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Pristine Solitude or Equal Footing? San Juan County v. United States and Utah's Larger Bid to Assert Control over Public Lands in the Western United States

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PRISTINE SOLITUDE OR EQUAL FOOTING? *SAN JUAN COUNTY V. UNITED STATES* AND UTAH'S LARGER BID TO ASSERT CONTROL OVER PUBLIC LANDS IN THE WESTERN UNITED STATES

ABSTRACT

Within the Mining Act of 1866 there is a brief provision known as Revised Statute 2477 (R.S. 2477) that has reignited the anti-federal fervor of western citizens and states' rights advocates demanding a return of federal public lands to more localized management. R.S. 2477 granted counties and states a right-of-way across federal land through the public's use of a particular route. R.S. 2477 was repealed in 1976, but rights-of-way that vested prior to this date remain valid if claimants can provide proof of the route's historic use. Federal courts and land management agencies have struggled to decipher this statutory relic in a modern context. Of the states attempting to use R.S. 2477 as part of a broader effort to balance out the long-standing inequity over control of public lands within western states, Utah has been the most aggressive. In *San Juan County v. United States*, a controversy involving the National Park Service's decision to close a nine-mile trail along a riverbed in Canyonlands National Park to motor vehicles, the Tenth Circuit held that Utah and San Juan County failed to establish the requisite ten years of continuous public use of the Salt Creek road as a "public thoroughfare" prior to the reservation of Canyonlands in 1964. The court recognized that frequency is an important factor when analyzing the public's use and that use under a private right is not sufficient in determining whether a public highway has been established.

This Comment starts by looking at the larger dispute at play over the vast amounts of federally controlled public lands in the western United States. It then explores the history of R.S. 2477 and the Tenth Circuit's prior treatment of this old frontier law. The *San Juan* decision raises the bar for R.S. 2477 claimants by recognizing a more stringent test for demonstrating continuous use by the public—filling a much needed gap in R.S. 2477 jurisprudence. However, the heavy emphasis on evaluating historic evidence and uniqueness of every R.S. 2477 road is a reality that limits the reach of any one particular court decision. Nevertheless, the *San Juan* decision will have a significant effect on how litigants and other western states approach the thousands of R.S. 2477 disputes certain to emerge in the future.

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INTRODUCTION

In Edward Abbey's renowned book, *Desert Solitaire*, he asserted "No more cars in national parks. Let the people walk."[1] Abbey's 1968 autobiographical work about his various encounters as a park ranger in the Colorado Plateau region of the southwestern United States describes his philosophy of the desert ecosystem, and in particular, his view that vehicles traversing through the canyons disturb the harmony struck between nature and nothingness.[2] There are many Americans who share Abbey's perspective that motorized tourists are a fundamental threat to the national park idea, while many others believe road access through these spectacular landscapes is a right that is often unjustly curtailed by regulations imposed by federal land management agencies. Recently, in

1. EDWARD ABBEY, DESERT SOLITAIRE: A SEASON IN THE WILDERNESS 65 (Ballantine Books ed., 1968).

2. *Id.* (proclaiming that "desert canyons are holier than our churches," and since we do not drive cars into cathedrals and "other sanctums of our culture," we should keep automobiles out of national parks as well).

San Juan, the Tenth Circuit decided a longstanding dispute over access to a historic route that cuts through Canyonlands National Park on its way to the iconic natural rock formation known as Angel Arch.[3] The legal issue centers on a brief provision of the Lode Mining Act of 1866, known as Revised Statute 2477 (R.S. 2477).[4]

R.S. 2477 drew little attention for almost a century, but it has been thrust into the forefront of a contentious battle over access to "roads" within public land managed by federal government agencies, as well as western citizens' larger bid to assert claims over federal lands in favor of more localized management. R.S. 2477 provides that "the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."[5] This single clause, enacted without any legislative history, is only one sentence long and on its face appears to be rather straightforward.[6] Nevertheless, it has been a headache for lower courts, federal land agencies, and private property owners attempting to flesh out exactly how to apply the nineteenth century statute in the modern era.[7]

R.S. 2477 was passed during a time when the federal government sought to encourage western expansion by granting easements over unreserved public lands.[8] These rights-of-way were "subject only to state law and did not require specific federal approval."[9] In 1976, Congress repealed this statutory relic though the enactment of the Federal Land Policy Management Act (FLPMA), but it did not extinguish valid preexisting rights-of-way, which may exist "if claimants can prove an R.S. 2477 claim predating 1976."[10] As part of the broader anti-federal fervor that arose when public land management policy shifted "from expansion to preservation," conflicting issues over the 150-year-old mining law's application began to arise.[11] Now, state and local governments see R.S.

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3. San Juan Cnty. v. United States, 754 F.3d 787, 790 (10th Cir. 2014).

4. An Act Granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for Other Purposes, ch. 262, § 8, 14 Stat. 251, 253 (1866) (repealed 1976).

5. *Id.*

6. Jacob Macfarlane, Note, *How Many Cooks Does It Take to Spoil a Soup?* San Juan County v. U.S. *and Interventions in R.S. 2477 Land Disputes*, 29 J. LAND, RESOURCES & ENVTL. L. 227, 228 (2009).

7. *See* Heidi McIntosh, *New Highways Under an Old Law? R.S. 2477 and Its Implications for the Future of Utah's Federal Public Lands*, 18 UTAH B.J., Mar./Apr. 2005, at 16. ("Little did Congress know when it enacted this little-known provision that it had sown the seeds for a controversy that would take us from the hoop skirts of the mid-19th century to the computer age.").

8. Macfarlane, *supra* note 6, at 229–30 (2009) (explaining the policies behind R.S. 2477 at the time of its enactment in 1866).

9. JAN, G. LAITOS ET AL., NATURAL RESOURCES LAW 324 (2d ed. 2012).

10. *Id.*

11. Macfarlane, *supra* note 6, at 227; *see also* Federal Land Policy and Management Act of 1976, Pub. L. No. 94–579, § 706(a), 90 Stat. 2743, 2793. Before the 1960s, development of natural resources on public land followed the principals of wise use and sustained yield management, but a new conservation ethic began to emerge that emphasized preservation over use. R. MCGREGGOR CAWLEY, FEDERAL LAND, WESTERN ANGER: THE SAGEBRUSH REBELLION AND ENVIRONMENTAL POLITICS 11 (1993).

2477 as part of their arsenal in a larger effort to balance out the long-standing inequity over management of public lands within their borders that is currently dominated by the federal government.[12] State and local officials argue that these rights-of-way are "crucial to economic prospects and quality of life" for rural citizens across the West who depend on access for their livelihoods.[13] Environmentalists, on the other hand, "view R.S. 2477 as an illegitimate means of defeating designation of wilderness areas, which must be roadless" and other non-economic values of public land.[14] Wilderness proponents and preservationists point out that many of these old routes claimed to be "highways" are really just "dirt tracks, stream bottoms, livestock trails, and other faint paths" that do not lead to any established anthropogenic destination.[15] After several legislative and administrative attempts failed to resolve the uncertainty surrounding R.S. 2477 ultimately failed, the federal courts became responsible for deciding the validity of R.S. 2477 claims.[16] Over the last fifty years federal courts have teased out various elements to provide guidance in R.S. 2477 disputes, but the effect of any court opinion is limited due to the unique history of every road, so resolving an R.S. 2477 dispute must still be determined on a road-by-road basis.[17]

In April of 2014, after decades of litigation and furious debate over the National Park Service's decision to close a nine-mile trail along a riverbed in Canyonlands National Park to motor vehicles, the Tenth Circuit decided San *Juan County v. United States*.[18] In a unanimous decision, the court held that Utah and San Juan County failed to establish "ten years of continuous public use of the Salt Creek Road as a public thoroughfare prior to the reservation of Canyonlands National Park in 1964" based on historical evidence of cattle grazing, mining operations, and exploratory travel along the route.[19] The court confirmed that fre-

12. William F. Jasper, *Feds vs. the West*, NEW AM. (May 3, 2014), http://www.thenewamerican.com/usnews/item/18177-feds-vs-the-west ("[M]any of the Western states are demanding their 'equal footing' as sovereign states, free from the shackles of an oppressive federal 'landlord.'").

13. Brian Maffly, *Ruling Sticks: Salt Creek Not a County Highway*, SALT LAKE TRIB. (Sept. 9, 2014, 10:33 AM), http://www.sltrib.com/sltrib/politics/58389383-90/amp-court-roads-salt.html.csp?page=2 (reporting the Tenth Circuit's decision to deny an en banc rehearing and the dismay of Utah officials with the April 2014 decision).

14. 2 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 15:19 (2d ed. 2014).

15. *See* LAITOS, *supra* note 9, at 325.

16. Macfarlane, *supra* note 6, at 227; *see also* COGGINS & GLICKSMAN, *supra* note 14, at § 15:19 (discussing the fact that "[t]here is no formal administrative process by which persons claiming R.S. 2477 rights-of-way can solicit binding determinations from the Interior Department as to their existence and validity").

17. For a sampling of R.S. 2477 cases, see Kane Cnty. v. Salazar, 562 F.3d 1077 (10th Cir. 2009); S. Utah Wilderness Alliance v. BLM, 425 F.3d 735 (10th Cir. 2005); Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988) *overruled in part on other grounds by* Vill. of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992); Kane Cnty. v. United States, No. 2:08–CV–00315, 2011 WL 2489819 (D. Utah June 21, 2011).

18. 754 F.3d 787 (10th Cir. 2014).

