R.S. 2477—A Federal Statute Granting Rights-of-Way to State and Local Governments: Don't Be Fooled; It May Not Eliminate Federal Government Involvement

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I. INTRODUCTION

With the increasing local and state government's interest in acquiring right-of-way designations under Revised Statute 2477 ("R.S. 2477"),[1] several debates concerning the authority of the Federal Government to intervene and regulate conduct on such R.S. 2477 roads have resulted in much litigation. In 1866, federal statute R.S. 2477 was a gift from the Federal Government to state and local governments granting them the right-of-way to "roads" created by frontiersmen traveling from one state to another.[2] Several counties have mistakenly initiated the process of obtaining a R.S. 2477 right-of-way believing that doing so would eliminate involvement by federal agencies in the maintenance and construction of current rights-of-way. For example, San Bernardino County, California ("San Bernardino") applied for a "recordable disclaimer"[3] under R.S.

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1. Rights-of-Way and Other Easements in Public Lands, ch. 262, § 8, 14 Stat. 251, 253 (1866) (repealed 1976).

2. Harry R. Bader, *Potential Legal Standards for Resolving the R. S. 2477 Right-of-Way Crisis*, 11 PACE ENVTL. L. REV. 485, 486 (1994) [hereinafter *Resolving R. S. 2477*].

3. A recordable disclaimer is an alternative to litigation in which the DOI issues a record-

2477.[4] San Bernardino admits that it chose Camp Rock Road as the first recordable disclaimer request primarily to eliminate Bureau of Land Management ("BLM") involvement in county maintained roads.[5] Although BLM may not be the agency regulating activities on Camp Rock Road, the Federal Government, through the Fish and Wildlife Service, remains the regulating authority concerning activities on the road.[6]

The purpose of this article is to define the law concerning the regulatory authority over R.S. 2477 rights-of-way. However, it is necessary to begin with a history of R.S. 2477, which will describe some of the confusion surrounding the poorly defined statute and subsequent revisions. In addition, to understand why the Federal Government may be involved in R.S. 2477 rights-of-way maintenance and construction, a brief synopsis of the Endangered Species Act follows. An examination of several cases demonstrates the misunderstanding of county governments over who has the say as to how an R.S. 2477 may be maintained. Finally, the article will include other cases where courts have determined that Federal Governments had the regulatory authority to mandate actions on R.S. 2477 rights-of-way.

II. The History of Revised Statute 2477

To facilitate the development of our nation's western territories, the federal government passed R.S. 2477 in 1866.[7] The statute, in its entirety, simply reads, "[T]he right-of-way for the construction of highways[8] over public lands, not reserved for public uses, is hereby granted."[9] Congress passed the statute to give states the discretion to develop roads created by America's frontiersmen over federal government lands.[10] Although no legislative history exists on the intent of the statute, it is commonly understood that R.S. 2477 was a federal government offer to the states to legitimize miners' and homesteaders' access routes that had developed across

able administrative disclaimer of federal interest in property conveying the interest to the applicant. Michael S. Freeman & Lusanna J. Ro, *R.S. 2477: The Battle over Rights-of-Way on Federal Land*, 32 Colo. Law. 105, 107 (2003); *see also* Disclaimer of Interest in Lands, 43 U.S.C. § 1745(a) (2004).

4. Postmus Notes, County Applies to Feds for Road Ownership (May 22, 2003), *at* http://www.sbcounty.gov/bosd1/newsletters/postmusnotes050203.htm.

5. *Id.*

6. Revised Statute 2477 Rights-of-Way, 59 Fed. Reg. 39226 (proposed Aug. 1, 1994).

7. Rights-of-Way and Other Easements in Public Lands, § 8.

8. Much of the debate over R.S. 2477 involves the different interpretations of the meaning of "construction" and "highways." The debate over this issue is beyond the scope of this article. However, for comprehensive discussion of this confusion *see* Michael J. Wolter, *Revised Statutes 2477 Rights-of-Way Settlement Act: Exorcism or Exercise for the Ghost of Land Use Past?*, 5 Dick. J. Envtl. L. & Pol'y 315 (1996).

9. Rights-of-Way and Other Easements in Public Lands, § 8.

10. *Resolving R. S. 2477*, *supra* note 2, at 486.

federal lands during the expansion of the western frontier.[11] The simple language of the statute provided no guidelines for determining the process though which a state accepts the federal government's offer nor the criteria for determining the scope of the granted easement.[12] The controversies still exist because persons constructing a right-of-way were not required to file any application or record a R.S. 2477 right-of-way.[13] Additionally, Congress failed to formally record the R.S. 2477 rights-of-way granted, causing uncertainty as to the number of rights-of-way that exist.[14]

