–1387.

⁷⁸ 16 U.S.C. §§ 1531–1544.

⁷⁹ See *Federal Power Comm’n v. Oregon*, 349 U.S. 435, 448 (1955) (holding that despite the long understanding of Desert Land Act states in the West that water use would be governed by state law, see *supra* note 73, the Desert Land Act did not apply to federal reservations where water was necessary to accomplish the purpose of the reservation). As one commentator points out, decisions like *Federal Power Comm’n v. Oregon* indicate that “it is not at all unusual for federal courts to interpret federal statutes in a manner inconsistent with prior state law which remained unchallenged for a long period of time by federal authorities.” Pamela Baldwin, *Highway Rights of Way on Public Lands: R.S. 2477 and Disclaimers of Interest*, Congressional Research Service, Report for Congress, RL32142, Nov. 7, 2003, at 40 n.148 (quoting Dept. of Justice amicus brief in *Alaska Greenhouses Inc. v. Anchorage* (Civ. A85-630, (D. Alaska 1986)).

⁸⁰ 30 U.S.C. § 28.

1. Pre-FLPMA Interpretation of R.S. 2477

With that preface in mind, how has R.S. 2477 been interpreted over the years? The starting place for statutory interpretation is, of course, the language of R.S. 2477 itself. The terse statutory language, however, does not indicate whether the existence of an R.S. 2477 right-of-way is to be determined by state or federal law. R.S. 2477 requires "construction of highways" but are those terms to be defined by reference to state or federal law? And, if by state law, what range of definitions can be described as reasonably within the broader purposes of the statute? Recall that R.S. 2477 was enacted as part of the 1866 mining law. As the Tenth Circuit has noted:

Congress explicitly adopted state or local law as the rule of decision for sections 1, 2, 5, and 9 of the 1866 Act; just as explicitly, Congress asserted the applicability of federal laws or regulations in sections 7, 10, and 11. The silence of section 8 reflects the probable fact that Congress simply did not decide which sovereign's law should apply.⁸¹

Where the statute itself is silent or ambiguous, courts typically defer to the interpretation of the statute offered by the federal agency charged with implementing the statute.⁸² This is where things get a bit more complicated. Between 1866 and 1898, the Department of the Interior did not issue any guidance on R.S. 2477. In 1898, the Secretary of the Interior ruled against a county's attempt to accept R.S. 2477 grants to the extent of 30 feet alongside all section lines in the county.⁸³ Although the Secretary's 1898 decision did not specifically address whether state or federal law governed the meaning of R.S. 2477,⁸⁴ the decision can be understood as an example of a federal law

⁸¹ *Sierra Club v. Hodel*, 848 F.2d 1068, 1080 (1988).

⁸² See *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). As the Court stated in *Chevron*:

The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. . . . Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Id. at 843-44 (internal quotations and citation omitted).

⁸³ *Douglas County, Washington*, 26 Pub. Lands Dec. 446, 447 (1898). The court remarked:

There is no showing of either a present or a future necessity for these roads or that any of them have been actually constructed, or that their construction and maintenance is practicable. Whatever may be the scope of the statute under consideration it certainly was not intended to grant a right of way over public lands in advance of an apparent necessity therefor, or on the mere suggestion that at some future time such roads may be needed.

Id. at 447.

⁸⁴ The Secretary's reasoning did hint that state law could determine the existence of a right-of-way:

If public highways have been, or shall hereafter be, established across any part of the public domain, in pursuance of law, that fact will be shown by local public records of

reasonableness limit on the scope of an R.S. 2477 grant. If section lines were held to be valid R.S. 2477 rights-of-way, an incredibly extensive cross-hatched grid of roads (with rights-of-way established at one-mile intervals—north, south, east, and west) across federal lands would be created.⁸⁵

It was not until 1938 that the Interior Department published a regulation dealing with R.S. 2477 rights-of-way.⁸⁶ The regulation simply provided: “This grant becomes effective upon the construction or establishing of highways, *in accordance with the 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.”⁸⁷ The Department of the Interior adhered to this basic position until FLPMA’s passage in 1976.⁸⁸

In the meantime, state courts went about adopting their own approaches to R.S. 2477. Some state courts—Kansas, South Dakota, and Alaska—in opposition to the 1898 decision of the Solicitor, upheld state statutes which created rights-of-way along all section lines regardless of construction or use.⁸⁹ Other states, including Utah, Colorado, Wyoming, New Mexico, and Oregon, provided that public use of a road over time could establish a highway.⁹⁰ Arizona, by contrast, decided that R.S. 2477 rights-of-

which all must take notice, and the subsequent sale or disposition by the United States of the lands over which such highways are established will not interfere with the authorized use thereof, because those acquiring such lands will take them subject to any easement existing by authority of law.

Id. at 447.

⁸⁵ Despite this ruling, several states have dedicated all section lines as public roads. See U.S. DEP’T OF THE INTERIOR, REPORT TO CONGRESS ON R.S. 2477: THE HISTORY AND MANAGEMENT OF R.S. 2477 RIGHTS-OF-WAY CLAIMS ON FEDERAL AND OTHER LANDS 15 (1993). This is not quite as odd as it may seem. As one commentator explains:

The American surveying system did not provide for road corridors along section lines. In contrast to the American system, the Canadian system expressly did provide for road corridors along all section and township lines. Some states adopted the Canadian approach and specified that rights of way existed along section lines.

Baldwin, *supra* note 79, at 46–47.

⁸⁶ Regulations Governing Rights-of-Way, 56 Interior Dec. 533, 551 (1938).

⁸⁷ *Id.*

⁸⁸ The actual regulation in effect at FLPMA’s passage had been published in 1970 and amended in 1974. Effective Date of Grant, Roads Over Public Lands Under R.S. 2477, 35 Fed. Reg. 9645, 9647 (June 13, 1970), as amended at 39 Fed. Reg. 39,440 (Nov. 7, 1974). It addressed the management of rights-of-way in more detail than the 1938 regulation but it retained the same basic position that grants became effective upon construction or establishment of highways in accordance with state law. *Id.*

⁸⁹ See Letter from Frederick N. Ferguson, Deputy Solicitor, to James W. Moorman, Assistant Attorney General (Apr. 28, 1980) (hereafter “Ferguson Letter”). In 2000, North Dakota’s Attorney General issued an opinion that all federal land in North Dakota was burdened with an R.S. 2477 right-of-way along all section lines. 2000 N.D. Op. Att’y Gen. No. 05 (Jan. 26, 2000), available at 2000 WL 146636.

⁹⁰ Ferguson Letter, *supra* note 89 at 3, (citations omitted). The Utah Supreme Court explained:

[D]ecisions are to the effect that an acceptance is shown by evidence of user for such a length of time and under such conditions as would establish a road by prescription, if the land over which it passed had been the subject of private ownership. *Okanogan Co. v. Cheetham*, 37 Wash. 682, 80 P. 262, 70 L.R. A. 1027; *City of Butte v. Mikosowitz*, 39 Mont.

way could be created only by local government resolution following construction of a highway.⁹¹

Despite this ongoing litigation, it is fair to say that for much of its history the interpretation of R.S. 2477 was not a particularly pressing issue for public land management. Most of the litigation was between private landowners and neighbors who sought to cross the landowner's property along what they alleged to be an R.S. 2477 right-of-way. Moreover, because no application needed to be filed or recorded to effectuate a grant, and because the federal government did little to hinder state, county, and private access across the public domain, there was little occasion to fight about whether an R.S. 2477 right-of-way had been established as against the United States. With the passage of FLPMA in 1976, however, the meaning of R.S. 2477 became much more important. Culminating what had been a century-long movement toward federal retention of the public lands, FLPMA declared Congress's intention that the "public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest. . . ."⁹² Although FLPMA's multiple use mandate lacked the preservation focus of other legislation such as the Wilderness Act⁹³ and the National Park Service Organic Act⁹⁴, FLPMA refocused the dialogue about the appropriate management of the BLM's lands and therefore about the meaning of R.S. 2477. Particularly in light of FLPMA's command that BLM perform a wilderness inventory of its lands and then manage wilderness study areas for non-impairment,⁹⁵ FLPMA energized a constituency for a new and narrower interpretation of R.S. 2477. Because FLPMA also repealed R.S. 2477,⁹⁶ while protecting R.S. 2477 rights-of-way in existence on the date of the Act's passage,⁹⁷ it also made clear that there was

350, 102 P. 593, or of public user for such time as is prescribed in state statutes upon which highways are deemed public highways. *McRose v. Bottyer*, 81 Cal. 122, 22 P. 393; *Schwerdtle v. Placer County*, 108 Cal. 589, 41 P. 448; *Walcott Tp. v. Skauge*, 6 N.D. 382, 71 N.W. 544; *Great N. R. Co. v. Viborg*, 17 S.D. 374, 97 N.W. 6. See, also, annotation on necessity and sufficiency of acceptance, L.R.A. 1917A, 355.