19. *Id.* at 801.

quency of public use is an important factor and that use under a private right is not sufficient in determining whether a public highway has been established.[20]

By looking at the *San Juan* decision, the aim of this Comment is to provide guidance for this murky body of law and to highlight the broader issues at play in the controversial debate over control and management of western public lands. Part I explores the larger debate over the vast amounts of federally controlled land concentrated in western states, and Utah's use of R.S. 2477 as a mechanism to retain control of roadways within the state's borders. Part II reviews the history of R.S. 2477, addresses prior Tenth Circuit cases, and provides context for the *San Juan* decision. Part III summarizes *San Juan*'s facts, procedural history, and the Tenth Circuit's unanimous decision. Part IV examines *San Juan*'s precedential value and its effect on R.S. 2477 cases going forward, explores potential nonlitigation alternatives for land management agencies looking for a more efficient way to resolve issues surrounding this old frontier law, and discusses *San Juan*'s potential implications for other western states looking to jump on the R.S. 2477 bandwagon.

I. WESTERN STATES' HOSTILITY TOWARDS FEDERAL LAND MANAGEMENT

It is difficult to grasp the modern fallout and possible ramifications of R.S. 2477 without first understanding the political backdrop that drives such fierce debate on both sides of the controversy. The dispute over R.S. 2477 can easily be framed into larger arguments about federalism and the long-standing imbalance of federal land ownership that exists in the western United States. During the nineteenth century, when territory was added to the United States by purchase, treaty, or conquest, almost all of it became part of the unappropriated public domain.[21] Prospective western states, in exchange for land grants, relinquished claims to large swaths of unappropriated lands within their boundaries.[22] In a 2012 study, the Congressional Research Service reported that the federal government owns nearly 30% of the land in the United States, mostly in the West and Alaska.[23] With most of this federal ownership concentrated

20. *See id.* at 796.

21. Louis Touton, Note, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817, 818 (1980) ("In admitting new states, however, Congress retained 'unappropriated lands' within their borders and continued its policy of encouraging settlement and development.").

22. MICHAEL P. DOMBECK ET AL., FROM CONQUEST TO CONSERVATION: OUR PUBLIC LANDS LEGACY 10 (2003).

23. ROSS W. GORTE ET AL., CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA, at *summary* (2012) ("62% of Alaska is federally owned, as is 47% of the 11 coterminous western states. By contrast, the federal government owns only 4% of lands in the other states.").

in the eleven coterminous western states,[24] controversies over land ownership and demands for more localized management are inevitable.[25]

For more than a century the federal government sought to dispose much of the public land in order to encourage settlement of the West, but eventually emphasis shifted to retention and preservation.[26] By the end of the nineteenth century, a conservation ethic began to emerge—sparked by the public's concern over federal land management practices.[27] Federal rangelands were greatly overgrazed, much of the prime hardwood forests had been clearcut without efforts to regenerate the timber supply, and "[c]oncerns continued to grow that mining, timber, and grazing interests had monopolized the frontier."[28] The passage of FLPMA in 1976, with its fundamental emphasis on public land conservation, was the first concrete recognition by Congress that the public domain should remain under federal control unless otherwise provided by agency planning.[29] However, the idea of permanent reservations was hard for many [Americans] to accept, and the concept was at odds with the entrenched ideal of Manifest Destiny that Americans had a right to conquer the land without government interference.[30] The conservation ethic was greeted with especially little fanfare in western states where large amounts of public land remained under federal control.[31] Constituents within these states came to view the federal government's reservation policy as "retarding their development, slowing down their progress, and keeping them in thralldom to a remote government not capable of understanding their needs."[32] From the perspective of local residents, environmentalists from far away had carved a dominant position of influence in federal land policy decisions, creating "an underlying bias in favor of preservation over development."[33]

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24. Arizona, California, Idaho, Montana, Utah, Colorado, Oregon, Washington, Wyoming, Nevada, and New Mexico. *Id.*

25. For a comprehensive history of public land law, see PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 30 (1968) (explaining that many western representatives in Congress are very critical about the large proportion of the natural resources within their states which are still held by the Federal government).

26. *See* GORTE ET AL., *supra* note 23, at 2.

27. DOMBECK ET AL., *supra* note 22, at 16–17.

28. *Id.*

29. *Id.* at 26–27. Other relevant environmental statutes passed prior to FLPMA include the Endangered Species Act of 1973 and National Environmental Policy Act of 1969, which requires federal agencies to perform environmental impact statements (EIS) for all "major Federal actions significantly affecting the quality of the human environment." Patrick Austin Perry, Comment, *Law West of the Pecos: The Growth of the Wise-Use Movement and the Challenge to Federal Public Land-Use Policy,* 30 LOY. L.A. L. REV. 275, 292 (1996) (quoting 42 U.S.C. § 4332(C)) (internal quotation marks omitted).

30. *See* GATES, *supra* note 25, at 771.

31. *Id.* at 772.

32. *Id.*

33. *See* CAWLEY, *supra* note 11, at 9.

Western states demanding that the federal government hand over public land within their borders is not a new occurrence,[34] but when the emphasis shifted to retention and preservation, land rights advocates became more assertive in their hostility towards federal land management.[35] Throughout the 1970s and 1980s, land rights advocates who believed federal management policies had become overly responsive to environmental preservation concerns began to mobilize and organize a protest in what came to be known as the Sagebrush Rebellion.[36] In the early 1990s, a similar grass-roots effort, known as the County Supremacy Movement, sought to protect property rights and return governmental power to local officials.[37]

Part of this federalism-infused debate is rooted in arguments implicated by the "equal footing" doctrine.[38] The doctrine was upheld by several Supreme Court cases, most notably the Court's 1845 decision in *Pollard* v. *Hagan*,[39] and it stands for the principle that "each state . . . entered the Union on an equal constitutional footing with the original thirteen."[40] Because the equal footing doctrine establishes that states admitted to the United States are given the same legal rights as preexisting states, many western land rights advocates view the federal dominance of land ownership in their states as a violation of this constitutional principle.[41] However, equal footing only guarantees that states have "equal authority" within the federal system, and Congress may use its power to adapt legislation according to "diverse local needs" unique to each state.[42] Hence, without more than "purely economic considerations or unequal treatment, the equal footing doctrine provides no judicially enforceable remedy" to western states wishing to invoke it in an effort to divest the federal government of public lands within their borders.[43] Thus, the notion of public land belonging to all U.S. citizens has remained "a concept basic to the formation of the Union itself."[44] Nonetheless, anti-federal fervor still invokes passion among western officials and local land rights advocates, and as their efforts have increased in

34. "At the Western Governors' Conference in 1913 and 1914 a demand was voiced for the cession of all remaining public lands" to be given back to "states in which they were located." GATES, *supra* note 25, at 30.

35. *See* GATES, *supra* note 25, at 8.

36. *See* CAWLEY, *supra* note 11, at 14.

37. Alexander H. Southwell, Comment, *The County Supremacy Movement: The Federalism Implications of a 1990s States' Rights Battle*, 32 GONZ. L. REV. 417, 420–21 (1996–97).

38. *See generally* Carolyn M. Landever, *Whose Home on the Range? Equal Footing, the New Federalism and State Jurisdiction on Public Lands*, 47 FLA. L. REV. 557 (1995) (explaining that R.S. 2477 arguments lend themselves to easy extrapolation into larger arguments about federalism).

39. 44 U.S. 212 (1845).

40. Touton, *supra* note 21, at 833; *see also Pollard*, 44 U.S. at 228–29.

41. *See* Jasper, *supra* note 12.

42. Touton, *supra* note 21, at 834–35.

43. *Id.* at 835 (footnote omitted).

44. DOMBECK ET AL., *supra* note 22, at 10 ("The public lands belong to all the people.").

recent decades, they have looked for other mechanisms to pursue their objectives.[45]

In Utah, 66% of the land acreage is federally owned.[46] While other western states have been aggressive in their efforts to gain control over federally managed public land within their borders, Utah has relied most heavily on R.S. 2477 as a mechanism to fulfill this objective.[47] To analyze the controversy it is helpful to understand the geological makeup of the region and view the situation from the perspective of those who call the "Canyon Country"[48] home. The R.S. 2477 debate has been most intense in the southern part of the state, where the land is mostly arid desert, characterized by deep winding canyons and unique erosional forms in the colorful sedimentary rock.[49] As early settlers quickly found out, the landscape is much less hospitable to eastern farming practices and large community development than other parts of the country.[50] In fact, the 1.5 million acres within the Greater Canyonlands "makes up 'the largest remaining block of undeveloped land in the lower 48.'"[51] There has been historical grazing and a few oil and mineral booms in the region, but most residents today see tourism and recreation as the most promising economic venture in the region.[52] In 2012, "41 percent of all jobs in Canyon Country [where four of Utah's five national parks are located] were in the leisure and hospitality sector."[53] The red rock wil-

45. For example, on April 18, 2014, more than fifty political leaders and officials from nine Western states attended the Legislative Summit on the Transfer of Public Lands in Salt Lake City to discuss ways of retaining control of federal lands they consider to be poorly managed. Kristen Moulton, *Western Lawmakers Gather in Utah to Talk Federal Land Takeover*, SALT LAKE TRIB. (Apr. 19, 2014, 7:13 PM), http://www.sltrib.com/sltrib/politics/57836973-90/utah-lands-lawmakers-federal.html.csp.

46. GORTE ET AL., *supra* note 23, at 5.

47. In 2012, Utah enacted a statute authorizing the use of taxpayers to claim around 25,000 of these historical rights-of-way on federal land. Hillary Hoffmann & Sara Imperiale, *Recent Surge in "Ghost Roads" Litigation Threatens National Parks and Other Federally Protected Lands*, VT. J. ENVTL. L., http://vjel.vermontlaw.edu/topten/recent-surge-in-ghost-roads-litigation-threatens-national-parks-and-other-federally-protected-lands/ (last visited Feb. 27, 2015).

48. Jennifer Leaver, *The State of Utah's Tourism, Travel and Recreation Industry*, 73 UTAH ECON. & BUS. REV. 1 (2014), *available at* https://bebr.business.utah.edu/sites/default/files/uebr2013no4.pdf.