Congress repealed R.S. 2477 in 1976 by enacting the Federal Land Policy and Management Act ("FLPMA") as a way of rectifying the above issues.[15] However, in doing so, Congress preserved the validity of preexisting R.S. 2477 rights-of-way.[16] Under FLPMA, the Secretary of the Interior could only expand *existing* R.S. 2477 rights-of-way through grants.[17] Since FLPMA's passage, the approach to R.S. 2477 claims have changed with each presidential administration.[18] In 1988, the Department of the Interior ("DOI") issued the Hodel Policy allowing any dirt road, cow path, or footpath to qualify as an R.S. 2477 right-of-way.[19] Eight years later, the DOI placed a moratorium on the consideration of R.S. 2477 claims under the Hodel Policy and eventually rescinded the policy.[20] In spite of the changing policies, FLPMA remains the governing authority over issuance of disclaimers of interest in federal land.

FLPMA required the DOI to establish "comprehensive rules and regulations after considering the views of the general public" relating to the issuance of disclaimers to R.S. 2477 rights-of-way.[21] State or local governments wanting to claim title to federal land may file an application with BLM requesting that a disclaimer of interest be issued when the applicant has reason to believe that a cloud exists on the title to the land

11. *Id.* at 486-87.

12. Sierra Club v. Hodel, 848 F.2d 1068, 1080 (10th Cir. 1988).

13. Freeman & Ro, *supra* note 3, at 106.

14. *Id.*

15. *See* Congressional Declaration of Policy, 43 U.S.C. § 1701 (1976); *see also* Terms and Conditions of Rights-of-Way Grants and Temporary Use Permits, 43 C.F.R. 2801 (2005); *see also Resolving R. S. 2477, supra* note 2, at 486.

16. *Resolving R.S. 2477, supra* note 2, at 487.

17. U. S. v. Garfield County, 122 F. Supp. 2d 1201, 1216 (D. Utah 2000).

18. Freeman & Ro, *supra* note 3, at 106.

19. *Id. See also* Memorandum from Assistant Secretary for Fish and Wildlife and Parks & Secretary for Land and Minerals Management, to the Secretary of the Interior 1 (Dec. 7, 1988), *available at* http://www.highway-robbery.org/resources.documents.htm. The Hodel Policy was a 1988 memorandum approved by Donald Hodel, the Secretary of the Interior.

20. Freeman & Ro, *supra* note 3, at 106.

21. 43 U.S.C. § 1701 (1976).

due to a pre-existing claim by the United States.[22] The Secretary of the Interior, authorized by FLPMA, delegates authority to BLM to issue a document of disclaimer of interest in any lands, thereby removing any cloud on the title of the land.[23] This document is issued after BLM determines whether "a record of interest of the United States in lands has terminated by operation of law or is otherwise invalid."[24] The disclaimer has the same effect as a quitclaim deed of the land from the United States to the applicant.[25]

The current regulations for obtaining a recordable disclaimer require each applicant to submit a legal description of the lands for which a disclaimer is sought.[26] The applicant must also complete a statement concerning the nature and extent of the cloud on the title and the reason the applicant believes the United States' interest in the land has terminated.[27] The disclaimer cannot be issued until a notice of the application, including the grounds supporting the application, has been published in the Federal Register for at least ninety days and the applicant has paid the administrative costs of issuing the disclaimer to the Secretary of DOI.[28] Upon receipt of the payment, and after the ninety-day waiting period, the DOI makes a decision about the application and if the application is allowed, issues the applicant a recordable disclaimer, thereby granting the land to the applicant.[29]

III. Endangered Species Act

Local and state entities should understand the legal obligations that attach to ownership of a R.S. 2477 right-of-way. Many R.S. 2477 roads are located in areas where endangered species habitats exist.[30] The Endangered Species Act ("ESA") prohibits persons from jeopardizing the lives and habitats of endangered species.[31] When an endangered species attempts to navigate across or around a R.S. 2477 right-of-way, many lose their lives either by collisions with vehicles, over exhaustion, or confisca-

22. Recordable Disclaimers of Interest in Land, 43 C.F.R. § 1864.1-1(a) (2004).

23. 43 U.S.C. § 1745(a) (2004).

24. § 1745(a).

25. § 1745(c).

26. 43 C.F.R. § 1864.1-2(c)(1).

27. § 1864.1-2(4)(i-ii).

28. § 1864.2.

29. § 1864.3.

30. Interview with Jay Tutchton, Professor of Law, University of Denver, Sturm College of Law, in Denver, Colo. (Sept. 15, 2004). There remains much confusion concerning what roads are R.S. 2477 rights-of-way because of the many interpretations of the statute.