Lindsay Land & Livestock v. Churnos, 285 P. 646, 648 (Utah 1930).

⁹¹ Ferguson Letter, *supra* note 89, at 9 (citations omitted).

⁹² Federal Land Policy and Management Act, 43 U.S.C. § 1701(a)(1)(2000). FLPMA repealed scores of old public lands laws and served as an organic act for BLM, directing that the grazing and other lands managed by BLM, like the national forests, should be managed "under the principles of multiple use and sustained yield" for a range of uses including extraction, recreation, and preservation, a philosophy commonly called multiple use and sustained yield that had originally been championed by Gifford Pinchot. See 43 U.S.C. § 1732 (2000) (setting forth the multiple use standard). BLM now administers about 180 million acres of land in the lower 48 states and another 86 million acres in Alaska. See BLM, Lands Managed by the BLM, http://www.blm.gov/nhp/facts/maps/landsmap_m.html (last visited Nov. 20, 2005) (depicting the lands managed by the BLM).

⁹³ Wilderness Act, 16 U.S.C. § 1131 et seq. (2000).

⁹⁴ National Park Service Act, 16 U.S.C. § 81 et seq. (2000).

⁹⁵ See *infra* Part III.B.

⁹⁶ See *supra* note 19 (citing statutory provisions regarding valid existing rights).

⁹⁷ See Federal Land Policy and Management Act, 43 U.S.C. §§ 1769(a), 1701(a), (h) (2000) (protecting valid existing rights).

a need to identify and recognize whatever rights existed as of 1976 so that title and management authority could be clarified. In basic terms, FLPMA started a political tug-of-war over the meaning of R.S. 2477. That tug-of-war is a classic, although not particularly uncommon, tale of the ebb and flow of administrative law over the course of successive presidential administrations.

2. The Carter Years

The first change in direction on R.S. 2477 policy came toward the end of the Carter administration. In 1980, the Solicitor's office issued a letter offering what it regarded as the proper substantive interpretation of R.S. 2477.⁹⁸ Deputy Solicitor Ferguson's letter concluded that "whether a particular highway has been legally established under R.S. 2477 remains a question of federal law."⁹⁹ And, as a matter of federal law, the word "construction" in the statute meant that "in order for a valid right-of-way to come into existence, there must have been the actual building of a highway; i.e., the grant could not be perfected without some actual construction."¹⁰⁰ "Mere use" was not sufficient; the word "construction" "implies the performance of work."¹⁰¹ The interpretation, it noted, also had the virtue of "avoiding what would otherwise be a serious conflict between highway rights-of-way established under R.S. 2477 and the meaning of the term 'roadless' in Section 603 of FLPMA."¹⁰²

⁹⁸ See Ferguson Letter, *supra* note 89. The so-called Ferguson letter had been preceded, in 1979, by proposed Interior Department regulations that would have required state or local governments to file maps with the BLM within three years showing the location of highways constructed under R.S. 2477. The filing was not to be conclusive evidence of an R.S. 2477 road but only a means whereby BLM would be able to note the public land records. 43 C.F.R. § 2802.3-6 (1979); 44 Fed. Reg. 58,118 (Oct. 9, 1979). When the final regulations were published, however, they simply stated that that there was an opportunity to file within three years. 43 C.F.R. § 2802.3-6 (1980); 45 Fed. Reg. 44,518, 44,531 (July 1, 1980). Then, when new regulations were published by the Reagan Interior Department in 1982, the three-year window was removed. 43 C.F.R. § 2802.5 (1982); 47 Fed. Reg. 12,568-70 (Mar. 23, 1982).

⁹⁹ Ferguson Letter, *supra* note 89, at 4.

¹⁰⁰ Ferguson Letter, *supra* note 89, at 5.

¹⁰¹ Ferguson Letter, *supra* note 89, at 5-6. One precedent that seemed to have particular influence on the view of the Solicitor's Office was the line of cases holding that grants by the federal government were to be construed favorably to the government and that nothing should be conveyed in the absence of clear and explicit language. *Id.* at 4 (citing *Caldwell v. United States*, 250 U.S. 14, 20 (1918); *Wisconsin Central R.R. Co. v. United States*, 164 U.S. 190, 202 (1898); *Great Northern Ry. Co. v. United States*, 315 U.S. 262, 272 (1942); *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 617 (1978)).

¹⁰² Ferguson Letter, *supra* note 89, at 2. The definition of road employed by the BLM in performing its section 603 inventory came from the House Report on FLPMA:

The word "roadless" refers to the absence of roads which have been improved and maintained by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road.

H.R. REP. NO. 94-1163, at 17 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6175. As explained above, *see supra* text accompanying note 63, if "beaten path" roads are valid R.S. 2477 roads, then WSAs determined with reference to a mechanical construction standard could actually be laced with roads subject to local government improvement, which presumably would preclude

3. The Reagan Years

The conclusions in the Ferguson letters were finally tested during the Reagan administration, in what became known as the Burr Trail case, *Sierra Club v. Hodel*.¹⁰³ As described by the court, the Burr Trail runs through a spectacular portion of Utah's red rock country, and

the road at various points traverses across or next to unreserved federal lands, two wilderness study areas, the Capitol Reef National Park, and the Glen Canyon National Recreation Area. The trail has hosted a variety of uses: during the late 1800s and early 1900s to drive cattle, sheep and horses to market; around 1918 to facilitate oil exploration; and since the 1930s for various transportation, emergency, mineral, agricultural, economic development, and tourist needs. Garfield County (the County) has maintained the Burr Trail since the early 1940s.¹⁰⁴

In light of this historic use and maintenance, the Sierra Club did not contest the *existence* of the right-of-way on appeal, but instead challenged its *scope*, contesting Garfield County's plan to expand the western 28 miles of the road from one lane to two and then to gravel the expanded portion.¹⁰⁵ The Tenth Circuit gave the Ferguson letter its narrowest possible reading, reasoning that whatever the merits of applying a federal "construction" standard to the question of the *existence* of an R.S. 2477 right-of-way, it was "most consonant with reason and precedent" that state law should control the *scope* of the right-of-way.¹⁰⁶

Following the Tenth Circuit's decision, President Reagan's Interior Secretary Donald Hodel issued a new policy statement on R.S. 2477.¹⁰⁷ The so-called "Hodel Policy" confirmed that the scope of rights-of-way was to be resolved by reference to state law.¹⁰⁸ It then rejected the Ferguson letter's definition of "construction." Without addressing whether the existence of an R.S. 2477 right-of-way was a question of state or federal law, the policy provided that

wilderness designation.

¹⁰³ 848 F.2d 1068 (10th Cir. 1988), *overruled on other grounds by* Village of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992).

¹⁰⁴ *Id.* at 1073.

¹⁰⁵ *Id.* The fact that the Sierra Club in the district court challenged the existence of any right-of-way along the Burr Trail illustrates that both sides in the R.S. 2477 debate have taken the most aggressive position possible.

¹⁰⁶ *Id.* at 1080-81. The court did not address whether federal law should decide the *existence* of R.S. 2477 rights-of-way. It did note that over the prior 125 years, "each western state has developed its own state-based definition of the perfection or scope of the R.S. 2477 grant, either by explicitly declaring R.S. 2477 to incorporate state law or by simply expounding its own law." *Id.* at 1082.

¹⁰⁷ Memorandum from the Acting Assistant Sec'y for Fish and Wildlife and Parks and the Assistant Sec'y for Land Mgmt. to the Sec'y of the Interior Regarding Departmental Policy on Section 8 of the Act of July 26, 1866, Revised Statute 2477 (Repealed), Grant of Right-of-Way for Public Highways (RS-2477) (Dec. 7, 1988) (hereinafter "Hodel Policy"), *available at* <http://www.rs2477roads.com/2hodel.htm>.

¹⁰⁸ Hodel Policy, *supra* note 107, at 3.

Construction is a physical act of readying the highway for use by the public according to the available or intended mode of transportation—foot, horse, vehicle, etc. Removing high vegetation, moving large rocks out of the way, or filling low spots, etc., may be sufficient as construction for a particular case.

....

Road maintenance over several years may equal actual construction.

The passage of vehicles by users over time may equal actual construction.¹⁰⁹

The *Hodel* decision also proved to be quite influential in the courts. In subsequent years, a number of federal district courts cited *Hodel* and offered varying degrees of analysis to adopt a state law, “continued use” standard for the existence of an R.S. 2477 claim.¹¹⁰

4. The Clinton Years

With the advent of the Clinton Administration, federal R.S. 2477 policy took another U-turn. In 1994, the Clinton Administration Department of the Interior proposed new R.S. 2477 regulations.¹¹¹ The proposed rules would have established a federal administrative procedure for determining the validity of R.S. 2477 claims.¹¹² They also returned to the construction standard of the Ferguson letter, defining construction as a matter of federal law to be “an intentional physical act or series of intentional physical acts that were intended to, and that accomplished, preparation of a durable, observable, physical modification of land for use by highway traffic.”¹¹³

The proposed rules, however, were never finalized because soon after the Republicans took control of Congress in 1994, Congress imposed a temporary moratorium on further Interior Department R.S. 2477 regulations,¹¹⁴ which was followed the next year by a permanent

¹⁰⁹ *Hodel* Policy, *supra* note 107, at 3. The Policy also called for the land management bureaus within the Interior Department to develop procedures for administratively recognizing highways for purposes such as developing land use plans. *Id.* at 2.