49. *San Juan County*, UTAH DIV. OF STATE HISTORY, http://ilovehistory.utah.gov/place/counties/san_juan.html (last visited Feb. 27, 2015).

50. DOMBECK ET AL., *supra* note 22, at 15.

51. RANDY T. SIMMONS & RYAN M. YONK, ECONOMIC IMPACTS OF SOUTHERN UTAH WILDERNESS ALLIANCE LITIGATION ON LOCAL COMMUNITIES 19 (2013), *available at* http://www.strata.org/wp-content/uploads/ipePublications/Economic-Impacts-of-Southern-Utah-Wilderness-Alliance-on-Lcoal-Comminities.pdf (quoting Brian Maffly, *Utah Democrats Call for Greater Canyonlands Protections*, SALT LAKE TRIB. (Feb. 5, 2013, 10:20 PM), http://www.sltrib.com/sltrib/politics/55771848-90/canyonlands-county-greater-landscape.html.csp).

52. UTAH DIV. OF STATE HISTORY, *supra* note 49.

53. *See* Leaver, *supra* note 48, at 5. Employment data based on detailed tourism-orientated NAICS codes are often unavailable at the county level, but one way to determine a region's dependence on the tourism industry is to calculate the area's share of leisure and hospitality jobs compared to total jobs.

derness is particularly valuable for recreational off-highway vehicle (OHV) use, and it is an important part of local economies.[54]

If OHV is limited by wilderness designation or other agency decisions, many local residents fear that tourism will decline, imposing an adverse economic effect on those communities.[55] A majority of residents in southern Utah are politically conservative, and agency decisions based on non-economic values of public lands (such as wilderness designation) often encounter fierce animosity from local residents.[56] In 2012 and 2013, the Utah state legislature passed several laws to petition the federal government to surrender control of the vast amounts of territory it controlled within the state.[57] One of the provisions authorized the use of taxpayer money and appropriated nearly $8 million from the state's Constitutional Defense Fund to assert thousands of R.S. 2477 claims on federal land.[58] Around the same time, the state of Utah and twenty-two counties began filing lawsuits against federal land management agencies, seeking rights-of-way over thousands of miles of old, pre-existing routes they claimed were historically in regular public use.[59] Other western states are watching how Utah's aggressive strategy fares in the courts,[60] which is

54. In the Mountain West, OHV recreation is common, "with a higher than average OHV participation rate of 28% of the population." SIMMONS & YONK, *supra* note 51, at 19.

55. *Id.* at 21. Wilderness designation can also eradicate the potential extraction of energy or developing recreational facilities. Brian C. Steed et al., *The Economic Costs of Wilderness*, ENVTL. TRENDS, June 2011, at 1, *available at* http://www.environmentaltrends.org/fileadmin/pri/documents/2011/brief062011.pdf (finding that "federally designated Wilderness negatively impacts local economic conditions," and that counties with wilderness experience lower household income, total payroll, and county tax receipts than counties without a wilderness presence).

56. Ed Quillen, *RS-2477: Old Roads and New Controversies*, COLO. CENT. MAG. (Mar. 2001), http://cozine.com/2001-march/rs-2477-old-roads-and-new-controversies. In Clinton's 1996 designation of Grand Staircase-Escalante National Monument, local residents and politicians complained they weren't consulted about the designation, which "closed off that land to any development of coal reserves." Michelle L. Price, *Herbert Hopeful for Utah Public Lands Deal*, WASH. TIMES (Sept. 17, 2014), http://www.washingtontimes.com/news/2014/sep/17/herbert-hopeful-for-utah-public-lands-deal/?page=all.

57. Cheryl K. Chumley, *Western States Seek Control of Federal Lands*, NEWSMAX (Apr. 21, 2014, 3:43 PM), http://www.newsmax.com/Newsfront/Cliven-Bundy-Western-federal-lands/2014/04/21/id/566804. On March 23, 2012, Utah Governor Gary R. Herbert signed House Bill 148, which demands the federal government make good on the promises made in Utah's 1894 Enabling Act (UEA) to extinguish title to federal lands in Utah. Kirk Johnson, *Utah Asks U.S. to Return 20 Million Acres of Land*, N.Y. TIMES (Mar. 23, 2012), http://www.nytimes.com/2012/03/24/us/utah-bill-asks-government-to-give-back-more-than-20-million-acres-of-land.html.

58. Gail Binkly, *Costly Claims: The Fight Over RS 2477 Roads*, FOUR CORNERS FREE PRESS (Sept. 2011), http://fourcornersfreepress.com/news/2011/091101.htm (explaining that HB 76 "establishes a federalism subcommittee of the Constitutional Defense Council to review federal laws applying to Utah, and encourages state officials to attack 'unconstitutional' laws and mandates, providing up to $1.2 million a year for them to do so").

59. Jodi Peterson, *Utah Denied Claim to Road in Canyonlands National Park*, HIGH COUNTRY NEWS (May 13, 2014), http://www.hcn.org/blogs/goat/utah-denied-claim-to-road-in-canyonlands-national-park.

60. *See* Hoffmann & Imperiale, *supra* note 47 (explaining that other western states "have earmarked funds for the study of 'potential'" 2477 claims and will likely increase funding if the Utah lawsuits prevail).

why cases reaching the Tenth Circuit will have ramifications for states looking for creative ways to assert control over federal public lands.

II. R.S. 2477 FRAMEWORK

Passed just one year after the Civil War ended, R.S. 2477 provides: "[T]he right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."[61] Like other land grant statutes passed during the post-Civil War era,[62] the purpose of the act was to encourage settlement and development of unreserved public lands in the American West.[63] Therefore, R.S. 2477 essentially provided western pioneers with an implied license to construct roads in order to divest the government's ownership of vast amounts of federal lands.[64] In 1976, the enactment of FLPMA marked an express "180-degree shift" in the federal government's attitude to managing public lands, and the emphasis drifted away from encouraging expansion and towards federal retention using a conservation-based approach.[65] However, Congress also specified that FLPMA was subject to valid existing rights; thus, an R.S. 2477 right-of-way may be valid today if it vested prior to 1976.[66] With this change in the federal government's stance towards public land management, issues over R.S. 2477 have crept back into the debate over the future of western landscapes, and federal land agencies and lower district courts have struggled to agree on a consistent modern interpretation due to the "cryptic language and sparse legislative history" of this old mining law provision.[67] Much of the focus has been on federally managed lands, but R.S. 2477 also affects private property owners that took title from the federal government subject to preexisting rights-of-way.[68] For many, the

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61. An Act Granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for Other Purposes, ch. 262, § 8, 14 Stat. 251, 253 (1866) (repealed 1976).

62. *See* DOMBECK ET AL., *supra* note 22, at 13, 15 ("The Homestead Act was passed in 1862 and provided free land" for up to 160 acres to settlers who "lived on the land and cultivated it for five years." "The Desert Land Act of 1877 enabled settlers to buy 640 acres of desert land for $1.25 per acre if they constructed irrigation systems.").

63. *See* McIntosh, *supra* note 7, at 18 (explaining that in the Homestead Act, the Desert Lands Act, and the Mining Act of 1872, Congress put forth a simple proposition to prospective landowners: "Work the land, and we will reward you with a property interest . . . . but specifically conditioned on the exertion of effort to create a lasting kind of development . . . that would contribute to the settlement of the west's open territory").

64. Lindsay Houseal, Comment, Wilderness Society v. Kane County, Utah*: A Welcome Change for the Tenth Circuit and Environmental Groups*, 87 DENV. U. L. REV. 725, 726 (2010).

65. Hillary M. Hoffmann, *Signs, Signs, Everywhere Signs:* The Wilderness Society v. Kane County *Leaves Everyone Confused About Navigating a Right-of-Way Claim Under Revised Statute 2477*, 18 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 3, 8–9 (2012) ("Instead of allowing and encouraging citizens to settle upon federal land . . . . FLPMA . . . required federal agencies to begin managing federal public lands using a conservation-based approach called 'sustained yield,' which contemplated planning around environmental values and objectives.").

66. LAITOS, *supra* note 9, at 324.

67. 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, 527 (2005).

68. *See* McIntosh, *supra* note 7, at 17 (explaining private landowners have dealt with county officials claiming "routes that did not appear on title searches . . . were 'highways' established when the land was once owned by the federal government").

prospect of having the public traverse through their backyard destroys the attributes of isolation that make such land valuable to the owner in the first place.[69]

At the center of the dispute are conflicting views concerning the existence, extent, duration, and scope of these preexisting rights-of-way. Parties with vastly different interests and objectives disagree on how to define the statute's ambiguous terms such as "highway" or "construction" and to what degree state law should determine the scope of "acceptance" through "sufficient public use." Public-access advocates, state and local governments, and off-road vehicle enthusiasts prefer a broad interpretation of what actions are necessary in order to establish a public highway.[70] They argue for a more relaxed standard of what constitutes "continuous public use" because the roadways are often in sparsely populated rural communities.[71] Thus, even if the roadways' use may not have been considered continuous "according to an urban point of reference," the roads were still used as often as the local residents found necessary.[72] These state and local officials assert that road access through federal lands is especially important for economic prosperity in rural areas where R.S. 2477 roads support recreation activities, in addition to ranching and mining.[73] At the opposite end of the spectrum are environmentalists, who support stricter application of R.S. 2477 terminology, such as requiring extensive frequency of use by the pubic or mechanical construction of the roadway.[74] They dismiss the other side's economic-livelihood argument and suggest the hidden objective is to use R.S. 2477 as an illegitimate way to circumvent environmental laws and disqualify large spreads of land from wilderness designation, which must be roadless.[75]

A. Ambiguous Terms: Congressional and Executive Attempts to Shape R.S. 2477's Application

The Department of the Interior (DOI) controls nearly 640 million acres of federally owned land, most of which is managed by three agen-

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69. For a list of 2477 claims on private lands, see *RS 2477: Impacts on Private Property*, S. UTAH WILDERNESS ALLIANCE (Feb. 9, 2011), http://www.suwa.org/wp-content/uploads/PrivateProperty_FactSheet.pdf.