31. 16 U.S.C. § 1538(a)(1)(B) (1973).

tion by those using the rights-of way.[32] Local and state entities possessing R.S. 2477 rights-of way risk legal liability for the prohibited "taking" of endangered species under the ESA.[33] "Taking" means harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, collecting, or attempting to engage in such conduct.[34] The "taking" may occur through a direct taking for example, shooting or squashing, or through the destruction or "harming" of endangered species habitat.[35] "Harm," as used in ESA's definition of taking, includes "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."[36]

Entities may "harm" endangered species when performing regular maintenance on the rights-of-way that run through endangered species habitat. Thus, the ESA requires the federal agency on whose land the rights-of-way cross to conduct studies and proscribe a course of action counties must take to ensure the survival of endangered species.[37] Once entities obtain ownership of R.S. 2477 rights-of-way, the burden of enforcing the ESA provisions falls to the federal agencies such as the Fish and Wildlife Service, the United States Forest Service, or the National Parks Service.[38] However, the right-of-way owner is ultimately responsible for complying with the ESA.[39]

To avoid criminal and civil penalties, state and local governments may apply for an incidental take permit under Section 10 of the ESA.[40] "Incidental taking" results when an otherwise lawful activity causes a "take," for example, running over an endangered species while lawfully using a right-of-way.[41] The Secretary of the DOI may issue permits for

32. Interview with Jay Tutchton, Professor of Law, University of Denver, Sturm College of Law, in Denver, Colo. (Sept. 15, 2004).

33. *Id.*

34. 16 U.S.C. § 1532(19) (2004).

35. 16 U.S.C. § 1538(a)(1)(B) (1973); 50 C.F.R. § 17.3 (2005).

36. 50 C.F.R. § 17.3. It is important to point out that "harm" may occur on any endangered species habitat. However, the Secretary of the Interior, concurrently with determining that a species is an endangered species or a threatened species, designates any habitat of such species that is considered to be "critical habitat." "Critical habitat" is defined as the specific areas within the geographical area occupied by an endangered species on which are found physical or biological features essential to the conservation of the species and which may require special management considerations or protection. 16 U.S.C. at § 1532(5)(A)(i)(I-II) (2004).

37. 16 U.S.C. at § 1536(g)(5)(A) (2004).

38. § 1536(g)(5)(A).

39. *See generally* Loggerhead Turtle v. County Council of Volusia, 896 F. Supp. 1170, 1182 (M.D. Fla. 1995). This concept will be discussed *infra* in section E.

40. 16 U.S.C. § 1539(a)(1)(B) (2004). Section 10 of the ESA also permits individuals to obtain incidental take permits. § 1539(2)(B)(i).

41. *See* Loggerhead Turtle v. County Council of Volusia, 148 F.3d 1231, 1258-59 (11th Cir. 1998).

incidental "takes" of endangered species otherwise prohibited by the ESA.[42] However, the permit applicant must submit a habitat conservation plan to the Secretary.[43] The plan must specify:

1. the impact which will likely result from such taking;
2. what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;
3. what alternative actions to such taking the applicant considered and the reason why such alternatives are not being utilized; and
4. such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.[44]

The Secretary may issue a permit if the habitat conservation plan indicates that

1. the taking will be incidental [to and not the primary purpose of the action];
2. the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;
3. the applicant will ensure that adequate funding for the plan will be provided;
4. the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and
5. the measures, if any, required . . . will be met. . . .[45]

Without an incidental take permit, the person causing the taking of endangered species is subject to civil as well as criminal penalties.[46] The ESA states that any person who knowingly violates the "take" provision of the Act may be assessed civil penalties up to $12,000 per violation.[47] Each violation constitutes a separate offense.[48] In addition, any person who knowingly violates the "take" provision of the Act is subject to a criminal suit.[49] Upon conviction, a violator may be fined up to $50,000 or imprisoned for not more than one year, or both.[50]

The term "person" means an "individual, corporation, partnership, trust association, or any other private entity; or any officer, employee, agent, department . . . of any State, municipality, or political subdivision of a State; . . . any State, municipality, or political subdivision of a State. . . ."[51] Thus, any state or local government official, as well as the

42. 16 U.S.C. § 1539(a)(1)(B).
43. § 1539(a)(2)(A).
44. § 1539(a)(2)(A)(i)-(iv).
45. § 1539(a)(2)(B)(i)-(v).
46. 16 U.S.C. § 1540(a)(1), (b) (2002).
47. § 1540(a)(1).
48. § 1540(a)(1).
49. § 1540(b)(1).
50. § 1540(b)(1).
51. 16 U.S.C. § 1532(13) (2004).

state or local government itself, is subject to both civil and criminal penalties pursuant to the ESA.