¹¹⁰ See *Barker v. Bd. of County Comm'rs of La Plata, Colo.*, 49 F. Supp. 2d 1203, 1214 (D. Colo. 1999); *United States v. Jenks*, 804 F. Supp. 232, 235–36 (D. N.M. 1992), *aff'd in part and rev'd in part on other grounds*, 22 F.3d 1513 (10th Cir. 1994); *Adams v. United States*, 687 F. Supp. 1479, 1490 (D. Nev. 1988). See also *Shultz v. United States Dept. of the Army*, 10 F.3d 649, 655 (9th Cir. 1993), *withdrawn and superseded on rehearing*, 96 F.3d 1222 (9th Cir. 1996).

¹¹¹ Revised Statute 2477 Rights-of-Way, 59 Fed. Reg. 39,216 (Aug. 1, 1994) (to be codified at 43 C.F.R. pt. 39).

¹¹² *Id.* at 39,226–29.

¹¹³ *Id.* at 39,225. In an advanced notice of a proposed rulemaking, announced the same day, the Interior Department also solicited comments on management standards for R.S. 2477 rights-of-way. See Advanced Notice of Proposed Rulemaking, Revised Statute 2477 Rights-of-Way, 59 Fed. Reg. 39,228 (August 1, 1994) (to be codified at 43 C.F.R. pt. 39) (noting as the basis of authority for those standards the command in FLPMA that BLM manage the public lands so as to prevent “unnecessary and undue degradation”); Federal Land Policy and Management Act, 43 U.S.C. § 1732(b) (“In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.”).

¹¹⁴ See National Highway System Designation Act of 1995, Pub. L. No. 104-59, § 349(a), 109

moratorium.¹¹⁵ Prevented from promulgating an R.S. 2477 rule, Secretary Babbitt, in 1997, issued a departmental policy statement that explicitly revoked the 1988 Hodel policy.¹¹⁶ It also noted that if the Department were asked to make an R.S. 2477 determination during the moratorium, it would apply state law in effect upon the passage of FLPMA “to the extent it is consistent with Federal law,” and it would rigorously examine whether construction had occurred on the right-of-way prior to FLPMA.¹¹⁷ Secretary Babbitt was not simply guessing that his Department might be asked to make an R.S. 2477 determination: the opportunity was already on the horizon.

On September 24, 1996, President Clinton used his authority under the Antiquities Act¹¹⁸ to proclaim the Grand Staircase-Escalante National Monument in southern Utah.¹¹⁹ The reaction in Utah was mostly negative. The congressional delegation, which had only learned of the President's intentions in a Washington Post story some eleven days before the proclamation,¹²⁰ criticized the President as a shameful and arrogant opportunist and cried foul over the administration's failure to consult them or to give any public notice of the proposal.¹²¹ In Kane and Garfield counties, the southern Utah counties where the Monument is located, President Clinton and Interior Secretary Babbitt were hung in effigy.¹²²

Stat. 568, 617-618 (1995) (sunset Sept. 30, 1996) (describing the moratorium).

¹¹⁵ See generally Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

¹¹⁶ Memorandum from Bruce Babbitt, Sec'y of the Interior to the Acting Assistant Secretaries of Fish and Wildlife and Parks, Land and Minerals Mgmt., Indian Affairs, and Water and Science regarding “Interim Departmental Policy on Revised Statute 2477 Grant of Right-of-Way for Public Highways; Revocation of December 7, 1988 Policy” (Jan. 22, 1977) at 1, available at http://www.highway-robbery.org/documents/1221997_memo_from_Bruce_Babbitt_RS2477_policy.pdf.

¹¹⁷ *Id.* at 3.

¹¹⁸ 16 U.S.C. § 431 (1994). Section 2 of the Act delegates broad authority to the President to create national monuments:

The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

¹¹⁹ For a review of President Clinton's designation of the Grand Staircase-Escalante National Monument, see James R. Rasband, *Utah's Grand Staircase: The Right Path to Wilderness Preservation?*, 70 U. COLO. L. REV. 483 (1999).

¹²⁰ See Tom Kenworthy, *President Considers Carving National Monument Out of Utah Land*, WASH. POST, Sept. 7, 1996, at A3 (reporting Clinton administration's plans to designate the national monument).

¹²¹ See, e.g., Laurie Sullivan Maddox, *Taking Swipes at Clinton, Utahns Vow to Fight Back*, SALT LAKE TRIB., Sept. 19, 1996, at A5 (quoting Utah Senator Hatch that “[i]n all my years in the U.S. Senate, I have never seen a clearer example of the arrogance of federal power Indeed, this is the mother of all land grabs.”).

¹²² See Paul Larmer, *Beauty and the Beast: The President's New Monument Forces Southern Utah to Face its Tourism Future*, HIGH COUNTRY NEWS, Apr. 14, 1997, at 8 (quoting Kane County Commissioner stating that “[i]t was arrogant as hell for the president to use the law to his

Soon after the Monument was declared, three southern Utah counties, including Kane and Garfield, sent out road crews to blade (i.e., to use a road grader to move earth with a snowplow-like blade) sixteen claimed R.S. 2477 rights-of-way within the Monument and elsewhere, including within wilderness study areas and land proposed as wilderness in legislation supported by the environmental community. Kane County Commissioner Joe Judd described the decision this way:

What we said was, if they are having trouble judging if it's a road, we are going to brighten those roads up," said Judd. "We went out and reestablished our roads. We smoothed them out. Then they can't say it wasn't graded or it wasn't maintained. It was to help them with their judgment.¹²³

In response to the counties' blading project, the Southern Utah Wilderness Alliance (SUWA) sued BLM and the three Utah counties in October 1996, arguing that the counties' road maintenance was illegal and that BLM had failed to fulfill its obligations under FLPMA and the Antiquities Act by not halting the counties' activities.¹²⁴ Later that same month, the United States filed cross-claim trespass actions against the counties.¹²⁵ The case moved fitfully forward until February 1998, when BLM asked the court to refer to the agency for initial determination whether the roads at issue were valid R.S. 2477 rights-of-way.¹²⁶ The Interior Department had the sort of

advantage as he did"); Laurie Sullivan Maddox, *It's a Monumental Day for Utah*, SALT LAKE TRIB., Sept. 18, 1996, at A1 (describing "loss of rights" rally held in Kane County on the day of the Monument's designation); Jim Woolf, *A Pretty, Great Monument?*, SALT LAKE TRIB., Sept. 19, 1996, at A4 ("What I'd like to do is declare war on the White House . . . but my church and the laws don't allow me to do that."); *Kane County Holds a Bitter Wake After Monument Decision*, SALT LAKE TRIB., Sept. 19, 1996, at A7 (describing Kane County's reaction to the decision); David Maraniss, *Clinton Acts To Protect Utah Land*, WASH. POST, Sept. 19, 1996, at A1 (quoting executive director of the Utah Association of Local Governments as saying, "this is the most arrogant gesture I have seen in my lifetime. . . . The only comparable act I can think of is when a country is ruled by a king and he sweeps his hand across a map and says, 'It will be thus!'").

¹²³ Tom Kenworthy, *Blazing Utah Trails to Block a Washington Monument*, WASH. POST, Nov. 30, 1996, at A1. On September 26, 1996 San Juan County notified BLM of its intention to maintain six of the roads and offered to allow BLM to assert a claim to those roads. See Appellant's Reply Brief at 32, *Southern Utah Wilderness Alliance v. Bureau of Land Mgmt.*, No. 04-4071 (10th Cir. filed Sept. 16, 2004) (describing San Juan County's offer to the BLM).

¹²⁴ See Brief of the Federal Appellee at 10, *Southern Utah Wilderness Alliance v. Bureau of Land Mgmt. (SUWA v. BLM)*, No. 04-4071, (10th Cir., June 30, 2004).

¹²⁵ See *id.* On appeal the counties have strenuously objected to the BLM, as a litigant in the case, having the opportunity to make an initial determination of the validity of the R.S. 2477 claims to which the district court then gave some deference. San Juan County's brief illustrates the frustration:

In this case the BLM served as policeman (see trespass citations); as plaintiff (see cross-claim); as legislator (see . . . determination which created new rules); as judge (see San Juan's determination); and amicus for itself as judge (see BLM's extensive memorandum requesting that the "court should affirm the determinations.") The sovereign's exercise of so many roles hearkens to the days of King George III.