70. *See* Houseal, *supra* note 64, at 727.

71. *See* Phil Taylor, *Utah, County Denied Rehearing in Canyonlands Roads Case*, GREENWIRE (Sept. 9, 2014), http://www.eenews.net/greenwire/stories/1060005472 (quoting Utah Association of Counties that "[s]parsely-populated landscape connected by seemingly empty roads are the geographic rule, not the exception, of the American West").

72. *Id.* ("Utah counties took exception to the 10th Circuit's frequency finding, calling it an 'urban-centric dismissal' of the rural West, where roads are less frequented . . . but are no less important to local residents.")

73. Alison Suthers, Note, *A Separate Peace?: Utah's R.S. 2477 Memorandum of Understanding, Disclaimers of Interest, and the Future of R.S. 2477 Rights-of-Way in the West*, 26 J. LAND RESOURCES & ENVTL. L. 111, 111 (2005).

74. *See* Houseal, *supra* note 64, at 727–28.

75. COGGINS & GLICKSMAN, *supra* note 14, § 15:19.

cies—the National Park Service (NPS), Bureau of Land Management (BLM), and Fish and Wildlife Service (FWS).[76] These agencies must conduct periodic planning "pursuant to their statutory mandates," and they are also charged with addressing issues that come up when conflicts erupt between competing land uses.[77]

For these federal land management agencies, the absence of any legislative history concerning R.S. 2477 makes the need for congressional and executive guidance crucial. Without consistent federal guidelines for interpreting and applying the statute, the ambiguity disrupts land use planning efforts, wilderness area designation, and private property titles are "clouded by potential [R.S. 2477] claims."[78] Unfortunately, past attempts to create an agency process for evaluating these preexisting claims have failed to provide any meaningful assistance.

In 1994, the DOI proposed regulations to create a formal administrative process by which persons claiming R.S. 2477 rights-of-way could solicit binding determinations as to the claim's existence and validity.[79] The regulations also put forth a timeframe for resolving such claims and provided more detailed definitions for statuory terms such as "construction" and "highway."[80] However, the DOI's efforts were ultimately blocked by Congress, and the polarizing politics surrounding the R.S. 2477 debate have prevented subsequent administrative efforts from providing much clarity to the controversy.[81]

In 2003, the DOI signed a Memorandum of Understanding (MOU) with the State of Utah, which provided a streamlined application process where the BLM would acknowledge the existence of an R.S. 2477 claim by issuing a "disclaimer of interest" if the application satisfied the terms of the MOU.[82] However, the MOU failed to garner widespread support since it was signed without involving input from the public and excluded claims involving "sensitive areas like national parks" or wilderness study areas.[83] Because the MOU was negotiated in a setting that included only parties from one side of the debate and incorporated an overly broad interpretation of what qualifies as a public highway, it is frequently at-

76. Hoffmann, *supra* note 65, at 16–17 (describing the confusion surrounding application of R.S. 2477 for federal land management agencies).

77. *Id.*

78. Macfarlane, *supra* note 6, at 252.

79. COGGINS & GLICKSMAN, *supra* note 14, § 15:19.

80. Michael S. Freeman & Lusanna J. Ro, *RS 2477: The Battle Over Rights-of-Way on Federal Land*, 32 COLO. LAW. 105, 106 (2003).

81. *Id.* (describing how the 1996 Congressional Moratorium stated that "without express Congressional approval, no final rule or regulation of any agency . . . pertaining to . . . 2477 shall take effect").

82. Memorandum of Understanding Between the State of Utah and the Dep't of the Interior on State & Cnty. Road1 Acknowledgment (Apr. 9, 2003), *available at* http://www.doi.gov/news/archive/03_News_Releases/mours2477.htm.

83. McIntosh, *supra* note 7, at 20.

tacked as an insufficient basis for asserting R.S. 2477 claims.[84] Consequently, costly and drawn-out litigation in federal courts has become the primary mechanism for resolving the more controversial R.S. 2477 claims like those within national parks or designated wilderness areas.[85]

B. Judicial Attempts to Resolve the Controversy

Land-access proponents and states attempting to establish routes through public lands use the Quiet Title Act (QTA) in conjunction with R.S. 2477 to sue the federal government.[86] "The QTA is a limited waiver of the United State's [sic] sovereign immunity which would otherwise protect the federal government from suit" where the claimant asserts an interest in real property against the United States.[87]

One of the first cases to reach the Tenth Circuit, and the leading opinion on R.S. 2477, was *Sierra Club v. Hodel*,[88] in which several environmental organizations sued the federal government and Garfield County, Utah, after the latter announced plans to widen portions of the Burr Trail.[89] Specifically, the county had proposed upgrading a former cattle trail into a two-lane gravel road that would provide access to a federal marina.[90] The Sierra Club sought an injunction against the road improvements because of the adverse effects the expansion would have on several adjacent wilderness study areas.[91] The Tenth Circuit majority decided that an R.S. 2477 right-of-way may be valid today if it vested prior to 1976, but that the scope of the preexisting right was to be measured by state law in effect at the time of repeal.[92]

A more recent case that helped define the requirements and scope of agency determination regarding R.S. 2477 was *Southern Utah Wilderness Alliance v. Bureau of Land Management* (*SUWA*).[93] The case was decided following the aftermath of President Clinton's establishment of Grand Staircase-Escalante National Monument in 1996.[94] Soon after the monument was dedicated tensions grew, and road crews from several southern Utah counties started grading various dirt trails in the monument without notifying the BLM.[95] When the BLM did nothing to stop

84. *See id.*
85. Macfarlane, *supra* note 6, at 243.
86. McIntosh, *supra* note 7, at 18–19.
87. *Id.* at 18.
88. 848 F.2d 1068 (10th Cir. 1988), *overruled in part on other grounds by* Vill. of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992).
89. *Id.* at 1068 (concluding that state law should control the scope of the right-of-way).
90. *Id.* at 1073.
91. *Id.* at 1074.
92. *Id.* at 1083–84.
93. 425 F.3d 735 (10th Cir. 2005).
94. Hoffmann, *supra* note 65, at 13–14 ("In September 1996, President Clinton . . . exacerbated the tensions by establishing the Grand Staircase-Escalante National Monument, pursuant to his authority under the American Antiquities Act, reserving almost two million acres . . . under BLM management." (footnote omitted)).
95. *Id.* at 14.

these activities, the Southern Utah Wilderness Alliance (SUWA), a nonprofit conservation group, filed an action in federal court against the BLM and several Utah counties.[96] After the district court held the counties did not require the BLM's permission to undertake routine maintenance on the roads, the Tenth Circuit reversed, and held 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 . . . beyond routine maintenance."[97] In essence, this clarified that counties could not simply drive bulldozers and other construction machines onto BLM land to conduct significant improvements without federal authorization.[98]

More importantly, elaborating on *Hodel*, the *SUWA* decision held that where the existence of the right-of-way is at issue, the BLM does not have primary jurisdiction over R.S. 2477 claims and that both perfection and scope of the preexisting right-of-way are determined by looking to state law.[99] However, the Tenth Circuit's ruling allowed the agency to make initial "administrative determinations" on the validity of an R.S. 2477 roadway for planning purposes only.[100] This meant the agency could issue its opinion as to the validity—but without carrying the force of law, the agency's determination "could be taken with a proverbial grain of salt."[101]

The court also briefly discussed the burdens of proof in an R.S. 2477 dispute. The court held that the party "seeking to enforce rights-of-way against the federal government" bears the burden of proof.[102] Thus, while the *SUWA* decision clarified which party bears the burden of proof, it did nothing to define what standard of evidence is used to satisfy the burden.

Finally, the Tenth Circuit created the "public use standard" for determining when and if an R.S. 2477 right-of-way had vested.[103] The court explained that under the common law, the establishment of a public right-of-way required two components: "the landowner's objectively manifested intent to dedicate property to the public use as a right of way,

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96. *Id.*

97. *SUWA*, 425 F.3d at 745.

98. Hoffmann, *supra* note 65, at 15–16.

99. *SUWA*, 425 F.3d at 757. This holding lies in contrast to the Ninth Circuit approach "which has overlooked state law . . . regarding the [validity] of R.S. 2477 claims." Macfarlane, *supra* note 6, at 233.

100. *SUWA*, 425 F.3d at 757–58.

101. Hoffmann, *supra* note 65, at 17.

102. *SUWA*, 425 F.3d at 768–69 (quoting S. Utah Wilderness Alliance v. BLM, 147 F. Supp. 2d 1130, 1136 (D. Utah 2001)) (internal quotation marks omitted) (explaining the allocation of the burden of proof is consistent with "the established rule . . . that land grants are construed favorably to the Government" (quoting S. Utah Wilderness Alliance v. BLM, 147 F. Supp. 2d at 1136) (internal quotation mark omitted)).

103. *Id.*

and acceptance by the public."[104] The first requirement—intent to dedicate—could manifest "by express statement or [be] presumed from conduct."[105] Public acceptance has been more difficult to determine, but under Utah law, "[a] highway shall be deemed and taken as dedicated and abandoned to the use of the Public when it has been continuously and uninterruptedly used as a Public thoroughfare for a period of ten years."[106] The *SUWA* decision provided clarity on issues such as how to measure public use, which party bears the burden of proof, and defined several terms such as highway and construction.[107] However, the Tenth Circuit's decision still left much to be desired for lower courts attempting to flesh out this vexing frontier law and determine the merits of R.S. 2477 disputes. In 2014, the Tenth Circuit got another opportunity in a decade-long dispute over an old route winding its way through a streambed in the heart of Canyonlands National Park.