IV. JARBIDGE SOUTH CANYON ROAD

San Bernardino County should consider the litigation concerning Elko County, Nevada to realize that R.S. 2477 right-of-way grants do not eliminate the Federal government's involvement in such roads. Elko County mistakenly assumed that by making a claim to a R.S. 2477 right-of-way it would be entitled to reconstruct South Canyon Road without Forest Service involvement.[52]

The problems with South Canyon Road began with a significant flood event in June 1995 that washed out and damaged sections of South Canyon road.[53] Following the flood, motorized passenger vehicles could no longer use the road.[54] The United States Forest Service ("USFS") obtained emergency funding to reconstruct portions of the road through funds provided by the Federal Highway Administration Emergency Relief for Federally Owned Roads Program by the Western Federal Lands Highway Division.[55] FWHA funds engineering services in order to restore access to public lands damaged by natural disasters.[56] However, before reconstruction of the road began, the USFS prepared an environmental assessment ("EA") finding no significant impact on the environment.[57] Trout Unlimited appealed that finding claiming "reconstruction of the road and subsequent actions proposed will impact bull trout individuals or habitat. . ."[58] The EA was remanded back to the Forest Service for further study.[59] Eventually, the USFS repaired the road but only to the extent that protected bull trout.[60] The road remained unusable by motorized passenger vehicles.[61]

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52. U.S. v. Carpenter, CV-N-990547-DWH(RAM) (D. Nev. 2004). In the court order in this case, the judge noted in a footnote that "the parties may be under the mistaken impression that recognition of an R.S. 2477 right of way in the County would deprive the United States of all regulatory authority over the road. This is not the case under controlling Ninth Circuit law." *Id.* (referring to Adams v. U.S., 3 F.3d. 1254, 1258 n.1 (9th Cir. 1993) (R.S. 2477 easement, if it existed, "would still be subject to reasonable Forest Service regulations")).

53. HUMBOLDT-TOIYABE NATIONAL FOREST, UNITED STATES DEPARTMENT OF AGRICULTURE, JARBIDGE CANYON DRAFT ENVIRONMENTAL IMPACT STATEMENT S-2 (Apr. 2003), [hereinafter *Draft EIS*], *available at* http://www.fs.fed.us/r4/htnf/projects/03apr/jarbidge/deis/draft_eis_summary.pdf.

54. *Id.*

55. *Id.* at S-4.

56. *Id.*

57. *Id.*

58. *Draft EIS*, *supra* note 53, at S-4.

59. *Id.*

60. *Id.*

61. *Id.*

Elko County, anxious for access to the road to be available for public use as well as emergency medical and fire protection, directed the County Road department to begin reconstruction of South Canyon Road.[62] The County, however, encountered a series of obstacles precluding the restoration of the road. In June 1998, the first hurdle to reconstructing the road occurred when the Nevada Division of Environmental Protection ("NDEP") halted the work Elko County Road Department had begun in reconstructing the road.[63] NDEP's acted in response to USFWS announcement of a proposed 240-day emergency listing of the Bull Trout as an endangered species.[64] USFWS attempted to protect a population of the Bull Trout that lived in the Jarbidge River, which is adjacent to South Canyon Road.[65] To protect the Bull Trout, the USFS began its own river restoration work where Elko County had begun reconstructing the road.[66] The U.S. Attorney's office then sent Elko County a letter requesting negotiations for repayment from Elko County for the cost of repairing the damage caused by the heavy equipment used by Elko County workers during its attempt to reconstruct the road.[67] The U.S. then filed a suit against Elko County to recover the costs of repairing the road.[68]

At that point, U.S. District Judge Hagen issued an order and required the parties to enter into mediation.[69] During the mediation, Elko County asserted that it had the authority to reestablish the road without federal approval by "virtue of its claimed ownership interest in the road under . . . R.S. 2477."[70] The United States contended that the road may only be restored in compliance with federal laws and regulations, including the NEPA and ESA, regardless of who owned the road.[71] However, rather than continuing to litigate the matter, the parties agreed to resolve the suit under an agreement.[72]

Under the agreement, the United States agreed not to contest that Elko County had an R.S. 2477 right-of-way for South Canyon Road.[73] The U.S. did not concede to any limit on its authority to manage the federally owned land in accordance with federal laws, including NEPA,

62. *Id.* at app. A-2, *available at* http://www.fs.fed.us/r4/htnf/projects/03apr/jarbidge/deis/appendix_a.pdf.
63. *Id.* at S-4.
64. *Id.*
65. *Id.* at S-5.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at app. A-1.
71. *Id.*
72. *Id.*
73. *Id.* at app. A-2.