Brief of Appellants at 18, *Southern Utah Wilderness Alliance v. Bureau of Land Mgmt.*, No. 04-4071 (10th Cir. June 9, 2004).

¹²⁶ Brief of the Federal Appellee at 3, *Southern Utah Wilderness Alliance v. Bureau of Land Mgmt.*, Nos. 04-4071, 04-4073 (10th Cir. Aug. 12, 2004). The motion was partly in reaction to the

request for a determination that Secretary Babbitt had envisioned in his 1997 policy memorandum.¹²⁷

Unsurprisingly, in investigating the road claims, BLM employed a definition of "construction" that required some form of mechanical construction and improvement.¹²⁸ Moreover, to be a "highway," BLM concluded that the road must be freely open to the public.¹²⁹ Applying this standard, along with the requirement that the area over which the alleged right-of-way traverses not be otherwise reserved for a public use,¹³⁰ BLM concluded that only one of the sixteen roads was a valid R.S. 2477 right-of-way.¹³¹ The district court gave BLM's statutory interpretation some deference and affirmed the agency's determination of the status of the sixteen roads.¹³² The court reasoned that the BLM's interpretation was consistent with current dictionary definitions of the word "construction."¹³³ It also emphasized that a 1992 Interior Appropriations Act House Conference Report had stated that the validity of an R.S. 2477 claim "should be drawn from the intent of R.S. 2477 and FLPMA."¹³⁴ And because FLPMA's purpose was that the public lands be retained in federal ownership, the word "construction" should be interpreted to help achieve that goal.¹³⁵

district court's statement in responding to a summary judgment motion by Garfield County seeking to quiet title to one particular road that "it appears to the court that when the validity of an R.S. 2477 right-of-way, or the scope of the right-of-way, is challenged, it is for the BLM to make a factual determination of the matter prior to the court's involvement." *Id.* at 12.

¹²⁷ See Babbitt, *supra* notes 116-17, at 45-46 and accompanying text (discussing Secretary Babbitt's 1997 policy memorandum).

¹²⁸ Southern Utah Wilderness Alliance v. Bureau of Land Mgmt. (*SUWA*), 147 F. Supp. 2d 1130, 1137 (D. Utah 2001).

¹²⁹ *Id.* at 1143.

¹³⁰ *Id.* at 1144. The BLM rejected some of the right-of-way claims on its finding that at the time the counties made their R.S. 2477 claims, the land had been reserved for public use pursuant to Coal Land Withdrawal No. 1, which was a 1910 reservation of public land in Utah promulgated as part of the Pickett Act of 1910. See Act of June 25, 1910, ch. 421, § 1; 36 Stat. 847 (giving the President authority to temporarily withdraw lands for various public purposes).

¹³¹ *SUWA*, 147 F. Supp. 2d at 1134.

¹³² *Id.* at 1135. Because the BLM's statutory interpretation was based upon the Ferguson letter, rather than formal rulemaking, the court stated that it was giving only limited deference under the Supreme Court's decision holding that interpretations contained in informal formats like the Ferguson letter are "entitled to respect" but only to the extent that those interpretations have the "power to persuade." *Id.* (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

¹³³ *Id.* at 1139. The court also said that the *existence* of an R.S. 2477 right-of-way was a question of federal law and any suggestion to the contrary in *Hodel* was dicta. *Id.* at 1143. Although the district court decided that the standard for whether an R.S. 2477 right-of-way exists is a question of federal law, other federal courts have suggested that the standard is a matter of state law. See *Wilkenson v. Dept. of Interior*, 634 F. Supp. 1265 (D. Colo. 1986); *Barker v. Board of County Comm'rs*, 49 F. Supp. 2d 1203, 1214 (D. Colo. 1999); *United States v. Jenks*, 804 F. Supp. 232, 235 (D.N.M. 1992) *rev'd. in part on other grounds*, 22 F.3d 1513 (10th Cir. 1994); *Sierra Club v. Hodel*, 675 F. Supp. 594, 604 (D. Colo. 1987).

¹³⁴ See *SUWA*, 147 F. Supp. 2d at 1139 (citing H.R. REP. NO. 102-5503 (1992) (Conf. Rep.)); 138 CONG. REC. H9306-01, H9325 (daily ed. Sept. 24, 1992).

¹³⁵ *SUWA*, 17 F. Supp. 2d at 1139-40. Using the goals of FLPMA, enacted in 1976, to interpret the meaning of R.S. 2477, enacted in 1866, seems plainly incorrect. See *United States v. SCS Bus. & Technical Inst., Inc.*, 173 F.3d 870, 878-79 (D.C. Cir. 1999) ("Post-enactment legislative history—perhaps better referred to as 'legislative future'—becomes of absolutely no significance when the subsequent Congress . . . takes on the role of a court and in its reports

The district court's decision, which is currently on appeal to the Tenth Circuit,¹³⁶ also found persuasive BLM's argument that an actual construction standard was required by the Supreme Court's decision in *Bear Lake & River Waterworks & Irrigation Co. v. Garland (Bear Lake Irrigation)*,¹³⁷ which considered § 9 of the 1866 Mining Act.¹³⁸ Similar to R.S. 2477, which appears in § 8 of the Act, § 9 provided that "the right-of-way for construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed. . . ."¹³⁹ The Supreme Court stated that

[u]nder this statute no right or title to the land, or to a right of way over or through it, or to the use of water from a well thereafter to be dug, vests, as against the government, in the party entering upon possession from the mere fact of such possession unaccompanied by the performance of any labor thereon It is the doing of the work, the completion of the well, or the digging of the ditch, within a reasonable time from the taking of possession, that gives the right to use the water in the well or the right of way for the ditches of the canal upon or through the public land.¹⁴⁰

The district court agreed with the BLM that the same word "construction" that appeared in both § 8 and § 9 should be given the same interpretation—actual labor directed at construction was necessary for title to vest.¹⁴¹ Although it is not entirely clear in *Bear Lake Irrigation* whether the Court applied a federal or state law definition of construction,¹⁴² the case again illustrates the typical nineteenth century congressional view that the "mere fact" of possession—capture alone—was not sufficient to give good title.

In the months prior to the designation of the Grand Staircase, yet another Utah case had arisen that both illustrated the bitter nature of R.S. 2477 disputes and provided insight into a point that is often frustrating to rural counties: Even where a county has an R.S. 2477 right-of-way, the right-of-way can still be subject to federal regulation.¹⁴³ The case, fittingly enough, arose again along the Burr Trail. In February 1996, without seeking a permit

asserts the meaning of a prior statute.").

¹³⁶ See *Southern Utah Wilderness Alliance v. Bureau of Land Mgmt. (SUWA II)*, 425 F.3d 735 (10th Cir. 2005). See also Heidi McIntosh, *New Highways Under an Old Law? R.S. 2477 and Its Implications for the Future of Utah's Federal Public Lands*, UTAH BAR JOURNAL, May 12, 2005, at 16 (citing a February 11, 2005 oral argument date), also available at <http://www.utahbar.org/barjournal/archives/000270.html>.

¹³⁷ 164 U.S. 1 (1896).

¹³⁸ Mining Act of 1866 § 9, 14 Stat. 251.

¹³⁹ *Id.*

¹⁴⁰ *Bear Lake Irrigation*, 164 U.S. at 18–19.

¹⁴¹ *SUWA*, 147 F. Supp. 2d at 1140. See also *Reno v. Koray*, 515 U.S. 50, 58 (1995) (noting that it is a "basic canon of statutory construction that identical terms within an Act bear the same meaning").

¹⁴² *Bear Lake Irrigation*, 164 U.S. at 18. The Court emphasized that the right-of-way would be acknowledged and confirmed "when rights have become vested and accrued, which are recognized and acknowledged by the local customs, laws, and decisions of courts" *Id.* The Court also noted that the labor requirement was consonant with prior *Utah* case law. *Id.* at 19.

¹⁴³ *United States v. Garfield County*, 122 F. Supp. 2d 1201, 1223 (D.Utah 2000) (*Garfield County*).

from the National Park Service as required by Park Service regulations,¹⁴⁴ Garfield County road crews performed what they described as routine road improvement along the Burr Trail at the entrance to Capitol Reef National Park. The county crews bulldozed a portion of a hillside to improve sight lines for travelers. As the county viewed it, as long as it stayed within the scope of its R.S. 2477 right-of-way the federal government had no business interfering.¹⁴⁵ The United States sued, seeking declaratory and injunctive relief as well as trespass damages. Although the United States exaggerated its factual allegation that the county had “completely transformed the gateway to the National Park” by “removing half of the hillside that framed its entrance,”¹⁴⁶ its legal argument was sound. As the district court concluded, under both the Property Clause¹⁴⁷ and the Commerce Clause,¹⁴⁸ the federal government plainly had authority to regulate a right-of-way across federal land.¹⁴⁹ The court also decided that in this case the county had actually exceeded the scope of its right-of-way and trespassed on federal lands.¹⁵⁰

Although it is well-established under the Property Clause that federal regulatory authority can extend beyond the public lands to adjacent private property,¹⁵¹ this precedent has never been embraced by many sagebrush rebels in the rural West. Indeed, in their view, continued federal ownership

¹⁴⁴ The relevant regulation provided that “constructing or attempting to construct a . . . road, trail, path, or other way . . . upon, across, over, through or under any park areas, except in accordance with the provisions of a valid permit, contract, or other written agreement with the United States, is prohibited.” 36 C.F.R. § 5.7 (2005).