III. *SAN JUAN V. UNITED STATES*

A. Facts

1. History of Use Along the Salt Creek Road

Salt Creek Canyon is considered as "one of the crown jewels of Canyonlands National Park,"[108] with its perennial stream providing an extensive riparian habitat for wildlife, as well as being the area with the highest recorded density of archeological sites in the park.[109] An old pioneer route located fifty miles from the nearest city winds its way through the canyon and "generally follows the course of Salt Creek."[110] Historical evidence gathered from maps, aerial photographs, geological surveys, the area's scant written history, and testimony from witnesses who visited the relevant landscape characterize the history of travel along the Salt Creek road.[111] Starting in the 1890s, a homesteader named Lee Kirk settled in an area south of the Salt Creek road, and it was supposed that he and his successors traversed the path to move supplies for farming activi-

104. *Id.* at 769.

105. *Id.*

106. *Id.* at 771 (quoting Lindsay Land & Live Stock Co. v. Churnos, 285 P. 646, 648 (Utah 1929)) (internal quotation marks omitted).

107. Hoffmann, *supra* note 65, at 18.

108. Stephen Bloch & Heidi McIntosh, *Tenth Circuit Denies State and San Juan County Petitions for Rehearing*, S. UTAH WILDERNESS ALLIANCE (Sept. 8, 2014), http://suwa.org/tenth-circuit-denies-state-san-juan-county-petitions-rehearing-2/.

109. Answering Brief of Defendants-Appellees at 7, San Juan Cnty. v. United States, 754 F.3d 787 (10th Cir. 2014) (Nos. 11-4146, 11-4149), 2012 WL 1074408, at *7 (explaining that "[s]urface and groundwater associated with the creek support the most extensive riparian ecosystem in Canyonlands, other than the Green and Colorado Rivers. Surface water and riparian habitat are among the rarest habitat types in the arid Canyonlands environment." (citation omitted)).

110. *Id.* at 9.

111. Appellant San Juan County's Opening Brief at 6, *San Juan Cnty.*, 754 F.3d 787 (Nos. 11-4146, 11-4149), 2011 WL 6179568, at *6.

ties.[112] Around the same period, ranchers began moving cattle along the Salt Creek road between winter and summer grazing seasons and continued to do so through the 1940s.[113] Most of the cattle-herding activities were conducted by the Scorup-Somerville Cattle Company, which carried out its operations pursuant to a grazing permit issued by the DOI.[114] There was also some evidence that uranium mining and oil drilling were conducted in the area, but there was very little, if any, evidence that the prospectors used the Salt Creek road for these extraction activities.[115] With the discovery of Angel Arch,[116] nascent uses by the general public along the claimed right-of-way began in the early 1950s.[117] Characterized as "exploration trips," these groups of tourists (boy scouts and curious travelers on horseback and in jeeps) ventured down the Salt Creek route for recreational purposes.[118] It was not until the latter half of the 1950s that the area saw a significant uptick in the number of visitors.[119]

2. Modern Use of Salt Creek Road and Events Leading to the Route's Closure

On September 12, 1964, Congress established Canyonlands National Park and reserved the lands within, including the Needles District where the Salt Creek road is located.[120] However, the reservation was "subject to valid existing rights," which included claims to R.S. 2477 rights-of-way.[121] Today, the nine-mile trail known as Salt Creek road "is the primary way for tourists to reach several scenic sites . . . including Angel Arch."[122] As it carves its way through the desert landscape, the unimproved road crosses the streambed many times, and for a long time jeep travel along the route was a popular choice for visitors not wishing to make the arduous trek by foot.[123] From 1980 to 2012, Canyonlands experienced the fastest growth in visitation among the state's national parks.[124] As the number of park visitors dramatically increased in the

112. Answering Brief of Defendants-Appellees, *supra* note 109, at 20–21.

113. *Id.* at 28.

114. Appellant San Juan County's Opening Brief, *supra* note 111, at 10; Answering Brief of Defendants-Appellees, *supra* note 109, at 20.

115. Answering Brief of Defendants-Appellees, *supra* note 109, at 22.

116. Angel Arch is a natural geological feature within Canyonlands National Park and is "considered by many people to be the most beautiful and spectacular arch in the park if not in the entire canyon country." S.W. LOHMAN, U.S. GEOLOGICAL SURVEY, GEOLOGICAL SURVEY BULLETIN 1327, THE GEOLOGIC STORY OF CANYONLANDS NATIONAL PARK (1974), *available at* http://www.cr.nps.gov/history/online_books/geology/publications/bul/1327/sec8.htm.

117. Answering Brief of Defendants-Appellees, *supra* note 109, at 23.

118. *Id.*

119. *Id.*

120. 16 U.S.C. § 271 (2012).

121. Appellant San Juan County's Opening Brief, *supra* note 111, at 5.

122. San Juan Cnty. v. United States, 754 F.3d 787, 790 (10th Cir. 2014).

123. Answering Brief of Defendants-Appellees, *supra* note 109, at 9 ("As the claimed Salt Creek road winds its way through [the] Canyon . . . it generally follows the course of Salt Creek . . . weaving in and out of the streambed and crossing the channel about 60 times.").

124. Canyonlands saw a 702% increase in visitation, followed by Arches (269%), Zion (165%), Bryce (142%) and Capitol Reef (96%). Leaver, *supra* note 48, at 6–7.

early 1990s, NPS officials began to notice that mounting jeep use was polluting the stream with engine fluids and degrading wildlife habitat in the Salt Creek ecosystem.[125]

In 1992, the NPS started developing its Back Country Management Plan (BMP) for Canyonlands, and there was considerable debate over how to balance the public's competing demands for vehicular access and preservation of Salt Creek's unique natural and cultural resources.[126] Upon the official release of the BMP in 1995, the NPS placed a permit gate on the Salt Creek road and limited the number of vehicles traveling on the route to twelve per day.[127]

The gate and permit system was not challenged by San Juan County or the state, but a complaint filed by SUWA against the NPS in earlier litigation resulted in an injunction that kept portions of the Salt Creek road closed to vehicular use.[128] Several off-road vehicle user groups successfully appealed the decision, and the Tenth Circuit vacated the injunction in 2000,[129] but the NPS decided to keep the road closed while it established a new policy regarding motor vehicle traffic on the Salt Creek road.[130] After conducting its environmental assessment in 2002, the NPS concluded that continuing to allow vehicle traffic would result in "adverse impacts to Salt Creek's ecosystem that would impair park resources and values."[131] This decision led the NPS to issue a final rule on June 14, 2004 that prohibited motor vehicles in Salt Creek Canyon above Peekaboo Spring, as well as the Park Service's administrative determination that an R.S. 2477 right-of-way did not exist.[132] That same day, San Juan County filed a suit to quiet title, claiming an alleged R.S. 2477 right-of-way along the Salt Creek road.[133]

3. Procedural History (SUWA Intervention and District Court Decision)

After the county filed its complaint asserting title to the alleged right-of-way, several environmental groups—SUWA, The Wilderness Society (TWS), and Grand Canyon Trust (GCT)—moved to intervene in the district court claiming that a decision to grant the R.S. 2477 right-of-

125. *See* Bloch & McIntosh, *supra* note 108 (discussing the Park Service's decision to close Salt Creek Canyon to vehicular use in 2004).

126. Answering Brief of Defendants-Appellees, *supra* note 109, at 15.

127. Appellant San Juan County's Opening Brief, *supra* note 111, at 2 ("From historically open travel that exceeded 60 vehicles per day . . . the BMP's permit gate reduced the number of vehicles . . . to no more than 10 private vehicles and 2 commercial tour vehicles per day.").

128. S. Utah Wilderness Alliance v. Dabney, 222 F. 3d 819, 822 (10th Cir. 2000).

129. *Id.* at 830.

130. Appellant San Juan County's Opening Brief, *supra* note 111, at 3.

131. Answering Brief of Defendants-Appellees, *supra* note 109, at 19–20.

132. Canyonlands National Park—Salt Creek Canyon, 69 Fed. Reg. 32,871, 32,876 (June 14, 2004) (codified at 36 C.F.R. § 7.44(a)).

133. Answering Brief of Defendants-Appellees, *supra* note 109, at 20.

way would seriously threaten their conservation interests.[134] The district court denied the intervention sought by the environmental advocacy groups, and the Tenth Circuit, sitting en banc, upheld the decision.[135] The court reasoned that while the conservation groups have an interest that may be impaired in the outcome of a title dispute involving an R.S. 2477 right-of-way, the federal government adequately represented those interests in the Salt Creek matter.[136] The environmental groups then moved for amicus status, and subsequently participated in litigation as "friends of the court," but not as parties.[137] This appeal only considered the intervention issue and did not consider the merits of the case.

Upon remand, the district court, after weighing all the historical evidence of use presented by both parties, ruled in favor of the United States.[138] Following R.S. 2477 precedent, the court looked to state common law to guide its determination of whether the public use amounts to acceptance as a public highway, and under Utah law, "[a] highway shall be deemed and taken as dedicated and abandoned to the use of the Public when it has been continuously and uninterruptedly used as a Public thoroughfare for a period of ten years."[139] According to the district court, "the evidence was not sufficient" to demonstrate that "the road had been in continuous public use as a public thoroughfare throughout a ten year period prior to the reservation of Canyonlands" in 1964.[140]

The district court disregarded the homesteading activities in the late nineteenth century, as there was "[v]ery little direct evidence" to the duration and extent of travel by these early pioneers along the claimed route.[141] The court also found it would strain the language of R.S. 2477 to characterize the cattle-grazing activities as public use because any evidence of sufficient use was conducted under a proprietary interest, pursuant to federal grazing permits.[142] As for the recreational activities that commenced in the 1950s, the court explained that the scenic tourism was "still in its embryonic stage" and "the sporadic trips along Salt Creek to Angel Arch . . . were still exploratory in nature."[143] Therefore, the dis-

134. San Juan Cnty. v. United States, 503 F.3d 1163, 1167 (10th Cir. 2007) (en banc). This earlier opinion dealt only with the issue of intervention and did not discuss the merits of the case.