NFMA and the ESA.[74] The parties agreed that the current law required Elko County to obtain USFS authorization prior to reconstructing South Canyon Road.[75] Therefore, Elko County agreed to submit proposals to USFS for any work planned for the reconstruction of the road.[76] Nevertheless, Elko County believed that authorization of the proposed work would not require a NEPA analysis.[77] The United States maintained that it may not authorize any work without a NEPA analysis and a determination that the work would comply with the federal laws.[78] Elko County agreed not to contest a determination by USFS that a submitted proposal required an analysis under NEPA.[79] In addition, Elko County agreed to submit any required permit applications and to comply with federal laws.[80] The USFS agreed to work cooperatively with Elko County to analyze plans with reasonable alternatives and to complete NEPA analysis and consultations as required under applicable federal law.[81]

Elko County agreed to perform any work in accordance with the

74. *Id.* The wording of the agreement became the source for another lawsuit. The agreement states

> It is not the intent of this agreement to alter or modify the rights of the parties under law except as expressly provided herein. If the South Canyon Road is reestablished pursuant to the terms of this Agreement, and all other obligations of the parties created by this Agreement have been performed, the rights and obligations of the parties shall be no different from those existing in all other cases in which a political subdivision of a state owns an R.S. 2477 right of way crossing National Forest System lands.

Id. Elko County filed a motion for clarification of the Order claiming its belief that the settlement agreement recognized the existence of an R.S. 2477 right of way over the South Canyon Road but the order possibly "converted" that right-of-way into an easement granted under FLPMA. The county warned that its decision to adopt the agreement would have to be reconsidered if that was the case. The court pointed out, and the US had conceded, that an R.S. 2477 right of way may not be granted affirmatively by settlement; either the right of way exists by operation of the statute, or it does not. The court declared that if Elko County had perfected an R.S. 2477 right of way as of the date of FLPMA's passage in 1976, that right of way would have been valid at the time of the agreement. But the mere existence of the road at FLPMA's passage may not be depositive. Elko County would have to establish an R.S. 2477 claim by proving that the road was "constructed" over "public lands." The court finds that Elko County did not present facts supporting the existence of an R.S. 2477 claim. U. S. v. Carpenter, 298 F.3d 1122, 1124-25 (9th Cir. 2002).

75. *Draft EIS, supra* note 52, at app. A-2.

76. *Id.*

77. *Id.* at app. A-2 to A-3.

78. *Id.* at app. A-3.

79. *Id.*

80. *Id.*

81. *Id.* In a statement before the House Committee on Resources, the Forest Supervisor of Humboldt-Taoiyabe National Forest praised its effort and Elko County's effort to follow the law.

> As required by law (the National Environmental Policy Act, the National Forest Management Act, and the Endangered Species Act, and others) and regulations, the Forest Service will consult with the Fish and Wildlife Service to guarantee that any action in the South Jarbidge Canyon will not jeopardize the continued existence of the listed bull trout. The Forest Service asked the Fish and Wildlife Service to be a cooperating agency during the environmental analysis process. The Service agreed. Working closely in this

terms and conditions provided in any authorization from USFS.[82] Elko County also agreed to perform work at its own expense, including the reconstruction, repair, and/or maintenance of the road.[83]

V. Federal Government Involvement in R.S. 2477 Roads Concerning Matters Other Than the ESA

Courts in several jurisdictions have concluded that the recognition of an R.S. 2477 right-of-way does not deprive the United States of all regulatory authority over the road.[84] In *U.S. v. Vogler*,[85] the Ninth Circuit Court of Appeals held that Congress clearly gave the Secretary of the Interior broad power to regulate and manage national parks.[86] "The Secretary's power to regulate within a national park to 'conserve the scenery and the nature and historic objects and wildlife therein. . . .' applies with equal force to regulating an established right of way within the park."[87] The court relies on a Colorado District Court case which upheld the National Park Service's authority to regulate commercial access on an R.S. 2477 right-of-way within the Colorado National Monument.[88] In that case, the court held that a local resident's claim that use of the road could not be regulated was invalid.[89] The Ninth Circuit also referred to the Mining in the Parks Act to support its position.[90] The Act provides that:

> [A]ll activities resulting from the exercise of valid existing mineral rights on patented or unpatented mining claims within any area of the National Park System shall be subject to such regulations prescribed by the Secretary of the Interior as he deems necessary or desirable for the preservation and management of those areas.[91]

Because the regulations on the R.S. 2477 right-of-way were necessary to conserve the beauty of the Preserve, the regulations were within the government's power to regulate roads in national parks.[92]

The U. S. District Court for the District of Utah also held that the

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manner will ensure the Service fully understands the project and potential impacts to the listed species, and allow them to provide input to the alternatives to be evaluated. Jarbidge River Population of Bull Trout—Truly Threatened?: Hearing Before the House Comm. on Resources, 107th Cong. (2002) (statement of Robert L. Vaught, Forest Supervisor, Humboldt-Toiyabe National Forest).