¹⁴⁵ *Garfield County*, 122 F. Supp. 2d at 1223. As Garfield County saw it, “the assertion of federal regulatory authority over its right-of-way” was the equivalent of federal “reacquisition of the interests it received under the R.S. § 2477 grant—a retrocession of ownership or jurisdiction to which it has not consented.” *Id.*

¹⁴⁶ Consider the before and after pictures of Garfield County’s road work at the entrance to Capitol Reef, and ask whether the United States is taking just as aggressive a view as the counties in arguing about what does and does not constitute part of an R.S. 2477 right-of-way. Official R.S. 2477 Website, *Which Photo Is Before and Which Photo Is After?*, at <http://www.rs2477roads.com/2bora1.htm> (last visited Nov. 20, 2005).

¹⁴⁷ See U.S. CONST., art. IV, § 3, cl. 2 (assigning to Congress the “power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States”).

¹⁴⁸ U.S. CONST. art. I, § 8.

¹⁴⁹ *Garfield County*, 122 F. Supp. 2d at 1240–41. As the court noted, the United States wore two hats: “one as the proprietor of an estate in land servient to Garfield County’s right-of-way, the other as a governmental instrumentality invested with the power to make rules and regulations concerning that same property.” *Id.* In the end, its regulatory authority could not be trumped by its servient ownership status. The only limit on its regulatory authority was that it had to be reasonable. *Id.* at 1241. “At the same time, however, the Park Service may not preclude or unreasonably interfere with the reasonable exercise of the rights of those who hold valid rights-of-way within the boundaries of the Park.” *Id.*

¹⁵⁰ The court awarded the United States \$6,840.00 in damages. *Id.* at 1265.

¹⁵¹ See, e.g., *Kleppe v. New Mexico*, 426 U.S. 529, 539–44 (1976) (holding that the property clause gives Congress authority to regulate activities on state or private land that will affect public land); *Camfield v. United States*, 167 U.S. 518, 523–29 (1897) (stating that Congress can regulate fences that enclose public land even though they are erected outside the federal land). Federal authority over private land could also be asserted under the Commerce Clause or other constitutionally enumerated powers.

of the public lands is itself unconstitutional.¹⁵² It is, nevertheless, a critical fact to remember in considering R.S. 2477. For these counties, a “win” on R.S. 2477 does not mean that they will have the unfettered ability to control what happens within their right-of-way. As often as not, any extensive work on an existing right-of-way will trigger NEPA analysis and ultimately be limited by federal efforts to protect adjacent resources. In the end, county authority over an R.S. 2477 right-of-way may not look all that different than county authority with respect to a right-of-way obtained by permission under Subchapter V of FLPMA.¹⁵³ That is not to say that there is no difference between an R.S. 2477 right-of-way and one granted by permit.¹⁵⁴

¹⁵² See generally RASBAND ET AL., *supra* note 22, at 146–57 (discussing arguments of Sagebrush rebels).

¹⁵³ Federal Land Policy and Management Act, 43 U.S.C. §§ 1761–65 (2000). Under FLPMA, a person seeking a right-of-way across federal lands must apply to the Secretary of the Interior or the Secretary of the Agriculture for a permit. The Secretaries are authorized, in their discretion, to issue permits for roads, canals, ditches, pipelines, utility corridors, and the like, but each right-of-way must contain:

such terms and conditions as the Secretary concerned deems necessary to (i) protect Federal property and economic interests; (ii) manage efficiently the lands which are subject to the right-of-way or adjacent thereto and protect the other lawful users of the lands adjacent to or traversed by such right-of-way; (iii) protect lives and property; (iv) protect the interests of individuals living in the general area traversed by the right-of-way who rely on the fish, wildlife, and other biotic resources of the area for subsistence purposes; (v) require location of the right-of-way along a route that will cause least damage to the environment, taking into consideration feasibility and other relevant factors; and (vi) otherwise protect the public interest in the lands traversed by the right-of-way or adjacent thereto.

Id. § 1765(b).

¹⁵⁴ R.S. 2477 rights-of-way are not the only property rights that allow access across federal lands. There is, for example, an implied property right to access inheld school trust lands, inheld private parcels, and unpatented mining claims. Where the access seeker has an implied property right to access, a variety of statutory and regulatory provisions can apply depending on the designation of the federal lands within which access is sought and on the type of activity for which the access is desired. With respect to the national forests, for example, Congress has provided that

Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of Agriculture may prescribe, the Secretary shall provide such access to nonfederally owned land within the boundaries of the National Forest System as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof: *Provided*, That such owner comply with rules and regulations applicable to ingress and egress to or from the National Forest System.

National Wilderness Preservation System Act, 16 U.S.C. § 3210(a). Oddly enough, this particular provision giving direction for all national forests is contained within the Alaska National Interest Lands Conservation Act (ANILCA). The Wilderness Act in section 1134(a) similarly provides for access to state or privately owned land surrounded by wilderness.

In any case where State-owned or privately owned land is completely surrounded by national forest lands within areas designated by this chapter as wilderness, such State or private owner shall be given such rights as may be necessary to assure adequate access to such State-owned or privately owned land by such State or private owner and their successors in interest, or the State-owned land or privately owned land shall be exchanged for federally owned land in the same State of approximately equal value under authorities available to the Secretary of Agriculture

Although the terms and conditions imposed as part of an agency's regulatory authority on an R.S. 2477 right-of-way can closely resemble the terms and conditions imposed on a discretionary right-of-way permit under Subchapter V of FLPMA, the relevant agency may be free to deny, or impose arduous conditions on a FLPMA permit where the access seeker has no claim of right and therefore cannot make a takings claim.

Utah, whose public lands have been at the center of the national wilderness debate in the last decade and thus the focal point of R.S. 2477 litigation, started yet another chapter of R.S. 2477 litigation before the end of the Clinton administration. Rather than allowing R.S. 2477 policy to be created by ad hoc litigation resulting from the individual federal-county disputes described above, the State of Utah decided on a different and more comprehensive approach.¹⁵⁵ In June 2000, pursuant to the Quiet Title Act, which waives sovereign immunity for disputes over "title to real property in which the United States claims an interest,"¹⁵⁶ Utah sent the Department of Interior a notice of intent to sue to establish its rights to approximately 1000 R.S. 2477 rights-of-way.¹⁵⁷ By the time the notice period had run, George W. Bush of Texas had been elected President. Unsurprisingly, Utah changed its strategy, realizing that a new approach—or, perhaps more accurately, an old approach—to R.S. 2477 might be in the offing.

16 U.S.C. § 1134(a). Subsection (b) provides similar access to mining claims in wilderness:

In any case where valid mining claims or other valid occupancies are wholly within a designated national forest wilderness area, the Secretary of Agriculture shall by reasonable regulations consistent with the preservation of the area as wilderness, permit ingress and egress to such surrounded areas by means which have been or are being customarily enjoyed with respect to other such areas similarly situated.

16 U.S.C. § 1134(b). For an overview of access issues, see Daniel A. Jensen, *How Do I Get There? Access to and Across Mining Claims and Mineral Leases*, 45 ROCKY MTN. MIN. L. INST. 20-1 (1999).

¹⁵⁵ Utah had also found itself stymied in Congress. Prior to the congressional moratorium, Utah Representative Hansen had introduced a bill that proposed to allow R.S. 2477 claimants to file a claim within ten years of the statute's enactment. See Revised Statutes 2477 Rights-of-Way Settlement Act, H.R. 2081, 104th Cong. (1995) (accompanied in the Senate by S. 1425, 104th Cong. (1995)). Under the bill, the United States had two years to accept or reject the claim. If it rejected the claim, it had to file a lawsuit in which it would bear the burden of proof, and the existence of the R.S. 2477 right-of-way would be determined by state law. *Id.* §§ 3(b), 5(c). The bill never made it beyond the House Resources Committee. See Kevin Hayes, *History and Future of the Conflict over Wilderness Designations of BLM Land in Utah*, 16 J. ENVTL. L. & LITIG. 203, 232 (2001) (discussing the proposed legislation).

¹⁵⁶ 28 U.S.C. § 2409a(a). Under the Quiet Title Act, actions must be commenced within twelve years of the date on which the action accrues, unless the action is filed by a state. *Id.* § 2409a(g).