135. *Id.* at 1167, 1207.

136. *Id.* at 1167–68.

137. Brief of Amici Curiae Southern Utah Wilderness Alliance, et al. in Opposition to the Petitions for Rehearing and Rehearing En Banc at 1–2, San Juan Cnty. v. United States, 754 F.3d 787 (10th Cir. 2014) (Nos. 11-4146, 11-4149), 2014 WL 3795351, at *1–2 [hereinafter Amici Brief for Southern Utah Wilderness Alliance]. The court may consider amicus filings but the extent and weight of such consideration is discretionary.

138. *San Juan Cnty.*, 754 F.3d at 791.

139. *Id.* at 791–92 (quoting Lindsay Land & Live Stock Co. v. Churnos, 285 P. 646, 648 (Utah 1929)) (internal quotation marks omitted).

140. *Id.*

141. San Juan Cnty v. United States, No. 2:04–CV–0552BSJ, 2011 WL 2144762, at *33 (D. Utah May 27, 2007).

142. *Id.* at *34.

143. *Id.* at *35.

trict court ruled in favor of the United States, explaining that while the state and county demonstrated a variety of historical uses, during the relevant period before 1954, "a visit to Salt Creek Canyon . . . was an experience marked by pristine solitude."[144]

4. Tenth Circuit Unanimously Affirms the District Court

On appeal, the United States Court of Appeals for the Tenth Circuit considered (1) whether the state and county's claims under the QTA were timely, and (2) and whether the state and county demonstrated acceptance through ten years of continuous public use prior to Canyonlands' reservation in 1964.[145]

a. Quiet Title Act/Sovereign Immunity

The United States contended that sovereign immunity deprived the district court of jurisdiction by claiming the limitation periods in the QTA had expired before the state and county could take advantage of the statute's limited waiver.[146] Because the sovereign immunity issue was jurisdictional, the Tenth Circuit addressed it first and held that the claims of both the state and county were timely.[147] The QTA establishes two different limitation periods for property claims brought against the federal government: "[A] general limitation period and a limitation period applicable only to claims brought by states."[148]

For claimants other than states, a claim needs to be filed within twelve years of the date of accrual, which means the statute of limitations started to run when the federal government gave San Juan County notice that it did not recognize the legitimacy of the county's use of the Salt Creek road.[149] The United States argued that several mid-1970s road closures south of the claimed road constituted sufficient notice to start the limitations period; by closing certain segments that connected to the Salt Creek Road, the U.S. gave notice by limiting the avenues of access to the claimed right-of-way.[150] The Tenth Circuit disagreed, explaining that despite the more restrictive management activities conducted by the federal agency, these earlier closures did not constitute an exclusive claim because "the public continued to have access to Salt Creek road consistent with the claimed right-of-way."[151] Thus, San Juan's claim was timely.

144. *Id.*
145. San Juan Cnty. v. United States, 754 F.3d 787, 792, 796 (10th Cir. 2014).
146. *Id.* at 792.
147. *Id.*
148. *Id.* at 793.
149. *Id.*
150. *Id.* at 793–94.
151. *Id.* at 794.

The Tenth Circuit then went on to address the timeliness of Utah's claim. For states, the notice requirement is different because "the trigger . . . requires more than fair notice; it requires substantial activity by the United States."[152] The court acknowledged that the United States had conducted "substantial activities" with respect to the right-of-way, but it nonetheless held that Utah's claim was timely since the limitation period applied to states only starts to run when the state "receive[s] notice" of the federal claims.[153] Because the route remained "fully accessible to the public" throughout all of the federal government's activities, and the first attempt to limit the public's access occurred after 1995 when the NPS proposed the permit system via the backcountry management plan, Utah's claim was not barred by the limitation period.[154]

b. "Continuous Use" (Acceptance of the Salt Creek Road as a Public Right-of-Way)

The state and county argued that the district judge erred in several ways by (1) requiring them to demonstrate greater frequency of public use than that which "the public finds . . . convenient or necessary," (2) disregarding evidence of cattle-grazing uses under a private right, (3) requiring a showing of a constructed or "discernible" road, and (4) concluding the burden of proof must be satisfied by clear and convincing evidence.[155]

The Tenth Circuit addressed the frequency of use argument first. The court held that "frequency or intensity of use is probative of the existence of a 'public thoroughfare,' and, to the extent recent changes to Utah law minimize the importance of this factor, it . . . remains pertinent under federal law."[156] The state and county were of the opinion that no particular frequency of use is required and the public use standard is fulfilled when the route's use "is as often as the public finds convenient or necessary during the ten-year period."[157] They based their argument on two cases decided by the Utah Supreme Court in 2008 that proclaimed a new interpretation of the public use standard where frequency of use is not a relevant consideration.[158] The Tenth Circuit reminded the parties that while federal courts may "borrow" from state law to aid in their determination of whether an R.S. 2477 right-of-way has been accepted, it "ceases to provide 'convenient and appropriate principles' when it con-

152. *Id.* at 795.

153. *Id.* (alteration in original) (quoting 28 U.S.C. § 2409a(i)).

154. *Id.* at 796.

155. *Id.* (alteration in original) (quoting Appellant San Juan County's Opening Brief, *supra* note 111, at 26, 30) (internal quotation marks omitted).

156. *Id.* at 797.

157. *Id.*

158. *Id.* at 798 (discussing *Wasatch County v. Okelberry*, 179 P.3d 768 (Utah 2008), and *Utah County v. Butler*, 179 P.3d 775 (Utah 2008), which held that a roadway becomes dedicated, and therefore accepted by the public, when it is created by a public user and held open for such use as is convenient or necessary for an uninterrupted ten year period).

travenes congressional intent."[159] The court explained that frequency and variety of use were both "critical common-law inquiries" when deciding whether a claimed right-of-way had been accepted by the public.[160] In addition, the relevant state law in this determination was the law in effect when the statute was repealed in 1976.[161] The court concluded that the Utah Supreme Court could not "retroactively broaden" the public use standard by applying a more lenient standard beyond what Congress intended when it preserved rights-of-way existing on the date of repeal.[162]

Next, the Tenth Circuit addressed the state and county's argument that cattle-grazing uses under a private right should have been given more weight in considering the existence of a public highway. The Tenth Circuit sided with the district court on this issue, explaining that these activities carried little probative value "because the users had 'proprietary interests in the upper Salt Creek'" pursuant to federal grazing permits and a deed to land in the adjacent area.[163] Therefore, the Tenth Circuit upheld Utah court decisions holding that use under private right is not sufficient to meet the public use standard.

The state and county also argued that the district court erred by requiring them to prove that a discernible jeep road had been "constructed."[164] The Tenth Circuit did not agree that an error had been committed and confirmed that although "mechanical construction is not necessary to prove a R.S. 2477 right-of-way[,] . . . 'evidence of actual construction . . . or lack thereof'" can be probative in determining what satisfies the requisite public use.[165]

Finally, the state and county argued that the district judge erred by applying the more stringent burden of proving acceptance by requiring a showing of clear and convincing evidence. They believed the correct standard needed to show the existence of a public thoroughfare should have been the more lenient preponderance of the evidence standard.[166] The Tenth Circuit declined to rule on this issue, stating that a resolution as to the proper evidentiary standard was unnecessary since the evidence failed to satisfy either standard.[167] Even so, the *San Juan* decision went further in reaching the merits of an R.S. 2477 claim than any Tenth Cir-

159. *Id.*

160. *Id.* at 799.

161. *Id.* (citing Sierra Club v. Hodel, 848 F.2d 1068, 1083 & n.14 (10th Cir. 1988), *overruled in part on other grounds by* Vill. of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992), which held that scope is determined with respect to state law as of date of repeal of statute).

162. *Id.*

163. *Id.* at 799–800.

164. *Id.* at 800.

165. *Id.* at 800 (citation omitted) (quoting S. Utah Wilderness Alliance v. BLM, 425 F.3d 735, 777–78 (10th Cir. 2005), which held the presence of a discernible road can be considered when determining whether a public thoroughfare existed).

166. Appellant San Juan County's Opening Brief, *supra* note 111, at 21.

167. *San Juan Cnty.*, 754 F.3d at 801.

cuit decision before it. Yet, despite its historic outcome, the full precedential thrust of the decision remains to be seen.

IV. ANALYSIS

A. San Juan*'s Effect and Precedential Value*

On September 8, 2014, the Tenth Circuit denied San Juan County's and the state of Utah's petitions for a rehearing en banc, settling the issue for Salt Creek Canyon once and for all.[168] However, there are still thousands of potential R.S. 2477 claims that could have a profound impact on the future of the West's wild landscapes. It may take decades for courts to settle the many vexing questions surrounding R.S. 2477, but the *San Juan* decision did help to flesh out the meaning of continuous use and frequency when interpreting this frontier law in the modern era.

San Juan signals a victory for those sympathetic to federal retention and preservation of western landscapes, but the reach of the Tenth Circuit's decision and its precedential value moving forward is less clear. The decision provides clarity on some issues such as the statute of limitations and the different types of notice the federal government must give to potential claimants in order to start the limited waiver period.[169] It also reaffirmed that while evidence of a discernible road is neither a necessary nor sufficient element, it may be probative when determining whether the required extent of public use has been satisfied.[170] Because the Salt Creek road is regularly washed out by storms and seasonal runoff,[171] the decision might signal that establishing a discernible road requires more than temporary seasonal use. The Tenth Circuit did not pronounce any sort of bright-line rule regarding seasonal use, but by reaffirming the probative value of proving a discernible road, the decision might handicap parties attempting to establish the validity of other potential R.S. 2477 claims in the Colorado Plateau, where spring runoff and winter snow prevent year-round access.