82. *Id.* at app. A-2.
83. *Id.* at app. A-4.
84. *Carpenter*, 298 F.3d at 1124.
85. U. S. v. Vogler, 859 F.2d 638 (9th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989).
86. *Id.* at 642.
87. *Id.*
88. *Id.* (citing Wilkenson v. Dep't of Interior, 634 F. Supp. 1265, 1279 (Colo. 1986)).
89. *Vogler*, 859 F.2d at 642.
90. *Id.*
91. *Id.* (citing 16 U.S.C. § 1902 (2005)).
92. *Vogler*, 859 F.2d at 642.

federal government had the power to regulate roads and recover damages caused by others on those roads. In *U.S. v. Garfield County*,[93] the court ordered the county to pay over $6,000 for damage caused to the vegetation of a hillside, which the county partially excavated with a bulldozer.[94] The U.S. contended that Garfield County workers had engaged in road *construction* work by "bulldoz[ing] two hillsides and [digging] a four-foot trench . . . excavating more than forty dump trucks worth of material."[95] The U.S. alleged that the construction activities "widened and realigned the road, destroyed vegetation, disturbed dirt that had been in place for millennia and changed the experience of the visitor entering the Park at that location."[96] By undertaking such activities, the U. S. contended that the County engaged in unauthorized road construction that was outside of its statutory right-of-way.[97] The U.S. accused the County of committing an unlawful trespass upon federal lands and damaging park resources.[98]

Garfield County confronted this accusation and maintained that the work was "reasonable and necessary to meet applicable safety standards," and was not road construction but rather *maintenance*.[99] The County argued that there was no trespass because the County believed that it had not exceeded the scope of the right-of-way and that the county's actions had not caused an impact to the values for which the Park was created.[100] The County contended that within the scope of the right-of-way, it did not need prior consultation or approval of the Park Service to maintain and improve the road as it saw fit and was "free from Park Service regulation and control."[101] The County submitted "R.S. 2477 grants no regulatory authority to any federal agency . . . but rather offers the right-of-way . . . with the reacquisition of the interests it received under the R.S. § 2477 grant. . . ."[102]

93. U. S. v. Garfield County, 122 F. Supp. 2d 1201 (D. Utah 2000).

94. *Id.* at 1265. At the time of the excavation, Garfield County had been performing work on the segment of the Burr Trail road that traverses Capitol Reef National Park since the Park opened. *Id.* at 1205. The county maintained the road so that it could be used by motor vehicles. *Id.* "For a brief period, maintenance was performed under a 'Cooperative Agreement' between the Park Service and the County, dated January 15, 1979, but the Park Service sought to terminate this agreement in 1981 because it could not compensate the County for the work as had been agreed." *Id.*

95. *Id.* at 1214.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* The court found that Garfield County had failed to establish that the bulldozing was "reasonable and necessary" and thus, trespassed upon U. S. Land. *Id.* at 1256.

100. *Id.*

101. *Id.* at 1222.

102. *Id.* at 1222-23.

The court explained in its opinion that "[a]t the same time that Congress protects the County's 'valid existing rights,' Congress also seeks to protect the natural scenic value of the Park lands."[103] Congress vested the Secretary of the Interior with the authority to "make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service. . . ."[104] Congress imposed a duty on the Park Service to "conserve the scenery and the natural and historic objects and the wild life therein," and "provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."[105] The court points out that the Park Service has also been charged with the affirmative duty to "administer, protect, and develop the park" as directed by the Secretary.[106] The Secretary's rule concerning roads through national parks reads,

> *Constructing or attempting to construct* a building or other structure, boat dock, *road*, trail, path, or other way, telephone line, telegraph line, power line, or any other private or public utility, *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*.[107]

The court concludes that both parties have limited authority as to the management and maintenance of the R.S. 2477 right-of-way. However, the initial determination of whether the activity falls within an established right-of-way must be made by the federal agency having authority over the land.[108] The court evoked Congress' intent that the parties should communicate and adjust the right-of-way if necessary so long as the park's resources do not suffer.[109] The court reminds the parties that for the agency to make the determination Garfield County must communicate its plan for the road and in turn, the Park Service must evaluate those plans in a timely manner.[110] Nevertheless, in the end, the Park Service had the regulatory authority over the road requiring Garfield County to consult with the Park Service before taking any action on the road.

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103. *Id.* at 1235.

104. 16 U.S.C. § 3 (1998).

105. 16 U.S.C. § 1 (1997).

106. *Garfield County*, 122 F. Supp. 2d at 1241 (citing 16 U.S.C. § 273(a)).

107. 36 C.F.R. § 5.7 (2000) (emphasis added).

108. *Garfield County*, 122 F. Supp. 2d at 1243 (citing Sierra Club v. Hodel, 848 F.2d 1068, 1085 (10th Cir. 1988).

109. *Id.*

110. *Id.* at 1243-44.