¹⁵⁷ Bloch & McIntosh, *supra* note 20, at 495-96. Subsection (m) of the Quiet Title Act requires that a State give the federal government 180 days notice before bringing a quiet title action. 28 U.S.C. § 2409a(m). A copy of the notice of intent to sue is available at: Letter to Bruce Babbitt from the State of Utah, http://www.rs2477.com/documents/6-14-2000_ltr_to_Bruce_Babbitt_from_State_of_Utah.pdf (last visited Nov. 20, 2005). For maps depicting the claims, see Highway Robbery: Utah's Lands at Risk <http://www.highway-robbery.org/lands/utah.htm> (last visited Nov. 19, 2005).

5. The Bush Years

By now the turn of events should be familiar—with a new administration came a new approach to R.S. 2477.¹⁵⁸ Soon after President Bush took office in 2001, the Department of the Interior began negotiating with Utah regarding Utah's notice of intent to sue. The product of that negotiation was a Memorandum of Understanding (MOU), signed in April 2003.¹⁵⁹ The MOU provided that Utah and its counties could seek from the Department of the Interior a recordable disclaimer of interest (essentially a federal quit-claim deed) for claimed R.S. 2477 roads. According to the MOU, an R.S. 2477 right-of-way exists if:

- a. the road existed prior to the enactment of FLPMA in 1976 and is in use at the present time;
- b. the road can be identified by centerline description or other appropriate legal description;
- c. the existence of the road prior to the enactment of FLPMA is documented by information sufficient to support a conclusion that the road meets the legal requirements of a right-of-way granted under R.S. 2477; this information may include, but is not limited to, photographs, affidavits, surveys, government records concerning the road, information concerning or information reasonably inferred from the road's current conditions; and
- d. the road was and continues to be public and capable of accommodating automobiles or trucks with four wheels and has been the subject of some type of periodic maintenance.¹⁶⁰

While not very specific—presumably to avoid running afoul of the 1996 congressional moratorium on R.S. 2477 rulemaking—the MOU language hints at a more generous definition of construction than the one employed by the Clinton administration. Nevertheless, the basic operating principle of the MOU was that many asserted R.S. 2477 rights-of-way will satisfy the “construction” standard under any definition of that term,¹⁶¹ and that both

¹⁵⁸ Further mirroring the prior course of R.S. 2477, with a change in the executive branch has come a corresponding effort from the congressional minority to push more restrictive R.S. 2477 legislation. Just like Utah Republican Representative Hansen proposed a county-friendly R.S. 2477 during the Clinton administration, *see supra* note 155 (discussing the bill), Colorado Democrat Representative Mark Udall introduced a bill on April 3, 2003 that would have adopted an administrative process for resolving R.S. 2477 road claims similar to that proposed by Secretary Babbitt in 1994. *See* H.R. 1639, 108th Cong. § 1 (2003) (text of bill introduced by Udall). Similar to Babbitt's proposed rule, Udall's bill defined “construction” as “an intentional physical act or series of intentional physical acts that were intended to prepare, and that accomplished preparation of, a highway by a durable, observable, physical modification of the land along the entire claimed route” *Id.* at § 2(7).

¹⁵⁹ Memorandum of Understanding Between the State of Utah and the Department of Interior on State and County Road Acknowledgement (Apr. 9, 2003), *available at* http://www.rs2477.com/documents/MOU_Utah_DOI.pdf.

¹⁶⁰ *Id.* at 3.

¹⁶¹ *See id.* at 1 (stating: “Most of the asserted R.S. 2477 rights-of-way that actually have been part of western states' inventoried and maintained transportation infrastructure since before the enactment of the Federal Land Policy and Management Act (FLPMA) in 1976 satisfy the statutory requirements of ‘construction’ and ‘highway’ under almost any interpretation of those

parties would benefit by resolving such claims without litigation. In an effort to avoid the most controversial R.S. 2477 claims, Utah also agreed that it would not use the MOU process to assert a right-of-way for roads within wilderness areas, wilderness study areas, or any unit of the National Park or National Wildlife Refuge Systems.¹⁶² Colorado and Alaska have also been pursuing their own MOUs with the Department of the Interior.¹⁶³

The recordable disclaimer of interest process that the MOU proposed to use is a reference to amended disclaimer regulations promulgated by the Interior Department two months before the signing of the MOU.¹⁶⁴ The disclaimer regulations, which implement FLPMA's Recordable Disclaimer of Interest provision,¹⁶⁵ provide for Department of the Interior disclaimers of federal ownership interests. The amended regulations make it easier to obtain federal recognition of R.S. 2477 rights-of-way in two senses. First, the regulations eliminate the previous requirement that a claimant be the current "owner of record" and thereby allow states and counties to obtain disclaimers despite the fact that they are not record owners.¹⁶⁶ Second, the amendments interpret the word "State" in the Quiet Title Act's exemption

statutory terms.").

¹⁶² *Id.* at 2. Utah has made several road claims under the MOU and has listed a total of twenty for which it intends to file claims under the MOU. See State of Utah, State Records Committee Appeal 04-04, <http://archives.utah.gov/appeals/04-04.htm> (last visited Nov. 20, 2005) (granting in part and denying in part an appeal of a discovery request of R.S. 2477 documents). The process, however, has proved slower than Utah hoped. Not only has the BLM been slow to process the MOU claims, but any claim BLM approves is likely to be challenged both on the ground that the MOU violates the congressional moratorium, see *infra* text accompanying note 169, and on the R.S. 2477 standard employed to resolve the claim. Although the environmental community would likely not agree, the Bush administration has not been particularly accommodating to Utah on R.S. 2477. Not only has it been slow to respond to MOU claims, but it has also maintained on appeal to the Tenth Circuit its position that mechanical construction of a public highway is a necessary prerequisite to establishing an R.S. 2477 right-of-way. *SUWA v. BLM*, 147 F. Supp. 2d 1130, 1137 (D. Utah 2001). Although the Secretary's brief asserts that the Department "retains discretion to reconsider its interpretation of R.S. 2477 in the context of future administrative policymaking," the brief also argues that "construction" requires "actual construction" insofar that "[s]ome form of mechanical construction must have occurred to construct or improve the highway." Brief of the Federal Appellee at 44 n.13, 49, *SUWA v. BLM*, No. 04-4071 (10th Cir. Aug. 12, 2004). In light of the uncertainties with the MOU process, Utah has begun to return its attention to the Quiet Title Act process it began in 2000. It has given the Department of the Interior notice of Utah's intent to sue on a number of claims, including claims for roads in Canyonlands National Park and adjacent to wilderness study areas. McIntosh, *supra* note 136, at 19.

¹⁶³ Birdsong, *supra* note 48, at 537.

¹⁶⁴ See Final Rule on Conveyances, Disclaimers, and Correction Documents ("Amended Disclaimer Regulations"), 68 Fed. Reg. 494 (Jan. 6, 2003) (summarizing amendments to regulations); 43 C.F.R. § 1864.0-5 (2005) (containing definitions relating to recordable disclaimers of interest in land).

¹⁶⁵ 43 U.S.C. § 1745(a) (2000) ("After consulting with any affected Federal agency, the Secretary is authorized to issue a document of disclaimer of interest or interests in any lands in any form suitable for recordation, where the disclaimer will help remove a cloud on the title of such lands and where he determines (1) a record interest of the United States in lands has terminated by operation of law or is otherwise invalid . . .").

¹⁶⁶ See Final Rule on Conveyances, Disclaimers, and Correction Documents ("Amended Disclaimer Regulations"), 68 Fed. Reg. 494 (Jan. 6, 2003).

from the twelve year statute of limitations¹⁶⁷ to include the various political subdivisions of a state.¹⁶⁸

The MOU and the amended disclaimer regulations have drawn fire from the environmental community. At one level the criticism simply tracks the same debate that has been raging since FLPMA repealed R.S. 2477. There is concern that the Department of the Interior will rely on the MOU to disclaim rights-of-way without insisting on mechanical construction of a public highway. A second criticism is a bit less familiar. Finding itself on the other side of the regulatory fence, the environmental community has taken up the same shield that was once used against it to defeat Secretary Babbitt's R.S. 2477 regulatory efforts. It has alleged that the MOU and the amended disclaimer regulations violate Congress' 1996 moratorium on new R.S. 2477 regulations.¹⁶⁹

B. R.S. 2477: A Rule of Capture?

R.S. 2477 sits on the cusp of several important developments. The Tenth Circuit's pending decision in *Southern Utah Wilderness Alliance (SUWA) v. BLM*¹⁷⁰ may prove to be the most important decision on the meaning of R.S. 2477 in the long history of the statute. At the same time, after years of study and preparation, Utah is moving forward on a variety of R.S. 2477 claims, under the MOU and the Quiet Title Act.¹⁷¹ What happens in the Tenth Circuit and the other claims percolating in Utah, and in the other states, will depend significantly upon whether the courts view nineteenth century public land law through the lens of capturer or improver.