Perhaps the most important result of this decision was the court's finding that frequency of use is still a probative consideration when evaluating the public use standard. It raises the bar for assembling the requisite historical evidence needed to prove an R.S. 2477 route was in continuous public use. Claimants relying on little more than ephemeral pro-

168. Order of Sept. 8, 2014, San Juan Cnty. v. United States, 754 F.3d 787 (10th Cir. 2014) (Nos. 11-4146, 11-4149), *available at* http://suwa.org/wp-content/uploads/San-Juan-County-and-Utah-v-US-9-8-14-order-denying-rehearing-en-banc.pdf.

169. *See generally San Juan Cnty.*, 754 F.3d 787.

170. *Id.* at 800.

171. State of Utah's Reply Brief on Appeal of Findings of Fact, Memorandum Opinion and Order of the U.S. District Court, for the District of Utah, the Honorable Bruce S. Jenkins, Presiding at 35, San Juan Cnty. v. United States, 754 F.3d 787 (10th Cir. 2014) (Nos. 11-4146, 11-4149), 2012 WL 1151679, at *35 [hereinafter Utah's Reply Brief] (explaining the topography of Canyonlands' "sedimentary and igneous formations" can make a road's seasonal use less discernible after periodic flooding and rechanneling of the riverbed).

spector use or cattle grazing pursuant to a federal permit may think twice before filing a claim. By disqualifying these cattle ranching activities as serving proprietary and not public uses, the *San Juan* decision will likely prevent a substantial number of old roads from being recognized as R.S. 2477 rights-of-way.[172]

The Tenth Circuit sent an important message when it proclaimed that state law cannot retroactively attempt to broaden the scope of continuous public use beyond that which was intended by Congress when it repealed R.S. 2477 in 1976.[173] The court properly followed circuit precedent by retaining the frequency of use requirement[174] and refusing to allow state courts to circumvent what Congress intended when it grandfathered preexisting rights-of-way over three decades ago.[175] Quoting *SUWA*, the court explained that frequency or intensity of use "has always been pertinent to establishing sufficient 'passing or travel' 'by the public.'"[176] Therefore, the frequency component remains relevant in determining whether a public thoroughfare existed, and recent Utah judicial precedents cannot alter that consideration.[177]

For other states and counties wishing to assert R.S. 2477 claims against the federal government, this decision will dictate how they move forward strategically.[178] Some believe the decision will have serious adverse consequences for local residents across the West who depend on access to public roads for their livelihoods.[179] However, it would be a mistake to think states like Utah will back down after the Tenth Circuit's ruling.[180] Many public access advocates disregarded the decision as an "urban-centric dismissal" of the views of rural western citizens, which

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172. San Juan County was worried about the effect of dismissing the cattle-grazing operations as "proprietary interests" because "the logical extension of the concept . . . will set the stage to eliminate pretty much *every* public use of a road under R.S. 2477. What would qualify as public use if personal intent matters?" Appellant San Juan County's Reply Brief at 21–22, San Juan Cnty. v. United States, 754 F.3d 787 (10th Cir. 2014) (Nos. 11-4146, 11-4149), 2012 WL 2510472, at *21–22 (citation omitted).

173. *San Juan Cnty.*, 754 F.3d at 799.

174. *See* S. Utah Wilderness Alliance v. BLM, 425 F.3d 735, 762 (10th Cir. 2005) ("The laws of the United States alone control the disposition of title to its lands. The states are powerless to place any limitation . . . on that control." (quoting United States v. Oregon, 295 U.S. 1, 27–28 (1935) (internal quotation marks omitted))).

175. Amici Brief for Southern Utah Wilderness Alliance, *supra* note 137, at 11–12.

176. *San Juan Cnty.*, 754 F.3d at 798.

177. *See* COGGINS & GLICKSMAN, *supra* note 14, § 15:19.

178. Soon after the decision, the state of Utah began developing evidence of "frequency of use" in order to meet the proper standard reaffirmed by the Tenth Circuit. *See* Amy Joi O'Donoghue, *Courtroom Defeat Fails to Back Utah Off Roads Fight*, DESERET NEWS (Apr. 29, 2014, 9:15 AM), http://www.deseretnews.com/article/865601968/Courtroom-defeat-fails-to-back-Utah-off-roads-fight.html.

179. *See* Appellant San Juan County's Reply Brief, *supra* note 172, at 22.

180. The Utah attorney general's office and county officials "say they intend to keep battling for local control over another 14,000 roads" within the state. Jodi Peterson, *Utah Denied Claim to Road in Canyonlands National Park*, HIGH COUNTRY NEWS (May 13, 2014), http://www.hcn.org/blogs/goat/utah-denied-claim-to-road-in-canyonlands-national-park.

may only fuel their growing hostile attitudes toward the federal government.[181]

One issue the Tenth Circuit did not resolve was the dispute over the proper evidentiary standard for proving the existence of a public thoroughfare. While the Tenth Circuit's earlier decision in *SUWA v. BLM* discussed which party bears the burden of proof, clarifying the proper evidentiary standard for an R.S. 2477 claim under the QTA was an issue of first impression before the court.[182] Because the outcome of an R.S. 2477 claim depends so much on weighing the evidence of historical public use, a ruling on the correct standard would have provided much-needed precedent. The district court believed the more stringent clear and convincing evidentiary standard was proper since that is the standard applied by Utah common law and because of the long-standing notion that federal land grant statutes are construed in favor of the United States.[183] The state of Utah argued for a "preponderance of the evidence standard," a more liberal construction in support of the policies behind R.S. 2477's enactment that encouraged private parties to settle the West and divest the federal government of public lands in the name of economic progress.[184] In other words, because the "condition of the country" in 1866 favored rapid western expansion and the creation of rights-of-way across public lands to facilitate that process, Congress intended a less restrictive standard of proof in establishing R.S. 2477 rights-of-way.[185] Although the *San Juan* decision went further in fleshing out R.S. 2477 jurisprudence at the circuit level than any case before it, the Tenth Circuit should have settled this issue. Perhaps the court thought it would be issuing an advisory opinion if it elaborated on the proper standard of proof, since it agreed with the district court judge that the evidence failed to satisfy either standard. However, it would not have merely been advisory because the decision would directly affect the rights and obligations of the county and state in hundreds, perhaps thousands, of other cases it was currently gathering evidence for.[186] In addition, appellate courts have a responsibility to guide lower courts and administrative agencies in their

181. *See* Taylor, *supra* note 71. Utah residents explain that "empty roads are the geographic rule, not exception, of the American West," and they take issue to dictating frequency of use according to an "urban point of reference." *Id.*

182. Appellant San Juan County's Reply Brief, *supra* note 172, at 16–17.

183. Answering Brief of Defendants-Appellees, *supra* note 109, at 32 ("[T]he clear and convincing evidence standard . . . . is compelled by the canon of construction that federal land-grant statutes are strictly construed in favor of the United States.").

184. Utah's Reply Brief, *supra* note 171, at 18–19, 21–22.

185. *Id.* at 21–22 ("[Se]ttlement was the sole interest of the federal government in the eighteenth and nineteenth centuries, and allowing individual access was such a given factor that is seldom discussed." (internal quotation mark omitted)).

186. Appellant San Juan County's Reply Brief, *supra* note 172, at 16–17 ("[L]egal predicate for further actions are not advisory.") (citing 13 FEDERAL PRACTICE & PROCEDURE, JURISDICTION AND RELATED MATTERS § 3529.1 (3d ed. 2011)).

application of legal principles to future cases or controversies.[187] The lower courts rely on appellate decisions as persuasive authority and would have benefitted from a simple determination of the correct standard to apply. With thousands of other potential claims lurking on millions of acres of public lands, the Tenth Circuit did a disservice to land management agencies trying to plan around this "very murky body of law."[188] Nevertheless, the higher standard of proving a public thoroughfare existed by clear and convincing evidence is probably the correct one. In Utah, this is the standard applied by the courts, and it is also consistent with the broad principle of sovereign immunity that doubts surrounding land grant issues are resolved in favor of the federal government.[189] Nevertheless, a circuit decision on this issue would be helpful to lower courts, land management agencies, and individuals deciding whether the pursuit of gathering vast amounts of historical evidence is worth the effort.

Assembling the requisite evidence to convince a court that an old pioneer trail is an R.S. 2477 public highway is no simple task. Because "rights-of-way were self-executing and required no formal approval from the federal government" under R.S. 2477, most antique routes are not recorded in public records.[190] It requires significant historical research, including an analysis of old land records, geological surveys, maps, aerial images produced from Global Positioning Satellites (GPS), and mining and grazing document assessments.[191] Many of these claims exist in memory only, and proving an R.S. 2477 right-of-way existed prior to 1976 typically involves an army of lawyers touring the state and taking depositions of elderly witnesses attesting to the route's use.[192] This makes pursuing an R.S. 2477 claim a costly endeavor.[193] While the *San Juan* case certainly set the bar higher, the fact that each R.S. 2477 route is unique and requires its own road-by-road analysis might limit the effect of the Salt Creek decision to some extent. The Tenth Circuit recognized that "[i]n the end, whether the public used the claimed road continuously . . . is a factual issue," alluding to the notion that any R.S. 2477 decision is difficult to predict until all the evidence unique to that par-

187. Hoffmann, *supra* note 65, at 20, 32 (discussing the Tenth Circuit's failure to decide on the merits of another contentious R.S. 2477 case involving four large parcels of federally managed land in Kane County, Utah).

188. *Id.* at 31.

189. Amici Brief for Southern Utah Wilderness Alliance, *supra* note 137, at 5 (explaining the state is wrong to suggest the policies behind R.S. 2477 require a more liberal construction).