VI. The Camp Rock Road Case Involving R.S. 2477 Right-of-Way

In April 2003, the San Bernardino County Board of Supervisors approved a motion to apply for ownership of Camp Rock Road, a 42-mile stretch of federal land in the Mojave Desert.[111] County officials chose Camp Rock Road for the first R.S. 2477 right-of-way application because it was a perfect example of a federal "right-of-way that should be granted [to state entities] and would make future cases easier to win."[112] The San Bernardino County Board of Supervisors chose Camp Rock Road as its first recordable disclaimer, or quitclaim deed, request because of the history and evidence of San Bernardino County money used for federally owned road maintenance.[113] The Board wanted to ensure that there would be no question about county funds being used only for county owned roads.[114]

This is an interesting case because the Board wanted to eliminate the BLM's involvement in the plans for county road maintenance. The Board stated, "[a]ccording to the Public Works Department, the BLM will not prescribe any terms, conditions or maintenance that will be required to maintain a right-of-way once a recordable disclaimer is issued."[115] The desire to eliminate the BLM's involvement in county road maintenance arose in response to maintenance protocols the BLM set forth for San Bernardino in 2001. The California Desert District of the BLM notified San Bernardino's Transportation Department that the county maintained road[116] ran through critical habitat for desert tortoises.[117] The manner in which the county maintained Camp Rock Road created berms[118] alongside the road.[119] The berms pose a threat to the tortoise's safe movement

111. Press Release, County of San Bernadino Supervisor Bill Postmus, Supervisors Apply to Feds for Road Ownership-County Could Be First Granted Title to Road Through Federal Land (Apr. 29, 2003) [hereinafter Press Release], *available at* http://www.co.san-bernardino.ca.us/bosd1/PressReleases-/CampRockRdRelease.pdf.

112. Sharon McNary, *Back Roads Battle*, Death-Valley.us Forums (Apr. 15, 2004), *available at* http://www.death-valley.us/article500.html.

113. Press Release, *supra* note 111.

114. *Id.*

115. *Id.*

116. San Bernardino County had a permit to maintain and use the right-of-way at the time. However, the Federal Government retained ownership of the right-of-way. *See* Letter from Tim Salt, District Manager, United States Department of the Interior Bureau of Land Management, to Ken A Miller, Director of County of San Bernardino, Transportation Department (May 11, 2001) (on file at U.S. DOI BLM California Desert District) [hereinafter *Tim Salt Letter*].

117. *Id.*

118. A berm is a mound or wall of earth. Berms are created when the grading of the roads cause the excess dirt to collect and build along side of the road. Merriam-Webster OnLine Dictionary, *available at* http://www.webster.com/cgi-bin/dictionary?book=dictionary&va=berm (last visited May 25, 2005).

119. *Tim Salt Letter*, *supra* note 116.

within their habitat.[120] The tortoises navigate along and down the berms slope eventually ending up on the roadway.[121] The steep slope of the berms prevents the tortoise's ability to navigate a return to safety because the tortoises are unable to climb back up the slope.[122] The tortoises either die from dehydration, starvation, or impacts from passing vehicles.[123]

The desert tortoise listing on the ESA's threatened wildlife species list requires the right-of-way permit holder to prevent the "takings" of desert tortoises.[124] The BLM, in explaining to the county that the ESA's unauthorized "takings" provision applies within the county's right of way authorization, emphasized the likelihood that the county would be identified as the "responsible party" in any future incident of unauthorized "takes" of desert tortoise.[125] The district manager of the BLM also stated that an individual's involvement in any unauthorized "take" may result in a variety of sanctions and legal liability, including the "cancellation of an existing federal authorization, such as a right-of-way."[126]

Pursuant to a right-of-way permit held by the county, BLM set out road maintenance protocols to reduce the unnecessary risks to desert tortoises. BLM's protocol instructed the county to reduce the slopes of all berms and ditches to less than thirty percent in desert tortoise habitat.[127] In addition, the protocol required "breaks" in the existing berms that would allow the desert tortoises to exit the roadway.[128] To circumvent the probability of desert tortoise deaths during their most vulnerable youth, the BLM placed non-emergency pipeline maintenance restrictions between June 16th and September 6th or November 8th and February 28th of each year, the periods when the young tortoises are actively roaming onto the roads.[129]

When the BLM handed the county this mandate, San Bernardino County claimed no responsibility for the "takings" because it was not the owner of the road. It merely had a right-of-way permit.[130] However, the BLM may revoke the county's right-of-way permit for not complying

120. *Id.*

121. Interview with Jay Tutchton, Professor of Law, University of Denver, Sturm College of Law, in Denver, Colo. (Sept. 15, 2004).

122. *Id.*

123. *Id.*

124. *Tim Salt Letter*, *supra* note 116.

125. *Id.*

126. *Id.*

127. *Tim Salt Letter*, *supra* note 116 (discussing attachment to letter: *Maintenance Stipulation for Graded Road Berm Size and Slope Design Standards*).

128. *Tim Salt Letter*, *supra* note 116.