How is R.S. 2477 to be interpreted almost 140 years after passage of the statute and just under thirty years after FLPMA's repeal? As an initial matter, the courts will need to decide which administrative interpretations of R.S. 2477 are entitled to deference. Here, the argument of the states and counties is stronger than that of the environmental community. As a general matter,

¹⁶⁷ See 28 U.S.C. § 2409a(g) (2000) (stating "any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued.").

¹⁶⁸ See 43 C.F.R. § 1864.0-5(h) ("State means 'the state and any of its creations including any governmental instrumentality within a state, including cities, counties, or other official local governmental entities.'").

¹⁶⁹ See National Highway System Designation Act of 1995, Pub. L. No. 104-59, § 349(a), 109 Stat. 568, 617-18 (1995) (sunset Sept. 30, 1996) (declaring that no federal agency may create any rule addressing rights-of-way authorized under R.S. 2477); Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (appropriating funds to federal agencies for the fiscal year ending September 30, 1997). For an argument that the combination of the MOU and the amended disclaimer regulations violate the congressional moratorium, see Sarah Krakoff, *Settling the Wilderness*, 75 U. Colo. L. Rev. 1159, 1181-85 (2004). In 2004, the Government Accounting Office issued a report concluding that the disclaimer regulations did not violate the moratorium but that the MOU did. See U.S. GEN. ACCOUNTING OFFICE, RECOGNITION OF R.S. 2477 RIGHTS-OF-WAY UNDER THE DEPARTMENT OF THE INTERIOR'S FLPMA DISCLAIMER RULES AND ITS MEMORANDUM OF UNDERSTANDING WITH THE STATE OF UTAH, (Feb. 6, 2004), available at <http://www.suwa.org/library/R.S.2477.GAO.Opinion.2.6.04.pdf>.

¹⁷⁰ 147 F.Supp. 2d 1130 (D. Utah 2001).

¹⁷¹ See *supra* note 162 (describing Utah's notices of intent to sue under the Quiet Title Act).

where the agency entrusted with implementing a particular law adopts a contemporaneous and reasonable interpretation of a statute through formal rulemaking or adjudication, its interpretation is entitled to deference.¹⁷² Moreover, agency interpretations, such as the Ferguson letter, that are adopted long after the passage of an act and that are not contained in rulemaking are not entitled to the same deference as a contemporaneous rulemaking.¹⁷³ In the case of R.S. 2477, there was no contemporaneous agency interpretation of the statute. The first Interior decision came in 1898 and the first regulatory guidance in 1938.¹⁷⁴ Nevertheless, logic suggests that the pre-FLPMA interpretation of R.S. 2477 is more likely to accurately identify congressional intent than is a post-FLPMA interpretation where the government's purposes and interests had plainly changed.

Also helpful to the states and counties' position is the significant number of state and lower federal court decisions suggesting that the existence and scope of R.S. 2477 rights-of-way is a matter for state law.¹⁷⁵ Although the federal government's interest in the public lands cannot be defeated by congressional acquiescence in these decisions,¹⁷⁶ it is also true that long congressional acquiescence in a particular interpretation of a federal statute can indicate ratification of that interpretation.¹⁷⁷

The pre-FLPMA administrative and state interpretations of R.S. 2477 point in the direction of a rather generous definition of "construction" and coincide with the general perception of the nineteenth century as the century of capture. On the other hand, the historical aspiration of Congress, which was enshrined in statute after statute although not always fulfilled in practice, was that obtaining title to the public lands depended upon more than capture and required some sort of effort at improvement. Thus, to the extent that state law purports to allow rights-of-way to be claimed in the absence of labor and effort, it is hard to square with congressional intent. Here, the environmental community seems to have the better of the argument. Surely, there is some limit on how far states can go in defining the existence and scope of an R.S. 2477 right-of-way. That limit can be described in terms of reasonableness,¹⁷⁸ or it can be described as requiring some

¹⁷² *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984).

¹⁷³ *Sec'y of the Interior v. California*, 464 U.S. 312, 320 n.6 (1984); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

¹⁷⁴ See *supra* Part IV.A.1 (discussing the pre-FLPMA development of the law on R.S. 2477).

¹⁷⁵ See *supra* notes 89–91 & 106 and accompanying text (discussing this case law). Although state court interpretation of R.S. 2477 prior to FLPMA was quite consistent, the acquiescence story is murkier after FLPMA's passage. Given that both the Carter and Clinton Administrations decided that the existence of an R.S. 2477 right-of-way was a question of federal law, it is hard to identify the interpretation of R.S. 2477 to which recent congresses have been deferring.

¹⁷⁶ See *Federal Power Comm'n v. Oregon*, 349 U.S. 435, 448 (1955) (holding that the long-held state understanding that the Desert Land Act worked a severance of waters from the public domain and gave states the authority to govern water rights did not apply to federal reservations).

¹⁷⁷ See, e.g., *United States v. Midwest Oil Co.*, 236 U.S. 459, 472–73 (1915) (observing that "government is a practical affair intended for practical men" and that "in determining the meaning of a statute . . . , weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation").

¹⁷⁸ See *supra* notes 72–80 and accompanying text (discussing this implicit limit on all state

minimal improvement content to R.S. 2477. In other words, even if state law controls the existence and scope of R.S. 2477 rights-of-way, state law must conform to a reasonable definition of the word "construction." Perhaps that does not mean mechanical construction such as grading, paving, or placing culverts, but unless R.S. 2477 is simply a rule of capture—which seems unlikely given the repeated emphasis on improvement in nineteenth century public land law—a claimant ought to be required to point to a reasonable amount of labor directed at making the road passable to vehicle traffic.¹⁷⁹

V. CONCLUSION

In the case of many public land statutes, the loose interpretation and application of statutory improvement requirements has already occurred and title has vested. The conundrum with R.S. 2477 is that the balancing of congressional aspiration versus on-the-ground practice is being done in the early twenty-first century rather than in the late nineteenth and early twentieth centuries. Imagine, for example, what it would be like if all homestead and preemption claims had been self-executing grants, as was the case with R.S. 2477, and courts were now faced with the question whether the occupant had accomplished sufficient improvement or cultivation on his 160 or 320 acre claim prior to 1976. Would statutory requirements like "cultivation" and "improvement" be interpreted with more rigor today than they would have been in 1880? And, if so, would that be an appropriate statutory interpretation? How much weight would be assigned to the congressional aspiration of supporting improvement of individual parcels, and how much to the subsequent practice of capture-like homesteading and the broader congressional objective of settling the West?¹⁸⁰ These are the sorts of questions presented by R.S. 2477, and the

law definitions of federal statutes).

¹⁷⁹ Understanding R.S. 2477 as containing an improvement requirement would not necessarily require improvement efforts along an entire right-of-way. Particularly in the arid Southwest where there can be areas with little vegetation, flat topography, or slickrock, it may be the case that a road would not require improvement efforts within certain sections. This understanding of an improvement requirement would be little different than in the Homestead Act or other land grant statutes where some portion of the acreage, rather than all of the acreage, had to be improved to merit title.

¹⁸⁰ As another analogy, consider the water law doctrine of beneficial use. In recent decades, there has been an effort to invest the beneficial use and waste doctrines with real teeth—to remind courts that water law is not a pure rule of capture. This effort has borne some fruit. See *Imperial Irrigation Dist. v. State Water Res. Control Bd.*, 225 Cal. App. 3d 548, 573 (1990) (finding waste in the Imperial Irrigation District's use of water and noting that "[a]ll things must end, even in the field of water law. It is time to recognize that this law is in flux and that its evolution has passed beyond traditional concepts of vested and immutable rights"). However, it has not been broadly successful because the idea that paper water rights are permanently vested is so firmly embedded in western water law. An interesting question is why the vested rights idea is so firmly entrenched. Is it because beneficial use was always a meaningless adornment on a rule of capture? Is it because there has been a departure from the original understanding of the beneficial use doctrine as a matter of administrative convenience or government acquiescence? Or is it simply that the original understanding of the beneficial use doctrine has lain dormant because the resource pressure has not been sufficient to require careful consideration of the doctrine's meaning?

answers are not obvious. Any interpretation of R.S. 2477 ought, however, to recognize not only that Congress was eager to grant resources and rights-of-way in order to develop the West but also that Congress did not generally regard a pure rule of capture as the way to accomplish that objective.

Understanding that the nineteenth century was not simply the century of capture also has implications beyond R.S. 2477. With the accelerating public preference for preservation and recreational opportunities, natural resources law and policy has in recent years increasingly focused on the question of what can be done to reacquire or reallocate natural resources that many perceive to have been unwisely disposed of during the nineteenth and early twentieth centuries. This reacquisition and reallocation has taken a number of forms. In some cases, it has involved purchase such as in the case of grazing buyouts, the purchase of important habitat and watersheds using the Land and Water Conservation Fund, and the purchase of water rights for instream flow purposes. Other times, reacquisition has come in the form of more aggressive regulation of natural resource use. Another method, although little used, has been the assertion of long dormant public trust interests in previously allocated resources.¹⁸¹ Our choice of which route to use to remedy prior resource allocations in response to changing public preference will depend in part on our perception of the nature of the existing resource user's ownership interest. Labeling nineteenth century natural resource law as a product of the rule of capture has the potential to misdirect our reallocation efforts. It risks forgetting that in some cases improvement was required but not accomplished and that in many other cases labor and improvement, rather than mere capture, is the foundation of the resource owner's reliance interest.