190. Suthers, *supra* note 73, at 113.

191. Hoffmann, *supra* note 65, at 9.

192. *See* Maffly, *supra* note 13.

193. *See id.* (explaining that the state's R.S. 2477 effort "is among the costliest legal undertakings ever pursued by Utah officials").

ticular road is laid out before the court.[194] This might minimize the precedential value of any individual case.[195]

The next R.S. 2477 case decided by the Tenth Circuit was *Kane County v. United States*,[196] an appeal from a district court judge's 2013 ruling in favor of Kane County and Utah in their efforts to claim R.S. 2477 rights-of-way in the Bald Knoll area.[197] The district court awarded Kane County title to twelve of the fifteen claimed roads, four of which are located inside the Grand Staircase-Escalante National Monument.[198] The Tenth Circuit then awarded the state and county title to six of the twelve roads and held the court had no jurisdiction to hear claims regarding the remaining six because there was no dispute as to legal title.[199] Like the Salt Creek road, several of the routes are unimproved jeep trails and one is inside a wilderness study area.[200] However, the roads at issue in *Kane* connect to other roads and their historic use by the public was less disputed.[201] As the previous paragraph hypothesized, the merits of the *San Juan* case did not come into play, and the *Kane* case illustrates the limited effect of any individual case on the outcome involving roads that are have different characteristics and their own unique history of use.[202]

B. Prevailing Uncertainty (and Potential Nonlitigation Alternatives)

Despite the recent clarity provided by the Tenth Circuit on R.S. 2477 jurisprudence, the depth of evidentiary analysis in *San Juan* decision is the exception, not the rule. There still exists considerable uncertainty for federal land agencies attempting to establish wilderness management plans, private property owners struggling to sort out potential clouds on title, and local government officials planning for road use and development strategies.[203] Several DOI agencies attempted to provide a formal adjudication process in 1994, but Congress blocked the at-

194. San Juan Cnty. v. United States, 754 F.3d 787, 801 (10th Cir. 2014).

195. *Id.* (acknowledging that "[t]he state and county put on a strong case, but so did the United States. In the end . . . . [i]t is the role of the judge to weigh the evidence presented at a bench trial").

196. 772 F.3d 1205 (10th Cir. 2014).

197. Bloch & McIntosh, *supra* note 108; *Tenth Circuit Denies SUWA's Intervention in Kane R.S. 2477 Bald Knoll Appeal*, UTAH'S PUB. LANDS POLICY COORDINATING OFFICE (Sept. 15, 2014), http://publiclands.utah.gov/tenth-circuit-denies-suwas-intervention-in-kane-r-s-2477-bald-knoll-appeal/.

198. Phil Taylor, *Judges Seem Skeptical of U.S. in High-Stakes Utah Road Dispute*, GREENWIRE (Sept. 30, 2014), http://www.eenews.net/stories/1060006616.

199. *See Kane Cnty.*, 772 F.3d at 1212–13, 1222–23.

200. Bloch & McIntosh, *supra* note 108. The argument that use of a route by ranchers does not meet the law's requirement that the route be used by the broader public was also at issue in the appeal. *See id.*

201. *See* Taylor, *supra* note 198.

202. Conservationists had hoped the *San Juan* ruling that proprietary use doesn't count for determining the validity would come into play, but it did not. Taylor, *supra* note 198.

203. *See* Macfarlane, *supra* note 6, at 252.

tempt.[204] Utah's 2003 MOU has been discredited for its failure to include a provision for public involvement in the acknowledgement process, and some critics have questioned its legality.[205] Perhaps the *San Juan* decision provides a more thorough roadmap for agencies, but there are still other non-litigation approaches that could establish a more consistent framework to predict the validity and resolve future R.S. 2477 claims. One potential method that has been suggested is the use of agency arbitration using a tiered approach where agencies have the authority to resolve less controversial R.S. 2477 claims through a simple application process.[206] The DOI has used alternative dispute resolution before, which it credited with a "43 percent reduction in formal case filings between 1992 and 1993."[207] However, more controversial claims, such as those impacting wilderness designation, the need for public input, and judicial resolution would still require case-by-case litigation in federal courts.[208] This tiered approach would result in more efficient resolution of claims that are less disputed, while still allowing for input from public interest groups and government transparency in claims that are more politically controversial.[209] Using a nonlitigation alternative will not solve all the problems that make up the legal quagmire presented by this old frontier law, and agency arbitration might not find enough support in a polarized Congress, but it is worth considering its implementation as a mechanism to ease the burden on federal land management agencies trying to sort out the validity of future R.S. 2477 claims.

C. The Battle Over Control of Public Lands and R.S. 2477 Moving Forward

In the case of Salt Creek, local governments spent over $1 million battling for this single dirt road.[210] It is unlikely the state of Utah has spent millions of taxpayer dollars simply to assist local residents wanting to drive their Jeeps to scenic sites like Angel Arch. It is more likely part of an experiment by the state to use R.S. 2477 as a mechanism to put its

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204. COGGINS & GLICKSMAN, *supra* note 14, § 15:19 ("The BLM, the NPS, and the FWS in 1994 jointly issued proposed regulations to clarify the application of R.S. 2477 and provide a formal adjudication process by which validly acquired rights-of-way may be recognized and regulated. Congress thereafter prohibited the Department from finalizing the regulations . . . and the regulations were not issued." (footnotes omitted)).

205. *See* Patrick Parenteau, *Anything Industry Wants: Environmental Policy Under Bush II*, 14 DUKE ENVTL. L. & POL'Y F. 363, 400 (2004) (describing the MOU as a "sweetheart deal[]" and charging that "reliance on the recordable disclaimer regulations to provide the substantive criteria for what qualifies as a valid existing right under FLPMA, in the absence of the explicit authorization required by section 108, is probably illegal").

206. *See* Macfarlane, *supra* note 6, at 249–50 ("[M]any claims . . . lie at the ends of the spectrum and are either clearly valid or are clearly not valid. These outlying claims could be easily resolved through a simple application process, allowing those seeking to establish a right-of-way . . . to petition for an agency designation.").

207. *Id.* at 249.

208. *Id.* at 251.

209. *Id.* at 228.

210. Binkly, *supra* note 58.

hostility toward federal land management into legal action. Yet, despite the massive amounts of money poured into Utah's land grab efforts, state victories have been few thus far, especially regarding routes like Salt Creek that do not connect to other roads used by the general public.[211] Still, other western states are watching Utah's aggressive R.S. 2477 attempts, especially in New Mexico, Colorado, and Wyoming where many preexisting rights-of-way likely exist and where Tenth Circuit decisions are binding authority on federal courts in those states. In Colorado, potential R.S. 2477 claims threaten more than 300,000 acres of land in Moffat County alone.[212] The resolution of each case decided by the Tenth Circuit may deter or encourage these other states to pursue their own claims of routes on public lands depending on the outcome. However, to determine what constitutes a highway under the statute, courts look to state law and standards can vary from state to state.[213] For example, Colorado has no specific time frame for proving continuous use, while Utah does.[214] Even in other western states where Tenth Circuit decisions provide persuasive authority, many officials are eagerly waiting to "jump on the R.S. 2477 bandwagon" if the courts validate even a fraction of Utah's claims.[215] Several states have already allotted funds for the purpose of studying potential R.S. 2477 "highways," and it would not be a surprise if funding increased following any successful litigation involving Utah's claims.[216]

For this reason, environmentalists worry that a threat to one protected region presents risks to the environmental integrity of all wild landscapes burdened by adjacent pioneer routes with R.S. 2477 potential.[217] Some worry the hidden goal is to open up these protected areas to natural resource extraction after validated R.S. 2477 claims disqualify them from permanent preservation designations, since a road cannot bisect potential reserves such as wilderness study areas.[218] Regardless of the motives behind R.S. 2477's resurrection, these roads are sure to generate fundamental disagreements between the values of access and preservation.

CONCLUSION

Besides marking a victory for federal control and environmental preservation advocates, the *San Juan* decision fills a much needed gap in R.S. 2477 case law and helps pave the way for other similar claims that

211. *See id.*

212. *R.S. 2477*, WILDERNESS SOC'Y, http://wilderness.org/sites/default/files/legacy/Complete-Congressional-Briefing-Book-09.pdf (last visited Jan. 10, 2015).

213. Binkly, *supra* note 58.

214. *Id.* ("In Utah . . . a route must have been used for 10 years continuously.").

215. Hoffmann & Imperiale, *supra* note 47.

216. *Id.*

217. *Id.*

218. *See id.* (explaining that once courts validate the claims, the state might be able to open up the land to oil and gas exploration and other extractive industries).

are sure to come before federal courts. While the Tenth Circuit helped to establish a working framework for determining the validity of such preexisting rights-of-way, the more recent *Kane County* case demonstrates the heavy emphasis on evaluating historical evidence and the uniqueness of each R.S. 2477 road is a potential obstacle that limits the reach of any one particular decision. It might take decades for courts to sort out questions relevant to evaluating the existence, scope, duration, and extent of use of the many preexisting frontier highways across the western United States. The use of agency arbitration in noncontroversial cases provides one mechanism that could ease the burden of land agencies and private property owners attempting to sort out these issues.

Future litigation will be determined by a careful analysis of the meaning and intent of R.S. 2477 and the evaluation of historical evidence of a route's use in each case, but it is hard to ignore the passionate feelings generated by "the magnificence of the natural wonders" at the end of each road, as well as the broader political ramifications at play.[219] Despite the uncertainty surrounding this vexing frontier law, one thing is certain: other western states wishing to retake federally owned lands within their borders are eagerly watching the battle taking place in Utah's federal courts. The outcome there may dictate how aggressively these other states decide to use R.S. 2477 as a mechanism to assert their hostility against federal land management.

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219. Utah's Reply Brief, *supra* note 171, at 36.

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