129. *Id.*

130. Interview with Jay Tutchton, Professor of Law, University of Denver, Sturm College of Law, in Denver, Colo. (Sept. 15, 2004).

with the protocol.[131] The county then decided to request a recordable disclaimer from the BLM for ownership of the road believing that the BLM's involvement in the plans for road maintenance on Camp Rock Road would terminate.[132]

The BLM may be restricted from mandating day-to-day operations on most R.S. 2477 rights-of-way, but accepting ownership of the right-of-way will not preclude the county from ESA enforcements either by private citizen suits or Federal government involvement.

The ESA allows the Secretary of the Interior to utilize, by agreement, the personnel, services, and facilities of any other Federal or State agency for purposes of enforcing the act.[133] Ownership of a R.S. 2477 right-of-way will not eliminate the federal government's involvement with maintenance protocols.[134] In any case, San Bernardino County's maintenance of Camp Rock Road will still be subject to the regulations provided in the Endangered Species Act that governed the protocols issued by BLM. At most, enforcement of the protocols will simply shift from BLM to another federal agency, the Fish and Wildlife Service. In the end, San Bernadino County, as owner of the road, increased its liability for the unlawful "taking" of endangered species by applying for a recordable disclaimer for Camp Rock Road even if third parties cause a "take" to occur.

As the owner of the road, the county's liability increased because it could be liable for "taking" endangered species either directly or indirectly. The manner in which "taking" occurs is of little consequence. If a county worker or administrator causes a "take", the county would be directly liable for the "take."[135] The county would also be liable for "take" if the activities which it allows to occur on the road results in a third party causing a "take."[136] In the first instance, the Endangered Species Act provides that it is unlawful for any person to take any endangered species.[137] The ESA defines a "person" to include any "State, municipality, or political subdivisions of a State, or any other entity subject to the jurisdiction of the United States."[138] Therefore, if a county worker or administrator causes a take, the county would be subject to civil and criminal punishment under the ESA.

In the second instance, although third parties may commit the "tak-

131. *Tim Salt Letter*, *supra* note 116.
132. Press Release, *supra* note 111.
133. *Id. See* 16 U.S.C. § 1540(e)(1).
134. Revised Statute 2477 Rights-of-Way, 59 Fed. Reg. 39216 (proposed Aug. 1, 1994).
135. *See* 16 U.S.C. § 1538(a)(1)(B).
136. *See generally Loggerhead Turtle*, 896 F. Supp. at 1182.
137. 16 U.S.C. § 1538(a)(1)(B).
138. 16 U.S.C. § 1532(13).

ing" of endangered species on county roads, the local government bears the liability for such takings for allowing public use of the rights-of-way. In *Loggerhead Turtle v. Volusia County*,[139] the court held the county liable for the "taking" of federally protected sea turtles committed by third parties on Volusia County owned land.[140] Volusia County permitted vehicles upon beaches at night, which resulted in the death of many sea turtles.[141] The light from the vehicles confused turtle hatchlings and caused their deaths. Once sea turtles hatch on the beach, they instinctively gravitate toward the ocean guided by the moon's reflection upon the water. The turtles mistake the vehicles headlights as the moon's reflection and proceed in the opposite direction of the ocean.[142] Additionally, the vehicles frequently run over the turtles during their misguided trek. The *Loggerhead Turtle* court held that the county permitted the "taking" of protected sea turtles by allowing private vehicles nighttime access to the beaches.[143] Consequently, the county was enjoined from permitting private vehicles nighttime access to its beaches.[144]

As the court in *Loggerhead Turtle* established, the county's liability remains intact although technically third party's actions caused the unauthorized "take."[145] The county is derivately liable for the unauthorized "takes" of the desert tortoises because it maintains Camp Rock Road and allows private vehicles to travel upon the road.

VII. Conclusion

The granting of R.S. 2477 rights-of-way from the Federal Government to state and local governments does not eliminate federal agency involvement in the maintenance and regulation of activities on such roads. When Congress created the National Park Service and passed the Endangered Species Act, it delegated power to the Secretary of the Interior to protect national parks and endangered species and their habitats. When counties assert a claim to an R.S. 2477 right-of-way designation, nothing prevents a federal agency from enforcing the provisions of the National Park Service or the Endangered Species Act. The only thing that might change is the agency that regulates the activities on the roads. Instead of the Bureau for Land Management enforcing provisions, other agencies such as the Fish and Wildlife Service, the Forest Service, or the National Park Service enforce the provisions using the same criteria set

139. Loggerhead Turtle v. County Council of Volusia, 896 F. Supp. 1170 (M.D. Fla. 1995).
140. *Id.* at 1182.
141. *Id.*
142. *Id.*
143. *Loggerhead Turtle*, 896 F. Supp. at 1182.
144. *Id.*
145. *Id.*

out by the relevant Acts. Counties asserting a right-of-way claim under R.S. 2477 will not be free to maintain and regulate activities on the road as they see fit as several counties have stated. Counties will remain responsible for maintaining the road and limiting access to the roads in a way that will protect parks and endangered species and their habitats.