VI. EPILOGUE

Four months after the conclusion of the Rule of Capture conference, on September 8, 2005, the Tenth Circuit issued its decision in *Southern Utah Wilderness Alliance v. Bureau of Land Management*.¹⁸² Writing for a unanimous panel, Judge Michael McConnell rejected the BLM's argument that mechanical construction was necessary to establish an R.S. 2477 right-of-way and held instead that a valid right-of-way could be created by use alone.

Before addressing the meaning of R.S. 2477, the Tenth Circuit decided that the Secretary of the Interior and BLM did not have primary jurisdiction over R.S. 2477 disputes. According to the court, because R.S. 2477 was a self-executing grant, deciding on the passage of title was a judicial rather than executive function. As the court put it:

It is one thing for an agency to make determinations regarding conditions precedent to the passage of title, and quite another for the agency to assert a

¹⁸¹ For a discussion of this move toward reacquisition, see James R. Rasband, *Buying Back the West*, 24 J. LAND RESOURCES & ENVTL. L. 179 (2004).

¹⁸² *Southern Utah Wilderness Alliance v. Bureau of Land Management (SUWA II)*, 425 F.3d 735 (10th Cir. 2005).

continuing authority to resolve by informal adjudication disputes between itself and private parties who claim that they acquired legal title to real property interests at some point in the past.¹⁸³

The court concluded that BLM has authority to make nonbinding, administrative determinations as to the existence of an R.S. 2477 right-of-way and to introduce and use its findings as evidence in litigation, but that “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.”¹⁸⁴ This conclusion, said the court, was “reinforced by the long history of practice under the statute, during which the BLM has consistently disclaimed authority to make binding decisions on R.S. 2477 rights-of-way.”¹⁸⁵

On the statutory interpretation question that is the focus of this article, the court first held that although the meaning of R.S. 2477 was necessarily a question of federal law, in determining what actions were required for acceptance of an R.S. 2477 right-of-way, federal law “borrows” from long-established principles of state and common law. Citing as an example the *Douglas County*¹⁸⁶ decision discussed above,¹⁸⁷ the court emphasized that state law could not override federal law or undermine federal land policy, but that courts should use state law “to the extent [it] provides convenient and appropriate principles for effectuating congressional intent.”¹⁸⁸

Then, applying state and common law to the interpretation of the word “construction,” the court held that acceptance of an R.S. 2477 right-of-way could be manifested by continuous public use over a sufficient period of time (in Utah, noted the court, the necessary period has been ten years). The court concluded that mechanical construction of the right-of-way was *not* necessary to manifest acceptance. Evidence of construction may be relevant, but it was not a required element to establish a valid right-of-way: “The necessary extent of ‘construction’ would be the construction necessary to enable the general public to use the route for its intended purposes.”¹⁸⁹

The court further concluded that a standard of continuous use instead of mechanical construction would not necessarily lead to an abundance of R.S. 2477 claims because:

it is quite possible for R.S. 2477 claims to pass the BLM’s ‘mechanical construction’ standard but to fail the common law test of continuous public use. *See Town of Rolling v. Emrich*, 99 N.W. 464, 464 (Wis.1904) (rejecting R.S. 2477 claim despite evidence that two men “cut out a road . . . through the 80 acres in question to haul logs upon”). For example, according to the BLM

¹⁸³ *Id.* at 752.

¹⁸⁴ *Id.* at 757.

¹⁸⁵ *Id.*

¹⁸⁶ *Douglas County*, Washington, 26 Pub. Lands Dec. 446 (1898).

¹⁸⁷ *See supra* note 83 and accompanying text (discussing the Secretary of the Interior’s rejection of the county’s attempt to accept R.S. 2477 grants to the extent of 30 feet alongside all section lines in the county).

¹⁸⁸ *SUWA II*, 425 F.3d at 766.

¹⁸⁹ *Id.* at 768.

administrative decision, San Juan County route 507, in the Hart's Point area, shows signs of mechanical construction: bulldozer grouser marks, berms, pushed trees and debris, and cut banks, and a witness testified that the road was constructed by mining companies in the 1950s, using bulldozers, for the purpose of accessing seismic lines. Yet the BLM found that "the use of this route by the public has been at most sporadic and infrequent." The record indicates that the same may be true of others of the contested routes. Large parts of southern Utah are crisscrossed by old mining and logging roads constructed for a particular purpose and used for a limited period of time, but not by the general public. . . . The common law standard of user, which takes evidence of construction into consideration along with other evidence of use by the general public, seems better calculated to distinguish between rights of way genuinely accepted through continual public use over a lengthy period of time, and routes which, though mechanically constructed (at least in part), served limited purposes for limited periods of time, and never formed part of the public transportation system.¹⁹⁰

Whether the Tenth Circuit is correct about a continuous use standard not leading to an explosion of R.S. 2477 claims will play out over time as will other implications of the decision. For example, given the court's denial of BLM's authority to adjudicate R.S. 2477 claims, there are questions about the validity of BLM's Memorandum of Understanding with Utah. To the extent that the MOU is understood as a method of informally adjudicating R.S. 2477 claims, it may not survive. On the other hand, if the MOU is viewed as merely recognizing BLM's ability to issue recordable disclaimers, it may survive, but only because it needlessly restates a proposition that is otherwise true—that the BLM has authority to disclaim federal ownership interests that might otherwise be contested via quiet title action in federal court.

And, finally, what of the implications of the Tenth Circuit's decision for the thesis of this article—that, given the improvement rationale which animated so many public lands statutes, it is unlikely Congress intended R.S. 2477 as a pure capture rule? On that score, the opinion must be read as rejecting an improver rationale. Indeed, the court rejected the argument that R.S. 2477 should be interpreted in line with the incentive and reward structure present in other land-grant statutes:

The trouble with this theory is that those who made the investment in the road did not receive any rights to it; R.S. 2477 rights of way are owned by the public and not by the individuals who "constructed" the highways. A more probable

¹⁹⁰ *Id.* at 781–82 (citations omitted). The court reached a few additional issues not directly implicated in this article. It also held 1) that R.S. 2477 claimants bear the burden of proof; 2) that coal withdrawals under the Coal Lands Act of 1910, 30 U.S.C. § 83 (2000) did not constitute a reservation for public use as contemplated by R.S. 2477 because withdrawals merely make public land unavailable for certain kinds of private appropriation under the public land laws, whereas a reservation not only withdraws land "from the operation of the public land laws, but also dedicates the land to a particular public use,"; and 3) that the holder of an R.S. 2477 right-of-way across federal land must consult with the appropriate federal land management agency before it undertakes any improvements to the right-of-way beyond routine maintenance. *Id.* at 748.

intention of Congress was to ensure that widely used routes would remain open to the public even after homesteaders or other land claimants obtained title to the land over which the public traveled. That explanation of congressional intent is more consistent with the common law interpretation than with the Appellees' proposed substitute.¹⁹¹

The court's suggestion that the federal government would have been less concerned about improvement where the captured benefit was public instead of private is not without merit. Indeed, contrary to this article's thesis, one could assert that because the public may continue to use the right-of-way, characterizing any interpretation of R.S. 2477 as a capture rule may be mistaken given that, traditionally, capture rules have resulted in private and exclusive ownership of a resource.

From the perspective of the federal government and the national public, however, the right-of-way is still captured in the sense that the future disposition of the resource is determined by a state or county rather than by Congress or a federal land manager. One could argue that states and counties may only use the right-of-way if they are fulfilling the federal purpose of providing a public highway. Nevertheless, the promise of shared access to a right-of-way controlled by a state or county is not the same as exclusive federal ownership and control. Before Congress would have agreed to give up ownership in favor of shared access, it would have wanted at least to ensure that the road it would share would be one that had been improved. Presumably, this was Congress's thinking in the variety of other statutes discussed in the article where Congress conditioned road grants on states actually expending labor to construct a road.¹⁹² It is unclear why Congress would take a different approach in R.S. 2477 or why Congress would have perceived the need to give away ownership in return for a shared right-of-way that was already usable without effort. It seems more likely that the trade-off for ceding federal control was the fact that a state, county, or private party would perform at least some work to make and maintain a passable public right-of-way. Finally, even setting aside this trade-off rationale, it is important to recall that the improvement requirements in nineteenth century public land law were not simply incentive and reward structures but reflected a more basic ethos that property rights that flowed from labor and improvement were superior to rights derived from capture and use.

¹⁹¹ *Id.* at 780.

¹⁹² See *supra* notes 43–46 and accompanying text (describing federal statutes conditioning grants on specific road improvements).